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

• 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.