



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

ZAMBIA

Overview



NOTE

The voluntary peer review of competition law and policies performed by UNCTAD falls within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (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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ZAMBIA

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This report was prepared for UNCTAD by Alex Kububa, Director, Competition and Tariff Commission, Zimbabwe. The substantive backstopping and review of the report were the responsibility of Elizabeth Gachuri. Ulla Schwager provided valuable feedback. UNCTAD would like to acknowledge the valuable assistance received from Chilufya Sampa, Executive Director, Competition & Consumer Protection Commission of Zambia, and his colleagues during the preparation of this report.

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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 tripartite 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 added value of the harmonization of competition law and its enforcement in this sub-region, as well as increased cooperation. 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 sub-regional perspective.

2. The report is based on extensive desk research and a fact-finding visit to Zambia. The desk research covered a review of, inter alia:

- (a) Relevant legal documents (the Constitution of Zambia, the country's old Competition and Fair Trading Act, 1994 and new Competition and Consumer Protection Act, 2010, and their subsidiary legislation);
- (b) Other regulations and guidelines of the Zambian competition authority, including the authority's decisions and reports; and
- (c) Laws, statutes and regulations related to the operations of sectoral regulators and other institutions whose activities affect the implementation of competition law and policy in Zambia.

The fact-finding visit to Zambia was undertaken during the period 16 – 23 October 2011, where interviews were carried out with various stakeholders.¹

I. GOALS OF COMPETITION POLICY AND DEVELOPMENT

3. Zambia is a landlocked country in Southern Africa. It is bordered by the Democratic Republic of the Congo to the north, the United Republic of Tanzania to the north-east, Malawi to the east, Mozambique to the south-east, Zimbabwe, Botswana and Namibia to the south, and Angola to the west, with a total area of

¹ Besides the Zambian competition authority, interviews were held with: (a) the Judiciary (Supreme Court of Zambia); (b) sector regulators (Pensions and Insurance Authority, Zambia Information and Communications Technology Authority, Energy Regulation Board, and Bank of Zambia); (c) other Statutory Bodies (Zambia Development Agency, and Citizens Economic Empowerment Commission); (d) business associations (Zambia Association of Chambers of Commerce and Industry), consumer organisations (Consumer Unity & Trust Society (CUTS) International); (e) professional bodies (Law Association of Zambia, and Economics Association of Zambia); (f) law firms Musa Dudhia & Co., and Corpus Legal Practitioners; and (g) individual enterprises (Zambian Breweries Plc., and MTN (Zambia) Limited).

752,614 square kilometres (290,586 square miles). It has an estimated population (2010) of 13.2 million², and is one of sub-Saharan Africa's most highly urbanised countries, with about 36 per cent of the national population living in the country's major towns.³

4. The Gross Domestic Product (GDP) for 2010 was \$16.19 billion, with a GDP per capita of \$1,500. Real GDP growth rate was 7.6 per cent in 2010.⁴

5. The Zambian economy has historically been based on the copper mining industry, and the mining and refining of copper constitutes the largest industry in the country. The copper mining industry is concentrated in the cities and towns of the Copperbelt Province, particularly in Kitwe, Chingola and Mufulila, and more recently in the North-Western Province. After a 30-year decline in output due to lack of investment, low copper prices, and uncertainty over privatization, output of copper had fallen to a significantly low level by 1998. In 2002, following privatization of the industry, copper production rebounded. Improvements in the world copper market have magnified the effect of this volume increase on revenues and foreign exchange earnings. The sector grew by 7.4 per cent in 2010. Cobalt, zinc, lead, emeralds, gold, silver, and coal are also mined.

6. The Zambian government is pursuing an economic diversification program to reduce the economy's reliance on the copper industry.⁵ The initiation seeks to exploit other components of Zambia's rich resource base by promoting agriculture, tourism, gemstone mining, and hydro-power generation. Agriculture plays a very important part in Zambia's economy, now providing more jobs than the mining industry. In 2010, agriculture grew by 7.6 per cent, and growth in 2011 and 2012 is projected at 3.2 per cent and 4.6 per cent respectively. Manufacturing, which historically has contributed about 10 per cent of GDP, grew by 2.5 per cent in 2010. Major manufacturing industries are in food and beverage processing, and the manufacture of chemicals, textiles, and fertilizer.

7. Zambia's main exports are copper, cobalt, electricity, tobacco, flowers, and cotton, and its principal imports are machinery, transportation equipment, petroleum products, fertilizer, foodstuffs, and clothing.⁶ Some of the country's main trading partners are the United Kingdom of Great Britain and Northern Ireland, South Africa, Malawi, Germany, Zimbabwe, Italy, Burundi, the Democratic Republic of the Congo, the United Republic of Tanzania, the Netherlands and Japan.

² Department of Economic and Social Affairs Population Division, *World Population Prospects*, United Nations.

³ <https://www.cia.gov/library/publications/the-world-factbook/geos/za.html>

⁴ http://www.indexmundi.com/zambia/economy_profile.html

⁵ Zambia – Economic History [Biz/ed Virtual Developing Country] (<http://www.bized.co.uk/virtual/dc/back/econ.htm>)

⁶ <http://www.infoplease.com/ce6/world/A0862057.html>.

8. Zambia is a member both the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC), which are two of the major regional economic communities in Africa. COMESA is a free trade area with a common tariff structure with nineteen member States stretching from Libya to Swaziland, including the Indian Ocean Island States of the Comoros, Madagascar, Mauritius, and Seychelles.⁷ The headquarters of COMESA are in the Zambian capital of Lusaka. SADC is an intergovernmental organization whose goal is to further socioeconomic cooperation and integration, as well as political and security cooperation among fifteen southern African States.⁸

9. Zambia remains one of the most politically stable countries in both COMESA and SADC, and Africa as a whole. Zambian politics take place in a framework of a presidential representative democratic republic, whereby the President of Zambia is both Head of State and Head of Government in a pluriform multi-party system. The Government exercises executive power, while legislative power is vested in both the Government and Parliament. The country declared independence from the United Kingdom on 24 October 1964.

10. The economic history of Zambia from independence up to the 2000s covers:

- (a) The post-Independence boom (1964–1975);
- (b) Economic decline (1975–1990);
- (c) Sustained economic reform of the 1990s, and;
- (d) Structural adjustment in the 2000s.

11. As stated by Lipimile (2005)⁹, economic liberalization in Zambia in 1991 witnessed the adoption of three key interrelated economic policy thrusts under the Structural Adjustment Programme (SAP):

- (a) Deregulation;
- (b) Commercialisation, and;
- (c) Privatisation.

⁷ COMESA members comprise Burundi, Comoros (the), the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

⁸ Member States of SADC comprise Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia, and Zimbabwe.

⁹ George K. Lipimile (the founding Executive Director of the Zambia Competition Commission), in the part on 'Zambia' in "Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia and Zimbabwe", United Nations, New York and Geneva, 2005.

Deregulation meant that quantity licensing, statutory protection of monopolies of parastatals, and structural barriers to entry to the Zambian market had to be removed. The economic policy thrust of commercialisation had objectives at both macro and micro levels. It entailed the reduction of public expenditure and removal of subsidies from parastatals, as well as the requirement that parastatals and quasi-government enterprises should not wastefully devote resources to maintaining services at higher costs for the benefit of consumers.

12. The economic reforms in Zambia witnessed economic transformation from an overly State-controlled socialist economy to a market economy, resulting in the commercialization and privatization of State-owned enterprises. Since the economy was previously characterized by monopoly and other dominant State enterprises, the Government sought to put in place a competition enforcement mechanism that would ensure that the gains of privatization and the new investment that was coming into the country would not be eroded by the anti-competitive conduct of private monopoly and dominant players in the newly liberalized economy. The Competition and Fair Trading Act, CAP 417 of the Laws of Zambia, was therefore enacted in 1994 by Parliament. The Zambia Competition Commission (ZCC) however, only became operational in May 1997.

13. The Competition and Fair Trading Act preserved market processes by preventing firms from engaging in activities that undermined rather than enhanced overall economic efficiency. It prevented firms from distorting the competitive process through conduct or agreements designed to exclude actual or potential competitors. The law in that regard essentially addressed the problems of monopoly power in three major settings:

- (a) Arrangements and agreements among otherwise independent firms;
- (b) Unilateral conduct of single firms in dominant positions, and;
- (c) Combinations of independent firms.

14. Two broad principles underlined the law. The first principle was that any behaviour which had the object, or effect, of substantially lessening competition in a market should be prohibited. The main types of anti-competitive conduct which were prohibited included the following:

- (a) Anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts, with a per se ban on price fixing and boycotts;
 - (b) Misuse of substantial market power for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct;
 - (c) Exclusive dealing which substantially lessens competition, with third line forcing prohibited per se;
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- (d) Resale price maintenance for goods, and;
- (e) Mergers and acquisitions which substantially lessen competition in a substantial market.

The second principle was that certain anti-competitive behaviour should be able to be authorized on the basis and grounds of 'economic efficiency'.

15. The enforcement of the Competition and Fair Trading Act, 1994 by the Commission was however beset by a number of problems and constraints, which included:

- (a) Interpretation and treatment of 'concerted practice' and vertical restraints;
- (b) Definition of 'merger' and notification of mergers;
- (c) Coverage of public interest in the Act;
- (d) Explicit exclusions, and;
- (e) Timetable for decisions on authorisations.

16. A number of other challenges that faced the Commission in its enforcement of the Competition and Fair Trading Act, 1994 were related to:

- (a) Limited investigative powers;
- (b) Limited administrative remedies;
- (c) Wide institutional mandate, and;
- (d) Absence of a leniency programme.

17. The formulation of Zambia's national competition and consumer policy was completed in 2009, 15 years after the coming into force of the country's competition law through the Competition and Fair Trading Act 1994. The policy as approved by Cabinet comprehensively covers the main elements of such policies.¹⁰ The implementation framework of the policy covers the following areas:

- (a) Institutional arrangements: the institutions that are important in the implementation of the policy include the Commission, sector regulators and the Judiciary, working in close collaboration with other stakeholders;
- (b) Zambia Competition Commission (ZCC): this is the primary institution mandated to implement the policy, and monitor, control and prohibit acts or behaviour which are likely to adversely affect competition, fair trading and consumer welfare in Zambia;

¹⁰ Republic of Zambia: National Competition & Consumer Policy, May 2009, Ministry of Commerce, Trade and Industry, Lusaka.

- (c) The Judiciary: the Judiciary through the court system should play an important role in enhancing the enforcement mandate of the competition and consumer authority;
- (d) Sector regulators: sector regulators would play a key role in competition and consumer protection enforcement through institutional linkages and coordination with the relevant authority – the sector regulators and ZCC should enter into Memoranda of Understanding to ensure coordinated implementation and enforcement of the legal framework;
- (e) Law enforcement agencies: the various law enforcement agencies should coordinate and cooperate with ZCC in the implementation and enforcement of the competition and consumer legislation;
- (f) Legal and regulatory framework: a comprehensive and complementary legal framework facilitates easy enforcement of competition and consumer provisions of the law – however, the Zambian legal framework is comprehensive but fragmented on consumer provisions, making implementation and enforcement difficult. To ease the operations of the relevant implementing agency, the following legislation plays an important role: (a) the Telecommunications Act which provides regulation of the Information Communication Technology (ICT) sector; (b) the Public Health Act which provides for public health and safety, and; (c) the Food and Drugs Act which provides for standards for food and drugs;
- (g) Resource mobilisation and financing: the principal responsibility of the central Government in the implementation of the policy would be to mobilise both internal and external sources of finances and provide the relevant agency with necessary financial resources to ensure that the competition and consumer authority successfully implements the proposed Government strategies and activities – a direct appropriation from Parliament would be an ideal process, and;
- (h) Monitoring and evaluation: the Ministry of Commerce, Trade and Industry should provide political support and facilitate the monitoring of the implementation process and be responsible for evaluating policy benchmarks herein. In monitoring the implementation of the policy ZCC or a successor institution should take the lead implementation role.

18. The experience gained by the Commission in enforcing the Competition and Fair Trading Act, 1994, and the adoption of the comprehensive national competition and consumer policy, led to the revision of the legislation in order

to strengthen the enforcement of the country's competition law. In 2010, the Competition and Fair Trading Act, 1994 was repealed and replaced by the Competition and Consumer Protection Act, 2010 (No.24 of 2010).

II. SCOPE OF COMPETITION POLICY AND LAW

19. In line with international best practice, Zambia's new Competition and Consumer Protection Act, 2010 (No.24 of 2010) (CCPA) is a general law of general application.¹¹

2.1 Definitions

20. As opposed to the old Act, which only had one definition section (section 2 of the Act), the new Act has a main preliminary catalogue of definitions, which lists terms used in the legislation, as well as a number of other definitions of terms applied only in the section of the legislation where they are actually used. In the old Act, only 19 terms were defined in the interpretation section 2 of that Act, while 47 terms are defined in the new Act.

21. The expanded list of comprehensively defined competition terms will go a long way towards resolving some of the implementation problems experienced by the former ZCC, particularly problems that were encountered in the interpretation of terms such as 'concerted practice' and 'vertical agreements', and the treatment of practices associated with those terms. The term 'confidential information'¹² has now also been defined in the Act. This is particularly important in the exchange of information cooperation with other competition authorities. The definition of the term 'consumer' in the new Act is comprehensive and includes intermediary users of raw materials in addition to final users.

22. The definition of the term 'undertaking'¹³ may however cause confusion since it is used, correctly, to refer to a commitment or promise provided to the Commission by a person or enterprise to address any competition concern raised by the Commission, and not to an enterprise as used in competition legislations of other countries in the region. There is need for consistency on how the term 'undertaking' is defined regionally.

23. The Commission's basic functions of investigating restrictive business

¹¹ 'Model Law on Competition' (TD/RBP/CONF:7/8), United Nations Conference on Trade and Development, United Nations, New York and Geneva, 2010

¹² The term 'confidential information' has been defined to mean "trade, business, commercial or industrial information that belongs to an enterprise, has a particular economic value and is not generally available to, or known by, others".

¹³ The term 'undertaking' has been defined as "a commitment, promise or other future conduct that a person or enterprise provides to the Commission in order to address any concern raised by the Commission".

practices, examining mergers, and of carrying out competition advocacy work, remain in the new Act. The Commission is given powers to undertake investigations on its own initiative or acting on a complaint made by any person.

24. The new Act also provides for a number of other functions of the Commission that were not provided for in the old Act, and which facilitates its better enforcement. For example, for the better enforcement of the Act's consumer protection provisions, the new Act gives the Commission the added functions of investigating unfair trading practices, and unfair contract terms. It also extends the Commission's undertaking of studies to matters of concern to consumers. The added function of liaising and exchanging information, knowledge and expertise with competition and consumer protection authorities in other countries gives the Commission the necessary mandate and legal powers to enter into cooperation agreements and arrangements with other competition authorities on a bilateral, regional or multilateral level.

2.3 Public interest considerations

25. The concept of public interest has been introduced formally in the new Act, particularly in the examination and determination of mergers. Except for the formulation of two subsections of the relevant provision, the public interest issues are clearly outlined in the Act, and include the promotion of exports and employment, and the protection of micro and small business enterprises. This recognizes the fact that competition policy in developing countries should be implemented in coherence with the country's other socioeconomic policies for effective economic development.

2.4 Substantive areas covered by CCPA

26. The core substantive issues covered by the Act are in Part III (restrictive business and anti-competitive trade practices, including their authorisation), Part IV (mergers), Part V (market inquiries), and Part VII (consumer protection).

2.4.1 Prohibition of anti-competitive agreements

27. Horizontal agreements that involve the hard-core cartel activities of price-fixing, market-sharing, and bid-rigging, as well as production limitation agreements, and boycotts and joint refusals to deal are per se prohibited. Stiff penalties for entering into per se prohibited horizontal agreements are provided for in line with the seriousness of the offence. Fines of up to 10 per cent of annual turnover can be imposed on enterprises.

28. The Act however recognizes that certain other horizontal agreements could be competitively beneficial by fostering efficiencies, promoting international trade, or could be in the public interest, and should therefore not be prohibited per se but should be considered using the rule-of-reason approach. Such agreements include those involving:

- (a) Maintaining or promoting exports from Zambia;
- (b) Promoting or maintaining the efficient production, distribution or provision of goods and services;
- (c) Promoting technical or economic progress in the production, distribution or provision of goods and services;
- (d) Maintaining lower prices, higher quality or greater choice of goods and services for consumers;
- (e) Promoting the competitiveness of micro and small business enterprises in Zambia, or;
- (f) Obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement.

29. The provisions on vertical agreements simply state that “a vertical agreement between enterprises is prohibited per se, and void, to the extent that it involves re-sale price maintenance”. The Act does not give examples of vertical agreements other than re-sale price maintenance.

2.4.2 Prohibition of the Abuse of Dominance

30. Abuse of dominant position is prohibited under section 16(1) of the Act. The threshold for establishing the existence of dominant position has been lowered from the old Act’s 50 per cent of production or distribution of goods or services in Zambia, or any substantial part of the country, to 30 per cent in the new Act.

31. It is noted that the new dominance threshold of 30 per cent is rather low, and goes against the practice of higher thresholds that has been established in the region. It is also arguable whether a rebuttable presumption of dominance would be more appropriate than a strict threshold. Competition legislation in other jurisdictions in the region does not provide for a strict dominance threshold, but experience has shown that this gives the competition authority too much subjective discretion in determining dominance, which can be challenged in the courts. A mixture of a rebuttable presumption of dominance and a strict threshold, as in South Africa, would seem appropriate.

2.4.3 Merger control

32. The definition of the term ‘merger’ in the new Act is comprehensive enough to cover all possible combinations, including all the three main types of mergers (i.e., horizontal, vertical and conglomerate mergers), as well as joint ventures. It also covers ‘pure mergers’, where enterprises exchange securities to form one firm, and acquisitions of one enterprise by another. It further involves the acquisition of both assets and shares. Unlike the old Act which only provided for pre-merger notification of horizontal mergers, the new Act provides that all reviewable mergers that meet a prescribed merger notification threshold, whether they be of a horizontal, vertical or conglomerate nature, must be notified to the Commission for authorisation.

33. With regards to the prescribed merger notification threshold, the Regulations pursuant to the Act¹⁴ provide that “a merger transaction shall require authorisation by the Commission where the combined turnover or assets, whichever is higher, in Zambia of the merging parties, is at least fifty million fee units in their latest full financial year, for which figures are available.”¹⁵

34. The new Act also gives the Commission powers to review mergers that fall below the prescribed threshold if the Commission has reasonable grounds to believe that the merger will raise serious competition and/or public interest concerns.

2.4.4 Market studies

35. The undertaking of market inquiries by the Commission has been introduced in the new Act, where the Commission has reasonable grounds to suspect that a restriction or distortion of competition is occurring within a particular sector of the economy within a particular type of agreement occurring across various sectors. The Commission may initiate a market inquiry based on:

- (a) Complaints made to it by enterprises, consumers or representative bodies;
- (b) Studies conducted by any relevant bodies in a particular sector;
- (c) Its own research;
- (d) Its experience in regulating restrictive business and anti-competitive trade practices, or;
- (e) Representations made to it by the Government regarding a particular sector or type of agreement.

¹⁴ *The Competition and Consumer Protection (General) Regulations, 2011, which were gazetted on 19 August 2011 as Statutory Instrument No.97 of 2011.*

¹⁵ *Under the Regulations, a fee unit is equivalent to Kwacha 180. The merger notification threshold of 50 million fee units therefore amounts to Kwacha 9 billion (about \$1.9 million at current exchange rate)*

2.5 Consumer protection

36. The new Act harmonises the various pieces of consumer protection legislation in Zambia, with the Commission being the focal-point enforcement agency. The consumer protection provisions in the Act have been enhanced to protect consumers effectively from unfair trading practices and unscrupulous businesses.

37. Consumer protection laws in Zambia had always been fragmented with no central agency to enforce the scattered pieces of legislation. The new Competition and Consumer Protection Act harmonises the various consumer protection legislation, with the Commission being the focal point enforcement agency. A trading practice is considered to be an 'unfair trading practice' against consumer protection if:

- (a) It misleads consumers;
- (b) It compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet, or;
- (c) It places pressure on consumers by use of harassment or coercion; and thereby distorts, or is likely to distort, the purchasing decisions of consumers.

The comprehensive list of prohibited unfair trading practices includes false or misleading representations, display of disclaimers, and supply of defective and unsuitable goods and services. It also covers issues related to product labelling, price display, consumer product safety, and unfair contract terms.

38. The list of prohibited unfair trading practices in the Act is thus very comprehensive, and includes most of those contained in the COMESA competition and consumer protection law.¹⁶ A notable omission is, however, the specific mention in the Act of unconscionable conduct in both consumer and business transactions, which has been adequately covered in the country's recently adopted national competition and consumer policy.

2.6 Investigative powers and procedural aspects

39. The Commission has powers under the Act to undertake investigations, on its own initiative or on a complaint made by any person, into contraventions of any provision of the Act. The investigative powers of the Commission have been strengthened under the new Act by the appointment of inspectors, who have statutory powers to conduct dawn raids. The need for due process and transparency in the undertaking of the Commission's investigations is also strongly enshrined in the Act. The Act allows the Commission to negotiate suitable arrangements with

¹⁶ COMESA Competition Regulations and Rules, Common Market for Eastern and Southern Africa, Lusaka, December 2004

enterprises under investigation aimed at ensuring the discontinuance of the practice under investigation at any time during or after an investigation. It also provides for the prohibition through injunctions or staying orders of certain acts pending investigation.

40. The Act provides for Commission directions relating to restrictive agreements (of both a horizontal and vertical nature), and relating to distortion, prevention or restriction of competition (i.e., abuse of dominance). The directions may be in the form of written orders and may include requirements that the enterprise to which they are given should:

- (a) Terminate or amend an agreement;
- (b) Cease or amend a practice or course of conduct, including conduct in relation to prices;
- (c) Supply goods or services, or grant access to facilities;
- (d) Separate or divest itself of any enterprise or assets, or;
- (e) Provide the Commission with specified information on a continuing basis.

41. The remedies in merger control that are provided for in the Act are also of both a structural and behavioural nature, and are provided for in the case of both prospective mergers and completed mergers that have been found to result in a substantial lessening of competition.

42. The enforcement of competition law by the Commission at the request of foreign competition authorities, particularly those in the COMESA and SADC regions, and for positive comity, is also provided for under the Act.

2.7 Sanctions

43. One of the major shortcomings of the old Act was the inadequacy of sanctions under that Act which did not deter would-be offenders. The new Act has rectified that problem and provides for the imposition of various sanctions, of both an administrative and criminal nature. The most deterrent administrative sanction is the imposition of fines of up to 10 per cent of the offending enterprise's annual turnover. Imprisonment can also be imposed on anyone who delays or obstructs the Commission's investigations, or gives the Commission false or misleading information in the course of its investigations. Managers of offending enterprises can also be made personally liable for offences committed by the enterprise.

2.8 Sector regulation

44. Sector regulated activities in Zambia are fully provided for in the new

Act. Activities of enterprises in regulated sectors fall under the jurisdiction of the Commission in as far as restrictive business and anti-competitive trade practices are concerned, unless the enterprises fall under the explicit exemption provisions of the Act. The Commission is required under the Act to enter into cooperation agreements with sector regulators in the implementation of competition policy and law. Of all the sector regulators in Zambia, four stand out as requiring cooperation with the Commission in the implementation of the country's competition policy and law since they have some competition functions. These are the Pensions and Insurance Authority, the Zambia Information and Communications Technology Authority, the Energy Regulation Board, and the Bank of Zambia.

45. The Commission has negotiated Memoranda of Understanding (MoUs) on concurrent jurisdiction in competition matters with all the sector regulators with competition functions in accordance with the provisions of the Act. The MoU with the energy regulator was signed in September 2011, while that with the ICT regulator was signed in October 2011. The MoUs with the pensions and insurance regulator and with the Bank of Zambia are in the process of finalization.

2.9 Judicial review of competition cases

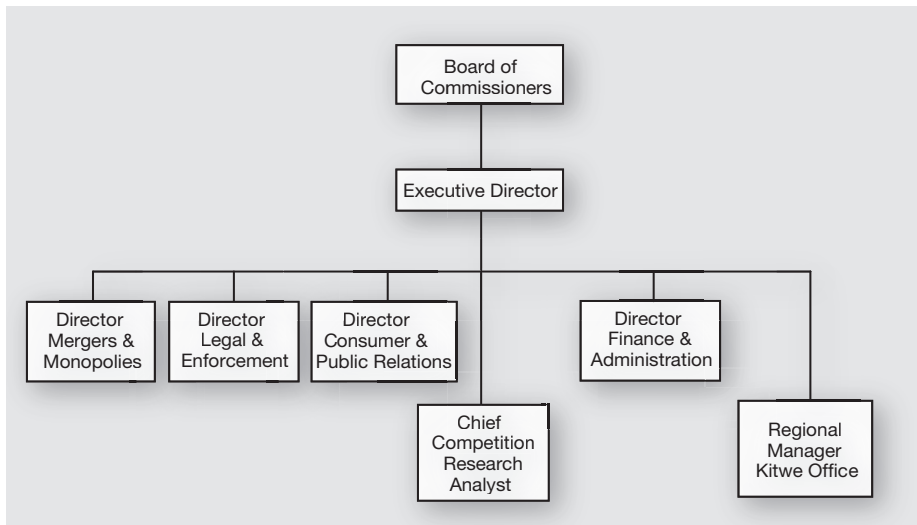
46. The judicial system in Zambia has four levels, starting with the lower courts and rising up to the Supreme Court. The lower courts are the local (traditional) courts and Magistrates Courts, while the higher courts are the High Court of Zambia and the Supreme Court of Zambia, which is the highest court in Zambia. The new Competition and Consumer Protection Act, 2010 provides for the setting up of a Competition and Consumer Protection Tribunal to hear appeals against decisions of the Commission.

47. Orders or directions made by the Commission from its investigations can be appealed against to the Competition and Consumer Protection Tribunal by any aggrieved person or enterprise within thirty days of receiving the order or direction. Appeals against decisions of the Tribunal can be made to the High Court, also within thirty days of the determination. The Tribunal consists of five part-time members appointed by the Minister under the terms of section 67(1) of the Act, as follows: "(a) a legal practitioner of not less than ten years legal experience, who shall be the Chairperson; (b) a representative of the Attorney-General, who shall be the Vice-Chairperson; and (c) three other members who shall be experts, with not less than five years experience and knowledge, in matters relevant to this Act". The Minister may also remove any member of the Tribunal for reasons that are not specified in the Act. The Secretariat of the Tribunal also consists of civil servants working in the Ministry of Commerce, Trade and Industry.

III. INSTITUTIONAL FRAMEWORK

3.1 Organisational structure

48. The figure below shows the organisational structure of the Commission. There are three operational divisions – mergers & monopolies, legal & enforcement, and consumer & public relations; and one administrative support division – finance & administration. There is also a research unit and a regional office.



Source: Commission

49. The investigative wing of the Commission is the Secretariat headed by the Executive Director, who is appointed by the Board of Commissioners under the terms of section 6(1) of the Act. The Executive Director is the chief executive officer of the Commission responsible for the day-to-day administration of the Commission, under the direction of the Board. The Board may also appoint under the terms of section 6(4) of the Act “such other staff as it considers necessary for the performance of the Commission’s functions under this Act”. Section 7(1) specifically provides for the appointment of inspectors “for the purposes of ensuring compliance with this Act”, and for undertaking specialized investigations.

50. The Secretariat has wide investigative powers, including the undertaking of dawn raids by inspectors. To facilitate the Secretariat’s cartel investigations, section 79(1) of the Act provides that “the Commission may operate a leniency programme where an enterprise that voluntarily discloses the existence of an

agreement that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act”.

51. The Secretariat submits to the Board of Commissioners for determination the findings and recommendations from its investigations into competition and consumer concerns.

52. The Board of Commissioners is the adjudicative wing of the Commission, which makes determinations on competition and consumer concerns that have been investigated by the Secretariat.

53. The Board composed of seven members appointed by the Minister under the terms of paragraph 1(1) of the First Schedule to the Act, consisting of:

- (a) A representative from the Ministry responsible for commerce;
- (b) A representative of the Attorney General, and;
- (c) Five other members, with experience and knowledge in matters relevant to the Act.

The Executive Director of the Commission is an ex officio member of the Board under the terms of section 6(3) of the Act. The Chair and Vice-Chair of the Board are appointed by the Minister from amongst the members of the Board. A member of the Board may be removed from office by the Minister.

54. The Minister has more powers on the appointment of members of the Board of Commissioners under the new Act than under the old Act. Under the old Act, the Minister was restricted to appoint only those members of the Board who were nominated by their respective institutions, while under the new Act the nomination system has been removed. The Minister can also remove a member of the Board of Commissioners without giving any reasons.

3.2 Staffing and Human Resources

55. The Commission has a total of 37 positions on its staff establishment, of which 29 are currently filled. Of the Commission’s present 29 full-time employees, 6 (or 21 per cent of the total number of employees) are in managerial positions, 14 (48 per cent) are in other professional positions, and 9 (31 per cent) are in financial and administrative support positions. A total of 17 managerial and professional staff is directly involved in competition and consumer issues, constituting about 60 per cent of the total number of employees. All the Commission’s professional staff have university degrees in their respective areas of competence (i.e., economics, law, administration, and accounting).

56. Staff turnover in the Commission has been very low since 2008, mainly because of improved conditions of service, in terms of both basic salaries and other employee benefits. Salaries in the Commission compare very favourably, not only nationally but also regionally. Over the last three years, the Commission has not lost any support staff, and lost only two professional staff.

57. The Commission recently appointed 10 inspectors on a part-time contract basis under the provisions of the Act. There are plans to appoint a total of 60 such inspectors based in all the country's ten provinces. A regional office has also been opened in the Copperbelt town of Kitwe, and staff for that office is being recruited. The office will handle both competition and consumer matters.

58. The Commission has a serious human resource gap since its present staffing level is not commensurate with its current operations and stakeholder expectations. For example, the Commission's Legal & Enforcement Department is manned by only 3 people, while the number of competition and consumer cases requiring legal advice and enforcement is on the increase. The Mergers & Monopolies Department and the Consumer & Public Relations Department are also only manned by 6 people each at Head Office, which over-strains the Departments in terms of investigations to the detriment of equally important advocacy and awareness activities. Of the 37 positions on the Commission's current staff establishment, only 29 positions are filled due to funding problems.

59. The universities should be the natural pool of trained personnel for the Commission in the specialist field of competition policy and law. However, none of the universities in Zambia are currently offering courses in subjects connected to competition policy and law. The University of Zambia has an elective course on intellectual property rights (IPRs) and competition, but the content is more on IPRs and not competition.

3.3 Budget and financial resources

60. The First Schedule to the Act provides that the funds of the Commission consist of "such moneys as may: (a) be appropriated by Parliament; (b) be paid to the Commission by way of fees, levies, grants or donations; or (c) vest in or accrue to the Commission". The Commission may also accept grants or donations from any source, raise loans, or charge and collect fees for services it provides. In 2010, 36 per cent of the Commission's total income was in the form of Government grants, while 61 per cent was from statutory fees.

61. The new Act also provides that the Minister of Finance may prescribe a percentage of the fines payable to the Commission to be retained by the Commission, but this has not been done.

3.4 Office facilities and equipment

62. Other pertinent issues affecting the effective implementation of competition and consumer protection policy and law in Zambia include the location and physical office premises of the Commission, the availability of motor vehicles, and human resource gaps.

63. The Commission's Head Office is located in the Main Post Office along Cairo Road in the central business area of the City of Lusaka. However, the offices are on the fourth floor of the building, which has had no functioning elevators for many years. Accessing the offices is therefore a daunting task for would-be competition and consumer protection complainants.

64. The Commission currently has a total of nine motor vehicles, of which five have been allocated to senior management for their official and personal use, three are pool vehicles for use in Lusaka, and one is for use in the Copperbelt. There is therefore a serious transport problem in the Commission, which is affecting the investigation of competition and consumer cases, as well as the undertaking of advocacy and awareness campaigns.

IV. COMPETITION LAW ENFORCEMENT

65. Cases handled by the Commission can be divided into seven categories:

- (a) Relocation of plant and equipment;
- (b) Restrictive business practices;
- (c) Mergers and acquisitions;
- (d) Trade agreements;
- (e) Trade associations;
- (f) Control of concentrations of economic power, and;
- (g) Unfair trading and consumer protection.

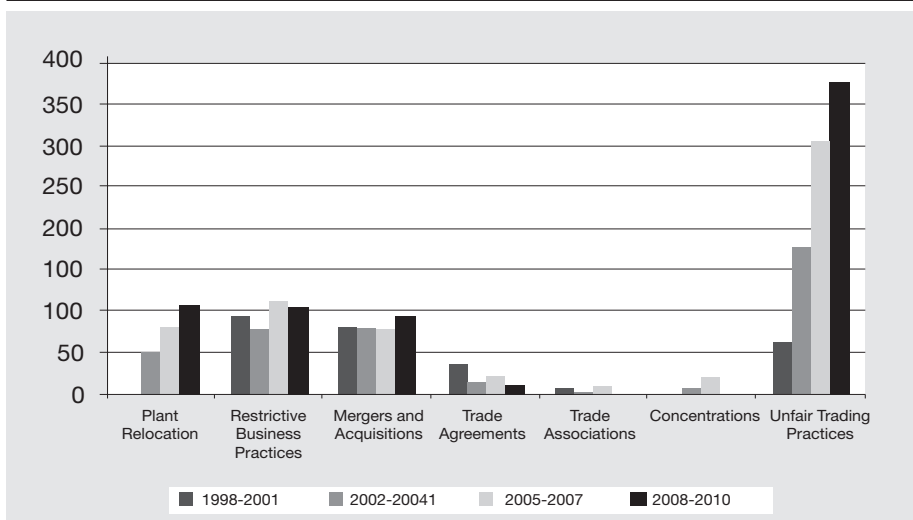
66. Cases involving unfair trading practices and consumer protection outnumber by far all the other cases, and have been on the increase since 1998. Cases involving restrictive business practices were a distant second, closely followed by those involving mergers and acquisitions. The Commission's case-load from 1998 to 2010 was a total of 1,996 cases, of which 923 cases (or 46.24 per cent of the total cases) involved unfair trading practices. 386 cases (19.34 per cent) involved restrictive business practices, while 331 (16.58 per cent) were mergers and acquisitions, and 235 (11.77 per cent) involved relocation of plant and equipment.

Table 1: Cases received and handled by the Commission during the period 1998–2010
Case-load of the Fair Competition Commission, 2008 to 2011

Legal provision	1998 – 2001	2002 – 2004	2005 – 2007	2008	2009	2010	Total (1998 – 2010)
Relocation of plant and equipment	0	49	79	27	31	49	235
Restrictive business practices	94	78	111	19	24	60	386
Mergers and acquisitions	81	79	78	30	18	45	331
Trade agreements	36	14	22	4	2	1	79
Trade associations	7	2	7	0	0	0	16
Control of concentrations of economic power	0	6	19	0	0	1	26
Unfair trading and consumer protection	62	177	306	103	65	210	923
Total cases	280	405	622	183	140	366	1 996

Source: CCPC 2010 Annual Report

Graph: Categories of cases handled since 1998



67. Sectors that are prone to anti-competitive practices or conduct include the telecommunications and broadcasting services sectors, the agricultural and mining sectors, and the beverages and cement industries. The major concerns are monopolisation and cartelisation.

V. COMPETITION ADVOCACY

68. The Commission has wide advocacy responsibilities under the Act. Under section 5 of the new Act the Commission is the “primary advocate for competition and effective consumer protection in Zambia.” It also has the functions of:

- (a) Advising Government on laws affecting competition and consumer protection;
- (b) Providing information for the guidance of consumers regarding their rights under the Act; (c) Advising the Minister on agreements relevant to competition and consumer protection and on any other matter relating to competition and consumer protection, and;
- (d) Cooperating with and assisting any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the Act.

69. The Commission makes itself visible to the business community and general public through the media (both print and electronic). It engages with the Government in what it is doing through representations on discussions under the auspices of trade negotiation forums such as the World Trade Organization and the Economic Partnership Agreements with the European Union. It also has held joint stakeholder workshops with various organizations such as the Law Association of Zambia, the Zambia Association of Chambers of Commerce and Industry, the Chamber of Mines, the Manufacturers Association, and the Pensions and Insurance Authority. Its other advocacy and awareness work has included the following:

- (a) Publication of a weekly column on competition and consumer issues in The Post newspaper, which has the largest circulation in Zambia;
- (b) Appearing on television, and speaking on the country’s two main radio stations, on consumer protection issues;
- (c) Touring the country’s nine Provinces on awareness campaigns, and;
- (d) Releasing press releases on case handling.

It is also publishing a quarterly newsletter with a wide local and international circulation.

70. While the Commission is doing a lot in sensitizing the business community and general public on competition and consumer protection issues, some stakeholders still feel that not enough is being done. There are concerns that the visibility of the Commission is still low and that the Commission needs to have physical representation in all the major centres of the country. There are also expectations

that the Commission should educate and sensitise the business community on various anti-competitive practices and the general implementation of competition policy and law, as well as on its responsibilities to consumers.

71. It is noteworthy that the awareness of consumer issues in Zambia was found to be relatively higher than that of competition issues.

VI. INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE

72. The competition authority of Zambia cooperates with other similar agencies worldwide at both multilateral and bilateral levels. The cooperation at a multilateral level is done under the auspices of various international and regional organizations, such as UNCTAD, the International Competition Network, COMESA, SADC, the Southern and Eastern Africa Competition Forum, and the African Competition Forum.

73. The Zambian competition authority has also received valuable technical assistance from various cooperating partners since its inception. In that regard, UNCTAD's capacity-building and technical assistance programme has played a prominent role.

VII. FINDINGS AND POSSIBLE POLICY OPTIONS

74. The implementation of competition policy and law in Zambia, including consumer protection, has developed considerably over the years, and that development has been much facilitated by the new Competition and Consumer Protection Act, 2010. The business community in Zambia is generally receptive to the country's competition and consumer protection law. In particular, the Commission's consumer protection work is highly appreciated.

75. The new Act removes most of the weaknesses in the legal framework that were prevalent in the old Act.

76. Very few things were found to be going wrong in the implementation of competition and consumer protection policy and law in Zambia. The following recommendations in that regard are mostly aimed at increasing the effectiveness of that implementation.

Table 2: Summarised policy recommendations**I. Recommendations directed at the Competition and Consumer Protection Commission (CCPC)****Recommendation**

1. The Commission should list through a Statutory Instrument the common types of vertical agreements and arrangements that restrain competition in Zambia for the information of the business community, and for the guidance of its competition practitioners. The list should clearly distinguish between re-sale price maintenance, that is per se prohibited and other forms of vertical restrictions that fall under the rule of reason.

2. The merger notification threshold should be constituted of a combination of the combined turnover/asset threshold in Zambia and a minimum turnover/asset threshold in Zambia for the target firm.

3. CCPA regulations should provide for merger assessment in two phases, with Phase 1 involving simple transactions taking a shorter period of, say, 30 days, and Phase 2 involving more complex transactions taking up to 90 days. It is noted that under the current institutional framework of the Commission, reducing the timeframe for non-problematic transactions to 30 days would be difficult given the fact that Commissioners only work part-time. This could possibly be addressed by having Commissioners work full-time so that cases can be brought to their attention on a continuous basis. An alternative would be to give the Secretariat discretion on simple mergers.

4. The Commission's Merger Control Guidelines that are in the process of being redrafted for the adoption by the Board of Commissioners should cover pertinent issues such as merger notification requirements, general assessment of mergers, and any other current merger control practices and should be published together with other pertinent information on Zambia's merger control system on the Commission's web site for easy access by the business community.

5. The Commission in giving directions on staying or prohibition orders under section 62(1) of the CCPA should state specific periods for the validity of the orders. This should be provided for in a Statutory Instrument, with the following suggested wording: "A staying order under the terms of section 62(1) of the Act shall remain in force: (a) until completion of the Commission's investigation into the matter concerned; or (b) for a period of [...] months from the date of its publication; whichever is the shorter period"

6. The Commission's MoUs with sector regulators should not only be confined to those with which it has concurrent jurisdiction on competition matters, but should also be extended to other regulators in other areas of cooperation.

7. It is recommended to revise the maximum merger notification fee in Zambia and lower it from the very high \$600,000 in line with practice in the region. Given the strong reliance of the Commission on merger notification fees, this recommendations needs to be implemented simultaneously with recommendation 21, i.e. the provision of adequate Government funding for the Commission.

8. The renovation of the office premises that the Commission has been offered by the Government should be expedited to enable their speedy occupation.

9. It should be made very clear through a Statutory Instrument that the ex officio membership of the Executive Director on the Commission's Board of Commissioners does not give him voting rights on competition and consumer protection cases being determined by the Board.

10. It is recommended that the Commission stop using its scarce resources in investigating relocation of plant and equipment from Zambia not related to specific competition complaints or concerns, and consider any competition concerns arising from such relocations using other competition instruments, such as merger control.

11. The Commission should allocate more funds for the financing of its advocacy and awareness activities, constituting not less than 5 per cent of its annual recurrent expenditure budget, and activities should be undertaken by a specialist unit based in the Office of the Executive Director with adequate staffing.

II. Recommendations directed at the Legislature

12. It is recommended to remove the apparent confusion over the use of the word 'undertaking' in the definition of the term 'statutory monopoly'.

13. It is recommended to amend section 14 CCPA to provide that the share of the supply threshold for authorization of horizontal agreements be 15 per cent or more, and that for vertical agreements be 30 per cent or more, not vice versa.

14. The dominance thresholds in all the Acts of Parliament that regulate enterprises in Zambia should be harmonized.

15. It is recommended to delete subsections (g) and (h) of section 31 CCPA which give the Commission wide discretionary powers of deciding what constitutes public interest in the consideration of mergers.

16. It is recommended to delete Section 86(3) of CCPA, which provides that the Minister of Finance may prescribe the percentage of the turnover paid by a person or an enterprise as a fine for contravening the provisions of the Act be retained by the Commission.

17. Section 42 of the CCPA should be amended to make it clear that enterprises in regulated sectors are not exempted from the requirements of the Act, in particular not from the requirements of Part IV on mergers, to read that “the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of the Act”

18. It is recommended that the Minister may remove a member of CCPT only on clear grounds and reasons that should be provided for in CCPA.

19. CCPA should provide for clear grounds upon which the Minister can remove from office a member of the Commission’s Board of Commissioners.

III. Recommendation directed at the Ministry of Commerce, Trade and Industry

20. The rules being worked out for CCPT should spell out clearly the roles of the Commission, the Tribunal and general law courts in the enforcement of consumer protection provisions of the Act to ensure the desired fast-tracking of consumer protection remedies.

IV. Recommendations directed at the Treasury

21. CCPC should be given the necessary funding to fill the existing human resources gap, and also that the main university in Lusaka be assisted in introducing courses related to competition policy and law to provide a source of trained staff for the Commission.

22. The Government should take up its responsibility of ensuring that the operations of CCPC are fully funded from Government grants.

23. It is recommended to give CCPC the necessary capital expenditure funds to procure the much-needed equipment to allow it to carry out its tasks effectively.

V. Recommendations directed at cooperating partners

24. Competition law training should be organised for members of CCPT, and the capacity of members of the Tribunal in the field of competition and consumer protection policy and law be continuously built upon through the holding of periodical adjudicators’ seminars and workshops to which the other members of the Judiciary in Zambia, including Magistrates and Judges, would be invited.

25. CCPT should undergo extensive training in the conduct of dawn raids, as well as in other competition enforcement areas such as case investigations and litigation.
