



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

UNITED REPUBLIC OF TANZANIA

Overview



NOTE

The voluntary peer review of competition law and policy by UNCTAD falls within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, known as the United Nations Set of Principles and Rules on Competition, adopted by the General Assembly in 1980. The Set seeks, inter alia, to assist developing countries in adopting and enforcing effective competition law and policy that are suited to their development needs and economic situation.

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UNCTAD/DITC/CLP/2012/1 (OVERVIEW)
UNITED REPUBLIC OF TANZANIA

ACKNOWLEDGEMENT

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PREFACE

1. This report is part of the voluntary tripartite peer review of competition policies in the United Republic of Tanzania, Zambia and Zimbabwe. The purpose of this peer review is to assess the legal framework and enforcement experiences in each of the three jurisdictions, draw lessons and best practices from each jurisdiction and examine the value added of the harmonization of competition law and its enforcement in this subregion. Further, the review aims to explore means of cooperation among the three peer-reviewed countries. The national reports review the competition policy systems in each of the above-mentioned countries and serve as a basis for a comparative assessment report that addresses pertinent issues from a subregional perspective.

2. The report is based on extensive desk research and a fact-finding visit to the United Republic of Tanzania. The desk research covered a review of, inter alia, (a) the Fair Competition Act of 2003 (FCA), the FCC Procedure Rules, the Merger Guidelines, the Merchandise Marks Act of 1963 and the Merchandise Marks Regulations of 2008; (b) selected decisions of the FCC and Annual Report for 2008–2009; (c) national policies such as the Sustainable Industrial Development Policy, National Vision 2025 and the National Trade Policy. The fact-finding visit to the United Republic of Tanzania, where interviews were carried out with various stakeholders, was carried out from 6 to 12 November 2011.¹

I. FOUNDATIONS AND HISTORY OF COMPETITION POLICY

A. Introduction: the competition system of the United Republic of Tanzania in context

3. The United Republic of Tanzania enacted its first competition law, the Fair Trade Practices Act in 1994 and set up a department within the Ministry of Trade and Industry to oversee its implementation. It was replaced by the FCA of 2003, which led to the establishment of the more autonomous and independent FCC in 2007.

B. Political, historical and economic context

4. The United Republic of Tanzania is a union of two States, Tanganyika and Zanzibar. Tanganyika became independent in 1961, and Zanzibar, in 1963, and they

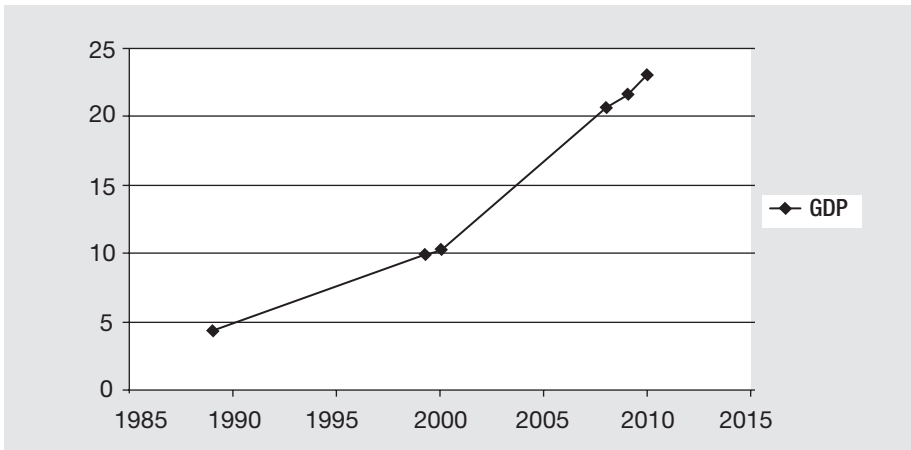
¹ Besides the Tanzanian competition authority, interviews were held with (a) the Registrar of the Fair Competition Tribunal, (b) the Ministry of Trade and Industry, (c) the Tanzania Chamber of Commerce, (c) regulators in the energy and telecommunications sectors, (d) academics at the University of Dar-Es-Salaam and economists at an economic research or think-tank institution.

merged to found the United Republic of Tanzania in 1964. Mwalimu Julius Nyerere became the President in 1962 under the Tanganyika African National Union party, whose Constitution enunciated a socialist State.

5. At independence, the United Republic of Tanzania inherited a market economy system, which prevailed up to 1967, when the Arusha Declaration was made. The Declaration emphasized the self-reliance of the Tanzanian people and collective farming in rural areas and questioned the benefits to the Tanzanian people of foreign or privately owned industries as agents of economic development. The Government nationalized major industries, created cooperatives in the agricultural sector and adopted the Regulation of Prices Act 1973, which set up the National Price Commission.² State control was eventually relinquished through structural reforms but the Government still plays a decisive role in how business is conducted in the United Republic of Tanzania.

6. While there have been some downward trends, the United Republic of Tanzania has made admirable economic gains since its independence in 1961. The country's gross domestic product (GDP) has been on a relative upswing since the reforms of the 1990s, as shown in the following figure.

Figure 1. Gross domestic product of the United Republic of Tanzania, 1989–2010 (Millions of dollars)

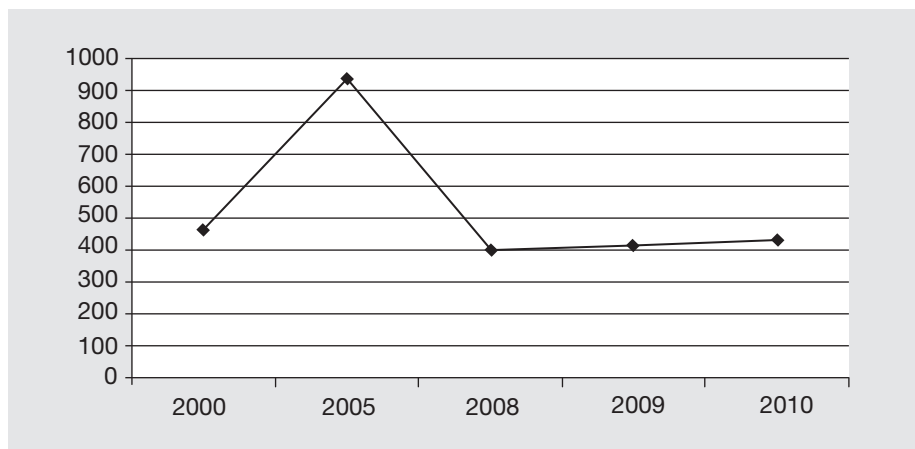


Source: Based on data from the World Bank, *World Development Indicators (2010)*.

²This situation was similar to what most countries in the region, for example, Zambia, experienced.

However, despite the impressive GDP growth rate, there has been a remarkable decline in foreign direct investment, as shown in figure 2:

**Figure 2. Foreign direct investment, net inflows
(Balance of payments, millions of current dollars)**



Source: Based on data from the World Bank, *World Development Indicators* (2010).

7. The nationalization of key sectors, such as banking, insurance, pension funds, national retail, agroprocessing and the national transport system, resulted in highly concentrated and monopolized industrial structures. Collective agricultural schemes removed all forms of innovativeness in the agricultural sector, while the State imposed itself as a monopsony buyer, distributor and seller of agricultural produce.³

8. State ownership in most of the key industrial sectors brought about the lack of recapitalization and accountability, and less innovation. Economic stagnation, the oil price shocks of the 1970s and falling prices of the country's main commodity exports contributed to economic decline in the 1980s. Following the resignation of President Nyerere, an economic reform programme was introduced. The economic transformation required an overhaul of the whole political and legal system.

9. In 1996, the Government proceeded to review its economic course and formulated the Sustainable Industrial Development Policy 1996–2020, wherein the Government recognized the role of the private sector as the principal vehicle for carrying out direct investment in industry.

³ Kjekshus H (1977). *Tanzanian villagization policy: Implementational lessons and ecological dimensions. Canadian Journal of African Studies/Revue Canadienne des Études Africaines*. 11(2): 269–282.

C. Economic goals of competition policy

10. The competition policy draws its efficacy from the primary goal of the National Development Vision 2025, the Sustainable Industrial Development Policy and the National Trade Policy, all of which emphasize poverty reduction and eradication through industrialization and an export-led competitive economy. Competition policy aims at addressing the problem of concentration of economic power that can arise from market imperfections and monopolistic behaviour leading to anticompetitive practices.

II. THE LEGAL FRAMEWORK: THE FAIR COMPETITION ACT

A. Objectives of the Act

11. In its preamble, the FCA states that it is “an Act to promote effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct...”. Its objective is to enhance the welfare of the people of the United Republic of Tanzania by promoting and protecting effective competition in markets, and preventing unfair and misleading market conduct throughout the country in order to increase efficiency in the production, distribution and supply of goods and services; promote innovation; maximize efficient allocation of resources; and protect consumers.⁴

B. Scope of application of the law

12. The Act applies to all commercial activities and bodies engaged in trade. It has six sections under the part that is dedicated to core competition issues (anticompetitive agreements, abuse of dominance and merger control). Parts III to IX of the Act include provisions on consumer protection.

State immunity

13. The FCA also applies to the State and State bodies engaged in trade, although section 6(2) holds that the State shall not be liable to any fine or penalty under this Act or be liable to be prosecuted for an offence against this Act. Nevertheless, the FCC has applied the law against a local authority and imposed fines. In *Alliance Media v. Arusha Municipal Council*, the Council was held liable for behaving “anticompetitively” by granting exclusive rights to Skytel Advertising Company in the business of installing gantries and billboards along the Arusha municipal roads. The Council was ordered to pay TSh10 million, and the agreement was declared null and void.⁵

⁴ Section 3 of the FCA.

14. The FCC overruled Tanroads, which challenged the FCC's jurisdiction over its exclusionary issuance of permits to outdoor firms to install billboards and gantries in road reserves countrywide.⁶ The FCC expressed satisfaction, inter alia, that the alleged conduct of the respondent (Tanroads), which erected barriers for potential entrants and ousted competitors from outdoor advertising business, was purely a competition issue to be determined by the FCC; Tanroads engaged in trade and hence falls under the provision of section 6(1) of the FCA; Tanroads was a "State body," not the "State," and therefore was not subject to exemption under section 6(2) of the Act; the permits issued by the respondent had a commercial value and did not fall under section 6(3) (b) (ii) and (iii) of the Act; and section 96 of the Act clearly provided that it applied to all persons in all sectors of the economy and could not be read down, excluded or modified by any other Act, except to the extent that the Act is passed after the commencement of the Act and expressly excludes or modifies it, or by any subsidiary legislation purports to exclude or modify the Act. The FCC annulled the exclusive contracts.

Limitations in regulated sectors

15. The FCC does not have jurisdiction to deal with competition issues in sectors where there is a sector-specific regulator. Under section 96 of the Act, four key sector regulators have the exclusive mandate to deal with competition matters within their jurisdictions, and it is not mandatory that they seek the counsel of the FCC. The regulators have the discretion whether or not to consult with the FCC.⁷

16. Where there is a competition issue in a regulated sector, the FCC can submit its position to the Minister of Trade and Industry, who has discretion to take such submission any further. There is no appeal against the Minister's decision. It was not clear as to what the policy intentions of this exclusion were.

17. In addition to the industry sectors identified in section 96 of the Act, through the Ministry of Agriculture, the crop marketing boards have the responsibility of regulating and setting prices and distribution dynamics for major cash crops such as coffee, cotton, cashew nuts and tobacco. They are legally empowered to fix crop prices through minimum price-setting arrangements annually. As in other similar countries, the agricultural sector attracts a great deal of political interventions that may conflict with competition policy.⁸

⁵ FCC Annual Report 2008–2009, p. 12.

⁶ FCC press statement, 12 November 2009.

⁷ Energy and Water Utilities Regulatory Authority Act, 2001 (EWURA); Surface and Marine Transport Regulatory Act, 2001 (SUMATRA); the Tanzania Civil Aviation Regulatory Authority Act, 2003 (TCAA); Tanzania Communications Regulatory Authority Act, 2003 (TCRA).

⁸ Within the FCC, it was not clear whether the crop marketing boards are part of the 'State' or whether they were "State bodies" on one hand, and on the other, whether they were strictly engaged in trade or not.

C. Prohibition of anticompetitive agreements

18. The core elements of the United Republic of Tanzania's competition law are prohibition of anticompetitive agreements, mergers, misuse of market power and consumer protection. Under section 8 of the FCA, "a person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition." The prohibition covers both horizontal and vertical agreements. As regards the latter, however, the Act contains a rebuttable presumption that they do not restrict competition.

19. Section 9 prohibits per se, price fixing between competitors, collective boycott by competitors, or collusive bidding or tendering. Mere proof of conduct is not sufficient. The FCC has to prove that a person who has engaged in this conduct acted intentionally or negligently. It is not clear from the application of this provision whether a person who unintentionally engages in the conduct would not be found to have broken the law. The FCC is yet to have a successful cartel case. There are no criminal sanctions except fines of between 5 per cent and 10 per cent of turnover.⁹ There is a need to expand the scope of hardcore cartels as well as to limit the fines to the relevant product, not to the turnover of the enterprise. A fine regime should also merely state that a fine not exceeding 10 per cent shall be imposed to allow for flexibility.

D. Misuse of market power

20. According to section 60(1) of the Act, a person has a dominant position in a market if when acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time and the person's share of the relevant market exceeds 35 per cent.

21. Unlike some legislation that deals with collective dominance, dominance under the Act is restricted to the conduct of a single firm. Section 10 proceeds further to address the concept of misuse of market power that "a person with a dominant position in a market shall not use his position of dominance if the object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition." The FCC does not have specific guidelines on how to deal with misuse of market power issues, and guidelines shall be necessary in view of the central role that misuse of market power plays in the competition law of the United Republic of Tanzania. However, a semblance of a guide is contained in the merger guidelines.

E. Merger control

22. The merger control system is set out in sections 11 and 13 of the Act and the

⁹ Section 60(1) of the Act.

merger guidelines adopted by the Commission. The definition of a merger is among the definitions provided for by section 2 of the Act: “Merger” means an acquisition of shares, a business or other assets, whether inside or outside of the United Republic of Tanzania, resulting in the change of control of a business, part of a business, or an asset of a business in the United Republic of Tanzania.

23. Section 11(1) of the Act brings out the substantive test that a merger is prohibited if it creates or strengthens a position of dominance in a market, of which dominance has a 35 per cent threshold. Stopping a merger simply because it would lead to a 35 per cent market share may prevent mergers that actually enhance efficiency. Exemptions for mergers that may have public benefits are provided for in section 12.¹⁰

F. Consumer protection

24. For purposes of the peer review of competition law and policy of the United Republic of Tanzania, this report is restricted to reviewing counterfeit matters, which are dealt with under a different law, the Merchandise Marks Act.

G. Procedural issues

Investigation of anticompetitive agreements

25. The substantive rules of procedure are contained in the FCC Procedural Rules. The FCC may initiate an investigation against a prohibited practice on its own initiative, i.e. *ex officio*.¹¹ The final determination whether to investigate a case or not lies with the FCC Director-General, who also sits as a voting member of the Commission. Where the complaint is not entertained, the complainant is furnished with the reasons for the decision, which may be referred to the FCC adjudicative wing if the complainant so desires. Where the decision is to enforce, the decision shall be made by the adjudication of FCC members. The Director-General plays three roles: the initiator or approver of an investigation, the prosecutor and the adjudicator. This may be a possible case of constitutional challenge and would require legal review.¹²

Determination of exemptions

26. Under part VI, rule 59 of the Procedural Rules, a person may apply for exemption of an agreement or all agreements falling within a class of agreements

¹⁰ On cross-border mergers, these are expected to be dealt with once the East African Community Competition Act of 2006 is operational.

¹¹ Section 69 of the FCA.

¹² Respondents have a right to be heard before determinations are made against them, and period of completion of a case depends on the gravity of the case – through, *inter alia*, rule 58 of the Procedural Rules.

under section 12(1) of the Act by filing an application in Form FCC.3 set out in the First Schedule to these Rules. Before granting or revoking an exemption under section 12 of the Act, the FCC shall, inter alia, place a notice in the Gazette of the application for an exemption, or of its intention to revoke that exemption; may consult other relevant stakeholders and may conduct an investigation into the agreement or class of agreements concerned. Where the FCC is contemplating revoking an exemption granted under section 12(6) of the Act, the FCC shall advise, in writing, the person concerned of the intention to do so, as well as publishing the notice required by rule 59(9).

Investigation of misuse of market power

27. The process of investigating a case of misuse of market power follows the same principle as for all other complaints in the Procedural Rules. The FCC does not have comprehensive guidelines on misuse of market power. Naturally, the first premise for misuse of market power is to determine whether the firm in question does have a market share in excess of 35 per cent, as stipulated under section 6 of the Act. While the Act does not have an indication as to which conduct would be considered to be instances of misuse of market power, the FCC's decision in *Serengeti Breweries Limited v. Tanzania Breweries Limited* contains a non-exhaustive list of examples inspired by international case law.

Review of mergers

28. A notification process is commenced with a notification form and payment of a statutory fee. A merger can be implemented only after the FCC's approval.¹³ Mergers are neither referred to the Minister nor to the Tribunal. Under rule 44 of the Procedural Rules, within five working days after receiving a formal notice, the FCC Director of Compliance shall deliver to the filing firm in a notice of complete filing or a notice of incomplete filing. When a notice of complete filing is issued, the merger shall be examined within 90 days, with a possible extension of 30 days.

29. The provisions on investigation under part IV of the Procedural Rules identified earlier shall apply *mutatis mutandis* to investigations conducted in merger cases. There seems to be an injustice under rule 53 that where the Investigation Department has indicated on a notice of incomplete filing that a merger appears to fall outside the jurisdiction of the Act, the filing fees shall be forfeited. Considering the colossal sums that are paid in form of notification or application fees, the FCC may consider reviewing this, and perhaps retaining a small amount for administrative expenses incurred.

¹³ Sections 11 and 13 of the FCA.

Inquiries under section 68 of the FCA

30. The FCC can conduct an inquiry where it considers it necessary or desirable for the purpose of carrying out its functions. Such inquiry is necessary before the Commission can exercise the power to grant, revoke or vary a block exemption under section 12 of the Act on exemptions. The Minister may also require the FCC to inquire into a matter specified in the direction and may specify a time within which the FCC shall submit its report to the Minister. While this may conflict with the independence of the FCC, it is however a necessary relationship. It is expected that such directive from the Minister shall be such as the Commission may be able to legally deal with. The FCC may also conduct an inquiry at the request of a regulatory body.¹⁴

Investigative powers

1. Most of the information collected by the FCC is voluntarily submitted. However, where the FCC has reason to believe that a person is capable of supplying information, producing a document or giving evidence that may assist in the performance of any of its functions, a member of the FCC may, by summons signed by the Chairman or Director-General of the FCC served on that person, require that person to produce information or appear before the FCC.¹⁵

32. Furthermore, where the FCC has reason to believe that a person is in possession or control of any documents that may assist it in the performance of any of its functions, it may apply to the Tribunal who shall issue a warrant authorizing any police officer, accompanied by staff of the Commission to enter premises, to conduct a search and make copies or take extracts of documents therein.

32. Furthermore, where the FCC has reason to believe that a person is in possession or control of any documents that may assist it in the performance of any of its functions, it may apply to the Tribunal who shall issue a warrant authorizing any police officer, accompanied by staff of the Commission to enter premises, to conduct a search and make copies or take extracts of documents therein.

H. Sanctions

33. In addition to imposing pecuniary sanctions,¹⁶ the FCC has powers to issue compliance and compensatory orders. Compliance orders are an extension of what

¹⁴ Section 68(4) of the Act. The FCC shall give notice of such inquiry in the Gazette and in a daily newspaper circulating generally in Tanzania or send a written notice to relevant stakeholders, including the Minister (section 68(5)(b) of the Act).

¹⁵ Section 71 of the Act.

¹⁶ In contrast to other countries from the region, the competition law of the United Republic of Tanzania does not provide for criminal sanctions in the case of hard-core cartels.

in other jurisdictions are referred to as “cease and desist.” The context in which they are used under the FCA does not end with cease and desist orders, but with a directive to perform a certain act. However, the compensatory order appears to concern instances where either a complainant or injured party has demonstrated certain injury or damage caused and the FCC metes out such compensation.

Compliance orders

34. Where the FCC is satisfied that a person has committed, or is likely to commit, an offence against the FCA (other than parts VI or VII of the Act, which deal with implied conditions in consumer contracts and the manufacturer’s obligations, respectively), it may make a compliance order against that person and any person involved in the offence. A compliance order is made in writing, specifying the grounds for making the order. In Case 2 of 2009,¹⁷ the FCC ruled under section 58(1) and (3) against Tanzania Breweries Limited, which was ordered to immediately refrain from removing its competitor’s point of sale materials at the outlets and entering into anticompetitive branding agreements with outlet owners. Further, in *Fair Competition Commission v. the Bank of Africa*, the FCC issued a compliance order to the Bank for failure to notify a merger. The compliance order called for the Bank to publish a notice of compliance to the public (in a newspaper) and a report expressing to the public how failure to notify their merger was inconsistent with the Act.¹⁸

Compensatory orders

35. Under section 59, any person who suffers loss or damage as a result of an offence against the Act (other than under parts VI or VII in the Act dealing with implied conditions in consumer contracts and manufacturers’ obligations, respectively) may apply to the FCC for compensatory orders under this section against the person who committed the offence and any person involved in the offence, whether or not convicted of the offence. Such application may be made at any time within three years after the loss or damage was suffered, or when the applicant became aware of the offence, whichever occurred later.¹⁹ This is in contrast to the substantive provision under section 60(8) of the Act, which gives the FCC the leeway to act upon an offence any time within six years after the commission of the offence. The FCC has yet to issue a compensatory order.

Fines to corporate bodies

36. Under section 60(1) of the Act, the FCC may impose fines. These fines may be imposed in addition to a compliance and/or a compensatory order. Interestingly,

¹⁷ *Serengeti Breweries Limited v. Tanzania Breweries Limited*, p. 53. Where a compliance order is issued, it shall be enforceable as an order of the High Court.

¹⁸ *FCC Annual Report 2008–2009*.

¹⁹ *Section 59(2) of the Act*.

however, there is no fine for disobeying a compliance or compensatory order. The minimum fine is 5 per cent of the annual turnover of a company in the United Republic of Tanzania, the maximum, 10 per cent. It appears that the minimum fine of 5 per cent of the annual turnover is far too high in cases where the anticompetitive conduct concerns only a part of a company's business activities, e.g. if only one product out of a large portfolio is concerned. It is therefore suggested to recommend deleting the minimum threshold for fines but have a maximum of 10 per cent based on the products in question.

37. The FCC has not been shy to use this power before. In Case 2 of 2009, the FCC ordered Tanzania Breweries Limited to pay 5 per cent of its turnover as a fine for misusing its market power.²⁰ Fines have also been meted out against the Tanzanian Cigarette Company Limited, which acquired a competitor without prior authorization by the FCC. Another fine of TSh3.9 billion was imposed on East African Breweries Limited for offloading its shares in Tanzania Breweries Limited without the authorization of the FCC.

Fines to shareholders, directors and officers

38. Where a person charged with an offence under the Act is a body corporate, every person who, at the time of the commission of the offence, was a director, manager or officer of the body corporate, may be charged jointly in the same proceedings with such body corporate and where the body corporate is convicted of the offence, every such director, manager or officer of the body corporate shall be deemed to be guilty of that offence unless the person proves that the offence was committed without his or her knowledge or that he or she exercised all due diligence to prevent the commission of the offence.²¹ However, the penalties for such officers are not spelled out in the law.

Statutory limitations

39. Section 60(8) of the Act limits the statutory role of the FCC in cases. It holds that the FCC may act upon an offence at any time within six years after the commission of the offence. In terms of mergers, the Commission has a limit of three years to deal with a merger after its implementation without formal notification to the Commission.

Enforcement record

40. Considering the plethora of functions of the FCC listed under section 65, and the extensive provisions dealing with consumer protection, the FCC does not

²⁰ About TSh27 billion.

²¹ Section 60(3) of the Act.

appear to have many cases for its technical staff. For instance, during the 2008–2009 period (which is the best so far in terms of case-load), the FCC only reviewed 3 non-notified mergers, fined 1 anticompetitive case; approved 7 mergers; and 26 cases of counterfeit goods were impounded or destroyed.²² A comparative analysis of the case-load is provided in the following table:

Case-load of the Fair Competition Commission, 2008 to 2011			
Subject area	2008–09	2009–10	2010–11
Vertical agreements	1	2	0
Horizontal agreements	0	1	0
Un-notified mergers	3	1	4
Reviewed mergers	8	5	19
Counterfeit product cases	26	0	0
Other cases	0	0	0
TOTAL CASES	38	9	23

Source: FCC.

Notes: (a) Since consumer cases are handled by the courts, the FCC does not have any cases, as it is a mere facilitator in consumer or trader disputes and where it is not resolved, consumers have recourse to the court system.

(b) Data for 2008–2009 are taken from the FCC Annual Report

41. At the end of 2011, four appeals were pending before the Fair Competition Tribunal on technicalities concerning the composition of the FCC.

III. ANTI-COUNTERFEITING

42. The anti-counterfeit functions of the FCC are an important public policy activity in the United Republic of Tanzania and are covered under the Merchandise Marks Act of 1963. The Director-General of the FCC was appointed by the Minister to be the Chief Inspector for the Act. The functions of the Chief Inspector are to inspect, seize and destroy goods suspected and proved to be counterfeits. Under section 2 of the Merchandise Marks Regulations 2008, counterfeiting is defined as "... protected goods are imitated in such manner and to such degree that those other goods are identical or substantially similar copies of the protected goods..."

43. Under regulation 34, the owner of the goods detained or seized as suspected offending goods may, within one month of the notice of detention or seizure, put up

²² FCC Annual Report 2008/2009, pp. 12–14.

a claim in writing for their restoration by the Chief Inspector. Where no claim is made within the period, the goods shall be forfeited and shall be disposed of as the Chief Inspector may determine. Under regulation 51, a person dissatisfied with a decision of the Chief Inspector may appeal to the Fair Competition Tribunal.

44. There has been criticism that the Merchandise Marks Act and the FCC are concerned largely with goods imported into the United Republic of Tanzania and not goods manufactured and sold locally. The inspectorate emphasis is on imports as well as on local music products. The locally produced goods are shielded from foreign competition whenever a local competitor files a complaint. While it is recognized that the Merchandise Marks Regulations cover frivolous complaints, it is again a self-defeating process, as the whole Merchandise Marks Act is based on “reasonable suspicion.” Regulation 23 may still be a deterrent for frivolous complaints aimed at frustrating competition.

45. From the requirements set out in regulation 12, it appears that the Chief Inspector may not act on anonymous complaints, as these may be sources of frivolous complaints and it may be difficult, if not impossible, for the FCC to identify the complainant after the fact. Regulation 35 suggests that a fee is charged for making a submission, which may be made by a principal or an agent, to the Chief Inspector.

46. According to the current legal framework, consumers cannot submit an application to the Chief Inspector, as they are not owners of intellectual property rights. This is a clear anomaly, and the law should have provided for consumer complaints where there is reasonable suspicion of harmful counterfeit or offending products, e.g. infant powdered milk.

IV. INSTITUTIONAL FRAMEWORK

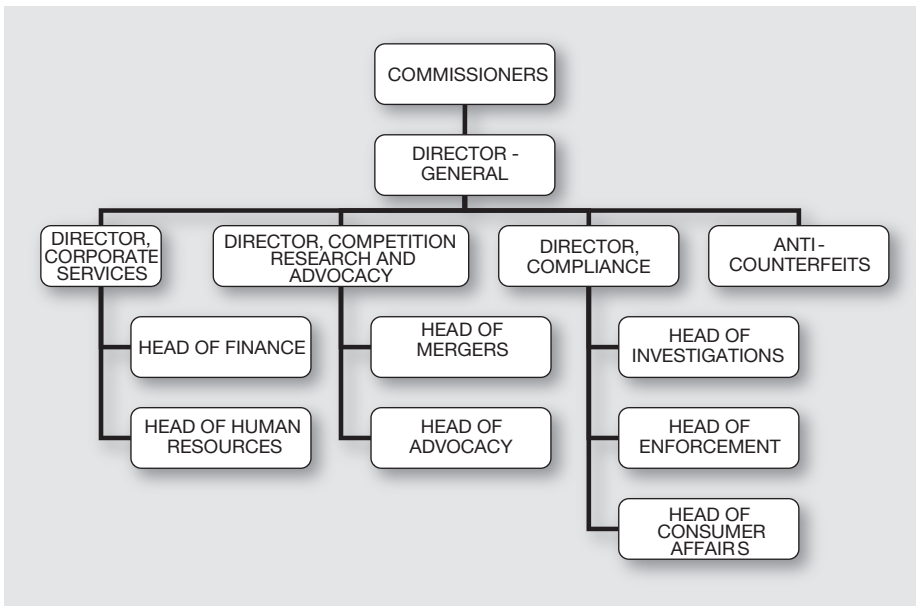
A. Institutional set-up of the Fair Competition Commission

47. Under section 62, the FCC is established as a body that “shall be independent and shall perform its functions and exercise its powers independently and impartially without fear or favour.” It is composed of five members: a non-executive Chairman appointed by the President, three non-executive members appointed by the Minister, and a Director-General appointed by the Minister. Its decisions are appealable to the Fair Competition Tribunal, except for consumer-related cases, which go to normal courts.²³ The members elect a Vice-Chairman from among themselves. (An organizational chart of the Commission is provided in figure 3.)

²³ FCC website: <http://www.competition.or.tz/page.php?9>.

48. The tenure of both the members and the Director-General are specified under section 63(7). It states that the first Chairman and the members of the FCC shall be appointed for the following fixed terms: Chairman – four years; Director-General – four years; one member – three years; and two members – five years.

Figure 3. Organizational structure



Source: FCC.

B. Functions

49. Section 65 lists the functions of the Commission. Its roles are divided into two categories: enforcement and advocacy. Enforcement includes investigations into anticompetitive trade practices, and advocacy includes promotion competition and consumer protection by sitting in on any public inquiry or contributing to policy and legal reform. The FCC is entitled to participate in the proceedings of courts, tribunals, regulatory authorities, government inquiries, commissions, committees and working groups for the purpose of observing the proceedings and making representations on matters relevant to its functions. This is a peculiar function that is not available to sister authorities in Zambia or Zimbabwe.

C. Staffing, agency resources and performance

50. The FCC has 58 staff members against a requirement of 72 for it to carry out its functions. Its annual budgetary needs are about TSh6 billion (\$4 million). Of this amount, TSh4 billion (\$2.5 million) are guaranteed from the Government and modest internal revenue collection through fees. Under section 78(1) of the Act, mandatory funding sources include, among others, funds allocated to the FCC from the funds of sector regulatory authorities for work done by the FCC, funds allocated to the FCC by Parliament and fees collected by the FCC. Funding from the sector regulators has not been adequate, as it is at their discretion.

51. The FCC and the Fair Competition Tribunal drafted Fair Competition (Commission and Tribunal) Funding Regulations in 2010, which were gazetted through Government Notice No. 208 of 11 June 2010.²⁴ However, collection of the 2.5 per cent fee from every business/trading licence through the Gazette Notice has been affected by the Government policy directive aimed at curtailing the multiplicity of payments that the business community has to make to the public-sector institutions. The internal sources of revenue for the FCC are from counterfeit penalties and merger filing fees.

D. Fair Competition Tribunal

52. The Fair Competition Tribunal is a quasi-judicial body with appellate responsibilities on cases from the FCC. The Tribunal is established under section 83 and consists of a Chairman, who shall be a person holding the office of a Judge of the High Court appointed by the President after consultation with the Chief Justice, and shall serve part time; and six members appointed to serve part time by the President after consultation with the Attorney-General from candidates nominated by a Nomination Committee.

53. The quorum for a meeting of the Tribunal shall be the Chairman and two other members. There is no Vice-Chairman of the Tribunal and thus, in the absence of the Chairman, a meeting of the Tribunal cannot take place, as the members cannot legally appoint a Chairman even for purposes of the meeting. The presence of a Vice-Chairman could facilitate a situation where the Fair Competition Tribunal is flexible to operate with two panels of its members sitting to look at different cases.

54. A judgment or order given by the Tribunal on any matter before it shall be final shall be executed and enforced in the same manner as judgments and orders of the High Court.²⁵ The Tribunal has jurisdiction to hear and determine appeals against

²⁴ By virtue of section 78(3) of the Act.

²⁵ Section 84 of the FCA.

the FCC under part XI of the Act and carry out the functions conferred on it under the EWURA Act 2001, the SUMATRA Act 2001, the TCRA Act 2003 and the TCAA Act 2003. The Tribunal received 63 cases since it began operations in 2007, 33 of which were miscellaneous applications, while 28 were appeals.

55. Section 84 of the Act states that there shall be no appeals to decisions made by the Tribunal. Nevertheless, a person aggrieved by a decision of the Tribunal may use administrative law to have the Tribunal review its decision.

56. The Tribunal is to be funded by the sector regulators, in addition to parliamentary disbursements. Sector regulator disbursements are discretionary and thus do not guarantee the Tribunal's revenue.

E. National Consumer Advocacy Council

57. Section 92 of the Act creates the National Consumer Advocacy Council, which has no enforcement powers but merely advocacy functions. The Council does not only advocate for consumers affected under the Act, but also those directly or indirectly affected by the activities of the sector regulators. It is a conduit through which consumers channel their grievances and plays a consultative and information dissemination role. The Council's functions under section 93 of the Act are to a large extent similar to those of the FCC under section 65.

58. However, the Council has no legal powers against the FCC or the sector regulators. It cannot take a matter to court on behalf of consumers. It cannot even lodge a counterfeit case with the FCC where it believes that consumer interests would be harmed.

59. While the FCC and the Fair Competition Tribunal are expected to be partly funded by sector regulators, the law has excluded the Council from receiving similar grants from regulators. The Council is yet to be functional. At the time of the fact-finding mission, it only had office space; it had neither staff nor office equipment.

V. COMPETITION ADVOCACY

60. The FCC has been an active advocate of competition and consumer protection law in the United Republic of Tanzania. Among other initiatives, the FCC has a newsletter, various brochures and booklets for public dissemination. The Commission has a website and conducts outreach programmes in both English and Swahili, the country's two official languages.

61. The FCC is empowered to study government policies, procedures and programmes, legislation and proposals for legislation, as well as policies, procedures and programmes of regulatory authorities, so as to assess their effects on competition

and consumer welfare and publicize the results of such studies. It is also authorized to investigate impediments to competition, including entry into and exit from markets, in the economy as a whole or in particular sectors, and publicize the results of such investigations.²⁶ The FCC has yet to stamp its mark in this area. It needs to engage more with sector regulators. There seems to be insufficient interaction between the regulators and the FCC.

62. The FCC's annual report, website, newsletter and case publications provide information to the private sector. Seminars and workshops have been held to engage trade and professional associations.

63. The FCC should work closely with academia and assist in developing competition and other related industrial sector studies from which it can be assisted to make sound advice to the Tanzanian Government. The FCC has yet to carry out a study in any agricultural sector for key crops such as coffee, cashew nuts, cotton, tobacco or sisal. The Act needs to be amended to include provisions on abuse of buyer power, which could then be used against anticompetitive practices in the agricultural sector in the United Republic of Tanzania.

VI. INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE

A. International cooperation

64. The FCC has been an active, participating member in most international and regional organizations dealing with competition policy, some of which are listed below:

- (a) Southern and Eastern African Competition Forum (SEACF), of which it is a founding member. SEACF member States were largely influential in the founding of the African Competition Forum;
- (b) African Competition Forum, of which FCC is a founding member;
- (c) Consumers International, where its consumer staff have been engaged in peer learning experiences;
- (d) International Competition Network, the annual conferences, merger and cartel workshops;
- (e) East African Community, where the United Republic of Tanzania played an active role in the formulation of the East African Community Competition Act, collaborating with Kenya to foster their regional integration arrangement.

²⁶ Section 65 of the FCA

65. The FCC has been engaged in bilateral training programmes with the Zambia Competition and Consumer Protection Commission, Kenya Competition Commission, and the South African Competition Commission where its staff has been attached. However, the Tribunal appears to have been left out in the various cooperation arrangements, which makes the interface with the FCC uneven.

B. Technical assistance

66. The FCC received unprecedented financial assistance from the World Bank prior to and during its establishment as part of assistance to the Government of the United Republic of Tanzania during the implementation of the structural adjustment programmes. The FCC has also benefited from training programmes under the auspices of UNCTAD, the Organization for Economic Cooperation and Development and the International Competition Network. The Commission is an active member of the Africa Dialogue Network under the auspices of the Federal Trade Commission.

67. The FCC has been an active beneficiary of training programmes under the American Bar Association on case analysis and Fordham University in New York on investigation skills and economic analysis.

68. Technical assistance included training in investigation techniques by UNCTAD in 2010, competition economics and policy by the World Bank in 2009, and role of competition policy in economic development through the World Trade Organization in 2008.

C. Areas requiring urgent technical assistance

69. The FCC indicated that they required technical assistance in the following areas:

- (a) Cartel investigation techniques, in particular how to carry out dawn raids, evidence gathering and handling;
 - (b) In view of the exemption of intellectual property rights under the Act, the interface and action required where there is an abuse of intellectual property rights in the market place;
 - (c) Quantitative or economic analysis in abuse of dominance (e.g. excessive pricing, predatory pricing and models thereto) and merger cases (e.g. econometric testing and future merger scenario simulations);
 - (d) Prosecution and evidence handling in competition matters (e.g. use of local versus international expert evidence), dealing with persons who breach competition law but are outside FCC jurisdiction;
 - (e) Effective consumer protection and case management.
-

D. Other areas requiring technical assistance

70. In addition to FCC, other institutions that are crucial for the promotion of a competition culture in the United Republic of Tanzania and need stronger support include the Fair Competition Tribunal, the National Consumer Advocacy Council, independent consumer advocacy groups, civil service/technocrats, academia, economists, research institutions, think tanks, the judiciary and the bar association.

VII. FINDINGS AND POSSIBLE POLICY OPTIONS

71. The United Republic of Tanzania has put in place a sound legal and institutional framework for the implementation and development of competition law and policy; which contains some of the international best practices and standards. This system needs to be sustained through greater and overt policy and financial support. While the enforcement of the Merchandise Marks Regulations has been prominent and received major public attention, the substantive provisions in the FCC that have received similar publicity are mergers. The FCC needs to enhance its work in abuse of dominance and cartels, more so in the agricultural sector. There is a need for the FCC to intensify its advocacy efforts to policymakers, sector regulators and academia. Further, the Fair Competition Tribunal should step up training and exposure of its members and staff to the international competition community training programmes.

72. In view of the foregoing, the following recommendations are made:

(a) Institutional issues and agency effectiveness

Recommendation	Required action	Responsibility
1. Funding to the FCC and the Fair Competition Tribunal should be predictable and implementable as provided for under section 78(c) of the FCA.	There could be a mandatory provision to deal with remittance of funds to the FCC and Fair Competition Tribunal and it should not be discretionary. There must be an appeal process to secure the funds.	Ministry/FCC

Recommendation	Required action	Responsibility
2. Consumer protection	The National Consumer Advocacy Council replicates the advocacy functions of the Commission. Its staff and funds can be absorbed in an expanded consumer protection, advocacy and anti-counterfeit division within the FCC – or the Council can be transformed into an enforcement agency for consumer protection as well as advocacy	Minister/FCC/ National Consumer Advocacy Council
3. Appeals to the Minister where a regulator engages in anticompetitive conduct	Under section 96(3) of the Act, the FCC is expected to appeal to the Minister where a sector regulator makes an anticompetitive decision. This appeal would be better suited to lay to the Tribunal, which would be better placed with less political influence to make a more objective decision.	FCC/Tribunal/ Minister

(b) Anticompetitive trade practices

Recommendation	Required action	Responsibility
4. Inclusion of vertical agreements in the law	Amendment to the law to include conduct such as tied selling and resale price maintenance	FCC
5. Enumeration of conduct to be considered misuse of market power	Amendment to the law. In the interim, there is need to have clear guidelines on this, in addition to the ones contained in the merger guidelines.	FCC
6. Introduce joint/combined dominance in the FCA.	Amendment to the law to include a situation where at least two firms exercising dominance in a market may be cited for joint dominance.	FCC

Recommendation	Required action	Responsibility
7. Introduce a new provision to deal with buyer power in the Act to address concerns raised in the agricultural sector	Inclusion of buyer power	FCC /Minister
8. Need to have a more exhaustive list of horizontal/cartel arrangements	Expansion of the list under section 9 to include market allocation, customer allocation and output restriction.	FCC
9. There is need to remove the tying of intention and negligence to cartel conduct under section 9(4) of the FCA.	Intention and negligence should not be of importance to cartel behaviour; therefore, section 9(4) should be removed from the law.	FCC
10. Issuance of a summons when the Commission seeks information	Summons under section 71 should ideally be issued only upon a person's refusal or inability to voluntarily submit the information.	FCC
11. Section 6 of the Act should be reviewed so that the application of the FCA to the State and State bodies shall not depend on whether they are engaged in trade, but whether their acts, arrangements or behaviour affect trade.	Review of section 6(1) and 6(4) of the FCA	FCC/Minister

Recommendation	Required action	Responsibility
12. Section 8(1) use of “agreement” including conduct, behaviour, or decision has been observed by FCC staff as limiting their intervention capacity.	Inclusion of the words “conduct” and “behaviour” in section 8(1) of the FCA.	FCC
13. Under section 8(7), determination of anticompetitive conduct should not depend on whether the conduct was committed intentionally or negligently.	Remove section 8(7) from the FCA, as intention and negligence are not what matter, bur rather the effect of such conduct.	FCC
14. Under section 8, the prohibition of anticompetitive conduct should extend to non-competitors in order to cover vertical agreements.	Remove section 8(3)(b) from the FCA.	FCC
15. Attribution of powers to the FCC to enforce the FCA against the State.	The law should be amended so that the State may be subject to compliance orders and compensatory orders under the Act and not be totally immune from meeting their obligations under the FCA.	Minister/FCC

Recommendation	Required action	Responsibility
<p>16. There is a need to have some form of mandatory consultation and/or involvement of the FCC in competition law matters explicit under legislations establishing regulators such as EWURA, SUMATRA, TCRA and TCCA. The current trend appears to be that they consult the FCC after the event and not before.</p>	<p>The law should be amended so that there is mandatory consultation with the FCC where there is a competition issue in a regulated sector.</p>	<p>Minister/FCC</p>
<p>17. Competition concerns against sector-specific regulators raised by the FCC could be handled by the Fair Competition Tribunal, not the Minister.</p>	<p>The FCC concerns against anticompetitive decisions made by the sector regulators should be reviewed by the Fair Competition Tribunal, and not the Minister as provided for under section 96(5) of the FCA.</p>	<p>Minister/FCC</p>
<p>18. There is a need to introduce criminal sanctions against shareholders, directors and officers of an enterprise engaged in cartel behaviour.</p>	<p>Cartel members are only fined a percentage of their turnover. Although the Act also mentions directors and managers as amenable to fines under section 60(3), the Act does not specify how such fines would be meted out on directors and managers. There are no criminal sanctions against cartel offences in the FCA. The FCA should be amended to introduce criminal sanctions against individual cartel officials involved in cartel activity.</p>	<p>FCC/Minister</p>

Recommendation	Required action	Responsibility
<p>19. There is a need to ensure that there is a clear administrative and visible separation of the triple roles of the Director-General as an investigator, prosecutor and adjudicator, as contained under sections 63, 65, 69 and section 73(6) of the FCA.</p>	<p>The Director-General cannot be an investigator and an adjudicator in the same case. While this is a debatable occurrence in most competition authorities, including the United Kingdom of Great Britain and Northern Ireland and South Africa, this practice should be aligned, for example, with that in Zambia and Zimbabwe, where the chief executive officer is an ex-officio member of the Commission.</p>	<p>FCC/Minister</p>
<p>20. There is a need to streamline fines. They should not be based, for example, on 5–10 per cent of the turnover for the whole enterprise as contained under section 60(1) of the FCA, but should be restricted to the turnover of the relevant products or services in question under section 60 of the Act.</p>	<p>Fines based on the whole firm's turnover may be unfair unless in situations where a firm deals in one product.</p> <p>Legal amendments should be made where the law should state that the FCC or the Fair Competition Tribunal can impose a fine not exceeding 10 per cent of the relevant product turnover. There should also be fining rules to guide both the FCC and the Tribunal.</p>	<p>FCC/Fair Competition Tribunal/ Minister</p>

(c) Anti-counterfeit and consumer protection

Recommendation	Required action	Responsibility
21. Enable consumer breaches under parts VI and VII to be justiciable under the FCC and FCA, rather than requiring consumers to process such complaints through the court system at their own expense.	Amendment to the law	FCC
22. There should be fines payable to consumers or offended parties under sections 15 and 16 of the Act, as in the case of the Zambian competition law.	Amendment to the law	FCC/National Consumer Advocacy Council
23. Consumer organization and anonymous complaints under the Merchandise Marks Act	It appears that under the Merchandise Marks Act, the FCC cannot entertain anonymous complaints. Further, only owners of intellectual property rights appear to have the right to complain against counterfeits. Consumers and traders who are likely to suffer harm and who suspect that harmful counterfeit products are likely or about to be supplied, should be empowered to lodge a complaint without necessarily filling in a prescribed form, which requires payment of a fee as well as detailed particulars of the suspected offending party.	FCC

Recommendation	Required action	Responsibility
24. There is a need to expand the scope of the Merchandise Marks Act.	The Merchandise Marks Act deals only with goods earmarked for import and export. The seizure and destruction of only imported goods and those earmarked for export create an uneven playing field in relation to those manufactured locally for local distribution, e.g. local copyright materials. The law should be amended to deal with all counterfeit goods on Tanzanian territory and not just those earmarked for exports or imports.	Minister/FCC
25. National Consumer Advisory Council funding	Each regulator must be mandated to financially support the National Consumer Advocacy Council. All consumer issues that are now handled by different sector regulators should be housed under one consumer council.	National Consumer Advocacy Council/FCC/ FCC/National Consumer Advocacy Council/ Consumer Consultative Council/ Regulators/ relevant Ministries

(d) Fair Competition Tribunal

Recommendation	Required action	Responsibility
26. There is need for a Vice-Chair at the Fair Competition Tribunal	Meetings of the Tribunal cannot take place in the absence of a Chair. It is not legally clear why the law does not provide for the office of a Vice-Chair. This needs to be considered.	Minister/Fair Competition Tribunal

Recommendation	Required action	Responsibility
27. There should be an appeal mechanism against a decision of the Tribunal as opposed to making the Tribunal the final court under section 84 of the FCA.	Section 84 should be amended to provide for an appeal against a decision of the Tribunal, as it is not a creature of the Constitution but of subsidiary legislation.	Minister/Tribunal
28. There is a need for a code of conduct for Tribunal members.	Development of a code of conduct for Tribunal members.	Fair Competition Tribunal/Chief Justice
