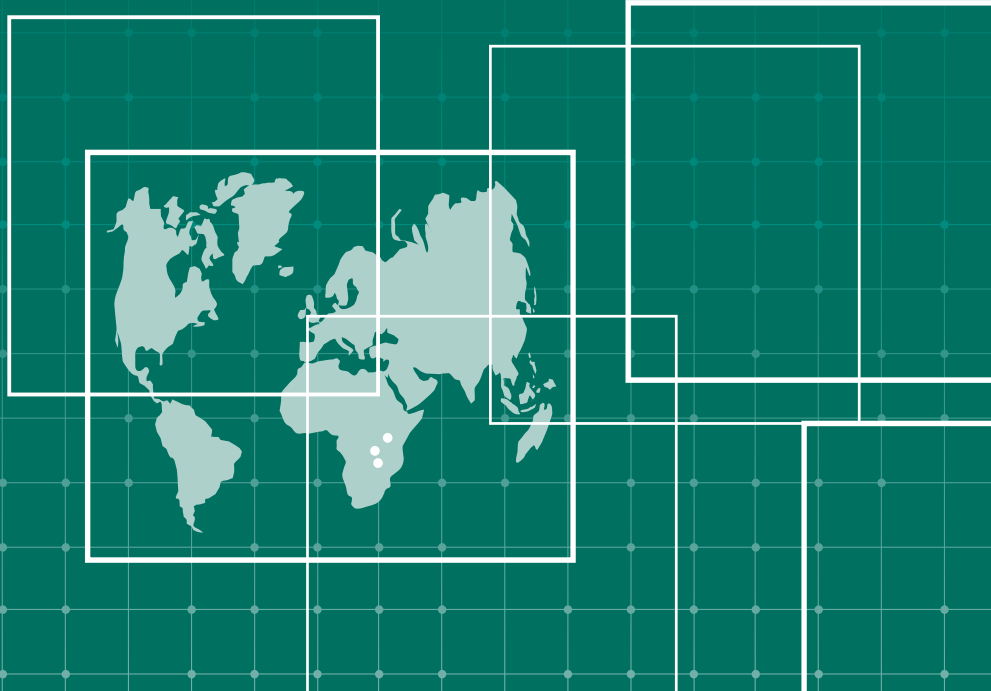




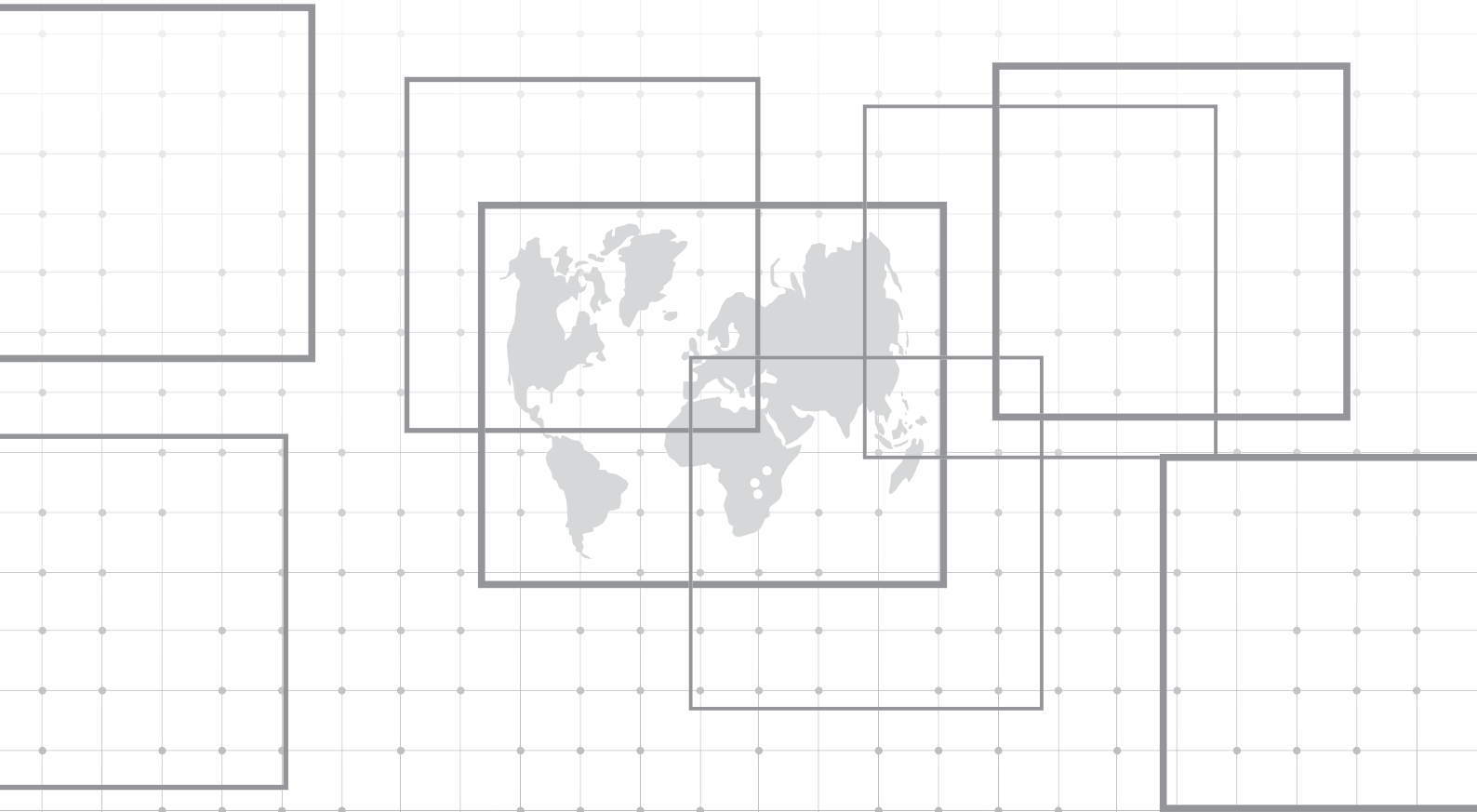
VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

**A TRIPARTITE REPORT ON THE UNITED REPUBLIC OF
TANZANIA-ZAMBIA-ZIMBABWE**





VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:
**A TRIPARTITE REPORT ON THE UNITED REPUBLIC OF
TANZANIA-ZAMBIA-ZIMBABWE**



**UNITED NATIONS CONFERENCE ON TRADE
AND DEVELOPMENT**

**VOLUNTARY PEER REVIEW OF COMPETITION
LAW AND POLICY:**

**A TRIPARTITE REPORT ON
THE UNITED REPUBLIC OF
TANZANIA – ZAMBIA – ZIMBABWE**



UNITED NATIONS
New York and Geneva, 2012

TABLE OF CONTENTS

NOTE.....	2
ACKNOWLEDGEMENT	3
COMPARATIVE ASSESMENT	5
VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY – FULL REPORT – UNITED REPUBLIC OF TANZANIA	27
VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY – FULL REPORT ZAMBIA	87
VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY – FULL REPORT ZIMBABWE.....	169
NOTES.....	211

NOTE

UNCTAD's voluntary peer review of competition law and policies falls within the framework of the Set of Multilaterally Agreed Equitable 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.

Due to capacity constraints, this publication has not been subject to formal editing.

The views expressed in this report are those of the author and do not necessarily reflect the views of the United Nations Secretariat. The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries. Material in this publication may be freely quoted or reprinted, but acknowledgement is requested, together with a reference to the document number. A copy of the documentation containing the quotation or reprint should be sent to the UNCTAD secretariat.

Unless otherwise specified, all references to dollars (\$) are United States dollars.

UNCTAD/DITC/CLP/2012/1

ACKNOWLEDGEMENT

UNCTAD's voluntary peer reviews of competition law and policies are conducted at the annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy or at the five-yearly United Nations Conferences to Review the UN Set. The substantive preparation is carried out by UNCTAD's Competition and Consumer Policies Branch (CCPB) under the direction of Hassan Qaqaya, Head of CCPB.

This report was prepared for UNCTAD by Alberto Heimler, on leave from the Italian Authority and currently Professor of Economics at the Scuola Superiore della Pubblica Amministrazione, the Italian School of Government. It is based on the reports on the three national assessment reports for the tripartite voluntary peer review of competition law and policy in the United Republic of Tanzania, Zambia and Zimbabwe prepared by Thulasoni Kaira, Chief Executive and Secretary to Botswana Competition Commission, Alex Kububa, Director, Competition and Tariff Commission, Zimbabwe, and Allan Mlulla, Director of Research, Mergers and Advocacy, Fair Competition Commission, United Republic of Tanzania. The substantive backstopping and review of the report were the responsibility of Elizabeth Gachuri. Geoffrey Mariki, Director General of the United Republic of Tanzania's Fair Competition Commission, Alex Kububa, Chilufya Sampa, Executive Director, Competition & Consumer Protection Commission of Zambia and Ulla Schwager provided valuable feedback.

COMPARATIVE ASSESSMENT

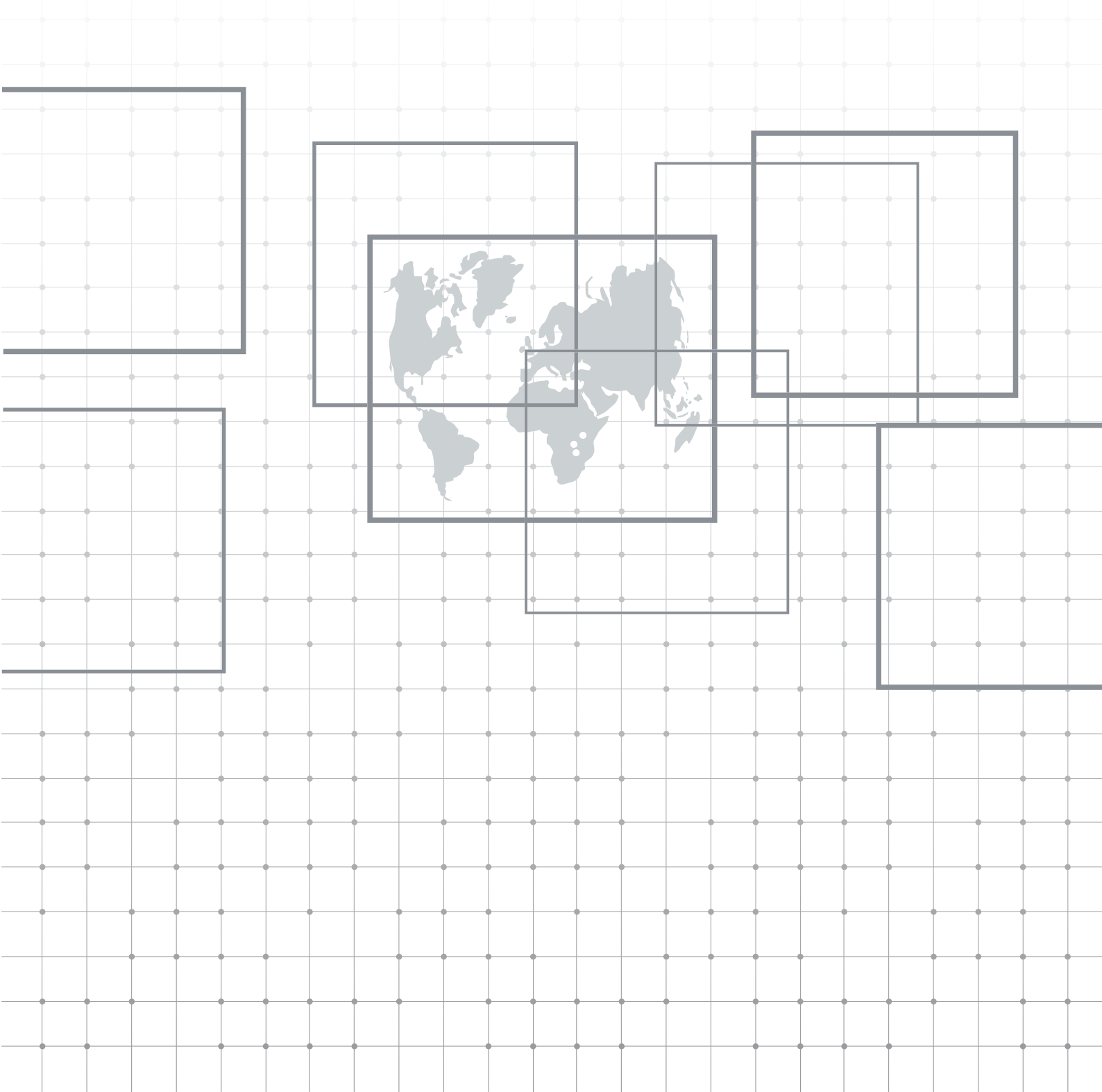


TABLE OF CONTENTS

NOTE	2
ACKNOWLEDGEMENT	3
PREFACE	7
I. Introduction	7
II. Comparative Review	7
1. The substantive part of the law: is a common interpretation possible?.....	8
2. The investigative powers of competition authorities	9
3. Sanctions.....	11
4. Judicial review	13
5. Merger Control.....	14
6. Public resources dedicated to antitrust enforcement.....	17
7. Enforcement Record	19
III. Regional Agreements	20
IV. Findings and Recommendations	21
1. Recommendations to be implemented at the national levels.....	21

PREFACE

This comparative assessment 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 value-added of the harmonization of competition law and its enforcement in this subregion, 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 the present comparative assessment report that addresses pertinent issues from a subregional perspective.

I. INTRODUCTION

The United Republic of Tanzania, Zambia and Zimbabwe have all introduced their competition law in the mid 1990s prompted by a process of privatization and liberalization that started in the late 1980s. After years of experimentation with a centrally planned economy, the opening up of markets was seen as the solution to large inefficiencies and slow economic growth. The process of liberalization is not yet complete and regulatory restrictions are still widespread, a legacy of colonial times and socialist tradition.¹

In all the three countries the introduction of competition law occurred quite early in the process and by the mid 1990s all of them had an antitrust law and an active authority in place. The purpose of these laws was to:

- accompany the development of market mechanisms, making sure that existing dominant companies, often protected by decades of protectionism, would not abuse their position by blocking or delaying the entry of competitors
- ensure that markets would not be cartelized and that anticompetitive mergers would not lead to a substantial lessening of competition.
- advocate competition principles in regulatory reform

In a way, the reasoning behind the introduction of antitrust laws in countries trying to liberalize and

improve the workings of the market mechanism is very much the same as that behind the introduction of antitrust provisions in the European Union Treaty back in 1957. Also in Europe the antitrust laws were meant to make sure that legal or regulatory protectionism dismantled by the European Treaty would not be replaced by private competitive restrictions.

The reference to the European Union in this comparative review will sometimes be used for helping the three jurisdictions avoid some of the mistakes the European Union went through, especially in its early days. Furthermore, the example of the European Union may help to evaluate the more recent institutional developments associated with the regionalization of antitrust and the setting up of regional groupings, like COMESA, EAC, SADC, to which these jurisdictions belong².

II. COMPARATIVE REVIEW

The purpose of the tripartite peer review is to analyze antitrust laws enforcement experiences of The United Republic of Tanzania, Zambia and Zimbabwe. The objectives pursued are to identify commonalities and differences and to provide some feedback on the actions to be undertaken in order for the competition authorities of these countries to become more effective. On the substantive aspects of the law some very useful suggestions for adjustments are contained in the reports for the individual countries. Certainly one major improvement would be for the three jurisdictions to at least converge on the way legal provisions are interpreted. This has been the process undertaken in the European Union where the interpretation of the substantive provisions of the law has constantly evolved through case law developments, new communications and regulatory reform, the legal provisions remaining always the same since the signing of the Treaty in 1957. The first mover would more often be the European Commission and then member States would follow, but sometimes member States would take the lead and the European Commission would follow. Having the same type of practices prohibited everywhere did allow the development of a standard and helped very much in the process of judicial review. For all

these reasons this Report will mainly concentrate on the process of convergence among the three jurisdictions, while changes in the law will be suggested only when strictly necessary. As the experience of many countries shows, changing the legal texts takes a lot of efforts and, not being a process under the control of the competition Authority, there is no guarantee that the end result will actually be advantageous. Of course this is general statement and there are exceptions, like the recent experience of Zambia and the United Republic of Tanzania shows. The point is that we all have imperfect laws, but we could all have a perfect case law. Indeed quite a lot can be achieved by fine tuning the way legal provisions are interpreted. In consequence this analysis will mainly concentrate on operational/ procedural/institutional aspects. As is well recognized, these aspects have been crucial to success of antitrust enforcement in all jurisdictions.

The three jurisdictions under review will be mainly compared on the:

- substantive provisions of competition law;
- different investigative powers of the Authorities;
- sanctions imposable for procedural and substantive violations;
- role of the judiciary;
- effectiveness of merger control;
- resources allocated to these authorities in relation to the tasks assigned to them;
- role regional agreements play in promoting a more effective antitrust enforcement environment;
- competition authorities' enforcement records

1. The substantive part of the law: is a common interpretation possible?

In all three jurisdictions, the law addresses anti-competitive agreements and abuses of a dominant position (merger control will be dealt in a separate section of this report). All economic activities are within the scope of the law and exceptions are limited. However, while the Tanzanian and Zambian laws are quite in line with international best practices, the Zimbabwe Competition Act would require some major reform. The major shortcoming of the Zimbabwe law is the fact that

it introduces a very artificial distinction between unfair trade practices (that can be sanctioned) and unfair business practices that can only be declared null and void. It is quite clear that omitting the possibility of sanctioning unfair business practices is a lack of coordination originating in the 2001 revision of the law. However this omission cannot be overcome through case law extension. It is not simply semantic. The Zimbabwe Competition Act clearly defines unfair trade practices as related to imports, while unfair business practices are all other restrictions of competition. Section 42.3, where sanctions are introduced in the Zimbabwe act, should be extended to cover unfair business practices as well. As it now stands, the law lacks any deterrent function.

Besides reformulating the provisions on sanctions, there is ample room for improvement in the Zimbabwe competition act. As the practice of major jurisdictions like the European Union and the United States shows, the substantive part of an antitrust law needs to be quite simple. All is needed is a general prohibition of restrictive agreements and abuse of dominance and a provision related to merger control. The UNCTAD model law suitably drafted to jurisdictional specificities, is quite useful in this respect. Making the law too complicated and too detailed like in Zimbabwe, reduces, not increases, the possibilities of enforcement since real case may fail to conform to the specificities of legal provisions. General provisions are much easier to adapt to the specific circumstances of a case. However provisions of a general type may be insufficiently clear in identifying what is actually prohibited. In order to enhance legal certainty, it is then necessary for competition authorities to issue guidelines that would serve a supplementary role of clarifying practical applications, but in a flexible easy-to-change way. This is the direction Zimbabwe should move.

As the individual reports show, as a result of recent changes, the laws in the United Republic of Tanzania and Zambia are already in line with international best practices. In their laws there is a general prohibition of restrictive agreements and of abusing a dominant position. The main difference between the two jurisdictions is that Zambia's Competition Act introduces, above certain market share thresholds, a system of notification and individual exemption for horizontal and vertical

agreements. In the United Republic of Tanzania, there is no market share threshold and parties can voluntarily notify any agreement that they believe deserves an exemption. The standard for an exemption is very similar in the two jurisdictions and based upon a balancing of efficiency benefits and the negative effects associated with the restrictions of competition. In both jurisdictions the law requires that in order to grant an exemption there should be a net benefit to the public, better to be interpreted as final consumers. In this way the efficiencies considered would have to be product specific.

Introducing a system of notification is not a very effective way to promote compliance with an anti-trust law, since the most identify serious restrictions to competition will never be notified. As the European experience shows (in Europe the notification system was abandoned in 2004), firms, when subject to an authorization system, notify only agreements that they believe can be exempted. Serious violations are kept secret. As a result, notifications just overburden competition authorities with paper work, but do not result in an improvement of the competitive environment.

The Zambian and the Tanzanian notification system may lead to a small number of notifications (also because in Zambia notifications are associated to a fee) and in that case the role that it plays is quite limited. Should the number of notifications increase too much, the Authorities may need to issue block exemption regulations that would reduce significantly their number, along the lines of what happened in the European Union before 2004. The existence of a notification fee in Zambia would make any attempt of rationalization impossible (unless funds are guaranteed to the Authority by some other source).

The individual country reports for the United Republic of Tanzania and Zambia do not contain recommendations that the substantive parts of their laws be changed. There are however some suggestions for revising the text of the Legislation on some procedural issues (for example the threshold for not restrictiveness of vertical agreements in Zambia) but these suggestions can be implemented through case law developments and through the issuing of guidelines so that firms are better informed on what is prohibited. This is the case of vertical agreements and horizontal cooperation

agreements in the area of technology transfers and R&D. A similar effort could be undertaken for abuse of dominance type violations.

The regional groupings, to which the three jurisdictions belong, could help in the issuing of these guidelines, providing reference documents that individual jurisdictions could then use domestically.

What is any case very important is that decisions by the authorities be motivated and published by making them available on the website of the authorities. With legal provisions of a general type decisions serve an educational purpose and should be made available to everybody, so as to enhance legal certainty. Also the judiciary should have the same type of obligations and judgments in competition cases should be made easily available, possibly on the website of the authorities.

2. The investigative powers of competition authorities

The major problem in antitrust cases is that the evidence that needs to be collected to prove a violation is not freely available in the market nor in the information set of possible complainants. For example in a predatory pricing case, the excluded competitor would not have any information on the actual level of costs of the dominant company to be used as a benchmark to which to compare the dominant company supposedly predatory prices. Similarly in a cartel case, a customer of the cartel would not have information on how the cartel operates or, even more importantly, on whether the cartel actually exists. As for the Authority role, simply asking those that might have committed a violation to provide the necessary evidence would not always be effective. In particular, requiring firms to provide some information can be effective only if the firm has an interest in being truthful and in being cooperative with the Authority. Otherwise firms will not respond or will not say the truth. This is why, outside of the merger area where firms have an interest in providing the necessary information for the Authority to issue a quick decision, competition authorities need strong investigative powers in order to be able to gather the necessary evidence.

In all three jurisdictions the Authority can open an own motion enquiry, act on complaints, require a person to submit information, to produce a document or to appear in person.

The investigative powers of the Authorities of the three jurisdictions are not limited to requiring information from the parties, but, where the Authority has reason to believe that a person is in possession or control of any documents that may assist it in an investigation, the Authority may, under a preliminary approval by a Tribunal, enter premises to conduct a search and make copies or take extracts of documents therein. Among the three jurisdictions, only Zambia has started to gain experience with dawn raids, having conducted two of such raids in recent years. All three authorities would need specialized training for conducting effective searches.

While requiring a preliminary approval by a Tribunal may be necessary when private houses are being entered into (to protect the fundamental rights of citizens to their privacy), the issue is less relevant with respect to corporate buildings. In such cases the inspection could well be decided by the Authority itself (like in Italy for example) without the need of any approval by a tribunal and subject only to judicial review (which of course implies the need to motivate the reason for the inspection). This would make the power to inspect much more flexible and effective.

As for Zimbabwe, full investigative powers can be used by the Authority only once a notice is published in the *Government Gazette* and in national newspapers circulating in the area covered by the investigation, stating the nature of the proposed investigation. While the publication in the Official Gazette may be necessary for inviting interested parties to submit some evidence on the case, for example in the process of evaluating a merger, it should not be required for the use of investigative powers. Especially with respect of inspections, it is very important that they come as a surprise for the firms involved. Too much advanced information would risk making them useless, since firms would be able to destroy before hand all existing evidence of wrong doing. Publication should be made on the same day the inspection takes place.

In Zimbabwe the possibility of conducting inspections is further reduced since the Authority is required by law to acquire the consent of the owner or person in charge of the premise before the Authority may be allowed to enter. So far the Zimbabwe Authority has not conducted any dawn raid. Just as a point of reference, practically all cases start with a dawn raid in the European Union and

in the most advanced jurisdictions of the world. This would also be possible in Zimbabwe. For example, as the Zimbabwe law clarifies, the Authority may still exercise the powers of entry and inspection without the consent of the owner or person in charge of the premises “where there are reasonable grounds for believing that it is necessary to exercise them for the prevention, investigation or detection of an offence” or “for the obtaining of evidence relating to such an offence”. The presence of the police in all dawn raids may help the Authority overcome any resistance.

As for the investigative procedure, in all three jurisdictions at the end of the investigation, all stakeholders are heard in front of the Authority. In principle, a statement of objection should be sent to the parties before hand, so that they know the charges that are being raised against them and can properly defend themselves. While transparency in these hearings is important, it should not go as far as having the press present at the hearing, as is the case in Zimbabwe. Too much transparency would make it impossible to protect the confidentiality of some information being provided to the Authority during the hearing, so that firms would be very careful in not mentioning anything confidential, making it very difficult for the Authority to achieve a full understanding of the case.

As for the burden of proof, any violation of the law should be proved by the Authority, while the parties should provide the necessary evidence for any possible exemption they request to be adopted. In general the structure of the law in the three jurisdictions follows this pattern. One important issue is that violations of the law are objectively defined and the proof of the violation on the part of the Authority should be based on a technical analysis of the facts of the case and their correspondence with the legal provisions. The further requirement in the United Republic of Tanzania that the law be violated intentionally makes the whole system much weaker and more difficult to enforce. Subjective appreciations of this kind should not be part of an administrative system of enforcement and should be eliminated. These words about intentionality should be interpreted as implying that when the reach of the law is extended by the case law to new areas or new practices, then a fine could be issued only for the future, once it is well known that such practices are indeed prohibited.

Finally in the United Republic of Tanzania, whether or not a procedure into an alleged prohibited practice has started, the complainant may apply to the Authority for an interim order in order to stop the allegedly anticompetitive practice. The Authority, after having given the respondent a reasonable opportunity to be heard, may grant an order (usually a cease and desist order) according to the collected evidence relating to the alleged prohibited practice and considering the need to prevent serious or irreparable damage to the applicant. These orders are rightly appealable and are followed by a full investigation by the Authority.

These interim powers are particularly important when the alleged anticompetitive practice originates in interrupting unilaterally a commercial practice that had existed in the past, for example refusing access to a port or to an essential infrastructure after such access had been made available for some time in the past. In such circumstances, if there is some evidence that there are no objective reasons for the refusal, granting an interim order may be necessary in order to keep the refused competitor in business until a full investigation is completed.

It is particularly important that such powers are vested also in the competition authority and not only with judge, as is the case in all three jurisdictions. Deciding on antitrust issues requires a certain amount of expertise; the more so on interim issues that are decided short of a full investigation. The Authority has all the necessary skills, much more than a non specialized judge. Furthermore, since the objective of antitrust enforcement is the protection of the competitive process, not the protection of (inefficient) competitors, giving the power to issue interim orders only to the judge may lead to an over application of the law, being the judge probably more sensitive to the reasons of an inefficient competitor.

The enforcement powers of an antitrust authority should not be exclusive. Antitrust prohibitions are rules like all the others and administrative authorities are created in order to make enforcement easier, overcoming all sort barriers that otherwise would exist (difficulty for a damaged party to gather the necessary evidence, free riding issues associated with the fact that anticompetitive practices may damage many people while the damage action may be initiated by only some of the

damaged parties, etc.). In other words, without the Authority the disciplining effect of the law would be much reduced, not eliminated. This implies that the possibility of privately enforcing the antitrust rules should not be ruled out, since with the possibility of damage actions the deterrent role of sanctions is significantly enhanced³. This does not mean that private enforcement would in any case flourish. In Europe, while antitrust rules have always been directly enforceable, the number of private litigations has been extremely small. However, especially for interim measures, any persons damaged by an anticompetitive action should also be allowed to take the case in front of a judge. Very often the violation of competition law is not stand alone and the judge would be better positioned to assess all the law violations (not just antitrust) in a given case.

3. Sanctions

Sanctions are necessary to make sure that legal provisions are respected. All three authorities have powers to impose procedural sanctions. In the United Republic of Tanzania and Zambia the Authorities can also impose sanctions for violations of antitrust provisions: as noted in Zimbabwe the Law does not foresee any sanctions on anticompetitive business agreements, aside from declaring them null and void.

Sanctions have to be credible in order for them to serve any deterrent function. The risk that criminal sanctions would remain just a hope rather than a reality leads many jurisdictions to remain with pecuniary fines only. The sanction for not providing information or for providing false information is in the United Republic of Tanzania quite low, while in Zambia and Zimbabwe very high (imprisonment on anyone who obstructs or delays the Authority's investigation or gives false or misleading information). It is clear that imprisonment is an excessive sanction for it to function as an effective deterrence, since in order for it to be enforced it would require a very serious act on the part of a firm, not just simply misleading the Authority or delaying the answer. As a result, even if the sanction is serious, compliance may not be achieved because the sanction is too high and a judge would hardly be convinced to put someone in jail for seriously misleading the Authority. Hardly ever the fine would

be enforced. Its existence may nonetheless have a negative effect on investment, scaring foreign investors and keeping them out of the country. Even in Zambia, proper administrative fines would be much more effective.

The law in the three jurisdictions should allow for high enough fines for not being truthful with the competition Authority or for not providing all the information available. For example in the European Union fines for providing to the European Commission an incorrect, incomplete or misleading information may go up to 1 per cent of the total turnover in the preceding business year.

As for the more general debate on whether fines should be pecuniary or criminal, it has to be acknowledged that many jurisdictions around the world have introduced criminal fines for having participated in a cartel, the most serious antitrust violation. While there are good reasons to introduce criminal sanctions for cartels, there are also good reasons for not to do so. The good reason is that very often it is the individual employee that sets up a cartel, while the company board is unaware of it (for example when cartels are set up at the local level by local managers of competing companies). If this is the case criminal sanctions just punish the individual responsible for the crime, not the unaware corporation and the even more unaware shareholder. A second good reason is that criminal sanctions deter individuals that otherwise may not be affected by the possibility that fines be levied against the corporation. A third good reason is that the deterrent level of a pecuniary fine may be too high and lead to the bankruptcy of the firm, so that no authority (and no judge) would ever decide it. The negative reason is that the burden of proof for criminal sanction is much higher than that for pecuniary fines (the standard of proof being beyond any reasonable doubt versus the balance of probability), so that the actual level of deterrence may not be as high as originally thought. Furthermore, in many jurisdictions white collar crimes are not considered very serious and judges tend to give lenient punishments for such offenses, further weakening the deterrent function of imprisonment. Finally, since the individual is responsible for the violation, corporations may respond by not caring whether their employees participate in a cartel, since they would not be liable as a corporation. With criminal sanction, it

may well be that the legal provision against cartels are less, not more respected.

The specificities of sanctions in Zambia and Zimbabwe that are particularly troublesome are the fact that many petty violations are subject to criminal fines. In Zimbabwe for example the law provides for the possibility of imprisonment of the manager of a firm that does not cooperate with the authority, including not notifying a merger. Similarly in Zambia imprisonment can be imposed to anyone who delays or obstructs the Authority's investigation or gives the Commission false or misleading information. This extension of the criminal nature of sanctions is clearly not advisable because judges are not likely to condemn anybody to serve a prison term for not being cooperative enough in the course of the investigations. As a result the threat of imprisonment may not be taken seriously and, to the contrary may lead to regulatory capture (between the companies and competition authority). As a result the threat of imprisonment may deter foreign direct investment, hardly a beneficial result.

Among the three countries only the United Republic of Tanzania does not have criminal sanctions. It is suggested that also Zambia and Zimbabwe impose administrative fines only, as the Law does not oblige imposing of criminal sanctions. In the case of lack of cooperation with the Authority, a proper pecuniary fine may be much more effective, being easier to administer and to decide.

As for pecuniary sanctions for the punishment of the violations of the substantive parts of the law, the level of fines in Zambia, up to 10 per cent of the offending enterprise annual turnover, is in line with international best practices. On the other hand the fining policy in Zimbabwe, besides the fact that antitrust violations are not subject to any fine, is nonetheless clearly too weak, the maximum fine being \$5000, and what is more problematic is that fines are not decided by the competition Authority itself but by a different body that does not have a precise representation of the seriousness of antitrust offenses. The best solution in Zambia and in Zimbabwe would be to change the law, eliminating the possibility of imprisonment for petty violations. In alternative the Authority could well issue a statement on when criminal sanction will be used, strictly limiting the possibility of imprisonment. In Zimbabwe administrative fines should

be set at a percentage of the global turnover of the firms involved, like in Zambia and the United Republic of Tanzania, introducing a 0–10 per cent interval.

What is in any case very important for antitrust enforcement to be effective is that fines be actually paid. This implies that firms should not wait for the issuing of the appeal judgment before paying the fine. Only when a judge (under a request for interim orders) concludes that a decision is *prima facie* wrong, he may suspend the obligation to pay the fine after the appeal was heard. In any case public administration should be efficient in fine collection (information on the 3 countries).

Fines should not become a source of funds for the Authority like in Zambia where the Authority is allowed by the law to retain a percentage of the fines paid, even though the law was never made operational. This was very wise on the part of the Authority. The system clearly modifies the incentives of the Authority to fine offending companies and therefore should be abolished, as the individual Report on Zambia suggests, since the Authority would lack neutrality in deciding on cases. Also appeal judges, knowing that if they block a case the Authority would lose an important part of its funding, may be tempted not to be too rigorous in their review. If proper funding of the Authority is not guaranteed by some other source, there is a risk that the Authority would be forced in the years to come to take advantage of the option to retain a percentage of the fines. Some action is needed to avoid it.

4. Judicial review

All decisions by competition authorities are appealable in front of a judge and of course this is so also in the three countries under review. This means that the problem of the Authority being an enforcer and an adjudicator at the same time is less relevant as it may appear, since a judge is in any case involved once the Authorities' decisions are appealed.

Four issues are particularly relevant. The first is whether the decision by the competition authority is enforceable even if appealed. The second is how extensive is the review of the judge (the standard over which the judge decides). The third is whether the judge is an expert about antitrust enforcement and how able is he to appreciate the

quality of the Authority's decisions. The fourth is the timing of judicial review.

In the European Union decision of competition authorities are fully enforceable even if appealed, unless they are suspended by the judge for serious shortcomings in the Authority's reasoning. This enforceability of the Authorities decisions even if appealed, is meant to speed up the process of judicial review by providing an incentive to act to the judge. This immediate enforceability of the Authority's decisions makes the judge aware that in order to block a decision there is a need for a ruling.

The distinction between full (where judicial review leads to a full revision of the case) and administrative jurisdiction (where judicial review controls the logic of the Authority's decision and whether the Authority's decision was taken according to the powers provided by the law) is much smaller than one may think. The only real difference is that with full jurisdiction the appealing judge is able to consider different facts than those considered by the Authority at the time of the decision. In fact, even an administrative judge would be able to assess all substantive aspects of a case, from the relevant market, to the restrictiveness of the practice, to the evaluation of the future course of events as originating from the prohibited practice. The expertise of the judge is very important, since antitrust rules are written in very general terms and what they actually prohibit needs to be interpreted. It does not originate by a simple reading of the legal provisions. For example, the move to an effect based approach in antitrust, which took place in the European Union in the last decade, was not evident by the way the substantive legal provisions are written. As a result, besides providing judges with specific training, it may be necessary to make sure that antitrust cases are always heard by the same court or by the same section of a larger court, so that judges could understand the philosophy behind the approach adopted by the Authority and be coherent in the future, once they approve it. Finally, since antitrust decisions are meant to influence the way firms behave in the market, it may be necessary to make sure that the full decision making (which includes the timing of the appeal) be quite short, otherwise decisions would really affect the history of antitrust, but be unable to influence current developments.

In the United Republic of Tanzania judicial review of competition cases is performed by the Fair Competition Tribunal, a quasi-judicial body with appellate responsibilities on cases from the Authority. Members are nominated by the President and can be removed by the President for reasons of mental or physical infirmity or if members failed to attend at least three consecutive meetings of the Tribunal. Although the Court is highly specialized, it takes too long for it to make its final decision/judgment, the reason being lack of staff necessary for assisting judges in writing the judgments after the decisions are made. This deficiency is very serious because in antitrust enforcement the rapidity of judgments is very important. Furthermore judges should be trained on antitrust enforcement; while most judges have not received proper training on these issues during their university studies or in preparation for the bench. What remains unclear is the extent of the review the Tribunal is entitled to perform, and whether the Tribunal has the power to re-investigate the case, which would be an excessive duplication. In this respect review judges should base their judgments on the decision of the Authority, the evidence the Authority had collected (that should be made available to the judge) and the grievances of those affected by the decision.

In Zambia, the new Competition and Consumer Protection Act of 2010 provides for the setting up of a Competition and Consumer Protection Tribunal to hear appeals against the decisions of the Authority. Any aggrieved person or enterprise has thirty days to appeal after having received the Authority's decision. Appeals against the decisions of the Tribunal can be made to the High Court. While the law allows the Tribunal to order the parties or either of them to produce to the Tribunal such information as the Tribunal considers necessary for the purposes of the proceedings, the law is not clear under which standard the Tribunal is supposed to act and, more importantly, whether it is constrained by the evidence collected by the Authority. This aspect should be clearly ruled in the law. The Tribunal, which was established in 2011 but is still not operational, does not have powers of reviewing the imposition of criminal sanctions on breach of the country's competition law. It consists of five part-time members that can be removed by the Minister for unspecified reasons. This unspecified threat judges are subject to may strongly reduce the independence of the Tribunal.

Judges should be removed only for very specific and serious reasons specified in the law along the lines of the rules that exist in the United Republic of Tanzania.

In Zimbabwe there is a double jurisdiction of the Administrative Court and of the High Court, while the relationship between the two is not clearly defined. Cases could go to one Court or to the other without a clear system of case allocation. In the past a few cases were appealed in front of the Administrative Court while others with the High Court. None of these cases was decided on substance, but mainly on procedural or jurisdictional grounds. In any case in Zimbabwe the level of expertise of these courts on competition issue is considered quite weak, but this has mainly to do with the fact that there are very few competition cases to be heard. If all cases would always go to the same section of a Court then there is no need to create a specialized tribunal, since judges (of that section) could well be trained on competition issues, while maintaining also the possibility of ruling on other matters. Such an arrangement (concentrate the cases in a section of a larger Court) would be preferable also for the United Republic of Tanzania and Zambia (where specialized Courts have been created) where judges do not have many cases over which to build their expertise, while they would still be working as judges if integrated in a larger court.

As for the timing of judicial review it is very important that reviews are quickly made. Otherwise, especially if the decision of the Authority is suspended, should it take years for a final judgment, the law would become irrelevant. Efforts should be made to arrive at a final judgment quickly. For example in Italy, although the general procedure of appeals is very slow, the 2005 reform of administrative proceedings gave precedence to antitrust cases, so that parties can expect a final judgment around a year after the decision of the Authority.

5. Merger Control

Markets differ according to the number and the size of buyers and sellers. Indeed there is a continuum of market structures starting from perfect competition characterized by many competing firms, none of which can influence the market price individually, to oligopolistic competition, where there are few firms, each having some power over

the market price but constrained by the rivalry of the others, to monopoly, in which a single firm sets the price unilaterally only constrained by demand. Markets change over time. Some that formerly were monopolies are now competitive, while others that once were competitive are now monopolized. The change over time is markedly significant in fast growing economies. Markets in general become less concentrated because of entry of new firms, product differentiation and innovation, and new firms grow while uncompetitive incumbents fail. Many fast growing economies have demonstrated that the 'new firms' effect can be enormous when induced by deregulating licensing regimes and general liberalization of entry and expansion conditions in State-reserved sectors⁴. This is a welcome development. However, some firms grow not because of their own competitive efforts but because of a merger. While gaining market shares by offering better products and lowering prices is very beneficial and quite difficult to achieve, acquiring market shares by buying out competitors is much easier to do. As for their market effects, while in most circumstances mergers favour growth in the economy, leading to stronger and more competitive firms, in some instances mergers are not efficiency-enhancing, they increase market power and simply lead to higher prices for intermediate and final consumers. Merger control is meant to identify those few inefficient mergers and make sure they are either blocked or modified to the benefit of consumers

The special characteristic of merger policy is that it requires a judgment concerning the impact of a merger on competition before the merger has occurred. This is why in most jurisdictions mergers are notified in advance under a mandatory notification system. Such a notification system should not be over inclusive and should be strictly limited to transactions that have a local nexus. Voluntary notification, while in principle less costly for enterprises, weakens the competition authority especially on politically sensitive mergers.

The three jurisdictions under review have all established a mandatory notification system for merger control. This is very useful. However for it to function properly a merger should have a clear and uncontroversial definition.

Indeed in the three jurisdictions under review the acquisition of control of an independent firm is the

triggering event for a merger to take place, the underlying hypothesis being that through the acquisition of control a separate legal entity would lose its commercial independence. A merger may take place even if separate legal entities may well continue to exist. Furthermore control can be exercised also jointly when some shareholders are tied by an agreement to run the company together. On the other hand there is no acquisition of control if there are shifting majorities. Without acquisition of control there is no structural change on the markets concerned and hence no concentration of assets or turnover.

Not all mergers need to be examined, just those that would have the potential to be anticompetitive. This is why a notification system based on turnover is in place. In the United Republic of Tanzania the actual turnover thresholds are identified by the Authority itself, which is quite important to fine-tune the system, so that not too many and not too few mergers are notified. Today a merger is notifiable if it involves turnover or assets above threshold amounts set by the Fair Competition Commission. The gazetted threshold is of Tanzanian Shillings 800 million.

Although the United Republic of Tanzania has a mandatory notification system, the law provides immunity to a person who acts unintentionally in contravention of the merger notification provisions, a very difficult test to apply and probably one that leads many mergers not to be notified. The obligation to notify should be full without exception and the law should be either modified accordingly or the unintentionally exception be interpreted so rigorously that it is never applied.

The Tanzanian law identifies a free harbour for mergers, with combined market shares below 35 per cent, while the merger guidelines inform firms on the actual standards to be applied in the merger review process. Restrictive mergers can be nonetheless authorized if there is an overriding public interest. The law lists what these overriding public interests are and most would fall under normal competition considerations in most jurisdictions, like the failing firm and the efficiency defences. Only the protection of the environment appears as a pure public interest item, but it is difficult to imagine how the protection of the environment can be affected by a merger. It seems therefore that the public interest objectives to be

considered in the United Republic of Tanzania entail only a competition type assessment.

Also in Zambia and in Zimbabwe all mergers above a certain threshold need to be notified. The thresholds for Zambia and Zimbabwe have a very similar structure. In Zambia the threshold is defined as the combined turnover or assets, whichever is higher, in Zambia of the merging parties, above fifty million fee units. Similarly in Zimbabwe the law requires mergers to be notified if the combined annual turnover or assets in Zimbabwe of the merging parties is above \$1 200 000.

A combined turnover threshold like the one adopted in Zambia and in Zimbabwe is disadvantageous towards the largest firms that have to notify also the smallest transactions and even acquisitions abroad, all instances where the influence of such transactions on the domestic economy is insignificant.

Each jurisdiction should limit the number of mergers to be notified to those that potentially lead to an increase in market power and that are likely to create anticompetitive effects on their markets. This suggests that what matters are threshold triggers that reflect sales and/or assets within the jurisdiction concerned of the relevant business entities to be combined. Since a notification system should be able to encompass both mergers and acquisitions, the notifications system should be based on two combined triggers: (a) combined turnover or assets of all parties to the concentration exceeding a fixed level and (b) a further requirement that at least two parties each have more than a fixed minimum turnover or assets in the jurisdiction. This is the direction all three jurisdictions should move.

Zambia and Zimbabwe differ with respect to the period required by the act to evaluate a notified merger. The Zambian law identifies a single limit of 90 days, extendable by other 30. However simpler transactions could be cleared in a much quicker way. If the law is not changed along the lines suggested by the country report (a two phases procedure), the Authority may decide to clear simpler transactions quicker at its own initiative. Even if the law identifies a single time limit for merger review, nothing impedes the Authority to voluntarily choose a shorter one for some transactions.

In Zimbabwe the law does not provide a term for the investigation to end, once the merger is

notified. Such an open ended phrase “as soon as practicable” may cause long delays for a decision. Although changes in the law would clearly be preferable to eliminate this challenge, the Authority should announce unilaterally stricter terms that it would constrain itself to follow. Or prepare operation guidelines as a secondary legislation to give them a force of law.

As for the standard for merger control, also Zambia and Zimbabwe adopt a public interest test. In Zimbabwe, once the Authority concludes that a merger substantially lessens competition, it then determines whether the merger is likely to result in any technological efficiency or other pro-competitive gain which would be greater than and offset the effects of any prevention or lessening of competition that may result or likely result from the merger, and would not likely be obtained if the merger is prevented. The pro-competitive gains include economies of scale or other reason likely to result in a more efficient use of resources in any business, trade or industry, necessary for the production, supply or distribution of any commodity or service in Zimbabwe. What this implies is that in Zimbabwe like in the United Republic of Tanzania the public interest test is really an efficiency defence and is clearly within the best practice in merger control.

In Zambia the definition of public interest is much wider than that provided in the United Republic of Tanzania and Zimbabwe. In Zambia the law, besides rightly considering the efficiency and the failing firm defences, allows an otherwise anticompetitive merger to be authorized for a number of very general reasons, leading to a very long list of exceptions. In particular, the Authority “may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including

- (a) the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;
- (b) the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer to skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia;
- (c) the saving of a failing firm;

- (d) the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia;
- (e) the extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests of micro and small business enterprises in Zambia;
- (f) the extent to which the proposed merger may affect the ability of national industries to compete in international markets;
- (g) socioeconomic factors as may be appropriate; and
- (h) any other factor that bears upon the public interest.”

Such an extensive list weakens substantially the technical approach of the Authority in the evaluation of mergers. The standard according to which mergers are evaluated should be clear and precise. This means that the standard should fully remain within a one dimensional type of measurement, i.e. the increase in market power associated with the merger. Authorities are well equipped to measure and to evaluate the effect of a merger over market power. A public interest standard introduces a multidimensional approach that requires some sort of political trade-off to be sorted out. How much exports should increase in order to more than overcome the increase in market power (prices) originating from the merger? Or how much should employment increase in order to overcome the increase in market power? These are questions that cannot be answered in a technical way. The most important point to make with respect of a public interest standard is that, while the increase in market power can be presumed with a high degree of probability, all these wider social effects are highly uncertain and very difficult to be considered in an administrative decision and, subsequently, in a Court of law. With such a long list of possible exceptions, the Authority would have to consider all sort of claims, without a clear theory to rely on in order to actually assess their validity. The length of the list would make it very difficult to prohibit even the most anticompetitive merger. The best approach would be to limit the public interest test to the efficiency and the failing firm defences, along the lines of the United Republic of Tanzania and the Zimbabwe laws.

If the law is not changed, the Zambian Authority should interpret these public interest provisions very strictly and authorize an anticompetitive merger only if the evidence that it is beneficial is compelling and unquestionable.

6. Public resources dedicated to antitrust enforcement

In all three jurisdictions the antitrust Authority is a relatively small, but a multiple tasks institution. Besides antitrust enforcement, the authorities are involved with consumer protection, fair trading, plus counterfeit goods (United Republic of Tanzania), relocation of Plant and Equipment (Zambia) or Tariff issues (Zimbabwe). As a result, the amount of resources dedicated to competition law enforcement and policy is extremely limited.

In Zimbabwe the Authority has a staff of 29 people out of which 16 are technical and 13 support staff. There is the Director, Secretary of the Commission and 2 (two) legal officers/counselors. The competition division is led by the Assistant Director for competition together with five economists and one law officer. In total seven staff are dedicated to competition. Furthermore, most of the competition staff is relatively new to the Commission; three were hired in 2007 and three in 2011. The Assistant Director for competition was hired in 2008. The only experienced competition expert is the Director who has been with the Commission since 1999. Among the operational staff, none has undergone competition training at University; internally there have not been any comprehensive in-house training of staff. At most members of staff and Commissioners have attended short trainings of 2–3 days abroad. In this area, the Authority should consider mobilising resources and organized a tailor made training aimed at addressing knowledge and skills gaps for both the Commissioners and staff.

The staff of the Authority is paid civil service type salaries (provided by the Public Service Commission), which are seven times lower than those of the staff of sector regulators or of the Central Bank. As a result the Authority does not attract well trained people and such salaries do not provide the right incentive for becoming a well trained antitrust enforcer. Resources dedicated to competition have to increase substantially, with the Authority increasing the number of staff, their salary and the

quality of the whole organization. Otherwise the Zimbabwe economy is not likely to benefit from a proper competitive environment. The competition authority should become like a Central Bank for the real economy. Competition oriented reforms require a technical body to design them and the Competition Authority is the right institution for being granted such powers. It should not remain a second tier institution. The goal to be achieved is for the Authority to get the resources, the quality of staff, the salary and the status of the Bank.

The Authority of the United Republic of Tanzania is better funded. It has a staff of 58, of which approximately 24 is dedicated to antitrust enforcement and competition advocacy. Contrary to Zimbabwe, the staff salaries are much higher than the average civil service and competitive with the private sector, also because more than 90 per cent of the Authority's budget has been funded by a World Bank grant. This is not a lasting arrangement. The Government will soon take responsibility for the budget of the institution. Like the Central Bank is advising the Government on economic policy, so the Competition authority should advise the Government on micro policies (economic regulation and liberalization). Indeed also in the United Republic of Tanzania the Central Bank should become the reference for the staff salaries and status of the institution.

In Zambia the Authority has a total staff of 29 of which 17 is directly involved in competition and consumer issues and only half on antitrust enforcement. Staff salaries are quite good and compare well nationally and regionally. The present staffing level of the Authority however is strongly inadequate and staff is unable to handle the increasing number of cases and funding is the major constraint that the Authority faces. The Authority recently appointed 10 part time Inspectors and a total of 60 Inspectors are planned to be hired in all the country's nine Provinces. All this people needs specialized training.

The Zambian Authority needs appropriate Government funding, increasing substantially from the current level (at around 36 per cent of the total). The major source of the Commission's income is statutory fees and fines, of which merger notification fees are predominant. New fees to be soon established for the exemption of anticompetitive agreements are hoped to significantly increase the

total (it may not be so because the fees may substantially reduce the incentive to notify).

It is not a good policy for Government institutions to be funded by the market through fees levied on statutory activities. The major problem is that once the fees are in place every change in current practices that may be appropriate on the substance may be blocked because of the effect it may have on the funding of the Authority. In other words the funding of the Authority may become a reason to avoid well meaning reforms (for example it may become impossible to eliminate the exemption procedure if this would lead to a reduction in the flow of funds to the Authority or to change the thresholds for merger notifications).

Also the funding of the Authority through fines is not advisable. The fines imposed on breach of competition law should be paid to Treasury, to avoid the possibility of the Authority over fining companies, as this is likely to compromise its independence. Treating fines as a direct source of funds for the Authority, may lead to erosion of trust and credibility of its actions by the business community.

If there is a need for external funding merger notification fees are less problematic, since their structure could be devised to be in some sort of relation with the complexity of the analysis. In other words the fee could increase in proportion of the turnover of the acquired company, not just with the turnover of the notifying party.

Merger notification fees exist in all three jurisdictions and everywhere they are biased with respect of the turnover of the notifying company. This bias should be eliminated. In Zambia there is the extra problem that fees are way too high and may arrive up to K3 billion (or about \$600 000). As the Zambia Report rightly notes, "the very high merger notification fees increase the transaction costs of merger transactions, and places a heavy financial burden on the merging parties who in most cases enter into merger transactions for economic and viability reasons. Secondly, it would not be prudent for the Commission to over-rely on merger notification fees for the funding of its operations since such fees are not a stable source of income."

The financing of competition Authorities is best achieved through Government funds, since inde-

pendence is maintained and there are no induced distortions on the type of actions the Authority takes. Any funding somehow related to an action of the Authority may induce the Authority to take that action, irrespective of the general interests that the action helps achieving. There is a further advantage with Government funding, provided that it is granted in a transparent way and without any hidden agenda: the Authority may be accountable for the use of its funding and be required to provide a sort of cost–benefit evaluation of its actions. This is, for example, the situation in the United States or in the United Kingdom where Parliament and Government are periodically actively evaluating the performance of antitrust Authorities and repeatedly ask if they provide value for money.

Government funding has some drawbacks because it may put into question the independence of the Authority, pushing it to become too complacent with special interests (especially State-owned enterprises). In such circumstances, it may be appropriate to provide direct funding of the Authority by some sort of a tax on undertakings, as has been done for example in Turkey (where the Authority is mainly funded by a tax on the capital increases of all incorporated or limited companies in the country) and, more recently, in Italy (where the Authority is funded via a turnover tax).

7. Enforcement Record

The individual reports on the three jurisdictions indicate the output of the authorities in terms of the number of competition cases that have formed their caseload over the past: a 10–11 year period in the case of Zambia and Zimbabwe and 3 recent years in the case of the United Republic of Tanzania.

The Zambian authority over the period 1998–2010 handled 386 Restrictive Business practices cases and 331 notifications of mergers and acquisitions. Confining attention to the period 2008–2010 it would appear that of the 103 cases handled, 13 resulted in “cease and desist” orders and a further 55 were closed. This would imply that a substantial number remains open. The introduction of a notification system under the Act of 2010 has showed up in a large increase in 2010 of new cases and suggests that the notification system is likely to consume significant resources that could be bet-

ter employed in detecting and prosecuting serious violations such as cartels. Over the same period 93 merger notifications were reviewed and for 49 there are statistics of Commission’s determination.

The Zimbabwe authority over the period 1999–2010 handled 220 cases of Restrictive Practices cases and 222 notifications of mergers. More detailed data indicates that the Zimbabwean competition authority takes annually on average around 8 decisions on restrictive business practices, out of which 18 per cent are decisions to proceed to a full investigation and 7 per cent are decisions to refer a case to the office of the Attorney general. In the absence of sanctions for violation, at best the decision can be assumed to be declaration of nullity. In the field of merger control, the Zimbabwean competition authority takes on average 10 decisions per year. 1 per cent of the mergers handled between 1999 and 2011 were prohibited, while 20 per cent were approved conditionally. In addition, 79 per cent were either approved unconditionally or not challenged.

The Tanzanian authority over the period 2008/9 to 2010/11 handled 4 cases of Restrictive agreements, 8 of unmodified mergers and 32 notified and reviewed mergers. A number of cases are pending before the authority’s and the strategic plan for 2011–2013 foresees an enforcement focus on cartel investigations.

This overview of enforcement record suggests some conclusions. Besides Zimbabwe, each of the other two authorities has been systematically deciding more cases related to non-competition tasks assigned to it than to antitrust, also because violations of the law associated with these other tasks are somehow easier and more resources should be dedicated to antitrust enforcement. Aside from procedural penalties there are, with some notable exceptions, very few prohibition decisions. The notable exceptions such as those in the Breweries sector (Serengeti Breweries V Tanzanian Breweries, or that involving Zambian breweries) are an indication of the scope of what is attainable with stronger enforcement. The overload of merger notifications can be well resolved with appropriate merger notification thresholds and the introduction of simplified decisions for mergers.

The key to obtaining the benefits for the economy and for consumers from implementing competi-

tion law and from having it respected resides in achieving a credible enforcement record through prohibition decisions. Faced with that challenge most authorities have introduced a combination of training and capacity building programmes in cartel detection, investigative methods, merger assessment for operational staff and instruction in case management and assessment techniques for senior officials. With respect of the three jurisdictions under review, training on the practical aspects of conducting investigations (how to conduct a dawn raid, what type of information to ask in the course of investigations, how to handle a request for access to file, how to set sanctions, how to prove cartels, what type of behaviour to consider an abuse, how to set up a strategic plan for action, etc.) would be particularly important. Only by becoming more effective in investigating relevant cases, the status of the Authorities in the three jurisdictions can be enhanced. This is the experience of all authorities in the world and the three jurisdictions are no exception. First (relevant) cases should be investigated and prohibition decisions be taken. As a result the credibility of the authority would be strengthened and so would be their status as first-class Government institutions. The other way around, first the status then (maybe) the cases, is indeed impossible.

III. REGIONAL AGREEMENTS

All three jurisdictions participate in some Regional agreements. The United Republic of Tanzania is a member of East African Community (EAC) and the Southern Africa Development Community (SADC), while Zambia and Zimbabwe are both members of the Common Market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community (SADC). SADC is the Regional organization to which all three jurisdictions belong.

While in the globalized economy there is a strong need for competition authorities to cooperate at the international and regional levels in order to address cross-border competition cases, the major weakness of some of these regional agreements is that the complexity of the tasks assigned to them is not always in line with the funds available to accomplish them. A summary of COMESA and SADC, the international organizations to which at least 2 of the countries under review belong is provided below.

COMESA is now working towards becoming a custom union. Indeed the provisions of the COMESA Treaty are primarily devoted to the elimination of trade barriers, to the enforcement of antidumping rules and to the creation of a free trade area. Recent developments have occurred which are part of a progressive effort towards the creation of a common market. The move to introduce antitrust enforcement within COMESA is one of such efforts.

In 2006, a full Competition Commission composed of nine Commissioners from COMESA member States was created. The Commission has been fully in place and operational since December 2009. The COMESA Competition Commission is responsible for enforcing the rules against abuse of dominance and cartel behaviour and it also has some powers with respect to merger control.

The institutional structure of COMESA and in particular the existence of a COMESA court of justice could rapidly lead to an efficient system of antitrust enforcement. However, jurisdictional issues are enormous since many COMESA member States are also members of other regional groupings with overlapping boundaries. As a result, for the three jurisdictions under review, the COMESA Competition Commission will have the preliminary task of going through EAC configuration when deciding on any case. The burden in terms of litigation could be enormous.

The European experience suggests that the adoption of the principle of *“effet utile”* may be a way to alleviate the jurisdictional issue faced by regional groupings such as COMESA.

According to the principle of *effet utile*, what matters, even in order to determine jurisdiction, is the substance of the decision. Judges or domestic antitrust authorities could apply either community or domestic antitrust laws, but the decisions they reach should in any case conform to community case law and jurisprudence. As a result of the principle of *effet utile*, domestic competition laws became fully integrated with community law, not simply complementary to it, as it might have been presumed.

In the past the COMESA Competition Commission lacked funding, both for the operation of the board and for recruiting staff. Adequate funds are an essential feature of any organization. Recently COMESA started recruiting new staff, a good sign towards

the effectiveness of the organization. However, since the United Republic of Tanzania is not a member, COMESA does not represent the complete solution for the three jurisdictions under review.

The South African Development Community (SADC), to which all three countries belong, is a 15 countries organization whose aim is to further their socio-economic cooperation and integration. Contrary to COMESA that is an enforcement Authority, SADC has simply created a framework of cooperation among the 15 countries. In particular, SADC competition policy is governed by the Declaration on Regional Cooperation in Competition and Consumer Policies aimed at facilitating investigations on anticompetitive practices that have cross-border effects. The declaration actively promotes cooperation among SADC member States, establishing comity principles among them, and setting up a dedicated institutional structure, the Competition and Consumer Policy and Law Committee (CCOPOLC). The CCOPOLC was established in 2008. It is a forum where Member States Competition Authorities' to exchange information and share enforcement experiences and meets once a year.

SADC structure does not have enforcement powers. In addition to promoting cooperation in competition enforcement, SADC could also become a centre of promotion of best practices on substance, procedure and institutional structure. This can be enhanced through appropriate training of staff within the Secretariat and its member States.

To further its cooperation facilitating mandate, SADC should prepare a comparative enforcement performance report of member States competition, for example starting with the three jurisdictions under review. This could be very useful domestically to exchange enforcement practices, adopt better procedures and, more importantly, strengthen domestic institutions (including their funding).

There are regional efforts in place to establish a tripartite free trade area, aimed at minimizing the effects of the overlaps in the membership of COMESA, SADC and EAC. It has been found prudent for the three regional groupings to cooperate and harmonize their trade, infrastructure and other regional integration programmes, including competition law and policy. With respect to competition, the three regional groupings are supposed to cooperate and exchange information in the formulation and/or implementation of the

competition policies and laws. This would indeed be a good step towards reducing enforcement overlaps and enhance the implementation of the recommendations of this review in the three jurisdictions individually and collectively.

IV. FINDINGS AND RECOMMENDATIONS

In the antitrust field the United Republic of Tanzania, Zambia and Zimbabwe have many things in common. Their laws were introduced around the same time in the mid 1990s, their competition authorities have a number of different mandates besides antitrust, from plant dislocation in Zambia to counterfeits in the United Republic of Tanzania and trade related issues in Zimbabwe. This puts pressure on the amount of resources dedicated to antitrust enforcement. In order to become more effective, the authorities need more resources and better funding. It is not easy to convince Governments to dedicate more resources to antitrust enforcement. The best way is to have a few high impact cases, along the lines of the brewery cases in the United Republic of Tanzania and Zambia that can show the importance of competition law and policy to the public and Government. While improving resources and funding of the national competition authorities constitutes the core recommendation of the comparative assessment, further issues need to be addressed in a view of bettering the enforcement of competition law and policy in the three countries and at the regional level.

1. Recommendations to be implemented at the national levels

a. Recommendations addressed to the legislature

As regards legislative reforms, it is only in Zimbabwe where the law needs to be thoroughly revised as described in the national assessment report in order to make sure that antitrust violations can be fined. Otherwise, as the law now stands, deterrence cannot be achieved. Zambia and the United Republic of Tanzania do not need to change major parts of their law. In these jurisdictions, however, there is a need to revise several specific provisions and to reinterpret others in order to converge to best practices.

Sanctions

Appropriate sanctions for procedural and substantive competition law breaches is a major area for revision/reinterpretation in all three jurisdictions:

The Zambia and Zimbabwe Authorities should ensure that petty violations are not punished with criminal sanctions. Failure to notify a merger or providing misleading information to the Authority should be sanctioned by a pecuniary fine. Imprisonment in such instances is not recommended. Such unnecessarily harsh penalties may weaken the flow of foreign direct investment to the country and may be counterproductive for economic development. In practical terms, a judge is unlikely to sentence a person to jail for such minor violations. However, the existence of such penalties in the law still represents a threat to outsiders. In cases where the law may not be easily amended, the Authority should develop guidelines by way of subsidiary legislation, which provides for very exceptional circumstances, under which the criminal provisions may be applied. This could be when the violation is repeated a number of times and is clearly part of a complex scheme of obstruction of justice.

Apart from criminalization of petty violations, in Zambia the provisions on sanctions are in line with international best practices. In the United Republic of Tanzania there is a need for a minor change in the law since the fine provided for in the law (from 5 to 10 per cent of the annual turnover) does not allow for firms to be compensated if they decide to cooperate with the Authority. In this respect, it is proposed that the scope of the sanctions should start from zero. However such reforms may not be a matter of urgency. A leniency programme becomes necessary and effective as authorities strengthen their enforcement credibility. There is room for the Tanzanian Authority to grow with the existing legislation. Some major refinements are necessary in Zimbabwe, not only because antitrust violations cannot be fined, but also due to the fact that existing fines are structurally inefficient to serve as a deterrent function. Also in Zimbabwe fines should be set as a percentage of turnover (0–10 per cent).

Merger control

In all three jurisdictions, mergers above a certain threshold need to be notified. However, in the

United Republic of Tanzania the thresholds can be modified by the Competition Authority. This is very important for fine tuning a system that in Zambia and Zimbabwe is disadvantageous for big firms that have to notify even transactions where the acquired company has an extremely small domestic turnover. This needs to be changed in the law by giving some flexibility to the Authority in the identification of the most appropriate turnover threshold. Furthermore, if the Zimbabwean law is not changed, the lack of a binding time frame for the assessment of a merger may be overcome by an administrative decision of the Authority to review all simple mergers within a month and more complex ones within four months.

All three jurisdictions have a public interest defence for otherwise anticompetitive mergers. While the test is quite appropriate in the United Republic of Tanzania and Zimbabwe practically referring only to efficiency and a failing firm defence, the public interest test introduced in Zambia is very wide. In Zambia, besides the efficiency and failing firm defences, the law lists export promotion, competitiveness, socio economic factors, etc. as matters to be considered as part of the public interest. Unless the law is changed, the Authority should interpret these provisions very rigorously and grant a public interest exception only when there is a net consumer benefit (i.e. interpreting these exceptions as extended efficiency defences).

Judicial review

In the United Republic of Tanzania and Zambia judicial review is assigned to specially established competition tribunals which ensure a high level of required expertise of the judges in charge of judicial review of competition cases.

In general, however, it is not necessary to introduce a specialized Court, it may be sufficient to ensure that judicial review of the competition authority's decisions is always carried out by the same judges of a more general Court so that these judges can develop the expertise required for the review of competition cases. Therefore, the double jurisdiction of the Administrative Court and the High Court in Zimbabwe need to be addressed. While a revision of the law to assign jurisdiction for judicial review of competition cases to a single body is the preferred option, there may be other

practical solutions, for example a memorandum of understanding between the two Courts on a division of tasks.

b. Recommendations addressed to the Government

In all three jurisdictions, the antitrust Authority is a relatively small institution and responsible for a number of functions (consumer protection, fair trading, counterfeit goods, relocation of plants and equipments, tariffs). As a result, the amount of resources dedicated to competition law and policy enforcement is limited. In terms of staff remuneration, in Zambia staff salaries are good. In the United Republic of Tanzania, conditions of service are far better than the civil service conditions and competitive with the private sector. However, for staff whose salaries are paid through the World Bank grant, their positions might be a risk when the grant expires. In Zimbabwe salaries are very low, which causes a severe challenge for staff retention.

Antitrust enforcement is a professional activity and the quality of the staff of the Authority is an asset on which every Government can rely for the development of a more market oriented regulatory environment. In all three jurisdictions, the competition Authority could become the "Central Bank" for micro policy, i.e. achieving the status and the reputation of the central bank with respect of the real economy. If this is achieved, then staff salaries would be high enough for well trained professionals to be attracted. Both advocacy and enforcement would greatly benefit. If staff is not well trained the quality of enforcement cannot increase which is essential for these authorities to make a difference in their jurisdictions.

The funding of the authorities in the three jurisdictions needs to be improved. Either the Authorities should be funded directly by Government or be funded by a tax on corporate entities above a certain thresholds, along the lines of similar practices in jurisdictions like Italy or Turkey. Having notification fees (like all three jurisdictions have) or providing the Authority with a percentage of the fines (as provided for by the Zambian law) should be changed because it is not reliable and may influence the outcomes of the case decisions by the Authority.

c. Recommendations addressed to the competition authorities

Enforcement practice

The first recommendation addressed to the competition authorities in the three jurisdictions is to enforce the law more effectively, starting with some high profile cases, prompted by dawn raids and ending with important sanctions. The reputation of the Authorities would greatly benefit as a result, and any strengthening of the organization (including the necessary increase in funding) would be made politically easier.

Dawn raids are the most common ways to discover whether a firm had actually violated the antitrust provisions, especially for cartels and abuse of dominance type violations. Dawn raids should come as a surprise to the firm; otherwise there is a risk that the evidence is destroyed. In the United Republic of Tanzania and Zambia the possibility of inspections is clearly within the reach of the Authority and in Zambia indeed there have been two dawn raids in recent years. In all jurisdictions practical experience should be gained for the Authorities to become more effective in conducting inspections. Specific training would be particularly useful.

As for Zimbabwe, since there is a mandatory publication provision on the reasons for each investigation, inspections should be organized on the same day of the publication.

In addition, the United Republic of Tanzania should make sure that the provision that the competition law be violated intentionally be interpreted very restrictively. In this sense, when the reach of the law is extended by the case law to new areas or new practices, a fine should be issued only once it is well known that such practices are indeed prohibited. Otherwise there is a risk that subjective appreciations about intentionality would put the effective application of competition law in the country at risk.

For deterrence to be achieved, fines need to be actually paid. Collection of fines is not to be undertaken by the Authority, but the Authorities in the three jurisdictions should advocate the Government to ensure collection of antitrust fines.

Furthermore, the Tanzanian and Zambian Authorities should exercise great care with the way they

will handle the flow of notifications of restrictive practices that the new law has made possible. Such notifications, as the European Union experience shows very well, are unlikely to uncover the most serious violations of the competition law. This indeed is the reason why the European Union eliminated the notification system in 2003. Over a thousand agreements were notified to the European commission in over 40 years and only a handful was prohibited.

Staff development

The strengthening of the reputation of the competition institutions requires extensive training of its staff and of the judges responsible for judicial review. The staff of the Authorities should be trained on the substantive aspects as well as the procedural aspects of law enforcement: how to conduct a dawn raid, what to put in a file of a case, how to handle a request for access to file, how to write a statement of objections and a final decision, how to set the fine, what type of remedies to identify, when to adopt a simplified procedure for mergers, etc.

Training would also be necessary for the drafting of guidelines and communications on how to interpret the substantive provisions of the laws. This type of training should be provided to directly to the three jurisdictions as well to their respective regional groupings. The enforcement problems in the three countries are similar and common issue papers could be drafted with the help of the individual authorities cooperating at the regional level under the auspices of international organizations that could provide specific expertise.

2. Recommendations to be implemented at the regional level

In their efforts to establish well functioning market economies, to a certain extent, the three countries face similar restrictions of competition. Furthermore, cross border anticompetitive practices are present in the region as everywhere in the world. Recently, regional initiatives have been put in place which would allow addressing these issues, namely the competition frameworks of SADC, COMESA and EAC. The three countries under review should make best use of the regional initiatives to strengthen their enforcement efforts by converging in the interpretation of the laws, exchanging experience and cooperating on case handling.

All three jurisdictions are members of SADC, which is an exception among the relevant regional organizations (EAC, COMESA and SADC), since it only offers a framework for cooperation and exchange of experience, but does not establish a supranational competition regime to be enforced by a regional competition authority.

As a result, SADC may serve as a forum for all the three jurisdictions under review to work on convergence and best practices, such as solutions to substantive and procedural problems of common interest.

The two countries under review who are members of COMESA (Zambia and Zimbabwe) have an opportunity to benefit from enforcement procedures under its competition regulations and share best practice arising from cross border case resolution. It is recommended that they share experience gained within COMESA with the United Republic of Tanzania, the third country under review. At the same time, taking into account that they are members of both regional organizations, COMESA and SADC have a special position to advocate the avoidance of conflicts between the two regional competition regimes.

In this respect, the effort to establish a tripartite free trade area, aimed at minimizing the effects of the overlaps in the membership of COMESA, SADC and EAC is likely to be beneficial. It has been found prudent for the three regional groupings to cooperate and harmonize their trade, infrastructure and other regional integration programmes, including competition law and policy. With respect to the latter, the three regional groupings are supposed to cooperate and exchange information in the formulation and/or implementation of the competition policies and laws.

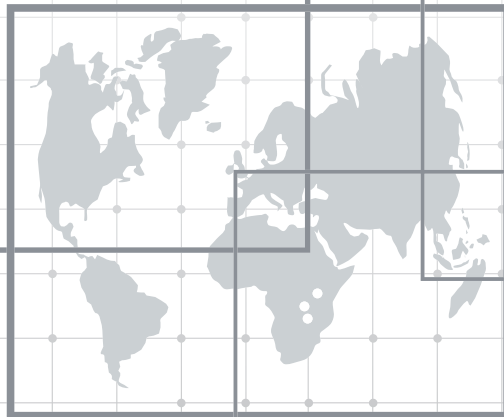
In this respect, the effort to establish a tripartite free trade area, aimed at minimizing the effects of the overlaps in the membership of COMESA, SADC and EAC is likely to be beneficial. It has been found prudent for the three regional groupings to cooperate and harmonize their trade, infrastructure and other regional integration programmes, including competition law and policy. With respect to the latter, the three regional groupings are supposed to cooperate and exchange information in the formulation and/or implementation of the competition policies and laws.

In addition to formal cooperation within the regional competition groupings, the three competition authorities under review should further strengthen their ties informally so as to exchange experience and possibly cooperate on the en-

forcement level. Joint training activities should aim at increasing competition law expertise and at the same time enhance networking and the forging of professional relationships.

TANZANIA FULL REPORT

TANZANIA



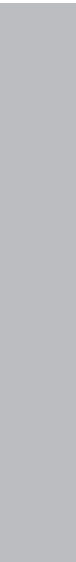


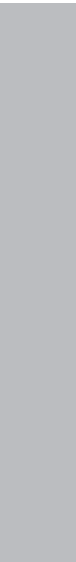
TABLE OF CONTENTS

ACRONYMS	30
PREFACE	33
1.0 GENERAL FRAMEWORK ON ECONOMIC POLICY AND DEVELOPMENT	33
1.1 Political Context.....	33
1.2 Economic Context.....	35
1.3 Foundations and History of Competition Policy	37
1.4 Economic Goals of Competition Policy	39
1.5 Process of Competition Law Drafting.....	40
2.0 THE SCOPE AND APPLICATION OF COMPETITION LAW AND POLICY	41
2.1 Objectives of the Tanzanian Competition Law.....	41
2.2 Scope of application of the law.....	41
2.3 Elements of the United Republic of Tanzania's Competition Law	46
2.4 Procedural Issues	56
2.5 Sanctions	59
2.6 Statutory Limitations	62
2.7 Enforcement record.....	62
3.0 ANTI-COUNTERFEITING UNDER THE MERCHANDISE MARKS ACT	63
3.1 Counterfeits and Competition.....	64
3.2 Counterfeits and Consumers.....	65
3.3 Other Pertinent Issues on Counterfeits	65
3.4 Organization and Responsiveness.....	66
4.0 THE INSTITUTIONAL FRAMEWORK	67
4.1 The Fair Competition Commission	67
4.2 Staffing and Human Resources	68
4.3 Agency Resources and Performance.....	70
4.4 The Fair Competition Tribunal (FCT).....	73
4.5 National Consumer Advocacy Council.....	75
4.6 The Minister.....	76
5.0 COMPETITION ADVOCACY	76
5.1 Competition advocacy and the policy/legislation making process	77
5.2 Competition advocacy and the private sector	77
5.3 Advocacy and the regulators.....	78
5.4 Research and competition advocacy.....	79
6.0 INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE	79
6.1 International Cooperation	79
6.2 Technical Assistance	80
6.3 Areas requiring urgent technical assistance.....	81
6.4 Other supportive areas for technical assistance	81
7.0 FINDINGS AND POSSIBLE POLICY OPTIONS	82

ACRONYMS

CCM	Chama Cha Mapinduzi
CD&MA)	Capital Development and Market's Authority
CMB	Crop Marketing Board
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ESRF	Economic and Social Research Foundation
ERP	Economic Reform Programme
EWURA	Energy and Water Utilities Regulatory Authority
FCA	Fair Competition Act, 2003
FCC	Fair Competition Commission
FCCPR	Fair Competition Commission Procedure Rules, 2010
FCT	Fair Competition Tribunal
ICT	Information and Communication Technology
IPC	Investment Promotion Centre
MMA	Merchandise Marks Act of 1963
MMR	Merchandise Marks Regulations of 2008
NIPPA	National Investment Promotion and Protection Act
NMC	National Milling Company
NPC	National Price Commission
NTP	National Trade Policy
PIP	Project Implementation Plan
PPSRC	Presidential Parastatal Sector Reform Commission
PSDS	Private Sector Development Strategy
RTC	Regional Trading Company
SADC	Southern Africa Development Community
SAP	Structural Adjustment Programme
SIDP	Sustainable Industrial Development Plan
SME	Small and Medium-sized Enterprise
SOE	State-Owned Enterprise
SUMATRA	Surface and Marine Transport Regulatory Authority
TANU	Tanzania African National Union
TCAS	Tanzania Consumer Advocacy Society
TCIA	Tanzania Civil Aviation Authority
TCRA	Tanzania Communications Regulatory Authority

TFDA	Tanzania Food, Drugs and Cosmetics Authority
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
URT	United Republic of Tanzania
WB	World Bank
WHO	World Health Organization



PREFACE

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 value-added of the harmonization of competition law and its enforcement in this subregion, 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 comparative assessment report that addresses pertinent issues from a subregional perspective.

The report is based on extensive desk research and a fact-finding visit to the United Republic of Tanzania. The desk research covered review of, *inter alia*: (i) the Fair Competition Act of 2003 (FCA), the Fair Competition Commission (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, National Trade Policy. The fact-finding visit to the United Republic of Tanzania was undertaken during the period 6 – 12 November 2011, where interviews were carried out with various stakeholders.⁵

1.0 GENERAL FRAMEWORK ON ECONOMIC POLICY AND DEVELOPMENT

1.1 Political Context

The United Republic of Tanzania is a union of two States of Tanganyika and Zanzibar. Following the German loss in the First World War, Tanganyika came under British rule in 1919 after the Treaty of Versailles where the “partition of Africa” was discussed⁶. The country became independent in 1960 with Mwalimu Julius Nyerere as its prime minister before becoming President in 1962 under the Tanganyika African National Union (TANU) party. TANU’s Constitution called for the creation

of a Socialist State in the United Republic of Tanzania, and as a party was inherently influenced by Chinese and Soviet political-economy concepts. TANU changed its name from 1977 to Chama Cha Mapinduzi⁷ (CCM), after establishing a One-party State as a conduit for more effective policy delivery. Influential economic decisions were made by party officials and at party conferences.

However, by the late 1980s there was irresistible pressure on firstly, the political system arising from its monopolistic influence over the economy, which system that had not delivered to people’s expectations. With the collapse of the Soviet Union, swift political change swept over most of the African continent, which necessitated the introduction of multiparty politics in the United Republic of Tanzania⁸. Multiparty elections were held in 1995 and the CCM won.

Following the 1995 elections, the CCM Government saw the need to formulate a new economic and social development vision for the United Republic of Tanzania. It was evident then that the developmental policies that had been undertaken under the one-party State had good intentions but did not progress the country to a higher developmental level. The National Development Vision 2025 was formulated in 1996 through the United Republic of Tanzania’s Planning Commission. The main purpose of the Vision was to transform the United Republic of Tanzania into a middle-income country within one generation through, *inter alia*, a strong and resilient economy which is competitive with sustained growth for the benefit of the people. In its conceptualization, the Vision 2025 holds that:

“A vision for development is an articulation of a desirable future condition or situation which a nation envisages to attain and the plausible course of action to be taken for its achievement...A shared vision arouses people’s aspirations and creates the spark that lifts the nations out of its mundane”.

The vision has the following three targets⁹:

- (i) High quality livelihood
- (ii) Good governance and rule of law
- (iii) A strong and competitive economy

Arising from the Vision, the United Republic of Tanzania's developmental path has revolved around other notable influential national documents such as Chama Cha Mapinduzi (CCM) Election Manifesto of 2005 whose main objective is to improve the quality of life for every Tanzanian; National Strategy for Growth and Reduction of Poverty; Sustainable Industrial Development Plan; National Trade Policy; Tanzania Mini Tiger Plan 2020; and the Millennium Development Goals. All these are meant to quicken the attainment of the country's Vision 2025¹⁰.

Three key issues in a political context stand out today to affect competition policy in the United Republic of Tanzania. Firstly, traditionally, the State has been an active participant in economic activity and took direct control of all the means of production for almost 20 years. This State control was eventually relinquished through the structural reform but there remains a strong regulatory oversight through sector specific regulators, Government departments and Ministries on how business is conducted in the country. Successful business growth and development is still linked to favourable political support. For instance, in 2000, the Government recorded that cashew nuts were at the time the leading foreign exchange earning crop for the country. Then President Benjamin Mkapa directed Government authorities to give incentives to investors, particularly for cashew nut processing plants. Arising from this, only processed cashew nuts, and not raw seeds, were to be exported.¹¹ This was a commendable directive as it facilitated the creation of locally based processing plants. The only drawback was that the incentives were given to the processors, but not the farmers, thereby creating a distortion in bargaining power and wealth creation as the processors exercised greater market power in their vertical relationship with the farmers. Other industrial sectors such as coffee and tea have faced similar challenges.

Secondly, there have been criticisms about the varying investment incentives and other terms that tend to favour foreign investors to local ones. While most Tanzanians are operating micro and SMEs, the blue-chip enterprises are operated by foreigners, more particularly Kenyans and South Africans stand out.¹² Where subcontracting with the big businesses are made, such contracts, if

lucrative, circulate amongst the already influential and well-connected Tanzanians. This again creates barriers to accessing big business and most probably has led to a stagnant domestic industrialization in the face of stagnant and/or perpetual SMEs. It has been noted that despite recent gains in economic development, the United Republic of Tanzania may still have a certain strong political inclination to State intervention in the economy, particularly the agricultural sector where the crop marketing boards (CMBs) have control over key cash crops. The CMBs are set up by Government action, with broad responsibilities and powers of compulsion over producers and handlers of defined commodities such as coffee, cashew nuts, cotton and tobacco. They come in the form of boards stabilizing prices by trading alongside other enterprises, export monopoly marketing boards, and domestic monopoly marketing boards as.¹³

Institutional reforms have well been underway and observers are optimistic that the country will continue on this path as it is essential to the development of a strong private sector.¹⁴ There is a large informal sector that needs to be incentivized to be innovative and graduate to the formal sector. Sanya and Gaertner (2012) study¹⁵ shows that the United Republic of Tanzania, owing to its large informal and rural community, has the highest unbanked community in the EAC, as shown below:

	Formal	Informal	Excluded Entirely
Kenya	40 per cent	27 per cent	33 per cent
Rwanda	21 per cent	26 per cent	52 per cent
United Republic of Tanzania	17 per cent	27 per cent	56 per cent
Uganda	28 per cent	42 per cent	30 per cent
South Africa	64 per cent	10 per cent	27 per cent

Source: Finscope 2010

Part of the proposed solution was that bank regulations should continue to promote contestable markets by levelling the playing field across the different types of banks and the products they offer. One way of doing this was to address market segmentation due to large State and foreign bank presence by privatizing the few remaining Government-owned banks in favour of domestic participation.

Thirdly, the domestic competition distortions have further been made manifest by the capital imbalance. A reliance on foreign capital is also an indication that Tanzanians do not have the financial resources to invest in high capital intensive industries such as mineral exploration, extraction, processing and banking. Locally owned mining ventures are not able to compete with the more resourceful foreign investors who, in addition, have access to better information, more negotiating power for advantageous investment conditions such as long-term tax holidays.

1.2 Economic Context

The United Republic of Tanzania inherited at independence a market economic system, which reflected the relationships inherited from the British colonial era, where the private sector played the conventional role of economic agent and engine of growth. Foreign trade flows and relations rested on continued increased production of agricultural commodities and raw materials for export, largely in unprocessed form. Domestic trade relations reflected the predominance of a subsistence economy in which policies and laws encouraged commercial activity based on export commodities and the discouragement of commercialization of the production of food crops. This situation prevailed up to 1967 when the ruling TANU Party enunciated the Arusha Declaration. TANU's Constitution created a socialist State based on collective consciousness, which in the Arusha Declaration found a Swahili equivalent of "Ujamaa". The Declaration emphasized on the self-reliance of the Tanzanian people, with a greater emphasis on the preservation and sustenance of the peasant farmers in the rural areas, as a source of wealth. The aims and objects of the Arusha Declaration included:

- To see the Government mobilize the resources of this country towards the elimination of poverty, ignorance and disease;
- To see that the Government actively assist in the formation and maintenance of cooperative organizations;
- To see that wherever possible the Government itself directly participated in the economic development of this country; and

- To see that the Government exercises effective control over the principle means of production and pursue policies which facilitated the way to collective ownership of the resources of this country.

A week after the Declaration was made, President Nyerere made the following comment¹⁶:

"... The Arusha Declaration and the actions relating to public ownership which we took last week were all concerned with ensuring that we can build Socialism in our country. The nationalization and the taking of a controlling interest in many firms were a necessary part of our determination to organize our society in such a way that our efforts benefit all our people and that there is no exploitation of one man by another".

The Arusha Declaration questioned the use of industries that were foreign or privately owned as agents of economic development capable of benefiting the people, especially the rural peasants. Among other measures, the Government nationalized major industries through SOEs and Crop Marketing Boards in the agriculture sector, the Regulation of Prices Act, 1973, which set up the National Price Commission (NPC).

However, by the late 1980s, both Government and party officials were, in retrospect, in agreement that the Arusha Declaration did not sufficiently address the complexity and dynamic character of policies and incentive structures which were necessary to effectively drive the development process. As noted earlier, the Declaration was overly based on State control of the major means of production, exchange and distribution with the State creating a viable public sector as the principal engine for wealth creation, distribution and retention¹⁷.

Direct Government intervention and participation in key industrial sectors, price controls, import quotas, rationing and use of permits to control the internal movement of goods and services were no longer sustainable. The internal limitations of a planned economy and external factors such as the series of oil-price shocks and the collapse of the East African Community (EAC) had a toll on the United Republic of Tanzania's economy. By the early 1980s the policy of trade confinement and its implications culminated in the following problems¹⁸:

- Inefficient resource allocation and inability to mobilize adequate resources due to Government intervention and controls in monetary policy including exchange and interest rate controls;
- The emergence of an inefficient payment system attributed to lack of competition in the financial system and the collapse of the credit system;
- Decline of private sector activity and Foreign Direct Investment (FDI) due to the nationalization of foreign and domestic investments and assets; and
- Transformation of the cooperative movement into inefficient State-owned enterprises (SOEs) and crop authorities serving as single agricultural marketing channels dependent on public subsidies.

It was inevitable that such an economic system was heading for a collapse. Most of the industries that were established from the late 1970s were eventually run down and a process of industrial re-organization and privatization commenced. Since the mid-1980s, the Government undertook economic liberalization measures in line with global economic changes. The main objective was to improve economic performance by providing sound macroeconomic policies and adjustment programmes for enhanced economic efficiency, domestic productivity and consumer welfare¹⁹.

The formal introduction of the Economic Reform Programme (ERP) in 1986 facilitated the extension of the liberalization initiative to include widespread price decontrol, and the removal of import restrictions. The ERP introduced a series of measures designed to establish a market economy based on free trade through gradual introduction of complementary policies that facilitate effective implementation of trade policies. The set of complementary policies which were put in place since then included liberalization of agricultural marketing system including the re-introduction of the cooperative movement; restructuring and divestiture of State-owned enterprises in the manufacturing, services and trade sectors; and public sector reforms to facilitate more efficient delivery of private sector support services and the establishment of an enabling business environment through legal and regulatory reforms.

As part of the SAPs, a privatization and commercialization programme was embarked on, which included a competition nomenclature. In 1994, the United Re-

public of Tanzania enacted its first competition law, the Fair Trade Practices Act and set up a department within the Ministry of Trade to oversee its implementation. In 1996, the country proceeded to review its economic course and formulated the “Sustainable Industrial Development Policy 1996–2020” (SIDP). In the SIDP, the Government of the United Republic of Tanzania (URT) recognized the role of the private sector as the principal vehicle in carrying out direct investments in industry. To facilitate and consolidate this position, the Government promised to undertake the following²⁰:

- (i) Make enabling amendments in all major policies, Acts of Law and legislations whose provisions discriminate or tend to discriminate against private sector investors;
- (ii) Provide a suitable environment for promotion of private sector investments, ensuring fair trade practices and competition as well as
- (iii) Develop social and economic infrastructure, including industrial support institutions.

The SIDP rightly underscored that under the economic reform measures, use of market forces had replaced the use of central-government-regulated economic management regime. Measures were taken to iron out distortions inhibiting the smooth functioning of the market forces, including price decontrol, liberalization of marketing and procurement. The Government further undertook to consolidate functioning of the market mechanism including full implementation of the 1994 Fair Trade Practices Act²¹(which was the forerunner to the Fair Competition Act of 2003). The Government also promised to adopt a new trade policy that was to inter alia, take into account fair trade practices.

The United Republic of Tanzania’s first acknowledged comprehensive National Trade Policy of 2003 also identified that the policy of confinement largely sought to place the trade regime, comprising of foreign and internal trade for goods and services at levels from wholesale to retail, under public sector control and management. The successful implementation of the National Trade Policy was understood to depend on 14 fundamental premises and challenges that served as prerequisites towards achieving the objectives and the vision of trade policy that the Government had to focus on. They were indispensable factors for the successful implementation of trade policies. The first three of these success factors were²²:

- Improvement of the macroeconomic environment;
- Creation of an enabling business environment; and
- Competition policy and regime.

It is clear that competition policy was not just a passive part of the United Republic of Tanzania's economic policy framework but was actually recognized as one of the top three action points for the Government, which culminated in enactment of the Fair Trade Practices Act in 1994, its subsequent review and enactment of the Fair Competition Act of 2003 and other complementary sector-specific legislations such as in banking, crop marketing, energy and insurance industries.

1.3 Foundations and History of Competition Policy

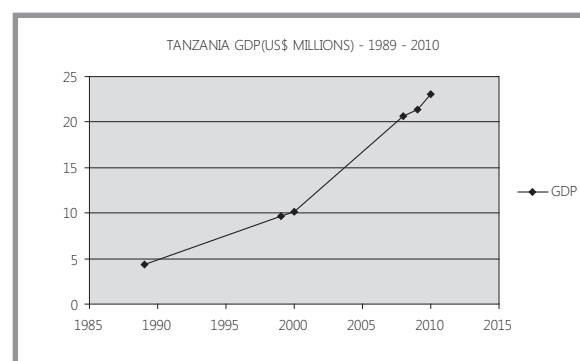
During 1985–1991, the United Republic of Tanzania underwent an intensive structural adjustment programme under the auspices of the IMF and World Bank. This programme was largely successful in bringing about a real gross domestic product growth of about five percent. While there have been some downward trends, the United Republic of Tanzania has made admirable economic gains since its independence more than 50 years ago. The United Republic of Tanzania has an annual GNI per capita of \$530, a population of 44.8 million people, and a total GDP of approximately \$23 billion according to the 2010 World Bank statistics²³. Of the total national product, about \$1 billion arrives in the form of bilateral aid.²⁴ Contribution to GDP by sector is 49 per cent agriculture; 17 per cent industry; and 34 per cent services, with an average inflation of 6 per cent. About 33.4 per cent of the population lives below the national poverty line. The core statistics are summarized below:

INDICATORS	
Population, total (millions)	44.8
Population growth (annual per cent)	3.0
GDP (current \$) (billions)	23.1
GDP per capita (current \$)	527
GDP growth (annual per cent)	7.0

Source: World Bank, *World Development Indicators* (2010)

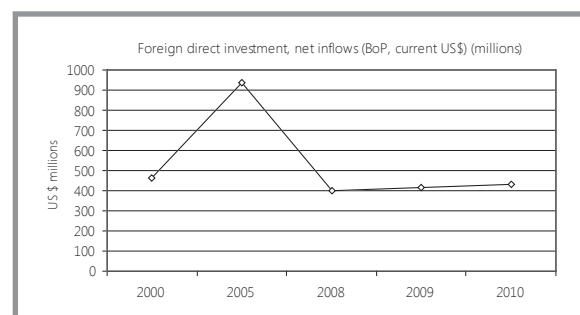
In terms of occupation, it is estimated that agriculture contributes 80 per cent, while industry and commerce contribute 20 per cent. Evidently, agriculture dominates the United Republic of Tanzania's economy, employing more than three quarters of the working population and accounting for 64 per cent of all exports. Agriculture is a major employer and key source of wealth for the country.

The country's GDP has been on a relative upswing since the reforms of the 1990s, as shown below:



Source: (table done by author) based on data from the World Bank, *World Development Indicators* (2010)

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



Source: (table done by author) based on data from the World Bank, *World Development Indicators* (2010)

Four key issues stand out to have influenced the foundations of competition policy in the United Republic of Tanzania. Firstly, the independence Government of President Nyerere had fought for independence on a populist platform of bringing power and wealth to the people. At independence, much of the economic wealth in the country was still in the hands of the European and other colonial settlers. Business activity, as may have been the case in Zambia and notably Zimbabwe, revolved around well connected and entrenched networks

amongst the settler-community and excluded the majority Africans who resided in the countryside. There was thus no “fair” competition that existed between the dominant economic community and the African majority. Sentiments of nationalization thus became prevalent, with the SOE recognized as the only channel through which the new Government could create fair access to employment, market opportunities and ultimately, wealth.

This invariably leads to the second issue of the Arusha Declaration. Arusha Declaration propagated the ownership of the factors of production by the State for the benefit of the people. Nationalization and expropriation were non-negotiable as the State created monopoly SOEs in key industrial sectors. The Declaration further put collective agricultural schemes at the centre of the national economy (rightly so) and introduced a programme of ‘villagization’, that is, the moving of peasant families into cooperative villages, the so-called “ujamaa” where they could supposedly be self-reliant by working together more productively and economically through common usage of agricultural inputs and machinery, such as fertilizers and tractors. This initiative failed to fulfil its initial objectives due to certain implementational features.²⁵ Ujamaa removed all forms of innovativeness in the agriculture sector, while the State imposed itself as a monopsony buyer, distributor and seller of agricultural produce.

Thirdly, State ownership in most of the key industrial sectors brought about mismanagement and lack of innovation, including lack of recapitalization, thereby affected economic development. Economic stagnation, oil price shocks of the 1970s and falling prices of the country’s main commodity exports contributed to economic decline in the 1980s. When President Ali Hassan Mwinyi became president in 1985 (following President Nyerere’s resignation), an economic reform programme was introduced to revamp the economic fortunes of the country. However, economic transformation required an overhaul of the whole political and legal system, which was eventually embarked upon.

Fourthly, industrial structures were highly concentrated through SOEs while the private sector was largely relegated to the agricultural sector, micro retailing/convenience stores, unregulated commuter transport, small restaurants, etc. Competition was a suspicious capitalist tool as hinted in

the Arusha Declaration. It was not considered a developmental tool of the then centrally planned system where the Government played the role of policy implementer and big business operator. As wealth creation at macro level was the preserve of the State, competition against the State in this context was not encouraged and where a private enterprise had grown to dominant proportions, the State had the legal grounds and a strong political will to expropriate and nationalize such companies. This was however not sustainable as by the mid-1980s, the economy needed an exposure to competition through the privatization process and the introduction of competition rules and principles.

A consumer activist²⁶ rightly observed that the motivations in which the United Republic of Tanzania adopted its current competition laws was due to the failure of socialism and its restrictive policies to achieve the desired objectives in the United Republic of Tanzania. Infant Tanzanian industries failed to meet even the local demand due to limited internal capacity, series of oil price increments, inadequate resource mobilization, and inefficient allocation of resources.

Consequently, the United Republic of Tanzania experienced severe macroeconomic hardship including, rising inflation rate, severe scarcity of essential goods and services, falling real GDP growth rate, widening fiscal and trade deficits. The United Republic of Tanzania had no other option than to resort to IMF and adopt its structural adjustment programmes, including the introduction of cost sharing on all social services, staff retrenchment, liberalization of imports, interest rates and exchange controls, devaluation of the shilling, price decontrol, privatization and restructuring of SOEs to improve efficiency in domestic production.²⁷ As part of this process, national distributional agencies, such as National Milling Corporation (NMC) and Regional Trading Company (RTC), were replaced by private companies, the former Price Commission during the controlled economy was abolished and replaced by the sector regulators and the competition authority.

In August 1990, the United Republic of Tanzania promulgated the National Investment Promotion and Protection Act (NIPPA), which established the Investment Promotion Centre (IPC). The IPC was designed to seek out and assist foreign di-

rect investment in the United Republic of Tanzania. NIPPA provided for priority investment areas, conferred eligible investors with generous incentives and attractive benefits and spelled out guarantees against nationalization, as well as provided assurances for dispute settlement. An investment attraction legislation of 1997 updated the NIPPA. In the revised law, IPC was transformed into a new organization known as Tanzania Investment Centre (TIC). The Capital Development and Market's Authority (CD&MA) was established in 1994. The first stock exchange, Dar es Salaam Stock Exchange (DSSE), began trading in April 1998.

Other institutions that came up were Tanzania Food, Drug and Cosmetics Authority (TFDA), Electricity, Water and Gas Utility Regulatory Authority (EWURA), Surface and Marine Transport Regulatory Authority (SUMATRA), Tanzania Communication Regulatory Authority, and the Civil Aviation Authority.

1.4 Economic Goals of Competition Policy

The United Republic of Tanzania's competition policy goals are no different from those of most countries in the region. With high unemployment and a less innovative and competitive domestic industrial structure, competition policy is aimed at addressing these issues. As all other policies, the competition policy is expected to draw its efficacy from the primary goal of the National Development Vision 2025, the SIDP, the NTP, etc – all emphasizing poverty reduction and its ultimate eradication through industrialization, and an export-led domestic economy. Competition policy has been recognized as aimed at addressing the problem of concentration of economic power that can arise from market imperfections, monopolistic behaviour in economic activities and consequent restrictive business practices. These aims are significantly not different from the overall economic goals.

The Government of the United Republic of Tanzania has recognized that competition policy aims at perpetuating freedom of trade, freedom of choice and access to markets. Accordingly, the ultimate objective of economic regulation and competition policy is to protect the consumer through control of monopoly behaviour on the part of producers. The National Trade Policy of 2003 was emphatic in

characterizing the domestic industrial sector and its preparedness in view of international competition:

“Competition is intensifying as firms become more innovative. Developments in information and communication technology (ICT) have given rise to new communication media with wide and instantaneous outreach at relatively low cost. The ultimate result is the transformation of customer expectations that are forcing the business world to strive for higher quality, lower prices and first-rate services. In this situation, export-led growth is a prerequisite for the attainment of poverty eradicating rates of GDP growth in the United Republic of Tanzania. However, the proficiency underpinning the competitiveness required in export-led growth is built and nurtured through the learning processes and experiences gained in the domestic economy. This calls for a dynamic process of trade development to stimulate the competitiveness of Tanzanian goods and services in the domestic and regional markets as the stepping stone to more effective entry and participation in the global market”.²⁸

A number of research work by academics and practitioners have previously attempted to review the goals of competition policy and its development in the United Republic of Tanzania. One such notable study was by a Tanzanian academic Godius Kahyarara. The study showed that efforts to protect consumers against anticompetitive practices have had a positive impact on firm productivity and business investments, and thus, on economic performance as a whole. Kahyarara correctly identified that competition policy comprised laws, regulations, and institutions that control the behaviour of dominant firms, prevent companies from becoming monopolistic through mergers, and prohibit anticompetitive behaviour such as price-fixing and bid rigging. “Competition policy is critical to any development process to ensure the effective utilization of resources, as well as the proper allocation, marketing, and pricing of those resources,” Kahyarara noted²⁹. “This research showed how fair competition was key in influencing the performances of enterprises in an African context.” Kahyarara noted that increasing competition within an economy is no easy task. Many stakeholders, particularly workers in protected businesses such as monopolies and SOEs, feared

for their future when liberalization is introduced. Promoting fair competition improved the performance of local manufacturers at the firm level. This translates into gains for the overall economy.

Under Section 3, the Act has an express “Object of the Act” clause, which states as follows:

The object of this Act is to enhance the welfare of the people of the United Republic of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout the United Republic of Tanzania in order to:

- (a) increase efficiency in the production, distribution and supply of goods and services;*
- (b) promote innovation;*
- (c) maximize the efficient allocation of resources; and*
- (d) protect consumers.*

The legislation provides broader goals for the competition law, no different than in most laws in the region. It would, however, seem that (a) and (c) above may be referring to one and the same thing. It is clear from the foregoing that the competition legislation in the United Republic of Tanzania has the core objectives which can be summarized as economic efficiency and consumer protection.

While there have been no empirical studies to show how the decisions of the competition authority have assisted in bringing about efficiencies in the economy, it is observed that in mergers, the focus is on prohibiting those mergers that create a dominant position of market power and inherently an attempt is made to “nip in the bud” barriers to market entry.

According to the Ministry of Trade, Industry and Marketing Annual Report for 2009–2011, about 97 per cent of the industry in the United Republic of Tanzania was in private hands. Further, the Government had developed a Private Sector Development Strategy (PSDS) to ensure broad-based and inclusive participation in production and trade. The PSDS entailed the establishment of an enabling business environment through better regulation; increased private sector access to capital including “titled-land,” education, skills and entrepreneurship as well as provision of business support services in management, production and marketing.

1.5 Process of Competition Law Drafting

The process of drafting the competition legislation, as in most countries in the Southern and Eastern Africa region, were precipitated by the collapse of the Soviet Union, which triggered political and economic reform in countries that had adopted the Soviet style of economic management. Through the World Bank and IMF supported SAPs, countries such as the United Republic of Tanzania were compelled to begin a process of privatization. Privatization meant industrial reorganization where the SOEs, usually monopoly or dominant firms, were hived off into private hands. With this, the World Bank rendered assistance to the United Republic of Tanzania to develop appropriate legislation such as the privatization and competition legislations. The usual legal process that was followed was a consultation process with key stakeholders such as consumer and trade related NGOs, the chambers of commerce, and the various Government ministries and departments before the law was drafted using a consultant and repositioned into a bill before Parliament through the Ministry of Justice.

In 1994, the United Republic of Tanzania enacted the Fair Trade Practices Act and established the Fair Trade Practices Commission³⁰. The Act covered general anticompetitive trade practices, unfair trade and consumer protection provisions. However, this law did not achieve much, speculatively because it was accepted without understanding as part of the IMF SAPs and did not have a national champion to promote and promulgate it. The Commission itself was not well resourced and supporting institutions not prepared. Interface with regulators was equally problematic.

Under the auspices of the World Bank’s Project Implementation Plan (PIP), a consultancy report was prepared to assist the Presidential Parastatal Sector Reform Commission (PPSRC), which recommended the establishment of two multi-sectoral regulatory agencies, namely the Fair Competition Commission and the Fair Competition Tribunal. The PIP included proposed organization structures, staffing levels, procurement plan, three years capital and operation manuals, implementation plan and code of ethics for the two institutions³¹. Following this, internal reviews followed and with the World

Bank support, the law was repealed and replaced with the Fair Competition Act in 2003 and replaced with a more focused Fair Competition Commission.

The Fair Competition Commission has made self-evident strides to publicize the law but only segments of it are known even by the educated elite. For instance, the lawyers spoken to were more conversant with the merger notification process while the consumers were more conversant with the counterfeit functions of the Commission.

2.0 THE SCOPE AND APPLICATION OF COMPETITION LAW AND POLICY

2.1 Objectives of the Tanzanian Competition Law

In its preamble, the Fair Competition Act has it that it is “an Act to promote effective competition in trade and commerce, to protect consumers from unfair and misleading market conduct...”. The Act replicates the objects of the Act under Section 3, which is an extension of the objects of the Act as contained in the preamble.

According to the Ministry of Industry, Trade and Marketing Strategic Plan document (2009–2011), the FCC is established and expected to promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct. The FCC is considered to be a “business support organization”³².

The goals of the competition policy and its development are clear that apart from the express protection of consumers, the law does not protect competitors but is aimed at “promoting and protecting effective competition”. This is explicitly echoed in the preamble to the FCA.

The distinction between competition and public interest considerations is always debatable in developing countries. It is not likely that a less developed country such as the United Republic of Tanzania will discard the public interest consideration. There is a veiled goal in Section 8(4) for instance whereby in an agreement that appreciably affects competition, the Commission shall have regard to whether:

Under Section 13(1)(b)(iv), the Commission may grant an unconditional or conditional exemption to a merger if the Commission is satisfied in all circumstances that the merger is or is likely to result in benefits to the public in one or more of...the benefits to the public resulting from the merger outweigh the detriments caused by preventing, restraining or distorting competition.

2.2 Scope of application of the law

Appropriately referred to as the “Fair Competition Act”, the FCA has compressed parts dealing with competition and extensive parts dealing with misleading market conduct and consumer protection.

In terms of geographical jurisdiction, the fair competition legislation does not apply to Zanzibar but to mainland Tanzania, historically known as Tanganyika. This is made manifest under Section 6(1) of the Act, which states as follows:

*(1) This Act shall apply to Mainland Tanzania, State bodies and local Government bodies in so far as they engage in trade*³³.

There is also extraterritorial application. This is under Section 7 as follows:

7. This Act shall apply to conduct outside mainland Tanzania:

- (a) by a citizen of the United Republic of Tanzania or a person ordinarily resident in the United Republic of Tanzania;*
- (b) by a body corporate incorporated in the United Republic of Tanzania or carrying on business within the United Republic of Tanzania;*
- (c) by any person in relation to the supply or acquisition of goods or services by that person into or within the United Republic of Tanzania; or*
- (d) by any person in relation to the acquisition of shares or other assets outside 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.*

The scope of the extraterritorial application is wide and includes both nationals, residents, non-nationals and non-residents. However, there are no guidelines as to how exactly a foreign national

would be subpoenaed to appear before the Commission or the Tribunal. Some countries have Mutual Legal Assistance Treaties or other related cooperation arrangements. The East African Community (EAC) Competition Law would likely deal with persons under the EAC.

Section 12 of the Act contains explicit exceptions to the application of competition law. It holds that under the Act, an agreement shall not be prohibited to the extent it relates to the:

- (a) remuneration, conditions of employment, hours of work or working conditions of employees;
- (b) compliance with or application of standards of dimension, design, quality or performance prepared or approved by the Tanzania Bureau of Standards or any other association, institution or body prescribed by regulations;
- (c) export of goods from the United Republic of Tanzania or the supply of services outside the United Republic of Tanzania if such particulars of the agreement as the Commission may by Order require are filed with the Commission within 21 days after it is made. However, this shall cease to apply to an agreement if the Commission decides the agreement may have an effect on competition in the United Republic of Tanzania and notifies the parties to the agreement of that decision; and
- (d) If it is necessary to do so in order to comply with the obligations of the United Republic under an agreement with the Government of another country, the particular agreement or conduct, or agreements or conduct of particular kind, shall be excluded from the prohibitions under the Act.

These provisions appear to be standard exceptions contained in various other comparable laws in the region. The difference may be that the Tanzanian law does not provide for a clear exception of possession of intellectual property. Some aspects of intellectual property protection are contained in the Merchandise Marks Act.

2.2.1 State immunity

In the UNCTAD Model Law on Competition (UNCTAD 2004), it is explicit for instance that competi-

tion law does not apply to the sovereign acts of the State itself, or to those of local Governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local Governments or branches of Government acting within their delegated power. However, the law should apply to the State and its agents engaged in commercial activity.

As regards the application of the Act to State bodies is still debatable in the United Republic of Tanzania as the competition law has been used on some State bodies but not on some – depending on whether they are involved in “trade”. While Section 6(1) makes it mandatory that the law shall apply to the State and State bodies and local Government bodies engaged in trade, 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*. Section 2 of the Act has defined the “State” as “... the Mainland Tanzania” which implicitly refers to the Government.

While the Act “applies” to “the State”, the application is only academic if not advisory in nature as the FCC cannot enforce a directive against the State. It cannot also impose a fine on the State or its agents. This is manifest in Section 6(2) of the Act. To demonstrate that the exemption does not extend to ‘State bodies, the FCC has applied the law against a local authority, which was also fined. In the case of *“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 TZS 10 million and the agreement itself was declared null and void.³⁴

On the other hand, there is a distinction made between “the State” and a ‘State body’ under Section 6 of the FCA. This was the case with the Tanzania National Roads Agency (TANROADS), which is a creation of statute.³⁵ The FCC overruled TANROADS who challenged the FCC’s jurisdiction over its exclusionary issuance of permits to outdoor firms to install billboards and gantries in road reserves countrywide. In a 32 page ruling read by its Chairperson, the FCC expressed satisfaction that:

- (i) 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 Commission;
- (ii) The respondent engaged in trade and hence falls under the provision of section 6(1) of the Fair Competition Act;
 - (iii) The respondent is a "State body" not the "State" and therefore is not subject to the exemption under section 6(2) of FCA;
 - (iv) The permits issued by the respondent have a commercial value and do not fall under section 6(3) (b) (ii) and (iii) of FCA;
 - (v) The relationship between the complainants and the respondent is contractual as per the provisions of section 10 of the Law of Contract Act, Cap 345 R.E. 2002; and
 - (vi) Based on (v) above, the respondent is a suitable entity as per section 3(6) (b) and (c) of the Executive Agencies Act, Cap 245 as amended by the Finance Act, No 18 of 2002. Furthermore, Section 96 of the FCA clearly provided that the FCA applies to all persons in all sectors of the economy and shall 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 FCA and expressly excludes or modifies FCA, or by any subsidiary legislation purports to exclude or modify FCA.

The FCC's decision followed a complaint filed by several outdoor firms that the TANROADS had granted exclusive permits to only two local advertising firms. The reason advanced by the respondent to the complainants for issuing exclusive permits was that the respondent intended to start a three-year pilot scheme and, in order to monitor the pilot exercise effectively; it had decided to identify only two local outdoor advertising firms capable of covering all the twenty one regions of Tanzania Mainland. As a result of the exclusive permits, all other firms operating in the business of outdoor advertising were ordered by TANROADS to remove all installed gantries (billboards) from the road reserve within 30 days counted from 1 August 2009 and that their advertising permits had been revoked. The FCC annulled the exclusive contracts.

Where the State is an active commercial player, the scenario evidently creates an unfair playing field

with the private sector that are engaged in commercial activities in e.g. the insurance, pension, banking and telecommunications. This may be an area that may be reviewed as it has been reviewed through a High Court judgment in Zambia as well as through the *Zambian Competition and Consumer Protection Act of 2003*. Under Section 3 of the *Zambian Competition and Consumer Protection Act of 2010*, the Act does not apply to the State where there is a statutory monopoly but the law does apply where the State is engaged in commercial activities in a sector that is open to competition. However, effecting fines on the State is a remote possibility under the Zambian competition regime. Judge Philip Musonda of the High Court of Zambia³⁶ anyhow ruled thus:

"...Sovereign States are entitled to immunity in respect of its Governmental acts, but not in respect of its commercial transactions. Every commercial undertaking engaged in the provision of goods and services is amenable to the Commission (author's emphasis)... In a nutshell, all commercial undertakings are regulable by the Commission, if such undertakings imperil consumer interests and I see no lacuna in the law..."

2.2.2 Limitations in regulated sectors

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 Commission. The regulators have the discretion whether to consult with the FCC or not. The exempted regulatory sectors are governed by the following Acts:

- (i) The Energy and Water Utilities Regulatory Authority Act, 2001 (EWURA Act);
- (ii) The Surface and Marine Transport Regulatory Act, 2001 (SUMATRA Act);
- (iii) Tanzania Civil Aviation Regulatory Authority Act, 2003 (TCAA Act);
- (iv) Tanzania Communications Regulatory Authority Act, 2003 (TCRA Act).

EWURA administers 8 separate legislations³⁷ dealing with water, petroleum and electricity matters in

the United Republic of Tanzania. Under Section 20 of the EWURA Act, EWURA has powers under sub-heading of “Competition policy and contraventions of competition legislation”, that in carrying out its functions and exercising its powers under this Act, and under sector legislation in relation to particular markets for regulated services, the Authority shall take into account:

- (a) whether the conditions for effective competition exist in the market;
- (b) whether any exercise by the Authority is likely to cause any lessening of competition or additional costs in the market and is likely to be detrimental to the public;
- (c) whether any such detriment to the public are likely to outweigh any benefits to the public resulting from the exercise of the powers.

EWURA is mandated³⁸, following the foregoing process, to deal with all competition issues which may arise in the course of the discharge of its functions, and may investigate and report on those issues, making appropriate recommendations to the Tanzania Bureau of Standards, the FCC or any other relevant authority in relation to –

- (a) any contravention of the Fair Competition Act, the Standards Act or any other written law;
- (b) actual or potential competition in any market or regulated services; and
- (c) any detriment likely to result to the members of the public.

The law does not provide any extensive provisions apart from the foregoing on how EWURA would deal with the competition matters. In the meetings held with EWURA, they admitted that they did not have any staff guidelines on how to deal with competition matters. There is also no compulsion to refer a competition matter to or for consultation with the FCC before the determination. As the law is currently couched, EWURA would have to voluntarily send its findings and recommendations to the FCC after the investigation. There appears to be a policy shift for laws that were enacted after 2003. Under section 32(2) of the Electricity Act of 2008, it states that “the Authority shall consult the Fair Competition Commission in any investigation into anticompetitive behaviour”. The understanding here is that EWURA may consult FCC but FCC does not have any overriding powers over EWU-

RA’s decision to reject the FCC’s advice. Where the FCC is not content that the competition issues have been addressed, FCC’s recourse is to refer the matter to the Minister for intervention as provided for under Section 96(4) of the FCA.

The role of the FCC in competition matters in the regulated sectors is merely advisory in relation to anticompetitive decisions the regulators effect. It is thus not clear whether the FCC would enforce the FCA against a player in the petroleum sector such as BP, Caltex, etc when these engage in conduct that has not been sanctioned by the sector regulator e.g. misuse of market power, price fixing or collective boycott. According to an informed opinion, such action may be possible under section 96(3) of the FCA and section 24 of the Petroleum Act discussed below.

The Petroleum Act of 2008 administered by EWURA has a PART IV dealing with “Assurance of Fair Competition”. Section 24 of the Petroleum Act of 2008 states that subject to the provisions of the EWURA Act, all petroleum operations shall be subject to the provisions of the FCA in relation to:

- (a) the formation of cartels
- (b) barriers to entry and exit
- (c) abuse of dominant position and market power
- (d) formation of mergers and acquisitions for anticompetitive purposes
- (e) attempts to control prices
- (f) the creation of artificial shortages of products or services; and
- (g) other restrictive trade practices as defined in that Act, with intention to contravene the principles of a free market for petroleum products within the country.

Section 24(3) of the said Petroleum Act is clear that the FCC shall monitor conditions of the market and trade practices of participants in the supply chain. It is not clear whether the FCC only has a “monitoring” role and not necessarily an “enforcement” role.

Under Section 5 of the TCRA Act of 2003, it is provided that it shall be the duty of TCRA that in carrying out its functions it shall strive to enhance the welfare of the society of the United Republic of Tanzania by:

- (a) promoting effective competition and economic efficiency;
- (b) protecting the interest of consumers;
- (c) protecting the financial viability of efficient suppliers;
- (d) promoting the availability of regulated services to all consumers including low income, rural and disadvantaged consumers;

Under Section 19(1), TCRA Act further proceeds to state that in carrying out its functions and exercising its powers under this Act, and under sector legislation in relation to particular markets for regulated services, the Authority shall take into account:

- (a) whether the conditions for effective competition exist in the market;
- (b) whether any exercise by the Authority is likely to cause any lessening of competition or additional costs in the market and is likely to be detrimental to the public;
- (c) whether any such detriments to the public are likely to outweigh any benefits to the public resulting from the exercise of the powers.

Under Section 19(2) of the TCRA Act, TCRA “shall deal with all competition issues which may arise in the course of the discharge of the functions, and may investigate and report on those issues, making appropriate recommendations to the FCC or any other relevant authority in relation to:

- (a) any contravention of the Fair Competition Act, 2003 the Tanzania Act No. Bureau of Standards Act, 1975, or any other written law;
- (b) actual or potential competition in any market for regulated services competition or additional costs in the market and is likely to be detrimental to the public;
- (c) any determinants likely to result to the members of the public.

It is clear that TCRA is clothed with powers to deal with competition matters under the legislation that establishes it. The TCRA does not provide details of how TCRA shall carry out its duty of promoting effective competition and economic efficiency in the ICT sector in the United Republic of Tanzania³⁹.

Under section 25 of the Tanzania Civil Aviation Authority (TCAA) Act, “it shall be the duty of the

Authority that in carrying out its functions it shall strive to enhance the welfare of society of the United Republic of Tanzania by

- (a) promoting effective competition and economic efficiency;
- (b) protecting the interest of consumers;
- (c) protecting the financial viability of efficient suppliers;
- (d) Promoting the availability of regulated services to all consumers including low income, rural and disadvantaged consumers.”

Under Section 40 of the TCAA Act, in carrying out its functions and exercising its powers under the TCCA Act, the TCAA shall take into account:

- (a) Whether the conditions for effective competition exist in the market;
- (b) Whether any exercise by the Authority is likely to cause any lessening of competition or additional costs in the market and likely to be detrimental to the public;
- (c) Whether any such detriments to the public are likely to outweigh any benefits to the public resulting from the exercise of the powers.

Section 40(2) is emphatic that the TCAA shall deal with all competition issues which may arise in the course of the discharge of the functions, and may investigate and report on those issues, making appropriate recommendations to the Tanzania Bureau of Standards, the FCC or any other relevant authority in relation matters falling under the FCC Act and the Tanzania Bureau of Standards Act, or any written law.

While some legislations⁴⁰ managed by EWURA call for consultation with the FCC on competition matters, the EWURA Act itself expressly states that it has powers to investigate and then report its findings to, *inter alia*, the FCC. This does seem to be a contradiction. The EWURA, TCRA and the TCAA legislations expressly confer them with powers to deal with competition matters in the ICT sector. The TCRA and TCAA can commence an investigation on competition matters, seemingly using the FCC Act itself, and provide FCC with a report of the action it (TCRA) has taken. This means that the legislature intended to have several general and specialist regulators alike to deal with competition matters in the best possible manner they under-

stood it, with appeals for the aggrieved lying with the FCT. Section 19 of the SUMATRA Act has similar provisions to those contained under section 19 of the TCRA Act and section 40 of the TCAA Act.

In light of these provisions, the FCC effectively cannot proactively deal with matters under sectors regulated by EWURA (with the exception of the Electricity Act and the Petroleum Act), TCRA, TCCA, SUMATRA and any other legislations that may have similar provisions enacted after the FCA came into being. The recourse FCC has under section 19(4) of the FCA is to submit its position to the Minister of Trade and Industry, who has discretion whether to take such submission any further⁴¹. The FCC effectively commands no enforcement jurisdiction in the named critical regulated sectors. It was not clear as to what the policy intentions of this exclusion were at the time but the future may be as was later enshrined under the Electricity Act and the Petroleum Act, both of 2008 where consultation with the FCC was mandatory.

While it is noted that specific competition provisions exist in the sector legislations, the experience has been that the sector regulators invest more in technical regulation than competition matters. In any case, they do not have the same vision on competition and thus would not see the competition effects of some of their decisions. Leaving the appeal process on competition matters to the Minister is not the best option as the Minister and the ministry officials are not competition experts to understand the intricacies of competition policy.

In addition to the industry sectors identified in Section 96, through Acts of Parliament, the Government retained the crop marketing boards (CMBs) that were established under the era of a State-run economy. The CMBs have the responsibility of regulating and setting prices and distribution dynamics for major cash crops such as coffee, cotton, cashew nuts and tobacco. The CMBs have a legal power to fix crop prices through “minimum price” setting arrangements annually. Considering that agriculture is the largest employer and mainstay of the most Tanzanians, the sector attracts a lot of political interest that would clearly class with competition policy. The FCC is yet to make a significant inroad into the CMBs market practices sector although its role may largely be advisory. Within the FCC, it was not clear whether the CMBs 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.

Under section 4(3) of the EAC Competition Act of 2006, even this supranational law shall not apply to restraints on competition imposed by and resulting from a Partner State’s regulation of specific sectors or industries to the extent that the anticompetitive conduct is required by such regulation within their own jurisdictions. This provision would make it difficult to achieve all the objectives of the competition law at both the national and regional levels.

2.3 Elements of the United Republic of Tanzania’s Competition Law

A competition law should generally have certain core elements such as control or eliminate restrictive agreements or arrangements among enterprises; control mergers and acquisitions and control abuse of dominant positions of market power⁴². The United Republic of Tanzania’s FCA contains the classical competition law provisions such as a generic statement on anticompetitive trade practices and then proceeds to list the specific areas such as misuse of market power, mergers and acquisitions and horizontal arrangements. Section 8 of the Fair Competition Act states that:

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.

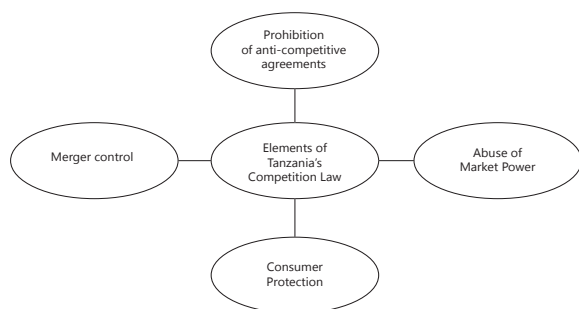
While at first sight the provision may appear to refer to both horizontal and vertical agreements, reading it further shows that it actually deals with general prohibitions of horizontal agreements. Section 8 (3) of the Act provides for the rebuttable presumption that they are not anticompetitive if none of the parties to the agreement holds a dominant position or are not competitors.

Under Section 9 of the FCA, the law details several agreements that are considered as *per se* anticompetitive in most jurisdictions. This type of agreement is considered to be anticompetitive by its nature so that the competition authority only has to prove the existence of such agreement, but does not have to assess its effects on the market. This is generally acceptable best practice.

Under Section 10 of the FCA, the law introduces “misuse of market power” and under Section 11

mergers and acquisitions. Being a law that deals with both competition and consumer protection matters, the law has generous provisions dealing with consumer protection. PARTS III – PART IX of the FCA contain provisions on the prohibition of misleading and deceptive conduct, unfair business practices, unconscionable conduct, manufacturers obligations, product safety and product recall.

In summary, the elements in the United Republic of Tanzania's FCA are as indicated in the diagram below:



2.3.1 Prohibition of Anticompetitive Agreements

As mentioned previously, Section 8 of the FCA is couched in the context of Article 101 of the Treaty on the Functioning of the European Union (TFEU), as follows:

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.

Certain of the legal terms used in this general prohibition are defined in Sections 2 and 5 FCA, which lay the conceptual framework for understanding the competition provisions of the FCA.

Section 2 of the Act defines an agreement as:

... any agreement, arrangement or understanding between two or more persons, whether or not it is: (a) formal or in writing; or (b) intended to be enforceable by legal proceedings, and includes a decision of an association.

With respect to the definition of the term agreement, during the field mission, the FCC staff raised the concern that Section 8 deals with "agreement" and not "conduct" or "behaviour". They understood this to mean that the FCC can only deal with

Section 8 matters where there is established an agreement, not merely where a conduct has been identified. Absent the agreement, then the FCC could not enforce the law. The FCC staff were of the view that this has affected the enforcement of the law as they first have to establish the existence of an agreement before they look into the conduct that may have "appreciably" affected competition.

Taking into account the definition of an agreement provided by Section 2 FCA, it needs however to be pointed out that an agreement does not necessarily have to be formal or in writing given that "arrangements" and "understandings" that may be inferred from the actual market behaviour of the suspected offenders are covered by the definition. Further, (a) and (b) are not conjunctive but disjunctive, that is, (a) and (b) do not have to be mutually inclusive.

Further legal definitions for the application of Section 8 FCA are provided by Section 5 FCA:

5(2). *"Competition" means competition in a market in [the United Republic of] Tanzania and refers to the process whereby two or more persons:*

- (a) *supply or attempt to supply the same or substitutable goods or services to the persons in the same relevant geographical market; or*
- (b) *acquire or attempt to acquire the same or substitutable goods or services from the persons in the same relevant geographical market.*

(3) *A person is a "competitor" of another person if they are in competition with each other or would, but for an agreement to which the two persons are parties, be likely to be in competition with each other.*

(4) *"Market" means a market in [the United Republic of] Tanzania or a part of [the United Republic of] Tanzania and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services.*

(5) *In defining markets, assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, in addition to other relevant matters, shall be taken into account:*

- (a) *competition from imported goods and services supplied by persons not resident or carrying on business in [the United Republic of] the United Republic of Tanzania; and*

(b) *the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.*

While the law does not provide the criteria to be applied to determine that an agreement “appreciably” prevents, restricts or distorts competition,

the process of determining harm on competition is contained in the *Merger Guidelines*.⁴³ In *Arusha Municipal Council* case, the matter was for instance “exclusive rights,” which are not expressly captured under the Act or in any of the Commission guidelines.

In a landmark *Serengeti Breweries Limited v Tanzanian Breweries Limited*⁴⁴, the FCC discussed Section 8(1) of the FCA as follows:

The word object as used in that provision means the subjective intention of parties when entering into that agreement. Where an agreement has an object of restricting competition it is not very necessary to establish that its effect would also have an anticompetitive effect in competition under section 8(1) of the FCA, 2003. Subsection 6 of Section 8 of the FCA, 2003 qualifies an object, as the object of an agreement even if it is only one of a number of objects of that agreement. Agreements considered to have

negative objects to competition are like price fixing, collective boycott, output restrictions and collusive bidding; these are considered as illegal per se in accordance with Section 9 of FCA, 2003.

When an agreement does not have the object (subjective intention) of preventing, restricting or distorting competition it is necessary to consider its effect or likely effect. When looking on the effect or likely effect it is necessary to conduct an analysis of the agreement’s effect in the market before concluding that there is an infringement.

Oxford Advanced Learner’s Dictionary, 6th Edition, by A.S. Hornby, published by Oxford University Press, 2001. The Dictionary provides the meaning of the three words as follows:

Prevent – “to stop something from happening (pg 922)”.

Restrict – “to limit the size, amount or range of something”, “to stop something from moving freely”, “to allow yourself or somebody to have only a limited amount of something or to do only a particular kind of activity (pg 1004)”.

Distort – “to change the shape, appearance or sound of something so that it is strange or not clear”, “to twist or change facts, ideas, etc, so that they are no longer correct or true (pg 338).”

Later on in the same case, the FCC explained the following⁴⁵:

*The object, effects and likely effects are in alternative and not mutually exclusive requirements for finding an infringement of the provisions of Sections 8 and 9 of the FCA, 2003. This is clear even from the European Court of Justice decision of *Societe Technique Miniere v. Maschinenbau Ulm*⁴⁶ which stated that the words: “object and effects were to be read disjunctively, so that it is necessary to consider what the object of an agreement is; only if it is not clear that the object of an agreement is to harm competition it is necessary to consider whether it might have the effect of doing so”*

The FCC did not however demonstrate and show how, in this case, the application of the word “appreciably” to the extent of preventing, restricting

or distorting competition. Section 8(1) does not just deal with agreements that may prevent, restrict or distort competition rather those that “appreciably” do so.

The law proceeds to highlight that an agreement in contravention of this section is unenforceable except to the extent the provisions of the agreement causing it to be in contravention of the section are severable from the other provisions of the agreement. Subsection three goes further to hold a rebuttable presumption⁴⁷ that unless proved otherwise, it shall be presumed that an agreement does not have the object, effect or likely effect of appreciably preventing, restricting or distorting competition if none of the parties to the agreement has a dominant position in a market affected by the agreement and either where the combined shares of the parties to the agreement of each market affected by the agreement is 35 per cent

or less; or none of the parties to the agreement are competitors.

As already mentioned, as regards vertical agreements, Section 8 (3) (b) of the Act provides for the rebuttable presumption that they are not anticompetitive if none of the parties to the agreement holds a dominant position.

As for horizontal agreements, the following two conditions need to be fulfilled in order for the presumption to apply: (i) none of the parties to the agreement holds a dominant position and (ii) their combined market share in each of the markets affected by the agreement is 35 per cent or less.

There is some form of “administrative jurisprudence” given by the FCC on the 35 per cent market shareholding in *Serengeti Breweries Limited v Tanzanian Breweries Limited*⁴⁸, as follows:

It is clear that the combined market shares of TBL and SBL is above 35 percent to the defined market. In holding the parties to the agreement liable the Commission considered the combined market shares of the parties in agreement, against other firms in the beer industry.

Against this background it has been established that the arrangements and understanding between TBL and SBL within the limits of the defined market had the effect of restricting, preventing and distorting competition in the Tanzanian beer market. The Commission is therefore satisfied that both TBL and SBL have infringed section 8(1) of the FCA, 2003 and, should be held liable.

For a rule of reason approach, the law may not necessarily have derogations but rely on specific analysis results to demonstrate whether a conduct does, or would likely, appreciably affect competition. For instance, under the European Union, a firm with market share greater than 10 per cent is considered to have capability to exert an influence on competition⁴⁹.

Section 8(4) FCA states that in determining whether the effect or likely effect of an agreement is to appreciably prevent, restrict or distort competition, the fact that similar agreements are widespread in a market affected by the agreement shall be taken into account. The provision should not be interpreted in a way that a conduct would not be classified as ‘appreciably’ affect-

ing competition if the conduct is widespread in the industry. Indeed, the anticompetitive effects of certain agreements can even be more pronounced if they are widespread in an industry as opposed to a single agreement. Therefore, the fact that similar agreements are widespread should be considered as an indication for the seriousness of the competitive concern. On the other hand, if there is a certain industry usage of the type of agreement under scrutiny, parties to the agreement may lack the consciousness of wrongdoing. In this way, the fact that the conduct is widespread might be treated as a mitigating factor to reduce any possible penalties. The FCC is yet to establish case law on this matter.

Section 8(5) which states that “this section does not apply to an agreement to the extent it provides for a merger” provides an interesting twist to Section 8(1). Can a merger be formed and allowed to stand if it does appreciably prevent or distort competition? The answer is actually yes as would be shown later under merger review. The Act does provide for exemptions as well as approval of mergers using the public interest.

Section 9 prohibits *per se*, the following:

(1) A person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is:

- (a) price fixing between competitors;
- (b) a collective boycott by competitors; or
- (c) collusive bidding or tendering.

(4) Any person who intentionally or negligently acts in contravention

of the provisions of this section, commits an offence, under this

Act.

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 violated the law. Only three hard core cartel provisions exist in the law, price fixing, collective boycott (or collective refusal to deal) and bid-rigging. Perhaps crucial omissions are market or customer allocation, and production quota allocation. Under the Act, the price-fixing, collective boycott and collusive tendering are defined as follows:

Conduct	Definition
Price Fixing	"price fixing between competitors" means to fix, restrict or control the prices, tariffs, surcharges or other charges for, or the terms or conditions upon which, a party to an agreement supplies or acquires, or offers to supply or acquire, goods or services, in competition with any other party to the agreement
Collective Boycott	"collective boycott by competitors" means: (i) to prevent a party to an agreement from supplying goods or services to particular persons, or acquiring goods or services from particular persons, in competition with any other party to the agreement; or (ii) to restrict or control the terms and conditions on which, or the circumstances in which, a party to an agreement supplies goods or services to particular persons, or acquires goods or services from particular persons, in competition with any other party to the agreement; (c) "output restrictions between competitors" means to prevent, restrict or control the production by a party to an agreement of goods or services to be supplied in competition with any other party to the agreement;
Collusive Tendering	"Collusive bidding or tendering" means: (i) to fix or control the prices or terms or conditions of any bid or tender by any of the parties to an agreement at an auction or in any tender or other form of bidding, in competition with any other party to the agreement; or (ii) to prevent a party to an agreement from making a bid or tender at an auction or in any tender or other form of bidding, in competition with any other party to the agreement.

Source: Section 9(2) of the FCA.

The law classifies the foregoing cartel offences as matters that are per se anticompetitive, as expressed by the title "Prohibition of certain agreements irrespective of their effect on competition". However, during the field visit some doubts as to this interpretation were voiced given that Section 9 refers to "*the object, effect or likely effect of the agreement*" which generally is an indication for the use of the rule of reason. However, it should be highlighted that while the general prohibition of Section 8 applies to an agreement "*if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition*" Section 9 does not include the criterion of an appreciable restriction of competition, but refers to specific types of hard core cartels. In this way, the formulation of Section 8 and Section 9 differ distinctively, which together with the title of Section 9 appears to justify the interpretation of Section 9 as a per se prohibition of the listed types of agreements.

Furthermore, the FCC will have to demonstrate that the agreement was done intentionally or negligently. This process for horizontal agreements of proving intention and negligence may have to be reviewed as it provides an unnecessary analytical process in proving a Section 8 case.

There are no criminal sanctions except fines of between 5 per cent and 10 per cent of turnover of an enterprises⁵⁰. There is need to expand the scope of the hardcore cartels. UNCTAD Model Law on Competition (2004) has proposed a list that the United Republic of Tanzania may borrow from, as follows:

- (a) Agreements to fix prices
- (b) Collusive Tendering
- (c) Market or customer allocation
- (d) Restraints on production and sale, including by quota
- (e) Concerted refusals to purchase
- (f) Concerted refusals to sale
- (g) Collective denial of access to an arrangement which is crucial to competition.

There would be need to review the fine regime so that it does not state 5–10 per cent rather be in a manner where it states that the fine "shall not be up to a maximum of 10 per cent" in order to accommodate lower fines where there may be leniency or other corroborating evidence.

Exemption Applications

Exemptions and exceptions are common in most competition legislations. Exceptions according to Section 14 have already been treated with under the scope of application of the FCA. As to exemptions, the FCA provides that the Commission may, upon the application of a party to an agreement, grant an exemption for that agreement, either unconditionally or subject to such conditions as the Commission sees fit, if the Commission is satisfied in all the circumstances that both paragraph (a) and (b) apply:

- (a) *the agreement either contravenes section 9 or has, or is likely to have, the effect*

of appreciably preventing, restraining or distorting competition; and

- (b) *the agreement results or is likely to result in benefits to the public in one or more of the following ways:*
 - (i) *by contributing to greater efficiency in production or distribution;*
 - (ii) *by promoting technical or economic progress;*
 - (iii) *by contributing to greater efficiency in the allocation of resources; or*
 - (iv) *by protecting the environment; and the agreement;*
 - (v) *prevents, restrains or distorts competition no more than is reasonably necessary to attain the benefits; and*
 - (vi) *the benefits to the public resulting from the agreement outweigh the detriments caused by preventing, restraining or distorting competition.*

Section 12(2) of the Act holds that the FCC may grant a block exemption, either unconditionally or subject to such conditions as the FCC sees fit, for all agreements falling within a class of agreements if the FCC is satisfied in all the circumstances that the agreement does not contravene Section 9 or has not, or is not likely to have, the effect of appreciably preventing, restraining or distorting competition. The period of the exemption is for a fixed period not exceeding 5 years.

It is noteworthy that conduct that is subject of block exemption is one which would not offend Section 9 of the Act, which deals with anticompetitive agreements that are hard core cartels/ per se anticompetitive. This is clear from the wording in Section 12(2). However, there appears to be a contradiction under Section 12(4) which states that:

An agreement exempted under this section is not prohibited by section 8 or 9 during the period of the exemption.

Where a block exemption was granted in contravention of Section 12 (2) of the FCA, it would simply have to be withdrawn. After the withdrawal, companies would have to adapt their agreements to the new legal situation. Based upon this read-

ing, subsection 4 actually does not contradict subsection 2 of Section 12 of the FCA.

Under PART VI of the Act (rule 59–61), the FCCPR have provided guidance on the procedures of handling exemptions. Furthermore, Section 68(1) of the Act stipulates that the FCC shall conduct a public inquiry before varying or revoking an exemption.

2.3.2 Misuse of Market Power

The concept of dominance or substantial market power limits the scope of application of most unilateral conduct laws. Making dominance or substantial market power a prerequisite for intervention under unilateral conduct laws serves as a filter for intervention against specific anticompetitive conduct⁵¹. Misuse of market power, or abuse of dominance, is a central theme in competition policy administration. The FCA contains the respective prohibition in Section 10. While the sub-heading under Section 10 denotes the wording “Misuse of market power”, the actual legislative text introduces “a person with a dominant position in a market and stipulates that such person 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 words “misuse” or “market power” have not been defined in the law, whereas the term dominant position is defined under Section 5 (6) of the Act:

(6) A person has a dominant position in a market if both (a) and (b) apply:

- (a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and*
- (b) the person's share of the relevant market exceeds 35 per cent.*

The provision ties both unilateral conduct and market share i.e. the conduct/behavioural and structural test are mutually inclusive. It is noteworthy that unlike some legislations that deal with “collective dominance”, dominance under the FCA is restricted to the conduct of a single firm. The legislative intention or perhaps the lacuna thereof may be dealt with under Section 8(1) which ap-

pears to capture the collective or concerted anti-competitive conduct – and to that extent Section 9. However, for future clarity, there would be need to have a specific provision to deal with collective dominance.

Generally, dominance is better dealt with under a rule of reason basis than strictly tied to the market share of a firm. Hence, under the UNCTAD has recommended that “Dominant position of market power” refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services (Model Law on Competition).

The following illustration of the concept of the abuse of a dominant position was given in a case of *Serengeti Breweries Limited v Tanzanian Breweries Limited*.⁵²

The main difference between the provision of Section 10(1) and of Section 8(1) of the FCA, 2003 is that, Section 10(1) centres on the object, effects or likely effects of the conduct of the dominant firm within the market, while section 8(1) is based on the agreements.

For clarity, a dominant position is defined under Section 5(6) of the FCA, 2003 to mean either a person is acting alone in the market, that is the person can profitably and materially restrain or reduce competition in that market for a significant period of time; or the person's share of the relevant market exceeds 35 per cent.

For that reason it is clear that a dominant person is presumed to have economic strength which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers. The two main elements provided under the provision of Section 5(6) are the person's ability to prevent, restrict and distort competition and the ability of the dominant firm to behave independently.

Section 10 proceeds further to address the concept of “misuse of market power” in the following manner:

10(1) 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.

(2) If the Commission has granted an exemption under section 12 for an agreement, conduct of a person in making or giving effect to that agreement is not prohibited by this section during the period of the exemption.

(3) For the purposes of subsection (1), an object is the object of conduct if it is a significant object of the conduct even if it is only one of a number of objects

(4) Any person who intentionally or negligently acts in contravention of the provisions of this section, commits an offence.

The Commission does not have specific guidelines on how to deal with misuse of market power 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. As the law does not specify instances of abuse of market power such as excessive pricing or predatory pricing, the Commission has a greater latitude to include anything that would be deemed to be an “abuse” or “misuse of market power”. However, competition law best practices and jurisprudence have a closed than open-ended list. The advantage of not stating the abuse instances for a competition authority is that it widens their ability to deal with all possible instances of abuse. The downside is that the lack of the law providing for those express instances is that it makes the law less transparent and certain for business. UNCTAD Model Law on Competition may be a useful reference point for inclusion of more elaborate provisions to deal with misuse of market power.

In Case 2 of 2009, *Serengeti Breweries Limited v Tanzanian Breweries*, the Commission used international case law to determine what it would classify as instances of “misuse of market”, as follows:

In order to breach the provision of Section 10(1), FCA, 2003 it must be established that the particular firm is in a dominant position and the particular conduct is anticompetitive due to misuse of that dominant position. Misuse of dominance positions include practices like excessive pricing, price discrimination, refusal to supply, tying practices, price predation, exclusive conduct and other barriers to market entry.

The Commission would like to provide an elaboration of some of these practices as follows:

- (i) Excessive pricing is the practice whereby a dominant firm sells at a higher price than would be the case in a fully competitive market.*
- (ii) Under discriminatory pricing the firm sells the same product at different prices to the customers within the same market.*
- (iii) Refusal to supply appears when a dominant firm refuses to supply goods or services for the purpose of forcing its customers to buy at a higher price or under conditions favourable to it.*
- (iv) Tying happens in two ways: first where the dominant firm which has an essential facility charges a higher price for its use (for example a ship docks charging higher prices for ship owners), and second, through "portfolio power". Under portfolio power, the large supplier selling to the retailer has the power of offering the retailer his full range of products and the retailer is then forced to make few purchases from other suppliers. It is likely that if the other suppliers are small they may be forced out of the market altogether.*
- (v) In predatory pricing the dominant firm sets the price low forcing competitors to lower their prices also. After the competitors have lowered their prices and incurred losses or even closed their businesses as a result, the dominant firm then raise its prices again, facing less or no competition.*

The foregoing listing is not exhaustive, and debatable as it is not inscribed in the law or in any of the Commission's publicly accessible guidelines.

2.3.3 Merger control

The rationale for merger control has been widely endorsed through competition law, and the FCA captures merger control as well. Several academicians and scholars have addressed the issue of merger control, which has been rightly regarded to have several aims. The core purpose is understood to generally be thought that its core purpose is to ensure that mergers do not jeopardize conditions for competition. Should the focus of merger policy be on preserving competition, protecting consumers or preserving economic efficiency?... On the other hand, are there situations where consumers benefit notwithstanding a reduction in competition? Is it ever possible that economic efficiency is enhanced despite a reduction in both competition and consumer benefits?⁵³.

The legal basis for the Tanzanian merger control system is contained in Sections 11 and 13 FCA which are complemented by merger guidelines adopted by the Commission. The definition of mergers is contained among the definitions provided for by Section 2 FCA and reads as follows:

"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.:

In this context, the Merger Guidelines by the Commission distinguish three types of mergers that it would look at i.e. horizontal, vertical and conglomerate mergers.⁵⁴

Section 11(1) of the Act brings out the substantive test for merger review which reads as follows: *"A merger is prohibited if it creates or strengthens a position of dominance in a market"*. This appears to take the approach of a structural paradigm as opposed to a behavioural one for mergers. As mentioned previously, the dominance test is laid under Section 5(6) as follows:

A person has a dominant position in a market if both (a) and (b) apply:

- (a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and*
- (b) the person's share of the relevant market exceeds 35 per cent.*

The above (a) and (b) must be mutually inclusive. The first test for the merger under (a) is based on

a rule of reason approach where the Commission considers the ability of a single firm to “profitably” and “materially” restrain or reduce competition (in that market) for a “significant period of time”. In the event of the merger, where two firms are combining their market influence, the single-firm exist post-merger and the Commission would have to simulate that the future merged entity’s capability to profitably and materially restrain or reduce competition.

In addition, the Commission has to prove that the merged entity’s share of the market exceeds 35 per cent. In other words, even if the Commission would prove under (a) that the firm does profitably and materially affect competition, it would not be sufficient to merit the rejection of the merger by the Commission. The next step would be to show whether this firm that is profitably and materially affecting competition has a market share exceeding 35 per cent. Strictly speaking, subsection (a) should be considered as sufficient ground to reject a merger and not, *in addition*, whether the firm’s market share is beyond 35 per cent. The issue should rather be whether the merged entity can profitably or materially affect competition. What happens after the analysis shows an effect on competition but the firm’s post merger market share is 34 per cent? The law prevents the FCC from prohibiting such a merger.

With respect to the substantive test provided by Section 11(1) and Section 5(6) of the Act, the Commission *Merger Guidelines* identify three scenarios that will eventually dictate the verdict of the merger application.⁵⁵ The scenarios are as follow:

(i) *Post Merger Firm’s Market Share below 35 per cent*

Most of such merger applications are approved during the first stage of analysis that is within 14 working days, as they are unlikely to prevent, restrain or distort competition, but to the contrary bring economic efficiencies. While in the *Merger guidelines*, the FCC has recognized that there are certain grounds that may raise substantial competition concerns, which necessitate further request for information and hence full analysis that takes up to 90 days, the FCA does not allow to block mergers where the combined post merger market share is below 35 per cent.

(ii) *Post Merger Firm’s Market Share above 35 per cent and Acting alone the Firm can not substantially restrain Competition*

In the event that the post merger firm’s market share exceeds 35 per cent, the Commission can still approve a merger provided that parties to the merger demonstrate to the Commission that acting alone the post merger firm cannot profitably and materially restrain or reduce competition in the market for a significant period of time. In considering approval of such a merger with regard to firm’s inability to profitably and materially restrain or reduce competition in the market for a significant period of time, the Commission shall consider the following factors:

- (a) The Number and Size of Participants In the Market
- (b) Barriers to Entry
- (c) Vertical Integration
- (d) Availability of Alternatives to the Services or Goods Provided by the Merging Firms
- (e) Efficiencies i.e. Static Efficiencies (cost savings); Dynamic Efficiencies (technological innovations) and Pecuniary Efficiencies (lower taxation or input costs as a result of improved bargaining power).
- (f) Effect of the Proposed Merger to Consumers, Competition and the Economy (e.g. likelihood of sustained price increases, the removal of adequate alternative supplies, the protection of inefficient operations or the likelihood of making excessive profits, etc)

(iii) *Post Merger Firm’s Market Share above 35 per cent and Acting alone the Firm can substantially restrain Competition*

If the post merger market share exceeds 35 per cent and acting alone the firm can profitably and materially restrain or reduce competition in the market for a significant period of time, then it is prohibited according to Section 11 (1). However, the applicant may apply for an exemption according to Section 13 in order to effect the merger.

In terms of the details of the notification process under the FCA⁵⁶, a merger is notifiable if it involves turnover or assets above threshold amounts set by the FCC. The gazetted threshold is of Tanzanian Shillings 800 million.⁵⁷ If within 14 days after receipt of a notification of a merger, the FCC determines that the proposed merger should be examined, the merger

shall be prohibited for a period of 90 days, which can be extended for a period not exceeding 30 days. A person shall not give effect to a notifiable merger unless it has, at least 14 days before doing so, filed with the Commission a notification of the proposed merger supplying such information as the Commission may require to be included in such notification. Any person who intentionally or negligently acts in contravention of these provisions commits an offence under the FAC. Further details on the merger review procedure are provided below.

Section 11(6) provides immunity to a person who does not intentionally or negligently act in contravention of the merger notification provisions. The Commission does not have guidelines as to how to determine such instances of non-intentional and non-negligent acts. Comprehensive rules of procedure for administrative handling of notified mergers are gazetted in the 'Fair Competition Commission Procedure Rules, 2010'.

Exemptions to Mergers

Mergers that are likely to create or strengthen a dominant position can be exempted according to Section 13 of the Act if there is an overriding public interest. Not all mergers are premised on anticompetitive conduct. To the contrary, there are mergers intended to improve efficiency and provide goods and services cheaply to the consumer. Such mergers in industrialized countries like Europe are exempted⁵⁸ ...

The FCC may, upon the application of a party to a merger, grant such exemption for that merger, either unconditionally or subject to such conditions as the FCC sees fit if the merger results or is likely to result in benefits to the public in one or more of the following ways:

- (i) by contributing to greater efficiency in production or distribution;
- (ii) by promoting technical or economic progress;
- (iii) by contributing to greater efficiency in the allocation of resources; or
- (iv) by protecting the environment and the merger:
- (v) prevents, restrains or distorts competition no more than is reasonably necessary to attain those benefits; and

- (vi) the benefits to the public resulting from the merger outweigh the detriments caused by preventing, restraining or distorting competition; and
- (vii) in the case of a merger resulting in the change of control of a business, the business faces actual or imminent financial failure and the merger offers the least anticompetitive alternative use of the assets of the business.

When granting an exemption under this section the FCC shall fix a period, not exceeding one year from the date the exemption is granted, as the period of the exemption. The FCC may revoke or vary an exemption at any time during the period of the exemption if it is satisfied that circumstances since the grant of the exemption have materially changed or the exemption was granted wholly or partly on the basis of false, misleading or incomplete information.

Cross-border mergers

Paragraph 2.4 of the *Merger Guidelines*, "cross-border mergers" are introduced as 'a transaction in which the assets and operation of two firms belonging to or registered in two different countries are combined to establish a new legal entity'. As the United Republic of Tanzania is a partner State of the East African Community, which has a supra national "East African Competition Act, 2006". This Act provides that all competition issues with cross-border effect are subject of the jurisdiction of the EAC. Under Article 4 of the EAC Competition Law, it states that "the Act shall apply to all economic activities and sectors having a cross-border effect."

2.3.4 Consumer Protection

The legislation has comprehensive consumer protection provisions, which appear to be inspired from the *Trade Practices Act 1974* of Australia. Reading through the law, it shows that there are only six sections (in one part) dedicated to the core competition restrictive business practices out of a total of 40 sections in 7 parts. Part III to Part IX include provisions on consumer protection relating to misleading and deceptive conduct, unfair business practices, unconscionable conduct, implied conditions in consumer contracts (the largest

portion, with 10 Sections), manufacturer's obligations, product safety, and product recall.

The consumer protection provisions are quite expansive and therefore would require a separate comprehensive review. For purposes of the peer review of competition law and policy of the United Republic of Tanzania, this report is restricted to reviewing the counterfeit products vis-à-vis competition on one hand, and counterfeit products and consumers on the other, see part 3 of the present report.

2.4 Procedural Issues

2.4.1 Investigation of anticompetitive agreements

As regards the investigation of potentially anticompetitive agreements, two scenarios need to be distinguished: (i) the parties to the agreement apply for an exemption according to Section 12 (1) FCA, or (ii) in absence of such application the Commission has intelligence about a potentially anticompetitive agreement. With respect to the latter case, Section 69 of the Act stipulates that the FCC may initiate an investigation against a prohibited practice on its own initiative i.e. *ex officio*. In addition to this, any person may submit information in any form or in a prescribed form, which is prescribed under Form FCC1 of the FCC Procedural Rules (FC-CPR). There is no clarity as to what the difference is between "information" to be submitted in any manner or form or a "complaint" to be submitted in Form FCC1. This form is a public record but portions of it may be made confidential. The granting of two options for the complainant, more so stating "in any manner or form" affords the majority of Tanzanians to lodge complaints with the Authority. Lodging a complaint is further, a free process for the complainant.

Under Rule 10(2) and (3) of the FCCPR, the Department of Investigation then reviews the complaint to determine whether:

- (a) the case falls under the Act
- (b) there are material effects on competition
- (c) it is worth devoting investigation resources
- (d) the complaint, in whole or in part, is before any court, tribunal, arbitration, etc.

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 FCC. Where the complaint is not entertained, the complainant is furnished with the reasons, which decision may be referred to the Commission adjudicative wing if the complainant so desires.

The Investigation department carries out investigations on all the approved cases and refer its findings to the Director-General. Where the decision is to enforce, the decision shall be made by the adjudication of Commission members. Through, *inter alia*, Rule 58 of the FCCPR, persons have a right to be heard before certain determinations are made. In terms of timelines for each step, they are largely *ad hoc* and depend on the gravity of the case.

There would appear to be a serious flaw in the investigation and adjudication process, where the Director-General of the FCC may be the initiator/approver of an investigation, preside over the administration of the investigation, receive and amend the investigation reports accordingly, and then sit together with the other Commission members and be part of the adjudicative process. This may be a possible case of constitutional challenge and would require legal review.

2.4.2 Determination of exemptions

Under Part VI, Rule 59 of the FCCPR, a person may apply for exemption of an agreement or all agreements falling within a class of agreements under section 12(1) of the Act in a prescribed form by filing an application in Form FCC.3 set out in the First Schedule to these Rules. Upon receiving an application in subrule (1). Before granting or revoking an exemption under section 12 of the Act, the FCC-

- (a) shall give a notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption;
- (b) shall give interested parties thirty working days from the date of that notice to make written representations as to why the exemption should not be granted or revoked;
- (c) may request further information from any person who submits a representation in response to a notice published under (a) and
- (d) may conduct an investigation into the agreement or class of agreements concerned.

Where the FCC determines that an application under Rule 59 does not concern a prohibited practice as contemplated by section 12 of the Act, the FCC shall issue a notice of refusal to grant an exemption on Form FCC.5; the FCC may later withdraw its notice of refusal to grant an exemption, by issuing notice to the applicant at least thirty working days before the withdrawal will take effect; and (ii) providing the applicant with written reasons for its action.

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). The Commission may request further information from the person concerned; or any person who submits a representation in response to a notice published in terms of Rule 59 (9).

As regards block exemptions, Section 68(2) of the Act stipulates that the FCC shall conduct an inquiry before exercising a power to grant, revoke or vary a block exemption under Section 12(2) of the FCA.

For the matter of completeness, it should also be mentioned that companies that wish to benefit from the exception provided by Section 14 (3) FCA for export agreements, need to file the respective agreement with the Commission within 21 days after the conclusion of the respective agreement. This filing requirement is also reflected in the FCC's "Guidance on Competition Law" of July 2006.

2.4.3 Investigation of misuse of market power

The process of investigating a case of misuse of market power follows the same principle as for all other complaints in the FCCPR. 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 prescribed 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 *Serengeti Breweries Limited v Tanzanian Breweries Limited* contains a non-exhaustive list of examples inspired by international case law.

2.4.4 Review of mergers

Part V of the FCCPR contains detailed processes of assessing mergers. A notification process is commenced with Form 8 and payment of a statutory fee. Where there is any claim of confidentiality on the merger notification is to be supported by a written statement on Form FCC2⁵⁹. As contained under section 11 and 13 of the Act, a merger cannot be implemented until after the FCC has determined the matter. Mergers in the United Republic of Tanzania are neither referred to the Minister nor to the Tribunal.

Under Rule 44 of the FCCPR, within five working days after receiving a Merger Notification, the Director of Compliance shall deliver to the filing firm in a prescribed form (a) Notice of Complete Filing on Form FCC11; or (b) Notice of Incomplete Filing on Form FCC.12.

Where the Commission determines that the merger shall be examined, or otherwise not prohibited; it shall notify the person within the initial period i.e. within 14 days allowed by section 11(3) of the Act to determine whether the merger shall be examined.⁶⁰ The proposed merger shall be examined for a period of ninety days. An extension period of thirty days granted by the Commission under section 11(4)(a) of the Act begins on a working day following the date on which the ninety days period expires; or in the case of second or subsequent extension granted under section 11(4)(b) of the Act, on the working day following the date on which previous extension expires.

The Investigation Department shall investigate the merger with a view to establishing whether it has any major economic impact. The provisions on investigation under Part IV of the FCCPR identified earlier shall apply *mutatis mutandis* to investigations conducted under this Rule.

There seems to be an injustice under Rule 53 that where the Investigation Department has indicated on 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 fee, the FCC may consider reviewing this and perhaps retaining a small amount for administrative expenses incurred.

Under Rule 55 (read in context with Rule 57) where the FCC intends to take a decision to revoke its own decision it shall give the notifying parties who have so requested in their written comments the opportunity to submit their arguments in a formal oral hearing; and other involved parties who have so requested in their written comments the opportunity to submit their arguments in a formal oral hearing.

When dealing with a merger, the FCC shall consult all relevant stakeholders that may be critical to the determination of the merger. For purposes of the right to be heard, in a notified merger, the following parties for instance are considered critical:

- (i) a notifying party
- (ii) other parties to the notified merger
- (iii) third parties such as customers, suppliers, competitors
- (iv) administrative or management officials of firms, representatives of employees
- (v) consumer associations (where the proposed merger concerns products or services used by final consumer).

2.4.5 Inquiries according to Section 68 FCA

Section 68 of the FCA empowers the FCC to 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 (which deals with exemptions). The Minister may also require the FCC to inquire into a matter specified in the direction and may specify in such direction 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 between the FCC and the political establishment. 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 body⁶¹. The FCC shall give notice of any such inquiry by:

- (a) publishing a notice in the Gazette and in a daily newspaper circulating generally in the United Republic of Tanzania

(b) sending written notice of the inquiry to:

- (i) undertakings whose interests the Commission considers are likely to be affected by the outcome of the inquiry;
- (ii) the National Consumer Advocacy Council
- (iii) Industry and consumer organizations which the Commission considers may have an interest in the matter
- (iv) The Minister⁶².

Where hearings are held, the FCC through its FC-CPR has adopted an inquisitorial than adversarial procedure⁶³.

2.4.6 Investigative Powers

An important procedural aspect for a competition authority is the process of collecting information. While most of the information collected by the FCC is voluntarily submitted, 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:

- (a) *to furnish the information in writing signed by him, in the case of a body corporate signed by a competent authorized officer or a legal officer of the body corporate;*
- (b) *to produce the document to the Commission;*
- (c) *to appear before the Commission to give evidence orally.*⁶⁴

While Section 71 of the FCA does not indicate whether the person so summoned will first have refused to provide such information, it would be a matter of course that before the FCC issues such a summon, the suspect should have refused to voluntarily submit the information. The FCC Procedure Rules at Rule 13 thereof do not state the circumstances when such summons would be issued.

Generally, the FCC has not had problems in receiving the information it requires, except in cartels where, since its inception, the FCC has not successfully investigated a cartel case. However, this is not for reason of suspects refusing to furnish information, rather by reason of the secrecy associated with cartel conduct.

Where the FCC issues a summons, such document shall specify the required time and manner of compliance. The Commission may require that any evidence referred to under this section be given on oath or affirmation and, for this purpose, the Chairman, the Director-General or any member of the FCC may administer the oath or affirmation. However, a person shall be excused from complying with a summons under this section on the grounds that compliance may tend to incriminate the person or make the person liable to a penalty, save that information, documents and evidence provided in answers to a summons will not be admissible in any proceedings against the person other than proceedings under this Act.

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, the Chairman, the Director-General or any member of the FCC, may apply to the Tribunal who, acting through the Chairman, shall issue a warrant authorizing any police officer, accompanied by staff of the Commission duly authorized by the Chairman of the FCC to enter premises to conduct a search and make copies or take extracts of documents therein.

Under Section 71, the FCC has a power to summon a person or information vested in the Director-General. The Director-General or any member of the FCC may apply to the Tribunal for a warrant authorizing police officers, accompanied by FCC staff (authorized by the Chairman) to search premises.

Furthermore, under Section 70, at anytime, whether or not a hearing into an alleged prohibited practice, has commenced the complainant may apply to the FCC for an interim order in respect of the alleged practice. The FCC -

- (a) shall give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
- (b) may grant an interim order if it is reasonable and just to do so, having regard to –
 - (i) the evidence relating to the alleged prohibited practice;
 - (ii) the need to prevent serious or irreparable damage to the applicant; and
 - (iii) the balance of convenience.

In its “Guidance on Competition Law” of July 2006, the FCC has advised as follows:

It is hardly necessary to add that it will be in the interest of companies to be alert to opportunities to apply to the Commission for interim orders or compensatory orders... when they think that they have been harmed by the practices of other companies and where the Commission has found (or might find) those practices to be in breach of the law.

2.5 Sanctions

The sanctions imposed for infringing the Fair Competition Act range from “compliance orders”, “compensatory” orders to fines. These are itemized under PART X of the Act. Under Section 57 of the Act, a person shall not: (a) aid, abet, counsel or procure; (b) conspire with others to commit; (c) be directly or indirectly knowingly concerned in; an offence against this Act by another person (in this section referred to as the “primary offence”). In this context, a person who commits an offence against subsection (1) is “involved” in the primary offence.

Compliance orders are an extension of what in other jurisdictions are referred to as “cease and desist”. The context in which they are used under the Fair Competition Act does not end with “cease and desist” orders but with a directive to perform a certain act. On the other hand, the “compensatory” order appears to be instances where either a complainant/injured party has demonstrated certain injury/damage caused and the Commission metes out such compensation. These are explained in detail below.

2.5.1 Compliance Orders and Compliance Agreements

Where the FCC is satisfied that a person has committed or is likely to commit an offence against this Act (other than Parts VI or VII of the FCA which deal with “implied conditions in consumer contracts” and “manufacturer’s obligations” respectively), it may make a compliance order under this section against that person and any person involved in the offence. Further, a person against whom a compliance order is made commits an offence if that person fails to comply with the order. A compliance order may require a person to refrain from

conduct in contravention of this Act or to take actions to comply with this Act, and shall specify the time for compliance with the order and the duration of the order. The FCC may make an interim compliance order pending a proper consideration of a matter if the Commission is of the opinion that there is an imminent danger of substantial damage to a person if a threatened or likely offence is committed or there are other good reasons for making such an order⁶⁵.

Under Section 58(5), the FCC has the powers to order a divestiture. Where the FCC is satisfied that a person has acquired shares or other assets in breach of section 11(1) on mergers, the Commission may make an order at anytime within three years after the acquisition: requiring the acquirer to dispose of some or all of the shares or assets within such time as the Commission specifies in the order; or declaring the acquisition to be void, requiring the acquirer to transfer some or all of the shares or assets back to the person from whom the acquirer acquired the shares or assets and requiring the vendor to refund to the acquirer some or all of the amounts received by the vendor in respect of the acquisition, as the Commission specifies in the order.

FCC entered into one Compliance Agreement with East Africa Breweries Limited which involved a fulfilment of the merger condition. This Compliance agreement involved a merger transaction between East African Breweries Limited (EABL) and Serengeti Breweries Limited (SBL). EABL was required to offload its shares within Tanzania Breweries Limited before it would consummate its merger. This condition took a longer time to be implemented thus led to FCC and EABL entering into an agreement whereby a time was specified in which EABL would have to fulfil the condition.

Where the Commission is satisfied that a person has committed an offence against this Act (other than under Parts VI and VII dealing with implied conditions in consumer contracts and manufacturer's obligations respectively), the Commission may order that person to publish, in such manner and within such time as the Commission sees fit, such information as Director-General considers appropriate relating to the offence. A compliance order is made in writing specifying the grounds for

making the order. In Case 2 of 2009⁶⁶, the Commission ruled thus:

That pursuant to Section 58(1) and (3) Tanzanian Breweries is hereby 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. Bank of Africa*, the Commission issued a compliance order to Bank of Africa for failure to notify a merger. The compliance order entailed the bank publishing a notice of compliance to the public (in a newspaper) a report expressing to the public how failure to notify their merger was inconsistent with the Act⁶⁷.

The Commission may enter into an agreement in writing, i.e. a "compliance agreement", whereby a person undertakes to the Commission to refrain from conduct in contravention of this Act from a date, and for a period of time, specified in the compliance agreement or for the disposal of shares or assets and other matters, on such terms and conditions as the Commission deems appropriate. A compliance order shall be enforceable as an order of the High Court.

2.5.2 Compensatory Orders

Under Section 59, any person who suffers loss or damage as a result of an offence against this Act (other than under Parts VI or VII dealing with implied conditions in consumer contracts and manufacturer's obligations respectively⁶⁸) may apply to the Commission for compensatory orders under this section against the person who committed the offence and any person involved in the offence, whether or not they have been convicted of the offence. Such application may be made at any time within three years after the loss or damage was suffered or the applicant became aware of the offence, whichever is the later⁶⁹. This is in contrast to the substantive provision under Section 60(8) of the Act which gives the Commission the leeway to act upon an offence any time within six years after the commission of the offence.

The law is silent about whether the Commission can at its own initiative, issue a compensatory order. For deterrent purposes and in the event that the case under review was commenced by the

Commission *ex-officio*, it may be prudent that the Commission should have the power to invoke a compensatory order more so when dealing with the weaker parties such as children, the elderly or the illiterate.

The compensatory orders are made against the person who committed the offence and any person involved in the offence (i.e. "respondents") as the Commission considers appropriate to compensate the applicant for the loss or damage suffered by the applicant or to prevent or reduce such loss or damage, including the orders below:

- (a) an order requiring the respondents to pay money;
- (b) an order requiring the respondents to supply goods or services for specified periods or on specified terms and conditions;
- (c) an order declaring void, terminating or varying a contract;
- (d) an order requiring the respondents to pay the costs of the applicant or of a person appearing at the hearing or producing documents.

According to Section 59(5) and (6) of the Act, any person against whom a compensatory order is made commits an offence if that person fails to comply with the order. Any person who suffers loss or damage as a result of breach of a condition or warranty implied under Part VI or a manufacturer's obligation under Part VII may seek a relief in a Court of competent jurisdiction but shall not seek, and the Commission shall not grant, a compensatory order under this section. Orders of the Commission under this section shall be enforceable as orders of the High Court⁷⁰.

2.5.3 Fines to corporate bodies

Under section 60(1) of the Act, the Commission may impose fines. These fines may be in addition to a compliance and/or a compensatory order (but there is interestingly no fine for disobeying a compliance or compensatory order). The minimum fine is 5 per cent and the maximum 10 per cent of annual turnover of the enterprise in the United Republic of Tanzania. It appears that the minimum fine of 5 per cent of the annual turnover may be too high in cases where the anticompetitive conduct only concerns 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.

The Commission has not been shy to use this power before. In Case 2 of 2009, the Commission ordered Tanzanian Breweries Limited to pay 5 per cent of its turnover as fine for misusing its market power. The Commission ruled thus:

That pursuant to Sections 60 (1) and 78(1)(f) of the Fair Competition Act, 2003, and Rule 41 of the Fair Competition Procedure Rules, 2009, Tanzania Breweries Limited is ordered to pay a fine of 5 percent⁷¹ of its turnover for the year of their latest audited accounts for the offences of entering into anticompetitive branding agreements with outlet owners and removing Serengeti Breweries Limited posters and signage.

Fines have also been meted out against the Tanzanian Cigarette Company Limited, which acquired a competitor without prior authorization by the Commission. Another fine of TZS 3.9 billion was imposed on East African Breweries Limited for offloading its shares in Tanzanian Breweries without the authorization of the Commission.

The Commission has otherwise been generally known by the public for imposing and collecting fines under the Merchandise Marks Act on counterfeit products. Criticism has been that the fines appear to be focused on suspected imported counterfeit products, while locally produced products are not consistently targeted.

The offences under the Act for breaching the law are aimed at having a deterrent effect. Where a person commits an offence against the Act (other than under Part VI, Part VII or sections 58, 59 or 88 of the FCA) or is involved in such an offence, the Commission may impose on that person a fine of not less than five percent of his annual turnover and not exceeding ten percent of his annual turnover.

In the event that the Commission is satisfied that a monetary value can reasonably be placed on the damage including loss of income suffered by a person as a result of an offence against this Act, the convicted person shall, in addition to any other penalty which may be imposed, be liable to a fine of two times such monetary value, which the Commission shall order to be paid to the person suffering the damage⁷².

2.5.4 *Fines to shareholders, directors and officers*

Where a person charged with an offence under this 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 he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence⁷³. However, the penalties for such officers are not spelt out in the law.

Further, any partner of a firm shall be jointly and severally liable for the acts or omissions of any other partner of the same firm done or omitted in the course of the firm's business.

A person who contravenes section 15 (dealing with misleading or deceptive conduct); section 16 (i.e. on false and misleading representations); warranty implied under Part VI or a manufacturer's obligation under Part VII is not liable to fines under this section but may be subject to compliance orders under section 58 and compensatory orders under section 59⁷⁴. It is not clear why this is the case (i.e. lack of fines) and it evidently makes the enforcement of these provisions problematic.

It is not clear how the Commission would fine shareholders, directors and managers as under Section 60(1) the penalty is tied to a fine based on turnover and under Section 60(2) it is tied to a "fine of two times" the monetary value of the damage or loss suffered by a person.

2.6 Statutory Limitations

Section 60(8) of the Act limits the statutory role of the Commission in cases. It holds that the Commission may act upon an offence at any time within six years after the commission of the offence. In some countries such as Zambia, there is no statute of limitations in case of a criminal offence but on civil offences it may for a maximum period of 6 years. The the United Republic of Tanzania competition law does not have criminal sanctions in its competition law. All the countries in the region have criminal sanctions on hardcore cartel.

In terms of mergers, the Commission has a limit of 3 years to deal with a merger after its implementation without formal notification to the Commission. Thus, a compliance order against a merger cannot be effected after three years⁷⁵. This robs the Commission of the opportunity to deal with mergers that produce undesirable industrial structures and potential harmful effects on competition and consumers. Other than monitoring such a merged entity's market behaviour, the Commission would also be understood to be precluded from entering into any compliance agreement.

It would be assumed that except for mergers, other offences may be a subject of a compliance order up to a maximum of 6 years after the commission of the offence.

While compliance orders, except for merger cases, may be issued up to a maximum period of 6 years, compensatory orders can only be issued within three years after a person "suffered loss or damage" or after "knowledge" of the offence by the applicant. Section 59(2) of the Act is clear that an application for a compensatory order "may be made at any time within three years after the loss or damage was suffered or the applicant became aware of the offence, whichever is the later". It is reasonable to assume that for a compensatory order, the offence may have been committed way beyond the three years and it is possible that the order by the Commission may be made way beyond the three year grace period.

It is not clear why the Commission was omitted from proactively seeking compensation on behalf of injured parties, especially consumers. Again, there seems to be no legislative rationale for the difference in dealing with compliance and compensatory orders under the Act.

2.7 Enforcement record

Considering the plethora of functions for the FCC under Section 65, and the extensive provisions dealing with consumer protection, the FCC does not appear to have a lot of 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 one (1) anticompetitive case; approved 7 mergers; and 26 cases of counterfeit goods impounded/destroyed⁷⁶. A comparative analysis of the case load is as follows:

SUBJECT AREA	2008/9*	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 CASE	38	9	23

Source: *From the 2008/9 Annual Report; the other figures as submitted by FCC.

At the end of 2011, there were complaints which were pending before the FCT as follows:

- (i) Fair Competition Commission (FCC) Vs Tanzania Cigarette Company (TCC) Complaint: This Complaint has been stayed waiting for the Miscellaneous Application by TCC before the High Court of the United Republic of Tanzania challenging constitutionality of the Commission in terms of it being an investigator, prosecutor and adjudicator.
- (ii) Baraka Stores V. Mabibo Wines & Spirits & TRA. The Complaint is still pending to the Commission after the Order of the fair Competition Tribunal for trial *de novo*.
- (iii) Global Outdoors Systems & Others V TANROAD. The Commission registered settlement out side the Commission by the parties i.e. before the case was taken for adjudication.
- (iv) Tanzania Breweries Limited Vs Serengeti Breweries and Fair Competition Commission (Consolidated Appeals Nos.4&5 at FCT): This appeal is still pending before FCT and parties were submitting skeleton of written submissions ready for hearing. The parties have contended that the Commission is illegally constituted and thus its decision against them should be annulled.

Almost all the cases are based on technicalities than on the substantive matters that touch on the elements of the United Republic of Tanzania's competition law.

3.0 ANTI-COUNTERFEITING UNDER THE MERCHANDISE MARKS ACT

Anti-counterfeit function of the FCC is an important public policy activity in the United Republic of Tanzania. With its long trading history, the United Republic of Tanzania's coastline also plays as an entry and exit point for a number of countries in eastern and southern Africa. The country's reputation as a trustworthy trade facilitator is important to keep. From the discussions held during the preparation of this assessment report, the FCC is actually more widely known by the general public as the "institution that deals with counterfeit products". The Commission's role in this area has been "scrupulous" and the media have tended to give this function more prominence than the core aspects of competition law – except occasionally on mergers.

It is worth noting from the outset that the counterfeit functions of the FCC are not covered under the FCA but under the Merchandise Marks Act (MMA) of 1963 which was passed by the Parliament of Tanganyika (i.e. before the union with Zanzibar). It is clear from its name and functions that the FCC was intended to deal with everything that affects "fair competition". The concept of fair competition is wider than the standard usage in the core elements of competition law. It is thus not surprising that the "Fair Competition Commission" has been assigned responsibilities to deal with counterfeit products that create an unfair competition landscape as well as have potential harmful effects on consumers.

The purpose clause of the MMA states that it is a law to control use of Marks and Trade Descriptions in relation to merchandise. The MMA contains important definitions such as the following:

"false name or initials" means, as applied to any goods, any name or initials of a person which –

- (a) are not a trade mark, or part of a trade mark; and
- (b) are identical with, or colourable imitation of, the name or initials of the person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials; and
- (c) are either those of a fictitious person or of some person not *bona fide* carrying on business in connection with such goods.

“false trade description” means a trade description which is false or misleading in material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description false or misleading in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description from being a false trade description within the meaning of this Act.

“goods” means anything which is the subject of trade, manufacture or merchandise.

“inspector” means any person appointed by the Minister to be an inspector for the purposes of this Act.

By policy direction, the Director-General of the FCC was appointed by the Minister to be the “Chief Inspector” for the MMA. The functions of such inspector are substantially to inspect, seize and destroy goods suspected and proved to be counterfeits. Under Section 2 of the Merchandise Marks Regulations (MMR) of 2008⁷⁷, the following terms are defined:

“Counterfeiting” means with the authority of the owner of any intellectual property right subsisting in the United Republic of Tanzania or elsewhere in respect of protected goods –

- (a) the manufacturing, producing, packaging, repackaging, labelling or marking, whether in the United Republic of Tanzania or elsewhere, of any goods whereby those 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;
- (b) the manufacturing, producing or making, whether in the United Republic of Tanzania or elsewhere, the subject matter of that intellectual property, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner, or any goods manufactured, produced or made under his licence;
- (c) the manufacturing, producing or making of copies in the United Republic of Tanzania or elsewhere in violation of authors rights or related rights.

“Counterfeit goods” or “pirated goods” of “offending goods” means goods available as a result of counterfeiting or piracy, and includes any means used for the purposes of counterfeiting or piracy.

“Piracy” means the illicit, prohibited or unauthorized copying of any intellectual property right on or over goods for the purpose of trade.

Under Regulations 4–5 of the MMR, the Chief Inspector is clothed with powers to, *inter alia*:

- (a) conduct an investigation on any breaches of the Act and request assistance of a police officer or any public officer;
- (b) detain or seize any goods which he reasonably suspects to be counterfeit goods; and
- (c) issue a receipt in respect of detained or seized goods under this Regulation;
- (d) conduct a public inquiry;
- (e) issue a summons
- (f) delegate in writing any of his functions to a public officer or public institution.

For purposes of carrying out these wide powers, the Minister may, on the advice of the Chief Inspector, establish regional offices in such places as he may think appropriate for the purposes of the better implementation of the Act⁷⁸.

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 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. At regulation 51, a person dissatisfied with a decision of the Chief Inspector may appeal to the Fair Competition Tribunal.

3.1 Counterfeits and Competition

There has been criticism that the MMA and the FCC for that matter are concerned largely with goods imported into the United Republic of Tanzania and not goods manufactured locally 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 MMR has a regulation on frivolous complaints, it is again a self-defeating process as the whole MMA is based on “reasonable suspicion”. Regulation 23 may still be a deterrent for frivolous complaints aimed at frustrating competition. The Regulation states that, “Where it is deemed by the Chief Inspector that an application made under Regulation 12 has been made frivolously or with an improper motive, the Chief Inspector may order the applicant to pay the owner or consignee or consignor of the goods appropriate compensation for any harm or loss occasioned through the wrongful detention of the goods.”

Under Regulation 12, a person who suspects the importation or exportation of counterfeit marks or pirated copies in violation of his intellectual property rights or any offending goods may make an application in writing to the Chief Inspector and provide sufficient/reasonable evidence on a prescribed form. However, from the wording under regulation 4, the Chief Inspector may investigate a suspected case at his own initiative.

To control frivolity, regulation 13 provides a discretionary power to the Chief Inspector to require the person who submits an application under regulation 12 to provide adequate security or to subscribe to an undertaking or bond to cover any costs or liability arising from claims in the event the goods are found not to be offending goods or where proceedings initiated under the MMR are discontinued or where there is an abuse of the process by the applicant. Under subregulation 14(5), there is a fine not exceeding one hundred thousand shillings, imprisonment for a term of two years or to both for a person who misleads or gives false information (this includes the owner of the IPR and the witnesses). This is a clear safeguard against unreasonable complaints against competitors. The process does not however, provide for a reasonable chance for foreign based exporter to the United Republic of Tanzania to defend themselves against a local competitor – and thus the full effects are felt by the importer.

From the requirements under 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 there is a fee charged for making a submission to the

Chief Inspector, which submission may be made by a principal or an agent.

Anonymous complaints have been sparingly received by the FCC and not acted upon as the FCC requires, by law, full details of the owner of the IPRs before they can invoke their powers. The IPR owner or their agent must pay a security with the FCC before the FCC processes their claim.

3.2 Counterfeits and Consumers

It is important for consumers to be protected from harmful counterfeit products. Considering the level of development of the United Republic of Tanzania, and the fact that counterfeit products provide cheaper sources to enjoy certain products, such as films and music, counterfeiting has received mixed feelings amongst consumers. While there is general agreement that those that have an adverse effect on health, such as foodstuffs and electrical products, should be controlled, the case is not so with pirated films and music, which can be easily found in the market.

Consumers are aware of a “certain Government department” that destroys pirated foodstuffs. A significant number of them are able to identify the Commission for this role as it goes to the core of the large informal and trading SME sector that the United Republic of Tanzania is renowned for.

Based on the wording of regulation 12 cited above, consumers cannot submit an application to the Chief Inspector as they are not owners of intellectual property rights (IPRs). 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. It is not legally clear whether consumer organizations or National Consumer Advisory Council (NCAC) could equally raise a complaint without being made to follow the process of depositing a security fee with the FCC as stipulated under regulation 12 of the MMR.

3.3 Other Pertinent Issues on Counterfeits

It is pertinent to note that the United Republic of Tanzania is not the first and perhaps last country to stretch the functions and duties of its competition

authority. Other competition authorities in both developed and developing countries have had to deal with laws that are not part of contemporary competition law. In Australia for example, the Australian Competition and Consumer Commission (ACCC) was tasked with dealing with the Price Surveillance Act, the Goods and Services Tax and other technical regulatory responsibilities in the electricity sector. The competition authority in Zimbabwe, aptly known as “Competition and Tariff Commission” deals with the Tariff Act as well. Clearly, the United Republic of Tanzania is the first country in the region where a competition authority deals with matters as prescribed under the MMA and the MMR.

Considering the enormity of the task under MMA, it is a task that requires a separate department/inspectorate wing headed by a Director reporting to the Director-General (who is the “Chief Inspector”). The Government’s position of appointing the FCC to perform counterfeit functions is justified in view of the close relation between counterfeits and consumer protection functions already being performed by the FCC. Therefore it is likely that attempts to remove these functions from the FCC would be rejected. This is also coupled with

the fact that the Government would not agree to create a separate statutory body to deal with the MMA due to cost implications. In these circumstances, the FCC appears to be a more suitable “Chief Inspector” and may perform this role for an unforeseeable future.

Enforcement of the MMA appears hinges on reports being submitted to the Chief Inspector by largely the IPR owner and there may be need to review these means by other parties that may be affected by counterfeits e.g. the traders who may suspect their supplier to be engaged in the scourge. This is in addition to consumers and consumer organizations mentioned above.

3.4 Organization and Responsiveness

In so far as consumers and consumer organizations are not able to report matters to the Commission, the effectiveness of combating the vice shall be affected. According to the Tanzanian Consumer Advocacy Society (TCAS), there are severe consumer’s rights violation and unfair business conduct in the Tanzanian market that are not dealt with, as shown in the table below:

- (a) *Mwananchi*, 23 April 2007, Swahili newspaper had a title; *Fake malaria drugs kill many Tanzanians.*
- (b) *Sunday Citizen* 10 December 2006 had an article with the title; *Many Tanzanians not fully aware of their rights.*
- (c) *The Guardian* dated 11 July 2007, for example, reported that banned HIV/AIDS life prolonging drug –EMTRI 30–40 from India that was disqualified by the WHO and its importation banned by the Ministry of Health and Social Welfare, was still circulating in Kisarawe district, Coast region despite an outcry by anti-AIDS activists
- (d) *The Citizen* of 28 July 2007, had a title; *“In for an injection, out with a limp” some people come out of the injection room with an abscess only shows up several weeks later; others come out with disabilities for life.*
- (e) *The Guardian* of 19 August 2007 had the title *“Fake goods impede producers – Producers are deeply alarmed by the flood of counterfeit products in the local market harming quality and undercut their efforts to thrive”.*
- (f) *The Guardian* of 12 September 2007 reported that; *Bulk of Kariakoo imported goods fake – about 50 per cent of all imported goods from China and sold in Kariakoo shops in Dar es Salaam are counterfeit.*
- (g) *The Guardian* of 4 November 2007; *Fake Medicines Pose Big Threat –Counterfeit Medicines In Tanzania; the story continued*
 - (i) *In August 1999, fake Metakelfin labelled as a genuine product from the original manufacturer, Pharmacia and Upjohn, was found in circulation in some pharmacies in the country.*
 - (ii) *Laboratory analysis confirmed that the counterfeit Metakelfin actually contained paracetamol. In May 2000, counterfeit Ampicillin capsules (250mg) were found circulating in some retail pharmacies.*
 - (iii) *Laboratory analysis confirmed the capsules contained potato starch. In June 2001, expired Chloroquine Injection (from an unregistered Indian company) was relabeled as Quinine Dihydrochloride Injection 600mg/2ml from a company in Cyprus.*

- (iv) In January 2005, fake Gentrison Cream (a product of Shin Poong, South Korea) was reported. In this case, the active ingredient was replaced with hand and body lotion.
- (h) The Guardian of 8 November 2007 had the title; Consumer awareness is no laughing matter.
- (i) The Business Times of 6 January 2008 had the title; Stakeholders urge for more awareness education.
- (j) Nipashe of 14 March 2008 had the title; Importation of counterfeit goods is a threat to consumers. More than 80 per cent of consumers in the United Republic of Tanzania are not aware of their rights.
- (k) Uhuru, a Swahili newspaper of 4 April 2008 had front page story with the title, "Expired toothpaste chemicals were found for Tanga Sabuni Detergent" – The chemicals were meant for making a famous toothpaste in the country – Aha.
- (l) Guardian of 27 March 2008 had the title; Vision 2025: Shall we achieve 'Green Revolution'? The prices of fertilizers and farming implements remain higher due to cheating by the distributors of fertilizers.

There are no provisions in MMA that provide for an FCC initiated investigation on whether a claim as above is actually meant to blame and defame a competing product and whether such claims are made by a competitor of the producer of the blamed product. The process of ascertaining facts about products is a public inquiry for the FCC. As has been noted above, under Regulation 12 of the MMR, the FCC has to satisfy itself of the locus of the complainant (who has to be the IP owner or agent) and a case is not ordinarily investigated until a security deposit has been made. There are also safeguards within the MMA and MMR against frivolous complaints as earlier indicated. However, civil society organizations such as TCAS, as well as the media have a leeway to pronounce allegations and hope that enforcement institutions such as the FCC would act on their allegations.

While it is acknowledged that the FCC has been working so hard to reduce the problem of counterfeit products in the market by destroying them and giving severe punishment in accordance with the law, the problem is still on the rise. Despite the rise in numbers of acts of unethical business conduct and violation of consumer's rights the TCAS considered that partnerships with independent civil society to curb the situation have not been extensively explored.

4.0 THE INSTITUTIONAL FRAMEWORK

4.1 The Fair Competition Commission

The FCC is established under Section 62 of the Act as a body of adjudicators that makes final deter-

minations after its secretariat has investigated, reviewed or assessed matters under the FCA. While there is a thin line between the secretariat and the FCC, the functional separation of duties is clear in practice. The FCC does appear to be a fairly independent agency, considering its functions, appointment and tenure of members, investigatory powers, funding, etc as explained in detail below.

4.1.1 Functions of the Commission

Section 65 outlines a rather long list of the functions of the FCC ranging from Section 65(2)(a) – (m) i.e. 13 functions to perform. The roles can be summarized into two categories i.e. enforcement and advocacy. Enforcement functions include investigations into anticompetitive trade practices and advocacy includes championing competition and consumer protection by sitting in on any public inquiry or contribute to policy and legal reform. With such a responsibility load, the Chairman of the FCC is expected, in consultation with the other members of the FCC, to determine from time to time the priority to be given to any of the functions and activities set out above for the effective and efficient administration of the FCA⁷⁹.

There is an important function that the FCC has been granted under Section 65(4) of the FCA. Proactively, 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 the FCC's functions. This is a peculiar function that is not available to sister authorities in Zambia or Zimbabwe.

However, while this power is admirable, the role of the FCC is merely to advise or raise an issue under the FCA. The court, tribunal, regulator or other inquirer has no legal obligation to take into account the FCC's position. This has happened with one regulator where the FCC's input was not actually referred to in the final decision.

4.1.2 Members of the FCC

Section 62 establishes the FCC as a body that "shall be independent and shall perform its functions and exercise its powers independently and impartially without fear or favour". Section 62(6) states that the FCC shall be constituted by five members, which is: a chairman, who shall be a non-executive appointed by the President; three non-executive members appointed by the Minister; and the Director-General who is appointed by the Minister.

The law has specified the functions and qualifications of the Director-General in its Second Schedule to the Act, which include that such person shall be graduate of a recognized university; and possess at least ten years experience in one or more of the fields of management, law, economics or finance. The tenure of both the members and the Director-General are specified under Section 63(7) where 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. Members are eligible for re-appointment for one further consecutive term but shall not be eligible for reappointment thereafter⁸⁰.

Their appointment is based on "knowledge of, or experience in, industry, commerce, economics, law, public administration or other related fields"⁸¹. In order to maintain impartiality of the FCC and for the purpose of avoiding conflict of interest, a person shall not be qualified for appointment as a member of the FCC if, he/she, owing to the nature of the office he holds, is likely to exert influence (or better still, "undue" influence) on the FCC. While the Act does not use the word "undue" influence, this may be considered in future amendments to the law.

Under Section 66(3) of the FCA, the Chairman of the FCC is expected, in consultation with the other members of the Commission, to determine from time to time the priority to be given to any of the functions and activities set out in Section 66(2) for effective and efficient administration of the FCA.

4.1.3 Investigatory powers of the FCC

Through the powers conferred upon it under the FCA, the FCC deals with all issues of anticompetitive conduct, abuse of dominance and has provisions for curtailing mergers and acquisitions if outcome is likely to create dominance in the market or lead to anticompetitive behaviour. The adjudication of consumer related cases is done in the normal courts.⁸²

The FCC is given powers to gather information and to conduct investigations under sections 68–71 of the FCA and to impose sanctions for violations of the FCA under section 57–60. In addition to implementing the Act, the Commission is also charged with the responsibility of enforcing the MMA, which is the legal instrument for fighting counterfeits.

4.2 Staffing and Human Resources

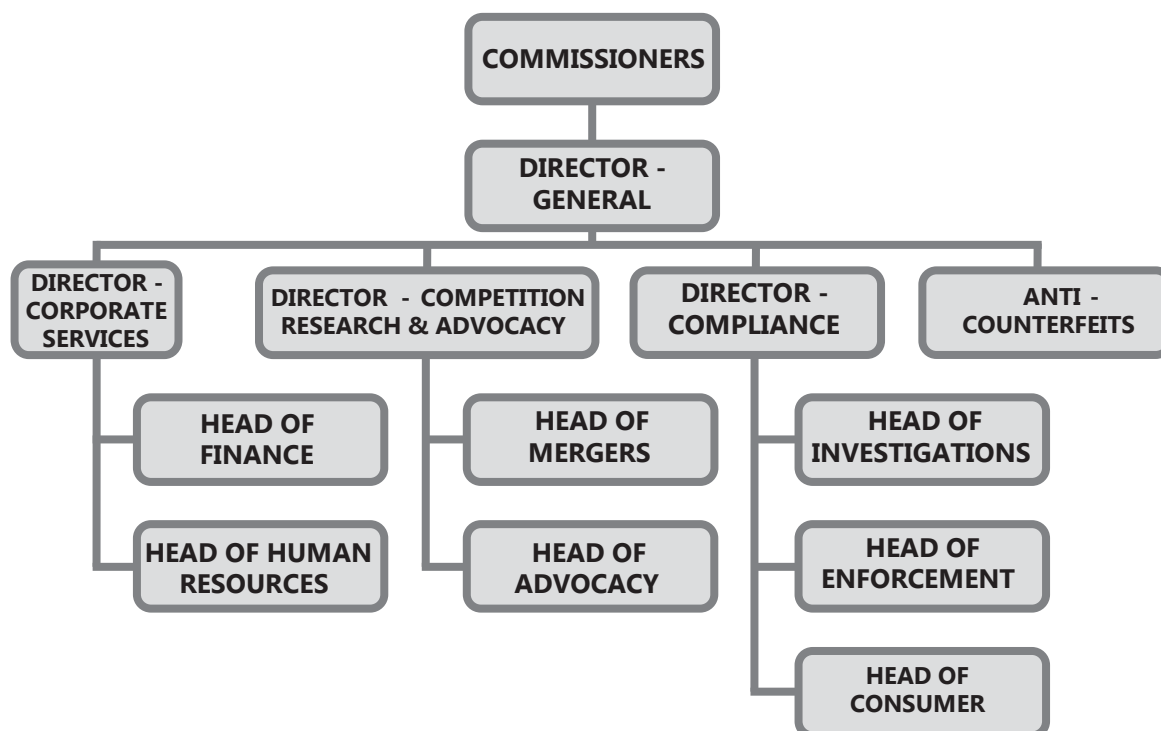
The FCC has a staff complement of 58 against a requirement of 72 for it to carry out the various functions/responsibilities under the Act. The Director-General is the chief executive officer of the FCC and is responsible for the day to day administration of the affairs of the FCC. The staff is spread out as follows:

FUNCTIONAL AREA	TOTAL STAFF	per cent
Director-General's Office	6	10 per cent
Corporate Affairs	26	45 per cent
Competition, Research & Advocacy	8	14 per cent
Compliance & Consumer	10	17 per cent
Anti-Counterfeit	8	14 per cent
TOTAL	58	100 per cent

Source: FCC

The FCC cannot unfortunately recruit any more staff unless it secures their remuneration. According to the corporate services officials, out of the 58 staff, the Government pays the salaries of 45 of them, while the FCC pays for the other 11. In the event that the FCC desires to have more than 45 staff funded by the Government, then it would have to seek the express authorization of the Ministry of Finance or raise independent funds. The salaries for the FCC are much higher than the average civil service salaries.

The Organization structure is as follows:



Source: FCC

The organization structure appears to be rather tilted to competition matters than on consumer protection. Considering that the FCC has more provisions dealing with consumer protection/unfair business practices, a fully fledged division would be necessary – probably be merged with anti-counterfeit. In addition to the consumer and unfair business practices within the Act itself, the FCC also enforces the Merchandise Marks Act under which it largely confiscates and destroys counterfeit products. During the field work, it was revealed that under the EAC treaty, each Member State is expected to have a separate office dealing with anti-counterfeit work. It was not clear how enforceable the requirement under the EAC is.

The FCC's conditions of service are reckoned to be far better than the civil service conditions and competitive with the private sector. Only three staff have reportedly left the FCC since it commenced full operations in 2007. There is however a looming threat that the conditions of service have not been significantly improved upon since 2007 and with the self-financing sector regulators continuously improving their terms and conditions, the

FCC may have to deal with possible poaching/head-hunting of its staff.

The FCC appears however confident that since their recruitment strategy is to employ young university graduates and mould them into competition investigators and analysts, such young graduates are likely to stay on longer than well experienced older staff. The young staff is employed on a permanent and pensionable basis, which better guarantees and security of employment than the private sector.

Under section 72(8) of the FCA, the FCC shall include in its Annual Report a report of its competitive staff selection procedure and its employment practices. The process was however not indicated in the 2008/9 Annual Report. At the time of finalizing this report, the 2009/10 and 2010/11 Annual Reports were not ready.

The FCC has a strict code of conduct for staff that extends to the period after they leave the FCC. According to the staff conditions laid down in the code of conduct, an employee of the FCC who resigns is not expected to work for a company that the FCC had investigated until after 18 months following such resignation. However, during this pe-

riod, such officer would be paid half the salary that they used to get at the FCC as compensation.

4.3 Agency Resources and Performance

The FCC is an agency of the Government of the United Republic of Tanzania and thus relies on public funding. Like most competition authorities, the funds of the Commission are from the National Assembly and from fees raised from mergers and other notification process. Section 78 of the FCA (dealt with in detail below) provides for the funding process for the FCC.

Under section 78(2) of the FCA, the FCC may make rules prescribing filing fees and other fees to be

paid by persons in connection with the procedures of the FCC. For good accountability, transparent and checks and balances, the FCC shall disclose details of the sources of its funds in the Annual Report.

4.3.1 Financial Situation

The FCC's annual budgetary needs are about TZS 6 billion (\$4 million). Of this amount, TZS 4 billion (\$2.5 million is guaranteed from the Government and modest internal revenue collection through fees. Like any other organization, the Commission has ambitious budget expectations as shown in the summarized table below:

ACTIVITY	YEAR		
	2010/11	2011/12	2012/13
Investigations of Anti-competitive conduct and enforcement of infringements of the Act	726,079,600	860,449,965	921,910,677
Fight against counterfeit goods in United Republic of Tanzania mainland	170,545,000	202,106,545	216,542,727
Enhancement of Research and Advocacy efforts towards Compliance with the Act	165,100,000	195,653,878	209,629,155
Enhancement of Consumer protection Enforcement Mechanism	103,332,500	139,971,015	144,322,562
Attainment of FCC Financial Sustainability	26,000,000	23,701,257	25,394,204
Improvement of Human Resource Management System	4,163,970,075	8,096,230,826	4,924,533,028
Improvement of Information Management System	159,100,000	70,000,000	75,000,000
Improvement of FCC's Communications and Public Relations	103,332,500	104,940,000	118,082,097
Procurement	740,000,000	876,946,514	939,585,551
TOTAL	6,357,459,675	10,570,000,000	7,575,000,000

Source: FCC

Each division and/or department is supposed to come up with an action plan to feed into and tap from the FCC budget. In terms of actual allocation of funding, the Director-General, as the Chief Executive, does have a decisive role on actual allocation of resources. The actual allocations may be a far cry from the desired figures in the budget. It is however clear that the first three operational priorities (after the human

resource related expenditure) in the budget are:

- (i) Enforcement
- (ii) Fight against counterfeit products
- (iii) Research, advocacy and compliance

The above is evidently higher than the proposed funding structure of the FCC for the period 2007 – 2010, as shown below:

SOURCE	YEAR		
	2007/8	2008/9	2009/10
World Bank	1,791,837,017	2,948,580,624	271,873,487
Government of the United Republic of Tanzania	142,903,899	57,953,238	2,672,006,724
Internal Sources	6,629,300	215,350,000	400,000,000
TOTAL	1,941,370,216	3,221,883,862	3,343,880,211

Source: FCC, Strategic Plan 2010–2013

In 2007/8 and 2008/9, the World Bank funded about 92 per cent of the FCC budget, which dropped to 8 per cent of the total budget in 2009/10. The World Bank funding was under the "Privatization and Private Sector Development Project" (PPSDP). The World Bank had actually been funding the operations since 2005, which is a unique case in the region.

Under the Section 78 of the FCA, mandatory funding sources have been prescribed as follows:

- (1) Funds of the Commission will comprise of –
 - (a) fees not exceeding 2.5 per cent of business licences;
 - (b) any grants, donations, bequests or other contributions made to the Commission;
 - (c) funds allocated to the Commission from the funds of EWURA, SUMATRA, the Tanzania Communications Regulatory Authority, the Tanzania Civil Aviation Authority and such other regulatory authorities for work done by the Commission or as provided in the other relevant legislation or as may be agreed between the Commission and those authorities respectively,
 - (d) funds allocated to the Commission by Parliament;
 - (e) fees collected by the Commission;
 - (f) all other payment due to the Commission in respect of any matter incidental to its functions;
- (2) The Commission may make rules prescribing filing fees and other fees to be paid by persons in connection with the procedures of the Commission.
- (3) The Commission shall disclose details of the sources of its funds in the Annual Report.

Following the end of the PPSDP, the FCC and the FCT came up with a Fair Competition (Commission and Tribunal) Funding Regulations, 2010, which

were gazetted through the Government Notice No. 208 of 11th June 2010⁹³. However, collection of the 2.5 per cent fee from every business/trading license through the Gazette Notice has been affected by the Government policy directive aimed at curtailing multiplicity of payments that the business community has to make to the public sector institutions.

As regards the funding from the sector regulators, this has not worked out very well as the funding is in practice at the pleasure of the sector regulator. The energy regulator EWURA, pays higher and regular payments more because the Director-General of the FCC is the Vice-Chairman of the EWURA Board, while there is no such linkage with the other regulators. In particular, the TCRA, which is probably the wealthiest, had been very reluctant to fund the FCC. Unfortunately, there is no appeal process for the FCC for such despite the provision under Section 78(c).

4.3.2 Fines and Fees

The bulk of the internal sources of revenue for the FCC are from merger filing fees. As in most competition authorities in the region, the FCC can issue administrative fines which are enforceable as judgments of the High Court. These fines do not however accrue to the FCC but are surrendered to the Treasury. On the other hand, the fees collected through mergers, exemptions and other applications to the FCC are retained by the FCC. In the 2009/2010 financial year, the Commission collected the following fees:

Tender Fees	–	2,050,000
Counterfeit destruction fees	–	40,800,000
Counterfeit penalty fees	–	172,500,000
Merger Filing Fees	–	83,000,000
Total		298,350,000

Source: FCC

4.3.3 Performance Audit for the Commission

Section 80 provides a very important check whereby the Controller and Auditor General shall at the request of the Minister conduct performance audit of the Commission's functions particularly in relation to the Commission's key performance indicators, on such terms and conditions as the Minister may determine. To facilitate this, the Commission is expected, before the beginning of each financial year, to adopt key performance indicators for that year and shall include them in its annual report. According to the wording in Section 80, the performance audit, other than the financial audit, is done at the behest of the Minister, which makes it to be a discretionary than mandatory annual compliance matter.

In its Strategic Plan (2010–2013), the Commission has performance indicators, which include the following:

Activity	Performance Indicators	
	Measure	Target Date
Cartel Investigation	No. and types of cartels investigated	2010/11 2011/12 2012/13
Introduction of Leniency Programme for cartel members	Prepare/draft and gazette Procedural Rules for Leniency Programme	2010/11
Combating counterfeits	No. of entry points inspected	2010/11 2011/12 2012/13

Source: FCC Strategic Plan 2010–2013, p. 14–16.

While the Strategic Plan provides general indicators of performance measures, which are supposed to be implemented through annual work plans and reported in the Annual Report, the performance indicators are FCC is however yet to complete a cartel investigation and the leniency programme is also still being developed. The Minister has not yet commissioned a performance audit for the FCC. Ministry of Trade officials were not aware of how and when such an audit would be done. The only audit availed during the peer review exercise was the financial statement audit by the Controller and Auditor-General.

Under section 81 of the Act, before 30th September each year, it is mandatory for the FCC to prepare an Annual Report in respect of the year up to the immediately preceding 30th June and submit

it to the Minister before 30th November in that year. The Annual Report is expected to provide information regarding the activities and plans of the FCC during the year to which it relates and must have sufficient information to impart an accurate understanding of the nature and scope of its activities and its plans and priorities and, without limitation, shall include:

- (a) a copy of the audited accounts of the Commission;
- (b) a copy of any report of the Controller and Auditor General on any performance audit carried out by the Controller and Auditor General during the year to which the Annual Report relates;
- (c) details of the performance of the Commission against its key performance indicators including the number and nature of complaints and applications the Commission has decided or are under consideration, the number and nature of investigations completed and continuing, significant studies and reports completed, undertaken or planned, and the number and nature of inquiries completed, undertaken or planned;
- (d) such information and other material as the Commission may be required by this Act or the regulations to include in the Annual Report;
- (e) such additional information or other material as the Minister may request in writing.

The Minister shall cause a copy of the Annual Report to be laid before the National Assembly within two months after receiving it from the Chairman or at the following meeting of the National Assembly. It is not clear from the Act what the consequences are for not publishing an Annual Report. From general practice, it would be expected under the governance and accountability principles and perhaps may influence the removal of the Director-General and other members of the FCC by the appointing authority.

The Annual Report for 2008/2009 shows that the performance audit was not done except for reporting on performance indicators and achievements by the Director-General – but not the Controller and Auditor-General as provided for by law. For better carrying out of its functions, it would be

prudent that the Minister and the Control/Auditor-General who, on the Minister's instructions, must carry out a performance indicators audit and not just a financial audit.

4.4 The Fair Competition Tribunal (FCT)

The Fair Competition Tribunal (FCT) 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 on part time basis; and six other members appointed to serve on part time basis by the President after consultation with the Attorney General from candidates nominated by a Nomination Committee.⁸⁴

According to Section 83(3), no person shall be appointed as a member of the FCT other than the Chairman, unless he qualifies for appointment by virtue of his knowledge of, or experience in industry, commerce, economics, law or public administration⁸⁵. A member of the Tribunal shall hold office for a period not exceeding three years as specified in the instrument of his appointment and shall be eligible for re-appointment unless, prior to the expiration of that period – (a) he resigns his office by written notification under his hand addressed to the President; or (b) the President, being satisfied that the member is unfit by reason of mental or physical infirmity to perform the duties of his office, or that the member has failed to attend at least three consecutive meetings of the Tribunal, revokes his appointment.

The quorum for a meeting of the Tribunal shall be the Chairman and two other members. There is no Vice-Chair of the Tribunal and thus, in the absence of the Chair, a meeting of the Tribunal cannot take place as the members cannot legally appoint a Chair even for purposes of the meeting. The Registrar of the FCT was concerned about this scenario and it is one of the areas earmarked for amendment. The presence of a Vice-Chair could also facilitate a situation where the FCT was flexible to operate with two panels of its members sitting to look at different cases. A concern was noted from the stakeholders by the Registrar that the FCT takes too long to make its final decision/judgment. The Registrar acknowledged this and alluded it to

the fact that the FCT is part time, and members have full-time jobs, more so the Chair who is a full-time judge. Apart from the Registrar, the Chair does not have his own staff to assist in writing the judgments after the decisions are made.

The Registrar acknowledged that the FCT needed to be more proactive in training its members in competition law and also in understanding the FCC and other regulator's procedures. International peer learning from similar tribunals, notably the South African one in the region, were identified. A concern was also expressed that apart from what is in the FCA, the FCT members did not have a comprehensive code of conduct or ethics. While the Chairman is a Judge, his/her code of conduct/ethics was covered under the relevant national judicial codes.

In terms of judgment⁸⁶, a judgment or order given by the Tribunal on any matter before it shall be final and shall be executed and enforced in the same manner as judgments and orders of the High Court.

The Tribunal shall have jurisdiction –

- (a) to hear and determine appeals under Part XI of the Act (which deals with matters of appeal to the Tribunal);
- (b) to issue warrants in accordance with section 71;
- (c) to carry out the functions conferred on it under the EWURA Act, 2001, the SUMATRA Act, 2001, the TCRA Act, 2003, the TCAA Act, 2003 and any other written law;
- (d) to exercise such other functions and powers as are conferred upon it by the Act.

Tribunal may decline to hear an appeal if it considers that the person does not have a pecuniary and material grievance arising from the decision of the FCC. In reaching its decision the Tribunal shall have regard to any regulations on the matters made by the Minister under section 98 of the Act⁸⁷. In the exercise of its functions under this Act, the FCT is guided by the rules of natural justice and shall publish its decisions and the reasons for its decisions in the Public Register maintained by the Tribunal.

Under Section 85(5), the FCT has all the powers of the High Court in respect of enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise; compelling the produc-

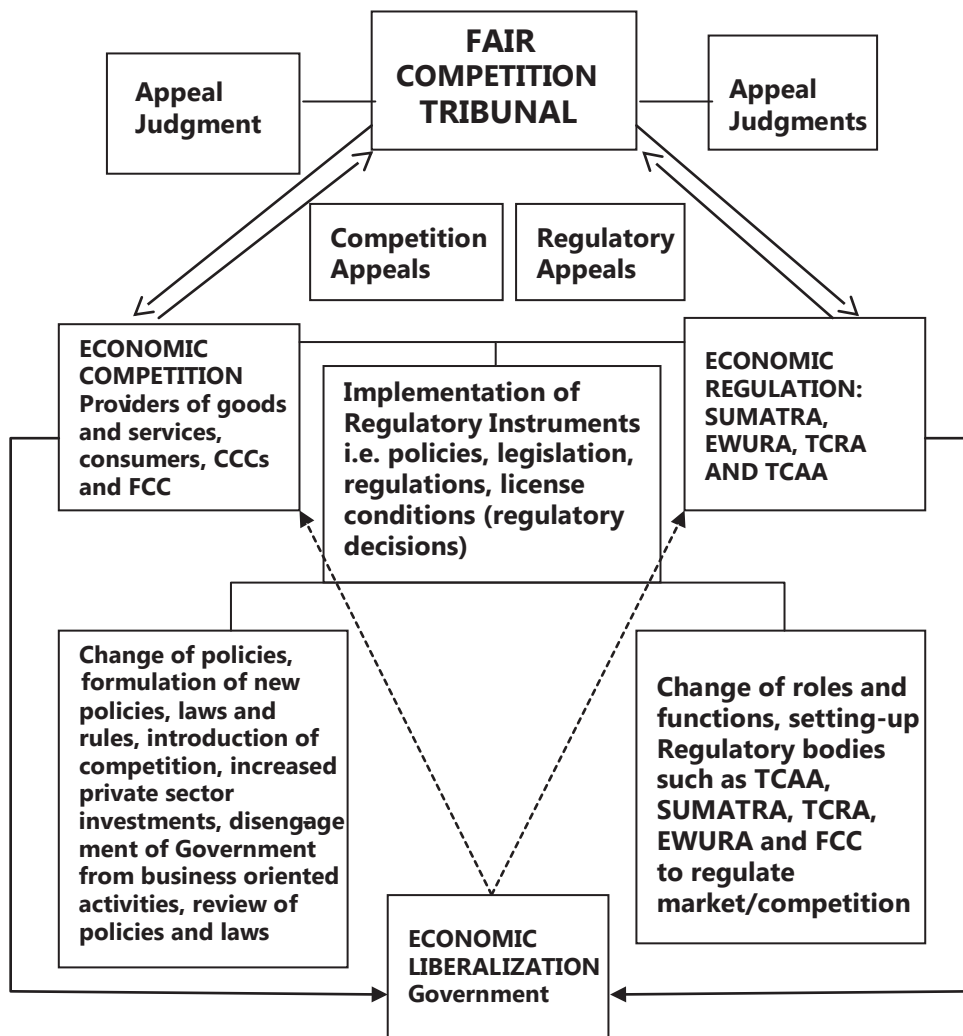
tion of documents; and the issue of a summons or request to examine witnesses abroad.

The FCT’s financial solidity and probably financial security is guaranteed, which is a prerequisite for its independence. This is guaranteed and/or safeguarded under Section 87 of the Act, which lays down the funds of the Tribunal as comprising fees paid to the FCT; funds allocated to the Tribunal by Parliament; grants, donations, bequests or other contributions made to the Tribunal; and funds allocated to the Tribunal from the funds of EWURA, SUMATRA, the TCRA, the TCAA and other Regulatory Authorities as provided for in the relevant legislation. These same institutions are also expected to fund the FCC). While on paper the funding appears to be “secured”, the practical side is that the expected disbursements from the sector regula-

tors are discretionary and like the FCC, FCT does not have any powers to enforce payments when the regulators do not remit the funds.

Under Section 89(2), the FCT is empowered to impose a fine of not less than one hundred thousand shilling and not exceeding five million shillings on a person that commits an offence such as misleading, obstructing, insulting or disturbing the Tribunal, or providing false information to the FCT, or failing/refusal to appear and/or refuse to take oath or affirmation before the FCT.

The FCT has presented its place in the institutional structure in the below figure. The figure portrays a linkage between and expected output of each player in the competition regime and regulatory implementation process in the United Republic of Tanzania



In discussions held with the Registrar of the FCT, he emphasized that the FCT did not have original jurisdiction, only appellate functions and can make its own Rules of Procedure, which it has under Gazette No. 189 of 22 June 2006. This was considered to be the norm for most tribunals. The FCT has its own staff /secretariat. Unlike the FCC staff, the FCT staff are civil servants. The FCT salaries are lower than the FCC ones.

In terms of cases, the FCT had received a total of 63 cases since it began operations in 2007. Thirty-three of these cases were miscellaneous applications, while 28 were appeals.

A concern was raised by the legal respondents to Section 84 of the FCA, which substantively states that there shall be no appeals to decisions made by the Tribunal. While its judgments shall be executed as judgments of the High Court, it follows that the rules of the High Court shall be applied and technically, it seems that the appeal may only relate to the detail of implementing the decision of the FCT and not the substance of the decision itself. The safety valve is that a person aggrieved by a decision of the FCT may use administrative law to have the FCT review its own decision.

4.5 National Consumer Advocacy Council

Section 92 of the Act creates a National Consumer Advocacy Council (NCAC), which has no enforcement powers but merely advocacy functions. It is noteworthy that the NCAC does not only advocate for consumers affected under the Fair Competition Act, but all consumers directly or indirectly affected by the activities of the sector specific regulators.

The NCAC shall consist of not less than five members and not more than ten members appointed by the Minister. The Minister appoints the Chairman and the Members elect the Deputy Chairman from amongst themselves. Before making the appointments of members pursuant to subsection (2), the Minister shall, by notice published in the *Gazette*, and in any newspaper or newspapers circulating widely in the country, invite nominations for appointments. After having received nominations, the Minister then publishes the appointments and call for comments, objections or representations from the public.

In appointing persons to the Council, the Minister shall have regard to the desirability of the Council

as a group having knowledge and understanding of the interests of consumers, including the interest of –

- (a) low income, rural and disadvantaged persons;
- (b) industrial and business users;
- (c) Government and community organizations.

Pursuant to Section 93 of FCA, in carrying out its functions conferred under this Act, the Council shall –

- (a) represent the interests of consumers by making submissions to, providing views and information to and consulting with the Commission, regulatory authorities and Government ministries;
- (b) receive and disseminate information and views on matters of interest to consumers;
- (c) establish regional and sector consumer committees and consult with them;
- (d) consult with industry, Government and other consumer groups on matters of interest to consumers.

Under section 95 of the FCA, the NCAC shall be funded by Parliament after justifying its budgetary needs. NCAC may also access grants, donations, bequests or other contributions. While the FCC and the FCT are expected to be partly funded by the sector regulators, the law has excluded NCAC from receiving similar grants from regulators.

Under section 95(4) of the Act, the NCAC is expected to prepare an Annual Report in relation to each year ending 30th June and submit it to the Minister before 30th November in that year. The NCAC is yet to be functional and there was therefore no annual report at the time of finalising this report. At the time of the field mission, the NCAC only had office space and did neither have staff nor office equipment.

It is not yet clear what role the NCAC will play, noting that it is actually created by statute and recognized as a quasi-statutory body but with no legal powers of any sought against the FCC or any of the industry specific regulators. NCAC is not a research institution but merely a conduit through which consumers channel their grievances and plays a consultative and information dissemination role. While the legislative intention may have been to create an independent organ to deal with advo-

cacy functions in the interest of the consumer, the reality is that the NCAC duplicates the advocacy functions already performed by the FCC and other sector regulators. Its functions under Section 93 are similar to the functions under Section 65 for the FCC, as indicated below:

NCAC FUNCTIONS	FCC FUNCTIONS
(a) represent the interests of consumers by making submissions to, providing views and information to and consulting with the Commission, regulatory authorities and Government ministries;	(i) participate in deliberations and proceedings of Government, Government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare;
(b) receive and disseminate information and views on matters of interest to consumers;	j) make representations to Government, Government commissions, regulatory authorities and other bodies on matters related to competition and consumer welfare;
(c) establish regional and sector consumer committees and consult with them	(k) consult with consumer bodies, regulatory authorities, business organizations and other interested persons;
	(l) consult with the competition authorities of other countries;
	(m) represent the United Republic of Tanzania at international forums concerned with matters relating to competition or the interests of consumers.

Source: Sections 65 and 93 of FCA.

In retrospect, NCAC itself feels inadequate to effectively carry out its mandate where its role is largely advisory and they cannot even take a matter to court on behalf of consumers. NCAC cannot even lodge a counterfeit case with the FCC where it believes that consumer interests would be harmed NCAC were reluctant to take on enforcement role with their current funding and structure but considered it a possibility in future for them to have some enforcement and binding advocacy functions for consumer protection under the FCA or the MMA. In this context, all parts dealing with consumer protection under the FCA or the MMA could at some future time be handled by the NCAC. This would allow the FCC to focus its resources on competition matters.

It has been observed that each regulator has a "consumer consultative council". This may be a costly exercise and as is the case with the FCT, the FCC and the regulators may have one national consumer council to advocacy for consumer inter-

ests under one voice. The fragmented consumer advocacy functions have not only affected funding, but also a more powerful advocacy voice.

4.6 The Minister

The Minister features prominently as an unavoidable towering figure in the establishment and implementation process of the fair competition legislation. Under Section 97, the functions and powers of the Minister are as follows:

- (i) To appoint members of the Commission other than the Chairman as provided for under Section 63
- (ii) to receive reports of any conflicts of interest by the Chairman or other members of the Commission as provided for under section 66;
- (iii) to direct the Commission to conduct an inquiry under section 68;
- (iv) to request performance audits of the Commission as provided for under section 80;
- (v) to receive the Annual Reports of the Commission and cause a copy to be laid before the National Assembly under section 8 1;
- (vi) to receive the budgets of the Commission and request assessments of the budgets under section 82;
- (vii) to appoint members to the Council, to receive Annual Reports and budgets of the Council and to request assessments of the budgets under section 95; and
- (viii) to make regulations under section 98.

Under Section 98 of the FCA, the Minister appears to have been conferred with residual powers, in consultation with the Commission or Tribunal, to make regulations not inconsistent with this Act as he considers necessary or desirable to give effect to the provisions of this Act. The Minister does not appear to have been conferred with any powers over the Fair Competition Tribunal.

5.0 COMPETITION ADVOCACY

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 FCC also has a

website and outreach programmes in both English and Swahili (which are the two official languages in the United Republic of Tanzania, with Swahili being more widely spoken). Under Section 65 of the Act, the FCC advocacy role is amplified in addition to its role of administering the Act and developing policies for enhancing competition and consumer welfare. In its advocacy role, the FCC is specifically empowered to undertake/do the following:

- Promote public knowledge, awareness and understanding of the obligations, rights and remedies under the Act and the duties, functions and activities of the FCC;
- make available to consumers information and guidelines relating to the obligations of Persons under the Act and the rights and remedies available to consumers under the Act;
- carry out inquiries studies and research into matters relating to competition and the protection of the interests of consumers;

The FCC has a well-functioning website with various documents on public awareness that can be downloaded. Its front office is also equipped with brochures targeted at the business and consumer community in both Swahili and English.

Publications availed to the public include the following:

- (i) Website www.competition.or.tz
- (ii) Annual Report 2008/9, 2009/10
- (iii) FCC Procedure Rules
- (iv) FCC Merger Guidelines
- (v) FCC Newsletter (quarterly)
- (vi) FCC Guide on the Competition Act
- (vii) FCC Guide on Competition Law
- (viii) Lodging a Complaint with the FCC

5.1 Competition advocacy and the policy/legislation making process

The FCC has a wide spectrum of stakeholders it has interacted with both in the Government and in the private sector. Section 62(3)(c) states that the FCC shall “have the power to exercise and perform the powers and functions conferred on it by or under this Act”. Section 65 of the Act has provisions which are express on this power, such as to study Gov-

ernment policies, procedures and programmes, legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicize the results of such studies; 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; and investigate 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. The FCC can also participate in deliberations and proceedings of Government, Government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare; make representations to Government, Government commissions, regulatory authorities and other bodies on matters related to competition and consumer welfare; consult with consumer bodies, regulatory authorities, business organizations and other interested persons; consult with the competition authorities of other countries; and represent the United Republic of Tanzania at international forums concerned with matters relating to competition or the interests of consumers.

Section 65(4) makes it mandatory for the FCC 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 the FCC’s functions.

Section 68 provides the FCC with an extensive advocacy function to conduct an inquiry where it considers it necessary or desirable for the purpose of carrying out its functions. The FCC can also conduct an inquiry at the request of the Minister or a regulatory body⁸⁸. The FCC’s advocacy role in terms of policy and legislation making process is perhaps unprecedented in the Southern and Eastern Africa region.

5.2 Competition advocacy and the private sector

Consumers and businesses have the direct experience of markets in which competition is restricted and innovation held back. The FCC is in contact with members of the public or companies who believe competition is being stifled in certain markets.

The public can also respond to notices that appear in newspapers announcing the formation of inquiries. In the early stage of any inquiry the FCC is said to desire that the scope of its subsequent investigation will be wide enough to include all the factors that may be impeding competition. Consumers and business are encouraged to ensure that these inquiries are as effective as possible by detailing their own experience.

The FCC's website, newsletter and case publications after a FCC decision provide information about present and past cases. The FCC's annual report enables the public to see how the FCC and the Tribunal are performing⁸⁹.

To this effect, the FCC has published a number of guidelines which have been used in advocacy efforts. The guidelines and other information materials are produced in both English and Swahili, which assists to effectively reach out to the average Tanzanian. These guidelines include one that explains the role of the FCC in relation to its functions under the FCA – targeted more at consumers, another on the core elements of the FCA that the FCC deals with and briefs on how it carries out its functions.

As noted by a consumer activist, having competition law in the United Republic of Tanzania has been seen as the end in itself, the cure of it all; but the way forward to it is to forge a strong Consumer, Private, Public Partnership with a shared commitment and efforts to achieve the intended object of the new law, all key stakeholders including Government itself (in this case sectoral regulatory authorities), consumers, producers, distributors, service providers, professionals, civil societies, NGOs, consumers' associations and others should work toward supplementing Government goals of seen business act responsively to consumer's needs and interests and at the same time there is fairness on business conducts in the end strengthening business environment for the United Republic of Tanzania for the betterment of all key stakeholders⁹⁰.

5.3 Advocacy and the regulators

Under Section 96 in Part XV of the Act dealing with inconsistency with other laws, the Act is deemed to apply to all persons in all sectors of the economy and shall not be read down, excluded or modified –

(a) *by any other Act except to the extent that the Act is passed after the commencement of this Act and expressly excludes or modifies this Act; or*

(b) *by any subsidiary legislation whether or not such subsidiary legislation purports to exclude or modify this Act.*

Under Section 96(2), the Act is clear that a person shall not contravene this Act by reason only of engaging in a conduct, unless a provision of an enactment specified in sector specific regulatory laws:

(a) requires the person to engage in the conduct or conduct of that kind; or

(b) authorizes or approves the person engaging or refraining from engaging in conduct of that kind.

The exceptional sector specific regulatory laws identified under section 96(3) are:

- Energy and Water Utilities Regulatory Authority Act, 2001
- Surface and Marine Transport Regulatory Act, Act, 2001
- Tanzania Communications Regulatory Authority Act, 2003
- Tanzania Civil Aviation Authority Act, 2003
- and sector legislation referred to in the sector legislation, enactments for the protection of the environment; and, any subsidiary legislation or instrument under any of the aforementioned Acts.

Where the FCC is of the opinion that any conduct required, authorized or approved by a regulatory authority under an enactment referred to above would be in breach of the Act if section 96(1) did not apply to the conduct, the FCC shall report the matter to the Minister. Where the Minister receives a report from the FCC in this context, the Minister may direct the relevant regulatory authority to take the necessary steps to ensure that the conduct described by the FCC is not required, authorized or approved by the regulatory authority. This process makes the decision susceptible to a more complicated bureaucracy and may better be dealt with through a more legalized framework under the FCT. However, the FCC is yet to take a matter to the Minister on such matters.

Section 96(6) of the Act provides an important caveat that a person shall not contravene the Act by reason only of engaging in conduct required in order to comply with an enactment other than an enactment referred to under Section 96(3).

It is equally noteworthy that under section 65(2) (i) of the FCA, the FCC has an exceptional power/privilege to participate in deliberations and proceedings of Government, Government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare. This provision assumes that the subject deliberations and/or proceedings are known by the FCC. The FCC is yet to exercise this power.

5.4 Research and competition advocacy

The FCC has carried out research work in the cement industry to study the competition dynamics therein and made policy recommendations to the Minister of Trade which bordered on removing the barrier of importation of cement into the United Republic of Tanzania. The FCC has engaged consultants in some projects but these have not produced desirable results. One of the problems identified is that the academia requires more time to understand competition law by engaging more with the competition authority through seminars, workshops and other joint training sessions. The FCC has generally found research based advocacy that has been done thus far using the academia has not brought out or identified the key competition issues relevant for its use. A complaint was also made that the FCC does appear to forget to put required value on research work. Sector regulators such as EWURA and TCRA were said to pay far better than the FCC on research work and their output has not been a subject of poor quality compared to work done for the FCC.

The FCC should work closely with the academia and assist in developing competition and other related industrial sector studies from which it can benefit in giving sound advice to the Government. It is evident then that the FCC may need to refocus its terms of reference as well as resources devoted to research undertaken by the academia.

The FCC conducted a study in the cement industry which addressed the supply and distribution constraints that required Government attention. However, considering that at least 70 per cent of the Tanzanian economy is in the agriculture sector, the FCC needs to focus on key agriculture sectors in particular the outgrower schemes for cotton, coffee and other cash crops involving big multinationals, which may be engaged in predatory pricing strategies as well as collusion. It would be pertinent that FCA be amended to include provisions on abuse of buyer power, which could then be used against anticompetitive (abusive) practices in the agricultural sector in the United Republic of Tanzania. It may be a problem amongst farmers that they are effectually compelled to sell cotton, coffee etc at very low prices due to abusive practices by enterprises buying from them. The FCC is yet to carry out a study in any agricultural sector. Furthermore, another potential problem that may be experienced amongst farmers may be that smallholder farmers are forced to sell their basic crops such as cotton and coffee at very low prices to large, usually transnational, companies which have much more negotiating power vis-à-vis small farmers. Oligopolistic markets where these transnational companies operate are usually prone to such practices on the buyer side. Therefore, it would be a welcome development if the FCA was amended to include provisions on abuse of buyer power, which could then be used against such anticompetitive (abusive) practices in the agricultural sector in the United Republic of Tanzania.

6.0 INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE

6.1 International Cooperation

The FCC has been an active participant member in most international and regional organizations dealing with competition policy. These are:

- (i) The Southern and Eastern Africa Competition Forum (SEACF), of which it is a founding member. The FCC has been engaged in bilateral training programmes with the Zambia Competition Commission (now Competition and Consumer Protection Commission) and the Kenya Competition Commission, and

the South African Competition Commission where its staff have been attached. The SEACF member States were largely influential in the founding of the African Competition Forum.

- (ii) Africa Competition Forum, of which FCC is a founding member.
- (iii) Consumers International where its consumer staff have been engaged in peer learning experiences.
- (iv) International Competition Network (ICN), the annual conferences, merger and cartel workshops.
- (v) East African Community, where the United Republic of Tanzania played an active role in the formulation of the EAC Competition Act, collaborating with Kenya to foster their regional integration arrangement.

However, the Tribunal appear to have been left out in the various cooperation arrangements, which makes the interface with the FCC uneven where the FCC participates more in the regional

and international cooperation arrangements and the FCT does not.

6.2 Technical Assistance

The FCC has been a recipient of 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 SAPs. The FCC have also benefited from training programmes under the auspices of UNCTAD and OECD Global Forum on Competition, as well as the International Competition Network (ICN). The Commission is an active member of the Africa Dialogue Network under the auspices of the Federal Trade Commission.

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

The technical assistance received by the FCC is as indicated below:

Technical Assistance	Facilitator	Description	Funds	Year
Drafting FCA Guidelines	Booz Allen Hamilton	Drafting process of the FCA	World Bank (IDA)	2000–2003
	Deloit & Touch	Development of Merger Guidelines and rules	World Bank (IDA)	2000–2003
Staff training	JICA	Competition Law and policy	JICA	2011
	KOICA	Competition Law and policy	KOICA	2010
	UNCTAD	Investigation techniques	UNCTAD	2010
	FTC	Competition Law and policy	American Embassy	2010
	FTC	IPR	American Embassy	2010
	Nathan Associates	Competition Economics and Competition Law	World Bank (IDA)	2009
		Competition assessment frame work for Southern African Countries	World Bank (IDA)	2008
	Institute for Public Private Partnership (IP3)	Managing regulatory authorities	World Bank (IDA)	2007
	IP3	Rate setting	World Bank (IDA)	2007
	IP3	United States Anti-trust Law	World Bank (IDA)	
	IP3	European Union Competition Law	World Bank (IDA)	2007
	WTO	Intensive course on Trade and Competition Policy for Anglophone Africa	Mauritius	2004
	WTO	Competition Policy for African Countries	Kenya	2003
	WTO	Intensive three-day exploration of topics before the WTO in the area of competition policy (i) the relationship between competition policy and economic development; (ii) the challenges involved in implementing competition policy in developing countries; and (iii) the role that the WTO can play in this area, including consideration of the pros and cons of a possible multilateral framework on competition policy	South Africa	2001

Source: FCC

6.3 Areas requiring urgent technical assistance

The FCC submitted that they required technical assistance in the following areas:

- (i) Cartel investigation techniques, in particular how to carry out a dawn raid, evidence gathering and handling.
- (ii) In view of the exemption of intellectual property rights under the Act, the interface and interventions required where there is an abuse of IPRs in the market place.
- (iii) Quantitative/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).
- (iv) 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 the FCC jurisdiction.
- (v) Effective consumer protection and case management.

6.4 Other supportive areas for technical assistance

Other important aspects of the institutional arrangement in the United Republic of Tanzania that require technical assistance were observed to include the following:

- (i) *The Fair Competition Tribunal*

The FCT has not received as much exposure and training as the FCC. There is need to train and expose the Registrar of the FCT to international best practices. All staff of the FCT would also need to be trained on competition matters so that they can effectively fulfil their mandates. The adjudicative functions of the FCT members also needs international expert assistance and exposure through attachments, secondments and perhaps extend it to case analysis expert who can be resident at the FCT offices to assist the tribunal members.

- (ii) *The National Consumer Advisory Council and other independent consumer advocacy groups*

The role of the NCAC is critical in the competition process as it is the voice of the consumers. There is need to ensure that the NCAC is properly trained and exposed to be able to usefully contextualize the decisions of the FCC, the FCT and other regulators and how those decisions affect consumers. With only one staff and no support staff, the NCAC requires urgent assistance for it to live up to its expected role in the competition and consumer policy implementation system of the United Republic of Tanzania.

- (iii) *Civil Service/Technocrats in Rationale for Competition Policy and its role in industrial/economic development*

There is a need to train the technocrats (both in the civil and public service) on the role of competition policy and its benefits to the economy. A lack of useful appreciation and/or an indifferent approach by policymakers and technocrats does affect the effective implementation of competition policy as these are the actors who influence budgetary allocations and thematic priorities in the national development system.

- (iv) *Academics, economists, research institutions, think tanks*

The FCC needs to be assisted to engage with the academicians and research institutions to develop competition studies that would be used in enforcement and primarily advocacy efforts. While the United Republic of Tanzania has a wealth of highly skilled and educated people, competition law has not been a part and parcel of their education system. The FCC is thus unlikely to benefit from sound research work if its circle of prospective researchers is not technically skilled to carry out desired competition and other market studies.

- (v) *The Legal Fraternity*

The legal fraternity and the judiciary (magistrates, judges) do require technical training in handling of competition cases. These have perhaps the final say on the inculcation of a competition culture in the country through the decisions they would make on appeals. Assistance from multi-lateral organizations over a sustained period of time would assist to spread the rationale for competition policy and instil a sense of appreciation of the trade.

7.0 FINDINGS AND POSSIBLE POLICY OPTIONS

7.1 The thrust of the findings is that effective implementation of competition law needs to be secured through sufficient funding as provided for in the law, as well as through some improvements in the legal framework. The FCC may currently be limited in effective enforcement of the FCA due to express exemptions from the application of the FCA of selected but key regulated sectors, such as telecommunications, energy (petroleum, water and gas), surface and marine transport, aviation,

crop marketing boards and any other subsequent legislation thereafter. There is also a problem of restricting the enforcement of Section 8 and limiting the scope to an “agreement” without the inclusion of decisions, conduct or behaviour of actors in a market. The rule of reason approach for hard-core horizontal agreements would also require revision and alignment with the international best practices. While the law calls for punishment to Directors and shareholders of a company, there is no mechanism of how these would be dealt with under the FCA.

7.2 The following recommendations are made:

A. INSTITUTIONAL ISSUES AND AGENCY EFFECTIVENESS

RECOMMENDATION	REQUIRED ACTION	RESPONSIBILITY
1. Funding to the FCC and the FCT must be predictable and implementable as provided for under Section 78(c) of the FCA	There must be a mandatory provision to deal with remittance of funds to the FCC and FCT and it should not be discretionary. There must be an appeal process to secure the funds.	Ministry/FCC
2. Consumer protection	NCAC 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 FCC – or make NCAC an enforcement agency for consumer protection as well as advocacy.	Minister/FCC/NCAC
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 better lie with the Tribunal, which would be better placed with less political influence to make a more objective decision.	FCC/Tribunal/Minister

B. ANTI-COMPETITIVE 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, resale price maintenance, etc.	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 other than 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
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 and therefore section 9(4) should be removed from the law.	FCC
10. Issuance of Summons when Commission wants information	Summons under Section 71 should ideally be issued only when person/s refuse or are not able to voluntarily submit the information.	FCC

RECOMMENDATION	REQUIRED ACTION	RESPONSIBILITY
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, rather whether their acts, arrangements or behaviour affect trade	Review of Section 6(1) and 6(4) of the FCA	FCC/Minister
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 an 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 critical but the "effect"	FCC
14. Under Section 8, the prohibition of anticompetitive conduct must not be restricted to competitors but must include non-competitors to include vertical agreements	Remove Section 8(3)(b) from the FCA	FCC
15. Attribution of powers to FCC to enforce the FCA against the State.	The law should be amended such 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
16. There is 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, TCCA, etc. Current trend appears to be that they consult the FCC after the event and not before.	The law should be amended so that there is mandatory consultation with FCC where there is a competition issue in a regulated sector.	Minister/FCC
17. Competition concerns against sector specific regulators raised by the FCC must be handled by the FCT and not the Minister.	The FCC concerns against anticompetitive decisions made by the sector regulators should be reviewed by the FCT and not the Minister as provided for under section 96(5) of the FCA.	Minister/FCC
18. There is need to consider the introduction of criminal sanctions against shareholders, directors and officers of an enterprise engaged in cartel behaviour.	Cartel members are only fined 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 employees involved in cartel activity.	FCC/Minister
19. There is need to ensure that there is a clear administrative and visible separation of the triple roles of the Director-General as investigator, prosecutor and adjudicator as contained under sections 63, 65, 69 and Section 73(6) of the FCA.	The Director-General cannot be an investigator and be an adjudicator in the same case. While this is a debatable occurrence in most competition authorities, including the United Kingdom and South Africa, this practice needs to be aligned e.g. to that in Zambia and Zimbabwe, where the CEO is an ex-officio member of the Commission.	FCC/Minister
20. There is need to streamline fines and not base it on e.g 5–10 per cent of the turnover for the whole enterprise as contained under section 60(1) of the FCA but restrict the fine to the turnover of the relevant products/ services in question under Section 60 of the Act.	Fines based on the whole firm's turnover may be unfair unless in situations where a firm deals in one product. Legal amendment should be made where the law should state that the FCC or FCT 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 FCT.	FCC/FCT/Minister

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 than requiring consumers to process such complaints through the court system at their cost	Amendment to the Law	FCC
23. There should be fines payable to consumers or offended parties under Section 15 and 16 of the Act – which similar cases in Zambia's competition law are subject to fines.	Law amendment	FCC/NCAC
24. Consumer organization and anonymous complaints under the Merchandise Marks Act	It appears under the MMA, the FCC cannot entertain anonymous complaints. Further, only owners of the IPR appear to have the right to complain against counterfeits. There is need to ensure that consumers and traders who are likely to suffer harm and who suspect 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
25. There is need to expand the scope of MMA.	MMA deals only with goods earmarked for import and export. The seizure and destruction of only imported goods and those earmarked for export creates 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 the Tanzanian territory and not just those earmarked for exports or imports.	Minister/FCC
26. National Consumer Advisory Council funding	Each regulator must be mandated to financially support the NCAC and the "Consumer Consultative Council" that each regulatory authority has should be under one consumer council instead of each regulator having a different council.	NCAC/FCC/ FCC/NCAC/ Consumer Consultative Council/ Regu- lators/Relevant Ministries

D. THE FAIR COMPETITION TRIBUNAL

RECOMMENDATION	REQUIRED ACTION	RESPONSIBILITY
27. There is need for a Vice Chair at the FCT.	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/FCT
28. There should be an appeal mechanism against a decision of the Tribunal as opposed to making the FCT as 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 the FCT is not a creature of the Constitution but of subsidiary legislation	Minister/FCT
29. There is need to have a Code of Conduct for the FCT Members.	Development of a Code of Conduct for the FCT members.	FCT/Chief Justice

It is noteworthy that the Fair Competition Commission has already embarked on major legal reforms/amendments which have reached an advanced legislative stage. The actual document containing the proposed amendments was

not availed because of the confidential nature of such processes. No reference has therefore been made to any of the changes that the document may contain.

ZAMBIA FULL REPORT

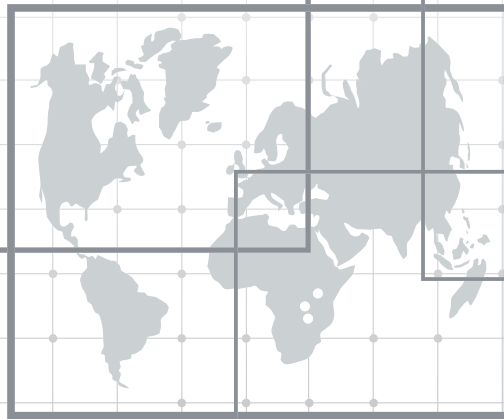
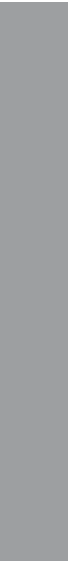


TABLE OF CONTENTS

ACRONYMS	89
PREFACE	91
1. GOALS OF COMPETITION POLICY AND DEVELOPMENT.....	91
1.1 Socio-Economic Background.....	91
1.2 Foundations and History of Competition Policy and Law in Zambia	96
1.3 National Competition and Consumer Policy.....	103
2. SCOPE OF COMPETITION POLICY AND LAW.....	106
2.1 Competition and Consumer Protection Act	106
2.2 Application and Exemptions	111
2.3 Substantive Analysis: Core Issues Covered by the Act	113
2.4 Procedural Issues	131
2.5 Sanctions.....	134
2.6 Sector Regulators.....	136
2.7 Judicial Review	140
3. INSTITUTIONAL FRAMEWORK.....	142
3.1 Resources.....	142
3.2 Assessment of Cases	147
3.3 The Investigative Wing	149
3.4 The Adjudicative Wing	150
4. COMPETITION LAW ENFORCEMENT	151
4.1 Competition Case Load.....	151
4.2 Anti-Competition Practices-Prone Sectors	155
4.3 Competition Enforcement Challenges.....	156
5. COMPETITION ADVOCACY	156
6. INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE.....	159
6.1 International Cooperation	159
6.2 Technical Assistance	161
7. FINDINGS AND POLICY RECOMMENDATIONS	163
7.1 Findings	163
7.2 Recommendations.....	163

ACRONYMS

ACCC	Australian Competition and Consumer Commission
ACF	African Competition Forum
AFRICOMP	Africa Competition Programme, of UNCTAD
COMESA	Common Market for Eastern and Southern Africa
CCPA	Competition and Consumer Protection Act, 2010 (No. 24 of 2010)
CCPC	Competition and Consumer Protection Commission
CCPT	Competition and Consumer Protection Tribunal
CUTS	Consumer Unity and Trust Society
EDF	European Development Fund
ERB	Energy Regulation Board
EPAs	Economic Partnership Agreements with the European Union
FNDP	Fifth National Development Plan
GDP	Gross Domestic Product
IDRC	International Development Research Centre
IGE	InterGovernmental Group of Experts on Competition Law and Policy
IPPs	Independent Power Producers
IPRs	Intellectual Property Rights
MFEZs	Multi Facility Economic Zones
MMD	Movement for Multi-Party Democracy
PF	Patriotic Front
PIA	Pensions and Insurance Authority
PSCAP	Public Sector Capacity Building Project, of the World Bank
PSDRP	Private Sector Development Reform Programme
RECs	Regional Economic Communities
SADC	Southern African Development Community
SAP	Structural Adjustment Programme
SEACF	Southern and Eastern Africa Competition Forum
SzOEs	State-owned enterprises
UNCTAD	United Nations Conference on Trade and Development
UNIP	United National Independence Party
WTO	World Trade Organization
ZACCI	Zambia Association of Chambers of Commerce and Industry
ZCC	Zambia Competition Commission
ZDA	Zambia Development Agency
ZIC	Zambia Investment Centre
ZICTA	Zambia Information and Communications Technology Authority
ZPA	Zambia Privatization Agency



PREFACE

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 value-added of the harmonization of competition law and its enforcement in this subregion, 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 comparative assessment report that addresses pertinent issues from a subregional perspective.

This report on the voluntary peer review of the implementation of competition law and policy in the Republic of Zambia is based on extensive desk research and a fact-finding visit to Zambia. The desk research covered review of, inter alia: (i) 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); (ii) other regulations and guidelines of the Zambian competition authority, including the authority's decisions and reports; and (iii) 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. GOALS OF COMPETITION POLICY AND DEVELOPMENT

1.1 Socio-Economic Background

Zambia, officially the Republic of Zambia, and formally the British colony of Northern Rhodesia, 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 752 614 square kilometres (290 586 square miles). It has an estimated population (2010) of 13.2 million⁹¹, of which about 26.5 per cent live in ten of the country's largest towns and cities⁹². The total urbanized population comprises 36 per cent of the national population if all the other towns are taken into account⁹³, making Zambia is one of sub-Saharan Africa's most highly urbanized countries.

Zambia's current (2010) Gross Domestic Product (GDP) is \$16.19 billion, with a GDP per capita of \$1 500.⁹⁴ The economy has experienced modest growth in recent years, with real GDP growth in 2005-2007 between 5-6 per cent⁹⁵, which rose to 7.6 per cent in 2010⁹⁶. The passing of the 6 per cent GDP growth threshold was a milestone since that is the level that is normally needed to reduce poverty significantly⁹⁷, a serious scourge in the region.

The country's currency is the Kwacha. Currently, the currency exchange rate has been stable at about Kwacha 4 854 per 1 United States dollar. In previous recent years, the exchange rates of Zambian Kwacha per dollar progressively were 3 601.5 (in 2006), 3 990.2 (2007), 3 512.9 (2008), 5 046.1 (2009), and 4 823.6 (2010)⁹⁸. The worsening of the exchange rate was a consequent of inflation. In 2007, the inflation rate in Zambia was brought down to 8 per cent, the first time in 30 years that the country had seen single digit inflation⁹⁹. In January 2011, it was reported by the Central Statistical Office that inflation had risen to 9 per cent. Historically, the same Wikipedia source reported that in the 1990s, a number of factors had drastically increased inflation in the country. The factors included lack of balance-of-payment support, expansion in the money supply to meet Government spending and debt obligations, and drawdown on foreign exchange reserves. All that put pressure on the Kwacha and inflation. In 2000, inflation held at 32 per cent, consequently, the Kwacha lost the same value against the dollar. In 2001, Zambia's fiscal management became more conservative, and as a result, inflation by year-end was below 20 per cent, the country's best result in decades. Infla-

tion however rose to 26.7 per cent in 2002, before being brought down to the 8 per cent in 2007.

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 history of copper mining in Zambia is briefly traced in Box 1¹⁰⁰.

gemstone mining, and hydro-power. 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.¹⁰⁵ The largest contribution to 2010 growth came from maize production. Other leading agricultural crops are sorghum,

Box 1: Brief History of Copper Mining in Zambia

The commercial possibilities of Zambia, then known as Northern Rhodesia, particularly of its copper, were recognized by the British Government during the 'Scramble for Africa' in the 1800s. The industrial revolution in Europe had meant that the demand for copper was growing rapidly. The mineral rights in the Rhodesias were owned by the British South African Mining Company and its founder, Cecil Rhodes.

At Independence in 1964, the Zambian Government managed to get the British South African Company to relinquish the copper mining rights. Copper mining in Zambia was then largely in the hands of two firms, the South African Anglo American Corporation and the Roan (Rhodesia) Selection Trust. By 1970, Zambia had acquired majority holding in the Zambian operations of those two major foreign mining corporations, which became the Nchanga Consolidated Copper Mines (NCCM), and Roan Copper Mines (RCM). The Zambian Government then created a new parastatal body, the Mining Development Corporation (MINDECO). At the same time, it also created the Finance and Development Corporation (FINDECO) to gain control of insurance companies and building societies. The Industrial Development Corporation (INDECO) had already been created to acquire equity holdings in a number of other key foreign-owned firms.

In 1971, INDECO, MINDECO, and FINDECO were brought together under an omnibus parastatal, the Zambia Industrial and Mining Corporation (ZIMCO), to create one of the largest companies in sub-Saharan Africa. The management contracts under which day-to-day operations of the mines had been carried out by the Anglo American Corporation and Rhodesian Selection Trust were ended in 1973. In 1982, the Nchanga Consolidated Copper Mines and the Roan Consolidated Mines were merged into the giant Zambia Consolidated Copper Mines Limited (ZCCM).

The copper mining industry is concentrated in the cities and towns of the Copperbelt¹⁰¹, particularly in Kitwe, Chingola, and Mufulila, and 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 low of 228 000 metric tonnes by 1998.¹⁰² In 2002, following privatization of the industry, copper production rebounded to 337 000 metric tonnes. 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 2010.¹⁰³ Cobalt, zinc, lead, emeralds, gold, silver, and coal are also mined.

The Zambian Government is pursuing an economic diversification programme to reduce the economy's reliance on the copper industry.¹⁰⁴ The initiation seeks to exploit other components of Zambia's rich resource base by promoting agriculture, tourism,

rice, peanuts, sunflower seeds, vegetables, flowers, tobacco, cotton, sugarcane, cassava, and coffee. Cattle, goats, pigs, and poultry are raised. There is a relatively small fishing industry. Manufacturing, which historically has contributed about 10 per cent of GDP, grew by 2.5 per cent in 2010.¹⁰⁶ Major manufacturing industries are in food and beverage processing, and the manufacture of chemicals, textiles, and fertilizer. The Government has made substantial progress in infrastructure construction and has invested in manufacturing through the establishment of Multi-Facility Economic Zones (MFEZs). The Government is also pursuing aggressive business reforms to encourage increased private investment. In that regard, the Private Sector Development Reform Programme (PSDRP) is intended to ease private sector development.

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.¹⁰⁷ 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, Holland, and Japan.

According to the Central Statistical Office of Zambia, the Zambian economy grew by 7.6 per cent in 2010 compared to a growth of 6.4 per cent in 2009¹⁰⁸. That growth was driven by increased output in mining and quarrying, transport and communications, and agriculture, forestry and fishing. Annual inflation declined to an estimated 7.9 per cent at the end of 2010, down from 9.9 per cent in December 2009.¹⁰⁹ The World Bank in 2010 named Zambia as one of the world's fastest economically reforming countries.

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 (RECs) in Africa. COMESA is a free trade area and common tariff structure with nineteen member States stretching from Libya to Swaziland, including the Indian Ocean island States of Comoros, Madagascar, Mauritius, and Seychelles.¹¹⁰ The headquarters of COMESA are in the Zambian capital of Lusaka. SADC is an inter-Governmental organization whose goal is to further socio-economic cooperation and integration, as well as political and security cooperation among fifteen southern African States.¹¹¹

Zambia remains one of the most politically stable countries in both COMESA and SADC, and Af-

rica 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.

Zambia declared independence from the United Kingdom on 24 October 1964, and Dr Kenneth Kaunda became the first Head of State. Dr Kaunda, of the socialist United National Independence Party (UNIP) governed the country from 1964 until 1991. Zambia was a one-party State from 1972 to 1991, with UNIP the sole legal political party. From 1991 to 2002, Zambia was governed by President Frederick Chiluba of the social-democratic Movement for Multi-Party Democracy (MMD), during which the country saw a rise in social-economic growth and increased decentralization of Government. Mr Levy Mwanawasa was the third President of Zambia, who presided over the country from January 2002 until his untimely death in August 2008. He is credited with having initiated a campaign to rid the country of corruption, and increasing standards of living from the levels left by the previous President. The fourth President of Zambia was Mr Rupiah Banda, who had been Vice President during the Presidency of Mr Mwanawasa. The current President is Mr Michael Chilufya Sata of the Patriotic Front (PF), who won the elections in September 2011. On his election, President Sata pledged to continue the fight against corruption in the country.

The economic history of Zambia from Independence up to the 2000s is traced in Box 2.

Box 2: Economic History of Zambia: 1960s to 2000s

Post Independence Boom

Following Independence, the Government of Dr Kenneth Kaunda adopted a socialist economic model with an African context. There was large-scale nationalization of the mining industry and the creation of large State-owned conglomerates or parastatals such as Zambia Consolidated Copper Mines (ZCCM). A considerable degree of central planning involving the setting up of a large civil service followed as the Government aimed to ensure self sufficiency coupled with industrial diversification. That period was relatively prosperous as the earnings from mineral exploitation grew as copper prices increased. In the ten years following independence, the level of real GDP grew at 2.3 per cent per annum.

Economic Decline (1975-1990)

The relative prosperity of the 1960s did not last. A number of external factors outside Zambia's control hit its economy. The fall in world price of copper and a decline in the quality of its ore exposed the country's over-

dependence on copper. In addition, the world price of oil and energy fuelled global inflation pushing up the price of capital imports. Its dependence on imported manufactured goods was also exposed. Its balance of payments situation deteriorated, and borrowing from overseas grew significantly. Throughout that period Zambia was also providing support to the various African freedom fighting movements, in Zimbabwe, South Africa, Mozambique, and Angola. As a consequence, its main trade routes were often interrupted. As a landlocked country, that was a major barrier to development. In the period between 1975 and 1990, the level of real GDP per capita declined by almost 30 per cent.

Initially the Government, believing in self sufficiency and import substitution, reacted to the deteriorating economic situation by commercial and public borrowing. It was believed that the market for copper would pick up and the economy would be kick started. The multilateral donors such as the IMF and the World Bank appeared to share this optimistic view, lending sums of money to the country at reduced concessionary rates.

Finally in 1985 due to the worsening economic climate, the donor organizations put pressure on the Zambian Government to attempt to restructure the economy through the introduction of a structural adjustment programme. Attempts to follow these reforms were met with internal opposition as the food riots objecting to the cutting back in food subsidies, and the structural adjustment programme was abandoned in 1987.

Sustained Economic Reform of the 1990s

The 1990s saw a move to a more outward oriented economy centred on a market based system. The newly elected Government of Mr Frederick Chiluba in 1991 adopted a structural adjustment programme agreed with the IMF and the World Bank. That included three main goals:

- to restore macroeconomic stability;
- to facilitate private sector growth through reducing the role of the State from controlling prices, foreign trade restrictions and foreign currency transactions;
- to privatize and deregulate agricultural and industrial output.

The Frederick Chiluba Government was committed to extensive economic reform. The Government privatized many State industries, and maintained positive and real interest rates. Exchange controls were eliminated and free market principles endorsed.

Despite attracting praise from the World Bank for the 'success' of its privatization programme, privatization had a very mixed record in Zambia. Although some failing State-run enterprises began to operate more effectively after privatization, many companies collapsed, jobs were lost and welfare programmes originally performed through a parastatal were not continued by private companies.

Trade liberalization was also disastrous for manufacturing industries, such as textiles, that used to produce import substitutes. Paid employment in mining, manufacturing and agriculture fell by nearly 40 per cent during the 1990s. It also had a negative impact on Government revenues which fell by more than 30 per cent in real terms. With a weak tax base, tariffs were an important source of Government finance before liberalization. With declining GDP after 1993, real Government expenditure in the domestic economy (excluding interest on debt) fell by almost half through the 1990s. Consequently, spending on important economic infrastructure, such as transport and communications, was heavily cut.

Agricultural market reform had a similarly poor record. A 2000 World Bank study acknowledged that the removal of all subsidies on maize and fertilizer led to 'stagnation and regression instead of helping Zambia's agricultural sector'. Devastating droughts in 1992 and 1994 deepened poverty in rural areas.

In its 2003 Human Development Report, the United Nations Development Programme (UNDP) reported that Zambia was the fourth worst performing economy in Africa with a 'growth' rate of -1.7 per cent per capita per year.

Structural Adjustment in the 2000s

The Elections in 2001 brought in Mr Levy Mwanawasa as the new President of Zambia. Mr Mwanawasa launched an anti-corruption investigation in 2002 to probe high-level corruption during the previous administration. In 2006-2007, that task force successfully prosecuted four cases, including a landmark civil case in the United Kingdom in which former President Chiluba and numerous others were found liable for \$41 million.

Zambia's economic performance in the 2000s suffered from a mix of domestic and international unfavourable factors with serious budget problems for the Zambian Government and relatively high inflation. The economy was hit by the pull out of the Anglo American Corporation from the copper industry, and the massive drought in 2002, however GDP and agricultural exports were boosted by improved copper price and a good maize harvest in 2004.

Despite progress in privatization and budgetary reform, Zambia's economic growth remained somewhat below the 5 per cent to 7 per cent needed to reduce poverty significantly. Rural farmers suffered particularly from market reforms, and HIV/Aids led to a shortage of labour on rural farms, with families having to sell land and capital equipment to pay for medicines. Three-quarters of the population lived on less than \$1 per day.

Repayments on an external debt of \$6.5 billion continued to be a debilitating drain on the economy. Despite reaching targets set by the IMF for Highly Indebted Poor Countries (HIPC)s debt relief, by the start of 2003 Zambia had received only 5 per cent of the debt service reduction committed to it.

The most urgent issues for the Zambian economy were thus debt relief, combating HIV/Aids, and a further reduction of its dependency on copper with the encouragement of private sector investment into export oriented agriculture, light manufacturing, small scale mining, and tourism.

Source: Drawn from three analytical papers: (i) *Zambia – Economic History* [Biz/ed Virtual Developing Country] (<http://www.bized.co.uk/virtual/dc/back/econ.htm>); (ii) *Zambia* (<http://www.eoearth.org/article/Zambia?topic+=49460>); and (iii) *Economy of Zambia* (http://en.wikipedia.org/wiki/Economy_of_Zambia).

As stated by Lipimile (2005)¹¹², the adoption of economic liberalization in Zambia in 1991 had witnessed the adoption of three key inter-related economic policy thrusts under the Structural Adjustment Programme (SAP): (i) deregulation; (ii) commercialization; and (iii) privatization. Lipimile (2005) had earlier noted "that following Zambia's independence in 1964, except in sectors subject to State restriction such as water, electricity, railways and postal services, the private sector operated in every sector and was flourishing. However, in 1968, most of the large private companies were nationalized by the Government. The Government instituted socialist economic policies which resulted in market distortions, economic instability, rising debt, growing inflation, and rapidly increasing unemployment due to the collapse of efficient private enterprises. The Government began instituting economic reforms in 1991 and, at that point, it was recognized that competition was an essential ingredient".¹¹³

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 commercialization 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.

Even though the privatization programme was begun in 1988/89¹¹⁴, it was only pursued in earnest after 1991 when the declining Government budget could not provide the investment capital needed to enable profitable parastatals and quasi-Government enterprises to grow, nor to finance the losses of those that were not profitable. Privatization of the enterprises was therefore the only viable option for their survival. According to Lipimile (2005), therefore, the privatization programme was thus clearly a 'damage control' exercise, undertaken during a period of extreme economic stress in an effort to enable enterprises to survive. The passing of the Privatization Act in 1992, and the establishment of the Zambia Privatization Agency (ZPA) reflected the Government's acceptance that the heavy burden placed on the Government budget by the State-owned enterprises was unsustainable, and that the survival of the enterprises could not be assured unless they were placed in private hands. The bulk of the enterprises, which then numbered around 150, were insolvent and many were technically bankrupt, being plagued by over-employment and operational inefficiencies. Creditors were threatening loss-making enterprises with receiverships. Some 38 enterprises had already been forced into liquidation before the privatization programme was launched, with notable ones being in the milling industry (United Milling) and the road and air transportation services sector (United Bus Company of Zambia, and Zambia Airways). Privatizations peaked in 1996 when 125 transactions were completed. Some of the enter-

prises, 12 in all, had however to be liquidated at the time of privatization as there were no buyers willing to resuscitate them.

Zambia's Fifth National Development Plan: 2006-2011 (FNDP) was adopted with a theme based on "broad-based wealth and job creation through citizenry participation and technological advancement". The Plan's strategic focus was on economic infrastructure and human resources development. It also had an interface with competition policy and law, as observed by the former Zambia Competition Commission (ZCC) in the Commission's Strategic Plan: 2008-2011¹¹⁵, in that it recognized the smallness of Zambia's domestic market, which made it susceptible to unfair advantage gained by private anticompetitive practices, which in turn created an uneven competitive playing field. In that regard ZCC stated that in the furtherance of the commerce

and trade objectives of the FNDP, "the Commission envisages a situation where competition plays a key role in ensuring that innovation in the production and distribution chain for goods and services does have a positive impact on wealth creation by way of access to equitable business opportunities for all entrepreneurs and that whatever wealth is created by business, it does lead to increased welfare of citizens (i.e., consumers)".

1.2 Foundations and History of Competition Policy and Law in Zambia

The Commission's Strategic Plan: 2008-2011 gives a very good background on the foundations and history of competition policy in Zambia, as shown in Box 3 on the relevant extract of the Plan.

Box 3: Extract from the Commission's Strategic Plan: 2008-2011 on Foundations and History of Competition Policy and Law in Zambia

The advent of "The Third Republic" in 1991 witnessed economic transformation from an overly State controlled Socialist economy to a market economy, resulting in the commercialization and privatization of State-owned enterprises. For purposes of privatization, the Privatization Act was passed in 1992 and the Zambia Privatization Agency (ZPA) established, followed by the Investment Act and the establishment of the Zambia Investment Centre (ZIC) to attract investment to the economy. 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 was not to be eroded by the anticompetitive 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 enacted in 1994 by Parliament. The Zambia Competition Commission however became operational in May 1997 when the Executive Director was appointed.

A common aspiration underlying these reforms was to provide greater incentives to stimulate entrepreneurial activity, business efficiency, productive investment and economic growth, as well as enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than administrative decision.

It was further anticipated that the "free play" of supply and demand would, in the long run, determine market price throughout the economy, allowing productive resources to be allocated in an efficient manner. Structural adjustment programmes were adopted that included market oriented reforms, notably in the areas of deregulation of prices, including the reduction or elimination of subsidies, administrative allocation of key product inputs, privatization of public enterprises and monopolies, as well as the liberalization of trade policy and investment regimes.

However, it was also recognized that the benefits of market oriented reforms are likely to be fully realized only if enterprises act under the spur of competition, so that consumer wishes and opinions are reflected in market performance. It was further recognized that a country that has undertaken trade liberalization measures has every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anticompetitive practices by firms.

As per Government vision, the law on competition in Zambia seeks to encourage competition and fair-trading by prohibiting anticompetitive practices which are likely to adversely affect competition and fair trading in Zambia. The law also controls mergers and acquisitions and regulates monopolies and concentrations of economic power. Other aspects of the law that fall within its legal protection are consumer welfare, freedom of trade and expansion of the base of entrepreneurship. In addition, the law seeks to improve the efficiency of production and distribution of goods and services in Zambia.

The competition and fair trading legislation introduced in Zambia a novel mechanism of systematically addressing unfair competition practices in the economy as well as preventing abuse of monopoly of dominant market power, with a deliberate outcome of a well-functioning market economy as well as enhanced consumer welfare. This spirit was encapsulated in the preamble to the legislation itself, which lists the following as its objectives: (i) to encourage competition in the economy; (ii) to protect consumer welfare; (iii) to strengthen the efficiency of production and distribution of goods and services; (iv) to secure the best possible conditions for the freedom of trade; (v) to expand the base of entrepreneurship; and (vi) to provide for matters connected with or incidental to the foregoing.

Source: Strategic Plan 2008-2011, Zambia Competition Commission.

Lipimile (2005)¹¹⁶ went into more detail on the need for a competition law and policy in Zambia. His submission on the matter is paraphrased in Box 4.

Box 4: Need for Competition Law and Policy in Zambia

There was a strong argument opposed to the development and enforcement of competition law in the least developed countries like Zambia. It was argued that the scarce, skilled labour required for the effective enforcement of competition is vastly disproportionate to its proven positive impact on economic development. Most, if not all, of the least developed countries had embarked on a liberalized industrial policy regime where private corporate sector was strongly encouraged. Trade liberalization was sufficient, along with other moves towards deregulation, to create a competitive domestic market. Liberalization of international trade was relatively simple to implement and did not require expenditure of scarce skills. In essence, that argument regarded liberalization of trade as a substitute for domestic competition law. The common example given was that of Asian countries which had no competition laws but were fully developed. The current trend was however that countries such as Hong Kong (China), Japan and South Korea had in the past decade introduced major measures that included competition law principles.

It was further argued that competition law limited the ability of the least developed country Governments to introduce pro-development industrial policy and prevented firms from achieving the economies of scale necessary to compete with the developed country multinational corporations. Competition law was seen as a danger to competitiveness. Competition law was also seen to limit the ability of domestic firms to become internationally competitive because it made it difficult to coordinate their business policies and strategies with domestic rivals by agreement.

While there is now a general consensus on the need for a competition law and policy for developing countries like Zambia, three inter-related issues are increasingly recognized:

- Competition policy needs may differ according to level of economic development of a nation.
- Competition law is just one of the various public policies that infringes on the competitive environment of an economy. Consequently, the linkages between various policy initiatives and their combined effect on competition, efficiency and growth need to be understood before identifying the key parameters of competition policy and the scope of competition law.
- The institutional legal framework is critical for the efficacy of competition law.

In making the case for an effective competition law, it was important to stress that the design of competition law had to take appropriate account of Zambia's level of development and the long-term objective of the country's economic policy.

Zambia had realized that competition policy and that competition policy and industrial trade policy should serve complementary roles in creating an environment that promoted growth and productivity on the one hand, and free and fair competition on the other. It was not a question of one replacing the other. Competition law and policy was also important as it allows the country to create conditions conducive to productivity enhancement, ensures the sound development of domestic industry, and restricts abuses of dominant positions by large companies, including multinationals.

The Zambian economy had been experiencing both the external pressure of competition and internal limits of growth. The country's dependence and strong trading links with South Africa's economy had a significant effect on the local market. Under those conditions, the adoption of a national competition law and policy had become necessary. If Zambia's economic productivity was to continue increasing so that the nation could maintain its competitive edge, adopting a national competition law was the pressing task at hand.

Source: George K. Lipimile, 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.

Zambia in 1994 enacted the Competition and Fair Trading Act, 1994 (No.18 of 1994). The Act's date of Assent by the President was 11 May 1994, and it came into operation on 10 February 1995. The preamble to that Act listed the following as the primary objectives of the legislation "... to encourage competition in the country by prohibiting anticompetitive practices; to regulate monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure the best possible conditions for the freedom of trade; to expand the base of entrepreneurship; and to provide for matters connected with or incidental to the foregoing".

The Act provided in terms of its section 4(1) for the establishment of the Zambia Competition Commission (ZCC) as "a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform". The functions of the Commission in terms of section 6(2) of the Act included the following: (i) carrying out investigations into anticompetitive practices, and mergers, on its own initiative or at the request of any person; (ii) taking action to prevent or redress the creation of a monopoly situation through mergers or the abuse of a dominant position; (iii) providing information to the business community and consumers regarding their rights under the Act; (iv) developing and promoting standards of conduct for ensuring compliance with the provisions of the Act; and (v) doing all such acts and things as are necessary for the better carrying out of its functions under the Act.

The Commission was established on 14 April 1997 following the appointment of its members, comprising the Board of Commissioners, by the Minister of Commerce, Trade and Industry.

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: (i) arrangements and agreements among otherwise

independent firms; (ii) unilateral conduct of single firms in dominant positions; and (iii) combinations of independent firms.

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 anticompetitive conduct which were prohibited included the following: (i) anticompetitive agreements and exclusionary provisions, including primary and secondary boycotts, with a *per se* ban on price fixing and boycotts; (ii) misuse of substantial market power for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct; (iii) exclusive dealing which substantially lessen competition, with third line forcing prohibited *per se*; (iv) resale price maintenance for goods; and (v) mergers and acquisitions which substantially lessen competition in a substantial market. The second principle was that certain anticompetitive behaviour should be able to be authorized on the basis and grounds of 'economic efficiency'.

The enforcement of the Competition and Fair Trading Act, 1994 by the Commission was besieged by a number of various problems and constraints, as chronicled by the Commission's competition practitioners in various publications. Problems and constraints that were identified by the Commission in its Strategic Plan: 2008-2011, as well as in its weekly newspaper column and quarterly Newsletter, and by Lipimile (2005)¹¹⁷ relate to the following broad categories: (i) scope of application of the Competition and Fair Trading Act, 1994; (ii) substantive provisions of the Competition and Fair Trading Act, 1994; (iii) procedural aspects of the Competition and Fair Trading Act, 1994, including enforcement powers of the Commission; (iv) the Commission's resources; (v) lack of Government support for the Commission; and (vi) a general lack of competition culture in Zambia:

- (i) Scope of application of the Competition and Fair Trading Act, 1994
 - *Coverage of Public Interest in the Act.* it was noted the Zambian competition law did not refer directly to the promotion of public interest. That was seen as an anomaly since the goal of maintaining inter-firm rivalry through competition should also be linked to broader economic and social policy objectives, instead

of just to a “narrow concept of economic efficiency”. Although the Commission had on several occasions taken into account public interest arguments, it was doubtful whether there were any legal bases.

- *Explicit Exclusions*: it was noted that one of the exclusions from the application of the Act of activities or agreements to which the Government is a party, had the effect of making the whole privatization of State enterprises process not subject to the country’s competition law since in all, or most of the sale agreements under the privatization programme, the State through the Ministry of Finance and National Planning was the other party as the State enterprises were majority owned by the Government.
- (ii) Substantive provisions of the Competition and Fair Trading Act, 1994
- *Definition of Merger and Notification of Mergers*: it was noted that the term ‘merger’ was not defined in the Act. Consequently, the Commission viewed a ‘merger situation’ to be very wide and covered several different kinds of transactions and arrangements. The Commission had also on several instances been challenged on the need to notify a merger. The argument was that the Act did not compel parties to a merger to notify where they thought that there was no likelihood to breach section 7 of the Act. There were also no provisions in the Act which empowered the Commission to request parties to notify a non-notifiable merger where it appeared to the Commission that the proposed merger was likely to substantially prevent or lessen competition.
 - *Interpretation and Treatment of ‘Concerted Practice’ and Vertical Restraints*: it was noted that the prohibition under section 7 of the Act applied to concerted practices as well as to agreements, when the boundary between the two concepts is imprecise. The key difference was that a concerted practice may exist where there is informal cooperation without any formal agreement or decision. In considering if a concerted practice exists, an economic assessment of the relevant market would need to be made, as well as the establishment of the following two main elements: (i) the existence of positive contacts between the parties; and (ii) the contact has the object or effect of changing the market behaviour of the undertakings in a way which may not be dictated by market forces. A problem with the wording of section 7(1) of the Act was therefore foreseen, since it would be difficult to establish that an entity acted for the prohibited objective. It was also noted that the provisions in the Act on vertical restraints are illustrative only, and that there may be many other types of vertical agreements that would fall within the provision. Equally, some types of agreements listed may not fall within the prohibition in the particular circumstances of the case. The crucial factor should be whether the agreement has the object or effect of preventing, restricting or distorting competition.
 - *Absence of a Leniency Programme*: the absence of provisions in the Act providing for leniency programmes was a major drawback in the effective implementation of competition policy and law in Zambia. In that regard, it was noted that even though Act out-rightly prohibited cartels, which are considered by many to be the worst competition law offence, anti-cartel enforcement had been weak since evidence is often difficult to obtain in the absence of a member of the cartel providing information on the cartel activities.
- (iii) Procedural aspects of the Competition and Fair Trading Act, 1994, including enforcement powers of the Commission
- *Timetable for Decisions on Authorizations*: it was noted that the Act did not provide for or stipulated time limits in which the Commission was required to carry out its work, particularly in authorizing mergers. The Commission recognized that the business community is anxious to avoid delay in obtaining regulatory approval for planned mergers or takeovers since such delays can mean a loss of business opportunity.
 - *Limited Investigative Powers*: the Commission did not have administrative powers to summon a suspect to assist in investigations, making the system voluntary. In that regard, it

was noted that in the absence of information, which some complainants and respondents, and other relevant stakeholders, were unwilling to furnish, it became difficult for the Commission to ensure speedy resolution of competition complaints. The law also did not give the Commission powers to carry out searches of premises on its own without first obtaining a warrant from the courts of law.

- *Limited Administrative Remedies:* the Commission did not have powers to impose fines outside the court process, which in Zambia is slow and expensive. Furthermore under the Act, offenders were liable upon conviction of a breach of competition law, including consumer protection law, to a fine of only up to 10 million Kwacha (\$2 000), and/or five years' imprisonment – sanctions that did not deter would-be offenders.
- *Private Rights of Action:* it was noted that the Act did not contain any express right to bring private civil actions for breach of Part III prohibitions of the Act that are related to anticompetitive practices. Under common law, which is applicable in Zambia, third parties can seek injunctive relief against breaches of the Act and are thought to be able to claim damages for losses sustained as a result of such breaches.
- *Insufficient Protection of Rights to Defence:* it was observed that there had been some dissatisfaction from the public who were claiming that the current decision-making procedure by the Board of Commissioners did not guarantee procedural fairness. That was because parties to matters being considered by the Board did not enjoy the 'rights to defence', i.e., there was no requirement for the parties to appear before the Board to defend their position.

(iv) The Commission's resources

- *Insufficient Staff for the Wide Institutional Mandate:* the Commission had a wide mandate under the Act that allowed it to address competition concerns in virtually all sectors of the Zambian economy, yet it had to cope with the problem of shortage of staff with the necessary expertise of analysing issues in every economic sector. Related to that was the challenge of concurrent jurisdiction with other

sector regulators, which was not adequately addressed in the Act.

- *Inability to Recruit and Retain Trained and Qualified Staff:* the Commission was unable to retain staff that had been trained at great cost because of uncompetitive conditions of service.
 - *Inappropriate Office Premises:* lack of adequate and reliable office space.
 - *Lack of Reference Materials:* lack of a proper library facility with requisite reference competition, economic, consumer, law, decided court cases, and other relevant literature.
 - *Low National Coverage:* lack of logistical capacity to monitor, control and prohibit anticompetitive practices at national level.
- (v) Lack of Government support for the Commission
- *Government Support for Competition Enforcement:* it was observed that the implementation of competition law in Zambia had not received the necessary support from government policymakers. In that regard, it was observed that there had been great reluctance by government to act upon the advice of the Commission, and that the Commission's competition opinions and recommendations to policymakers "are not effectively observed due to discretionary policy making by government institutions". That was because the government is not bound by the decisions or recommendations of the Commission, unlike the competition law of Malawi, which contains a specific provision which binds government to the decisions of the competition authority¹¹⁸.
- (vi) A general lack of competition culture in Zambia
 - *Fear of Competition Policy and Law by Manufacturers:* it was observed that most of the manufacturers did not share a common and full understanding of the importance of competition law and policy, probably because there seemed to be deep-rooted fears among some manufacturers that local firms could be overpowered by foreign firms when competition laws and policies are effectively

enforced. While it was acknowledged that domestic competition, enhanced by competition law and policy, would contribute positively to the growth of the national economy, the manufacturers feared that competition with foreign firms would also be facilitated, thus hampering the development of local firms.

- *Weak Domestic Corporate Image:* owing largely to the low level of public awareness of the Commission's activities and/or interventions in key sectors of the economy.

The experience gained by the Commission in enforcing the Competition and Fair Trading Act, 1994 led to the revision of the legislation in order to

strengthen the enforcement of the country's competition law. The exercise involved renowned international competition experts, and was undertaken in consultation with a number of other developed competition authorities, notably, the Bundeskartellamt of Germany, and the Federal Trade Commission of the United States of America.

The shortcomings in the enforcement of Zambia's competition law under the Competition and Fair Trading Act, 1994 was clearly stated by the then Minister of Commerce, Trade and Industry in his Ministerial Statement to the National Assembly of Zambia on the First Reading on 28 July 2010 of the Competition and Consumer Protection Bill 2010. The following in Box 5 are the main points of the Minister's Statement:

Box 5: Main Points of Ministerial Statement to Parliament on First Reading of the Competition and Consumer Protection Bill, 28 July 2010

Background and Rationale for the Competition and Consumer Protection Bill

Competition and consumer protection issues in Zambia have been addressed by the Competition and Fair Trading Act Cap. 417 which was enacted in April 1994. That Act, which shall be repealed with the passing of the Competition and Consumer Protection Bill had been found inadequate in addressing competition and consumer protection matters of enforcement and clarity in certain circumstances. The Ministry recognized that competition and consumer protection was not governed by any policy, which resulted in inconsistent enforcement of the law. With the approval of the Competition and Consumer Protection Policy by Cabinet and recognizing the need for more enforcement powers in order to protect our economy and the citizens of Zambia, the Ministry has proposed that the Competition and Fair Trading Act be repealed.

In that connection, the Ministry proposed the Competition and Consumer Protection Bill which is a more comprehensive Bill addressing competition and consumer issues that are currently affecting our economy and consumers.

The essence of the Bill is to provide for accountable and transparent enforcement provisions and a legal regime which would efficiently and effectively capture cartel activities, abuse of dominance and monopoly market positions, and general anticompetitive or restrictive business practices; provide for the process which would not necessarily frustrate businesses in Zambia; creation of a competitive environment that would remove artificial barriers to enterprise entry; protect consumers from unscrupulous traders and manufacturers; and provide for a legal regime that is robust, but fair and accountable. The specific objectives of this Bill are to: (i) align the competition and consumer legislation to international standards; (ii) strengthen the enforcement powers and penalties; (iii) enhancement of consumer protection provisions; (iv) revise the legal regime dealing with competition and consumer cases; and (v) regulatory interface with sector regulators.

The reasons that necessitated the above mentioned changes were as follows:

(a) Align the Competition and Consumer Legislation to International Standards

The Competition and Fair Trading Act, Cap 417 of the Laws of Zambia was enacted in 1994 and had been enforced since 1997. During that period, a number of developments have occurred in areas of competition law and consumer protection. The developments include matters to strengthen secret business agreements (formal, informal, written or unwritten), i.e., cartel activities of persons engaged in business. Governments the world over have realized the great losses that are subjected to absolve in awarding contracts to businesses that collusively tender for bids or allocate markets to each other. Zambia is no exception to these kinds of vices that negate welfare gains.

The United Nations Set of Principles and Rules on Competition which were adopted in 1980 by the United Nations General Assembly were reaffirmed in 2000 and called upon all Member States to, *inter alia*, take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules. Further, there

have been developments at regional level where COMESA competition regulations and rules were adopted by the Council of Ministers in December 2006 in which the regulations and rules cover both competition and consumer provisions. Member States are expected to, the most practical extent, adapt as much as they can from the regional competition and consumer protection nomenclature in order to provide for convergence in enforcement approach across the Common Market.

(b) Strengthen the Enforcement Powers and Penalties

The current enforcement powers of the Zambia Competition Commission and penalties in the current legislation are not effective and efficient in their application. The Commission has no administrative powers to subpoena or fine persons but has to rely on the Court process to do this. There is thus need to strengthen the investigatory powers as well as the penalties against cartel activities. A number of competition authorities have power to summon persons to provide information and also to call for submission of documents. Unlike the Anti-Corruption Commission and the Drug Enforcement Agency, the Zambia Competition Commission does not have summoning powers at the moment. This has made it difficult to collect information as persons who refuse have to be taken to court – which is an inefficient way of enforcing such a law.

(c) Enhancement of Consumer Protection Provisions

Consumer protection has been problematic for some time and is fragmented in different pieces of legislation. All economic activity has to result in a gain by citizens through consumption. Such consumption must adhere to certain minimum quality standards. International consumer welfare protection actions by governments have primarily been advanced through the *United Nations Guidelines on Consumer Protection*. The guidelines call on UN Member States to provide for mechanisms to deal with potentially harmful government and business actions that may affect consumer welfare. For instance, Article II of the United Nations Guidelines on Consumer Protection call on Member States to develop and maintain strong consumer protection policies, taking into account the adopted guidelines and relevant international agreements. In doing so each government is expected to set its own priorities for the protection of consumers in accordance with economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of any proposed measure.

A comprehensive draft Consumer Protection Bill was prepared under the auspices of the Zambia Law Development Commission in 2004 and the Government directed the Zambia Competition Commission to have the draft Consumer Protection Bill to be merged with the Competition and Fair Trading Act in order to optimize on resource allocation and use in one institution. A draft Bill resulting from merging the two has resulted in a total review and thus what is effectively proposed is a repeal of the old law.

The merging competition and consumer protection matters in a legislation are based on models from Australia, the United Kingdom and the United States of America, as well as the COMESA Competition Regulations and Rules under Article 55 of the COMESA Treaty.

(d) Revise the Adjudicative Powers Dealing with Competition and Consumer Cases

There have been proposals to set up a competition and consumer tribunal to act as a court of first instance in competition matters while small claims by consumers and unfair trading matters may be dealt with under the Small Claims Court Act. Similar tribunals exist in countries such as the United Republic of Tanzania, South Africa, the United Kingdom and Australia.

A tribunal is proposed to be fashioned along the lines of the Revenue Tribunal or the Banking and Financial Services Tribunal.

(e) Regulatory Interface with Sector Regulators

The proliferation of regulators in the economy entails that there is need to provide for a working relationship amongst them to avoid increasing business transaction costs through adherence to multiple requirements which in any case may be confusing to business persons as to which regulator's decision to comply with first. Competition and consumer protection issues cut across the whole economy and the proposed legislation is expected to deal with regulatory relations where there is concurrent jurisdiction with other specific regulators.

Conclusion

It is essential that competition and consumer laws be strengthened to facilitate a competitive economy on one hand and protect citizens from unscrupulous businesses on the other hand.

1.3 National Competition and Consumer Policy

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. Normal practice is that the formulation of competition policy precedes the drafting of competition law because the law should be based on the policy. The enactment of governing laws before the formulation of the base policies seems to be a common practice in the regulatory sector of Zambia. For example, the Investment Act, 1993 was also enacted before the formulation of the investment policy¹¹⁹, and the enactment of the Citizens Economic Empowerment Act, 2006 preceded the formulation of the economic empowerment policy, which is still being formulated¹²⁰. The reasons given included having the law first to force and convince the actors to apply it, and assessing the economic importance of a policy through the effective enforcement of the law before formalizing the policy.

A comprehensive competition policy should take into account all government policies that promote as well as restrict competition. It therefore should extend beyond traditional competition law. In any country there are several pieces of legislation that influence the effectiveness of competition law, which must be taken into account in a comprehensive competition policy. In addition to traditional competition law, these include trade and industrial policies, privatization and investment policies, sector regulation, and consumer protection.

Zambia's national competition and consumer policy as approved by Cabinet comprehensively covers the main elements.¹²¹ Its vision is: *To develop and facilitate an enabling national growth environment which is transparent, equitable, efficient and provides for procedural fairness and for the protection of the competitive process and consumers.*

The objectives and strategies of Zambia's national competition and consumer policy are summarized below:

<p>1. Mergers and Acquisitions <i>To prevent the creation of a market structure that can lead to a likely substantial lessening of competition and/or abuse of dominance.</i></p>	<ul style="list-style-type: none"> • The ZCC shall provide proper merger notification guidelines to ensure that only mergers that are likely to adversely affect competition notify. • The ZCC shall ensure that all notifiable mergers are assessed in a transparent and efficient manner. • The ZCC shall consult stakeholders in merger assessment. • The final authority for consummating all mergers shall be the preserve of the ZCC.
<p>2. Abuse of Dominance <i>To prevent likely and remedy existing abuse of dominant position of market power.</i></p>	<ul style="list-style-type: none"> • Undertaking research studies and using appropriate analytical tools to identify abuse of dominance and make informed decisions. • Put in place enforcement mechanisms that would deter the persons from abuse of dominant position of market power.
<p>3. Essential Facilities <i>To ensure equitable and affordable access to the facility by potential and actual users.</i></p>	<ul style="list-style-type: none"> • Publication of access guidelines such as minimum cost, timetable for access to the facility, timeframe be more specific. • The ZCC should regularly monitor the implementation of the guidelines.
<p>4. Restrictive Business Practices <i>To monitor, control and prohibit business conducts that are likely to prevent, restrict or distort competition in Zambia.</i></p>	<ul style="list-style-type: none"> • Put in place adequate enforcement mechanisms that will enable the relevant authorities prohibit and deter restrictive business conduct. • Sensitization of consumers and businesses regarding their rights and obligations under relevant legislation. • Undertaking research studies and using appropriate analytical tools to identify abuse of dominance and market informed decisions.

<p>5. Cartels <i>To identify, prevent and eliminate the formation of cartels.</i></p>	<ul style="list-style-type: none"> • Undertake periodic research to ascertain the existence of cartels in the economy. • Expose cartels to the public (name and shame). • Relevant authority to establish close relationships with competition authorities in other countries and collaborate in investigation and prosecution of cartels. • Collaborate with internal security wings in cartel identification and investigations. • Establish a mechanism to encourage informers and provide for their protection. • Put in place enforcement mechanisms that will deter persons from cartelistic behaviour such as stiffer penalties.
<p>6. Hoarding of Products <i>To ensure that there is no artificial shortage in the supply of products aimed at increasing the price.</i></p>	<ul style="list-style-type: none"> • Assess reasons for market shortages as and when they arise. • Establish a surveillance mechanism with other relevant public and private sector organizations. • Put in place adequate enforcement mechanisms that will deter the persons from hoarding products.
<p>7. Product Safety <i>To ensure that consumers are not exposed to unsafe products.</i></p>	<ul style="list-style-type: none"> • To ensure that the products supplied are subjected to mandatory or voluntary testing by relevant authorities. • Expose defaulting companies to the public (name and shame). • Put in place adequate enforcement mechanisms that will deter the persons from supplying unsafe products. • Encourage relevant authorities to cooperate with counterparts in originating countries of unsafe products.
<p>8. Defective and Sub-Standard Products <i>To ensure that consumers are not exposed to defective and sub-standard products.</i></p>	<ul style="list-style-type: none"> • To ensure that the products supplied in the Zambian market are subjected to acceptable standards and testing recognized by Zambian laws. • Expose defaulting companies to the public (name and shame). • Put in place enforcement mechanisms that will deter the persons from supplying defective and sub-standard products. • Put in a framework for cooperation with counterparts in originating countries of unsafe products.
<p>9. Unconscionable Conduct <i>To protect consumers and businesses from unreasonable and/or unfair business transactions that go against good conscience.</i></p>	<ul style="list-style-type: none"> • Promote ethical business practices. • Put in place enforcement mechanisms that will deter person from engaging in unconscionable conduct. • Compel manufacturers and suppliers to provide adequate and necessary product information through legal provisions.
<p>10. Misleading and Deceptive Conduct <i>To protect consumers from misleading and deceptive conduct by manufacturers and traders.</i></p>	<ul style="list-style-type: none"> • Promote ethical business practices. • Put in place enforcement mechanisms that will deter the persons from misleading and deceptive conduct. • Encourage manufacturers and suppliers to provide adequate and necessary information about their commercial practices.
<p>11. Warranties and Guarantees <i>To ensure that consumers are provided with reasonable and enforceable terms for warranties and guarantees.</i></p>	<ul style="list-style-type: none"> • Put in place minimum benchmark standards for product warranties and guarantees. • Compel manufacturers and suppliers to provide adequate and necessary warranties and guarantees through legal provisions.

12. Advocacy Programmes

To create a culture of competition and consumer welfare among consumers, business community, policymakers and other stakeholders.

- Carry out information dissemination activities.
- Inform consumers about the regulatory bodies that can address their grievances.
- Engage the media in the sensitization process by promoting competition and consumer programmes in electronic and print media.

13. Resolution of Disputes

To ensure that consumers have recourse to formal or informal procedures that are expeditious, fair and inexpensive.

- Establish legal and institutional framework and clear administrative procedure.

14. Inter-Institutional Linkages

To harmonize the activities and legal framework of relevant institutions involved in competition and consumer welfare matters.

- Review of current legislation and amendment or repeal where necessary.
- Encourage relevant authorities to cooperate with counterparts.
- Create clear inter-institutional mechanisms for synergy identification and collaboration of activities.

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

The implementation framework of the Policy covered the following areas: (i) institutional arrangements; (ii) the Zambia Competition Commission; (iii) the judiciary; (iv) sector regulators; (v) law

enforcement agencies; (vi) legal and regulatory framework; (vii) resource mobilization and financing; and (viii) monitoring and evaluation. These are briefly explained in Box 6 below:

Box 6: Implementation Framework of the Policy*1. Institutional Arrangements:*

The institutions that will be important in the implementation of the Policy include the Commission, sector regulators and the Judiciary. The implementation of the Policy will require working in close collaboration with other stakeholders.

2. Zambia Competition Commission

The primary institution mandated to implement the competition and consumer welfare policy is the Zambia Competition Commission (ZCC). The ZCC will monitor, control and prohibit acts or behaviour, which are likely to adversely affect competition, fair trading and consumer welfare in Zambia. Furthermore, the ZCC should be empowered to address such market disputes through effective enforcement of competition and consumer law. In addition, a Competition and Consumer Tribunal should be established to allow for due process.

In order for ZCC to effectively implement the law, it should be accessible countrywide, thus the need to decentralize its operations.

3. The Judiciary

The Judiciary through the court system shall play an important role in enhancing the enforcement mandate of the competition and consumer authority.

In that regard, the Small Claims Court shall provide timely and cost effective resolution of disputes for small claims. The relevant authority and other institutions that deal with consumer protection shall refer appropriate cases to the Small Claims Court. The relevant authority and/or statute creating its existence shall develop an institutional coordination mechanism with the Small Claims Court for the purposes of identifying cases that may need the attention of either institution.

4. Sector Regulators

Sector regulators will play a key role in competition and consumer protection enforcement through institutional linkages and coordination with the relevant authority. The sector regulators and the ZCC shall enter into memoranda of understanding to ensure coordinated implementation and enforcement of the legal framework. The following are some of the regulators need to coordinate with the competition authority: (i) Energy Regulation Board; (ii) Communications Authority of Zambia; (iii) Patents and Companies Registration Office; (iv) Zambia Development Agency; (v) National Water Supply and Sanitation Council; (vi) Pharmaceutical Regulatory Authority; (vii) Zambia Bureau of Standards; (viii) Zambia Weights and Measures Agency; (ix) Bank of Zambia; (x) Securities and Exchange Commission; (xi) Pensions and Insurance Authority; (xii) Zambia Revenue Authority; (xiii) Zambia Wildlife Authority.

5. Law Enforcement Agencies

The various law enforcement agencies shall coordinate and cooperate with the ZCC in the implementation and enforcement of the competition and consumer legislation.

6. 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 legislations play an important role: (i) Telecommunications Act which provides regulation of Information Communication Technology sector; (ii) Public Health Act provides for public health and safety; and (iii) Food and Drugs Act which provides for standards for food and drugs.

7. Resource Mobilization and Financing

The principal responsibility of the central government in the implementation of the policy will be to mobilize 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.

8. Monitoring and Evaluation

The Ministry responsible for commerce, trade and industry shall provide political support and facilitate the monitoring of the implementation process and be responsible for evaluating policy benchmarks herein. The Ministry shall conduct periodic monitoring exercises to assess adherence to the provisions of the Policy and to determine whether intervention activities are contributing towards the policy vision and its outlined objectives.

In monitoring the implementation of the Policy the ZCC or successor institution shall take the lead implementation agent role.

Source: National Competition & Consumer Policy of the Republic of Zambia, May 2009.

2. SCOPE OF COMPETITION POLICY AND LAW

In line with international best practice, and as suggested in the UNCTAD Model Law on Competition¹²², Zambia's new Competition and Consumer Protection Act, 2010 (No.24 of 2010) (CCPA) is a general law of general application. It therefore places upon the Commission a great responsibility of promoting competition and protecting consumer welfare in the whole economy of Zambia through the effective enforcement of the Act.

2.1 Competition and Consumer Protection Act

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). The following in Box 7 is the text of a communiqué that the Commission released to the business community and consumers on that development:

Box 7: Commission Communiqué on the Repeal of the Competition and Fair Trading Act, 1994 and the Coming into Force of the Competition and Consumer Protection Act, 2010

The Competition and Consumer Protection Commission (CCPC) formerly called Zambia Competition Commission (ZCC) has finally come into effect following signing of the Commencement Order by the Minister of Commerce, Trade and Industry on 4th October 2010. The Order has repealed the Competition and Fair Trading Act, CAP 417 of the laws of Zambia enacted in 1994, aimed at promoting competition and consumer welfare in the economy. The newly enacted Competition and Consumer Protection Act No. 24 of 2010, is poised to improve enforcement of competition law and consumer protection in Zambia.

The Competition and Consumer Protection Act No. 24 of 2010 seeks to safeguard and promote competition and protect consumers against unfair trade practices in Zambia. The CCPC that replaces ZCC will also advise the government on laws affecting competition and consumer protection and provision of information for the guidance of consumers regarding their rights and obligations.

The new law, unlike the repealed Competition and Fair Trading Act, comprehensively defines various competition and consumer protection terms that were previously not defined, thereby making enforcement difficult. The Act also provides for fines not exceeding 10 per cent of the annual turnover of guilty businesses for violating both competition and consumer provisions of the Act. It not only gives administrative powers to the Commission to be able to impose fines but also a broader scope of enforcement provisions. The Act also provides for the establishment of the Competition and Consumer Protection Tribunal which is a milestone in an effort to ensuring that appeal cases are dealt with expeditiously within the confines of the law.

The law among other things clearly prohibits:

1. Display of disclaimers in trading places such as 'No Return, No Refund'.
2. False or misleading representation such as claiming that goods sold are new when they are not.
3. Supply of defective goods, e.g., pressing iron that does not get hot.
4. Sale of goods which are not properly labelled, i.e., without product name and ingredients.
5. Charging a consumer more than the price indicated or displayed on a product or service.
6. Sale of goods that do not conform to the mandatory safety standard set by the Zambia Bureau of Standards or other relevant bodies.

Source: Commission Communiqué on the Repeal of the Competition and Fair Trading Act, 1994 and the Coming into Force of the Competition and Consumer Protection Act, 2010.

Zambia's competition law is enshrined in the Competition and Consumer Protection Act, 2010, which captures the gist of the country's competition policy. The Act's date of Assent by the President of Zambia was 14 August 2010. The preamble to the Act gives its broad objectives as follows:

"An Act to continue the existence of the Zambia Competition Commission and to re-name it as the Competition and Consumer Protection Commission; safeguard and promote competition; protect consumers against unfair trade practices; provide for the establishment of the Competition and Consumer Protection Tribunal; repeal and replace the Competition and Fair Trading Act, 1994; and provide for matters connection with, or incidental to, the foregoing".

The import of the above preamble to the new Act is that it clearly provides for the continuation of the activities of ZCC under the re-named Competition and Consumer Protection Commission (CCPC). This is important since it removes the legal uncertainty and juridical problems over cases initiated by ZCC under the old law, as well as over all other operations and decisions of ZCC. Most of the other objectives of the Act remain more or less similar to those of the old Act.

As stated in the Commission's communiqué to the business community and consumers on the coming into force of the Act, the new law comprehensively defines various competition and consumer protection terms that were previously not defined. This facilitates the proper interpretation of the law,

and minimizes time and resource consuming disagreements on its application. As stated in UNCTAD Model Law on Competition, definitions make the reading of the law easier, and prevent confusion or ambiguity. For that purpose, they stipulate those elements that are essential for the application of term which in ordinary usage may have uncertain or multiple meanings.

As opposed to the old Act, which only had one definitional 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. For example, the definition of the term ‘merger’ is not found in the general

definitional section 2 of the Act, but in section 21 (Part IV on Mergers), and the definition of the term ‘unfair trading practice’ is found in section 45 (Part VII on Consumer Protection). This is in order since it removes confusion and uncertainty over the general application of the terms in other parts of the Act.

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. All the definitions of the new terms facilitate the proper interpretation of the law, and thus its effective enforcement. For example, some of the pertinent terms defined in terms of section 2(1) of the Act include the following in Box 8:

Box 8: Important New Definitions in the Competition and Consumer Protection Act, 2010

“acquired” means acquired by takeover, purchase of shares or assets, or any other means through which an enterprise obtains, secures or gains a legal interest in another independent enterprise;

“agreement” means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises;

“assets” in relation to an enterprise, includes physical assets, businesses, shares and other financial securities, brands and intangible assets including goodwill, intellectual property rights and knowhow;

“bid-rigging” means a horizontal agreement between enterprises where: (a) one or more parties to the agreement agrees not to submit a bid in response to a call for bids; or (b) the parties to the agreement agree upon the prices, terms or conditions of a bid to be submitted in response to a call for bids;

“concerted practice” means a practice which involves some form of communication or coordination between competitors falling short of an actual agreement but which replaces their independent action and restricts or lessens competition between them;

“confidential information” means 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;

“consumer” means: (a) for the purposes of Part III (restrictive business and anticompetitive trade practices), any person who purchases or offers to purchase goods or services supplied by an enterprise in the course of business, and includes a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer; and (b) for the purposes of the other Parts of this Act, other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration;

“dominant position” means a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;

“enterprise” means a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly controlled by them;

“goods or products” includes services, buildings and other structures;

“horizontal agreement” means an agreement between enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market;

“market” in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the goods or services;

“merger” has the meaning assigned to it in section twenty-four;

“negative clearance” means the certification by the Commission that an otherwise anticompetitive conduct can be allowed under conditions specified by the Commission;

“per se” in relation to a prohibited practice, means a practice which is prohibited in all circumstances so that it is not necessary for the Commission to demonstrate that it has anticompetitive effects;

“professional association” means the controlling body established by, or registered under, any law, or recognized by the Commission as fulfilling similar functions on behalf of its members, in respect of a profession;

“regulator” means a regulatory body or agency, or a government department that exercises functions of prudential, technical or economic regulation on the basis of statutory powers;

“statutory monopoly” means a commercial undertaking or an activity conducted by an entity, whether or not owned wholly or partly by the State, on the basis of statutory provisions that preclude other entities from conducting the same activity;

“undertaking” means 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; and

“vertical agreement” means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

Source: Competition and Consumer Protection Act, 2010.

The expanded list of comprehensively defined competition terms will go a long way in resolving some of the implementation problems experienced by the ZCC that were enunciated by the former Commission’s competition practitioners, 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’ has now also been defined in the Act. This is particularly important in the exchange of information cooperation with other competition authorities. Zambia cooperates with all competition authorities in the SADC and COMESA regions in exchange of information on the implementation of competition policy and law, and that cooperation had been hampered, and continues to be hampered, by the lack of legal guidance on what constitutes confidential information.¹²³

The definition of the term ‘consumer’ in the new Act is comprehensive enough. On one hand it includes intermediary users of raw materials, for the purposes of restrictive business and anticompeti-

tive trade practices, and thus protects small and medium-sized undertakings from the abuses of larger enterprises. On the other hand it is limited to final consumers of goods and services in situations other hand for the purposes of restrictive business and anticompetitive trade practices. It is however noted that some stakeholders in Zambia are still of the opinion that the definition is still limited.¹²⁴

It is however noted that while the definition of the term ‘undertaking’ has been defined in the Act, correctly in the meaning contemplated in the Act, as a commitment or promise provided to the Commission by a person or enterprise to address any competition concern raised by the Commission, the same term is defined differently as meaning a commercial enterprise in some other competition laws in the region, such as those of Namibia, Zimbabwe, and COMESA¹²⁵. This might therefore confuse the use of the term in the Commission’s cooperation arrangements with other competition authorities in the region. It is however not being suggested that the definition of undertaking in the Act should be changed in line with some competition legislations in the region. Zambia has enforced

competition law over 15 years, and the definitions of terms in the new Act, including that of ‘undertaking’, must have been tested over time, either in Zambia itself or in other jurisdictions with longer experiences, as to stand up to challenges in law courts. On the other hand, the other jurisdictions in the region which are defining the term differently from Zambia have relatively shorter competition law enforcement experiences. It is also noted that regarding commercial entities as ‘enterprises’ as is done in the Zambian Act is in conformity with the UNCTAD Model Law¹²⁶.

There could however be confusion in Zambia over the definition of the term ‘undertaking’ in the Act since the same word is used differently in another defined term in the same section 2 of the Act. The term ‘statutory monopoly’ is defined in the Act as to mean “a commercial *undertaking* or an activity conducted by an entity ...”. The word ‘undertaking’ in that definition is clearly meant to refer to an enterprise, and not to mean “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”.

It is recommended that the apparent confusion over the use of the word ‘undertaking’ in the definition of the term ‘statutory monopoly’ be removed.

The new Act in terms of section 4(1) re-names the Zambia Competition Commission (ZCC) to the Competition and Consumer Protection Commission (CCPC), with the Commission retaining its corporate status as in the old Act of being “a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may, by law, do or perform”. The statutory functions of the Commission in the new Act have however been re-arranged, and differ somewhat in their form and execution from the old Act. In terms of section 5 of the Act, the functions of the Commission are to:

- “(a) review the operation of markets in Zambia and the conditions of competition in those markets;
- (b) review the trading practices pursued by enterprises doing business in Zambia;

- (c) investigate and assess restrictive agreements, abuse of dominant positions and mergers;
- (d) investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;
- (e) undertake and publish general studies on the effectiveness of competition in individual sectors of the economy in Zambia and on matters of concern to consumers;
- (f) act as a primary advocate for competition and effective consumer protection in Zambia;
- (g) advise government on laws affecting competition and consumer protection;
- (h) provide information for the guidance of consumers regarding their rights under this Act;
- (i) liaise and exchange information, knowledge and expertise with competition and consumer protection authorities in other countries;
- (j) advise the Minister on agreements relevant to competition and consumer protection and on any other matter relating to competition and consumer protection;
- (k) cooperate with and assist 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 this Act; and
- (l) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.”

The Commission’s basic functions of investigating restrictive business practices, and examining mergers, and of carrying out competition advocacy work, remain in the new Act. It is noted that section 55 under Part VIII of the Act on investigations and determination by Commission gives the Commission powers of undertaking investigations at its own initiative or on a complaint made by any person. Anyone can therefore refer a case to the Commission for investigation, and the Commission can also proactively investigate a competition and consumer protection concern.

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 trad-

ing practices, and unfair contract terms, as well as extends the Commission's undertaking of studies to matters of concern to consumers. While these functions were implied in the old, and the ZCC had always performed them, the functions now have legal legitimacy under the new Act. The added function of acting as the primary advocate for competition and effective consumer protection in Zambia strengthens the Commission's jurisdiction on competition and consumer protection matters over other sector regulators and consumer associations. The function of advising government on laws affecting competition and consumer protection, and on agreements relevant to competition and consumer protection should go a long way in making the government take cognizance of the decisions and recommendations of the Commission, which was one of the problems and constraints that the Commission faced in the implementation of the country's competition policy and law under the old Act that had been identified by the ZCC's competition practitioners.

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 of entering into cooperation agreements and arrangements with other competition authorities on a bilateral, regional or multilateral level.

The concept of public interest has been introduced in the new Act, particularly in the examination and determination of mergers. 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 socio-economic policies for effective economic development.

On the whole, the new Competition and Consumer Protection Act, 2010 of Zambia is very comprehensive, the fact that was recognized by virtually all the stakeholders that were interviewed during the fact-finding visit to Zambia during the period 16 – 23 October 2011¹²⁷, with high expectations that the implementation of competition policy and law in the country will be much improved than before. The general observation was however that

the Act focuses more on consumer protection than on purely competition issues.

2.2 Application and Exemptions

The UNCTAD Model Law on Competition, in giving guidance for best practices in competition law design, suggests that the law should have general applicability, i.e., that it should apply to all industries, agreements and entities engaged in the commercial exchange of goods and services. The rationale being that enterprises engaged in the same or similar business activities should be subject to the same set of legal rules and standards to ensure fairness, equality and non-discriminatory treatment under competition law.

However, reality, and practice, dictates that some exemptions and exclusions should be granted in competition law for social, economic, and political reasons. Care should however be taken in granting blanket exemptions and exclusions that certain economic sectors are not completely exempted, thus giving them legal licences to engage in anti-competitive practices.

The Competition and Consumer Protection Act, 2010 of Zambia expressly provides under section 3(1) that the Act "... applies to all economic activity within, or having an effect within, Zambia". These important provisions were not specifically provided for, but implied, in the old Competition and Fair Trading Act, 1994, which only provided for the exemptions and exclusions from the application of the Act. The provisions are important and crucial, particularly in merger control, since they empower the Commission to examine the competitive effects in Zambia of transactions concluded and entered into elsewhere. The Act in terms of section 3(2) also "binds the State insofar as the State or an enterprise owned, wholly or in part, by the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market that is open to participation by other enterprises". Thus, there are no 'sacred cows' and the Commission can enforce competition law on State enterprises, or parastatal organizations, that engage in commercial activities in competition with private companies.

Even though it is not expressly stated in the Act, it is implied that the Act does not apply to the

sovereign acts of the State. This is a general non-application of competition law worldwide, which is recognized in the UNCTAD Model Law on Competition.

The explicit exemptions from the application of the Act are provided for under section 3(3), and include intellectual property rights (IPRs), collective bargaining activities, non-commercial activities of a socio-economic nature, and certain aspects of statutory monopolies. The relevant provisions of section 3(3) provide as follows:

“This Act shall not apply to –

- (a) an agreement or conduct insofar as it relates to intellectual property rights including the protection, licensing or assignment of rights under, or existing by virtue of, a law relating to copyright, design rights, patents or trademarks;
- (b) activities of employers or an agreement to which employers are party, insofar as it relates to the remuneration, terms or conditions of employment of the employees;
- (c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- (d) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose; and
- (e) the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia:

Provided that –

- (i) the enterprise does not enter into an agreement that has the purpose of restricting competition;
- (ii) the conduct of the enterprise does not, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position; or
- (iii) the enterprise, if it wishes to enter into a merger transaction, is in compliance with the provisions of this Act relating to mergers.”

It is noted that the exemption in the old Act on activities approved or required under an agreement to which the government is a party, which had placed the privatization process outside the jurisdiction of the Commission, has been removed in the new Act. The Commission can now therefore play its important role in the privatization of State enterprises of ensuring that public monopolies are not simply turned into private ones, which are

more difficult to monitor and control. The Commission’s involvement in the privatization process was formalized in 2010 when Cabinet determined that it be included in the Committee that oversaw the privatization of the telecommunications company.¹²⁸

The other removed exemption is that in respect of activities of professional associations which are designed to develop or enforce professional standards reasonably necessary for the protection of the public. This block exemption of the activities of professional associations has been replaced by provisions of section 22 of the new Act, which provide that professional associations whose rules contain a restriction that has the effect of lessening competition in a market may apply to the Commission for a specific exemption of the prohibited restrictive practice. The activities of professional associations can therefore now be considered for exemption on a case by case basis.

The non-application of the Act to “the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia” is in line with the general non-application of competition law to sovereign acts of the State. The provision in the Act as rider to that exemption is very important since it makes it clear that while the Commission cannot challenge the existence of statutory monopolies, it can still take the necessary corrective measures if the monopolies engage in anticompetitive practices that affect the competitiveness of other companies with commercial businesses in other sectors, or that adversely affect consumers..

Section 3(4) of the Act also provides another important proviso to the exemption of intellectual property rights in that an agreement or conduct relating to IPRs can be subjected to the application of the provisions of the Act if such agreement or conduct involves a practice that is *per se* prohibited under the Act, “or disproportionately restricts or prevents competition”. Therefore, the Act is not so much concerned over the holding of intellectual property rights, but the abuse of those rights.

The Act also provides for other exemptions, exceptions and exclusions from its application in the form of authorizations. Section 18 provides that enterprises may apply to the Commission for exemption from prohibition of horizontal and vertical

agreements, except those agreements that are *per se* prohibited. Such applications are considered on a case by case basis using the rule-of-reason approach. In that regard, the relevant provisions of section 19 of the Act provide that the Commission may, or may not, grant the exemption applied for, and also that an exemption should be granted if the agreement is likely to foster efficiencies in the production or distribution of goods and services, as well as to result in “obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, from the agreement”.

It is noteworthy that the exemptions under the new Act are not automatic, as it was the case under the old Act. Undertakings seeking to be exempted from any business practice prohibited under the Act need to apply to the Commission for the necessary authorization.

The *de minimis*¹²⁹ doctrine is also enshrined in the Act to ensure that only those anticompetitive practices that lead to substantial reduction or lessening of competition are prohibited. For example, the prohibition of anticompetitive practice, agreement or decision under section 8 of the Act only applies to such practices, agreements or decisions that prevents, restricts or distorts competition “to an appreciable extent in Zambia”. In the case of mergers and acquisitions, only those transactions that are reviewable, that is, that fall within the merger notification threshold prescribed in terms of section 26 of the Act, are subject to merger examination provisions.

The effect of the *de minimis* rule in the Act is to exclude most practices of small and medium-sized enterprises, whose activities generally do not lead to an appreciable reduction in competition, except those that are *per se* prohibited, from the application of the Act. This is in line with one of the underlying objectives of competition policy and law in Zambia, of promoting the competitiveness of micro and small business enterprises in Zambia.

2.3 Substantive Analysis: Core Issues Covered by the Act

The core substantive issues covered by the Act are in Part III (restrictive business and anticompetitive trade practices, including their authorization), Part

IV (mergers), Part V (market inquiries), and Part VII (consumer protection).

(a) Part III: Restrictive Business and Anticompetitive Trade Practices

This Part III of the Act deals with anticompetitive agreements (of both horizontal and vertical nature), and abuse of dominant position (or monopolization), as well as with authorizations of restrictive business practices.

Section 7 in the old Act is now section 8 of the new Act and provides that “any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anticompetitive and prohibited”. The new Act however spells out in more detail the types and treatment of the anticompetitive practices. This makes enforcement of the law easier.

Section 9(1) of the Act prohibits *per se* certain horizontal agreements¹³⁰ 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. The relevant provisions state that:

- “A horizontal agreement between enterprises is prohibited *per se*, and void, if the agreement –
- (a) fixes, directly or indirectly, a purchase or selling price or any other trading conditions;
 - (b) divides markets by allocating customers, suppliers or territories specific types of goods or services;
 - (c) involves bid rigging, unless the person requesting the bid is informed of the terms of the agreement prior to the making of the bid;
 - (d) sets production quotas; or
 - (e) provides for collective refusal to deal in, or supply, goods or services.”

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. For natural persons, fines and/or imprisonment for periods up to five years may also be imposed. Cartels are considered by many to be the worst competition offence because of their harm to competition, and to the economy as a whole without any redeeming economic features. Their harsh treatment in the Act is therefore proper since it discourages such practices and conduct.

The Act however recognizes that some 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. Section 18 of the Act therefore provides that applications for exemption of such agreements could be made to the Commission. In terms of section 19(2) exemptions can be granted if the agreement contributes to, or is likely to contribute to, or result in:

- “(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 is likely to result, from the agreement.”

Professional associations whose rules contain a restriction that has the effect of lessening competition in a market may also apply in terms of section 22(1) of the Act for an exemption of the restriction as long as it does not constitute a *per se* prohibited horizontal or vertical agreement.

The provisions on vertical agreements¹³¹ are under section 10 of the Act, which 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 above means that with the exception of re-sale price maintenance, all the other vertical agreements are considered using the rule-of-reason approach under the Act. This is in recognition of the fact that most such agreements give rise to many efficiency gains, such as removal of pricing distortions, optimized investment levels, and avoidance of transaction costs. Re-sale price maintenance has been *per se* prohibited under the Act because that practice is prevalent in Zambia and has serious adverse effects, not only on competition but also on consumer welfare. Section 10(2) however provides that a “supplier or producer may recommend a

minimum re-sale price to the re-seller of a good or a service if: (a) the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and (b) the product has a price stated on it and the words ‘recommended price’ appear next to the stated price”. This clarifies that non-binding resale price recommendations do not constitute cases of prohibited resale price maintenance.

The treatment of re-sale price maintenance under competition law differs from jurisdiction to jurisdiction. In some jurisdictions, particularly in developing countries whose economic activities are dominated by few players, re-sale price maintenance is *per se* prohibited because of its serious effects. In other jurisdictions, the practice is increasingly being considered using the rule-of-reason approach because it may generate some efficiencies in product distribution. In its treatment of re-sale price maintenance, therefore, the Zambian competition legislation takes into account both considerations. While it prohibits *per se* the practice, it also provides that resale prices can be recommended. The circumstances of allowing re-sale price recommendations under the Act are very clear and do not contradict the general prohibition.

The Act does not give examples of other vertical agreements than re-sale price maintenance. This may be because section 10 of the Act only deals with vertical agreements that are *per se* prohibited. Most vertical agreements are considered using the rule-of-reason approach. They are also numerous, and include agreements and arrangements on exclusive distribution and dealing, tie-in sales, quantity forcing, and franchises, which are all common in Zambia. While the list of vertical restraints cannot be exhaustive, it would assist the Commission in its enforcement, and the business community in complying with competition law, if the common vertical restraints in Zambia are listed for guidance purposes.

It is recommended that the Commission through a Statutory Instrument lists 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.

Section 14 of the Act provides for notification of horizontal and vertical agreements, and for the share of supply threshold for authorization of such agreements that are not *per se* prohibited. In that regard, section 14(1) provides that:

“Where the parties to –

- (a) a horizontal agreement, together supply or acquire thirty percent or more of goods or services of any description in a relevant market in Zambia; or
- (b) a vertical agreement, individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, fifteen percent or more of goods or services of any description in a relevant market in Zambia;

the parties shall apply to the Commission for authorization of the agreement in the prescribed manner and form.”

The importance of the above provisions, which are innovative in competition legislation in Southern Africa, is that it places upon parties to agreements that are potentially harmful to competition the onus of notifying the agreements to the Commission for examination of their competitive effects, given the fact that the Commission on its own cannot possibly identify such agreements for pre-emptive control. The Act therefore makes it mandatory for enterprises entering into agreements that meet the set thresholds to notify the Commission for the assessment of the competitive effects of the agreements using the rule-of-reason approach. The enterprises are thus given a chance to justify the agreements on the market.

However, in noting that section 14 provides that the respective threshold for horizontal agreements is 30 per cent or more of goods or services in a relevant market, and that for vertical agreements is 15 per cent, the Commission is of the view that the opposite should be the case because horizontal agreements are potentially more harmful to competition than vertical agreements. The Commission’s view is supported.

It is recommended that section 14 of the Act be amended to provide that the share of 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*.

Abuse of dominant position is prohibited under section 16(1) of the Act. The relevant provisions state that “an enterprises shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general”. 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. The current provisions in terms of section 15 of the Act state that “a dominant position exists in relation to the supply of goods or services in Zambia if: (a) thirty percent or more of those goods or services are supplied or acquired by one enterprise; or (b) sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises”.

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.¹³² It is also arguable whether a rebuttable presumption of dominance would be more appropriate than a strict threshold. A few competition legislations in the region do not provide for a strict dominance threshold¹³³, but experience has shown that this gives the competition authority too much subjective discretion in determining dominance, which can be challenged in law courts. A mixture of a rebuttable presumption of dominance and a strict threshold, as in South Africa, seems appropriate.

The lowering of the dominance threshold from 50 per cent to 30 per cent market share under the Act has however created marked differences with other Acts of Parliament that regulate the same enterprises that are regulated by the Act. For example, the dominance threshold that is prescribed under the Information and Communication Technologies Act, 2009 (No.15 of 2009) is still 50 per cent of market share.¹³⁴

It is recommended that the dominance thresholds in all the Acts of Parliament that regulate enterprises in Zambia be harmonized.

The prohibited abusive practices of dominant firms in Zambia, as in most other countries, are both of

an exclusionary and exploitation nature.¹³⁵ Section 16(2) of the Act provides that ‘abuse of a dominant position’ includes: “(a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions; (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition; (c) applying dissimilar conditions to equivalent transaction with other trading parties; (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; (e) denying any person access to an essential facility; (f) charging an excessive price to the detriment of consumers; or (g) selling goods below their marginal or variable cost”.

As stated in the Act, the list of abusive practices of enterprises in dominant positions is not exhaustive. For example, it does not include a common exclusionary practice in the Southern African region of “buying-up a scarce supply of intermediate goods or resources required by a competitor”¹³⁶.

It is noted that the list of abusive practices in Zambia’s new Act is somewhat different from the one in the old Act, indicating that the current list is based on the practical implementation of the old Act by the Commission and the changed economic conditions in the country.

Section 17 of the Act provides for the determination of relevant product markets within which the share of supply or acquisition thresholds are to be met for the authorization of restrictive agreements (section 14(1)), and for establishing existence of dominant positions (section 15). In that regard, it is provided that “the Minister may, on the advice of the Commission, prescribe the procedure for determining the relevant product market within which the share of supply or acquisition thresholds are to be met under subsection (1) of sections *fourteen* and *fifteen*”.

The determination of relevant markets is critical in competition analysis. Market definition is usually the first, and often the most important, task in competition analysis since all calculations, assessments, and judgements about the competitive implications of any given conduct depend on the size and shape of the relevant market. A defini-

tion of the relevant market is imperative to establish the context for the exercise of market power, and the competitive effect of a restrictive business practice under investigation. Once the market has been defined, the behaviour or conduct in question can be examined with a reasonable degree of accuracy to determine whether it has or would have an anticompetitive effect.

The definition of the relevant market commonly comprises a product and geographic dimension. The product market describes the good or service that is bought and sold. From a buyer’s perspective, the product market is determined from his ability to switch from one product to another closely substitutable product. The key element in this market is substitutability of demand. Demand-side substitution is considered to be the most relevant factor in defining a relevant product market since it refers to the ability of customers to switch to rival products. The most commonly used method of assessing demand-side substitution is the hypothetical monopolist test. The hypothetical monopolist test asks whether, in response to a *small but significant and non-transitory increase in price* (“SSNIP”) for the product, a sufficient number of customers would switch to other products such that the product supplier would not impose the price increase. If so, the product market must be expanded to include one or more additional substitutes. This process continues until a group of products is identified for which a hypothetical monopolist selling those products could profitably raise the price significantly. Supply side considerations are also assessed in the determination of relevant markets, when switching costs are very low so that producers of close products and services exercise competitive pressure.

The determination of relevant product markets is often highly contentious, and cause of litigious disagreements between competition authorities and enterprises involved in competition cases as respondents. The prescription through a Statutory Instrument under section 17 of the Act therefore removes unnecessary disagreements on the matter. In that regard, the Regulations to the Act were *gazette* on 19 August 2011 as the Competition and Consumer Protection (General) Regulations, 2011 (Statutory Instrument No.97 of 2011). Regulation 3 of the Regulations on the determination of relevant product market provides as follows:

"(1) The Commission shall, in determining the relevant market, identify –

- (a) the peculiar appearance, use, price, range, quality characteristics, uniqueness and any other feature or characteristic of the product that sufficiently distinguishes it from other products;*
 - (b) whether targeted consumers consider the product to be different in terms of, among others, benefits, taste or usage, to the extent that it affects purchase decisions;*
 - (c) whether in the event of a shortage, lack of availability, a price increase on any other constraining factor, another product could be used or substituted by consumers for the same use;*
 - (d) whether competitors have failed or are likely to fail to supply a similar product;*
 - (e) the geographical location within Zambia in which the bulk of sales or supply of the product take place;*
 - (f) the historical consumer behaviour, if any, related to the product; and*
 - (g) the uniqueness of the production process of the product and the ease with which a different production process can be altered to produce the product.*
- (2) Notwithstanding subregulation (1), the Commission, in determining the relevant product market, may use any relevant research findings of third parties, conduct public inquiries, consider or adopt international best practice determinations of market definition, insofar as they are consistent with the Act and these Regulations and are practical to the Zambian situation, as it may determine".*

The determination of the relevant product market under the Regulations therefore covers the main analytical areas of such determination. In normal practice, the 'relevant market' refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn to in the short term if the restraint or abuse increased prices by an insignificant amount.

(b) Part IV: Mergers

Provisions on mergers in the new Act are contained in a whole Part with 13 sections (sections 24 to 37), as opposed to those in the old Act which were only in one section (section 8). That shows that merger control in Zambia has assumed greater importance and relevance to the national economy since the enactment of the old Act in 1994.

For developing countries like Zambia, mergers play a very important role in economic development. The reasons why firms merge are many and diverse, and include the need to achieve economies of scale and scope, and other operational efficiencies such as functional synergies, and research and development, as well as the creation of national champions. Most mergers pose little or no serious threat to competition, and may actually be pro-competitive. Such benevolent mergers have a number of economic advantages such as resultant economies of scale, reduction in the cost of production and sale, and gains of horizontal integration. There could also be more convenient and reliable supply of input materials and reduction of overheads. The advantages could lead to lower prices to the consumer.

Other mergers however seriously harm competition by increasing the probability of exercise of market power¹³⁷. In that regard, concerns about vertical restraints and abuse of dominance come to the fore. Mergers can also sometimes produce market structures that are anticompetitive in the sense of making it easier for a group of firms to cartelize a market, or enabling the merged entity to act more like a monopolist.

There is therefore need for competition authorities to thoroughly examine mergers in order to identify and prevent those transactions that are harmful to competition. All the three main types of mergers (i.e., horizontal mergers, vertical mergers, and conglomerate mergers)¹³⁸ can be harmful to competition.¹³⁹

In Zambia, the definition of 'merger' is provided for in section 24(1) of the new Act (the old Act did not define that term), which states that "... a merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for

common ownership or control over the whole or part of their respective businesses". Section 24(2) goes on further to provide that a merger may be achieved in the following circumstances: "(a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise; (b) where an enterprise amalgamates or combines with another enterprise; or (c) where a joint venture occurs between two or more independent enterprises.

The above definition of merger in the Zambian competition legislation is comprehensive enough to cover all possible combinations, including all the three main types of 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. This is important since trading of shares on the Zambia Stock Exchange would be covered by the merger control provisions of the Act.

Unlike the old Act which only provided for pre-merger notification of horizontal mergers, the new Act provides that all reviewable mergers that meet the merger notification threshold prescribed by the Minister in terms of section 26(5) of the Act must be notified to the Commission for authorization, i.e., whether they are of a horizontal, vertical or conglomerate nature.

The rationale for pre-merger notification is very strong. Of the different types of merger notification systems (i.e., the pre-merger notification system, the post-merger notification system, and the voluntary notification system), The pre-merger notification system is the most preferred because it avoids a number of difficulties that competition authorities encounter when they challenge anti-competitive mergers after they occur. Pre-merger notification provides competition authorities with the opportunity to stop the merger if it will result in a substantial lessening of competition in a relevant market since it is much easier to stop the merger in advance rather than to try to 'unscramble the eggs' once the merger has been consummated.¹⁴⁰ In a pre-merger notification situation, the competition authority is therefore not so much constrained in terms of the most suitable remedies, and the costs to the merging firms for the implementation of the remedies are minimized.

The term 'reviewable' mergers is used in section 25(1) of the Act to mean those mergers that meet the merger notification threshold prescribed by the Minister. Therefore, not all mergers need to be notified to the Commission for examination, unlike under the old Act which required all mergers to be notified to the Commission regardless of size. This is in line with general practice, and for practical reasons. Merger examination is one of the most resource-intensive activities in the implementation of competition policy and law. To require all mergers to be notified to the competition authority for examination would therefore place a heavy resource burden on the authority that has to review the notifications. Most competition authorities in developing countries, and even some in the more developed countries, do not have such resources. It would also add a significant and unnecessary compliance burden on the business community.

The Regulations to the Act¹⁴¹ provide as follows under regulation 8(1) with regards thresholds for authorization of proposed mergers:

"A merger transaction shall require authorization 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".¹⁴²

It is noted that the above merger notification threshold captures all mergers involving large companies that meet the prescribed threshold even if the target firm does not realize any substantial turnover in Zambia, or does not hold any assets in Zambia. The threshold therefore does not take into account the *de minimus* rule that target firms with small turnovers/assets should not be cause for competition concern. Merger notification thresholds in some other countries in the region, such as in South Africa, are a combination of the combined turnover/asset threshold of the merging parties and a minimum turnover/asset threshold for the target firm.

It is recommended that the merger notification threshold in Zambia 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.

Section 27(1) of the new Act however 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, including that the merger: (i) is likely to create a position of dominance in the relevant market; (ii) may substantially prevent or lessen competition; (iii) is concluded outside Zambia and has consequences in Zambia that require further consideration; and (iv) as its result, there is likely to be competition and public interest factors which require to be considered. This is quite in order since competition authorities should retain the power to challenge non-notifiable mergers, breaking them up after consummation if necessary or preventing their consummation if it learns about them other than through pre-merger notification, if the mergers have serious anticompetitive effects on the relevant markets.

While the conditions in section 27(1) of the new Act giving the Commission powers to review mergers that fall below the prescribed threshold that if the merger “is concluded outside Zambia and has consequences in Zambia that require further consideration” and that “as its result, there is likely to be competition and public interest factors which require to be considered” might seem vague, they have relevance to developing countries like Zambia. Zambia has been affected by transnational mergers that had been concluded outside the country’s borders, such as the *Cadbury-Schweppes/Coca-Cola merger* and the *Rothmans of Pall-Mall/British American Tobacco merger*, which it only managed to minimize their adverse effects on local competition by examining their competitive effects and imposing the necessary conditions on authorising the Zambian subsidiaries of the merging parties to implement the transactions.

The Act does not specifically provide for the charging of merger notification fees. Section 87 of the Act however provides that “the Minister may, by statutory instrument, on the recommendation of the Commission, make regulations for the better carrying out of the provisions of this Act”, and the Minister in the Regulations to the Act that were gazetted in August 2011¹⁴³ accordingly prescribed merger notification fees as 0.1 per cent of the merging parties’ combined annual turnover or assets in Zambia, whichever is higher.

The rather controversial issue of the inclusion of public interest criteria in competition regimes also needs to be looked at from the point of view of developing countries that have a multiplicity of developmental policies to implement. In such a situation, competition policy should not be implemented with blinkers, oblivious of the country’s other socio-economic policies but should support and complement those policies. A competition authority should however not be given wide discretionary powers of deciding what should constitute public interest in the context of considering competition cases. The public interest factors to be considered should be provided for and indicated in the legislation or regulations. For example in South Africa, it is clearly provided for that in investigating and analysing the likely effects of a merger consideration is also made of the likely impact that the transaction would likely have on the following public interest grounds: (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (iv) the ability of national industries to compete in international markets. Also in the determination of mergers, public interest factors should not override purely competition factors related to the major substantive test of substantial prevention or lessening of competition in the relevant market.

The substantive test in assessing mergers in terms of section 30(1) of the Act is “whether the merger is likely to prevent or substantially lessen competition in a market in Zambia”. In that assessment, section 30(2) provides for a number of factors that the Commission must take into account, as follows: “(a) the levels of concentration of players in the relevant market; (b) the creation or strengthening of barriers to market entry; (c) the level of imports in the relevant market; (d) the extent to which there is countervailing buyer or supplier power in the relevant market; (e) the availability of substitute products in the relevant market; (f) the likelihood of the merger removing from the market an existing effective and vigorous competitor; (g) the dynamic characteristics of the market including growth, innovation, pricing and other inherent market characteristics; and (h) the risk that a position of dominance may be abused”.

The above is a great improvement in the new Act since the old Act did not give guidance to the Commission on factors to be taken into account in assessing mergers. The merger assessment guiding factors not only make the examination of mergers transparent, but also ensure that the Commission's examination of mergers stands the rigours of legal scrutiny in law courts.

The taking into account of public interest factors in the assessment of mergers has also been provided for in the Act. This is in line with practices in several developing countries. The old Act did not provide for public interest assessment of mergers, and only provided for the consideration of economic efficiency in that assessment. The Commission nevertheless considered public interest issues in reviewing mergers because of the need to ensure coherence of competition policy with the government's other policies of a socio-economic nature. The new Act therefore gives legitimacy to the consideration of such issues in merger review. Public interest assessment of mergers is provided for in terms of section 31 of the Act as follows:

"The Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including –

- (a) the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;
- (b) the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer to skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia;
- (c) the saving of a failing firm;
- (d) the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia;
- (e) the extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests of micro and small business enterprises in Zambia;
- (f) the extent to which the proposed merger may affect the ability of national industries to compete in international markets;
- (g) socioeconomic factors as may be appropriate; and
- (h) any other factor that bears upon the public interest."

While the taking into account of public interest factors in the assessment of mergers is in line with practices in several developing countries, a competition authority should however not be given wide discretionary powers of deciding what should constitute public interest in the context of considering competition cases since it normally does not have the capability of doing so. In the case of section 31 of the new Act in Zambia, it is noted that (g) and (h), "socioeconomic factors as may be appropriate" and "any other factors that bears upon the public interest" respectively, give the Commission such wide discretionary powers.

It is recommended that section 31 of the Competition and Consumer Protection Act, 2010 be amended by the deletion of (g) and (h) that give the Commission wide discretionary powers of deciding what constitutes public interest in the consideration of mergers.

It is noteworthy that the 'failing firm' argument in favour of mergers has been included as one of the public interest factors to be taken into account in the assessment of mergers. The saving of a failing firm factor is normally used as a strong competition promotion feature in the avoidance of market exits that increase market concentration. It also has direct public interest features, as recognized in the Act, that relate to the need to retain employment, ensure the continued availability of goods and services, and the continuation of taxation benefits to the State.

The competitiveness of Zambian firms on the domestic and international markets has also been recognized as one of the public interest factors to be taken into account in the assessment of mergers, and this shows the realization of the interface between the country's trade policy and competition policy.

The Act introduces under section 32(1) the period allowed for merger assessment. It is provided that "the Commission shall complete its assessment of a proposed merger and issue its determination within a period of ninety days from the date of the application for authorization of the proposed merger ...". The merger assessment period is however subject to parties to proposed

merges providing the Commission with all relevant information that is required for the completion of the assessment. The full cooperation of the merging parties in the assessment of mergers is therefore assured. It is further provided in section 32(2) that “where the Commission does not issue its determination regarding a proposed merger, within the period specified in subsection (1), the proposed merger shall be deemed to be approved”.

The need to compel competition authorities to consider mergers as expeditiously as possible is in line with international best practice. The negotiation and conclusion of mergers involves a lot of transaction costs to the merging parties, which should not unnecessarily be increased by excessively long merger assessment periods on the part of competition authorities. The up to ninety-day merger assessment period provided for under section 32(1) of the CCPA however seem to be rather long for mergers that do not raise serious competition concerns, such as most conglomerate mergers and certain vertical mergers, whose assessment can be fast-tracked. Section 32(3) of the Act further provides that “the Commission may extend the assessment period referred to in subsection (1), by a period not exceeding thirty days”. The merger assessment period in Zambia can therefore extend to 190 days! The competition legislation of some other countries in the region, such as South Africa and Namibia, provide that the competition authority must consider and make a determination in relation to a proposed merger within 30 days after the date on which the notification is received, and that the period can be extended due to the complexity of the issues involved for a further period not exceeding 60 days.¹⁴⁴

It is recommended that the CCPA provides for merger assessment in two phases, with Phase 1 involving simple transactions taking a shorter period of, say, thirty days, and Phase 2 involving more complex transactions taking up to ninety days.

The provisions of section 36 that “an approval of a merger by the Commission under this Part shall not relieve an enterprise from complying with any other applicable laws” are also relevant

in the context of Zambia which has a number of sector regulators with statutory competition functions. Mergers of enterprises in certain regulated sectors, such as the financial services sector, also need to be sanctioned by the relevant sector regulators.

The merger control provisions of the new Act are by far a great improvement to those of the old Act. Stakeholder comments in that regard included the following: “the new Competition and Consumer Protection Act is very comprehensive, and its coverage of merger control is good”¹⁴⁵, and “the new Act when compared with the old Act has been a milestone since it captures virtually everything on merger control”¹⁴⁶

The old Act did not have specific provisions on bases for approving or disapproving mergers. The Commission however had administrative guidelines to that effect, which still exist. In considering whether to grant authorization to a proposed merger, takeover or any other form of acquisition, the Commission’s main concern is to ensure that the merger or takeover will not result in a substantial lessening of competition in any market in Zambia or a substantial part of it. However, it is taken into account that mergers may be one means of achieving efficiencies, particularly where increased exposure to global markets is placing pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive in those markets. Efficiency issues are relevant both for assessing the impact of a merger on competition and for assessing the overall public benefit that would flow from a merger.

The Commission’s Merger Control Guidelines were in the process of being redrafted for adoption by the Board of Commissioners by the time of this peer review.

The Commission’s Directorate of Mergers and Monopolies (DMM) in January 2011 produced its Operations Manual, which cover a wide range of areas from strategic merger control objectives, through investigations, to standard letters on various merger control issues. Box 9 below shows the standard operational procedure in a typical merger case as outlined in the Manual.

Box 9: Standard Operational Procedure in a Merger Case

- (i) The Act provides that a merger assessment should be completed within a period of 90 days from the date of application with possible extension a maximum of 30 days.
- (ii) Record of allegations of a merger made or noted by an officer.
- (iii) Record on Investigations Authorization Form.
- (iv) Pre-Notification Meeting usually held with the parties (formally or informally).
- (v) Executive Director makes decision as to whether to pursue the matter.
- (vi) The Commission issues invoice to parties.
- (vii) Parties complete Form CCPC 1 (merger notification form).
- (viii) Relevant statutory fees are paid.
- (ix) Investigation guidelines issued to the Case Officer by Director.
- (x) Case Officer takes charge of the investigation, interviewing various stakeholders to the issue.
- (xi) Opposition Procedure, i.e., Third Party views.
- (xii) Report written by Case Officer to the Director.
- (xiii) Director submits report to the Executive Director.
- (xiv) Executive Director submits the preliminary report to the Technical Committee of the Board of Commissioners for interim determination. The Technical Committee then submits the final report "Staff Paper" to the Board for final determination. The Technical Committee can issue an Interim Authorization where circumstances so warrant. The Board may: (i) reject the application; (ii) approve the application unconditionally; (iii) approve the application conditionally.
NB: The Commission may where necessary issue directions to parties to a merger to (a) remedy, mitigate or prevent the substantial lessening of competition; and (b) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.
- (xv) If the parties do not agree with Board decision, they have 30 days to appeal to the Competition and Consumer Protection Tribunal.

Source: Operations Manual, Directorate of Mergers and Monopolies, Zambia Competition and Consumer Protection Commission, 2011.

In a typical merger case, pertinent areas covered include: (i) legal provisions and assessment tests (i.e., the relevant provisions of the Act, and the effect, dominance and public interest tests); (ii) investigations conducted (i.e., methodology); (iii) findings (nature of the transaction and the parties, market definition, competitors and market shares,

etc.); (iii) competition analysis and relevant observations; (iv) conclusions; and (v) recommendations.

As an example, Box 10 below shows the Executive Summary of the report on the proposed merger between Cena Farms Zambia Limited and Mount Isabelle Limited.

Box 10: Executive Summary of Staff Paper Report on Proposed Merger between Cena Farms Zambia Limited and Mount Isabelle Limited**Background**

The Competition and Consumer Protection Commission on 12th May, 2010 received an application from Chibesakunda and Company concerning an application for authorization of a merger between Cena Farms Zambia Limited ("Cena Farms") and Mount Isabelle Limited ("Mount Isabelle") herein referred to as the parties. The proposed transaction entails that Cena Farms will acquire 100 per cent of Mount Isabelle at a purchase price of [].

The parties have submitted that Cena Farms was incorporated in Zambia in 2009 under the Companies Act Cap 388 of the Laws of Zambia. The parties submitted that their registered office is located at Maanu Centre, Stand No 4647 Beit Road in Lusaka while their business address is at Farm No. 2644 in Mkushi. The principal activity of the

company is that of mixed commercial farming, i.e., agricultural production and processing of agricultural produce but not limited to wheat, maize, soya milling and baking.

The parties have submitted that Mount Isabelle Limited is incorporated in Zambia under the Companies Act Cap 388 of the Laws of Zambia. The parties submitted that their registered office is located at Counting House Square, Thabo Mbeki Road in Lusaka while their business address is at Farm No. 923 in Mkushi. The principal activity of the company is that of manufacturing and mixed commercial farming.

On the basis of this formal application, the Commission instituted investigations under Section 25 of the Competition and Consumer Protection Act, No. 24 of the Laws of Zambia (*'the Act'*) to establish the facts surrounding the effects of the transaction in the relevant market and in order to fulfil the notification requirement pursuant to the Statutory Instrument No. 46 of 2006 the parties made payment equivalent to Zambian Kwacha [].

Interim Authorization

The Technical Committee at their 34th Meeting held on the 25th July 2011, granted an Interim Authorization Cena Farms Limited and Mount Isabelle Limited because the preliminary market inquiry showed that the proposed transaction would not likely prevent, restrict or distort competition to an appreciable extent in the relevant product market and that it was unlikely to have a detriment effect on the economy of Zambia in general.

Market Inquiries

This report is based on information that was submitted by the parties in the notification Form (CCPC Form 1), a market survey that was conducted and other primary data researched from the internet and other literature readings. In addition, the Commission wrote to third parties in accordance with Section 29 of the Act requesting for their comments regarding the proposed transaction.

Relevant Market

This case it would appear had three relevant product markets identified under this transaction in which the parties' products overlapped:

(i) *Agricultural Production of Maize*: It appears the relevant product market is the agricultural production of maize and food processing.

(ii) *Agricultural Production of Soya Beans*: It appears the relevant product market is the agricultural production of soya beans and food processing.

(iii) *Agricultural Production of Wheat*: It appears the relevant product market is the agricultural production of wheat and food processing.

Market Concentration

Market concentration is a function of the number of firms in a market and their respective market shares. The relevant market is largely fragmented with subsistence and commercial farmers nationwide who equally produce products such as maize, wheat and soya.

The estimated market share of Cena Farms total agricultural production is less than 1 per cent and Mount Isabelle's total agricultural production is less than 2 per cent. Therefore, the total production for both Cena Farms and Mount Isabelle post merger transaction is likely to be approximately 3 per cent of the total market. This market includes many other fragmented grain producers in the market which is still insignificant.

Therefore, the level of production that Cena Farms is likely to assume does not necessarily entrench its market position and the merger would not result into increased market concentration capable of raising competition concerns in the relevant product market.

Import Competition

The relevant product market has no import competition restrictions. However, it would still not make economic sense for any firm in particular in the post 2010 harvest session to import maize when the country had recorded a bumper harvest.

The relevant soya bean product market has sufficient import competition because the country annually does experience insufficient supplies of the commodity hence firms resort to importing the commodity. There are no import restrictions in the relevant product market and firms are permitted to import the soya beans.

The relevant wheat product market has very little import competition because the Government through the Ministry of Agriculture and Cooperatives has imposed a ban on the importation of such commodity into the country.

Barriers to Entry

Barriers to entry are obstacles on the way of potential new entrants to enter the market and compete with the incumbents.

Generally it would appear there are low barriers in the relevant maize and soya beans product markets as the sector continues to enjoy favourable treatment from the government through various incentives and also prevailing excellent soils, water availability, land, climate among others and Zambia continually attracts new entrants on the market, both commercial, small scale and subsistence farmers.

It would appear there are high barriers in the relevant wheat product market as wheat grows in winter and requires specialized irrigation systems as needed during the winter season as the weather is dry in the country.

Countervailing Power

It is unlikely that Cena Farms would exercise any countervailing power on the maize market post merger because with approximately 3 per cent market share, it is unlikely to exert any market power over other producers post merger who include commercial, subsistence and peasant farmers across the country because there are sufficient sources of alternative supply of maize and soya beans in the market.

Removal of a Vigorous Competitor

A vigorous competitor includes, a “smaller firm, which despite its size, has been introducing innovative products and pricing them keenly”.

The proposed acquisition of assets belonging to Mount Isabelle by Cena Farms is not likely to pose a threat because Cena Farms is relatively small with approximately 3 per cent market share which is insignificant in the relevant market. Most of the agricultural maize products that are produced are directly consumed up to the Zambian main market.

Consideration of Dominance

Evidence relied upon so far represents that Cena Farms has less than 1 per cent market share in the agricultural production while Mount Isabelle accounts for less than 2 per cent of the total agriculture production of which translates into combined production levels post merger transaction of 3 per cent market share. Therefore, the acquisition of assets of Mount Isabelle by Cena Farms is not likely to give Cena Farms a dominant position in the maize relevant product market.

Abuse of Dominance

The competition legislation in Zambia does not prohibit the existence of a monopoly or a dominant firm rather calls on such firms to refrain from certain acts or behaviour that would adversely affect competition or the economy in general.

Cena Farms has less than 1 per cent market share in the agricultural production while Mount Isabelle accounts for less than 2 per cent of the total production of which translates into combined production levels post merger transaction of 3 per cent market share. Therefore, the acquisition of assets of Mount Isabelle by Cena Farms is not likely to give Cena Farms a dominant position that could possibly lead to abuse of market power in the relevant product market.

The two undertakings in their respective product lines have reportedly to be facing substantial competition from other competitors, imports and unquantified informal sector with no single firm holding a monopolistic position. Therefore, the acquisition of assets of Mount Isabelle by Cena Farms is not likely to give Cena Farms a dominant position that could lead to abuse of market power in the relevant product market.

Conclusions

Substantial Lessening of Competition

Generally, it would appear there are low barriers in the relevant product markets of soya beans and maize as the sector continues to enjoy favourable treatment from the government through various incentives and also prevailing excellent soils, water availability, land, climate, among others. There are high barriers in the relevant product market of wheat as wheat grows in winter and requires specialized irrigation systems as need during the winter season as

the weather is dry in the country. It is evident that the relevant product market has recorded new entrants in the market with respect to commercial farmers.

However, the relevant product markets have recorded numerous entrants with respect to farming and that farming is one of the most widely performed activities in Zambia and it continually attracts new entrants on the market, both commercial, small scale and subsistence farmers. The proposed acquisition of assets of Mount Isabelle by Cena Farms is not likely to pose a threat to result in exit of other competitors to the undertaking in the relevant product market owing to the fact that the parties have small and insignificant market shares in the relevant product market.

Consideration of Dominant Position

Cena Farms, post merger, would not qualify to be a dominant or monopoly as defined under Section 15(a) of the Competition and Consumer Protection Act, No. 24 of 2010 that states that “a dominant position exists in relation to the supply of goods or services in Zambia, if thirty (30) per cent or more of those goods or services are supplied or acquired by one enterprise”. Cena Farms currently holds less than 30 per cent in the relevant product markets.

Consideration of Abuse of Dominant Position of Market Power

In the current case the threat for abuse in the relevant product market arising from this transaction is not likely because of the perceived low barriers to entry and having experienced recently numerous entrants attracted by government incentives and favourable climate and soil, among others. Therefore, the potential for abuse of market power by Cena Farms in the relevant product market is not likely to lead to abuse of market power which can only be done and sustained by a dominant undertaking.

Consideration of Third Party Views

The third parties that submitted their comments regarding the proposed merger between Cena Farms and Mount Isabelle supported the transaction based on reasons that it is not likely to adversely affect competition and also accent public interest issues that would likely to accrue from the transaction through additional jobs at the farms. This is so because the third parties felt that if the merger was sanctioned it would lead to increased competition in the market due to increased productivity, resulting into improved quality of services being provided to the consumers. In addition, the merger would create be not significant job losses or a negative impact on the labour market, as the two parties are in the same line of business, therefore, most employees were likely to be retained.

Recommendations

Given the foregoing analysis and conclusions, the Technical Committee of the Board of Commissioners recommends to the Board of Commissioners that unconditional authorization be granted to the parties because preliminary investigations and assessment have revealed that the transaction would not raise any competition concerns that may lead to substantial lessening of competition or abuse of dominant position of market power in the economy of Zambia.

Source: Staff Paper Report on Proposed Merger between Cena Farms Zambia Limited and Mount Isabelle Limited, CCPC.

The Commission’s examination of the above *Cena Farms Zambia Limited/ Mount Isabelle Limited merger*, which the Board of Commissioners unconditionally authorized, shows that the examination was based on the merger control provisions of the Act, including economic analysis, and that the substantive test for assessing mergers as provided for in the Act was applied. The examination was also based on stakeholder consultations. It is however noted that the Technical Committee of the Board of Commissioners granted an interim authorization of the transaction “because the preliminary market enquiry showed that the proposed transaction would not likely prevent, restrict or distort competition to an appreciable extent in the relevant product market and that it was un-

likely to have a detriment effect on the economy of Zambia in general”. The Act does not provide for interim authorizations of mergers.¹⁴⁷ In the case of the *Cena Farms Zambia Limited/ Mount Isabelle Limited merger*, the transaction could have definitively been authorized on the recommendation of the Technical Committee for ratification at the next meeting of the Board of Commissioners, if it was of an urgent matter, since it raised no serious competition concerns.

The stakeholders that were interviewed during the fact-finding visit to Zambia were generally satisfied with the way and manner that the Commission handles merger notifications, particularly under the new Act. Sentiments expressed in that

regard included the following: (i) the Commission seeks the views and comments of the relevant stakeholders in its examination of mergers (Pensions and Insurance Authority, Zambia Development Agency, Bank of Zambia, Zambia Association of Chambers of Commerce and Industry); (ii) the Commission always gives professional advice on policy issues related to mergers and acquisitions (Musa Dudhia & Co. Legal Practitioners); (iii) the merger examination procedure at the Commission is very well outlined, and the pre-notification meetings with the Commission are very helpful (Corpus Legal Practitioners); and (iv) the Commission gives adequate support to merging parties (Zambian Breweries Plc, MTN (Zambia) Limited. Corpus Legal Practitioners gave the Commission an 8, on a scale of 0 to 10, for the effective implementation of the merger control provisions of the new Act.

The general stakeholder sentiment was that the new Act when compared with the old Act has been a milestone in merger control since it captures virtually everything on such control. For example, the term ‘merger’ is now defined in the Act, and merger notification thresholds have been provided for. The inclusion of the mining industry in the application of the Act was a positive development since mining is the major economic activity in the country that generates a lot of mergers and acquisitions.

Some stakeholder concerns were however expressed over some aspects of merger control in Zambia. Musa Dudhia & Co., one of the two leading law firms in Zambia that works in the field of mergers and acquisitions in assisting enterprises in applying for the Commission’s authorization of such transactions, felt that not enough sensitization of the business community is being done on issues such as merger notification requirements, changes in policy, and general assessment of mergers.

The Bank of Zambia, the country’s central bank, was baffled with some of the Commission’s decisions on mergers. For example, it queried why a merger of the country’s two largest breweries be approved, and why a dominant brewery be allowed to acquire a soft drinks company. The Commission explained that the merger transactions referred to by the Bank involved the 1999 acquisition of Northern Brewery by Zambian Breweries to form Zambian Breweries Group, and the

acquisition of the *Coca-Cola* beverages brands by Zambian Breweries Group. In both cases, the mergers involved failing firms, and were therefore approved mainly for public interest reasons, but with conditions aimed at minimizing the effects of the identified competition concerns.

Another issue that caused some stakeholder concerns was the Commission’s practice of charging an extra fee, over and above the normal merger notification fee, for the expeditious assessment of urgent merger transactions. Musa Dudhia & Co. Legal Practitioners submitted that its foreign clients usually ask how soon a merger determination is made after paying the extra fee since these guidelines are not given by the Commission. The justification of the extra fee was also not adequately explained to the business community. The Commission explained that the charging of extra merger examination expedition fees, which has now been discontinued in the Regulations to the new Act since the Act now provides for specific merger examination deadline, had been justified by the fact that the Commission had to call extraordinary meetings of the Board of Commissioners, at double the normal Board sitting fees, to consider the urgent mergers.

All the above stakeholder concerns over some aspects of merger control in Zambia highlight the need for comprehensive Merger Control Guidelines for the information of the business community and other stakeholders.

It is recommended that the Commission’s Merger Control Guidelines that are in the process of being redrafted for the adoption by the Board of Commissioners cover pertinent issues such as merger notification requirements, general assessment of mergers, and any other current merger control practices.

(c) Part V: Market Inquiries

The undertaking of market inquiries has been introduced in the new Act. In terms of section 38 of the Act, “the Commission may initiate a market inquiry where it has reasonable grounds to suspect that a restriction or distortion of competition is occurring: (a) within a particular sector of the economy; or (b) within a particular type of agreement occurring across various sectors”.

The purpose of the market inquiries, which were not provided for in the old Act, is to determine whether there are serious competition concerns in any sector, and if so, whether they are any efficiency benefits that could enable the Commission to exempt the identified anticompetitive practices from prohibition under the Act. The inquiries are also of particular importance since they enable the Commission to pro-actively investigate competition concerns in any sector.

According to the *gazetted* Regulations to the Act (the Competition and Consumer Protection (General) Regulations, 2011), 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 on a particular sector; (c) its own research; (d) its experience in regulating restrictive business and anticompetitive trade practices; or (e) representations made to it by the Government regarding a particular sector or type of agreement.

(d) Part VII: Consumer Protection

In the new Act, the provisions on consumer protection take up a whole Part VI, with ten sections,

as opposed to only one section in the old Act. The provisions have been enhanced to effectively protect consumers from unfair trading practices and unscrupulous businesses. 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 harmonizes the various consumer protection legislation, with the Commission being the focal point enforcement agency.

In terms of section 45 of the Act, 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".

Unfair trading practices are prohibited under the Act. The various unfair trading practices that are prohibited under the Act include those described in Box 11 as follows:

Box 11: Prohibited Unfair Trading Practices under the Competition and Consumer Protection Act, 2010

- *False or misleading representations* (section 47 of the Act): falsely representing that: (i) any goods are of a particular standard, quality, value, grade, composition, style or model or have a particular history or previous case; (ii) any services are of a particular standard, quality, value or grade; (iii) any goods are new; (iv) a particular person has agreed to acquire goods or services; or (v) any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have; or making a false or misleading representation concerning the price of any goods or services, the availability of facilities for the repair or any goods or of spare parts for goods, the place of origin of any goods, the need for any goods or services, or the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.
- *Display of disclaimers* (section 48): displaying any sign or notice that purports to disclaim any liability or deny any right that a consumer has under the Act or any other written law.
- *Supply of defective and unsuitable goods and services* (section 49): supplying a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise.
- *Product labelling* (section 50): a product that is sold in Zambia should have a label to clearly indicate the product name, the ingredients used in the product, the date of manufacture and expiry of the product, the manufacturer's name, the physical location of the manufacturer, the telephone number and any other contact details of the manufacturer, and a person or an enterprise should not sell any goods to consumers unless the goods conform to the mandatory consumer product information standard for the class of goods set by the Zambia Bureau of Standards or other relevant competent body.
- *Price display* (section 51): a person or an enterprise should not charge a consumer more than the price indicated or displayed on a product or service.

- *Consumer product safety* (section 52): a person or an enterprise should not sell any goods to consumers unless the goods conform to the mandatory safety standard for the class of goods set by the Zambia Bureau of Standards or other relevant competent body.
- *Unfair contract terms* (section 53): in a contract between an enterprise and a consumer, the contract or a term of the contract is regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Source: CCPA.

The list of prohibited unfair trading practices is thus very comprehensive, and includes most that are contained in the COMESA competition and consumer protection law¹⁴⁸. 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 as being a growing concern affecting small business and consumers.¹⁴⁹ In the case of Zambia, which has a relatively large number of enterprises in dominant or monopoly positions, the vulnerability of small businesses and consumers to unconscionable conduct is large. It is however noted that most of the concerns related to unconscionable conduct are dealt with in the control of the other prohibited unfair trading practices that are listed in Part VII of the Act.

Section 54 of the Act provides that complaints against unfair trading practices may be lodged with the Commission for investigation. A consumer who alleges that a person or an enterprise is engaged in any unfair trading practice may lodge a complaint with the Commission either verbally, or in writing, or through any other means of communication as may reasonably be understood by the Commission.¹⁵⁰

The new Act provides for quicker remedies to the consumer. In that regard, the Commission has been given greater enforcement powers. In the past, the Commission had been forced to use advocacy and persuasion to resolve many consumer cases because of the slow court processes. The establishment of the Competition and Consumer Protection Tribunal (CCPT) under the new Act is designed to fast track consumer protection remedies. It is however noted that section 50(5) of the Act provides that a person who, or an enterprise which, fails to comply with a Commission order to recall a product from the market commits an offence and is liable to a fine and/or imprisonment, but only *upon conviction*. Since only the law courts

can convict anyone, the whole purpose of establishing the CCPT for fast tracked remedies is defeated.

It is recommended that the rules being worked out for the CCPT should clearly spell out 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.

The new Act thus has very comprehensive provisions on consumer protection, and bestows upon the Commission the primary responsibility of consumer protection, leading to consumer welfare.

Even though the Commission is the primary consumer organization in Zambia, there are two other main consumer associations in the country. These are the Zambia Consumer Association and Consumer Alliance Zambia, which are however not very effective because they lack the necessary statutory powers. The Southern Africa Office of Consumer Unity and Trust Society (CUTS) International is also based in the Zambian capital of Lusaka and is doing a sterling job in consumer protection in the country through publications, workshops and general education of consumers of their rights.

The Zambia Association of Chambers of Commerce and Industry (ZACCI) has also been active through its journal in disseminating information on consumer benefits arising from the enforcement of the country's competition and consumer protection law. In its 2010 journal¹⁵¹, the Association published articles on the 'Menace of Counterfeit Products', and on 'Globalization ... Has played a Role in Counterfeit Goods'. That was after the Association noted that "one of the worst things affecting economy in Zambia, and the world at large, is counterfeit products. In the same issue of the

journal, the Association published an article by the then Executive Director of the Competition Commission, Mr. Thula Kaira, on "Why We should have Competition Law" in which the benefits of the law to economic growth and poverty reduction were discussed. In the current journal¹⁵² the Association has published another article by the Commission on "Competition Its Benefits In A Market".

The Commission admitted that the allocation of its resources between competition and consumer protection work tends to favour consumer protection because of the nature of the work involved, which requires a lot of consumer education and awareness. Most of the stakeholders that were interviewed during the fact-finding visit to Zambia, notably the Economics Association of Zambia, cited the existence of more consumer protection issues than pure competition issues in the country. A joint CUTS International/Competition Commission study on the identification of main consumer concerns in Zambia that was funded by the European Development Fund (EDF) found that unfair trading practices in the country centred on misleading advertising, non-conformity with requirements on product expiry goods, disclaimers (which were almost like a disease), and tied selling.

Most of the stakeholders that were interviewed commended the Commission for highlighting through its awareness campaigns the consumer benefits that are accruing from the effective im-

plementation of the country's competition and consumer protection policy and law. Sentiments expressed in that regard included the following: (i) there is good sensitization by the Commission of both consumers and producers over the television (Zambia Development Agency); (ii) the public is now aware of the Commission's existence, particularly of its consumer protection activities (Citizens Economic Empowerment Commission); (iii) the public knowledge of competition and consumer protection policy and law has increased because of the Commission's awareness programmes, particularly in relation to product safety and in the area of sub-standard goods (Zambia Association of Chambers of Commerce and Industry); (iv) the Commission tries to sensitize the business community and the general public on consumer issues through its weekly newspaper column, and its stakeholder workshops (CUTS International); and (v) the Commission's weekly newspaper column is in the right direction of educating consumers of their right, and on how to channel their complaints (Economics Association of Zambia).

The Commission's weekly column in *The Post* newspaper of 17 October 2011 during the fact-finding visit to Zambia provided some consumer feedback on the efforts by the Commission in sensitizing the general public on consumer protection issues. The article is reproduced in full in Box 12 because of its relevance:

Box 12: Newspaper Article on CCPC Conducts Inspections in Eastern Province, *The Post*, 17 October 2011

The Competition and Consumer Protection Commission recently conducted a sensitization and enforcement tour in the Eastern Province of Zambia. The Commission toured 6 districts of Eastern Province, namely Luangwa, Nyimba, Petauke, Katete, Chipata and Chadiza. The aim of the tour was to register the presence and functions of the Commission to both traders and consumers in the Province, sensitize consumers on their rights and obligations and how to lodge complaints with the Commission.

1¹The Commission also wanted to check for the display of disclaimers of "No Return, No Refund, No Exchange" in trading premises whose display are prohibited under Section 48(1) of the Competition and Consumer Protection Act No. 24 of 2010 ('the Act'), sensitize traders on their obligations and rights under the Act and to establish networks between the Commission and local authorities.

The majority if not all members of the public in Eastern Province expressed gratitude over the Commission's visit, which showed that there is concern about their welfare. There were a lot of views expressed on the need for the Commission to engage consumers in the Province as many were not aware of their rights and they do not have the muscle to enforce their rights against the 'strong' traders.

On the other hand, some traders also welcomed the Commission's tour stating that it is important for traders to also know their rights and obligations.

The Commission was however impressed with the receptive approach shown by the consumers in the Province through their willingness to learn as much as they could about the rights and obligations as well as they can be assisted when unfairly treated by a trader. The traders also were not hostile but accommodated the Commission's views and asked as many questions as they could about the Competition and Consumer Protection Act.

The Council officials were also very receptive and welcomed the idea to work with the Commission through inspectors. They pointed out the need to expedite the devolution of the Commission's powers in order to ensure that the efforts of the Commission's work through the inspectors are not diluted by augmented/cemented. The idea of working with the Councils is something that the Commission has done before and has worked well as it has no presence in all the nine Provinces and hence consumers are at times denied quick resolution to their complaints because of the lack of presence of Commission offices in all districts.

There are Market Associations in the districts whose members' participation in the inspections was very useful as they are well known by traders and they in turn know the activities of the traders and are able to easily point to the problematic traders. The members of the Association are more than willing to support the Commission in its future enforcement/awareness activities. The Commission may appoint Association members as inspectors to have presence in the markets as well.

Out of the 563 trading premises visited, only 10 per cent still had disclaimers displayed either on the wall or on the receipts, indicating that the levels of compliance of the law is quite good. This is however not to say that the inspections will not be conducted again as the Commission is striving to have hundred percent compliance among traders.

Over 500 consumers were sensitized on their rights with emphasis on their protection against the display of disclaimers. The Commission will continue its provincial sensitization and enforcement tours to ensure that all consumers get to know about their rights and obligations and how they can seek redress. The traders also should know the provisions of the law and abide by them so that their businesses can thrive by avoiding fines provided for in the law.

As we move to other Provinces, we advise traders and consumers to take advantage of the Commission officers' presence in their districts to learn more about their rights, obligations and how to lodge complaints with the Commission.

Source: The Post, 17 October 2011

The Commission's attempts at publicizing unfair trading practices in the economy have however not been welcomed by some of the offending par-

ties, and have even resulted in threats of legal action. The case, which involved the *Zambian Breweries Group*, is briefly outlined in Box 13 below:

Box 13: Supply by *Zambian Breweries* of Product Likely to Cause Injury or Health or Physical Harm or Which Does not Comply with a Consumer Safety Standard

This is a case in which a consumer bought a crate of *Castle Lager* beer and found one bottle with a foreign matter, namely, a K50 note. The supply of the product in its reported format was contrary to section 237(f) of the Penal Code as read with section 12e of the Competition and Fair Trading Act, Cap 417 of the Laws of Zambia and section 3 of the Food and Drugs Act, Cap 303 of the Laws of Zambia.

The Commission instituted court proceedings against *Zambian Breweries Group*.

Source: CCPC 2010 Annual Report

The judgment of the Magistrates Court, which was delivered on 14 October 2010, found *Zambian Breweries Group* guilty as charged after the Magistrate noted that "it is my considered view that there is overwhelming evidence that the produce contained a foreign matter which is contrary to Section 3 of the Food and Drugs Act, Cap. 303 of the Laws of Zambia, which prohibits the sale of any food

product that consists in whole or in part any foreign matter, or is otherwise unfit for human consumption. It is a fact that P1 (the sealed bottle of beer) was intended for human consumption, and it is a fact that the product contained a foreign matter in form for a K50.00 note. This rendered the product to be unfit for human consumption, and it did not comply with the consumer safety standards".

At the interview held with *Zambian Breweries* on 19 October 2011 during the fact-finding visit to Zambia, the *Breweries* expressed serious concerns over the Commission's handling of the case. It was explained that the Commission "went out of its way to fix the *Breweries*" by over-publicising the case in the media, and in its Newsletter, and that the publicity inspired many members of the public to make false claims against the *Breweries*, which threatened to cause the *Breweries* serious financial harm. As a result, the *Breweries* was seriously considering suing the Commission.

The above shows the impact of the Commission's sensitization of the consumers of the effects of unfair trading practices. There was nothing wrong in the Commission publicizing the case since it involved the safety and health of consumers. As a result, *Zambian Breweries* has intensified its efforts of ensuring that its products do not contain foreign bodies.

There is debate over whether hybrid laws combining competition and consumer protection issues should be replaced by separate competition and consumer protection laws. The argument for separate competition and consumer protection laws is that hybrid laws only relate to unfair trading and do not take into account other pertinent consumer elements, such as the 8 basic consumer rights¹⁵³. The combination of competition and consumer protection issues under one law however takes cognizance of the fact that the ultimate objective of competition policy is consumer protection and welfare. The COMESA Competition Regulations is also a hybrid law that combines competition and consumer protection issues in a single legislation, and Zambia, like all other COMESA member States, has an obligation to ensure that its national competition law conforms to the regional law for uniform and effective enforcement of the laws.

2.4 Procedural Issues

The competition and consumer protection procedural issues in Zambia are provided for in Part VIII of the Act, on investigations and determination by Commission.

Section 55(1) of the Act provides that "the Commission may, at its own initiative or on a complaint made by any person, undertake an investigation if it has reasonable grounds to believe that there is, or is likely to be, a contravention of any provision

of this Act". There are therefore no restrictions in the Act on the sources of competition and consumer complaints that the Commission can investigate. This ensures investigation of all breaches of the Act regardless of the source of the complaint. The sources of complaints into competition and consumer protection cases are numerous, and include complaints from the aggrieved parties, referrals from government ministries and departments, including sector regulators, and initiations by competition authorities from their studies or inquiries, newspaper articles, etc.

The Commission may however decide not to investigate a complaint. In that regard, section 56(1) of the Act provides that "the Commission shall, where it receives a request from any person to investigate a matter and determines that a request is frivolous or vexatious, dismiss the request and inform, in writing, that person of its decision and reasons therefore".

The Commission has been strengthened under the new Act in the undertaking of investigations by the appointment of Inspectors under section 7. Inspectors have statutory powers of conducting dawn raids and undertaking other inspections necessary for the gathering of information required for investigations. In that regard, section 7(4) provides that Inspectors may, with a warrant issued by a Magistrate, at any reasonable time do any of the following things:

- (i) enter and search any premises occupied by an enterprise or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation may be kept;
- (ii) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;
- (iii) examine any document or article found on the premises that has a bearing on the investigation;
- (iv) require information to be given about any document or article by the owner of the premises, or the person in control of the premises, or any person who has control of the document or article, or any other person who may have the information;
- (v) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;

- (vi) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to search any data contained in, or available to the computer system, reproduce any record from the data, or seize any output from the computer for examination and copying; and
- (vii) attach and, if necessary, remove from the premises for examination and safeguarding any document or article that appears to have a bearing on the investigation.

The Commission is also empowered in terms of section 55(4) of the Act to give written notices to any person requiring that person to furnish it with any information pertaining to any matter specified in the notice, or to produce any document or article which relates to any matter which the Commission considers relevant to the investigation. The notices can also require any person to appear before the Commission to give evidence into the investigation.

Section 55(9) however provides that “nothing in this section compels a person to supply any document or information which the person would be entitled to refuse to produce or give in civil proceedings before any court”. This is in line with the general legal principle that one should not be forced to incriminate himself or herself. The Commission can however view the invocation of this section as an assumption of guilt, therefore requiring further investigations using other means.

The need for due process and transparency in the undertaking of the Commission’s investigations is also strongly enshrined in the Act. In terms of section 55(3), the Commission is required to give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be investigated. It is however noted that section 55(6) of the Act provides that “the Commission may, where it has reasonable grounds to believe that the giving of a written notice under subsection (3) ... may materially prejudice its investigation, defer the giving of such notice until after the investigation is concluded”. This is important in cases of cartel investigations requiring possible dawn-raids in which prior notice of the investigation could result in evidence destruction. The Commission is also required in terms of section

55(2) to carry out public consultations on the subject matter of the investigation. The above ensures that the rules commonly known as the rules of natural justice are duly observed and, in particular, that all reasonable steps are taken to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given an adequate opportunity to make representations in the matter. The Commission is further required in terms of section 55(10) to publish at the conclusion of an investigation a report of the inquiry and its conclusion.

Section 57(1) of the Act allows the Commission to negotiate suitable arrangements with enterprises under investigation aimed at ensuring the discontinuance of the practice under investigation. The relevant provisions provide that “the Commission may, at any time, during or after an investigation under this Part, enter into a consent agreement with an enterprise under investigation or request the enterprise to give an undertaking in the prescribed manner and form”. This reduces the costs to both the Commission and the business community of protracted competition investigations.

Section 62(1) also provides for the prohibition through injunctions or staying orders of certain acts pending investigation. This is in the case where: (a) the Commission “has reasonable grounds to suspect that an enterprise is a party to a prohibited agreement and has not completed its examination of the matter, but believes that there is the risk of serious or irreparable injury to a particular person as a consequence of the agreement”; (b) an enterprise is a party to an agreement which is subject to review, to a monopoly situation or to a merger, on which the Commission has opened but not completed an investigation, and the Commission is satisfied that: (i) there is a *prima facie* evidence that competition is being prevented, restricted, distorted or substantially lessened and that, in consequence, serious or irreparable damage may be caused to a particular person; or (ii) the enterprise is taking steps that would effectively pre-empt remedial action being taken that would restore the conditions of competition existing prior to the investigation.

While staying orders are necessary in circumstances described above in section 62(1) of the Act, they need to be issued with extreme caution since they can have serious adverse effects on the competitiveness of the affected enterprises if the

investigation ultimately clears the enterprises from the alleged anticompetitive practices. Such orders must therefore be made on very good ground, and for specific periods of time.

It is recommended that the Commission in giving directions on staying or prohibition orders under section 62(1) of the Act 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 in 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 six months from the date of its publication; whichever is the shorter period".

Sections 58 and 59 of the Act provide for Commission directions relating to restrictive agreements (of both 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.

Section 61 provides for remedies in merger control. The remedies are in the case of both prospective mergers and completed mergers that have been found to result in a substantial lessening of competition. These are listed in Table 1 below.

Table 1: Remedies in Merger Control

In Case of Prospective Mergers (Section 62(2))	In Case of Completed Mergers (Section 62(3))
<p>The Commission may, in the case of a prospective merger, require an enterprise to:</p> <ul style="list-style-type: none"> • desist from completion or implementation of the merger insofar as it relates to a market in Zambia; • divest such assets as are specified in a direction within the period so specified in the direction, before the merger can be completed or implemented; or • adopt, or desist from, such conduct, including conduct in relation to prices, as is specified in a direction as a condition of proceeding with the merger. 	<p>The Commission may, in the case of a completed merger, require an enterprise to:</p> <ul style="list-style-type: none"> • divest itself of such assets as are specified in a direction within the period so specified in the direction; or • adopt, or to desist from, such conduct, including conduct in relation to prices, as is specified in the direction as a condition of maintaining or proceeding with the merger.

Remedies in merger control under the Act are therefore both of a structural and behavioural nature.¹⁵⁴ While both forms of remedies are effective in redressing competition concerns, structural remedies are generally preferred to behavioural ones, mainly because they are felt to be more effective in the long run, and do not require continuing oversight or regulation by competition authorities. In requiring continuing oversight by competition authorities, behavioural remedies place a heavy burden on the resources of the authorities, which are scarce in developing countries like Zambia. Structural remedies have been found to be most effective in merger control, particularly in remedying the competitive effects of horizontal mergers.

In the case of restrictive business and anticompetitive trade practices (i.e., anticompetitive agree-

ments and abuse of dominant position), both structural and behavioural remedies are also provided under the Act. While structural remedies have been found to be effective in merger control, they have been found not to be suitable in redressing certain other competition concerns. For example, while structural remedies have been applied on abuse of dominance¹⁵⁵, they may not be the most suitable for such anticompetitive practices. It has generally been accepted that being dominant *per se* is not being anticompetitive, but it is the abuse of that dominance through the engagement of exclusionary and exploitative practices which is cause for competition concern. This is the reason why most competition authorities consider abuse of dominance using the rule-of-reason approach in order to weigh out their efficiency features

against the anticompetitive elements. The same applies to vertical restraints. Therefore, the breaking up of a dominant firm that realizes immense economies of scale, or the elimination of vertical restraint agreements or arrangements that serve legitimate efficiency or pro-competitive purposes, could therefore be an extreme form of remedy. It must be noted that care must be taken to avoid imposing greater costs than those incurred by the anticompetitive conduct.

Restitution and payment of damages are also generally considered to be appropriate remedies in abuse cases.

Section 65 of the Act provides for enforcement of competition law by the Commission at the request of foreign competition authorities, and for positive comity. Section 65(1) provides that “a foreign competition authority may, where it has reasonable grounds to believe that anticompetitive practices in Zambia are damaging competition in the country of the authority, request the Commission to investigate and make an appropriate determination”. The above definitively applies to requests from other members of COMESA and/or SADC by virtue of the obligations that Zambia has assumed towards these regional organizations. It also applies “where the Minister has certified by order, in the *Gazette*, that Zambia has entered into an agreement with one or more States or organizations whereby, on a basis of reciprocity, each party to the agreement shall exercise the principle of comity ... in investigating and determining cases falling within its jurisdiction”.

The above provisions greatly facilitate Zambia's cooperation with other countries in the effective implementation of competition policy and law, both regionally and internationally.

The provisions of section 66 of the Act also greatly facilitate the effective implementation of competition policy and law in Zambia. They provide that “the Minister may, by statutory instrument, on the recommendation of the Commission, make regulations to provide for the manner in which investigations under this Part shall be carried out”. The importance of the provisions is that they enable the Commission to lay out in more detail, which can be subjected to frequent changes and amendments, pertinent matters pertaining to procedural issues. As has already been stated earlier,

the main regulations to the Act, the Competition and Consumer Protection (General) Regulations, 2011, were *gazetted* on 19 August 2011 as Statutory Instrument No.97 of 2011. The regulations cover the following areas: (i) determination of relevant product market; (ii) market inquiry process; (iii) application for authorization of horizontal or vertical agreement, and application for exemption; (iv) threshold for authorization of proposed merger, and application for negative clearance; (v) authorization of investigations, notice of investigation, unannounced raid on premises, form of consent agreement, undertakings, and investigation at request of foreign competition authority; (vi) lodging of complaints; and (vii) service of documents on Commission, service of documents on person other than Commission, service of notice by Commission, Inspectors, and fees.

2.5 Sanctions

One of the major shortcomings of the old Act that was identified by officials of the former Zambia Competition Commission (ZCC) 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 administrative and criminal nature. Administrative sanctions are imposed by the Commission, while criminal sanctions can only be imposed by law courts.

The most deterrent administrative sanction is the imposition of fines of up to 10 per cent of the offending enterprise's annual turnover. This sanction is imposed for a number of offences, including the following: (i) entering into or giving effect to *per se* prohibited agreements (in breach of sections 9(1) and 10(1) of the Act); (ii) abusing a position of dominance (in breach of section 16(1) of the Act); (iii) not complying with a condition of an exemption (section 21(3)); (iii) offences relating to mergers (i.e., implementing a reviewable merger without the approval of the Commission, implementing a merger that has been rejected by the Commission, or (iv) failing to comply with merger approval conditions) (section 37); and (v) certain offences relating to consumer protection (e.g., engaging in unfair trading practices, false or misleading representations, display of disclaimers, supply of defective and unsuitable goods and services,

charging consumers more than the price indicated or displayed on a product or service, violating consumer product safety)

For most offences relating to consumer protection (i.e., those related to unfair trading practices, false or misleading representations, supply of defective and unsuitable goods and services, and consumer product safety), the imposition of penalty units is allowed in terms of section 50(3) of the Act in cases where such units are higher than the monetary fines of up to 10 per cent of annual turnover. In the case of product labelling, the criminal sanction of imprisonment of up to 3 years may also be imposed.

Penalty units are provided for in the Fees and Fines Act (Cap 45) of 1994. Part III of that Act, on Fines and Penalty Units, provides that where any Act provides that a fine may be imposed for an offence, the fines should be expressed in penalty units, and that “in any written law, unless the context otherwise requires, ‘penalty unit’ means one hundred and eighty kwacha”. At the current exchange rate, one kwacha is equal to \$0.04.

Imprisonment can also be imposed in terms of section 7(6) of the Act on anyone who delays or obstructs the Commission’s investigations, or gives the Commission false or misleading information in the course of its investigations.

The fines under the new Act are therefore much higher than those under the old Act, which only amounted to up to 10 million Kwacha (\$2 000). The higher fines are thus suitable and deterrent enough for serious competition offences such as cartelization and monopolization, as well as for consumer protection offences.

It is noted that section 86(3) provides that the Commission may retain a percentage of fines paid in relation to the annual turnover of a person or an enterprise that is prescribed by the Minister responsible for finance. Such practice however has potential adverse side-effects to effective implementation of competition policy and law. Firstly, it puts the neutrality of the competition authority at risk by the mere fact that financial considerations might guide the authority in arriving at its decisions on competition cases. Secondly, the monetary interest in competition enforcement activities directs the attention of the competition authority from other equally important competition promotion

activities, such as advocacy. While the investigation of competition and consumer protection violations is a resourceful activity on the part of competition authorities, whose costs need to be defrayed by those who directly benefit commercially from the investigative activity, the costs should more appropriately be defrayed from administrative fees rather than from fines.

It is recommended that section 86(3) of the Act, 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 be deleted.

Among other administrative sanctions under the Act, the Commission may revoke approved mergers, or exemptions granted on anticompetitive practices, if a party to the merger or exempted practice submitted materially incorrect or misleading information in support of the merger or the practice, or fails to comply with any condition of an approval of the merger or exemption of the practice (section 21(1) and section 35(1)). It may also make a person liable for any loss or damage arising as a result of the lack of conformity of the goods with the relevant standard, or the defect or dangerous characteristic on account of which the goods have been declared unsafe (section 52(3)), or declare unfair contract terms null and void.

Section 82 of the Act contains the general penalty provisions. In that section, it is provided that “a person who contravenes a provision of this Act for which a specific penalty is not provided for under this Act, commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both”.

Section 83 makes managers of offending enterprises personally liable for offences committed by the enterprise, thus strengthening the deterrent effects of sanctions under the Act. The relevant provisions of section 83 provide that “where an offence under this Act is committed by a body corporate or unincorporated body, every director or manager of the body corporate or unincorporated body shall be liable, upon conviction, as if the di-

rector or manager had personally committed the offence, unless the director or manager proves to the satisfaction of the court that the act constituting the offence was done without the knowledge, consent or connivance of the director or manager or that the director or manager took reasonable steps to prevent the commission of the offence". It is noted that the liability of management is *upon conviction* by a law court, with the assumption that all the legal requirements of natural justice have to be met in the process.

2.6 Sector Regulators

Sector regulated activities in Zambia are provided for in Part VI of the Act. Section 42 provides that "subject to section *three*, the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III". The referred to section *three* of the Act contains the application provisions of the Act, which provide that the Act: (a) applies to all economic activity within, or having an effect within, Zambia; (b) binds the State insofar as the State or an enterprise owned by the State engages in commercial activities; (c) exempts: (i) collective bargaining activities; (ii) intellectual property rights; (iii) conduct designed to achieve non-commercial socio-economic objectives; and (iv) business of statutory monopolies.

Part III of the Act deals with restrictive business and anticompetitive trade practices (anticompetitive agreements of a horizontal and vertical nature, and abuse of dominant position).

Section 42 of the Act therefore means that activities of enterprises in regulated sectors fall under the jurisdiction of the Commission in as far as restrictive business and anticompetitive trade practices are concerned, unless the enterprises fall under the explicit exemptions of section 3 of the Act. The Commission also has powers in terms of section 44 to undertake market inquiries into competition in regulated sectors. The Act is however silent on whether or not the requirements of its Part IV, on mergers, also apply to enterprises in regulated sectors. While it can be assumed that the requirements of Part IV are applicable, this needs to be clarified to avoid legal wrangles, more so because mergers and acquisitions in regulated sectors are rife.

It is recommended that it also be made clear under section 42 of the Act that "the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III and Part IV".

The Commission is required under the Act to enter into cooperation agreements with sector regulators in the implementation of competition policy and law. In that regard, section 43 of the Act provides that "for the purpose of coordinating and harmonizing matters relating to competition in other sectors of the economy, enter into a memorandum of understanding with any regulator in that sector, in the prescribed manner and form".

The interface between competition authorities and sector regulators has always been a contentious issue worldwide¹⁵⁶. It has been noted that despite having a common goal, and potentially playing complementary roles in fostering competitive markets and safeguarding consumer welfare, the different approaches employed and different perspectives held by competition policy and sector regulation can be a source of friction. The friction is heightened by the blurring of the distinction between economic and technical regulation and competition enforcement, which are common regulatory tasks. Common regulatory tasks are briefly explained in Box 14 below

Box 14: Common Regulatory Tasks

- Competition Protection: controlling anticompetitive conduct and mergers.
- Access Regulation: ensuring non-discriminatory access to necessary inputs, particularly network infrastructure.
- Economic Regulation: adopting measures to control monopoly pricing.
- Technical Regulation: setting and monitoring standards to ensure compatibility and to address privacy, safety and environmental concerns.

Source: OECD, Relationship between Regulators and Competition Authorities, 1999.

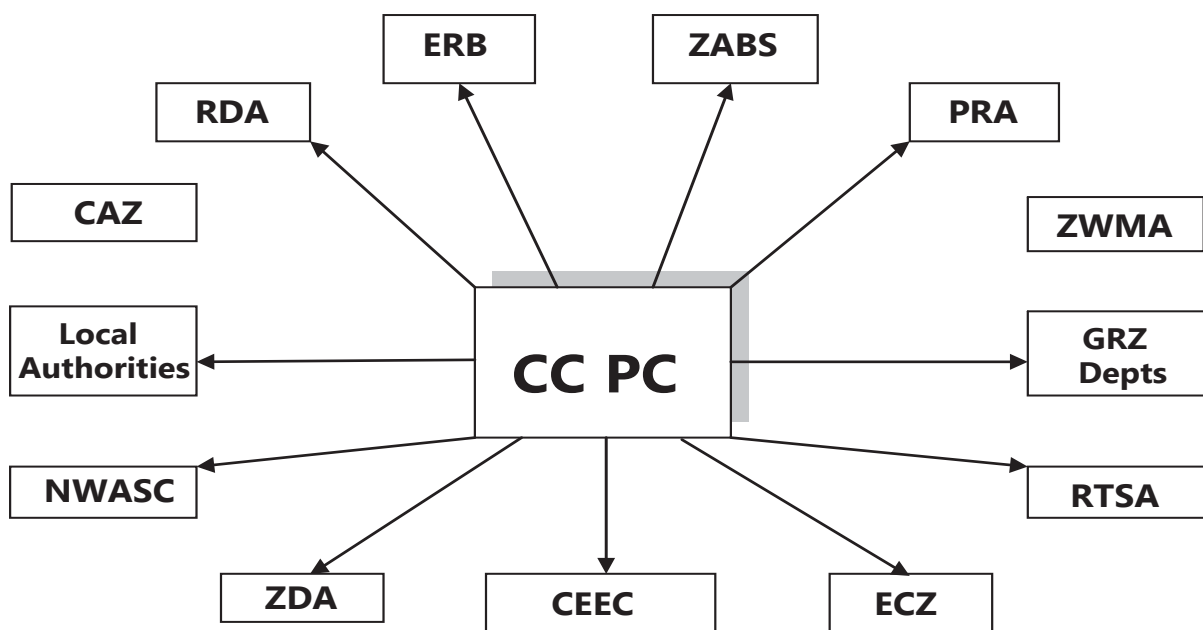
It has also been found that jurisdictional conflicts occur as a result of ambiguities in the law as to whether sector regulation or competition law has pre-

edence with regard to competition issues. In many instances, sector regulators preceded competition authorities and were thus given responsibility for competition issues in their respective sectors. Even in cases where new sector regulators have been created after competition authorities, most countries choose to assign them competition responsibilities

as a means of infusing and diffusing competition principles in the sector-regulatory regime.

The regulatory environment in Zambia has grown considerably, with competition regulation by the Competition Commission occupying the centre of that environment, as shown in the Figure 1 below:

Figure 1: Regulatory Environment in Zambia¹⁵⁷



Source: Zambia Competition Commission Strategic Plan: 2008-2011

In Zambia, like in most other countries, regulation cannot entirely be separated from competition law, as observed by the former ZCC in its Strategic Plan: 2008-2011. Regulation has often preceded competition law, and was used as a fundamental instrument to introduce competition in specific economic sectors.

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 (PIA), the Zambia Information and Communications Technology Authority (ZICTA), the Energy Regulation Board (ERB), and the Bank of Zambia.

The enabling Act of PIA is the Pension Scheme Regulation Act, 1996 (No.28 of 1996) (as amended

by Act No.27 of 2005). The broad functions of the Authority are to supervise and regulate the pensions and insurance industry in Zambia, and to license entities operating in the industry (i.e., pension schemes, insurance firms, insurance brokers, etc.). Its specific functions in terms of section 5(1) of its enabling Act include "in consultation with the Competition Commission to formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industry".

ZICTA administers the Information and Communication Technologies Act, 2009 (ICT Act), as well as the Electronic Communications and Transactions Act, 2009, and the Postal Services Act, 2009. The basic functions of the Authority in terms of section 6 of the ICT Act include the implementation and

administration of the licensing and assignment schemes in the Zambian ICT market, the provision of national frequency and numbering plans, the allocation of radio transmission frequencies, and the promotion of research and development. It also has the statutory function to “promote competition among persons engaged in commercial activities relating to, or in connection with, the provision of information and communication technology and efficiency and economy on the part of persons so engaged”. Section 8 of the ICT Act however provides that “the Authority shall consult the Zambia Competition Commission on any matter relating to competition in the sector”.

According to the Commission, a lot of anti-competitive practices go unchecked in the telecommunications services sector because of the concurrent jurisdiction on competition between the Commission and ZICTA, which confuses the investigative and enforcement authority. The Commission is however receiving a lot of complaints from the sector. ZICTA confirmed that there are a lot of competition concerns in the sector, with the major concern being dominance, and its abuse through both exploitative and exclusionary practices. The Authority had to put price caps on interconnection rates to avoid predatory practices, as well as collusive pricing. Tying arrangements are also prevalent in the sector.

The ERB was established under the Energy Regulation Act, 1995 with the functions of licensing all players in the energy sector (electricity, petroleum, gas, etc.), and setting electricity tariffs. It also monitors the efficiency and performance of undertakings in the energy sector, and investigates complaints from consumers on price adjustments made, or services provided, by the undertakings. The Board’s competition functions in terms of section 6 of its enabling Act are “in conjunction with the Zambia Competition Commission established by the Competition and Fair Trading Act, monitor the levels and structures of competition within the energy sector with a view to promoting competition and accessibility to any company or individual who meets the basic requirements for operating as a business in Zambia”.

The Bank of Zambia is a Statutory Body that was

established under the Bank of Zambia Act, 1996. It administers the Banking and Financial Services Act, 2005. Its broad functions are to formulate and implement monetary and supervisory policies that will ensure the maintenance of price and financial systems stability so as to promote balanced macro-economic development. The Bank has competition functions since it is concerned over collusion between banks on interest rates and other charges. In the area of mergers and acquisitions, no banking undertaking can engage in corporate restructuring without the authority of the Bank. The factors that the Bank takes into account in assessing consolidations include limitations in voting control to avoid dominance by one undertaking.

There are serious competition concerns in all the regulated sectors, with the main concerns being: (i) abuse of dominance, or monopolization (in the ICT, insurance, energy (particularly electricity) sectors); (ii) collusive and cartel-like behaviour (ICT, energy, and banking sectors); (iii) tying arrangements (ICT sector); and predatory lending (banking sector).

From the interviews held with all the above sector regulators during the fact-finding visit to Zambia, the cooperation between the Commission and the regulators is good and satisfactory, with the sector regulators acknowledging the supremacy of the Commission over competition matters in their respective sectors. The following are the views and comments expressed in that regard: (i) as provided for in the ICT Act, the Authority has to collaborate with the Commission on any issue related to competition, including the Authority’s pricing determinations – the Authority also always seeks the advice of the Commission whenever it receives applications for change of licences; mergers and acquisitions in the sector are not the Authority’s primary concern, but that of the Commission; the Commission however always requests the Authority’s views and comments on such transactions (Zambia Information and Communications Technology Authority); (ii) even though the Board has concurrent jurisdiction with the Commission over competition in the energy sector, it views the Commission as the boss in that area, and that the role of the Board is to give the Commission the necessary technical advice and support; the Commission

therefore leads with the Board's support (Energy Regulation Board); (iii) in cases of mergers in the pensions and insurance sector, these are notified to the Commission for examination since the Pensions Act does not specifically provide for that; the Commission however always requests the Authority to comment and give its views on such mergers (Pensions and Insurance Authority); and (iv) the engagement between the Bank and the Commission is satisfactory; the Bank often refers cases to the Commission for investigation; in merger control, there is a realization that even though the Bank and the Commission have concurrent jurisdiction, the Bank is only concerned over the protection of depositors while the Commission looks at lessening of competition in the relevant market; a merger of financial institutions can therefore only be implemented if it gets the authority of both regulators (Bank of Zambia).

The Commission has negotiated Memoranda of Understanding (MoUs) on concurrent jurisdiction on competition matters with some of the sector regulators with competition functions in accordance with the provisions of section 43 of the new 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 being finalized.

The MoUs cover the following areas: (i) basis of Agreement (that the agreement is entered into in order to establish the manner in which the parties will interact with each other in respect of the investigation, evaluation and analysis of mergers and acquisition transactions and complaints involving anti-competition practices); (ii) investigations (that the parties may under certain circumstances and at the request of either party assist each other to carry out investigations); (iii) restrictive practices complaints (handling of complaints where the parties have concurrent jurisdiction, and where there is no such jurisdiction); (iii) application for approval in respect of particular transactions; (iv) establishment of joint Working Committee (to manage and facilitate cooperation and consultation in respect of matters dealt with by each party in terms of the agreement); (v) sharing of re-

sources; (vi) exchange of information; and (vii) confidentiality.

Other Statutory Bodies without competition functions that were interviewed during the fact-finding visit to Zambia, such as the Zambia Development Agency (ZDA) and the Citizens Economic Empowerment Commission (CEEC) also indicated a great wish to cooperate with the Commission. ZDA cooperates with the Commission in the area of privatization of State enterprises, and is prepared to extend that cooperation in the area of promotion of micro, small and medium enterprises. CEEC is prepared to cooperate with the Commission in consumer education and awareness through the use of its offices in all the nine Provinces in the country.

Even though sector regulators that have competition functions are prepared to cooperate with the Commission in other fields such as consumer protection and welfare. For example PIA advised that it deals with a lot of service providers in the pensions and insurance sector who are abusing consumers, most of the affected consumers not knowing whether and how they can submit their complaints to the Commission. The Authority would therefore want to collaborate more with the Commission on consumer protection in the sector. The Bank of Zambia also advised that it is concerned over predatory lending in the banking sector, which is hurting consumers, and is working with the Commission on the drafting of a whole chapter on competition and consumer protection in the Banking and Financial Services Act.

It is recommended that the Commission's MoUs with sector regulators should not only be confined to those that it has concurrent jurisdiction on competition matters with, but should also be extended to other regulators on other areas of cooperation.

The Zambia Information and Communications Technology Authority (ZICTA) at the interview held on 18 October 2011 during the fact-finding visit to Zambia raised a concern that even though a system of consultations with the Commission was in place before the signing of the MoU between the two regulators, the Commission in 2010 made an application to the High Court on

the interpretation of a Statutory Instrument that had been *gazetted* by the Minister of Transport and Communications under the ICT Act to foreclose entry into the mobile cellular phone and fixed landline sectors for a period of five years, thus violating the provisions of the Competition Act. The Commission had not informed or consulted the Authority, as it usually did on issues affecting competition in the sector, before making the court application. The Authority was therefore left with no choice but to oppose the application since it was the administrator of the Statutory Instrument in question. The Authority felt that the above disagreement with the Commission was caused by lack of information and consultations before the matter was referred to the courts by the Commission. With the signing of the MoU between the two regulators, similar disagreements should not arise since the MoU provides for the establishment of a Committee to facilitate exchange of information between the two.

In response to the above concerns, the Commission was rather surprised that ZICTA was complaining that the Commission did not consult the Authority before taking the issue of the Statutory Instrument to the High Court for interpretation when the Authority did not consult the Commission in the first place when it was drafting that Statutory Instrument with the knowledge that it was in violation of the provisions of the Competition Act. The Commission however agreed with the Authority that similar disagreements should not arise with the signed MoU between the two regulators in place.

2.7 Judicial Review

The judicial system in Zambia is at four levels, starting with the lower courts up to the Supreme Court. The lowest courts are the local (traditional) courts, which consider cases of a customary nature (divorces, child maintenance, adultery, witchcraft, etc.). The next level of courts are the Magistrates Courts, consisting of both lay Magistrates, who are trained for periods of not less than two years, and professional Magistrates, who are trained lawyers. The courts hear matters on first instance, as well as appeals from the local courts. They hear civil cases involving up to Kwacha 30 million (about \$60 000), as well as criminal cases except those that attract capital punishment.

The higher courts are the High Court of Zambia, consisting of Judges, and the Supreme Court of Zambia, which is the highest court in Zambia.

All court appeals in Zambia are dependent on the aggrieved party making the appeal within the stipulated 30-day time frame. The appeal period is not based on working days but on calendar days if more than 7 days. There are plans to reduce the appeal period so as to finalize cases as soon as possible.¹⁵⁸

The new Competition and Consumer Protection Act, 2010 provides for the setting up of a Competition and Consumer Protection Tribunal (CCPT) to hear appeals against the decisions of the Commission. Even though the Tribunal was established in 2011, its rules had not been *gazetted* by the end of that year. In the absence of the rules of the Tribunal, all appeals against the decisions of the Commission have to be made directly to the High Court.

Stakeholders interviewed during the fact-finding visit to Zambia expressed mixed sentiments on the involvement of the CCPT in the appeal process. One view was that the involvement of the Tribunal would lessen the costs of appeal to the parties. The other view was however that the Tribunal would be a further impediment in the appeal process, which would merely lengthen the process, since it would be an intermediary appeal body before the matter is referred to the High Court if its decision is appealed against.

Not many competition and consumer protection cases have undergone judicial review. The few reviewed cases have included two criminal cases in the Magistrates Court against Zambia Breweries Group, involving foreign bodies in a sealed beer bottle in contravention of section 12(e)¹⁵⁹ of the old Competition and Fair Trading Act, 1994, and abuse of dominance in contravention of section 7(2)(e)¹⁶⁰ of the same Act, and two Commission applications to the High Court for interpretation of Statutory Instrument No.11 of 2009 (Reserved Services Order), 2009, and for the interpretation of the meaning of the terms ‘merger’, ‘takeover’ and ‘acquisition’.

The judiciary in Zambia has therefore not had much experience in considering competition and consumer protection cases, and requires capacity building in that area through the holding of adjudicators seminars and workshops.

It is recommended that competition law training be organized for members of the CCPT, and that 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 at which the other members of the Judiciary in Zambia, including Magistrates and Judges, would be invited.

Section 60 of the Act provides that orders or directions of the Commission from its investigations can be appealed against to the CCPT by any aggrieved person or enterprise within thirty days of receiving the order or direction. Appeals against the decisions of the Tribunal can be made to the High Court in terms of section 75 of the Act, also within thirty days of the determination.

The functions of the Tribunal in terms of section 68 of the Act are to: "(a) hear any appeal made to it under this Act; and (b) perform such other functions as are assigned to it under this Act or any other law". Other functions assigned to the Competition and Consumer Protection Tribunal under the Act include: (i) confirming consent agreements or undertakings entered into by the Commission with enterprises under competition investigations; (ii) considering applications from the Commission for mandatory orders to enforce the payment of penalties imposed by the Commission against the concerned enterprises; (iii) considering applications from the Commission for mandatory orders on the enforcement of directions and undertakings; (iv) ordering divestiture, or declaring void any provision of a merger agreement, if a merger is implemented in contravention of the Act; and (v) considering applications from the Commission for orders prohibiting the sale of an unsafe goods.

The Tribunal has strong powers in the undertaking of its adjudicative proceedings. In that regard, section 71 of the Act provides as follows:

"(1) The Tribunal may –

- (a) order the parties or either of them to produce to the Tribunal such information as the Tribunal considers necessary for the purposes of the proceedings; or

- (b) take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the Tribunal.
- (2) The Tribunal may summon witnesses, call for the production of, or inspection of, books, documents and other things, and examine witnesses on oath, and for those purposes, the Chairperson is hereby authorized to administer oaths.
- (3) A summons for the attendance of any witness or the production of any book, document or other thing shall be signed by the Chairperson and served in the prescribed manner".

The Tribunal, which was established in 2011 but has still not commenced effective operations pending the adoption of its rules, however does not have powers of reviewing the imposition of criminal sanctions on breach of the country's competition law, such powers rest with law courts.

The Tribunal consists of five part-time members appointed by the Minister in 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 desired independence, or decision making autonomy, of the Tribunal from political influence is greatly compromised. Apart from being appointed by the Minister, its members may also be removed by the Minister for unspecified reasons in terms of section 67(5) of the Act. The Secretariat of the Tribunal also consists of civil servants working in a government ministry, as provided for in section 69 of the Act, which provides that "the Ministry responsible for commerce shall provide the necessary secretarial and accounting services to the Tribunal to perform its functions under this Act".

It is recommended that the removal by the Minister of a member of the Competition and Consumer Protection Tribunal be on clear grounds and reasons that should be provided for in the Act.

3. INSTITUTIONAL FRAMEWORK

3.1 Resources

(a) Staffing and Human Resources

The Commission has a total of 37 positions on its staff establishment (the former ZCC only had 26 positions on its establishment), of which 29 are currently filled, as shown in Table 2 below. The organizational structure of the Commission is also shown in Figure 2 below.

Table 2: Filled Positions on the Commission's Staff Establishment (as at 16 October 2011)

Department	Staff Positions	Total No. Filled Positions
Office of the Executive Director	Executive Director, Personal Assistant, Chief Analyst	3
Mergers & Monopolies Department	Director, Senior Research Analyst, Research Analysts	5
Consumer & Public Relations Department	Director, Research Analysts, Public Relations Officer	5
Legal & Enforcement Department	Director, Manager Legal, Legal Assistant	3
Finance & Administration Department	Director, Human Resources Officer, Research Analyst, Accountant, Administrative Assistants, Receptionist, Office Assistants, Library Assistant, Drivers	11
Kitwe Office	Research Analysts	2
Total No. of Filled Positions on the Establishment		29

Source: Compiled from information obtained from the CCPC

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 has University degrees in their respective areas of competences (i.e., economics, law, administration, and accounts). The mix of economists and lawyers is however not adequate. The Commission presently only has 3 lawyers, and up to 15 economists. There is therefore need for more lawyers.

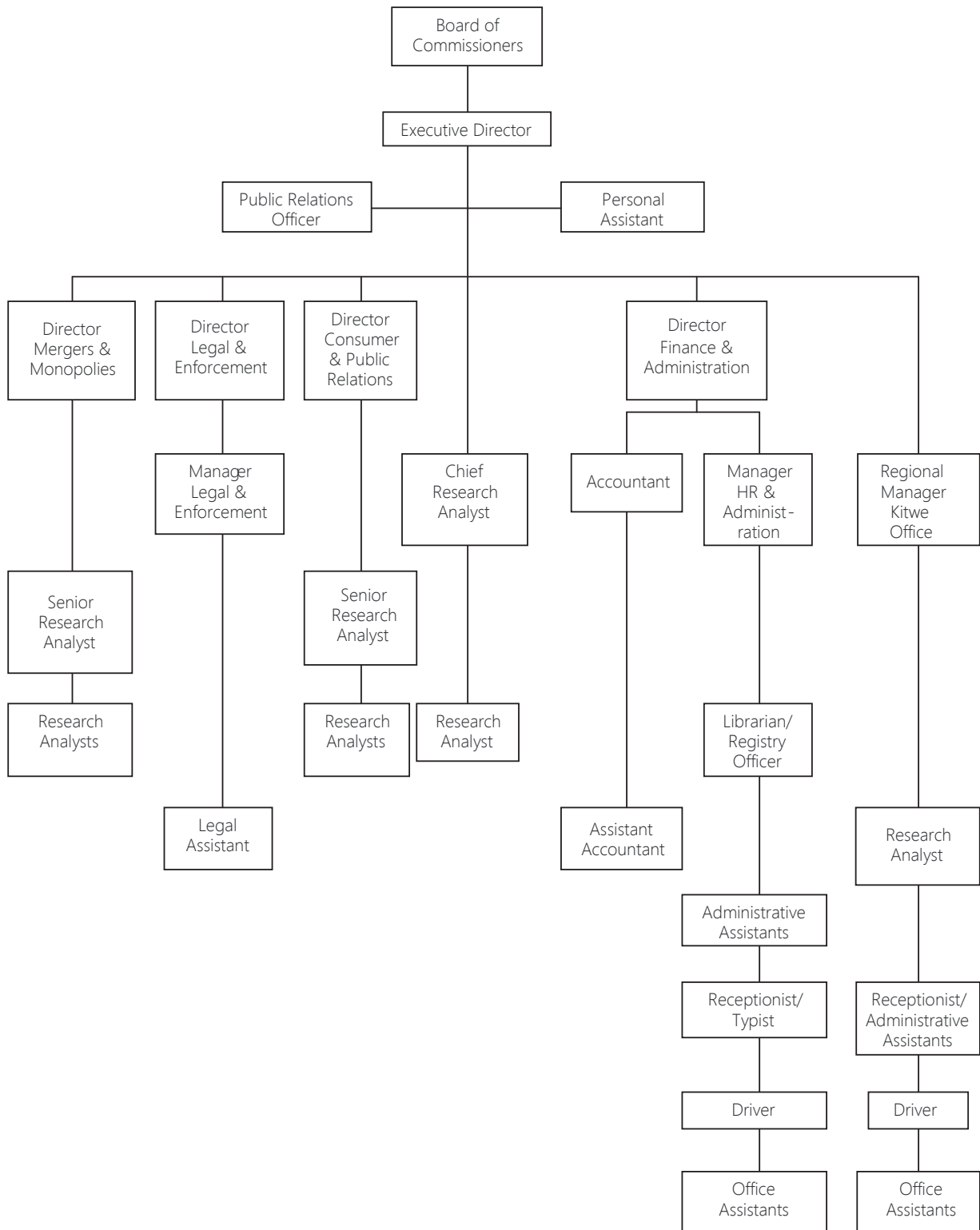
Staff turnover in the Commission has been very low since 2008, mainly because of improved conditions of services, in terms of both basic salaries and other employee benefits. Salaries in the Commission compare very favourably, not only nationally but also regionally. Over the last three years, the Commission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

The Commission however has a serious human resources 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 sacrifice of equally important advocacy and awareness activities. The Kitwe office is particularly affected since the critical post of Regional Manager has still not been filled. The Commission advised during the fact-finding visit to Zambia that funding is the major impediment to filling the human resources gap.

The Universities should be the natural pool of trained personnel for the Commission in the specialized 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 Commission recently appointed on a part-time contract basis 10 Inspectors in terms of section 7 of the Act. Plans are to appoint a total of 60 such Inspectors based in all the country's nine Provinces. A Regional Office has also been opened



Source: CCPC

in the Copperbelt town of Kitwe, and staff for that office is being recruited. The Office will handle both competition and consumer matters.

It is recommended that the Commission 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 trained human resource source for the Commission.

(b) Budget and Financial Resources

Paragraph 10 of 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.

Table 3 below shows the Commission’s income sources in 2010. In 2010 (up to November 2010), total income received by the Commission was about K4.600 billion (about \$950 000), of which only about K1.666 (about \$340 000), or (36 per cent of total income) was in the form of government grants. The major source of the Commission’s income was statutory fees and fines, of which merger notification fees were predominant. Fees to be levied for applications for exemption of rule-of-reason anticompetitive agreements, as provided for under sections 18 and 22 of the new Act, will also significantly contribute to the Commission’s income through adequate stakeholder education of the provisions of the Act.

Table 3: Income Sources in 2010

Income Source	Approved Budget Jan-Dec (ZMK)	Actual Income Jan-Nov		Actual Income Jan-Nov Percentages
		(ZMK)	(\$)	
Government grant	2 201 000 000	1 666 034 723	343 229	36.22 per cent
Statutory fees and fines	1 828 060 000	2 805 203 252	577 916	60.99 per cent
Extraordinary board meetings income	0	109 400 000	22 538	2.38 per cent
Income from workshops	15 000 000	19 095 206	3 934	0.42 per cent
Total income	4 044 060 000	4 599 733 181	947 617	100 per cent

Source: From figures supplied by the CCPC

As indicated in the Commission’s approved Budget for 2010, the Government should be the major funder of the Commission’s operations through grants since the Commission is a Statutory Body with non-commercial functions of a regulatory nature. The actual grant disbursements in 2010 were however much reduced, resulting in income from statutory fees and fines being the largest contributor to the Commission’s funds, at about 61 per cent of total income. Income from fees and fines is however not reliable since it depends on unpredictable behaviour of enterprises, such that it cannot be depended upon to finance the Commission’s advocacy and awareness activities. Ideally, the fines imposed on breach of competition law should be paid to Treasury, to avoid the likely possibility of the Commission prioritizing competi-

tion cases that attract such fines to the detriment of other equally important competition activities like advocacy and awareness, while service fees could be paid to the Commission for cost reduction purposes and as supplementary to government grants for use to fund the Commission’s developmental projects.

It is recommended that the Government should take up its responsibility of ensuring that the Commission’s operations are fully funded from government grants.

Even though the Act does not specifically provide for the charging of merger notification fees, the administrative regulations to the Act do provide for the collection of such fees. Merger notification

fees are becoming a major source of funding for competition authorities, particularly those in developing countries but also in some developed countries. The competition activities of most, if not all, developing countries are grossly under-funded. It has been found that merger notification fees go a long way in assisting in the meeting of the high costs of merger review and examination. It can also be argued that merger notification fees are an effective deterrent against the notification of mergers with motives other than pro-competitive efficiency reasons.

Merger notification fees in Zambia are relatively high compared with those charged in other countries in the region. The fees are calculated at 0.1 per cent of the combined annual turnover or assets in Zambia of the merging parties, whichever is higher, with a cap of maximum fee of 16 666 667 fee units¹⁶¹, which translate to K3 billion (or about \$600 000).¹⁶² The high fees go beyond their intended purpose of defraying the Commission's costs of merger examination, and are a major source of income for the Commission. It is therefore not surprising that merger notification fees constitute over 60 per cent of the Commission's income, far outstripping the government grant, which should be the major source of the Commission's operational funds. This presents two major concerns. Firstly, the very high merger notification fees increase the transaction costs of merger transactions, and places a heavy financial burden on the merging parties who in most cases enter into merger transactions for economic and viability reasons. Secondly, it would not be prudent for the Commission to over-rely on merger notification fees for the funding of its operations since such fees are not a stable source of income.

It is therefore recommended that the maximum merger notification fee in Zambia be revised and lowered from the very high \$600 000 in line with practice in the region.

In addition to merger notification fees, the Commission under the old Act also used to charge an extra fee for expediting its examination of mergers. The charging of the extra merger examination expedition fees is however no longer provided for in the Regulations to the new Act since the Act now provides for specific merger examination

deadlines. The Commission has therefore discontinued the practice.

The 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. The Commission has made proposals that it retains 60 per cent of the fines, which have still to be approved by the Minister. The Ministry is of the view that such requests should be made on a case by case basis, depending on the specific financial requirements of the Commission. It is not surprising that the Commission's proposals to retain as much as 60 per cent of the fines have not been approved by the Ministry of Finance given the fact that fines of up to 10 per cent of the offending enterprises' annual turnovers can be very high. The retention by the Commission of a percentage of fines imposed on contravention of certain provisions of the Act adversely affects the Commission's prioritization of its activities, and it has already been recommended that the relevant provisions of the Act be removed.

Based on the Commission's budgetary performance in 2010, total employment costs of about K2.725 (about \$561 390) were by far the largest expenditure, at 72 per cent of total recurrent expenditure of about K3.787 billion (about \$780 141). Table 4 below shows the breakdown of employment costs during that year, excluding allowances directly related to operations, such as travel *per diem* allowances.

Table 4: Employment Costs in 2010

Employment Cost	Actual Expenditure 2010 Jan-Nov	
	ZMK	\$
Personal Emoluments	2 297 262 414	473 272
Employees Pension Scheme	134 215 314	27 650
Medical and Funeral Expenses	27 854 880	5 739
NAPSA Contributions (national social security)	79 682 637	16 416
Staff Welfare	7 132 602	1 469
Gratuity and Terminal Benefits	178 840 071	36 844
Total Employment Costs	2 724 987 918	561 390

Source: From figures supplied by CCPC

220. While having employment costs as high as 72 per cent of total recurrent expenditure might

seem unacceptable for a regulatory authority with a wide socio-economic mandate, the figures involved in dollar terms are relatively small, indicating that the Commission's other operations are being under-funded. There is also need to maintain highly competitive conditions of services to avert high staff turnover. Presently, staff salaries in the Commission are highly competitive, and compare favourably with other government bodies, including sector regulatory bodies. What is required therefore is to reduce the percentage of employment costs to total expenditure is increased funding for the Commission for use in other operational areas, such as advocacy and awareness activities.

(c) Office Facilities and Equipment

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. The offices are however on the fourth floor of the building, which has had no functioning elevators for many years. Accessing the offices is therefore a daunting task unless one is in excellent physical position, which many of the Commission's clients are not.

The location of the Commission's offices therefore does not encourage visits to the Commission for the purposes of lodging competition and consumer complaints, which are core to the Commission's operations. While seriously affected competition complainants might not be deterred by the location, the location most certainly discourages individual consumer complainants, particularly ordinary citizens.

The Commission was offered bigger office premises in a government building three years ago, but has not occupied it because the building needs a lot of renovation. The office premises, which are situated along Cairo Road in Lusaka, are much more easily accessible than the Commission's present offices in the Main Post Office since they are on the ground floor right from the busy street.

It is recommended that the renovation of the office premises that the Commission has been offered by the Government be expedited to enable its speedy occupation.

The Commission has a good information technology (IT) equipment. It is now on optic fibre internet

connection, with 25 computers connected in the Lusaka office and 3 computers in the Kitwe office. It bought another 12 computers in 2012 to replace old computers and for new staff employed.

The Commission currently has a total of 9 motor vehicles, of which 5 have been allocated to senior management for their official and personal use, 2 are pool vehicles for use in Lusaka, and 2 are for use in the Copperbelt. Senior management is allocated vehicles as part of employment contracts. The vehicles are allocated both for official and personal use, and can therefore be used for official Commission business.

Zambia is a huge but sparsely populated country. Air travel is serviced by nine main airports in seven of the country's ten Provinces¹⁶³, and a number of other airdromes that are not commercialized serviced. The major national airline, Zambia Airways, is no longer operating, and the privately owned airline, Zambezi Airways, has also suspended operations. The Zambia Railway Network comprises Zambia Railway Limited, with 846 kilometres mainline rail lines and 427 kilometres of branch lines, mostly in the Copperbelt, and TAZARA Railway linking Zambia with Dar-es-Salaam in the United Republic of Tanzania, with 891 kilometres of rail lines in Zambia.¹⁶⁴ The internal rail network in Zambia however only covers three regions of the country (the Northern Region, the Central Region, and the Southern Region)¹⁶⁵. Passenger services under Zambia Railway Limited are however only between Kitwe and Livingstone (Kitwe-Ndola-Kapiri Mposhi-Lusaka-Livingstone, and back), and under TAZARA Railway only between Kapiri Mposhi and the border with the United Republic of Tanzania (Kapiri Mposhi-Mbeya).¹⁶⁶ Zambia has an extensive road network totalling over 95 000 kilometres, of which over 25 000 are paved (over 7 000 kilometres being trunk of main routes), and over 75 000 kilometres are unpaved (some of the unpaved highways are grade laterite roads).¹⁶⁷

The most commonly used means of transport in Zambia, which covers all the remote areas of the country is therefore road transport.

With only 9 motor vehicles, 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.

It is recommended that the Commission be given the necessary capital expenditure funds to procure the much-needed equipment to allow it to carry out its tasks effectively.

3.2 Assessment of Cases

The Commission has in place the following documented guidelines on the handling and assessment of competition and consumer protection cases: (i) the Enforcement Manual; (ii) Operations Manual on Merger and Monopolies; and (iii) Guide on consumer protection matters. The guidelines are in line with international best practice, with some of them based on UNCTAD and ICN models.

(a) Enforcement Manual

The Enforcement Manual outlines the administrative enforcement procedures and practices for handling cases under the new Act.

According to the Manual, the following are the three underlying principles behind the Commission's enforcement activities which are aimed at providing standards for enforcing the law in order to encourage greater levels of consistency, transparency and accountability on its part: (i) primary advocate of competition and consumer protection; (ii) balanced enforcement; and (iii) cooperation and consultation.

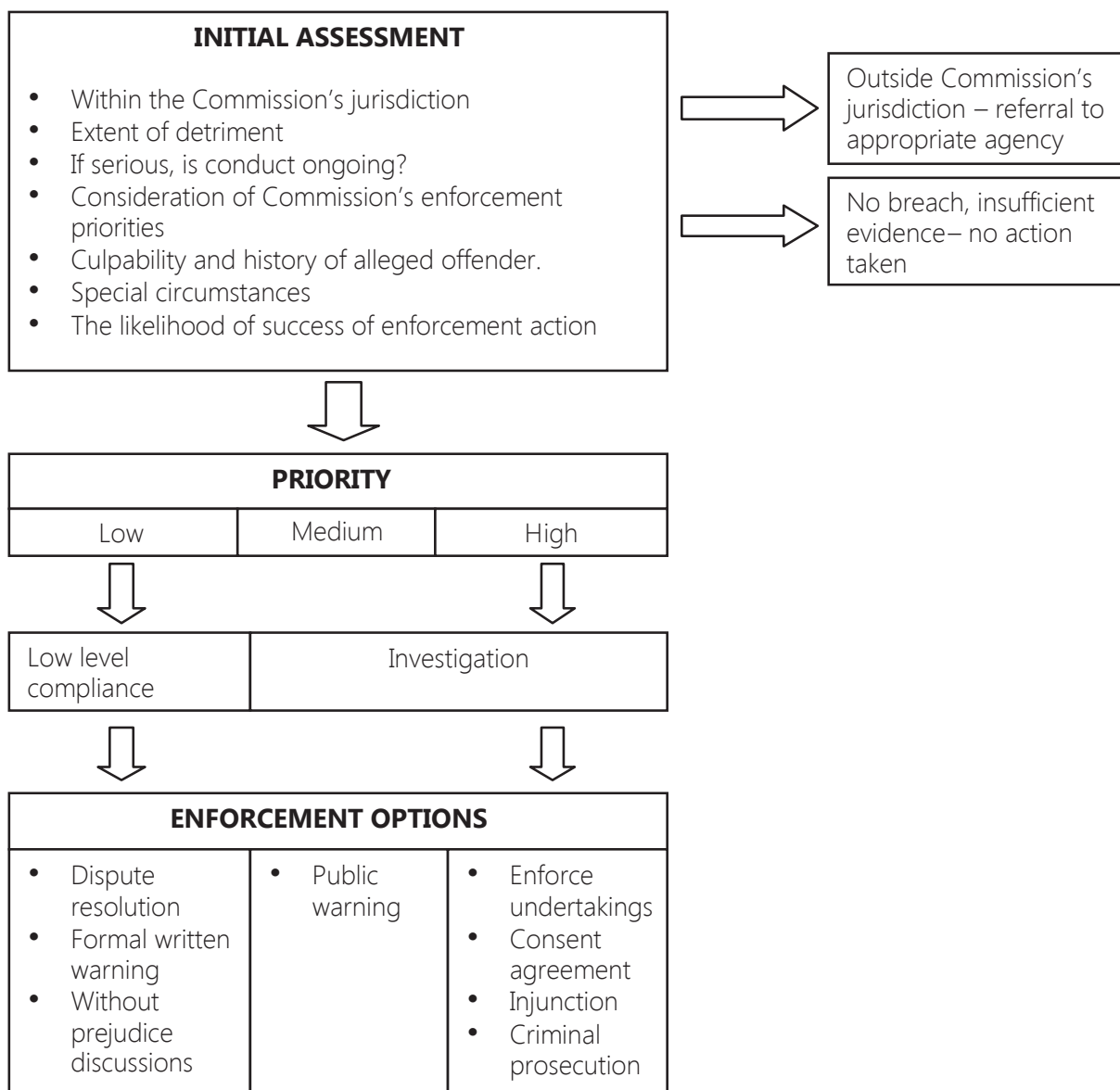
- *Primary advocate of competition and consumer protection:* the Commission has the power to intervene in all sectors of the economy in ensuring compliance in relation to its mandate under the Act through the use of enforcement tools such as fines, and equally important in securing behavioural change, through undertakings and consent agreements.
- *Balanced enforcement:* the Commission considers matters from the perspective of focusing on those matters where enforcement measures will result in a broader market impact by increasing compliance in a particular sector. The Commission strives to be balanced in its enforcement strategy to seek to foster behaviour change, stop ongoing conduct, and secure future compliance and not simply punish wrongdoing. However where legal contraventions are blatant, repeated and result in significant detriment, the Commission imposes stiff fines against offenders or prosecute where necessary.

- *Cooperation and consultation:* the Commission values input it receives from other national regulators and its counterpart agencies from other jurisdictions, as well as from market players. In its consultations with consumers, traders and market players in general, the Commission endeavours to promote voluntary compliance and transparency.

For the purposes of implementing a fair approach to compliance and enforcement, and making strategic use of available resources, the Commission applies the following general criteria to all enforcement activities: (i) proportionality (any enforcement action taken should be proportionate to the legal contravention and the seriousness of the breach); (ii) consistency (a consistent approach in similar circumstances should be taken to achieve consistent outcomes); (iii) transparency (enforcement measure should be applied clearly and openly so that business and consumers know what is expected of them and what they can expect when in contravention of the law; and (iv) targeting (effective use of limited resources should be a big priority and may be achieved through the targeting of issues in line with risks, new and emerging issues and enforcement priorities – the Commission however as much as possible handles all matters that raise concerns under the Act).

The Commission uses the following criteria to determine whether a matter is appropriate for investigation with a view to enforcement action (not all criteria need to be met for a matter to be authorized for investigation): (i) jurisdiction (this entails assessing whether the alleged conduct falls within the Commission's mandate as provided for under the Act); (ii) detriment (this entails assessing the harm or potential harm the alleged conduct results into); (iii) culpability and history of alleged offender (this entails considering the blameworthiness of the offender and his past conduct vis-à-vis competition and consumer matters); (iv) gravity of conduct (here the Commission considers the seriousness of the conduct by considering whether the conduct is systematic, deliberate and not accidental, and a manifest or deliberate breach); and (v) likelihood of success of enforcement action.

Diagram 1 below provides a summary of the factors that the Commission takes into account in arriving at a decision to investigate a matter and investigate various enforcement options:



The Manual goes on to give guidelines on pertinent issues such as: (i) handling of evidence; (ii) witness statements; (iii) method of setting financial penalties for breaches of the Act; and (iv) leniency for enterprises volunteering information about prohibited agreements.

(b) Operations Manual on Mergers and Monopolies

Operations Manual on mergers and monopolies gives guidelines on the operations of the Commission’s Mergers & Monopolies Directorate. They therefore cover areas such as: (i) compliance with Parts III (restrictive business and anticompetitive trade practices), IV (mergers), V (market inquiries),

and VI (sector regulated activities) of the Act; (ii) monitoring of market conduct of monopolies and dominant firms; (iii) facilitation of industrial structures that are open to competitive entry; (iv) attainment and adherence to the best practices in merger control and analysis; and (v) information to the public on merger control and related anti-competitive practices.

The Manual outlines the standard operational procedure in a typical merger case as shown in Box 9 above. It goes on to guidelines on related issues such as investigations, contact with clients and collection of information, and writing papers for the Commission.

(c) **Guide on Consumer Protection**

The Guide deals with matters connected with Part VIII (consumer protection) of the Act. It notes that the Act itself explains what an unfair trading practice is, and that a trading practice is unfair if it misleads consumers, if it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet, or if it places pressure on consumers by use of harassment or coercion, thereby distorting or likely distorting the purchasing decisions of consumers.

The Guide therefore explains that the following elements should be proven in determining whether a trading practice is unfair:

- *Whether the conduct complained of was during trading:* In this test, there is need to prove that unfair trading was engaged in during the course of trading or normal course of doing business. In order to prove this, there must be evidence of receipts or invoices.
- *Whether the trading practice engaged in was unfair:* In this test, there is need to prove that the practice complained of was unfair. An unfair trading practice is engaged in when the said and/or identified practice compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet; or places pressure on consumers by use of harassment or coercion; and thereby distorts or likely to distort, the purchasing decisions of consumers.
- *Whether consumers have been misled:* Misleading conduct occurs when a false statement of fact is made by one party to another party, which has the effect of inducing that party into a contract.
- *Whether the practice compromised standard of honesty and good faith:* In this case, good faith would mean the observance of honourable intent in business relations and the avoidance of any attempts to deceive consumers during the performance of contractual obligations. Traders and service providers therefore should desist from entering into contracts with consumers for goods or services that they know very well from the onset that they will not deliver.
- *Whether pressure through harassment or coercion was placed on consumers:* There is need to prove that the consumer was harassed or coerced. Harassment occurs when someone behaves in an unpleasant or threatening way, and coercion means forcing someone to do something they do not want to do by threatening them.

- *Whether the pressure distorted or likely distorted the consumer's purchasing decisions:* There is need to establish how the consumer's purchasing decision was distorted. To distort means to change the appearance, sound or shape of something so that it is strange or unclear, or to change a situation from the way it would naturally be.

240. The Guide goes on to explain and give guidelines on the assessments tests and investigation procedure for unfair trading practices in general. The same is done for various unfair trading practices under the following sections of the Act: (i) section 47 (false or misleading representations); (ii) section 48 (display of disclaimers); (iii) section 49 (supply of defective and unsuitable goods and services); (iv) section 50 (product labelling); (v) section 51 (price display); section 52 (consumer product safety); and (vi) section 53 (unfair contract terms)

3.3 The Investigative Wing

The investigative wing of the Commission is the Secretariat headed by the Executive Director, who is appointed by the Board of Commissioners in 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 in 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.

The Secretariat, has wide investigative powers, including the undertaking of dawn raids by the 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 sub-

ject to all or part of a fine that could otherwise be imposed under this Act”.

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

3.4 The Adjudicative Wing

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. The Board however does not have powers of imposing criminal sanctions since that is the preserve of law courts. The Commission only refers to the Attorney-General’s Office for prosecution proven *per se* prohibited competition and consumer cases.

The Board composed of seven members appointed by the Minister in terms of paragraph 1(1) of the First Schedule to the Act, consisting: (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 in terms of section 6(3) of the Act. The Chairperson and the Vice-Chairperson of the Board is appointed by the Minister from amongst the members of the Board. A member of the Board may be removed from office by the Minister.

The *ex officio* membership of the Commission’s Executive Director, who is the head of the Commission’s investigative wing, on the Board of Commissioners, which is the adjudicative wing of the Commission, presents potential conflict of interest concerns because of his involvement in both the investigative and adjudicative functions of the Commission. This might present appealable grounds on determinations and decisions made by the Board on competition and consumer protection cases. It was explained that the Executive Director, being an *ex officio* member of the Board, does not have voting rights on competition and consumer protection cases being determined by the Board. His presence during the Board’s deliberations on such cases is only as a resource person. This should be made very clear to all stakeholders, particularly respondents in competition

and consumer cases, to avoid unnecessary and costly challenges.

It is recommended that it 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.

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. One of the stakeholders that were interviewed during the fact-finding visit to Zambia (CUTS International) felt that with no statutory criterion on the appointments by the Minister, the process could be done on political basis, thus compromising the credibility of the Board’s decision-making. The old system of Board appointments was also preferred, or alternatively the involvement of the beneficiaries of the Act (i.e., the private sector) in the appointment system.

It is however also noted that the old system of Ministerial appointments based on nominations by specified institutions potentially compromised the independence of the Board’s decision-making if the nominated members felt obliged to support the players from their respective sectors regardless of the merits of the case or issue under consideration.

More seriously is the power of the Minister to remove a member of the Board of Commissioners without giving any reasons, which can be used for political reasons not related to the exigencies of the Commission.

It is recommended that the Act should provide for clear grounds upon which the Minister can remove from office a member of the Commission’s Board of Commissioners.

4. COMPETITION LAW ENFORCEMENT

4.1 Competition Case Load

According to the old Act, cases handled by the Commission were divided into seven categories: (i) relocation of plant and equipment (section 5 of the new Act and section 6 of the old Act); (ii) restrictive business practices (Part III of the new Act and section 7 of the old Act);¹⁶⁸ (iii) mergers and acquisitions (Part IV of the new Act and section 8 of the old Act); (iv) trade agreements (Part III of the new Act and section 9 of the old Act); (v) trade associations (Part III of the new Act and section 10 of the old Act); (vi) control of concentrations of economic power (section 11 of the old Act); and (vii) unfair trading and consumer protection (Part VII of the new Act and section 12 of the old Act).

Cases involving relocation of plant and equipment fall under the general functions of the Commission of monitoring, controlling and prohibiting acts or behaviour which are likely to adversely affect competition and fair trading in Zambia. It is arguable whether the Commission has legal basis under competition law to consider relocation of plant and equipment from Zambia if such relocation is not connected with any restrictive business practice. The provisions of the Act that the Commission is using to consider the plant and equipment relocations also do not make any reference to such practices.

The reason for, and rationale behind, the Commission's monitoring and controlling of relocation of industrial assets from Zambia was amply given by the former ZCC in its 2009 Annual Report. In that Report, it was stated that:

"Relocation of company core assets outside the Republic of Zambia was a problem that resulted from the privatization of formerly State-owned Enterprises (SOEs) in which key industrial machinery and/or equipment found its way outside Zambia without any regulatory intervention. Government realized this threat of 'asset stripping' and thus, the Commission was mandated to monitor and control the movement of such assets outside the country under section 6 of the Competition and Fair Trading Act, Cap 417 of the Laws of Zambia.

The rationale for controlling the movement of assets outside Zambia by private companies has been based on the prevention of asset stripping of core assets, which was prevalent in the early years of the post-privatization period.

It is however, important to note that NOT all relocations are of concern under Section 6(1) or Section 7(1) of the Act. The essence of conducting an assessment of the relocation is to prevent *stripping of 'core'* company assets without a reasonable or objective justification by the applicant, which conduct might impair the attainment of the objectives of the Act such as ensuring efficiencies in the production and distribution of goods and services in the economy.

The following categories of relocations are not of concern:

- (i) spare part of machinery and/or equipment whether for repair or not;
- (ii) motor vehicles such as used in mining, drilling, etc.;
- (iii) other assets that initially were brought to Zambia for specific projects and are exiting on account of completion of contractual assignment."

The ZCC in its 2008 Annual Report had explained in some detail the Commission's involvement in the relocation of plant and equipment from Zambia as in Box 15 below:

Box 15: Relocation of Plant and Equipment Explanation

Section 6(1) of the Competition and Fair Trading Act empowers the Zambia Competition Commission to "monitor, control and prohibit acts or behaviours which are likely to adversely affect competition and fair trading in Zambia". It is important to note that the relocation or export of core company assets is not a contravention in itself as no offence has been committed but only if such transaction has an adverse effect on competition and fair trading in Zambia. Consequently, business organizations are required to notify the Commission of such transactions.

The nature of such intervention strictly addresses the competition concerns and public interests that may arise especially for permanent relocations. The Commission wishes to ascertain whether the effect of such a relocation of plant and machinery will substantially lessen competition in the relevant market?

The control of the movement of core assets by firms from Zambia is an important element of any law aimed at preserving a high level of competition in the country. In considering whether or not to grant authorization to a proposed relocation or export of assets from Zambia, the Commission's main concern will be to ensure that the

export of such assets will not result in a substantial lessening of competition in any market in Zambia or a substantial part of it. The definition of core assets will among other considerations include the disposal of assets that would prejudice the firm's position as a going concern commensurate with its economic operations.

The requirement to notify the proposed relocation of core assets from Zambia with the Commission did not in any way or manner infringe the individual or firm's property rights for the free movement of goods and services across the Zambian borders. Therefore, when considering a proposed relocation of assets from Zambia, the Commission usually approaches it on the basis of a consultative process with third parties and other stakeholders in the relevant industry, in order to determine the potential market place competition effects of the transaction.

Source: ZCC 2008 Annual Report

The following in Box 16 is an example of a relocation of plant and equipment case that was handled by the Commission in 2010, as reported in the Commission's 2010 Annual Report.

Box 16: Application by Truckmec (Z) Limited for the Relocation of a Tadano 25-ton Crane to the Democratic Republic of Congo

The Commission received an application for authorization from Truckmec (Z) Limited to temporarily relocate a Tadano 25 ton Crane to the Democratic Republic of Congo. Investigations by the Commission revealed that the crane being relocated to DRC was going to be used in the Frontier Mine SPRL in DRC after Truckmec was awarded a contract to do some earth moving works.

The Board resolved to authorize the relocation of the machinery because the transaction was not likely to adversely affect competition and fair trade in the relevant market.

Source: CCPC Annual Report 2010.

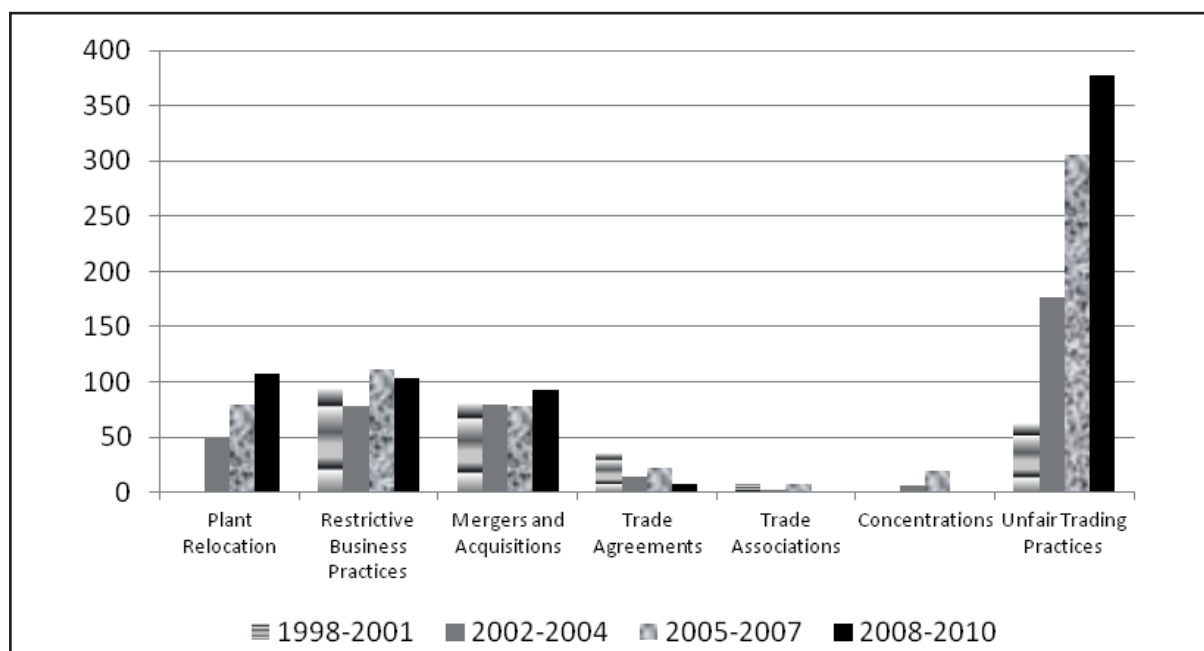
While it can be accepted that the monitoring and controlling of relocation of industrial assets from Zambia is of the country's peculiar national interest, arising from the real threat of asset stripping following privatization, particularly of the country's key mining companies, competition law is not the best instrument to be used for that purpose since the practice raises little or no competition concerns. In that regard, it is noted that all the 27 cases of plant relocations that were closed by the Commission in 2010 were authorized because the transactions were found not likely to adversely affect competition and fair trade in the relevant markets.¹⁶⁹

The above questions the futility of the Commission expending considerable resources in investigating cases of relocation of plant and equipment,

which do not raise serious competition concerns. As shown in Table 5 below, the Commission in 2010 received and handled a total of 49 such cases which consumed a lot of its resources in investigating and analysing, resources which should have been better utilized in the handling of restrictive business practices, or competition advocacy. It can also be argued that the threat of privatization-induced 'asset stripping' no longer exists following the long completion of the privatization programme, and that in any case any competition concerns arising from plant relocation can adequately be addressed by the Commission using other more appropriate competition instruments, such as merger control.

It is therefore 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.

Graph 1 below shows that cases involving unfair trading practices and consumer protection outnumber by far all the other cases, and that they have been on the increase since 1998. Cases involving restrictive business practices were a distant second, closely followed by those involving mergers and acquisitions. Applications for relocation of plant and equipment have also been on the increase over the years. The other cases, involving trade agreements, trade associations, and control of concentrations of market power have almost been negligible. However, with the new requirement under section 14 of the new Act for notifica-

Graph 1: Categories of Cases Handled Since 1998

Source: Based on figures given in CCPC 2010 Annual Report

tion of non-*per se* prohibited horizontal and vertical agreements for their competitive assessment using the rule-of-reason approach, it is expected that cases involving agreements will drastically increase.

Table 5 below shows the trend in cases handled by the Commission since 1998. 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. The rest of the cases, as also indicated in Graph 1 above, were negligible and their numbers have been declining over the years.

Table 5: Cases Received and Handled by the Commission during the Period 1998-2010

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

Table 6 shows the outcome of competition cases involving restrictive business practices (inclusion of cases involving anticompetitive

agreements and abuse of dominance) that were closed by the Commission during the period 2006-2010.

Table 6: Restrictive Business Practices Closed by the Commission During the Period 2006-2010

Commission Decision	No. of Cases					Total
	2010	2009	2008	2007	2006	
Case closed for lack of serious competition concerns	4	7	6	5	5	27
Case closed on grounds of no breach of the Competition Act	3	4	5	5	5	22
Case closed for lack of competition concerns	2	1	1	0	2	6
Imposition of cease-and-desist order	1	3	0	5	4	13
Totals	10	15	12	15	16	68

Source: ZCC and CCPC Annual Reports

None of the competition cases involving restrictive business practices that were closed during the period 2006-2010 were terminated through the imposition of fines or other criminal sanctions. That was mainly because of the difficulties of identifying and proving cartel activity. It is hoped that the introduction of a leniency programme in the new Act will expose such anticompetitive conduct and behaviour. It is also noted that most cases were

closed for lack of serious competition concerns, or for no breach of the country's competition law, indicative of lack of adequate competition education in the country. The most effective remedial action taken by the Commission was the imposition of cease-and-desist orders.

Table 7 shows the Commission's determination of competition cases involving mergers and acquisitions during the period 2006-2010.

Table 7: Determination of Mergers and Acquisitions by the Commission During the Period 2006-2010

Commission Determination	No. of Cases					Total
	2010	2009	2008	2007	2006	
Unconditional authorization	10	9	15	13	9	46
Conditional authorization	1	2	1	3	10	17
Case closed for absence/cancellation of merger transaction	5	5	1	2	8	21
Totals	16	16	17	18	27	94

Source: ZCC and CCPC Annual Reports

No merger transaction was prohibited by the Commission during the period 2006-2010. Instead, the Commission unconditionally approved most of the notified transactions, about 48.9 per cent of the determined cases. The conditions that were imposed on the relatively few conditionally authorized mergers were of a behavioural nature.¹⁷⁰ All the conditions were accepted by the merging parties. The other cases were closed either for absence of merger transaction, i.e., lack of a notifiable transaction, or withdrawal of merger notification by the parties.

Table 8 shows consumer cases involving unfair trading practices that were closed by the Commission during the period 2007-2010.

Most unfair trading practices cases that were closed by the Commission during the period 2007-2010 (over 62 per cent of the cases) ended with refunds, or replacement of the defective products. A number of cases were also referred to other authorities for resolution, such as the Zambia Bureau of Standards and other relevant sector regulators, the Police, and institution of court proceedings.

Table 8: Unfair Trading Practices Cases Closed by the Commission During the Period 2007-2010

Commission Decision	No. of Cases				Total
	2010	2009	2008	2007	
Complainant given refund, or replacement, on defective product	32	45	42	35	154
Case referred to other relevant authorities	11	3	6	5	25
Case closed on grounds of lack of consumer protection concerns, or no breach of the Act	4	5	1	6	16
Case referred to Small Claims Court	3	2	0	0	5
Case closed on grounds of complainant non-reachability	2	0	16	4	29
Case closed for other reasons (such as withdrawal of complaint, amicable resolution between complainant and respondent, and issuance of behavioural directive)	3	0	10	4	17
Totals	55	55	75	61	246

Source: ZCC and CCPC Annual Reports

Fines imposed for the breach of the Act's consumer protection provisions amounted to about K50.266 million (about \$10 355) in 2011 alone. The money was paid to the government Treasury as the Commission is not allowed to keep the money collected from fines. Two of the Commission's decisions on unfair trading practices, against Zambia Breweries and the MTN Zoning Distribution Agreement case, were appealed against in the High Court of Zambia. Both appeals are still to be ruled on.

Most of the stakeholders that were interviewed during the fact-finding visit to Zambia were of the view that there are more consumer protection issues in the country than pure competition issues, and that consumer concerns are more critical since there are not much serious competition concerns with the big players. It should however be noted that consumer concerns by their nature are generally more transparent and evident than competition concerns, many of which are not as visible, e.g., cartel activity.

4.2 Anti-Competition Practices-Prone Sectors

Sectors that are prone to anticompetitive practices or conduct as identified by the Commission include the telecommunications and broadcasting services sectors, the agricultural and mining sectors, and the beverages and cement industries.

With regards the agricultural sector, the Commission submitted that this sector enjoys a lot of

government support and, because of that, there is a tendency for a number of restrictive business practices, mainly related to monopolization and cartelization. The most affected are the sugar, beef, and to some extent the maize, sub-sectors. In the mining sector, a number of competition complaints are now coming through to the Commission, particularly those related to refusal to deal. Most mining companies had in the past ignored the principles of competition in their operations since the mining industry had traditionally been exempted from the application of the Zambian competition law. It is only in the new Act of 2010 that the exemption was lifted. The industry is therefore still relatively new to the application of competition principles, and needs intensive education on its obligations under the new Act.

The beverages and cement industries in both the COMESA and SADC regions have always been highly anticompetitive because of their high concentration levels, and it is therefore not surprising that those industries in Zambia are also prone to anticompetitive practices and conduct. The Commission identified exclusive dealings and market allocation arrangements as the most prevalent restrictive business practices in the two industries.

Other sectors that were identified by other stakeholders consulted during the fact-finding visit to Zambia as prone to anticompetitive practices and conduct include the insurance services sector, the energy sector, and the financial services

sector. According to the Pensions and Insurance Authority (PIA), most competition concerns in the insurance sector relate to unfair practices and under-cutting of each other by the industry players. The Energy Regulation Board (ERB) submitted that the main competition concerns in the energy sector include monopolistic tendencies, because of high entry barriers, and predatory pricing, and that collusive and cartel-like behaviour in the sector is also a very live issue. ERB also submitted that there are a lot of competition concerns in the electricity sector because of its dominance by one player, Zambia Electricity Supply Company, which tends to abuse its dominance.

In the financial services sector, the Zambia Development Agency (ZDA) identified collusion as being rife in the banking services sub-sector, related to exploitative bank charges.

4.3 Competition Enforcement Challenges

The new Act greatly facilitated the effective enforcement of competition law in Zambia. As has already been pointed out, the main enforcement challenges under the old Act included wide exclusions and exemption provisions, limited interpretation of key terms, unclear merger notification provisions, limited investigative powers and administrative remedies, and absence of a leniency programme, which have all been addressed in the new Act. The Commission is however still facing some challenges in competition enforcement.

The Commission for the first time since its establishment conducted two dawn raids during the months of October and November 2011. The challenges it faced in doing so were mainly related to the human factor. It had to rely on other security agencies to undertake the raids, which had little knowledge of what was being looked for. Lessons were learnt but it was recognized that a lot more needed to be done by the Commission at the next raid.

The Commission has had difficulties in analyzing abuse cases because of lack of information and appropriate economic tools. Training needs required in competition enforcement include investigative skills, litigation skills, and, to a lesser extent, principles of competition law.

It is recommended that the Commission undergo extensive training in the conduct of dawn raids, as well as in other competition enforcement areas such as case investigations and litigation.

5. COMPETITION ADVOCACY

The Commission has wide advocacy responsibilities under the Act. In terms of 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: (i) advising government on laws affecting competition and consumer protection; (ii) providing information for the guidance of consumers regarding their rights under the Act; (iii) advising the Minister on agreements relevant to competition and consumer protection and on any other matter relating to competition and consumer protection; and (iv) 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.

The old Act also bestowed upon the Commission considerable advocacy functions, such as the functions of: (i) providing persons engaged in business with information regarding their rights under the Act; (ii) undertaking studies and making available to the public reports regarding the operations of the Act; and (iii) 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.

The Commission submitted during the fact-finding visit to Zambia that it tries to make itself visible to the business community and general public through the media (both print and electronic). It engages the government in what it is doing through representations on discussions under the auspices of trade negotiations forums such as the WTO and the Economic Partnership Agreements (EPAs) with the European Union. It also has held joint stakeholders 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.

The Commission however did not do much in 2011 on its statutory advocacy function of “advising government on laws affecting competition and consumer protection”, mainly because that was the Election year, and there were many changes in the environment that made such advocacy work difficult. The Commission however started working on two studies during that year. One is on the wheat sector and the other on anticompetitive practices in the mining industry. The Commission will also be presenting a paper on competition and public procurement and corruption to Parliament in February 2012.

The Commission’s other advocacy and awareness work has included the following: (i) publication of a weekly column on competition and consumer issues in *The Post* newspaper, which has the largest circulation in Zambia; (ii) appearing on the television, and speaking on the country’s various radio stations, on consumer protection issues; (iii) touring the country’s nine Provinces on awareness campaigns; and (iv) releasing Press Releases on case handling. It is also publishing a quarterly Newsletter with a wide local and international circulation.

The Commission’s newspaper column in *The Post* during the fact-finding visit was published on 17 October 2011, and was on its recent sensitization and enforcement tour of the Eastern Province of Zambia. It was reported that the aim of the tour was to register the presence and functions of the Commission to both traders and consumers in the Province, sensitize consumers on their rights and obligations, and how to lodge complaints with the Commission. During the fact-finding visit, the Commission also held a public lecture at the Lusaka University’s Economics Department on competition and consumer protection policy and law.

The 2010 Annual Report of the Commission analyses the Commission’s performance against targets in the area of advocacy and public relations during that year, as shown in Table 9 below.

The above clearly shows that the Commission is doing a lot in sensitizing the business community and general public on competition and consumer protection issues, and this was generally acknowledged by most stakeholders that were interviewed during the fact-finding visit to Zambia in October 2011. Some stakeholders however still felt not enough was being done. For example, there are

concerns that the visibility of the Commission is still low (Bank of Zambia, Citizens Economic Empowerment Commission, Economics Association of Zambia) and that the Commission needs to have physical representation in all the major centres of the country (Zambia Development Agency, Citizens Economic Empowerment Commission, Economics Association of Zambia). There are also expectations that the Commission should educate and sensitize the business community on various anticompetitive practices and the general implementation of competition policy and law, as well as on its responsibilities to consumers (Pensions and Insurance Authority, Zambia Association of Chambers of Commerce and Industry, CUTS International, Musa Dudhia & Co.). Greater education of consumers of their rights and how they can effectively channel their complaints was also stressed (Pensions and Insurance Authority, Economics Association of Zambia).

The Commission itself agreed during the fact-finding visit that lack of awareness of the public on both competition and consumer issues is a formidable challenge it is facing. For example, monopolization is often not reported to the Commission for investigation because of lack of awareness of its adverse effects. Enterprises in dominant or monopoly positions are also feared for possible retaliation if their abusive practices are reported to the Commission because of lack of knowledge of how the whistleblowers can be protected by the Commission.

The awareness of consumer issues in Zambia was found to be relatively higher than that of competition issues. Most stakeholders that were interviewed cited consumer concerns, such as disclaimers and ‘no return’ provisions, sale of inferior goods and expired products, and copyright infringements, as the major concerns in the implementation of competition and consumer protection policy and law. Competition concerns cited were limited to predation, abuse of dominance, or monopolization, tying arrangements, and collusive and cartel-like behaviour, mostly in regulated sectors. Even the Zambia Association of Chambers of Commerce and Industry, the “Voice of the private sector”, was more concerned over consumer issues than over traditional competition issues.

While the Commission’s advocacy work is commendable, there is need for more resources to be

Table 9: Commission Performance against Targets on Advocacy and Public Relations in 2010

Objective	Target	Performance Results	Reason for Variance
To minimize the weak corporate domestic image of ZCC	<p>Hold a press briefing quarterly, 1 media workshop and 2 breakfast meetings.</p> <p>Improve and promote the Commission's website and Newsletter to be produced quarterly.</p> <p>Run a 13-series programme on community radio stations and a 13-week one hour programme on ZNBC television.</p> <p>At least have 5 presentations per quarter.</p>	<p>A total of 47 articles were published in The Post newspaper, and 4 were published in the Commerce Gazette, ZACCI Journal, and African Consumer Dialogue Newsletter.</p> <p>Produced and circulated editions of e-Newsletters.</p> <p>Participated on 10 ZNBC TV programmes and 5 ZNBC TV interviews.</p> <p>Ran 1 interactive TV programme with CUTS, and produced and broadcasted 8 radio programme series on ZNBC Radio 2.</p> <p>Made 4 presentations to Zambia Institute of Marketing (ZIM) conference, Citizens' Economic Empowerment, and Zambia Development Agency (2) forums.</p> <p>24 radio programmes on 7 mostly Lusaka based radio stations on the role of ZCC.</p> <p>8 presentations/ lectures to 8 high schools/ colleges.</p> <p>Commemorated World Consumer Rights Day on 15 March 2010 and distributed brochures to the public. Published 7 types of brochures with funding from EDF.</p> <p>Issued 31 press releases on various competition and consumer issues used consistently by at least 15 major media organizations.</p> <p>60 mentions in three major daily newspapers, namely Zambia Daily Mail, Times of Zambia, and The Post. 42 news mentions on ZNBC and Muvi TV stations.</p> <p>Distributed at least 5 000 brochures across 4 events on Consumer Beware, Know Your Consumer Rights, Lodging a Complaint & Redress Process.</p> <p>Exhibited at Zambia International Trade Fair.</p>	The Department (i.e., the Consumer and Public Relations Department) faced challenges such as inadequacy of funds to conduct radio programmes in selected community radio stations, the website and TV spot announcements in local languages.
<p>Political Support</p> <p>ZCC principle competition advocate</p> <p>Lack of knowledge by professionals</p>	<p>Hold workshops for trade associations.</p> <p>Five provincial works.</p> <p>Hold two national school competitions.</p> <p>Hold 1 workshop with curriculum development officers.</p>	<p>Held presentations to Committee of National Assembly on ZNBC (Amendment) Bill 2010 on competition and consumer protection.</p> <p>1 UNCTAD Stakeholders seminar on competition and development.</p> <p>2 workshops presentations on the role of ZCC in promoting competitiveness to multi-stakeholders in Mansa and Kabwe.</p> <p>1 stakeholder seminar on the Competition and Consumer Protection Act, No.24 of 2010.</p>	

Source: CCPC 2010 Annual Report

put into that activity for greater effectiveness, in terms of both financial resources and human resources. It is noted that the Commission specifi-

cally sets aside some financial resources for direct advocacy and awareness activities in its annual expenditure budget, as shown in Table 10 below

Table 10: Expenditure Budget on Advocacy and Awareness Activities

Expenditure Item	2010 Approved Budget Jan-Dec (ZMK)	2010 Actual Jan-Nov (ZMK)	2011 Approved Budget Jan-Dec (ZMK)	2011 Revised Budget Jan-Dec (ZMK)
Consumer and Public Awareness Activities	27 590 000	36 274 780	275 000 000	154 500 000
Business and Public Relations	10 000 000	12 149 900	15 000 000	15 000 000
Trade/ Agricultural Show	31 000 000	48 770 000	36 000 000	36 000 000
Total Advocacy and Awareness Budget	68 590 000	98 194 680	326 000 000	205 000 000
Total Recurrent Expenditure Budget	4 036 017 701	4 476 353 610	7 189 319 972	6 340 832 138
Percentage of Advocacy Budget to Total Budget	1.70 per cent	2.19 per cent	4.53 per cent	3.23 per cent

Source: Based on figures supplied by CCPC

Given the view of the stakeholders that the Commission is not doing enough to sensitize the business community and the general public on competition and consumer protection issues through workshops and other awareness activities, including the extensive use of the media, and expectations that the Commission should be physically represented in all the country's nine Provinces, the amounts being allocated for advocacy and awareness activities are not enough. In that regard, it is noted that the amount that was budgeted for such activities in 2010 was only 1.70 per cent of the Commission's total expenditure budget, which rose to 2.19 per cent in actual expenditure. In 2011, the revised budget for the activities is still a low 3.23 per cent of total budgeted expenditure (the revised budget was additional to the approved budget, i.e., ZMK 205 million added).

It is also noted that the Commission's advocacy and awareness work is coordinated under its Consumer and Public Relations Department. This presents two major problems. Firstly, and as also reflected in the Commission's awareness focus, pure competition advocacy might be sidelined in favour of consumer awareness. Secondly, that Department at Head Office is manned by only six professional staff, which is operating under a heavy workload on cases involving unfair trading practices and consumer protection as shown in Table 2 above. The Department is therefore physi-

cally unable to give due attention to advocacy and awareness work.

The Commission's advocacy and awareness work should therefore be handled by an adequately staffed and resourced specialist Unit in the Executive Director's Office, which would concentrate on these very important activities to the Commission's operations.

It is recommended that 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 that the activities should be undertaken by a specialist Unit based in the Office of the Executive Director with adequate staffing.

6. INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE

6.1 International Cooperation

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 (ICN), COMESA, SADC, Southern and Eastern Africa Competition Forum (SEACF), and the African Competition Forum (ACF).

Cooperation with UNCTAD is long standing, and dates back from the inception of the Commission in 1997. The cooperation not only involves capacity building and technical assistance, but also involves active participation at meetings of the Intergovernmental Group of Experts on Competition Law and Policy (IGE), and other gatherings such as the United Nations Conferences to review all aspects of the Set of Multilaterally Agreed Equitable Principles for the Control of Restrictive Business Practices. The Commission further contributes to various UNCTAD publications on competition policy and law.

The ICN, an informal virtual network that seeks to facilitate cooperation between competition law authorities globally, was launched in October 2001 by competition authorities from 14 jurisdictions, including Zambia¹⁷¹. It has since grown to a membership of 117 competition authorities from 103 countries with the admission of the authorities of Namibia and Zimbabwe in 2011. The competition authority of Zambia has been an active participant in the ICN work programmes, including the Network's working groups¹⁷².

Zambia is a founding member of COMESA, and hosts that regional economic community. The country's competition authority is an active participant in the regional body's competition initiatives. In that regard, the former Zambia Competition Commission (ZCC) provided one of the three regional competition experts that assisted in the formulation and drafting of the COMESA competition regulations and rules, that led to the formation of the COMESA Competition Commission.

The COMESA Competition Commission is however still not fully operational. Although the first Board of Commissioners was appointed in 2006, no substantive work was accomplished towards the operationalization of the competition Regulations or the commencement of the operations of the Commission because of lack of funding. It was only in February 2011 that the Director of the Commission was appointed. Upon his appointment, the Director commenced the ground logistics on the commencement of the operations of the Commission at its headquarters in Lilongwe,

Malawi (setting up the office, recruiting staff, etc.). A new Board of Commissioners was sworn in October 2011. The Board consists of chief executive officers of national competition authorities, and other relevant experts, from nine COMESA member States¹⁷³. The Commission is currently working, with the European Union's technical assistance under the TradeCom Project, on the effective commencement of its operations. The activities under the Project include the drafting of enforcement rules and procedures.

The jurisdiction between the COMESA Competition Commission and national competition authorities is very clear. The regional authority is only concerned with competition concerns with a cross border dimension, or which affect trade between the member States. The COMESA regional competition regulations take precedence over national competition laws in accordance with the COMESA Treaty. This was raised during the fact-finding visit to Zambia by Musa Dudhia & Co. law firm, which noted that Zambia's new Act is silent on the supremacy of the COMESA competition regulations on cross-border transactions affecting Zambia. Cooperation in competition case handling between the regional and national authorities is encouraged.

Zambia is also a signatory to the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, which was signed by the Heads of State or Government in September 2009¹⁷⁴. The Declaration notes that the SADC Protocol on Trade provides that member States should implement measures within the Community that prohibit unfair business practices, and promote competition, and that the Protocol also provides that a framework of trade cooperation among member States based on equity, fair competition and mutual benefit would contribute to the creation of a viable Development Community in Southern Africa. It also recognizes the important role which competition and consumer policies can play in promoting economic growth, economic efficiency, development and alleviation of poverty in the region. The Declaration calls for the establishment of a system for effective cooperation in the application of member States' respective competition and consumer protection laws, but acknowledges that cooperation should proceed in a gradual and phased approach with the ultimate aim of achieving harmonization, and establishing a regional framework in competition and consumer policies. A Competition and

Consumer Policy and Law Committee (CCOPOLC) has been established to implement the system of cooperation. The competition authority of Zambia actively participates in that Committee.

The CCOPOLC meets at least once a year to enable SADC member States to exchange views on the status of competition and consumer policy in their respective countries. The Committee is currently pre-occupied with the harmonization of national competition laws in the region. Capacity building is one of the key components of the regional competition policy programme to facilitate the development and implementation of competition and consumer laws and policies in member States. In that regard, member States have cooperated with each other in the application of competition and consumer protection laws. So far, Seychelles, Swaziland, and Namibia have been given technical assistance under the SADC programme in the establishment of their competition authorities. The technical assistance was given by the other older competition authorities in the region, those of Zambia and Zimbabwe.

Regional training workshops on competition law and policy are also a regular feature of the SADC competition cooperation programme. The fourth such workshop was held in Gaborone, Botswana in June 2011. The main purpose of the workshop was to impart the requisite practical skills necessary to effectively enforce national competition laws, foster dialogue, share enforcement experience and best practices. It was facilitated by regional and international resource persons who led discussions and presented on key topics, such as: (i) essentials of the investigative process; (ii) abuse of dominance; (iii) intellectual property and competition policy; and (iv) competition policy and consumer welfare.

The competition authority of Zambia is a founding member of the Southern and East African Competition Forum (SEACF). At its formation in 2002, the SEACF comprised competition authorities of five countries (Kenya, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe). It has since grown to include those countries in the region that have adopted competition policies and laws, and established competition authorities (i.e., Botswana, Malawi, Mauritius, Namibia, Seychelles, and Swaziland). The primary objectives of the Forum include close cooperation between its members on general competition policy issues, cooperation in respect of investigations, assisting each other on

capacity building, and formulating common positions, where possible, on competition policy and law discussions in international forums. The Zambian competition authority has always been in the Executive Committee of the Forum, and currently holds the chairmanship.

SEACF has however not been very active in the undertaking of its programmes, apart from holding periodic meetings with the assistance of UNCTAD back-to-back with annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) in Geneva, mainly because of lack of funding. The older members of the Forum, particularly the competition authorities of South Africa, Zambia and Zimbabwe, have however individually assisted the newer members in the handling of competition cases. The establishment of the African Competition Forum (ACF) puts the continued existence of SEACF in doubt.

The Zambian competition authority has been actively involved in the formation of the ACF right from the inception of that cooperation programme, and is in the Steering Committee of the Forum.

At a bilateral level, the former ZCC, and now the CCPC, has informally cooperated with a number of other competition authorities, particularly in exchange of information, case handling, and staff exchanges. The cooperation has mainly been with the following competition authorities: the Bundeskartellamt (Federal Cartel Office) of Germany, the Federal Trade Office of the United States of America, the Office of Fair Trading of the United Kingdom, the Norwegian Competition Authority, the Australian Competition and Consumer Commission, the Competition Commission South Africa, the Namibian Competition Commission, the Competition and Tariff Commission of Zimbabwe, the Monopolies and Prices Commission of Kenya, the Competition and Fair Trading Commission of Malawi, the Fair Competition Commission of the United Republic of Tanzania, to name just a few.

6.2 Technical Assistance

The Zambian competition authority has 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.

UNCTAD provides capacity-building and technical assistance on competition law and policy in developing and least developed countries, as well as countries in transition in accordance with requests received, the needs of the countries concerned and resources available. This includes both national and regional assistance in drafting competition laws and policy guidelines as well as capacity-building in the implementation of competition policy with a long-term perspective in line with the

United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the requests made by the Fourth United Nations Conference to Review All Aspects of the Set.¹⁷⁵

The technical assistance that the Zambian competition authority has received under the UNCTAD programme over the years is tabulated in Table 11 below

Table 11: Technical Assistance Given Under UNCTAD Programme

Year	Technical Assistance
1999	UNCTAD/COMESA Regional Seminar on Competition Law and Policy held in Lusaka during the period 2 to 4 June 1999. Other participant countries were Kenya, Malawi, Swaziland, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Sudan, Uganda, and Zimbabwe
2002	UNCTAD Regional Seminar on Competition Law and Policy held in Livingstone during the period 1 to 3 December 2002. The seminar attracted participants from both the SADC and COMESA regional trading blocs.
2004	UNCTAD Investigative Techniques Course and Adjudicators Seminar held in Livingstone during the period 5 to 13 October 2004.
2008	UNCTAD Regional Competition Seminar held in Siavonga during the period 26 to 29 May 2008. The other participant countries were Botswana, Swaziland, Malawi, Mozambique, Kenya, the United Republic of Tanzania and Zimbabwe.
2010	Awareness Seminar on Competition Law and Policy conducted in Lusaka during the period 13 to 14 May 2010.
2010	Sectoral study of the petroleum sector in Zambia.
2010	UNCTAD Regional Course on Investigation in Dar-es-Salaam, Tanzania, during the period 29 November to 2 December 2010.

Source: ZCC Annual Reports

The European Development Fund (EDF)'s technical assistance to the Commission under the 9th EDF, which was aimed at enhancing capacity building, has been extensive, and has covered the following activities since 2005: (i) capacity building of staff through training (including courses at Kings College in the United Kingdom on European Commission competition law); (ii) creation of effective regulatory framework through empowerment of consumers and traders; (iii) national workshop for local consumer advisers; (iv) public awareness programmes through private and public media; (v) hosting of public hearings on the repealing of the Competition and Fair Trading Act and replacing it with the Competition and Consumer Protection Act; (vi) hosting of an investigations workshop on cartel enforcement and prosecution; (vii) hosting of consumer protection and awareness workshops, and undertaking of consumer sensitization cam-

paigns; (viii) publication of competition literature on the Zambian law; (ix) purchase of new office equipment, such as computers, printers, scanners, a photocopying machine, and a motor vehicle; and (x) study tour for new members of the Board of Commissioners to South Africa and Washington D.C.

The Commission has also benefitted from the World Bank Public Sector Capacity Building Project (PSCAP) in the form of human resource development, advocacy and public awareness, and procurement of office equipment and two motor vehicles. The Commission's first national seminar on competition law and policy that was held in Livingstone in November 2002 was funded under the Project.

The Commission has received two research grants from the International Development Research Centre (IDRC), which are designed to enhance capacity in research. The first grant was given in 2005

to undertake research in the distribution sector, and the second one was given in 2009 to conduct research in the dairy, poultry and beef sectors, in terms of understanding the competition levels in those sectors. The Commission was also jointly given in 2009 an IDRC grant with the competition authorities of South Africa and Egypt to establish the causes of the increase in price of staple foods. The Commission identified milling and fertilizer agro-sub sectors as its areas of concern.

Technical assistance given to the Commission on a bilateral basis has included a 10-month internship with the Australian Competition and Consumer Commission (ACCC). The aims of the ACCC's International Internship Programme were: (i) to contribute to the development of competition, consumer protection and utility regulation policies and initiatives internationally, by providing interested, suitably qualified overseas parties with the opportunity to spend one year working at the ACCC; (ii) to enhance ACCC's links with international counterpart agencies; (iii) to enable participants to develop knowledge of legislation relevant to the functioning of the ACCC, and understanding of competition, consumer protection, pricing and utility regulation issues, an awareness of the political, commercial and social environments and the management framework in which the ACCC operates; and (iv) for those parties to positively contribute to the operation of the ACCC through the completion of work placements at the ACCC.

7. FINDINGS AND POLICY RECOMMENDATIONS

7.1 Findings

The report was based on extensive desk research of pertinent documents supplied by the Competition and Consumer Protection Commission on

its operations and practices, and of other relevant documents obtained from the internet, and on a fact-finding visit to Zambia during the period. A total of 38 stakeholders from 16 organizations were interviewed during the fact-finding visit. In addition to the Commission, the stakeholders interviewed were drawn from business and consumer associations, sector regulators, other statutory bodies, the Judiciary, law firms, professional organizations, and individual companies.

The implementation of competition policy and law in Zambia, including consumer protection, was found to have developed considerably over the years, and was much facilitated by the new Competition and Consumer Protection Act, 2010. The business community in Zambia, as represented by the Zambia Association of Chambers of Commerce and Industry, is very receptive of the country's competition and consumer protection law. In particular, the Commission's consumer protection work is highly appreciated.

The new Act removes most of the weaknesses in the legal framework that were prevalent in the old Act. The peer review however revealed some remaining or new weaknesses in the framework, which have been assessed against international best practices as suggested in the UNCTAD Model Law on Competition¹⁷⁶.

7.2 Recommendations

Very few things were found to be going wrong in the implementation of competition and consumer protection policy and law in Zambia. The recommendations made in the report are mostly aimed at increasing the effectiveness of that implementation. For ease of reference, the recommendations were made at the parts of the report to which they relate. These are summarized in Table 12 below.

Table 12: Summarized Policy Recommendations

I. Recommendations Directed to the Competition and Consumer Protection Commission (CCPC)	
Observation	Recommendation
<p>1. The Act under section 10 does not give examples of other vertical agreements than re-sale price maintenance. Vertical restraints are numerous, and include agreements and arrangements on exclusive distribution and dealing, tie-in sales, quantity forcing, franchises, etc., which are all common in Zambia. While the list of vertical restraints cannot be exhaustive, it would assist the business community in complying with, and the Commission in enforcing, competition law if the common such restraints in Zambia are listed for guidance purposes.</p>	<p>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.</p>
<p>2. The Regulations to the CCPA provide that “a merger transaction shall require authorization 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”.</p> <p>The above merger notification threshold captures all mergers involving large companies that meet the prescribed threshold even if the target firm does not realize any substantial turnover, or hold any assets, in Zambia. Merger notification thresholds in some other countries in the region are a combination of the combined turnover/asset threshold of the merging parties and a minimum turnover/asset threshold for the target firm.</p>	<p>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.</p>
<p>3. Section 32(1) of the CCPA provides that the “Commission shall complete its assessment of a proposed merger and issue its determination within a period of ninety days from the date of the application for authorization of the proposed merger”. The up to 90-day merger assessment period seem to be rather long for mergers that do not raise serious competition concerns.</p>	<p>The Regulations to the CCPA should provide for merger assessment in two phases, with Phase 1 involving simple transactions taking a shorter period of say, thirty days, and Phase 2 involving more complex transactions taking up to ninety 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 fulltime 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.</p>
<p>4. Stakeholder concerns over the Commission's merger control activities include inadequate sensitization of the business community on issues such as merger notification requirements, changes in policy, and general assessment of mergers.</p>	<p>The Commission's Merger Control Guidelines that are in the process of being re-drafted 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 website for easy access by the business community.</p>
<p>5. Section 62(1) of the Act provides for the prohibition through injunctions or staying orders certain acts pending investigation. While staying orders are necessary in circumstances described in the Act, they need to be issued with extreme caution since they can have serious adverse effects on the competitiveness of the affected enterprise if the investigation ultimately clears the enterprise from the alleged anticompetitive practices. Such orders must therefore be made on very good ground and for specific periods of time.</p>	<p>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 in 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”.</p>
<p>6. The Commission has negotiated Memoranda of Understanding (MoUs) with a number of sector regulators with competition functions on concurrent jurisdiction on competition matters. However, other statutory bodies without competition functions have indicated a willingness to cooperate with the Commission in other areas, such as the privatization of State enterprises, the promotion of small and medium enterprises, and consumer protection. Even some of those sector regulators with competition functions have indicated willingness to cooperate with the Commission in the area of consumer protection.</p>	<p>The Commission's MoUs with sector regulators should not only be confined to those that it has concurrent jurisdiction on competition matters with, but should also be extended to other regulators on other areas of cooperation.</p>

<p>7. Merger notification fees in Zambia are relatively high compared with those charged in other countries in the region, which average a maximum of about \$50 000. In Zambia, the fees are calculated at 0.1 per cent of the combined annual turnover or assets in Zambia of the merging parties, whichever is higher, with a cap of maximum fee of 16 666 667 fee units, which translate to K3 billion (or about \$600 000). The high fees go beyond their intended purpose of defraying the Commission's costs of merger examination, and place a heavy financial burden on the merging parties, thus increasing the transaction costs of mergers.</p>	<p>The maximum merger notification fee in Zambia should be revised and lowered 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 recommendation needs to be implemented simultaneously with recommendation 21, ie. the provision of adequate government funding for the Commission.</p>
<p>8. The Commission's offices in Lusaka are difficult to access, and limit its expansion. The Government however offered the Commission three years ago bigger office premises that are much more easily accessible, but which the Commission has not occupied because the building needs a lot of renovation.</p>	<p>The renovation of the office premises that the Commission has been offered by the Government should be expedited to enable its speedy occupation.</p>
<p>9. The Executive Director of the Commission is an ex officio member of the Board of Commissioners, which is the adjudicative wing of the Commission. The ex officio membership of the Board of the Executive Director, who is head of the Commission's investigative wing, might therefore present appealable grounds on determinations and decisions made by the Board on competition and consumer protection cases.</p>	<p>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.</p>
<p>10. The Commission is expending a lot of resources in investigating relocation of plant and equipment from Zambia, which raises little or no competition concerns, for reasons other than promotion of competition. While in the past, the Commission would recover the cost of these investigations, the new Act does not provide for a legal instrument to recover those costs.</p>	<p>The Commission should 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.</p>
<p>11. The amounts being allocated by the Commission for its advocacy and awareness activities, which constituted only 2.19 per cent of its total recurrent expenditure budget in 2010, are not enough, given the stakeholders' expectations and its own admission that lack of awareness of the public on both competition and consumer issues is a formidable challenge to it.</p> <p>The Commission's advocacy and awareness work is also being coordinated under its Consumer & Public Relations Department, which is under-staffed and divides its meagre resources between investigation and control of unfair trading practices and public relations.</p>	<p>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 that the activities should be undertaken by a specialist Unit based in the Office of the Executive Director with adequate staffing.</p>
<h2>II. Recommendations Directed to the Legislature</h2>	
<p>12. The term 'undertaking' is defined in terms of section 2(1) of the Act as to mean as a commitment or promise provided to the Commission by a person or enterprise to address any competition concern raised by the Commission. The same term is however used differently in the definition of the term 'statutory monopoly' as to have the meaning of enterprise.</p>	<p>The apparent confusion over the use of the word 'undertaking' in the definition of the term 'statutory monopoly' should be removed.</p>
<p>13. Section 14 of the Act provides that the dominance threshold for horizontal agreements is 30 per cent or more of goods or services in a relevant market, and that for vertical agreements is 15 per cent. The opposite should however be the case because horizontal agreements are potentially more harmful to competition than vertical agreements.</p>	<p>Section 14 of the CCPA should be amended to provide that the share of 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.</p>
<p>14. The threshold for establishing the existence of dominant position under section 15 of the Act has been reduced 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. The reduction of the dominance threshold under the Act has however created marked differences with other Acts of Parliament that regulate the same enterprises, such as the ICT Act, and this creates compliance problems for the affected enterprises.</p>	<p>The dominance thresholds in all the Acts of Parliament that regulate enterprises in Zambia be harmonized.</p>

<p>15. While the taking into account of public interest factors in the assessment of mergers is in line with practices in several developing countries, a competition authority should however not be given wide discretionary powers of deciding what should constitute public interest in the context of considering competition cases since it normally does not have the capability of doing so. It is noted that section 31 of the CCPA under subsections (g) and (h) give the CCPC such wide discretionary powers in taking into account "socioeconomic factors as may be appropriate" and "any other factors that bears upon the public interest", respectively.</p>	<p>Section 31 of the CCPA should be amended by the deletion of subsections (g) and (h) that give the Commission wide discretionary powers of deciding what constitutes public interest in the consideration of mergers.</p>
<p>16. Section 86(3) of the CCPA provides that the Commission may retain a percentage of fines paid in relation to the annual turnover of a person or an enterprise that is prescribed by the Minister responsible for finance. Such practice however has potential adverse side-effects to effective implementation of competition policy and law. Firstly, it puts the neutrality of the competition authority at risk by the mere fact that financial considerations might guide the authority in arriving at its decisions on competition cases. Secondly, the monetary interest in competition enforcement activities directs the attention of the competition authority from other equally important competition promotion activities, such as advocacy. It is noted that the Minister of Finance has not set the percentage of fines to be retained by the Commission and is considered to be reluctant to do so. Thus, in the current situation all fines go to the treasury.</p>	<p>Section 86(3) of the 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 should be deleted.</p>
<p>17. Section 42 of the Act seems to exclude enterprises in regulated sectors from the requirements of Part IV of the Act, on mergers, and other parts of the Act since it only refers to the requirements of Part III, on restrictive business and anticompetitive trade practices. This might have been an oversight since mergers and acquisitions in regulated sectors are rife.</p>	<p>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".</p>
<p>18. In terms of section 67(5) of the CCPA, the Minister can remove any member of the CCPT for unspecified reasons. The desired independence, or decision making autonomy, of the Tribunal from political influence is therefore greatly compromised.</p>	<p>The removal by the Minister of a member of the CCPT should be on clear grounds and reasons that should be provided for in the CCPA.</p>
<p>19. The CCPA gives the Minister powers of removing a member of the Board of Commissioners without giving any reasons, which can be used for political reasons not related to the exigencies of the Commission.</p>	<p>The CCPA should provide for clear grounds upon which the Minister can remove from office a member of the Commission's Board of Commissioners.</p>
III. Recommendation Directed to the Ministry of Commerce, Trade and Industry	
<p>20. The establishment of the CCPT under the CCPA is designed to fast track consumer protection remedies. Section 50(5) of the Act however provides that a person who, or an enterprise which, fails to comply with a Commission order to recall a product from the market commits an offence and is liable to a fine and/or imprisonment, but only upon conviction. Since only the law courts in Zambia can convict anyone, the whole purpose of establishing the CCPT for fast tracked remedies is defeated.</p>	<p>The rules being worked out for the CCPT should clearly spell out 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.</p>
IV. Recommendations Directed to Treasury	
<p>21. The Commission has a serious human resources gap since its present staffing level is not commensurate with its current operations and stakeholder expectations. While the universities in Zambia should be the natural pool of trained personnel for the Commission in the specialized field of competition policy and law, none of them are currently offering courses in subjects connection to competition policy and law.</p>	<p>The 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 trained human resource source for the Commission.</p>

<p>22. The Government should be the major funder of the Commission's operations through grants since the Commission is a Statutory Body with non-commercial functions of a regulatory nature. The government grant to the Commission is however much lower than income from other sources, such as fees and fines, which cannot be depended upon to finance the Commission's competition and consumer advocacy and awareness activities. While fines imposed for breach of competition law should ideally be paid to Treasury, service fees could be paid to the Commission for cost reduction purposes, and as supplementary to government grants for use to fund the Commission's developmental projects.</p>	<p>The Government should take up its responsibility of ensuring that the CCPC's operations are fully funded from government grants.</p>
<p>23. There is 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.</p>	<p>The CCPC should be given the necessary capital expenditure funds to procure the much-needed equipment to allow it to carry out its tasks effectively.</p>
<p>V. Recommendations Directed to Cooperating Partners</p>	
<p>24. The CCPA provides for the setting up of the CCPT to hear appeals against the decisions of the CCPC. Even though the Tribunal was established in 2011 it is still not fully operational pending the gazetting of its rules. The Tribunal will work closely with the judiciary, which however has not had much experience in considering competition and consumer protection cases. Both the Tribunal and the judiciary therefore require capacity building and training in the area of competition and consumer protection policy and law.</p>	<p>Competition law training should be organized for members of the CCPT, and that 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 at which the other members of the Judiciary in Zambia, including Magistrates and Judges, would be invited.</p>
<p>25. The Commission conducted its first two dawn raids in 2011. The challenges it faced in doing so were mainly related to the human factor. It had to rely on other security agencies to undertake the raids, which had little knowledge of what was being looked for. Lessons were learnt but it was recognized that a lot more needed to be done by the Commission at the next raid. The Commission has also had difficulties in analyzing abuse cases because of lack of information and appropriate economic tools. Training needs required in competition enforcement include investigative skills, litigation skills, and, to a lesser extent, principles of competition law.</p>	<p>The 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.</p>

ZIMBABWE FULL REPORT



TABLE OF CONTENTS

PREFACE	173
1.0 FOUNDATIONS AND HISTORY OF COMPETITION POLICY	173
1.1 Context and History	173
1.2 Political Context of the Zimbabwe Competition Law	175
1.3 Current Issues in Implementation of the ZCA	176
2.0 LEGAL FRAMEWORK - THE ZIMBABWE COMPETITION ACT	176
2.1 Anticompetitive Agreements	177
2.2 Abuse of Dominance	181
2.3 Mergers and Acquisitions	182
2.4 Consumer Protection/Unfair Competition Issues	184
2.5 Price Control	186
3.0 INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES	186
3.1 Competition Policy Institutions	186
3.2 Sources of Competition Cases	188
3.3 Investigative Powers	189
3.4 Separation of Investigative and Adjudicative Powers	191
3.5 Sanctions	193
3.6 Role of the Courts	194
3.7 Other Enforcement Methods	195
3.8 Agency Resources, Caseload, Priorities and Management	195
4.0 LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES	200
4.1 Economy-wide Exemptions and Special Treatments	200
4.2 Sector-specific Rules and Exemptions	201
5.0 COMPETITION ADVOCACY	202
5.1 Competition Advocacy and Public Education	203
6.0 INTERFACE BETWEEN COMPETITION AND TRADE POLICIES	204
6.1 Examination of the Merger between Competition and Tariff Commission	204
6.2 Effects to the Implementation of Competition Policy and Law	204
7.0 INTERNATIONAL RELATIONS AND REGIONAL COOPERATION	205
8.0 FINDINGS AND POSSIBLE POLICY OPTIONS	206
8.1 Recommendations addressed to the Legislature (Proposals for Amendment of the Current Competition Law)	206
8.2 Recommendations addressed to the Government	208
8.3 Recommendations addressed to the CTC	208
8.4 Further Recommendations	209
NOTES	211

PREFACE

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 value-added of the harmonization of competition law and its enforcement in this subregion, 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 comparative assessment report that addresses pertinent issues from a subregional perspective.

The report examines Zimbabwe's competition policy system. The report is based upon a review of the legal texts that supply the framework for the Zimbabwean competition policy system and of decisions issued by the Competition and Tariff Commission; study of other reports dealing with the Zimbabwean competition policy system; interviews with the leadership and staff of the Competition and Tariff Commission; officials from other government authorities and representatives of non-governmental organizations.

1.0 FOUNDATIONS AND HISTORY OF COMPETITION POLICY

1.1 Context and History

The need for a formal competition policy was heightened by Zimbabwe's adoption of an IMF-sponsored Economic Structural Adjustment Programme (ESAP) in 1992, this was particularly brought about by the growing concern within the business community that there was lack of domestic competition and that the country's industries were not competitive internationally. The Programme prompted for the establishment of a "Monopolies Commission" to monitor competitiveness and regulate restrictive business practices in the economy (Kububa, 2009).

It is worth noting that the Government of Zimbabwe had been engaged in control of monop-

lies and oligopolies through price controls which were extensively used to limit the ability of firms in monopoly or dominant positions to charge consumers high monopoly prices and the creation of parastatal organizations which were created as public enterprises in the industrial and commercial sectors in order to counter and limit the ability of monopolies and oligopolies to abuse their dominant positions among other mechanisms (Kububa¹⁷⁷, 2009).

Following the concerted need for having in place a monopolies commission, a study of "Monopolies and Competition Policy in Zimbabwe" was carried out by a team of international competition consultants in 1992. USAID sponsored the team under the programme called Implementing Policy Change (IPC). In summary, the study came up with a number of findings on the state of competition in Zimbabwe as hereunder:

- i. the manufacturing sector in Zimbabwe was highly concentrated that, of the over 7,000 items produced, a half were produced by only one producer; and approximately 80 per cent of all items were produced by three or less firms;¹⁷⁸
- ii. many major industrial groups had close relations with each other, either through direct equity holdings or through cross-directorships, indicating further concentration of ownership and/or control;
- iii. a large number of commercial and services sectors were dominated by parastatal organizations, which were in monopoly and/or 'privileged' positions over the private firms;
- iv. significant barriers to entry served to increase or maintain high levels of industrial concentration, preclude entry by other firms, and furthered the creation of uncompetitive market structures which served to increase prices and restrain output to the detriment of consumers;
- v. identified entry barriers included (a) government-erected barriers (price controls, foreign exchange controls, labour regulations and State monopolies) (b) industry-structure barriers (limited supplies of raw materials,

economies of scale and scope and product differentiation and brand loyalty) and (c) business practices (price fixing, collusive tendering, tied sales, and allocation of market and customers).

The study concluded that “while the combination of a high degree of industrial concentration and high barriers to entry does not automatically lead to abuse of market power by monopolists and oligopolists, the possibility for exercising market power existed and that there was some evidence and good reason to believe that restrictive business practices were extensive in Zimbabwe”. Based on this conclusion, it was recommended that there be the adoption of competition policy and law in Zimbabwe and the creation of a competition authority to administer that policy and law.

The recommendations were adopted by the Government of Zimbabwe whereby in 1996 the Competition Act was enacted, within which the Industry and Trade Competition Commission, the authority to administer that policy and law was established under section 4 of the Act. This marked the formal adoption of competition policy and law in Zimbabwe thus becoming the fifth country in the southern and eastern Africa to do so after South Africa, Kenya, the United Republic of Tanzania and Zambia. As it was for other countries’ experiences, the Act came into operation in 1998, the same year¹⁷⁹ that the competition authority to implement it was established.

The main justification for the adoption of competition policy and law in Zimbabwe was to complement market forces particularly in instances where forces of supply and demand do not give desirable market outcomes. Given the structure of the economy that is characterized by monopolies, oligopolies and various forms of anticompetitive practices, regulation becomes very important to protect consumers and investors. Competition policy and law was therefore adopted in 1996 as a basic requirement for the country’s market-based economic reforms.

A few years after adoption and commencement of implementation of Competition law; Zimbabwe was involved in the war in the Democratic Republic of the Congo (1998-2002). Invariably, the Government’s land reform programme in 1999, which had a bad reception by actors within and outside Zim-

babwe; and resulted into imposition of economic sanctions by some of its key trading partners. The two factors have badly damaged the economy, particularly the commercial farming sector which is the traditional source of exports and foreign exchange and the provider of 400,000 jobs. As a result of the worsened economic situation Zimbabwe turned into a net importer of food products.

Zimbabwe is faced with economic difficulties including a large external debt estimated at 241.6 per cent of GDP in 2010. In 2007 Foreign Direct Investment was estimated at \$30 million; this was a massive reduction as compared to a 1998 figure which was estimated at \$400 million. In 2010, the country registered an estimated GDP \$4.395 billion whereby the agriculture sector contributed 19.5 per cent of the total GDP, while industry and services sectors contributed 24 per cent, and 56.5 per cent respectively. According to World Bank data on Zimbabwe (World Development Indicators)¹⁸⁰, the employment to population ratio for the age group 15 years and above was 61 per cent in 2009. According to Zimbabwe Statistics (ZimStats), the unemployment level is between 5 per cent and 13 per cent if informal employment is taken into account.

Most of Zimbabwe’s contemporary economic problems have emerged from sanctions that the country has gone through. Invariably, like other Sub-Saharan African countries, the economy is characterized by features such as majority of the workforce engagement in agricultural production, limited formal employment, high percentage of population living below defined poverty lines as well as low capital formation coupled with low Foreign Direct Investment figures. However, there is a renewed initiative in Foreign Direct Investment through international partnerships with South Africa.

In continued efforts to manage the economy, until early 2009, the Reserve Bank of Zimbabwe attempted to stabilize the economy through fiduciary acts to no avail, thus causing hyperinflation in the economy. In February 2009, Zimbabwe adopted a multicurrency¹⁸¹ regime characterized by stoppage of use of Zimbabwean dollars in the economy and removal of price controls. These measures have led to some economic improvements, including the cessation of hyperinflation; as such, in 2010 the economy registered its first growth in a decade.

With the growing political consensus and further political improvement to which economic growth is significantly reliant, greater economic recovery and growth is expected.

1.2 Political Context of the Zimbabwe Competition Law

There is generally a wide political support for competition policy and law in Zimbabwe. This is witnessed by the fact that there has never been any political interference with the work of the Competition and Tariffs Commission ("CTC") even at the times of economic hardships that Zimbabwe underwent in the past decade of competition law and policy implementation.

During the establishment of competition law and policy in Zimbabwe, there was a Memorandum to Cabinet Committee on Development regarding the Establishment of a Monopolies Commission, the then Minister of Industry and Commerce in October 1992 recommended the adoption of the IPC Study and its findings. In that Memorandum, the Minister made a number of key policy statements on the form of competition policy that Zimbabwe should adopt, including the one on "Need for Competition Policy".

Findings from interviewed stakeholder show that there was a comprehensive competition policy document prepared in late 1990s. Despite the confirmation by one interviewed stakeholder, neither the CTC nor the Ministry of Commerce who are the custodian of the document seems to know where exactly the policy is to be found. Efforts to look for it were met by an assertion that it is among the oldest files in the Ministry's Registry, the location of which it is difficult to access, probably due to the way files and records are heaped together. This tells that even though the policy could have been made, it has not been practically used in providing guidance on issues that it was meant to streamline. Instead, the CTC has relied on the policy guidelines of the Memorandum to the Cabinet Committee on Development in guiding its competition operations since its establishment.

While the reliance on the memorandum is a commendable effort by CTC, it remains a fact that a comprehensive policy on competition is required in the Zimbabwean economy. Development of a competition policy based on already existing doc-

uments and experience gathered from the decade of implementation by CTC should be considered as part of reforming the competition regime in Zimbabwe.

1.2.1 Policy Goals

According to (Kububa, 2009) during the inception of the competition regime in Zimbabwe, it was argued that although the Structural Adjustment Programme (SAP) through trade liberalization, price decontrol, domestic deregulation and public sector enterprise/parastatal reform would address and remove some of the factors that had protected monopolies, encouraged restrictive business practices that hampered competition; monopolistic tendencies and Restrictive Business Practices (RBPs) will persist beyond 1995, hence the need to regulate and control them.

It was further argued that regulations and controls were moreover needed during the SAP period, in order to guide the economy's transition to a market-oriented one. The regulations and controls would be complementary to Zimbabwe's efforts to protect consumer welfare, promote economic efficiency and competitiveness and to expand the entrepreneurial base. These are still valid arguments today, as they constitute the purpose of enacting competition legislation in an economy.

The preliminary draft of the Monopolies and Mergers Commission Bill was prepared by the then Ministry of Industry and Commerce with the assistance of two seconded competition experts from the United States of America – one from the Federal Trade Commission and the other an academic. The draft borrowed heavily from the South African competition legislation, with influence from the British and American practices. The draft produced was submitted to the Attorney General's Office for legal drafting in July 1993.

The Bill underwent a long-winded consultative process involving major stakeholders, which included two public seminars organized by the Friedrich Naumann Foundation of Germany and the Indigenous Business Development Centre, and association of black businessmen with the primary aim of promoting and facilitating black business advancement and entrepreneurship.

Established businesses, particularly companies enjoying monopolies or near monopolies in in-

dustries such as beer brewing and cigarette manufacturing, were very much against the introduction of competition policy and law in Zimbabwe and therefore heavily lobbied Parliamentarians against the passing of the Bill in Parliament. Their fears were that the new competition authority would disband monopolies or unbundle conglomerate companies. They argued that Zimbabwe with its small economy did not need a competition authority.

Other groups with sectoral interests also attempted to hijack the whole process for the sole protection of their special interests. Even in the public sector there was some disquiet over the inclusion under competition jurisdiction of parastatal organizations with public economies in certain economic activities.

A lot of compromises were made in the consultative process. For example, the idea of establishing a 'Monopolies and Mergers Commission' aimed at dominant companies was dropped for the establishment of a broader based Competition Commission. While the principle that all economic activities in Zimbabwe should come under competition legislation, the qualification was made that activities of statutory bodies that are expressly authorized by other Acts of Parliament should be exempted. The consultations and compromises made on the Bill made it possible for its smooth passage through Parliament in 1996.

The fear and lobby from the monopolies and near monopolies public and private, foreign and local has not faded away during a decade of ZCA implementation. It is important to put these threats on constant check, more so now that there is need for developing the competition law to address competition concerns based on a decade long implementation experience.

1.2.2 Competition Policy in Reforms

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. The main argument for the combination of the two Commissions was cost saving on the Government's side by running one instead of two Commissions which are interconnected by the synergies and complementarities between competition policy and trade (tariffs) policies.

Following a decade of the merger of the two Commissions, there is a need to reexamine whether the reasons for the merger still exist in the current Zimbabwean economy context, and if it results into more benefit than harm to the economy given the prevailing circumstances. This will be done in the subsequent paragraphs of this report.

The Amendments Act also strengthened the Commission's handling of mergers and acquisitions and expanded the list of restrictive and unfair business practices. It further gave the Commission the added functions of price surveillance and monitoring.

1.3 Current Issues in Implementation of the ZCA

There is a set of identified gaps in the ZCA that the CTC has gathered from its implementation experience over the years especially during the post hyperinflation period after the introduction of multicurrency in the economy in 2009. These gaps will be assessed and for part of recommendations that this report bring up.

According to field interview findings, Zimbabwe has been generally described as a less litigious society; many of the enterprises that have been summoned to appear before the CTC have complied and appeared without legal representation. This trend has been changing from 2009 and increasingly, firms have been engaging high profile corporate lawyers mainly due to the severity of penalties which are now quoted in United States dollars as compared to when they were quoted in Zimbabwean dollars.

According to the interviewed CTC staff, the level of legal scrutiny of the ZCA has deepened significantly in the post multicurrency period, hence the exposure of the gaps in the ZCA and the need for address of the identified gaps to avoid both protracted litigations at the Courts and CTC's consequential inability to intervene on cases whose provisions are either inadequately provided for or completely not provided by the ZCA.

2.0 LEGAL FRAMEWORK - THE ZIMBABWE COMPETITION ACT

The ZCA was enacted with a broad objective to promote and maintain competition in the economy, to provide for the prevention and control

of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices, and to provide for matters connected with or incidental to the foregoing. Like other competition laws, the Zimbabwean covers (i) Anticompetitive Agreements in both vertical and horizontal aspects (ii) Abuse of Dominant Position (iii) Merger Control. Furthermore, it contains provisions relating to Unfair Competition / Consumer Protection.

The Competition Act applies to all economic activities within or having an effect within the Republic of Zimbabwe. It does not draw a distinction between Regulated Sectors (natural monopolies especially found on utility networks).

2.1 Anticompetitive Agreements

While the ZCA distinguishes between various forms of objectionable conduct, namely unfair business practices,¹⁸² restrictive practices¹⁸³ and unfair trade practices,¹⁸⁴ it does not contain a provision for general prohibition of anticompetitive agreements. However, the CTC is empowered to prohibit restrictive practices on an individual basis according to Section 31 ZCA if it is satisfied that the restrictive practice is contrary to public interest. Agreements which are commonly considered as anticompetitive are partly provided for by the ZCA's category of unfair business practices.

According to the current wording of the ZCA only unfair trade practices constitute an offence and are sanctioned by a fine or imprisonment as provided in section 42 (3) ZCA, while unfair business practices are only sanctioned by nullity as provided in section 43 (a) and (b) ZCA. The absence of sanctions for unfair business practices in section 42(3) of the ZCA was occasioned by possible drafting omissions at the time the ZCA was amended by the 2001 Amendment. After repealing the Tariff Commission Act [Chapter 14:29] and incorporating its provisions which predominantly covered unfair trade practices into the ZCA, the 2001 Amendment sought to substitute all terms referring to "unfair trade practices" in the former Competition Act, 1996 with the term "unfair business practice" in order to avoid confusion as the two terms were now intended to mean different things. Unfortunately for section 42, only the section heading and subsection (1) were amended leaving out subsection (3). This therefore

left subsection (3) prohibiting unfair trade practices when the section was supposed to be dealing with unfair business practices as per its heading and subsection (1). The other absurd result of this omission is that unfair trade practices as provided for in sections 34B and 34C are practices that are related to imports and are mainly perpetrated at national level and not by individual persons and hence the legislature could not have intended to impose criminal sanctions on nation States. Thus, one can safely conclude that the legislature intended to delete "unfair trade practices" wherever it appeared in section 42 and substitute it with "unfair business practice" as was done to section 43. This anomaly however can only be cured by another amendment to the ZCA as it stands. As such, the matter calls for urgent intervention as it poses a huge potential for offenders to take advantage of the weakness in the ZCA to harm competition without fear.

The ZCA covers the rule of reason and per se approach in both horizontal and vertical agreements. From the reading and interpretation of the definitions as provided in Section 2; one can construe the provision that restrictive practices are dealt with by invoking Rule of Reason approach whereas unfair business practices that are listed in the First Schedule are dealt with under the Per Se approach. However, the distinction is not as sharp because of the double provision for issues under Section 2 and the First Schedule. The issue of ZCA not specifically addressing per se and rule of reason prohibitions separately is considered a shortcoming, that needs to be addressed so as to ensure that users get a clear grasp of the provisions from onset.

As such in the first Schedule there is a mix up of issues usually termed under abuse of dominance such as overcharging, refusal to deal, retail price maintenance and exclusive dealing. There are also unfair competition issues provided for such as misleading advertising and false bargain. The corollary of this mix-up of issues is restraint to both interpretation and enforcement of these very core provisions of competition legislation.

2.1.1 Restrictive Practices in the Act

Ideally Section 2 of the Competition Act can be construed to provide for Rule of Reason issues. Restrictive Practices under this section are defined as follows:

- (a) any agreement, arrangement or understanding whether enforceable or not, between two or more persons; or
- (b) any business practice or method of trading; or
- (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or
- (d) any situation arising out of the activities of any person or class of persons.

Any of the acts in (a) to (d) above were aimed for prohibition to the extent that they restrict competition directly or indirectly to a material degree in that it has or is likely to have any one or more of the following effects:

- (i) restricting the production or distribution of any commodity or service.
- (ii) limiting the facilities available for the production or distribution of any commodity or service.
- (iii) enhancing or maintaining the price of any commodity or service.
- (iv) preventing the production or distribution of any commodity or service by the most efficient or economical means,
- (v) preventing or retarding the development or introduction of technical improvements in regard to any commodity or service,
- (vi) preventing or restricting the entry into any market of persons producing or distributing any commodity or service,
- (vii) preventing or retarding the expansion of the existing market for any commodity or service or the development of new markets therefore,
- (viii) limiting the commodity or service available due to tied or conditional selling.

As reported earlier on the definition of restrictive practices by Section 2, ZCA does not contain such prohibition and Section 31 of the ZCA only allows for a prohibition on an individual basis, thus making the whole text on restrictive practices obsolete irrespective of its good wording because of lack of the prohibitive element.

Section 32 (2) of the ZCA provides that the Commission should regard a restrictive practice as contrary to the public interest if it is engaged in by

a person with substantial market control over the commodity or service (a dominant firm) to which the practice relates. In applying the Rule of Reason approach, a restrictive practice can be considered as not contrary to the public interest in any of the following situations:

- (i) the restrictive practice is reasonably necessary, having regard to the character of the commodity or service to which it applies, to protect consumers or users of the commodity or service, or the general public, against injury or harm;
- (ii) termination of the restrictive practice would deny to consumers or users of the commodity or service to which the restrictive practice applies, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them, whether by virtue of the restrictive practice itself or by virtue of any arrangement or operation resulting there from;
- (iii) termination of the restrictive practice would be likely to have a serious and persistently adverse effect on the general level of unemployment in any area in which a substantial proportion of the business, trade or industry to which the restrictive practice relates is situated;
- (iv) termination of the restrictive practice would be likely to cause a substantial reduction in the volume or earnings of any export business or trade of Zimbabwe;
- (v) the restrictive practice is reasonably required to maintain an authorized practice or any other restrictive practice which, in the Commission's opinion, is not contrary to the public interest;
- (vi) the restrictive practice does not directly or indirectly restrict or discourage competition to a material degree in any business, trade or industry and is not likely to do so.

Furthermore, agreements to be examined under the rule of reason approach are ideally set to target competitors in a relevant market; another shortcoming in the Act is that it does not define "Market" which makes it hard for both the enforcing agent and Public to make sound interpretation of the provision. In the architecture of competition laws, many competition laws do not provide for a definition of the term market or relevant market, but in the absence of a legal definition,

competition authorities do adopt guidelines on how to define the relevant market. Given that the definition of the relevant market is rather complex, CTC should consider adopting guidelines on the determination of the relevant market based on international best practices in areas where definition of relevant market is to be invoked.

Notification for rule of reason agreements is provided for under Section 35 (1) and (2) of the ZCA. Despite the fact that the process for notification is provided, the timeframe for which the agreement will be reviewed is not stipulated. In practice, there have however not been many applications for authorization of restrictive practices and other conduct,¹⁸⁵ hence the enforcement practice is not yet fully established and there is a need for guidance in this area. The provision also lacks a threshold for which the agreeing parties are prohibited in a particular party thus leaving too wide a room for agreements to be notified. Numerical thresholds are helpful to establish and thus easier to be complied with as compared to other more flexible approaches which require in-depth understanding of competition which is vividly lacking in the developing world. The Tanzanian law for example provides as follows: “unless proved otherwise, it shall be presumed that an agreement does not have the object, effect or likely effect of appreciably preventing, restricting or distorting competition if none of the parties to the agreement has a dominant position in a market affected by the agreement and either (a) or (b) applies:

- (a) the combined shares of the parties to the agreement of each market affected by the agreement is 35 per cent or less; or
- (b) none of the parties to the agreement are competitors”.

Such a threshold and condition precedent gives elaborate definition of agreements that are considered under rule of reason approach. The threshold also tends to leave out of scrutiny small companies that seek to grow and enhance their efficiencies through various forms of such agreements. It is also worth mentioning that the provision does not provide for its restriction in so far as it does not provide for mergers since mergers too are a form of agreement that may be construed to be the scrutiny of this provision. There is an attempt to establish such a definition as provided in Section 2 (3) of the ZCA,

but it is not sharp enough to give users of the law a clear situation for which they are entering into an agreement or understanding that is subject to the Rule of Reason as provided in the ZCA.

With regards to (b) “any business practice or method of trading; constitute a restrictive practice to the extent that they restrict competition directly or indirectly to a material degree in that it has or is likely to have any one or more of the following effects ...” in the absence of distinction between conducts and/or providing for specific prohibited conducts, there is a potential for misinterpretation and confusion for users of the law; the same can be said for (c) and (d). In particular (c) “any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person” there is a connotation of unilateral conduct (acting independently) which does not amount to an agreement hence more dilemma to the users of the law.

With regards to the effects mentioned in (i) to (viii) again there is a mix up of prohibitions i.e. (i), (ii) and (iv) seem to refer to Output Restriction which is an issue dealt with under Per Se approach (iii) refers to Price Fixing which is also an issue dealt with under Per Se approach. Effects running from (v) through to (vii) are issues dealt with under Abuse of Dominance as Exclusionary Conducts whereas (vii) is an issue dealt with under Abuse of Dominance as an Exploitative Conduct.

Based on the analogy above, it is apparent that the concept of Rule of Reason has been lost as a result of mixing up of issues as explained.

2.1.2 Unfair Business Practices

Section 2 of the ZCA defines unfair business practice as restrictive practice or other conducts specified in the First Schedule. The latter would generally be considered to be more harmful to competition and/or consumer welfare and would be accorded a Per Se Prohibition. Despite their provision, it should be recalled that that the ZCA in its current wording does not contain a prohibition of unfair business practices. These practices are practices as follows:

2.1.2.1 Misleading Advertising

Misleading Advertising is defined as, for the purposes or in the course of any trade or business,

publishing an advertisement containing a representation which the publisher knows or ought to know is false or misleading in a material respect; or containing a statement, warranty or guarantee as to the performance, efficacy or length of life of any commodity, which statement, warranty or guarantee the publisher knows or ought to know is not based on an adequate or proper test thereof; or containing a statement, warranty or guarantee that any service is or will be of a particular kind, standard, quality or quantity, or that it is supplied by any particular person or by a person of a particular trade, qualification or skill, which statement, warranty or guarantee the publisher knows or ought to know is untrue.

The ZCA also provide for the purposes of misleading advertising a representation, statement, warranty or guarantee expressed on or attached to an article offered or displayed for sale, or expressed on the wrapper or container of such an article, shall be deemed to have been made in an advertisement.

2.1.2.2 False Bargains

False bargains are defined as advertising any commodity or service for distribution at a price:

- (i) which is represented in the advertisement to be a bargain price; or
- (ii) which is so represented in the advertisement as to lead a person who reads, hears or sees the advertisement to the reasonable belief that it is a bargain price; if the distributor of the commodity or service does not intend to distribute it at that price, or has no reasonable grounds for believing that he can do so, for a period that is, and in quantities that are, reasonable in relation to the nature of the commodity or service concerned and the nature and size of the distributor's undertaking.

2.1.2.3 Distribution of Commodities or Services above Advertised Price

Having advertised any commodity or service for distribution at a particular price, distributing it, during the period and in the market to which the advertisement relates, at a higher price than that advertised.

2.1.2.4 Undue Refusal to Distribute Commodities or Services

The law defines undue refusal to distribute commodities or services as failing or refusing to distribute any commodity to another person unless the other person:

- (i) Causes or refrains from distributing or using a commodity produced by some other person; or
- (ii) Restricts his distribution of a commodity produced by some other person;
- (iii) Distributes the commodity at a specified price or at a price which is not less than a specified minimum price.

2.1.2.5 Bid Rigging

Entering into or giving effect to an agreement, arrangement or understanding, whether enforceable or not, with another person whereby:

- (i) any of the parties to the agreement, arrangement or understanding undertakes not to submit a bid or tender in response to a call or request for bids or tenders; or
- (ii) in response to a call or request for bids or tenders, some or all the parties to the agreement, arrangement or understanding submit bids or tenders that have been arrived at by agreement between themselves.

The provision shall not apply to an agreement, arrangement or understanding between companies which are all part of a single group of companies.

2.1.2.6 Collusive Arrangements between Competitors

The ZCA provides that, "Being a producer or distributor of any class or type of commodity or service, entering into or giving effect to any agreement, arrangement or understanding, whether enforceable or not, with another person who produces or distributes a commodity or service of the same or a similar class or type:

- (a) to distribute the commodity or service at a particular price or within a particular range of prices; or
- (b) to share the market for the commodity or service, whether the market shares are

divided according to geographical area, class of consumer or otherwise; or

- (c) to limit, by number or quantity, the commodities or services produced or distributed.

The provision shall not apply to an agreement, arrangement or understanding:

- (a) between companies which are all part of a single group of companies; or
- (b) bona fide intended solely to improve standards of quality or service in regard to the production or distribution of the commodity or service concerned.

In examining the issues provided in 2.2.2.1 through to 2.2.2.6, it is imperative to assert that distribution of commodities or services above advertised price can be construed as one form of misleading advertising hence are actually one and the same issue.

That notwithstanding, issues of misleading advertising, false bargain and selling above advertised prices are commonly referred to as Fair Competition issues. They are done unilaterally thus deviating from the root of qualifying from being agreements let alone being per se prohibited.

These issues are not among core competition issues commonly addressed by competition legislations. Jurisdictions treat them differently, some refer to them as part of consumer protection (as may be the case for Zimbabwe), other jurisdictions refer to them as Fair Competition issues and are dealt with under a different legislation.

The provisions in undue refusal to distribute commodities or services in so far as they refer to collective boycott and bid rigging are well placed to be prohibited Per Se. Equally rightly placed are the provision referring to "Collusive Arrangements between Competitors" which covers under (a), the issue of price fixing, (b) Market Allocation between Competitors and (c) Output Restriction.

2.1.2.7 Predatory Pricing, Retail Price Maintenance and Exclusive Dealing

These are typical abuse of dominance issues whose determination procedures are distinct from those invoked in dealing with Per Se prohibited agreements. Logically subjecting the issues under

Per Se approach poses a potential for confusion to users of the ZCA.

2.2 Abuse of Dominance

The ZCA does not contain a general prohibition of the abuse of dominance. Section 2 contains a definition of monopoly situation and substantial market control as shall be provided later in this report. 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 case to case basis as earlier reported.

This is different as compared to prohibition such as that in the Tanzanian law Section 10 (1) "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" or that of the Zambian law Section 16 (1) "An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general".

The ZCA defines "Monopoly Situation" as a situation in which a single person exercises, or two or more persons with a substantial economic connection exercises, substantial market control over any commodity or service;

The ZCA also defines "Substantial Market Control" as a situation:

- (a) Being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to raise or maintain the price of commodity or service above competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe".
- (b) Being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to lower or maintain the price of commodity or service below competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe".

The ZCA does not provide level of market share that a person must attain to be considered dominant. While several competition laws contain a market share thresholds for the finding of dominance, this is not compulsory and has also attracted some criticism, despite their inherent ability of creating legal certainty. They are criticized for being rigid and not allowing for the required economic assessment of the question whether or not a company enjoys substantial market power. A rebuttable presumption of dominance triggered by the achievement of certain market share thresholds appears to accommodate the concerns of both views¹⁸⁶.

In absence of a market share threshold which triggers a rebuttable presumption, CTC may consider a possibility of adopting guidelines on how it assesses market power, i.e. what type of factors it takes into consideration (not what constitutes public interest as the current ZCA wording provides) in addition to market shares, but as earlier asserted, given the low level of competition expertise in the developing world, this should be considered for future development of the ZCA or used in alternative with market share provided that it won't confuse users of the law.

The CTC considers administratively, that a person cannot have substantial market control if market share is less than 25 per cent and firms with market shares of over 50 per cent are assumed to have that control. During the field visit, it was established that there is another assertion that 40 per cent of market share is considered for dominance test. It is not clear as why the practice has not been given legal force under Section 50 of the ZCA that provide for the Minister to make regulations to give effect to the ZCA in consultation with the Commission.

The unfair business practices listed in the First Schedule of the ZCA contain certain conducts that are universally qualified as abuse of a dominant position, Section 31(2) ZCA allows the CTC to prohibit a monopoly situation if it is satisfied that it is contrary to the public interest. Contradictorily, Section 32 (5) ZCA appears to bear a presumption that all monopoly situations are against public interest unless, certain conditions are met.

Therefore, the ZCA is ambiguous as to whether a dominant position as such or only its abuse is against public interest and can therefore be prohibited. It is

recommended that the ZCA clearly prohibits the abuse of a dominant position as a general rule. This general rule can then be followed by a non-exhaustive list of examples for abusive behaviors that are universally agreeable based on best practices such as those provided in Section 16 (2) of the Zambian law. This reaffirms the earlier position that placing abuse of dominance issues under Per Se prohibition in Schedule One is faulty. By the absence of provision for market definition and a blunt definition of dominance, pursuit of abuse cases has been substantially mired from the enactment of the ZCA.

2.3 Mergers and Acquisitions

Section 2 of the ZCA defines a merger as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:

- (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
- (c) any means other than as specified in paragraphs (a) and (b).

The Competition Amendment Act of 2001 improved the original definition of merger in the Competition Act of 1996 by including the definition of not only horizontal and vertical mergers as well as covering other possible business combinations. The underlying principle was that such joint ventures and strategic alliances have the same effect as pure mergers and should therefore be examined for possible anticompetitive effects.

The term 'merger' as defined in the ZCA definitively covers both horizontal and vertical mergers. It however does not include pure conglomerate mergers, unless they have horizontal or vertical elements. Although there are no decided court cases on the definition of the term 'merger' in Zimbabwe, the Commission, and also the legal practitioners who have handled mergers notified to the Commission, have invariably interpreted the term merger not to include pure conglomerate mergers.

The Commission in 2006 whilst dealing with the acquisition of Blanket Mine (Private) Limited by Caledonia Holdings (Africa) had to deal with the definition of the term 'merger'. In that regard, the Commission received and agreed with a written legal opinion from the well known Zimbabwean lawyer, Advocate Adrian P. De Bourbon SC, now practising in South Africa, to the effect that the critical words to be examined in the definition of merger are "of a competitor, supplier, customer or other person". These words cannot be read simply as though Parliament had used the words "any person". There can be no doubt that Parliament intended to create a genus (a class of things which have common characteristics) which would be applicable in relation to the concept of merger. The presence of a distinct genus or category calls for the invoking of the application of the rule of interpreting statutes known as the *Ejusdem generis* rule. *Ejusdem generis* is a Latin term that means "of the same kind". The rule holds that where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. For example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation. The rule is that where particular words have a common characteristic (i.e. of a class) any general words that follow should be construed as referring generally to that class; no wider construction should be afforded. This therefore means that "other person" in the definition of merger should be interpreted to refer to the class of "competitors, suppliers or customer". Thus, from the definition of merger, Parliament intended to create a category of persons whose economic activities within Zimbabwe needed to be examined to ensure that the principles relating to fair competition enunciated in the legislation were met. In other words, the need to notify a merger is because the policy behind the legislation is to bring about a situation whereby the Commission can look at the merger between competitors, suppliers, customers and similar persons to determine whether or not the merger will affect the balance of economic activity within Zimbabwe. The definition of merger in the ZCA as applied by the Commission therefore does not cover conglomerate mergers, unless such mergers have horizontal and/or vertical elements.

It also does not include joint ventures resulting in the establishment of 'green field' enterprises and the general provision under Section 2 (c) cannot justify the omission of a specific provision to cover for such mergers. This shortcoming should also be rectified for the betterment of competition enforcement on mergers and acquisitions aspect in Zimbabwe.

At inception in 1998, Zimbabwe had a voluntary notification whereby the parties were not prevented from closing a merger deal and implementing the transaction in advance of having applied for and received merger clearance from the Commission.

Today, Section 34 of the ZCA provides for a pre-merger notification regime (introduced by the Competition Amendment Act of 2001) which requires mergers with values at or above a prescribed threshold (currently \$1 200 000 of the combined annual turnover or assets in Zimbabwe of the merging parties).

ZCA also provides for the payment of a merger notification fee (currently 0.5 per cent of the combined annual turnover or combined value of assets in Zimbabwe of the merging parties). Stakeholders have expressed grievance that the manner with which the fees is calculated, particularly on holding companies, involves assets of unrelated business, hence attracting exorbitant fees. As a result of that the proposed transaction had to be restructured. This has since been rectified by introducing turnover bands; the fixed per centum remains but with ceilings, that is, minimum of \$10 000 and maximum of \$50 000.

Furthermore, the provision does not clearly provide which among the merging parties (Acquiring or Target firms) is responsible for notifying the CTC of the intended merger transaction. Although a minor omission, its rectification may sharpen the provision and lead to better compliance of the ZCA.

Reading of Section 34A of the ZCA together with Statutory Instrument 270 of 2002 particularly Section 5 on "Determination of Notification" which provides that "on receipt of a notification of a proposed merger, in terms of subsection (1) of section 34A of the Act, the Commission shall, as soon as practicable, consider the proposed merger". These provisions show that the ZCA does not provide for binding deadline for the CTC to assess a merger.

Such an open ended phrase “as soon as practicable” may cause long delays to the notifying parties given that the parties to a merger have a legitimate interest to know how long the merger control procedure will last. This is a major shortcoming that should be rectified for the betterment of competition enforcement on mergers and acquisitions aspect in Zimbabwe.

In practice most merger control regimes are based on similar underlying principle of prohibiting the creation or strengthening of a dominant position which would result in either substantial lessening of effective competition or resulting to significant impediment to effective competition in a particular relevant market. The merger test is usually crafted to prohibit those mergers that either create or strengthen a position of dominance in a relevant market.

The ZCA has attempted to provide for this test in Section 32 (1) that “... In determining, for the purposes of section thirty-one, whether or not any restrictive practice, merger or monopoly situation is or will be contrary to the public interest ...” and Section 32 (4) “the Commission shall regard a merger as contrary to the public interest if the Commission is satisfied that the merger:

- (a) has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe; or
- (b) has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest”.

The Section 32 (1) prohibits mergers which are contrary to public interest; Section 32 (4) impliedly defines public interest particularly Section 32 (4) (b) which covers both creation and strengthening of dominance in the market. It can be observed that the prohibition is scattered in Sections 2, 32 (1), 32 (4) and 34 of the ZCA, makes the interpretation of the ZCA in so far as prohibited mergers is concerned a complicated undertaking. To make it simple, the prohibition of mergers would directly and categorically target the creation and strengthening of position of dominance/monopoly situation.

If it appears that the merger is likely to substantially prevent or lessen competition in Zimbabwe or any part of Zimbabwe, the Commission then

determines whether the merger is likely to result in any technological efficiency or other pro-competitive gain which would be greater than and offset the effects of any prevention or lessening of competition that may result or likely result from the merger, and would not likely be obtained if the merger is prevented.

The pro-competitive gains include economies of scale or other reason resulting into or are likely to result in a more efficient use of resources in any business, trade or industry, necessary for the production, supply or distribution of any commodity or service in Zimbabwe.

Failure to notify a notifiable merger attracts a penalty of up to 10 per cent of either or both of the merging parties’ annual turnovers in Zimbabwe. There are no provisions to provide for a procedure to handle a breach of merger condition as it may be ordered under Section 31 (2) (e). Invariably there is no provision to sanction such breach in the ZCA. Section 33 of the ZCA attempts to provide for this, by allowing for the registration of the CTC orders for enforcement purposes and the penalty for failure to comply with such orders. Whilst Section 33 (2) provides that once registered, the order of the CTC has the effect of a civil judgment, the same Section under Subsection (7) goes on to prescribe a criminal penalty for failure to comply with any provision of the order, thus derailing its potency. This is an anomaly that needs to be addressed.

Penalties associated with breach of merger provisions (failure to notify a notifiable merger) as provided in Section 34 A (4) are too wide (1 – 10 per cent of either or both of the merging parties) hence giving room for exercise of greater discretion than prudence would demand. The lower limit should have been elevated especially considering the gravity of the offences as provided in Section 34 A (3) (a) and (b).

2.4 Consumer Protection/Unfair Competition Issues

Consumer protection laws are designed to ensure existence of fair competition and the free flow of truthful information in the marketplace. The laws are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may provide additional protection for the weak and those unable

to take care of themselves. It is a law that regulates private relationships between individual consumers and businesses that sell those goods and services (Antle¹⁸⁷, 1995).

The preamble of the ZCA provides for "... the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing ...". Although there is no specific mention of consumer protection in the preamble, but it is common knowledge that the ultimate objective of competition law and policy is promotion and protection of consumer welfare through control of anticompetitive practices. It may also be construed that the consumer related provisions in the ZCA came about through the last part of the preamble "... and to provide for matters connected with or incidental to the foregoing ..."

Consumer protection covers a wide range of topics, including but not necessarily limited to product liability, privacy rights, unfair business practices, fraud, misrepresentation, and other consumer/business interactions. Consumer protection laws are therefore a form of government instrument aimed at protecting the eight acclaimed universally accepted consumer rights.

The ZCA does not have a specific Part devoted to consumer protection. It however has a number of Sections on consumer welfare and protection that are scattered in various Parts of the ZCA. These include three unfair business practices as follows:

- (i) misleading advertising,
- (ii) false bargains, and
- (iii) distribution of commodities or services above advertised price.

Almost all consumer protection related provisions in other Parts of the ZCA are definitional, factors to be considered in issuing orders and are basically related to pricing of goods and services. These include the following:

- (a) in the definition of 'restrictive practice', one of the effects that determines an anticompetitive practice is the "enhancing or maintaining the price of any commodity or service "as provided under Section 2;

- (b) orders made by the Commission against restrictive practices include:
 - (i) requiring the offender to publish lists of prices, or otherwise notify prices; as provided under Section 31 (1) (c);
 - (ii) regulating the price which the offender may charge for any commodity or service as provided under Section 31 (1) (d);
- (c) factors considered by the Commission when making orders include the promotion of "the interests of consumers, purchasers and other users of commodities and services ... in regard to the prices, quality and variety of such commodities and services" provided under Section 32 (1) (b);
- (d) the Commission does not regard a restrictive practice as contrary to the public interest if:
 - (iii) that restrictive practice is reasonably necessary, having regard to the character of the commodity or service to which it applies, to protect consumers or users of the commodity or service, or the general public, against injury or harm Section 32 (2) (a);
 - (iv) the termination of the restrictive practice would deny to consumers or users of the commodity or service to which the restrictive practice applies, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them Section 32 (2) (b).

In practice, among the three unfair competition issues, it is only misleading advertising that has been dealt with by the CTC. There are 10 cases that have been disposed between 1999 and 2010; provisions for the two other issues have not been put to test.

Currently, the Ministry of Industry and Commerce is in the process of enacting a substantive consumer protection law for Zimbabwe. The proposed Consumer Protection Bill will soon be discussed by a wider set of stakeholders to allow for collection of their views on the proposed bill with a view to improve on the provisions. Two stakeholders interviewed on the subject who have happened to see the proposed bill have indicated that the Consumer Protection Law will be administered by a body to be established by itself and not the competition

authority. Shall that be the case; these consumers relate provision will be out of place in the ZCA.

Zimbabwe had a consumer watchdog, the Consumer Council of Zimbabwe (CCZ) established in 1975 way before the Competition Act enacted. According to the interviewed officials at the CCZ; the Council is currently registered under the Registrar Societies, but it is lobbying for its establishment under the new Consumer Protection Law which would give them more powers in executing their mandate. CCZ receives funding from the Government.

Objectives of the CCZ include protecting consumers, protecting manufacturing standards, improvement of consumer awareness through education and settlement of disputes between consumers and suppliers.

Regarding their functions, CCZ prepares and disseminate “monthly basket” that provide for prices of selected goods and services, an exercise that aims at monitoring prices in urban areas. CCZ also conduct research and disseminate relevant information to the public among other duties. In the overall, its functions entail educating the consumers to understand their rights and obligations so that they have a degree of self protection and are in a position to influence the government and lawmakers in a bid to ensure that they make policy and laws that protect them.

Consumer Specific Laws in Zimbabwe include the Mass Action Act of 1992 which makes provision for consumers to jointly seek legal redress, Small Claims Court Act which is mostly accessible to low income groups who cannot afford to pay for legal fees in ordinary Courts, Consumer Contract Act of 1994 which protects consumers against unfair contracts, Health Professions Act, Food and Food Standards Act, Competition Act of 1996 as amended in 2001 which encourages and promotes competition in all sectors of the economy and the Patients Charter which seeks to create an environment of mutual understanding, participation and humane treatment of patients.

According to CCZ officials, most of the legislation came about as part of their effort in championing for the protection of Zimbabwe consumer.

2.5 Price Control

This function was introduced to the CTC in 2001 by the Competition Amendments Act. During the course of its insertion, there was a debate as to how it should be done so as ensure the CTC is not statutorily empowered to either prescribe or fix prices in the market. The compromise text is as provided in Section (5) (h) of the ZCA that the CTC shall “monitor prices, costs, and profits in any industry or business that the Minister directs the Commission to monitor, and to report its findings to the Minister”.

Despite being provided for in the ZCA, this function has never been done as there has never been any Ministerial Directive to the CTC to execute such an activity for the past ten years. This is a good reason to drop it from the ZCA because it really isn’t a common feature to be dealt with regularly in the manner it is prescribed. It can be dealt with indirectly through the core competition provisions. Similarly, it should not be construed that CTC is empowered to set prices in its orders regarding restrictive business practices according to Section 31 (1) of the ZCA.

3.0 INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

3.1 Competition Policy Institutions

3.1.1 *The Competition and Tariff Commission*

CTC is established by Section 4 of the ZCA, Commission shall consist of not fewer than five and not more than ten members appointed by the President (under Section 6) for a period not exceeding three (3) years (under Section 8). Section 11 throws in, a controversy by providing that the Minister may appoint a member to constitute a quorum; in the event of death or vacation of office by a member, if such a scenario would affect a quorum (a condition precedent). The process preceding the appointment is not elaborated in the ZCA. More controversy is observed when the Minister may suspend or require a member to vacate office

(under Section 9); basically having the powers to fire whereas the Minister is not the hiring authority.

The general impression from experience according to interviewed stakeholders is that the Minister appoints the Commissioners. This is said to have come from the unwritten version of Section 6 of the ZCA that “the Minister in consultation with the President shall appoint the Commissioners” this provision is neither in the 1996 nor in the Amendment Act of 2001. According to Section 6 (1) of the Zimbabwean Competition Act (“ZCA”), members of the Commission are appointed by the President, whereas Section 6 (2) stipulates that the Minister in consultation with the President shall ensure that all interested groups and classes of persons, including consumers are being represented on the Commission. As such, the wording of Section 6 is unclear as to who is the appointing authority. The anomaly in section 6(2) on the appointment of Commissioners came about after the amendment of the ZCA by the Competition Amendment Act No. 29 of 2001 (2001 Amendment). Prior to the amendment, both subsections (1) and (2) to section 6 referred to the President as the appointing authority. In line with that legal position, the letters of appointment for the Commissioners who were appointed during that period stated that “... His Excellency the President has appointed you Commissioner...” and were signed by the relevant Minister. After the amendment, subsection (1) retained the President as the appointing authority whilst subsection (2) was amended to provide for the “Minister in consultation with the President” selects the persons for appointment as Commissioners. Following that amendment, the Commissioners’ appointment letters signed by the relevant Minister stated that “... I have, with the concurrence of His Excellency the President of the Republic of Zimbabwe, appointed you Commissioner ...”. The practice is therefore contrary to what is provided in the relevant section leading to the assumption that the 2001 Amendment Act intended to amend both subsections (1) and (2) to section 6 to have the Minister as the appointing authority after consultation with the President, but due to a possible omission by the drafters this was not captured in the resultant law. It is therefore strongly recommended to bring the wording of Section 6 ZCA in line with the legislative intention as stated above. The current wording of Section 6 ZCA is an anomaly that needs to be looked into as a matter

of priority, as it goes to the root of existence of the Commission and properness of its constitution; which may in turn have consequential bearing on implications of decisions done by the Commissioners.

Furthermore, the appointment duration of three years is deemed too short for a part time Commissioner to learn and master the subject so as to be able to serve in the manner and way they are expected. Adding to the shortcoming is the fact that the Commissioners are not undergoing any competitive section to at least ensure that they have interest in serving as Commissioners let alone having the requisite knowledge to make decisions from the time they are engaged. The other shortcoming on Section 8 is the indirect silence on staggering membership of the Commissioners based on the short duration explained earlier. Interviews with stakeholders have shown that there has been a scenario in the past, within which the Board had three Commissioners whose conduct (non-participatory presence and/or absenteeism) showed that they had no interest in serving as Commissioners.

Without prejudice to the status quo, the ideal situation would be for the Minister to appoint members, following an independent competitive process which shall produce a list of qualified candidates from which the Minister can appoint. The President may be left to appoint the Chairman; on the other hand the powers to remove members should be vested upon the President alone.

This shall not rob the Ministerial appointment powers, but shall ensure more transparency and recruitment of suitable persona to the Board as compared to how the current system does. The terms should also be elongated to between 5 to 7 years staggered among the members so as to ensure that the institutional memory is statutorily sustained among the same Board and carried over to the successive Boards. The powers to remove members shall also have been statutorily put on check to provide for more versatility in decision making at the Commission.

Regarding independency, Section 5 (3) provides that in the lawful exercise of its functions under this ZCA the Commission shall not be subject to the direction or control of any other person or authority. This is a provision that gives statutory independency particularly in decision making, but this

independency is silently withdrawn by Section 18 that the Minister may give the Commission such general directions relating to the policy the Commission is to observe in the exercise of its functions as the Minister considers being necessary in the national interest.

Ironically, national interest have not been defined, and in the general context within which they are mentioned, they pose a huge potential for interferences with the independency provided for in Section 5(3) notwithstanding the caveats prescribed in Section 18 (2) especially considering the manner the Commission is supposed to act to such policy directions as provided in Section 18 (3) that the Commission shall take all necessary steps to comply with any direction given to it by the Minister.

With regard to validity of decisions and acts of Commission and committees as provided under Section 19 that “No decision or act of the Commission or a committee and no act that is authorized by the Commission or a committee shall be invalid solely because there was a vacancy in the membership of the Commission or the committee or because a disqualified person purported to act as a member of the Commission or the committee, as the case may be, at the time the decision was taken or the act was done or authorized.

This provision can be construed to defeat the purpose of appointment of members as provided under Section 6 and validity of meetings where decisions are made (regarding quorum) as provided under Section 13 (6) thus being contrary to principles of good regulation that ensures due process in delivery of competition justice.

3.1.2 The Directorate of the CTC

The organigram of the CTC as supported by the ZCA provides for the Board of Commissioners as the oversight Board which works supervises the Secretariat/Directorate which is led by a director as appointed under Section 17 (1) and Assistant Directors under Section 17 (6).

The internal structure of the directorate is deemed to be ideal given the prevailing conditions that CTC also deal with Tariff as another core mandate, thus having a division of its own. The structure caters for fully-fledged competition division that may be subdivided into narrow thematic areas such as

mergers and cartels as the law develops overtime. Staff recruitment has also been done to complement the dichotomy of law and economics ideal for a competition authority.

Problems lie with the relative inexperience of most staff and the lack of specialized training on competition as shall be discussed later in the subsequent subtopics.

3.2 Sources of Competition Cases

Statutorily, CTC’s major sources of competition cases are (i) complaints from the business community and the general public (ii) concerns learnt from the media (iii) issues identified from the sectoral studies (iv) ministerial instructions from the government (v) referrals from sector regulators.

These are conventional ways for which competition authorities globally employ in identifying issues to be dealt with by competition law. Handling of the complaints is as provided hereunder.

3.2.1 Handling of Competition Complaints at CTC

CTC’s directorate undertakes preliminary investigation into the allegation in order to identify and assess the nature of competition issue so as to establish a *prima facie* case for a full-scale investigation under Section 28 of the ZCA. The investigations undertaken involve information gathering and interviews with major stakeholders (competitors, customers, suppliers, policymakers, etc.) and analysis of the information gathered. Draft reports (with appropriate recommendations) on the preliminary investigations undertaken are thoroughly considered and debated by the Directorate’s Operations Committee before they are submitted to the relevant Committee of the Commission¹⁸⁸ and ultimately to the full Commission for determination.

According to CTC reports, there are four committees formed, Audit & Administration Committee, Mergers & Restrictive Practices Committee, Tariffs Committee and the Legal & Enforcement Committee. The committees would basically sit to deliberate and sharpen recommendations emanating from Directorate’s Operations Committee in the spirit of bettering the exercise of CTC’s function as provided under Section 14 (1).

Full scale investigation is usually a follow up of establishment of a *prima facie* by investigators as defined by Section 46 of the ZCA to include (i) employees of the CTC (ii) member of public service subject to the approval of Public Service Commission¹⁸⁹. Records show that so far, the CTC has not designated any member of public service as an investigator. As a general rule, cases involving unfair business practices and those involving other serious abuse of monopoly situation (dominant position) proceed to the full-scale investigation stage. Some cases are closed under Section 30 of the ZCA following negotiations on the discontinuation or termination of the identified anticompetitive practices. Only a few cases are presently proceeding to the full-scale investigation stage requiring public notices¹⁹⁰ and public or stakeholder hearings because of their serious effect on competition in Zimbabwe. A number of cases are dropped at the preliminary investigations stage for various reasons, such as lack of evidence to support the allegations made, unfounded allegations or alleged practices not in breach of the ZCA using the *de minimus* rule.

3.2.2 Handling of Mergers

The examination of mergers and acquisitions is more elaborate. Merger application forms have to be filled by the merging parties. The forms request information on all aspects of the merger transaction, including: (i) financial information on the merging parties; (ii) details of the ownership and control of the merging parties; (iii) timing, plans and motives of the merger; and (iv) details of markets involved. Additional information is obtained from submissions and interviews with the relevant stakeholders. Other competition authorities are also consulted on their similar experiences. Where necessary, consumer surveys on the relevant market are undertaken. In cases involving mergers of industrial concerns, factory visits are made to the merging parties' premises.

3.3 Investigative Powers

Section 28 of the ZCA empowers the CTC to make such investigation into any restrictive practice which the Commission has reason to believe exists or may come into existence, as well as in order to ascertain whether any merger has been, is being or is proposed to be made, the nature and extent

of any controlling interest that is held or may be acquired in any merger or proposed merger.

It may also investigate into any type of business agreement, arrangement, understanding or method of trading which, in the opinion of the Commission, is being or may be adopted for the purpose of or in connection with the creation or maintenance of a restrictive practice. Investigations may also be conducted in relation to any monopoly situation which the Commission has reason to believe exists or may come into existence.

In the course of investigation the Commission may, conduct preliminary investigation without notice in accordance to Section 47. Where the Commission deems necessary that a full investigation should be conducted, the law requires that a notice is published in the *Government Gazette* and in National Newspapers circulating in the area covered by the investigation, stating the nature of the proposed investigation, inviting interested parties to submit written representations within two weeks¹⁹¹ period after the notice and publication.

All representations sent by stakeholders are analysed by the directorate responsible for competition at CTC for use by the Board of Commissioners; a date is set for the full-scale hearings considering the issue of giving enough time for the respondents and having confirmed a quorum of Commissioners. Ideally the entire Board of Commissioners should be present; the hearings can only take place if at least five members (Commissioners) are present. The proceedings are open and the press is usually present. The full Commission is expected to be at the full-scale hearings and when making decisions on any matter.

In conducting the investigation the Commission ensures that the rules commonly known as the rules of natural justice are duly observed and, in particular, takes all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given an adequate opportunity to make representations in the matter. The Commission's powers of investigation are specified in Sections 28, 45 and 47 ZCA. Given their relevance, they are reproduced at length below:

"28. (1) Subject to this Act, the Commission may make such investigation as it considers necessary –

- (a) into any restrictive practice which the Commission has reason to believe exists or may come into existence;
- (b) in order to ascertain –
 - (i) whether any merger has been, is being or is proposed to be made;
 - (ii) the nature and extent of any controlling interest that is held or may be acquired in any merger or proposed merger.
- (c) into any type of business agreement, arrangement, understanding or method of trading which, in the opinion of the Commission, is being or may be adopted for the purpose of or in connection with the creation or maintenance of a restrictive practice;
- (d) into any monopoly situation which the Commission has reason to believe exists or may come into existence.

(1a) For the purposes of subsection (1) the Commission may, through its investigation officers, make a preliminary investigation without notice, and section forty-seven shall apply to such preliminary investigation.

(2) If the Commission considers an investigation to be necessary, whether or not after a preliminary investigation in terms of subsection (1a), the Commission shall publish a notice in the Gazette and in such newspaper circulating in the area covered by the investigation as the Commission thinks appropriate –

- (a) stating the nature of the proposed investigation; and
- (b) calling upon any interested person who wishes to do so to submit written representations to the Commission in regard to the subject-matter of the proposed investigation.

For the purposes of an investigation under this section, the Commission shall have the powers that are conferred upon a commissioner by the Commissions of Inquiry Act [Chapter 10:07], other than the power to order a person to be detained in custody, and subsection (3) of section 2 and sections 9 to 12 and 14 to 18 of that Act shall apply, mutatis mutandis, in relation to an investigation under this section and to any person summoned to give or giving evidence at that investigation.

..."

"45. (1) Subject to subsection (3), for the purpose of investigating and detecting restrictive practices and monopoly situations, the Commission may serve a written notice to any person engaged in any business or industry requiring him to furnish the Commission within such reasonable period or at such reasonable intervals as the Commission may specify in the notice, with information regarding his business or operations, including information as to –

- (a) any business agreement which he may at any time have entered into with any other person, or which he may at any time have been concerned; and
- (b) any arrangement or understanding to which he or his business or industry may at any time have been a party; and
- (c) any interest which he or his business or industry may at any time have acquired in any other business, undertaking or asset.

(2) Any person who, when required to furnish the Commission with information under subsection (1) –

- (a) fails or refuses to do so; or
- (b) furnishes the Commission with information which he knows to be false, or does not believe on reasonable grounds to be true;

shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

(3) Nothing in this section shall be construed as requiring any person to disclose information that he could not be required to disclose when giving evidence in a court of law.

..."

"47. (1) Subject to subsection (2), an investigating officer may at all reasonable times –

- (a) enter any premises in or on which there is reasonably suspected to be any book, record or document relating to any restrictive practice or unfair business practice or any actual or potential merger or monopoly situation; and
- (b) require any person upon the premises –
 - (i) to disclose all information at his disposal; and

- (ii) to produce any book, record or document or copy thereof or extract therefrom;
 - (c) make copies of or take extracts from any book, record or document referred to in paragraph (b).
- (2) The powers of entry and inspection conferred by subsection (1) shall not be exercised except with the consent of the owner or person in charge of the premises concerned, or where there are reasonable grounds for believing that it is necessary to exercise them for the prevention, investigation or detection of an offence, other than an offence in terms of subsection (2) of section forty-five, or for the obtaining of evidence relating to such an offence.
- (3) Any person who, without lawful excuse –
- (a) hinders or prevents an investigating officer from exercising any power under subsection (1); or
 - (b) fails or refuses to comply with any requirement of an investigating officer under subsection (1); or
 - (c) upon being required under subsection (1) to disclose any information, fails or refuses to do so or provides information that is false or which he does not believe on reasonable grounds to be true;

shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding six months to both such a fine and such imprisonment.”

A close scrutiny of the provisions of section 47(2) of the ZCA as quoted above shows that even though section 47(2) of the Act has provisions that the “powers of entry and inspection should not be exercised except with the consent of the owner or person in charge of the premises”, the Commission may still exercise the powers of entry and inspection without the consent of the owner or person in charge of the premises “where there are reasonable grounds for believing that it is necessary to exercise them for the prevention, investigation or detection of an offence” or “for the obtaining of evidence relating to such an offence”.

The Commission therefore does have powers under the Act to conduct effective dawn raids, even though those powers have still not been used. It is, however,

observed that the ZCA does not provide for leniency programme for which cartelists would voluntarily provide information to the CTC regarding collusive/ concerted and other anticompetitive behaviours in the markets. These shortcomings are a potential for substantial lessening of CTC’s ability to effectively investigate complex anticompetitive behaviours that require rectification as a matter of priority.

Section 29 (1) of the ZCA gives the Commission wide powers to stay restrictive practices or mergers, pending the completion of its investigation. The section makes it a criminal offence to contravene or fail to comply with the provisions of a notice made in terms of Section 29 (1). Such contravention or failure attracts a fine or imprisonment or both such fine and imprisonment.

3.4 Separation of Investigative and Adjudicative Powers

The genesis of this controversy is the fact that the CTC is vested with powers to investigate, prosecute and determine matters that fall within its jurisdiction. In the Zimbabwean justice system which is based on Commonwealth practice these functions are supposed to be separated so as to conform to principles of natural justice.

The CTC has been in existence for over ten years, during which there haven’t been neither legal challenge nor complaint leveled against CTC in the course of carrying out its functions in the manner prescribed above. As such none of the interviewed stakeholders raised the issue, but it is of concern to the staff and Commissioners of the CTC that it may only be a matter of time before it is challenged in Courts of law.

In addressing the issue of separation of powers, two systems are compared so as to appreciate the diversity in ways and means of dispensation of justice as applied in different jurisdictions.

3.4.1 Adversarial System

It is a system whereby, the parties to a controversy develop and present their arguments, gather and submit evidence, call and question witnesses, and, within the confines of certain rules, control the process. The fact finder, usually a judge or jury, remains neutral and passive throughout the proceeding.¹⁹²

3.4.2 Inquisitorial System

A method of legal practice in which the judge endeavours to discover facts while simultaneously representing the interests of the State in a trial or inquisitorial means a detailed examination or investigation, formerly the tribunal for suppressing heresy. It is also known as accusatorial procedure. It commonly applied in continental Europe jurisdictions.

3.4.3 Comparative Analysis of the Adversarial System and Inquisitorial Systems¹⁹³

In the Adversarial system, two or more opposing parties gather evidence and present the evidence, and their arguments, to a judge or jury. The judge or jury knows nothing of the litigation until the parties present their cases to the decision maker. The defendant in a criminal trial is not required to testify.

In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. The judge actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Attorneys play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. Attorney questioning is often brief because the judge tries to ask all relevant questions.

The goal of both the adversarial system and the inquisitorial system is to find the truth. The adversarial system seeks the truth by pitting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute.

CTC as an administrative agency is established to administer the ZCA with a view to promoting its compliance. As per definition, compliance means an act or process of complying with official requirements and recommendations or is either a state of being in accordance with established guidelines, specifications, or legislation or the process of becoming so.¹⁹⁴ Compliance is usually complemented by enforcement, which refers to the act or process of compelling compliance with

a law, mandate, command, decree or agreement. It also refers to giving force or effect to a law or to compel its obedience.¹⁹⁵ In the process, CTC is statutorily empowered to investigate and determine a matter in the course of ensuring compliance is attained.

Based on the foregoing, it is therefore sound to say that law enforcement broadly refers to any system by which some members of society act in an organized manner to promote adherence to the law by discovering and punishing persons who violate the rules and norms governing that society.

The preamble and Sections 4, 5, 6, 5 and 28 of the ZCA, can be construed that CTC is a regulatory body established to administer the ZCA and to encourage and promote competition and to enforce compliance with the ZCA. It is a body corporate with powers to investigate complaints and in cause of the investigation can hear interested parties and make decisions with the objective of promoting and enforce compliance with the ZCA.

The very purpose of establishment of CTC is to have a Regulatory Body to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices in the economy of Zimbabwe. All the foregoing boils down to promotion and maintenance of competition through enforcement of compliance with ZCA in all sectors of the economy and that in the course of doing so they may inquire on matters falling under the ZCA. It is apparent that the enforcement power of CTC extends only so far as contravention of ZCA is concerned and not anything beyond.

Considering the meaning of competition, establishment of the CTC, functions of the Commission, appointment of members as well as power to initiate complaints and enforce compliance with the ZCA; the Commission may investigate impediments to competition, a function that Courts of Law in Zimbabwe do not perform.

CTC should hence, not be compared to a Court of Law¹⁹⁶ as the two are not the same; that unlike a Court, whenever CTC conducts an investigation or a hearing of a complaint leading to a decision it does so in its capacity as a regulator and in pursuance of its functions of administering the ZCA and enforcing compliance with the ZCA.

The fact that CTC has a competition division with powers to investigate complaints and that during hearing of a complaint, CTC accords the offender an opportunity to make his case heard; the practice at CTC is more inclined to an inquisitorial system. The hearing is part of the investigation procedure that follows after the preliminary investigation is complete; it means that **unlike** in a trial the Court, the CTC continues its investigation right up to the hearing. The corollary is, that the hearing itself is nothing but part of the investigation procedure.

In establishing administrative agencies, the Parliament passes enabling legislation specifying the purpose, name, functions, and powers of the agency (Sections 1, 5 of the ZCA). It further describes the procedures of the agency for handling issues submitted (Section 28 of the ZCA) and provides for judicial review of agency orders (Section 33, 40 of the ZCA). It is under the enabling legislation (the ZCA) that the Rulemaking power of the agency is described (Section 50 of the ZCA). As a general rule, an agency lacks the power to act beyond the scope of its enabling legislation (Doctrine of *Ultra vires*). The ZCA is unlikely to bring about any issues that relate natural justice breach in so far as separation of powers; as such ZCA is mindful of natural justice principle as it is asserted in Section 28 (4). To avert fears and speculation, the ZCA may provide that it shall adopt an inquisitorial approach in its case handling procedure, so as to sharpen its differentiation from the commonly known adversarial practice.

Shall there be a need of having an adversarial practice, which observes strict separation of investigative and adjudicative functions; then the best institutional arrangement would be that, there are three distinct institutions. One for investigation, one for adjudication and another for appeals, like it is the case in South Africa. However, this would be costly to the Zimbabwean economy and difficult to attain given the low level of competition practice currently observed.

3.5 Sanctions

Enforcement of compliance is usually criminal in nature. The ZCA provides that, "Any person who contravenes Section ... shall be guilty of an offence and liable to a fine not exceeding level ... or to imprisonment for a period not exceeding ... months/

years or to both such fine and such imprisonment." Competition violations are hence criminal in their nature, the only difference with penal sanctions being that the accused in competition cases is often a legal person, i.e. the enterprise and not a natural person.

The ZCA does not categorically provide for the procedure to be followed when a person (who is not defined by ZCA) is to be committed to prison. Responses from interviewed stakeholders show that there has not been any person who has been imprisoned for infraction of the ZCA, hence no experience in implementing these provisions.

The style for which the offences are created and sanctions are levied in the same provision is good as it reduces the hassle of going back and forth to match an offence with penalties as provided in competition laws of other jurisdictions. However, the provisions on fines are provided for under the First Schedule to the Criminal Law (Codification and Reform) Act [Chapter 9:23]; this Act provides for levels which are pre-determined and administered by a different authority thus, the CTC is not party to this decision.

There is a possibility for a mismatch of gravity of offences between competition and other offences that may make the ZCA less deterrent as is supposed. The maximum is level 14 which carries a fine of up to \$5,000 which is comparatively too low as compared to the harm caused by offences such as cartels.

The ideal situation would be to de-link ZCA offences from the (Codification and Reform) Act provisions and allow ZCA to independently provide for penalties so as to ensure offences are accorded commensurate penalties. This will not only ensure deterrence, but also bring about consistency because offences for mergers in the same ZCA are penalized by fines not exceeding ten per centum of either or both merging parties' annual turnover in Zimbabwe.

Interviews with the legal drafting section at the Attorney Generals' office showed that they were indifferent about the issue, citing that the rationale was to create uniformity across the jurisdiction in so far as fines are concerned, adding further that there have not been any problems with its application. Nevertheless, the idea of improving the law was welcomed.

3.6 Role of the Courts

Section 33 provides for enforcement of the orders of the Commission by the High Court or Magistrates' Courts; it also provides for the procedure on how the transfer of orders of the Commission to the respective Courts for enforcement should be done.

Section 33 provides that "The Commission or any person in whose favor or for whose benefit an order has been made may lodge a copy of the order, certified by the Director or a person authorized by the Director, with:

- (a) the Registrar of the High Court; or
- (b) the clerk of any magistrates court which would have had jurisdiction to make the order had the matter been determined by it; and the Registrar or clerk shall forthwith record the order as a judgment of the High Court or the magistrates court, as the case may be.

An order that has been recorded under the subsection shall, **for the purposes of enforcement**, have the effect of a civil judgment of the High Court or the magistrates court concerned, as the case may be".

ZCA also acknowledge the judicial review powers of the High Court as provided in Section 33 (3) (a) of the ZCA that if an order that has been recorded is varied or set aside by the High Court on review ... the Registrar of the High Court or clerk of the magistrates court concerned, as the case may be, shall make the appropriate adjustment in his records.

The Administrative Court where appeals against decisions of the CTC lie is also part of the Courts in the Zimbabwean jurisdiction.

The existence of parallel appeals to the High Court and the Administrative Court opens up a potential for serious conflicts in practice, in particular if judicial review use different standards as compared to Administrative Court hence diverging verdicts.

There has been some case emanating from decisions of the CTC that has been lodged at the High Court by way of judicial review. The CTC has been challenged on the Blanket Mine, Total Zimbabwe/Mobil Oil merger, the Cimas Dialysis cases. Recently, CTC was challenged in the Zimbabwe Electricity Supply Authority (ZESA) case which was eventually

appealed against to the Supreme Court. The case was however not heard on merits but rather technicalities. It was about abuse of monopoly.

According to the President of the Administrative Court, there are two cases lodged that emanate from CTC decisions; previously there was also one case that was dealt with by the Administrative Court. So far, there has not been any case that has been heard on merits of competition issues in both the High Court and the Administrative Court, making it difficult to evaluate the real rigor of the Courts with reference to handling of competition matters. That notwithstanding, looking at the jurisdiction of the Administrative Court, it is far from being a specialized body that can preserve the competition expertise presumed to have been embedded in the CTC decisions.

According to the President, the jurisdiction covers issues related to land, town planning, liquor etc. Furthermore, currently there is only one President who admitted to have not gained any competition related training in his career. The constitution of the Administrative Court (Section 41 of the ZCA) allows for sitting of two assessors (as judges of facts) who assist the President in determining competition cases; the decision remains the preserve of the President.

Given the nascence of competition culture, lack of formal competition training in curricula and limited jurisprudence in Zimbabwe; one can conclude that it will be difficult to have skilled assessors to assist the President in decision making, especially considering that the laws do not provide for foreign expertise in the context of assessors in so far as the Administrative Court is concerned. The same is for the High Court and Supreme Court; there is no training on competition done to neither judges nor technical staff in the judiciary. The ideal situation would be to establish a specialized tribunal to handle competition and related issues as is the case in the United Republic of Tanzania and recently introduced in Zambia. So as to provide the tribunal with sufficient appeals, matters emanating from the regulated sector authorities decisions should also be appealable at the tribunal. This may help in mobilizing sufficient political support for a standalone competition tribunal and defeat the argument that there is a low number of appeals to be handled hence unjustifiable. The tribunal should be manned by a full time secre-

tariat of technocrats, who would form the basis of decisions in terms of competition economics and law that goes with dispensation of competition justice. An alternative solution would be to limit the appeal to one jurisdiction, either High Court or Administrative Court and create a specialized competition chamber within the preferred Court.

3.7 Other Enforcement Methods

3.7.1 Compliance Agreements

The ZCA does not specifically for compliance agreements, but Section 30 provides that the Commission can at any time during the course of its investigations negotiate the termination or discontinuation of identified restrictive practices, anticompetitive mergers or monopoly situations. The relevant provisions of section 30 read as follows:

“(1) The Commission may at any time negotiate with any person with a view to making an arrangement which, in the Commission’s opinion, will –

(a) ensure the discontinuance of any restrictive practice which exists or may come into existence; or

(b) terminate, prevent or alter any merger or monopoly situation which exists or may come into existence; whether or not the Commission has embarked on an investigation into the restrictive practice, merger or monopoly situation concerned.

(2) Where the Commission has made an arrangement after negotiations under subsection (1), it may embody the arrangement in an order.

Pursuant to this provision, CTC has signed a Competition Compliance Programme and Agreement with Schweppes Zimbabwe Limited in May 2011, and with Delta Beverages in August 2011.

3.8 Agency Resources, Caseload, Priorities and Management

3.8.1 Agency Resources

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 (two) legal officers/counsels. Competition division is led by Assistant Director Competi-

tion together with 5 economists and 1 law officer, in total 7 staff are dedicated to competition. Tariff division is led by Assistant Director Tariff together with 4 economists; in total 5 staff are dedicated to tariff.

Records at CTC show that most of the current competition staff were relatively new to the Commission; 3 were hired in 2007 and 3 in 2011. The Assistant Director competition was hired in 2008. The only experienced competition expert is the Director who has been with the Commission since 1999. Among the operational staff, none has undergone competition training at University; internally there have not been any comprehensive training-in-house training of staff. At most members of staff and Commissioners have attended short trainings 2-3 days abroad. In this area, the CTC should consider mobilising resources and organized a tailor made training aimed at addressing knowledge and skills gaps for both the Commissioners and staff as identified.

According to the Director, there has been a high turnover of staff at the CTC mainly attributed to the economic turmoil the country has undergone since early 2000s; adding that in 2007/2008, CTC lost the entire competition division. Efforts to rebuild the division have been fruitful as evidenced by presence of the newly recruited staff; the challenge remaining for the CTC is to ensure their retention.

According to observations made from information collected at the CTC and its corroboration from interviewed stakeholders; the members of staff at CTC are paid salaries pegged on civil service scales. CTC has attempted within its limited resources to provide for non-salary benefits in a bid to raise its staff’s remuneration; nonetheless, the salaries remain generally low as compared to those paid to staff of the sectoral regulators¹⁹⁷. It was difficult to get hold of the documents for salary scales of the regulators as their release is guided by strict confidentiality rules; but according to alternative sources that the consultant could not independently verify, the average difference between scales of CTC and regulators could be estimated at 700 per cent.

A significant difference is also observed when comparing the salary scales at CTC and other competition authorities in within the Tripartite i.e.

the United Republic of Tanzania and Zambia. This scenario is highly capable of triggering staff turnover and other human resources problems, hence immediate prompt remedy is called for to normalize the situation especially considering the fact that the Zimbabwean economy is recovering and creating more demand for competition related interventions.

It was also learnt that CTC have attempted to raise pay of its staff, but the procedure is too bureaucratic that the Minister of Trade must consult the Minister of Finance for approval of pay rise for staff of the CTC. This not only robs the independence, given to CTC by ZCA in Section 3, but also demonstrates the myriad powers that Ministers have over CTC functions. The implication of such statutory provisions is that even in the event that CTC is adequately resourced financially it shall still have to struggle with approvals of the two Ministers.

There is limited use of ICT and electronic documentation of proceed and archives that may lead to avoidable delays in implementation of activities at the CTC. There is no website and just recently CTC have managed to establish its own domain of emails.

According to the interviewed staff, CTC does not have any department or section specifically dealing with ICT; the CTC has signed service contracts with ICT specialist. Once there is a justifiable demand for a full time person to manage ICT then the Commission will recruit one such person, adding that financial resources are also another limiting factor to having such facilities as prudence may require.

Regarding financial resources, the CTC has limited funds to carry out the broad mandate it has been statutorily given. Table 1 below shows that merger notification fees were a main source of income for the CTC followed by Trade Development Levy¹⁹⁸. CTC operates with a budget of less than a million \$dollars annually which is comparatively low as compared to its counterpart in the United Republic of Tanzania at equivalent of \$3.2 million. While an increase in the budget of the CTC is strongly recommended, it needs, however to be noted that comparing the CTC's budget directly with the competition authority of the United Republic of Tanzania might be misleading since unlike the latter, the Zimbabwean authority does not have ex-

tensive consumer protection functions, which take up a lot of resources.

Table 1: Commission's Income Source Since 2010

Source	2010 (Actual) (\$)	2011 (Actual) (\$)	2012 (Estimate) (\$)
Government Grant	114 154	210 405	319 000
Merger Notification Fees	154 986	267 402	368 450
Trade Development Levy	657 620	205 986	200 000
Investment Income	0	42 683	50 000
Sundry Income	1 211	5 492	-
Total	927 971	731 969	937 450

Source: CTC

As per section 23, CTC receives money from Parliamentary allocation, fees and other sources any other moneys that may vest in or accrue to the Commission, whether in terms of the ZCA or otherwise (emphasis by the author). This can be construed too broadly to even inflict sources inconsistent with the spirit and objectives of the ZCA; it needs to be limited to issues consistent to the ZCA.

There is evidence that regulatory authorities have excess money that emanate from their regulatory functions. Other jurisdictions (United Republic of Tanzania and Turkey) have statutorily provided in their competition laws that they shall receive funds from the regulated sectors authorities. These would be examples worth emulating so as to boost CTC coffers in a bid to have the competition frontier pushed forward in tandem with the regulated sectors. This reemphasizes the need to have the relationship with the regulated sectors well defined and provided for statutorily by both competition and sector regulator's laws.

3.8.2 Caseload

The CTC reports on cases that have been handled to mean all those that have been initiated irrespective of their closure. Table 2 below summarizes figures of competition matters handled over the years.¹⁹⁹

Table 2: Number of Competition Matters Handled During 1999 - 2010

Case Category	1999-2001	2002-2004	2005-2007	2008	2009	2010	Total
Restrictive Practices	58	61	54	14	15	18	220
Mergers and Acquisitions	24	78	81	16	9	14	222
Competition Studies	9	12	13	2	1	1	38
Totals	91	151	148	32	25	33	480

(CTC Annual Report, 2010)

Operationally, the same case officers handle restrictive practices, unfair business practices and merger control. There is no separation of duties as to cartel, abuse of dominance and merger control cases.

3.8.2.1 Restrictive Business Practices

Since the effective commencement of the Commission's operations in 1999, the Commission

has made decisions on a total of 100 competition cases involving restrictive and unfair business practices (inclusion of anticompetitive agreements, and abuse of dominance) from the Directorate's preliminary investigations. Of those decisions, 59 were made during the period 1999-2005, 29 during the period 2006-2009, and 12 during the period 2010-2011. Table 3 shows the Commission's decisions on restrictive business practices during the 1999-2011 period:

Table 3: Commission Decisions on Restrictive Business Practices During 1999-2011 Period

Period	Commission Decision
1999-2005	Of the 59 cases made decisions on during the period 1999-2005, 14 were closed for lack of competition concerns, 8 were closed for lack of serious competition concerns, 8 were closed for lack of evidence to substantiate the allegations, 12 proceeded to the full-scale investigation stage, 10 were closed following conclusion of consent agreements, 4 were closed on discontinuation of alleged restrictive practices, 1 was referred to the Attorney-General's Office for prosecution, and 2 were shelved pending the lifting of government price controls on the relevant products.
2006-2009	Of the 29 decisions made on restrictive and unfair business practices during the period 2006-2009, 6 were on the closure of the case for lack of evidence to substantiate the allegations, 5 were referred to the Attorney-General's Office for prosecution, 5 on closure of the case for lack of serious competition concerns, 4 on closure of the case on conclusion of consent agreements, 3 were on closure of the case for lack of competition concerns, 2 were on closure of the case for lack of jurisdiction, 1 was on closure of the case for discontinuation of the alleged restrictive practices, 1 was referred to other relevant authorities, and 1 was shelved pending lifting of government price controls on the relevant products.
2010-2011	Of the 12 decisions on restrictive and unfair business practices made during the period 2010-2011, 4 were on proceeding the case to the full-scale investigation stage, 3 were to close the case for lack of competition concerns, 2 were to close the case for lack of evidence to substantiate the allegations, 1 was to close the case following conclusion of a consent agreement, 1 was to refer the case to the Attorney-General's Office for prosecution, and 1 was to close the case for lack of jurisdiction.

The Table 4 below summarizes the number of Commission's decisions on restrictive business practices since 1999.

on the alleged anticompetitive practices, most of whom were related to collusive and cartel-like behaviour, highlighting the need for training in inves-

Table 4: Summarized Commission Decisions on Restrictive Business Practices During 1999-2011 Period

Commission Decision	No. of RBP Cases Decided Upon			Total	Percentage
	1999-2005	2006-2009	2010-2011		
Case closed for lack of competition concerns	14	3	3	20	20 per cent
Case closed for lack of serious competition concerns	8	5	0	13	13 per cent
Case closed for lack of evidence to substantiate the allegations	8	6	2	16	16 per cent
Case closed for lack of jurisdiction	0	1	1	3	3 per cent
Case proceed to full-scale investigation stage	12	2	4	18	18 per cent
Case closed on conclusion of consent agreements and signing of Undertakings	10	4	1	15	15 per cent
Case closed on discontinuation of alleged restrictive practices	4	1	0	5	5 per cent
Case referred to Attorney-General's Office for prosecution	1	5	1	7	7 per cent
Case referred to other relevant authorities	0	1	0	1	1 per cent
Case shelved pending lifting of government price controls on relevant products	2	1	0	3	3 per cent
Totals	59	29	12	100	100 per cent

A total of 18 cases decided upon from preliminary investigations (18 per cent of the total cases decided upon) proceeded to the full-scale investigation stage, requiring advertising in the *Government Gazette* and national newspapers and holding of public hearings.²⁰⁰ All the full-scale investigations were terminate with the Commission issuing remedial orders on the identified restrictive practices and/or making advocacy recommendations to the relevant government authorities.²⁰¹

Furthermore, the above Table shows that only 16 per cent of the cases were closed for lack of evidence to substantiate the allegations (this is nevertheless still a high percentage of case closure for lack of evidence

tigative techniques for officials of the Commission). Cases that were not definitely decided upon by the Commission were those closed for lack of jurisdiction (3 per cent), closed on discontinuation of the alleged restrictive practices (5 per cent), referred to other relevant authorities (1 per cent), and shelved pending the lifting of government price controls on the relevant products (3 per cent). The rest of the cases (72 per cent) were heard on merit by the Commission, and amply decided upon accordingly.

The following in Table 5 are statistics on the types of restrictive and unfair business practices that the Commission has addressed from its competition decisions during the period 2008-2011:

Table 5: Types of Restrictive and Unfair Business Practices Addressed During Period 2005-2010202

Restrictive/ Unfair Business Practice	2005	2006	2007	2008	2009	2010	Total
Abuse of dominance (monopolization)	4	6	3	2	5	5	25
Collusive and cartel-like behaviour	1	1	3	3	1	2	11
Misleading advertising	1	2	1	2	0	1	7
Vertical restraints	3	3	2	1	1	0	10
Unfair consumer practice (selling of inferior and sub-standard goods)	0	0	0	1	0	0	1
Totals	9	12	9	9	7	8	54

Regarding the handling of case of anticompetitive behavior, it should be pointed out that there are a number of success stories in the Commission's handling of competition cases. As found out in a study undertaken in 2008 on the impact of the implementation of competition policy and law in Zimbabwe²⁰³, the control and abolishment of restrictive business practices has had immense benefits of a socio-economic nature in the country. The Commission's competition intervention into various industries and sectors in Zimbabwe through the issuance of remedial orders and conclusion of Consent Agreements or Undertakings on restrictive business practices can be summarized as follows:

- horizontal restraints arising from collusive and cartel-like behaviour of a grossly anticompetitive nature were abolished in key and essential industries and sectors, such as the cement industry, the coal industry and the dry cleaning and laundry services sector;
- vertical restraints with substantial economic and efficiency benefits were however allowed, but under control, in other essential industries like the coal tar fuel industry;
- abusive practices of firms in dominant positions in consumer products industries such as the alcoholic beverages industry and the cigarette industry, as well as in utilities sectors such as electricity and telecommunications that directly affect the consumer, were brought to an end; and
- entry barriers were removed in industries such as the cement industry, the coal industry, the sugar industry, and the fertilizer industry, resulting in the introduction of new economic players and increased employment.

More recently, the Commission's intervention in the health insurance services sector, through its full-scale investigation into the abusive practices

by Cimas Medical Aid Society against liver dialysis patients, resulted in the issuance of remedial orders that not only strengthened competition in that sector but also had immense consumer protection benefits. Its intervention in the electricity services sector, through another full-scale investigation into abuse of monopoly position by the electricity utility, also got acclaims from the government, the business community, and the general public because its remedial orders had far-reaching positive implications of a socio-economic nature.

Despite these success stories, given the architecture of the law with regard to issues is considered to be Restrictive Practices in ZCA and the nature prohibitions associated to the anticompetitive restrictive practices, without prejudice to the sovereignty of CTC's decisions, it is logical to conclude that there is need a new law to properly provide for restrictive practices, identify and sharpen offences associates to such practices and prohibit the same commensurately.

Invariably, there arises an issue of concern as to what makes many cases be dropped after they have been initiated. Interview findings have shown that the inadequacies in the law and lack of proper competition knowledge at both the staff and Commission levels have contributed to such a scenario, hence the need for remedial action to such undesired state of affairs at CTC.

3.8.2.2 Merger control

The Commission has made determinations on a total of 137 mergers and acquisitions since it effectively commenced its operations in 1999. Of those, 71 transactions were determined during the period 1999-2005, 49 during the period 2006-2009, 16 during the period 2010-2011, and 1 already determined so far during the current 2012 year, as shown in Table 6 below:

Table 6: Commission's Merger Determinations From 1999 to Date

Merger Determination Period	Comments
1999-2005	Of the 71 mergers that were determined during the period 1999-2005, 52 were approved without any conditions, 11 were approved with some conditions ²⁰⁴ , 6 were not challenged ²⁰⁵ , and 2 were prohibited.
2006-2009	Of the 49 mergers and acquisitions that the Commission determined during the period 2006-2009, 33 were approved without any conditions, 11 were approved with some conditions, and 5 were not challenged.
2010-2011	Of the 16 mergers that were determined during the period 2010-2011, 11 were approved unconditionally, while the remaining 5 were approved with some conditions.
2012 to date	So far this year, the only merger that was determined by the Commission was approved without any conditions.

Source: CTC

Table 7 below summarizes the Commission's determinations of mergers and acquisitions since 1999.

Subsequent conditionally approved mergers also produced more or less similar economic benefits, e.g., the more recently the *Total Zimbabwe/Mobil*

Table 7: Summarized Commission Determinations on Mergers Since 1999

Commission Determination	No. of Merger Cases				Total	Percentage
	1999-2005	2006-2009	2010-2011	2012 (to date)		
Unconditional Approval	52	33	11	1	97	71 per cent
Conditional Approval	11	11	5	0	27	20 per cent
Not Challenged	6	5	0	0	11	8 per cent
Rejected/ Prohibited	2	0	0	0	2	1 per cent
Totals	71	49	16	1	137	100 per cent

The socio-economic impact of the Commission's merger control activities has also been notable. In the first study on the impact of the implementation of competition policy and law in Zimbabwe that was undertaken in 2006²⁰⁶, it was found that specific economic efficiencies that directly arose from the mergers that were conditionally approved by the Commission included the following:

- increased production efficiency and machine utilization (*Rothmans of Pall Mall/British American Tobacco merger, BP Zimbabwe/Castrol Zimbabwe merger, Zimboard Products/PG Bison Mauritius merger*);
- restoration of plant productivity (*Portland Holdings/Pretoria Portland Cement merger, Zimboard Products/PG Bison Mauritius merger*);
- procurement efficiencies from consolidation of requirements and leveraging advantage (*Rothmans of Pall Mall/British American Tobacco merger, Shashi Private Hospital/PSMI merger*);
- additional supply-chain efficiencies in product distribution (*Rothmans of Pall Mall/British American Tobacco merger*);
- increased competence and maintenance of market share through technical and commercial support (*Portland Holdings/Pretoria Portland Cement merger*);
- introduction of self-reliance in input requirements (*Delta Beverages/Mr Juicy merger*);
- improvement in product quality (*Zimboard Products/PG Bison Mauritius merger*); and
- effective turnaround from operating loss to operating profit (*Zimboard Products/PG Bison Mauritius merger*).

Oil merger, the Schweppes Zimbabwe/Delta Beverages merger, the Burley Marketing Zimbabwe/Farm-a-Rama merger, the West Beverages/Starafriacorporation merger, and the Olivine Holdings/Cotton Company of Zimbabwe merger.

It can therefore safely be concluded that there are many documented success stories in the Commission's handling of competition cases. The socio-economic impact of the Commission's effective implementation of competition policy and law in Zimbabwe, through its handling of competition cases, has been notable. The Commission has tackled the major competition concerns in Zimbabwe, and has ensured that firms are competing vigorously, but fairly, for the benefit of consumers.

3.8.3 Priorities and Management

Currently, the focus is mainly on mergers and is being managed with the limited context the CTC operates. There is now need to open horizons and venture into area of cartels and abuse of dominance. To do this, the enabling legislation has to be re worked to ensure smooth take off based on best practices.

4.0 LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES

4.1 Economy-wide Exemptions and Special Treatments

Section 3 (1) of the ZCA provides that it applies to all economic activities within or having an effect within the Republic of Zimbabwe

(Emphasis by the author) but shall not be construed so as to:

- (a) limit any right acquired under:
 - (i) the Plant Breeders Rights Act [*Chapter 18:16*]; or
 - (ii) the Copyright Act [*Chapter 26:01*]; or
 - (iii) the Industrial Designs Act [*Chapter 26:02*]; or
 - (iv) the Patents Act [*Chapter 26:03*]; or
 - (v) the Trade Marks Act [*Chapter 26:04*];

Except to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of “restrictive practice” in section two; or

- (b) preventing trade unions or other representatives of employees from protecting their members’ interests by negotiating and concluding agreements and other arrangements with employers or representatives of employers in terms of the Labour Relations Act, [*Chapter 28:01*].

4.2 Sector-specific Rules and Exemptions

The ZCA does not provide for sector specific exemptions other than those provided in section 3 (1). According to this provision; CTC is deemed to have jurisdiction over all the regulated sectors (network based utilities) which would entail electricity, petroleum, water, gas collectively known as energy; communication; surface and marine transport and civil aviation sectors. ZCA has also overlooked commonly found phenomenon known as block exemption that exempts (after assessment) some identified activities in key sectors from competition law. Such activities include price setting for cash crops in agricultural markets.

Statutorily, the CTC is not barred from exercising its jurisdiction in the regulated sectors despite the fact that the sectoral regulators are also mandated by their laws to deal with competition issues.

4.2.1 The Postal and Telecommunication Sector

Section 4 (1) (f) of the Postal and Telecommunication Act provides that one of the functions of the

Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) shall be to maintain and promote effective competition between persons engaged in the provision of postal and telecommunication services and any activities connected therewith.

The Act neither stipulates how the function shall be dealt with nor does it provide for a mechanism for the interaction between POTRAZ and the CTC in so far as competition matters are concerned. Interviews with the POTRAZ staff showed that these issues are not even provided for in the regulation. There has been an attempt to establish a Memorandum of Understanding (MoU) between POTRAZ and CTC that could address this matter but it has not come into being for among other reasons lack of legal basis for such MoU in both the legislation establishing the two institutions.

According to the interview findings, the two institutions co-exist in professional harmony, based on the character of individuals in office, but the two laws as they currently exist, provide for recipe for clashes between the two institutions.

4.2.2 The Energy Sector

The Petroleum Act, 2006 and the Electricity Act, 2002 are read together with the Energy Regulatory Authority Act, 2011 as a sectoral legislation. Section 4 (1) (g) of the Energy Regulatory Authority Act, 2011 provides that one of the functions of the Zimbabwe Energy Regulatory Authority (ZERA) shall be to maintain and promote effective competition within the energy industry.

The Petroleum Act, 2006 provided in Section 52 that the Authority shall have the responsibility for monitoring whether the provision of petroleum products is being done competitively.

The Electricity Act, 2002 has dedicated the whole of Part X for Competition and Market Power, the act further provides in Section 59 that ZERA shall have the ongoing responsibility to monitor whether electricity services are being provided competitively, and in particular shall determine whether any electricity services (refereed as regulated services) in respect of which prices or tariffs are fixed by ZERA can be provided competitively and report the matter to the Minister responsible for administering the Act (Mines and Energy) .

Upon finding that it is in the public interest that a regulated service should be freed from price or tariff regulation, ZERA may subject to the approval of the responsible Minister determine when and under what circumstances such service should be deregulated. (Emphasis by the author).

Section 59 (7) of the Electricity Act, 2002 further provides that ZERA shall be required to provide to the Competition Commission and Tariff Commission any information or evidence of the presence of, or the possible development of, market power in the operation of the licensed undertakings or electricity markets.

Section 59 (8) In the event that the Commission determines that there is any problem related to the development or unfair exercise of market power, it may:

- (a) issue such cease and desist orders as may be required upon the licensee or licensees concerned ;
- (b) levy monetary penalties upon the licensee or licensees concerned;

(c) refer the matter to the Competition and Tariff Commission for investigation:

Provided that the Commission shall not utilize the powers in terms of paragraphs (a) or (b) except with the concurrence of the Competition and Tariff Commission. (Emphasis by the author).

This is a good model as it clearly stipulates the interaction with the CTC in relation to competition issues and most important how a regulated service shall be freed from regulation (deregulated).

Having read these Petroleum Act, 2006 and the Electricity Act, 2002 and the Energy Regulatory Authority Act, 2011, it is observed that the Electricity Act, 2002 has covered extensively competition issues including defining the concurrence of competition jurisdiction between CTC and ZERA and the manner with which the two institutions shall interact. This elaborate process is missing in the Petroleum Act, 2006 which apparently was enacted after the enactment of the Electricity Act. Given the differences in the years with which they were enacted, one would expect the same provisions to be found in the Petroleum Act. This not being the case, the omission can partly be explained by ei-

ther lack of consistent presence of knowledge on how competition and economic regulation co-exists or disjoint of competition and regulation legislation in consideration of the amendments.

As a result of this gap, there have been cases between the Zimbabwe Electricity Supply Authority (ZESA) and the CTC lodged before the High Court and the Administrative Court whereby the issue of CTC's jurisdiction in the electricity sector has been a borne of contention. Interviews findings with the staff at the ZERA show that, there is a serious overlap that is brought about by the unlimited powers (as far as regulated sectors are concerned) of the ZCA that mandate CTC investigate matters in the electricity sector. The interviewee asserted that even if the ZCA in its generality is silent on its limitation of powers in the electricity sector; the Electricity Act in Section 59 (7) has provided for specific conditions for which the two institutions (ZERA and CTC) should interact and how that should be done. On strength of the specificity of the Electricity Act over the generality of the ZCA based on principles of interpretation of laws, the CTC should only deal with matters in the electricity sector after it has been prompted by ZERA and not moving on its own.

The analogy of the legislation in the two regulated sectors, as they relate to ZCA dictates that there is harmonization between sector regulation legislation and competition; and amongst sectoral legislation so as to have uniformity on treatment of competition issues in the regulated sectors. As it is, treatment of competition issues in the petroleum sector is different from those from the electricity sector although both are regulated by ZERA.

5.0 COMPETITION ADVOCACY

The ZCA indirectly provides for advocacy as one of the functions of the CTC in Section 5 (1) (e) to advise the Minister in regard to:

- (i) All aspects of economic competition, including entrepreneurial activities carried on by institutions directly or indirectly controlled by the State; and
- (ii) the formulation, co-ordination, implementation and administration of government policy in regard to economic competition;

Section 5 (1) (f) that provide as “to provide information to interested persons on current policy with regard to restrictive practices, acquisitions and monopoly situations, to serve as guidelines for the benefit of those persons”.

5.1 Competition Advocacy and Public Education

The CTC has done a few activities in this area. In 2008, the CTC had been writing articles on competition law and publishing them in the local newspaper once a month, but the activity stopped in 2010 for unexplainable reasons. During the same time, interviews were held at least twice in year on local Television channel and on the local radio station. The Director and the Assistant Director (competition) appeared on these media coverage. The other advocacy work done, was in conjunction with workshops on utility provision and public hearing workshops for cases before the CTC.

Interview with the Zimbabwe Law Association (ZLA) showed that there was very little interaction between the two institutions; as such there have not been any established relationship. With regard to competition law practice, it was reported that there was no firm that specializes in competition, but business law practitioners were seen to be possible candidates for such specialization due to resemblance of the issues. It was further found out that, ZLA had not placed competition as a priority in its agenda, partly because there was no demand for such services from the market and also because the CTC had not been active in using the ZLA as a forum for promoting competition law practice.

The ZLA considered the CTC to be doing a commendable job given the economic challenges that Zimbabwe went through. It was reported that in the area of merger control, a lot of work has been done but there was either no non merger cases dealt with or not publicized. Regarding public protection of government monopolies, the CTC was thought of having limited enforcement powers being nick named “toothless bulldog”.

The same sentiment was shared with Confederation of Zimbabwe Industries (CZI) which is an organization with a membership base of 1,350 business mostly manufacturers and service pro-

viders and the Zimbabwe National Chamber of Commerce (ZNCC) an organization with 800 active members and 3,000 on their data base. The other ZNCC fora include Annual general meetings where 200 members are usually in attendance and the Newsletter distributed to 3,000 different entities in Zimbabwe and beyond.

According to interviewed officials at CZI, there was no established relationship between the CZI and the CTC and that it was their feeling that CTC has greater role to play and they have not met their obligation especially on protection of local industries.

It was learnt during this interview that, there were policy issues emanating from the CTC’s duo (competition and tariff) mandate. CZI blamed the CTC for not doing enough to protect the local industry from foreign competition; even in highly concentrated industries such as the brewery. Without being specific, the beer imports are a constraint to the local manufactured beers, they put pressure from arbitral price rise; the CTC is on one hand supposed to promote this through competition and on the other side supposed to restrict the same beer import through tariff in support of local beer manufacturing industry. This is a classic example of conflicting policy objective resulting from the co-existence of competition and tariff at the CTC.

The academia has also been reached out sparingly; the CTC has once invited the University of Zimbabwe (Economics Department) to present a paper in a workshop on competition law. With the Faculty of Law, there is no specific course in competition at both undergraduates and postgraduate levels.

There are 49 under-graduate students out of which 26 take elective business related courses such as Business Law, Commercial Law Company Law and Corporate Law. In terms of research, there have not been substantive dissertations in the area of competition other than three 4th year law students who have done research work on competition law as part of fulfillment or the laws degree.

It was also learnt that the university had no formal relationship with the CTC but it was opportune time to establish a competition law subject in the laws degree programme; and that the University is willing and eager to forge relationship with CTC in pursuit of this endeavor.

The only course that touches competition issues is the Master of Business Administration, in a subject called Business Law. Competition is not yet a standalone course or module and pleaded for UNCTAD assistance to establish a course and have visiting lecturer ship to assist in the establishment of the course.

6.0 INTERFACE BETWEEN COMPETITION AND TRADE POLICIES

Currently the presence of tariff division at CTC demonstrates the interaction between the two policies. The co existence of the two functions at CTC has been with some manageable challenges that perhaps require a permanent solution so that each of the two can operate optimally.

6.1 Examination of the Merger between Competition and Tariff Commission

Section 34 C of the ZCA empowers CTC with powers to make investigations into any tariff charge or any matter related thereto, which causes threats to cause detriment to local industry in order to ascertain whether any tariff charge needs to be revised and the extent of any such revision, for the purpose of providing assistance or protection to local industry and redressing any imbalance in trade between Zimbabwe and any other country. The policy objective of tariff as administered by CTC is therefore geared towards protectionism which may operationally be reduced into barriers to entry.

In the contrary, the aim of competition policy and law is to promote effective competition in markets, whereby in assessing the level of competition in a market, factors including the actual and potential level of import competition in the market and the barriers to entry i.e. ease of entry into the market, including tariff and regulatory barriers. Tariffs are therefore a factor which may affect competition in the market (Mitchell²⁰⁷, 2003).

While it is debated to what extent tariff measures are beneficial to the country; their placement and co existence with competition under the administration of CTC pose a serious potential for conflicting policy objective which may defeat the

very purpose of enacting a competition law in the economy.

Tariff decisions are made by the Minister whereas competition issues are dealt with by the Board of Commissioners. Responses from the field mission have shown that administratively, tariff as a function of the CTC, has not been given the prominence it deserves owing to the fact that it was one of the merged institution to form CTC and that it contributes significantly to the CTC revenues (16.8 per cent) see Table 1 above.

It was also reported that tariff related issues are also dealt by the Ministry of Industry and Commerce, Ministry of Finance and the Zimbabwe Revenue Authority. At the CTC, like competition, tariff function is equally understaffed to discharge the extended mandate that include anti dumping, subsidization and safeguards. Broadly construed, its placement at CTC can be looked as a replication that constrains the economy wide competition mandate which is solely done by CTC with exceptions in some regulated sectors.

Despite being provided in the ZCA, issues of anti dumping, subsidization and safeguards have never been dealt with at the CTC for the past ten (10) years of their existence in the ZCA.

6.2 Effects to the Implementation of Competition Policy and Law

According to findings from interviews with CTC staff, there has not been any open policy clash so far despite the existence of potential for such conflicts. As the Zimbabwean economic recovery deepens, it is expected that the volume of transactions will grow and increase the probability of controversial matters (in so far as coexistence of tariff and competition is concerned) that are lodged before the CTC.

Interview findings show that some key stakeholders are of the view that the reasons for the merging of the Tariffs and Competition Commissions still exist, mainly citing that the CTC still rely on trade development levy to fund its operations. The stakeholders further argue that, whilst conflicts between the tariffs and competition mandates do exist, there are also complementarities, adding that the contradictions will be managed whilst the complementarities are enhanced.

Whilst the arguments can be considered in the strength of touching the fundamental issue of financing the CTC; the financing aspect can be dealt with in a mutually exclusive manner that will not jeopardize the crucial competition mandate at CTC.

The beer industry example discussed above should be considered as a wakeup call for the CTC and the Ministry to re consider the merger, so that moving forward; there is no policy objective incoherence at the CTC.

The Zimbabwean case is peculiar in so far as statutory coexistence with Tariffs is concerned. There is no any other jurisdiction known for having such a practice. However other jurisdictions also have other functions, within the tripartite, Zambia has consumer protection function which is widely practiced elsewhere in the world including the United States and Australia. The United Republic of Tanzania has consumer protection and Anti counterfeits which is provided for by a different law and is placed at FCC by a Ministerial Order through a government notice.

The experience of all these coexistences has not been without scuffles. The standard recommended practice is having a stand alone competition authority, for which Zimbabwe is close from its attainment since the common partner consumer protection is poised to have its own separate institution.

7.0 INTERNATIONAL RELATIONS AND REGIONAL COOPERATION

The CTC has cooperated with a number of other competition organizations at bilateral and multi-lateral levels, both as a technical assistance beneficiary and provider. The Commission has received technical assistance in the form of capacity building and training from other competition authorities such as the Anti-Trust Division of the United States Department of Justice, the United States Federal Trade Commission, the the United Kingdom Office of Fair Trading, the Australian Competition and Consumer Commission, and the Competition Commission South Africa. It has also given technical assistance to other competition authorities in the region, notably to the Competition and Fair Trading Commission of Malawi, and the Namibian Competition Commission.

The Commission has also cooperated with other competition authorities in the region, notably authorities in Kenya, Namibia, South Africa and Zambia, in exchange of information. The cooperation with the Zambian competition authority has extended to the handling and investigation of competition cases.

International organizations that have given the Commission capacity building and technical assistance in the field of competition policy and law have included the Commonwealth Secretariat, the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference for Trade and Development (UNCTAD). The Commonwealth Secretariat assisted in the operationalization of the Commission by providing a technical advisor for a period of one and a half years, and funding the Commission's first regional workshop on competition policy and law. Cooperation with UNCTAD has been the most profound. It has not only involved capacity building and technical assistance, but has also involved participation at events such as the Intergovernmental Group of Experts on Competition Law and Policy (IGE), at which the Commission is a frequent contributor. Technical assistance given to the Commission by UNCTAD has included the following:

- regional seminars on competition law and policy, held in Lusaka, Zambia (1999), Livingstone, Zambia (2000, 2002 and 2004), Mombasa, Kenya (2001), Blantyre, Malawi (2004), Siavonga, Zambia (2008), and Dar-es-Salaam, United Republic of Tanzania (2010);
- national workshop on competition law and policy, held in Kariba, Zimbabwe (2002); and
- establishment of the Commission's website (2001).

The Commission is a member of the International Competition Network (ICN), that seeks to facilitate global cooperation between competition authorities, and actively participates in the Network's programmes.

At continental and regional level, CTC is a member of both the African Competition Forum (ACF) and the Southern and Eastern Africa Competition Forum (SEACF). The Commission provided one of the regional competition experts that formulated and drafted the Common Market for Eastern and Southern Africa (COMESA) regional competition policy and law, and sits on the Board of Commis-

sioners of the COMESA Competition Commission. In the Southern Africa Development Community (SADC), the Commission is an active member of the Competition and Consumer Policy and Law Committee that was established under the SADC Declaration on Regional Cooperation in Competition and Consumer Policies to implement the system of cooperation.

8.0 FINDINGS AND POSSIBLE POLICY OPTIONS

8.1 Recommendations addressed to the Legislature (Proposals for Amendment of the Current Competition Law)

Considering the identified gaps in the ZCA in the context of the tripartite i.e. Zambia and the United Republic of Tanzania; the most of the reasons that made Zambia in 2010 and the United Republic of Tanzania in 2003 repeal their competition laws exist in the Zimbabwean competition and regulatory framework. The reasons include unlimited scope of the law in relation to regulated sectors, clear procedure in appointment of commissioners, un-

clear provisions on operational autonomy of the competition authority, lack of consideration of the weaknesses of consumers in its provisions, lack of provisions that ensure curbing of arbitrary erection of artificial barriers to entry, poor drafting of core competition law provision and too technical language leading to unfriendliness of the law to its users, too much power to the Minister (s) with a potential for interference with decisions of the competition authority and lack of provisions for supremacy of competition law over other laws so as to eliminate possibility of the competition being read down by other subsequent laws (URT²⁰⁸, 2002).

Given the volume of issues that may require either introduction or amendments in the current ZCA and their resemblance with the gaps identified elsewhere in the tripartite as reported above; 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.

For the ease of reference, Table 8 below provides a summary of the report's assessment of the various legal provisions of the ZCA and its respective recommendations. Note that the UNCTAD Model Law on Competition has served to structure this overview.

Table 8: Summary of the assessment of the main elements of the ZCA.

UNCTAD Model Law Provision	Provision in ZCA	Shortcomings	Recommendations
Title of the Law	Section 1	–	–
Objectives or Purpose of the Law	Preamble	No stand alone Section to provide for this important part of the Law.	Include a section providing for the objectives or purpose of the Law.
Definitions	Section 2	The language used providing for most definitions are not in concurrence with commonly used "competition language" and are used too interchangeably and are confusing.	<ul style="list-style-type: none"> Those definitions that are generally part of a substantive rule, e.g. the prohibition of restrictive practices, should be shifted from Section 2 to the part of the ZCA that contains the respective substantive provision. Clearer definitions and use of important common competition language for terminologies should be introduced to avoid mix ups which may open unnecessary arguments. Guidelines to be adopted by the CTC to explain core competition law concepts, such as the definition of the relevant market.
Scope of Applications	Section 3	Economy wide with no limitations that provide for concurrent jurisdiction with sectoral regulators.	Clear separation of jurisdiction over competition issues in regulated sectors should be introduced in the Law.

Anti competitive agreements	Section 2 Part 8,9 and 10 of the First Schedule	<ul style="list-style-type: none"> No clear line of demarcation between anticompetitive agreements, the abuse of market power and acts of unfair competition. Absence of a general prohibition of anticompetitive agreements and the abuse of a dominant position. Abuse of Dominant Position issues are provided for under Per Se prohibition rule and under Section 2, on restrictive practices. The law has indirectly dealt with Rule of Reason referring to restrictive practices related to agreements as defined in Section 2 of the ZCA. Those which are provided under the First Schedule are called Unfair Business Practices and are Per Se prohibited. 	<ul style="list-style-type: none"> Introduce a general prohibition of anticompetitive agreements and concerted practices, followed by a non-exhaustive list of examples. Clearly distinguish between agreements that are per se prohibited and those that fall under the rule of reason. No mix of specific types of anticompetitive agreements with acts of unfair competition. <p>The conduct listed in the First Schedule should be moved to the parts of the ZCA where it belongs (i.e. anticompetitive agreements or acts of unfair competition).</p>
Acts or behaviours constituting an Abuse of dominant position of market power.	Section 2		<ul style="list-style-type: none"> Introduce a general prohibition of the abuse of a dominant position, followed by a non-exhaustive list of examples. The language used in defining dominance should be consistent with common competition language that is simply understood by users. To be discussed whether a rebuttable presumption of dominance based on a specific market share threshold should be introduced.
Notification, investigation and control of mergers.	Section 34 and 34A	<ul style="list-style-type: none"> Investigation procedure, in particular timelines, not specified. Joint-ventures and pure conglomerate mergers are not captured by the definition of a merger. Substantive merger control test spread over several provisions. 	<ul style="list-style-type: none"> Include a binding timeframe for the review of mergers. Include the establishment of a full-function joint venture and pure conglomerate mergers in the definition of mergers. Provide for substantive merger control test in a single provision.
Authorization or exemption	Sections 35,36,37,38 and 39	Investigation procedure, in particular timelines, not specified.	Include a binding timeframe for the review of agreements.
Some possible aspects of consumer protection.	Part 8 of the First Schedule	There is no clear demarcation of provisions to deal with competition and those which deal with consumer both are categorized under the First Schedule	Based on the finding that the Consumer Protection Bill will be administered by a different body, consumer protection aspects can be dropped from the competition law. This should only be done after the Consumer Law is out so as not to create a gap that will expose consumers to exploiters. Alternatively, a remedy can be by drawing a line of demarcation between the two.
Investigation Procedures	Section 34C	Lack of express provision on leniency programme for cartel members.	Introduce express provision on leniency programme for cartel members.
Relationship between competition authorities and sector regulators	Section 3 (a) and (b)	Not provided for specifically, although one regulatory authority has specific provision on how competition matters should be referred to CTC.	The competition law should acknowledge the co-existence of sectoral regulators and limit itself accordingly. Section 59 of the Electricity Act should be strengthened and used as a model for interactions between sectoral regulators and CTC.
Establishment, functions and powers of the administering authority	Section 4, 5, 6 and the second schedule	<ul style="list-style-type: none"> Too much power is vested on the Minister responsible for the CTC and Minister for Finance; it poses a threat to the independence of the Commission. Section 6 ZCA unclear as to who is vested with the power to appoint Commissioners Tenure of Commissioners of a period of three years is too short to allow for Commissioners to acquire required competition law expertise and build up an institutional memory. 	<ul style="list-style-type: none"> Minister (s) should be stripped off some powers to ensure that members have a better security of tenure for them to function more efficiently. Policy to place the competition and economic regulation institutions under one Ministry so as to ease policy decision patterning the competition and regulatory interaction. Clarify that the Minister in consultation with the President shall appoint the Commissioners. Tenure of Commissioners to be extended to 5 to 7 years.

Powers of enforcement	Section 30, 31 and 32	The actual enforcement of Commission Orders is done by Courts. This may create multiplicity of procedures and may cause unnecessary delays in delivery of justice.	CTC should assume some powers of actual enforcement and state those that the Courts should deal with, mostly the criminal sanctions, particularly imprisonment.
Sanctions and remedies (Actions for damages)	Section 31, 44 and 45	Provided in using a general and wide benchmark as a result there is no enough deterrence to offenders. Omission of some offences such as breach of a merger condition following conditional approval of a merger.	Provide ZCA specific sanctions to bring about deterrence to offenders. Provide for the identified omitted offense in the ZCA.
Appeals	Section 40	Judicial review can be exercised by the High Court and the Administrative Court.	<ul style="list-style-type: none"> Only one Court should have jurisdiction over competition cases. Competition cases should be heard by specialized judges.

8.2 Recommendations addressed to the Government

- 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 form basis for development of a comprehensive competition policy and eventually the new law. Furthermore, taking into account possible policy conflicts between the competition and the tariff mandate of the CTC, as well as the fact that combining these two mandates in one institution is highly unusual, the study should address the question whether or not to maintain the current mandates of the CTC. In fact, it is recommended to consider unbundling the two mandates and assigning only the competition mandated to the CTC.
- The Government should increase CTC's budget to optimal levels based on the decade long experience of implementation under the prevailing limited budget. Comparisons should be with the sector regulators, owing to the fact that they save the same entities in the economy, more so that CTC's mandate is wider than the sector specific regulators. Among sources of the increase to be considered are government grants and introduction of a statutory regime that will provide for a mechanism for CTC to receive funds from the regulated sectors.
- Salaries for the CTC personnel should also be substantially increased to competitive levels in order motivate staff and also to ensure their retention.

- Placement of competition and regulatory authorities under one central ministry, so as to avoid competing and conflicting policy objectives as well as the disjoint between competition and regulation in Zimbabwe. This will ease the implementation of the coexistence of competition and regulatory authorities as economic entities that serve the same consumer in the Zimbabwean economy, hence the need to share information, financial and other resources for the benefit of the consumer and the economy.

8.3 Recommendations addressed to the CTC

- Establishment of a sound Information and Communication Technology department at the CTC, which shall take care of website, electronic documentation of proceeds and archives and a library.
- Tailor made training on competition to staff, Commissioners, appellant bodies, university staff, practising lawyers and regulated sector staff as a routine practice for between 3 to 5 years, so as to impart competition knowledge and skills in to the Zimbabwe competition and regulatory framework.
- The CTC Board revamps the advocacy component for competition issues. Opportunities readily available such as engagement with the Bar association, the Academia and the Trade and commerce should be ceased immediately because they can be carried out by resources compliment currently available at CTC.
- CTC should reorient its the enforcement practice

by conducting its case determination function in an inquisitorial approach that shall exonerate itself from the liability of compliance to requirements of separation of powers currently haunting its functioning as explained earlier in this report.

8.4 Further Recommendations

- Establishment of a Competition Law and Policy Course at the University, so as to ensure availability of basic competition training in Zimbabwe.

NOTES

- ¹ Stiglitz, J. (2000) "Keynote address", First course on competition law and policy, World Bank, Washington D.C. (author recollection).
- ² The United Republic of Tanzania is a member of East African Community (EAC) and the Southern Africa Development Community (SADC), while Zambia and Zimbabwe are both members of the Common Market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community (SADC).
- ³ See, for example, Heimler, A. and Mehta K. (2012) "Violations of antitrust provisions: the optimal level of fines for achieving deterrence", *World Competition*, March.
- ⁴ See the analysis in Arvind Panagariya, "India – The Emerging Giant" OUP, 2008.
- ⁵ Besides the Tanzanian competition authority, interviews were held with: (i) the Registrar of the Fair Competition Tribunal; (ii) Ministry of Trade and Industry; (iii) Tanzania Chamber of Commerce; (iv) regulators in the energy and telecommunications sectors; (v) academia at University of Dar-Es-Salaam and economists at an economic research/think-tank institution.
- ⁶ <http://www.tanzania.go.tz/history.html> as downloaded on 23 October 2011
- ⁷ "Revolutionary Party"
- ⁸ Same kind of transformation was experienced in neighbouring countries such as Kenya, Malawi and Zambia
- ⁹ Ministry of Trade, Industry and Marketing, *Strategic Plan 2009–2011*, p. 6.
- ¹⁰ Speech by the Minister for Finance and Economic Affairs, Hon. Mustafa Haidi Mkulo (MP), introducing to the National Assembly, the Estimates of Government Revenue and Expenditure for the Financial Year 2009/10, para. 42, p. 28.
- ¹¹ SAPA-AFP, 23 July 2000, www.gopher.anc.org.za/00/anc/newsbrief/2000/news0724
- ¹² Opposition parties in the United Republic of Tanzania have voiced their concerns over the continued domination of attractive business ventures by South Africans – John Onger, African Eye News Service, 26 June 2000
- ¹³ Abbott, John. C., *Agricultural Marketing Boards in Developing Countries*, Journal of Farm Economics, Vol.49, No.3, Aug.1967
- ¹⁴ Economic and Social Research Foundation.
- ¹⁵ Sanya, Sarah, and Gaertner, Matthew, Assessing Bank Competition within the East African Community, IMF Working Paper, WP/12/32, January 2012.
- ¹⁶ Excerpts from J.K. Nyerere. *Freedom and Development*. Dar-es-Salaam: Government Printer – also reprinted in *Freedom and Development*, Oxford University Press, 1973.
- ¹⁷ This situation was similar to what most countries in the region such as Zambia went through
- ¹⁸ United Republic of Tanzania's "National Trade Policy" of 2003, page 5
- ¹⁹ Fair Competition Tribunal Strategic Plan 2009/2012
- ²⁰ SIDP, paragraph 3.2, p.12, available at: <http://www.tzonline.org/pdf/sustainableindustrial.pdf>
- ²¹ SIDP, paragraph 3.4.1, p.14
- ²² National Trade Policy 2003, p. 72
- ²³ <http://data.worldbank.org/country/tanzania>
- ²⁴ *Markets and Morality: American Relations with Tanzania*, African Studies Quarterly, March 22, 2006, Tony Waters
- ²⁵ Helge Kjekshus, Tanzanian Villagization Policy: Implementational Lessons and Ecological Dimensions *Canadian Journal of African Studies/Revue Canadienne des Études Africaines*, Vol. 11, No. 2 (1977), pp. 269–282.
- ²⁶ Bernard Elia Kihyo, Executive Director, Tanzania Consumer Advocacy Society, "Why do Countries Adopt Competition Laws – Tanzania as a case study", at http://tanzaniaconsumer.blogspot.com/2008/12/why-do-countries-adopt-competition-laws_28.html

- ²⁷ National Trade Policy 2003, p. 22,
- ²⁸ National Trade Policy 2003. p. 9,
- ²⁹ Kahyarara, G. (2004). Competition Policy Manufacturing Exports, Investment and Productivity: Firm-Level Evidence from Tanzania Manufacturing Enterprises, in P. Brusick et al. (eds.) *Competition, Competitiveness and Development: Lessons from Developing Countries*, United Nations, New York and Geneva, 2004.
- ³⁰ *Competition Law & Policy – A Tool for Development in Tanzania*, CUTS, 2002.
- ³¹ Fair Competition Tribunal Strategic Plan 2009/2012
- ³² Page 2–3 of the Strategic Plan
- ³³ The Union treaty between “Tanganyika” (i.e the mainland) and Zanzibar provides for each country enacting its own laws to apply on its territory, which laws are not applicable to the other unless so expressly agreed. However, in terms of enforcement, under section 7 of the Act, the FCC can apply the Act to conduct outside the United Republic of Tanzania
- ³⁴ FCC Annual Report 2008/2009, page 12
- ³⁵ FCC Press Statement, 12th November 2009.
- ³⁶ In the matter of an application for interpretation of Section 3(f) of the Competition and Fair Trading Act, CAP 417 of the Laws of Zambia, Case No. 2009/HP/297. Section 3(f) seemingly exempted the application of the Act to “any act expressly required under a treaty or agreement to which the Republic of Zambia is a party”.
- ³⁷ The EWURA Act, Electricity Act, Water Supply and Sanitation Act, Waterworks Act, Dar-es-Salaam Water and Sewerage Authority Act, Water Utilization (Control and Regulation) Act, Petroleum Exploration and Production Act, Petroleum (Conservation) Act, and the Petroleum Act.
- ³⁸ Section 20(2) of the EWURA Act
- ³⁹ TCRA submitted during the consultations for this report that they had guidelines to assist staff to deal with competition review and analysis in the sector.
- ⁴⁰ The Electricity Act and Petroleum Act in particular. The Director-General of the FCC is Vice-Chairperson of the Board of EWURA. This arrangement is a mere coincidence rather than a legal requirement.
- ⁴¹ Section 19(5) states that where the Minister receives a report from the Commission. He may direct the relevant regulatory authority to take the necessary steps to ensure that the conduct described by the Commission is not required, authorised or approved by the regulatory authority
- ⁴² UNCTAD Model Law on Competition, page 1
- ⁴³ Pages 12–14
- ⁴⁴ Case 2 of 2009, page 24 and 25
- ⁴⁵ Case 2. of 2009, page 40/41, *Serengeti Breweries Ltd v Tanzanian Breweries Ltd*
- ⁴⁶ Case 56/65 (1966) ECR 235, pg 249, CMLR 357, pg 375
- ⁴⁷ A rebuttable presumption is an assumption made by a court or legal provision, one that is to be taken to be true unless proved otherwise
- ⁴⁸ Case 2 of 2009, page 27
- ⁴⁹ European Commission, *Volk v Vervaeke* (1969) ECR 295 on the *de minimis* rule.
- ⁵⁰ Section 60(1) of the Act
- ⁵¹ (ICN Unilateral Conduct Working Group Recommended Practices).
- ⁵² Case No. 2 of 2009, page 28 by the Fair Competition Commission
- ⁵³ ICN Merger Working Group: Analytical Framework Subgroup THE ANALYTICAL FRAMEWORK FOR MERGER CONTROL Final paper for ICN annual conference , Office of Fair Trading¹, London
- ⁵⁴ While it has been recognized that the *Merger Guidelines* should not be taken as a replacement of the Act and the Rules thereof, the process of assessing the vertical mergers for instance appears to depart from the provisions of the Act. It
-

considers (i) *Whether the merged firm will have market power in one market that could be leveraged into a vertically related market* (ii) *Whether the target firm is a likely entrant into a vertically related market* (iii) *Whether the merged firm will control access to an essential input, and* (iv) *Whether the vertical integration raises barriers to new entry.*

⁵⁵ from Page 31

⁵⁶ Section 11(2)–(5)

⁵⁷ While above the FCC's threshold, prior notification of mergers is a legal requirement, it may also be useful in the case of smaller mergers: to avoid a situation in which a merger has to be reversed because the FCC finds it harmful to competition. Providing advance notice of a merger may have the additional advantage that the company is able to identify a way in which the merger which might otherwise be blocked could go ahead in an amended form.

⁵⁸ Judge Philip Musonda: IN THE MATTER of An application for interpretation of section 3(f) of the Competition and Fair Trading Act, CAP 417 of the Laws of Zambia, Case # 2009/HP/297

⁵⁹ All the forms are attached as Schedule to the FCCPR

⁶⁰ Rule 44 of the FCCPR

⁶¹ Section 68(4) of the Act

⁶² Section 68(5)(b) of the Act

⁶³ Rule 17 of the Procedure Rules

⁶⁴ Section 71 of the Act

⁶⁵ Section 58 of the Act

⁶⁶ Page 53, *Serengeti Breweries Limited v Tanzanian Breweries Limited*

⁶⁷ FCC Annual Report 2008/2009

⁶⁸ Section 59(6) of the Act states that any person who suffers loss or damage as a result of a breach of a condition warranty implied under PART VI or a manufacturer's obligation under PART VII may seek a relief in a Court of competent jurisdiction but shall not seek, and the Commission shall not grant, a compensatory order under this section.

⁶⁹ Section 59(2) of the Act

⁷⁰ Section 59(7)

⁷¹ Which was about TZS 27 billion

⁷² Section 60 of the Act

⁷³ Section 60(3) of the Act

⁷⁴ Section 60(5) of the Act

⁷⁵ Section 58(5) of the Act

⁷⁶ Fair Competition Commission *Annual Report* 2008/2009, pages 12–14.

⁷⁷ *Government Gazette No. 89 of 20th June 2008*

⁷⁸ Under regulation 8 of the MMR, a Task Force is appointed consisting of a representative each from the Attorney-General's Chambers, Tanzania Revenue Authority, Police Force, Tanzania Bureau of Standards, Foods and Drugs Authority, and a Public Officer. The Task Force shall assist the Chief Inspector in his work.

⁷⁹ Section 65(3) of the Act

⁸⁰ Section 63(8)

⁸¹ Section 63(5) of the Act

⁸² FCC website <http://www.competition.or.tz/page.php?9> as downloaded on 23 October 2011

⁸³ By virtue of Section 78(3) of the Act

- ⁸⁴ Paragraph 1 to the First Schedule to the Act on composition of Nominations Committee: (a) the Permanent Secretary of the Ministry responsible for the Commission in the case of appointments to the Commission, or by the Permanent Secretary of the Ministry responsible for Justice in the case of appointments to the Tribunal, as the case may be, who shall be the Chairman of the Committee; and (b) two other persons appointed by the Minister, in the case of appointments to the Commission, or by the Attorney-General in the case of appointments to the Tribunal, as the case may be, one nominated by a body recognized as being representative of private sector and one nominated by a body recognized as being representative of consumers.
- ⁸⁵ Section 83(4) states that whenever a member or members of the Tribunal, other than the Chairman, are to be appointed to the Tribunal, a Nomination Committee shall be established as follows: (a) the committee shall be separate from any Nomination Committee established under section 63; and (b) the composition, functions and procedure of the Nomination Committee shall be as provided for under the First Schedule subject to the substitution of the Attorney-General for the Minister and of the Permanent Secretary of the Ministry responsible for Justice for the Permanent Secretary of the Ministry responsible for the Commission.
- ⁸⁶ Section 84 of the Act.
- ⁸⁷ Section 98 of the Act holds that the Minister may, in consultation with the Commission or Tribunal, make regulations not inconsistent with this Act as he considers necessary or desirable to give effect to the provisions of this Act.
- ⁸⁸ Section 68(3) and (4)
- ⁸⁹ The Fair Competition Commission's *Annual Report 2005* and as replicated in the "Guidance on Competition Law" booklet of January 2006 by the FCC
- ⁹⁰ Bernard Elia Kihyo, Executive Director, Tanzania Consumer Advocacy Society, "Why do Countries Adopt Competition Laws – Tanzania as a case study", at http://tanzaniaconsumer.blogspot.com/2008/12/why-do-countries-adopt-competition-laws_28.html
- ⁹¹ Department of Economic and Social Affairs Population Division, *World Population Prospects*, United Nations.
- ⁹² According to wikipedia, the population of major towns and cities in Zambia in 2010 was 3.524 million, inclusive of Lusaka (1 460 566), Kitwe (547 700), Ndola (495 004), Kabwe (215 015), Chingola (178 092), Mufulila (141 056), Livingstone (133 936), Luanshya (132 117), Kasama (111 588), and Chipata (109 344).
- ⁹³ <https://www.cia.gov/library/publications/the-world-factbook/geos/za.html>
- ⁹⁴ http://www.indexmundi.com/zambia/economy_profile.html.
- ⁹⁵ <http://www.eoearth.org/article/Zambia?topic=49460>.
- ⁹⁶ http://www.indexmundi.com/zambia/economy_profile.html
- ⁹⁷ http://en.wikipaedia.org/wiki/Economy_of_Zambia
- ⁹⁸ Zambia Economy 2011, CIA World Factbook (http://www.theodora.com/wfbcurrent/zambia/zambia_economy.html)
- ⁹⁹ http://en.wikipedia.org/wiki/Economy_of_Zambia
- ¹⁰⁰ The history of copper mining in Zambia in Box 1 was obtained from Zambia – Economic History [Biz/ed Virtual Developing Country] (<http://www.bized.co.uk/virtual/dc/back/econ.htm>), and Wikipedia Economy of Zambia (http://en.wikipedia.org/wiki/Economy_of_Zambia).
- ¹⁰¹ The cities and towns of the Copperbelt are Ndola, Kitwe, Mufulila, Chingola, Kalulushi, Chilabongure, Solwezi, and Luansha.
- ¹⁰² <http://en.wikipedia.org/wiki/Zambia>.
- ¹⁰³ <http://www.afribiz.info/content/zambia-overview-2011>
- ¹⁰⁴ Zambia – Economic History [Biz/ed Virtual Developing Country] (<http://www.bized.co.uk/virtual/dc/back/econ.htm>)
- ¹⁰⁵ Ibid.
- ¹⁰⁶ Ibid.
- ¹⁰⁷ <http://www.infoplease.com/ce6/world/A0862057.html>.
- ¹⁰⁸ <http://www.zamztats.gov.zm>.
-

- ¹⁰⁹ <http://www.afribiz.info/content/zambia-economy-overview-2011>.
- ¹¹⁰ Member States of COMESA comprise Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.
- ¹¹¹ Member States of SADC comprise Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia, and Zimbabwe.
- ¹¹² 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.
- ¹¹³ George Lipimile, in a presentation on 'Implementing Competition Policy in Africa: the Progress to Date and Practical Challenges to the Met' at the WTO Regional Workshop on *Competition Policy, Economic Development and the Multilateral Trading System: Overview of the Issues and Options for the Future*, that was held in Cape Town, South Africa, during the period 22 – 24 February 2001.
- ¹¹⁴ George K. Lipimile, 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.
- ¹¹⁵ Strategic Plan: 2008–2011 (*Making Competition & Consumer Protection National Priorities*), Zambia Competition Commission, November 2008.
- ¹¹⁶ George K. Lipimile, 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.
- ¹¹⁷ George K. Lipimile, 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.
- ¹¹⁸ The Competition and Fair Trading Act (Chapter 48:09) of Malawi provides in terms of its section 54 that "this Act shall apply to and bind the Government".
- ¹¹⁹ Submission by the Zambia Development Agency during the fact-finding visit interview held on 18 October 2011.
- ¹²⁰ As submitted by the Citizens Economic Empowerment Commission during the fact-finding visit interview held on 19 October 2011.
- ¹²¹ Republic of Zambia: National Competition & Consumer Policy, May 2009, Ministry of Commerce, Trade and Industry, Lusaka.
- ¹²² 'Model Law on Competition' (TD/RBP/CONF.7/8), United Nations Conference on Trade and Development, United Nations, New York and Geneva, 2010
- ¹²³ The need to have clear definitions of confidential information in national competition laws was highlighted during discussions on the study on *Harmonization Framework of the National Competition Laws and Policies in SADC* at the Roundtable on SADC Regional Competition Policy held in Gaborone, Botswana, during the period 27–28 October 2011. Some member States felt that it would be difficult for them to subscribe to cooperation in "the development of an appropriate framework for exchanging confidential information on competition cases" in the absence of a clear definition of the term 'confidential information'.
- ¹²⁴ CUTS International, Lusaka, during the fact-finding visit interview held on 19 October 2011 submitted that the definition of a consumer should be wide enough to include not only direct consumers but also other beneficiaries, and therefore any other user other than the buyer, purchaser or partly promised person of a good-service is also considered as a consumer.
- ¹²⁵ The term 'undertaking' is defined in section 1 of the Competition Act, 2003 (Act No.2 of 2003) of Namibia as to mean "any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service"; in section 2 of the Competition Act [Chapter 14:28] of Zimbabwe as to mean "any person engaged for gain in the production or distribution of a commodity or service"; and in Article 1 of the COMESA Competition Regulations as to include "any person, public or private, involved in the production of, or the trade in, goods, or the provision of services".

- ¹²⁶ The UNCTAD Model Law on Competition recommends the use of the term ‘enterprises’ as to mean “firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them”.
- ¹²⁷ The stakeholders interviewed included the Judiciary, sector regulators, other statutory bodies, business associations, consumer associations/organizations, professional bodies, law firms, and individual business enterprises.
- ¹²⁸ The only remaining major State enterprise is the electricity company, ZESCO Holdings. According to the Energy Regulation Board (ERB) during the interview with the sector regulator on 21 October 2011, there are however no immediate plans of privatising the company, but to commercialise and unbundle it. The company’s statutory monopoly was removed in 1998, and there are now a number of independent power producers (IPPs)
- ¹²⁹ *De minimis* is a Latin term that means of no significance or not worthy of consideration. The term is an abbreviated form of *de minimis non curat lex*, “the law cares not for small things”. Essentially it refers to something or a difference that is so little, small, minuscule, or tiny that the law does not refer to it and will not consider it. In legal terms, the consequences of an act in violation of a legal requirement may be considered so small that they do not justify pursuing legal action.
- ¹³⁰ “Horizontal” agreements are those among competitor, which implicitly or explicitly restrict competitors’ ability to act independently.
- ¹³¹ “Vertical” agreements refer to those between enterprises operating at different stages of the production and distribution chain, i.e., between upstream and downstream firms.
- ¹³² In terms of section 7 of the South African Competition Act, No.89 of 1998, “a firm is dominant in a market if: (a) it has at least 45per cent of that market; (b) it has at least 35per cent, but less than 45per cent, of that market, unless it can show that it does not have market power; or (c) it has less than 35per cent of that market, but has market power”. Similar provisions are found in the Competition Act, 2003 (Act No.2 of 2003) of Namibia.
- ¹³³ The COMESA Competition Regulations provide in terms of Article 17 that “an undertaking holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors”. Section 2(2) of the Competition Act [Chapter 14:28] of Zimbabwe provide that “a person has substantial market control over a commodity or service if: (a) being a producer or distributor of the commodity or service, he has the power, either by himself or in concert with other persons with whom he has a substantial economic connection, profitably to raise or maintain the price of the commodity or service above competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe; (b) being a purchaser or user of the commodity or service, he has the power, either by himself or in concert with other persons, with whom he has a substantial economic connection, profitably to lower or maintain the price of the commodity or service below competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe”.
- ¹³⁴ Even though the Bank of Zambia assesses consolidations of financial institutions to limit voting control to avoid dominance by one undertaking, it has not determined dominance thresholds under the Bank of Zambia Act, 1996 (No.43 of 1996) since the market is self-regulatory with no undertaking holding more than 30per cent market share (as submitted during the fact-finding visit interview with the Bank on 21 October 2011).
- ¹³⁵ As stated by Robert Anderson, Timothy Daniel, and Alberto Heimler, in the chapter on ‘Abuse of Dominance’ in *A Framework for the Design and Implementation of Competition Law and Policy* (The World Bank, Washington, D.C. and Organization for Economic Cooperation and Development (OECD), Paris, 1999), exclusionary abuses are those in which a firm attempts to suppress competition – for example, by refusing to deal with a competitor, raising competitors’ costs of entering a market, or charging predatory prices, while exploitative abuses are those in which a firm takes advantages of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices.
- ¹³⁶ As provided for in section 8 of the Competition Act of South Africa.
- ¹³⁷ Peter Bamford, David Elliott, Russell Pittman, and Margaret Sanderson, in the chapter on ‘Mergers’, in *A Framework for the Design and Implementation of Competition Law and Policy*. The World Bank, Washington, D.C. and Organization for Economic Cooperation and Development (OECD), Paris, 1999,
- ¹³⁸ Horizontal mergers are those that take place between directly competing firms in the same product market and at the same level of the production or distribution cycle. Vertical mergers are those between firms with actual or potential buyer–seller relationships. Conglomerate mergers bring together firms that do not compete with each other in any product market and do not have vertical integration.
- ¹³⁹ Horizontal mergers present the greatest danger to competition by the mere fact that they reduce the number of competing firms in the relevant market. Since vertical mergers combine firms at different stages in the production and

distribution process, they may also have harmful effects on competition if they give rise to risk of markets becoming foreclosed to third parties. While conglomerate mergers present the least danger to competition, since in the case of pure conglomerates there is no functional link whatever between the merged firms, they nevertheless can be potentially anticompetitive if they are considered in the context of additional financial strength (or 'deep pockets') they give to the parties involved, which the parties can use against actual or potential competitors through cross-subsidization.

- ¹⁴⁰ Mark A A Warner, *International Aspects of Competition Policy – Possible Directions for the FTAA*, in "World Competition: Law and Economics Review", Vol. 22 No.1, March 1999.
- ¹⁴¹ The Competition and Consumer Protection (General) Regulations, 2011, which were *gazetted* on 19 August 2011 as Statutory Instrument No.97 of 2011.
- ¹⁴² 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)
- ¹⁴³ The Competition and Consumer Protection (General) Regulations, 2011 (Statutory Instrument No.97 of 2011), that were *gazetted* on 19 August 2011.
- ¹⁴⁴ Section 45 of the Competition Act, 2003 (Act No.2 of 2003) of Namibia provides that "(1) ... the Commission must consider and make a determination in relation to a proposed merger of which it has received notification ... (a) within 30 days after the date on which the Commission receives that notification; or (b) if the Commission requests further information ..., within 30 days after the date of receipt by the Commission of the information; or (c) if a conference is convened ..., within 30 days after the date of conclusion of the conference. (2) If the Commission is of the opinion that the period referred to in paragraph (a), (b) or (c) of subsection (1) should be extended due to the complexity of the issues involved it may, before expiry of that period, by notice in writing to the undertakings involved extend the relevant period for a further period, not exceeding 60 days, specified in the notice".
- ¹⁴⁵ Zambia Association of Chambers of Commerce and Industry, during the fact-finding visit interview held on 17 October 2011.
- ¹⁴⁶ Corpus Legal Practitioners, during the fact-finding visit interview held on 21 October 2011.
- ¹⁴⁷ The interim measures provisions of section 62(1) of the Act only relate to the prevention of potentially harmful mergers before completion of the assessment of the competitive effects of the transaction, and not to authorization of mergers.
- ¹⁴⁸ COMESA Competition Regulations and Rules, Common Market for Eastern and Southern Africa, Lusaka, December 2004.
- ¹⁴⁹ Unconscionable conduct is described in the national competition and consumer protection policy as unfair and unreasonable conduct in business transactions that goes against good conscience, and can occur in transactions between businesses or in transactions between businesses and consumers.
- ¹⁵⁰ Regulation 16 of the Competition and Consumer Protection (General) Regulations, 2011.
- ¹⁵¹ The ZACCI Journal, Volume 1, Issue 7, 2010.
- ¹⁵² The ZACCI Journal, Volume 1, Issue 9.
- ¹⁵³ The 8 basic consumer rights are the rights to information, choice, safety, education, clean environment, basic consumer goods, to be heard, and to redress.
- ¹⁵⁴ Structural remedies are those aimed at changing or altering the structure of the market, such as ordering divestiture or full dissolution or breakup of a firm, while behavioural remedies are those aimed at regulating or modifying the future conduct of the offending firm to prevent or control the identified anticompetitive practices.
- ¹⁵⁵ A structural order to establish competition in an industry that had been monopolised was the break-up in the United States of America of AT&T (American Telephone and Telegraph Company) by a court order in the early 1980s. The current Microsoft case might also be concluded with structural remedies.
- ¹⁵⁶ See UNCTAD, "Best Practices for Defining Respective Competences and Settling of Cases which Involve Joint Action by Competition Authorities and Regulatory Bodies" (TD/RBP/CONF.6/13/Rev.1 and TD/B/COM.2/CLP/44/Rev.2, of 17 August 2006).
- ¹⁵⁷ The following are the full names of the abbreviated symbols in Figure 1: (i) CC (Competition Authority); (ii) CAZ (Communications Authority of Zambia); (iii) CEEC (Citizens Economic Empowerment Commission); (iv) ECZ (Environmental Council of Zambia); (v) ERB (Energy Regulation Board); (vi) GRZ (Government of the Republic of Zambia); (vii) NWASCO (National Water & Sanitation Council); (viii) PRA (Pharmaceutical Regulatory Authority); (ix) RDA (Road Development Agency); (x) RTSA (Road Transport and Safety Agency); (xi) ZABS (Zambia Bureau of Standards); (xii) ZDA (Zambia De-

velopment Agency); and (xiii) ZWMA (Zambia Weights & Measures Agency).

- ¹⁵⁸ As submitted by the Registrar & Director of Court Operations of the Supreme Court of Zambia during the fact-finding visit interview held on 18 October 2011.
- ¹⁵⁹ Section 12(e) of the old Competition and Fair Trading Act, 1994 provided that a person should not “supply any product which is likely to cause injury or health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any law”.
- ¹⁶⁰ Section 7(2)(e) of the old Act provided that enterprises in dominant positions should refrain from the restrictive practice of “imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported”.
- ¹⁶¹ Competition and Consumer Protection (General) Regulations, 2011 (Statutory Instrument No.97 of 2011).
- ¹⁶² In Zimbabwe, while the merger notification fee is also calculated at 0.1 per cent of the combined annual turnover or assets in Zimbabwe of the merging parties, the maximum cap is \$50 000. In South Africa, the notification fee for an intermediate merger is R100 000 (about \$12 800), and for a large merger is R350 000 (about \$45 000), with no fees charged for the notification of small mergers.
- ¹⁶³ The main airports are Kenneth Kaunda International Airport (in the Lusaka Province), the Kalulushi and Ndola Airports (Copperbelt Province), the Chipata Airport (Eastern Province), the Livingstone Airport (Southern Province), the Kasama Airport (Northern Province), the Mansa Airport (Luapula Province), the Solwezi Airport (the North Western Province), and the Mongu Airport (Western Province).
- ¹⁶⁴ http://en.wikipedia.org/wiki/Transport_in_Zambia.
- ¹⁶⁵ <http://www.railtracker.org/RailSFFILIATES/Railways/ZR/zrrailnt.htm>.
- ¹⁶⁶ <http://seat61.com/Zambia.htm/>
- ¹⁶⁷ http://en.wikipedia.org/wiki/Tansport_in_Zambia.
- ¹⁶⁸ Part III of the Act, on Restrictive Business and Anticompetitive Trade Practices, provides for the prohibition of both anti-competitive agreements and abuse of dominance. The available statistics on the Commission’s case load in the Annual Reports do not make a clear distinction between these two sets of anticompetitive practices.
- ¹⁶⁹ CCPC 2010 Annual Report.
- ¹⁷⁰ For example: (i) in 2010, the Commission conditionally authorized the takeover of 100 per cent shares capital of Zain Africa BV (including Celtel Zambia Plc) by Bharti Airtel International (Netherlands) BC on the conditions that “the disputes pertaining to the interconnection fees issues in the sector in relation to the outstanding complaints of interconnection fees/rates to the competitors which is inimical to section 7(2)(a) and (b) of the Competition and Fair Trading Act, Cap. 417 of the Laws of Zambia” and “to address full disclosure to the public of mobile internet and roaming charges (and any other services on offer) in compliance with section 12(d) of the Competition and Fair Trading Act, Cap. 417 of the Laws of Zambia”; (ii) in 2009, the Commission conditionally authorized the acquisition of Proflight Commuter Services Limited Alliance by Zambia Airlines on condition that the parties to the transaction did not abuse their dominant position of market power in the domestic market, and it also conditionally authorized the joint venture between Copperbelt Energy Corporation and Realtime Technology Alliance Africa Limited on condition that Copperbelt Energy Corporation should not engage in any form of discrimination when providing its services to internet service providers; and (iii) in 2008, the Commission conditionally authorized the acquisition of Nedfin Limited by Blue Employee Benefits of Botswana on condition that none of the directors and shareholders in Nedfin Zambia Limited and Blue Financial Services Zambia Limited should hold directorship or shareholding in a microfinance institution in Zambia without seeking the prior authorization of the Zambia Competition Commission.
- ¹⁷¹ The ICN launching authorities were from Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia.
- ¹⁷² The ICN has five Working Groups. These are: (i) The Cartel Working Group; (ii) the Mergers Working Group; (iii) the Unilateral Conduct Working Group; (iv) the Advocacy Working Group; and (v) the Agency Effectiveness Working Group.
- ¹⁷³ The nine COMESA member States that provided members of the Board of Commissioners are Djibouti, Egypt, Kenya, Mauritius, Seychelles, Swaziland, Uganda, Zambia, and Zimbabwe.
- ¹⁷⁴ SADC is a trade and development regional grouping, whose country membership comprise the Republic of Angola, the Republic of Botswana, the Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Mauritius, the Republic of Mozambique, the Republic of Namibia, the Republic of Seychelles, the Republic

of South Africa, the Kingdom of Swaziland, the United Republic of Tanzania, the Republic of Zambia, and the Republic of Zimbabwe. More than half of the SADC countries have adopted competition policies and laws at national level, and established competition authorities to implement the policies and laws. These are Botswana (2009), Malawi (1995), Mauritius (2007), Namibia (2003), South Africa (1979), Seychelles (2010), Swaziland (2007), the United Republic of Tanzania (2007), Zambia (1994), and Zimbabwe (1996).

- ¹⁷⁵ Report of Capacity-Building and Technical Assistance on Competition Law and Policy at the Fifth United Nations Conference held in Antalya, Turkey, 14–18 November 2005
- ¹⁷⁶ ‘Model Law on Competition’ (TD/RBP/CONF.7/8), United Nations Conference on Trade and Development, United Nations, New York and Geneva, 2010
- ¹⁷⁷ Presentation by Mr Alexander J. Kububa, Director and Chief Executive Officer of the Competition and Tariffs Commission of Zimbabwe at the Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in Pretoria, South Africa: 3 – 4 September 2009
- ¹⁷⁸ Zimbabwe’s core economic industries are mining (coal, gold, platinum, copper, nickel, tin, clay, numerous metallic and nonmetallic ores), steel; wood products, cement, chemicals, fertilizer, clothing and footwear, foodstuffs, beverages and agricultural products which include corn, cotton, tobacco, wheat, coffee, sugarcane, peanuts, sheep, goats and pigs.
- ¹⁷⁹ The United Republic of Tanzania enacted the current legislation in 2003; it was put to effect in 2004. The first Commissioners were appointed in 2004 and the Competition Authority became operational in 2007.
- ¹⁸⁰ <http://data.worldbank.org/topic/labor-and-social-protection>.
- ¹⁸¹ Refers to the introduction of South African Rand and United States of America dollar as currencies in the Zimbabwean economy in February, 2009.
- ¹⁸² According to Section 2 (1) ZCA, unfair business practice means restrictive practice or conduct specified in the First Schedule.
- ¹⁸³ Section 2 (1) ZCA defines restrictive practices as
- (a) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons, or
 - (b) any business practice or method of trading; or
 - (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or
 - (d) any situation arising out of the activities of any person or class of persons; which restricts competition directly or indirectly to a material degree, in that it has or is likely to have any one or more of the following effects:
 - (i) restricting the production or distribution of any commodity or service;
 - (ii) limiting the facilities available for the production or distribution of any commodity or service;
 - (iii) enhancing or maintaining the price of any commodity or service;
 - (iv) preventing the production or distribution of any commodity or service by the most efficient or economical means;
 - (v) preventing or retarding the development or introduction of technical improvements in regard to any commodity or service;
 - (vi) preventing or restricting the entry into any market of persons producing or distributing any commodity or service;
 - (vii) preventing or retarding the expansion of the existing market for any commodity or service or the development of new markets therefore;
 - (viii) limiting the commodity or service available due to tied or conditional selling.
- ¹⁸⁴ According to Sections 2(1) and 34B ZCA, unfair trade practice means
- (a) the dumping of imported commodities as described in subsection (1) of section 90 of the Customs and Excise Act [Chapter 23:02];
 - (b) the granting of a bounty or subsidy with respect to imported commodities within the meaning of section 92 of the Customs and Excise Act [Chapter 23:02],
 - (c) any other practice in relation to the importation of commodities or services of the sale of imported commodities or the or provision of an imported service where such practice is declared to be unfair in terms of paragraph (b) of subsection (3) or section thirty-four C.
- ¹⁸⁵ The only application for authorization of a restrictive practice that was received and considered by the Commission was in 2003 for authorization of Zimchem’s exclusive coal tar supply agreement with Ziscosteel and Wankie Colliery Company, which the Commission approved on the grounds that the agreement’s public interest benefits overwhelmingly outweighed its anticompetitive features.
- ¹⁸⁶ For further details, please see the UNCTAD Model Law on Competition 2010 – Chapter IV, available at http://www.unctad.org/en/docs/tdrbpconf7L4_en.pdf.

- ¹⁸⁷ Antle, J.M. (1995). Choice and Efficiency in Food Safety Policy. In: Beghin, J.C. and Bureau, J-C, (2001). Quantification of Sanitary, Phytosanitary, and Technical Barriers to Trade for Trade Policy Analysis. Working Paper 01-WP-291. Iowa State University. Pp 1–35.
- ¹⁸⁸ Committees of the Commission are provided for under Section 14 of the ZCA. The provision allows for non members of the Commission to sit in the Committees of the Commission under Section 14 (2) (b). In practice this has never happened; all four Committees established have members who are Commissioners.
- ¹⁸⁹ The provision can be a good avenue for strengthening relations with the Executive, but it should not compromise the quality of work to be done since competition cases require specialized training and skills that could not be possessed by ordinary Public Servants in Zimbabwe.
- ¹⁹⁰ It is worth noting that certain types of investigative measures, such as dawn raids require secret preparation in order to ensure that evidence will not be destroyed beforehand. In such cases, a public notice of the investigation is less than useful. This issue will be looked into later in the report when discussing investigation powers.
- ¹⁹¹ The procedure is not articulated in neither ZCA nor in any regulation made from ZCA to give effect to the functioning of the CTC. Section 28 provides for generalities regarding investigations. Details provided in this text are based on the practice as gathered during field mission in Zimbabwe.
- ¹⁹² <http://legal-dictionary.thefreedictionary.com>
- ¹⁹³ Ibid
- ¹⁹⁴ <http://searchdatamanagement.techtargget.com/definition/compliance>
- ¹⁹⁵ BLD
- ¹⁹⁶ The transfer of orders of the Commission provided in Section 33 of the ZCA is for enforcement purposes only and it should not be construed to mean that the CTC is equivalent to a High Court.
- ¹⁹⁷ Practice in other similar jurisdictions is such that salary scales of competition authorities staff are compared to those of the sectoral regulators and not civil service scales which are usually low.
- ¹⁹⁸ The trade development levy is a surcharge of 0.1 per cent of the free on board value of specific goods imported into or exported from Zimbabwe. This surcharge is levied in order to fund the promotion of export trade of Zimbabwe and for matters connected therewith. To date, two organizations have been declared as trade development organizations for the purposes of benefitting from the trade development levy, which are ZimTrade and the CTC. The trade development levy collected under the Trade Development Surcharge Act is therefore shared between ZimTrade and the CTC on a 70/30 basis. The funds collected are expected to be used solely for trade development and promotion work.
- ¹⁹⁹ Note that the figures provided in Table 2 include all cases handled in the respective periods. For this reason they are higher than the figures provided in Tables 3 to 7, which refer to matters that were actually decided and closed during the respective periods.
- ²⁰⁰ Full-scale investigations have been undertaken into the following industries and sectors: cement industry, coal industry, retail pharmaceutical services sector, sugar industry, fertilizer industry, automotive glass industry, dry-cleaning and laundry services sector, health insurance services sector, alcoholic spirits industry, waste paper collection industry, textile fabrics industry, packaging ink industry, electricity utilities sector, and telecommunications services sector. The Commission is currently undertaking full-scale investigations into four industries and sectors: bakery industry, textbook distribution industry, ambulance services sector, and cotton industry.
- ²⁰¹ For example, the full-scale investigation into the cement industry was terminated by the Commission in making the following orders in terms of section 31(1) of the Competition Act [Chapter 14:28] with regard the competition concerns identified from the investigation: (i) that Portland Holdings Limited (Unicem) of Bulawayo stop giving preference in the collection of cement to its transport contract customers to reduce the queuing times of its other customers; and (ii) that Circle Cement of Harare give its customers choice in selecting the most suitable and competitive form of transportation of their cement purchases from the factory.

The Commission also made the following recommendations with regard public interest concerns identified: (i) Unicem and Circle Cement should at provincial and district levels and at Growth Points expand their cement distribution network in cooperation with bodies such as the Small Enterprises Development Corporation (SEDCO) in order to cover a larger geographical area; (ii) Unicem should, when awarding its transport and distribution contracts, endeavour to act in a fair and transparent manner so that such contracts contribute to the efficiency of its cement distribution; (iii) the (then) Ministry of Finance and Economic Development should either remove customs duties on the importation of cement clinker or grant that product when in short supply duty exemption status during the peak period from about October to December of each year so as to allow the local cement manufacturers to increase their production by operating at full

capacity; (iv) the Ministry of Finance should also remove sales tax on cement sales below 20 bags in order to increase the competitiveness of small cement merchants vis-à-vis informal cement traders, and to lessen the burden on small users of cement; (v) the Zimbabwe Investment Centre and the Small Enterprises Development Corporation should encourage and support the establishment of economical and less capital intensive cement production plants in smaller centres and Growth Points along the lines of the new processing and blending plants of Zimbabwe Cement Company (Pvt) Limited of Norton and Techniks (Pvt) Limited of Gweru; and (vi) Government procurement of cement for public projects should be centrally coordinated, and responsibility placed at senior level within the implementation agencies so as to ensure adequate cement supplies to to defined public projects on a priority basis.

- ²⁰² It should be noted that a case might involve more than one types of restrictive and unfair business practices, e.g., one case can involve both abuse of dominance and collusive and cartel-like behaviour. The number of types of restrictive business practices addressed during a particular period therefore does not necessarily mean that the same number of competition cases was decided upon during that period.
- ²⁰³ Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part II, August 2008 (unpublished).
- ²⁰⁴ The conditions imposed on the approval of the mergers were aimed at addressing the transactions' identified competition concerns, or to realize other public interest benefits.
- ²⁰⁵ The mergers that were not challenged were those that were examined post-merger but found not to raise serious competition concerns in the relevant markets.
- ²⁰⁶ Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part I, November 2006 (unpublished).
- ²⁰⁷ Mitchell, L. (2003). Economic Theory and Conceptual Relationships between food Safety and International Trade. In: Buzby, J.C.(ed.); International Trade and Food Safety- Economic Theory and Case Studies. USDA Agricultural Economic report #828.pp10–24.
- ²⁰⁸ Cabinet paper on the repeal of the Fair Competition Act, 1994 and enactment of the Fair Competition Act No. 8 of 2003.



UNITED NATIONS