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# **Voluntary Peer Review of Competition Policy: Zimbabwe**

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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

# Context and History of the Zimbabwean Competition Regime

- IMF-sponsored Economic Structural Adjustment Programme in 1992.
- Adoption of the Zimbabwe Competition Act (ZCA) in 1996.
- War with DRC (1998-2002).
- Zimbabwe's land reform program of 1999 negatively perceived abroad.
- Economic sanctions by some key trading partners badly damaged the country's economy.
- Introduction of monetary measures to curb the situation (stoppage of the use of the Zimbabwean Dollar and removal of price controls).
- Some economic improvements, including the cessation of hyperinflation.
- In 2010, first growth of the Zimbabwean economy in a decade.



## Reforms of the Zimbabwean Competition Regime

- In 2001, ZCA was amended to provide for the combination of the Competition Commission and the Tariffs Commission, to form the Competition and Tariffs Commission, as a cost saving measure for the Government.
- The Amendments also strengthened Commission's handling of mergers and acquisitions, expanded the list of restrictive and unfair business practices and added the functions of price surveillance and monitoring.
- It appears that an incomplete adaptation of ZCA's wording in 2001 has resulted in some of the major shortcomings of the Act today.



# Legal Framework

## Scope of the ZCA

- The ZCA was enacted to promote and maintain competition in the economy,
  - to provide for prevention and control of restrictive practices,
  - regulation of mergers, prevention and control of monopoly situations and
  - prohibition of unfair trade practices,
- and to provide for matters related to the foregoing.

# Anti-Competitive Agreements

- The ZCA distinguishes various forms of objectionable conduct:
  - unfair business practices,
  - restrictive agreements, and
  - unfair trade practices;

However, there is no general prohibition of anti-comp. agreements.

- Only unfair trade practices (e.g. dumping) constitute an offence and are sanctioned by a fine or imprisonment.
- Unfair business practices, which comprise generally restrictive practices and specific practices that are individually listed in the First Schedule, are only sanctioned by nullity, Section 43 (a) and (b).
- Thus, the CTC can prohibit restrictive business practices only on an individual basis if it is satisfied that the restrictive practice is contrary to public interest, Section 31.



## Anti-Competitive Agreements (cont'd)

- The list of specifically defined unfair trade practices in Schedule 1 mixes up agreements that would typically fall under the rule of reason with hard core cartels.
- It further contains conduct that is typically considered as unfair trade practices.
- It also includes exclusionary and exploitative conduct issues that are typically dealt with under Abuse of Dominance.
- Section 35 (1) and (2) of the ZCA provides for notification of rule of reason agreements. However, the timeframe for which the agreement will be reviewed is not stipulated.

## Abuse of Dominance

- The ZCA does not contain a general prohibition for abuse of dominance:
  - Section 2 contains a definition of monopoly situation and substantial market control.
  - Section 31 (2) allows the CTC to declare a monopoly situation unlawful if it is satisfied that it is contrary to the public interest on individual basis.
- “Substantial Market Control” is given, where a person has the power to profitably raise, maintain or lower prices above or below the competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe, Section 2 (2).



## Abuse of Dominance (cont'd)

- Section 32 (5) ZCA appears to bear a presumption that all monopoly situations are against public interest unless, certain conditions are met.
- This is contrary to the ideal prohibition that target certain conduct deemed abusive.
- ZCA is ambiguous as to whether a dominant position as such or only its abuse is against public interest and can therefore be prohibited.
- ZCA should clearly prohibit abuse of a dominant position as a general rule.



## Mergers and Acquisitions

- At inception, Zimbabwe had a voluntary merger notification system which was changed by the Amendment Act of 2001.
- Section 34 of the ZCA provides for a pre-merger notification regime which requires mergers with values at or above a prescribed threshold be notified (currently US \$1 200 000 of the combined annual turnover or assets in Zimbabwe of the merging parties).
- Mergers which are contrary to the public interest are prohibited. Section 32 (4) impliedly defines public interest to cover both creation and strengthening of dominance in the market.
- Nevertheless, the prohibition is scattered in Sections 2, 32 (1), 32 (4) and 34 of the ZCA, thus making the interpretation thereof a complicated undertaking.

## Mergers and Acquisitions (cont'd)

- Reading of Section 34A of the ZCA together with Statutory Instrument 270 of 2002 particularly Section 5 on “Determination of Notification” show that the ZCA does not provide for binding deadline for the CTC to assess a merger.
- It is also unclear which among the merging parties (Acquiring or Target firms) is responsible for notifying the CTC of the intended merger transaction.

## Institutional set up of the CTC

- CTC has a human resources base of 29 staff out of which 16 are technical and 13 support staff.
- There is the Director: Secretary of the Commission and 2 legal officers/counsels.
- Competition division is led by Assistant Director, 5 economists and 1 law officer.
- Tariff division: Assistant Director Tariff 4 economists.
- Most of the competition experts are new with limited training in Competition.

# Institutional Issues

- Staff at CTC are paid salaries pegged to civil service scales which is estimated at 700 % lower compared to sectoral regulators.
- There is limited use of ICT and electronic documentation of at proceedings CTC.
- CTC has limited funds to carry out its mandate.
- None of CTC staff has undergone competition training at University and at most, members of staff and Commissioners have attended short trainings of 2-3 days abroad.

## Enforcement Record

- Since 1999 the Commission has made decisions on a total of 100 competition cases involving restrictive and unfair business practices (inclusion of anti-competitive agreements and abuse of dominance)
- During the same period, the Commission has handled 222 merger applications.
- Success stories in handling of competition cases include removal of entry barriers in industries such as cement, coal, sugar and fertilizer; resulting in the introduction of new economic players to the markets.

## Recommendations

- Salaries for the CTC personnel should also be substantially increased for obvious reasons of motivation on their part and retention of staff on the CTC's part as an employer.
- Placement of competition and regulatory authorities under one central ministry.
- Establishment of a Competition Law and Policy Course at the University.
- Establishment of a sound Information and Communication Technology department at the CTC

## Recommendations (cont'd)

- It is recommended that the ZCA be repealed and replaced with a new act that will address the gaps and other issues as proposed in the report.
- Drafting of the new law should be preceded by a comprehensive study that should enlighten details regarding the economics and legal aspects of the competition regime based on requirements of the contemporary Zimbabwean social, economic and political contexts.
- The study should also form basis for development of a competition policy and eventually the new law.
- It is recommended that the Government increase CTC's budget to optimal levels based on the decade long experience of implementation under the prevailing limited budget.