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**Review of Recent Experiences in the
Formulation and Implementation of
Competition Law and Policy
in Selected Developing Countries**

Thailand, Lao, Kenya, Zambia, Zimbabwe

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Foreword

Since the mid 1970s, UNCTAD has been dealing with the issues of competition law and policy and its interface with the development dimension. As evidenced by the large and growing number of countries which have adopted or are in the process of preparing competition laws and policies, there is growing awareness among developing countries, including the least developed countries (LDCs), of the important role which competition law and policy can play in promoting efficiency, economic growth and poverty reduction. This volume highlights the opportunities and challenges which the formulation and implementation of an effective competition law pose for developing countries. The focus of the country reviews is on the experience gained by the five countries over the last five years on the policy options available to them and on the need for formulation of appropriate institutional framework for effective enforcement. It also identifies best practices and lessons from the five countries reviewed and which can contribute to better enforcement and improved economic performance and growth.

The key lessons of the country reviews is that merely adopting a competition law is no panacea. Adequate institutional framework, human resources and transparency and fairness in the enforcement process are needed to ensure that competition law and policy are implemented well for markets to function properly, particularly for the poor.

The country reviews make a series of recommendations for legislative and institutional reforms for Thailand, Lao, Kenya, Zambia and Zimbabwe that are needed for effective enforcement of competition law and promoting domestic competition, international competitiveness and development. It is hoped that this publication, which is launched on the occasion of the 5th UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which is to be held in Antalya, 14 - 18 November 2005, will raise awareness and enhance expertise among competition agency officials, private sector stakeholders, consumer organizations and sector regulators about the crucial importance of transparency and fairness in the enforcement of competition law.

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THAILAND

1. Introduction

Why did Thailand adopt a Competition Act in 1999? There are a number of explanations. It is argued that Section 87¹ of the current Constitution of the Kingdom of Thailand B.E. 2540 (1999) mandates the Thai government to enact the competition law in order to prevent direct and indirect monopolies and to ensure fair competition. This explanation is reflected in the note at the end of the Competition Act of 1999. The note, which explains the rationale for enacting the Competition Act of 1999 reads:

“The reason for enacting this law is that the Price Control and Antimonopoly Act of 1979 had been repealed and that law had both the price control provisions and anti-monopoly provisions. It is deemed appropriate to improve provisions relating to anti-monopoly and separate

¹ Section 87 of the Thai Constitution (1999) reads:

“The State shall encourage a free economic system through market force, ensure and supervise fair competition, protect consumers, and prevent direct and indirect monopolies, repeal and refrain from enacting laws and regulations controlling businesses which do not correspond with the economic necessity, and shall not engage in an enterprise in competition with the private sector unless it is necessary for the purpose of maintaining the security of the State, preserving the common interest, or providing public utilities.”

those provisions from price-control provisions. The purpose of this law is to prevent monopoly, restraint of business competition and that will lead to the promotion of free competition and prevention of unfair business practices. Therefore, it is necessary to enact this law.” (translated unofficial Thai by the author)

However, there is a counter-argument to the aforementioned explanation. Namely, Section 87 belongs to Chapter V (Directive Principles of Fundamental State Policies) which does not have legal binding upon government agencies. Section 88 of the same Chapter reads:

“The provisions of this Chapter are intended to serve as directive principles for legislating and determining policies for the administration of the State affairs.”

The second explanation is based upon economic structural change and the non-functioning of the Price Control and Antimonopoly Act of 1979. Due to the rapid economic growth that occurred in Thailand from 1987 to 1992, the economic structure in Thailand changed drastically. The boom that began in 1987 surprised Thai observers as much as outsiders. The boom was apparently driven by three principal forces: the depreciation of the U.S. dollar in relation to other currencies and the fact that the baht was pegged to it, which made Thai exports more competitive internationally; foreign investment, especially from two of the present newly industrializing economies (NIEs), Taiwan and Hong Kong, which wished to avoid rising labor costs in their own countries; and continuing low international petroleum prices in relation

to those of Thailand's export commodities. It was argued that this was due to the drastic changes in the economic structure arising from 1987 economic crises. The Thai Ministry of Commerce (MOC) established a Working Committee consisting of MOC officials and university professors to examine whether the existing Price Fixing and Anti-Monopoly Act of 1979 (PFA) was still suitable for the economic structure that had gone through such a remarkable growth period. The Working Committee concluded that the PFA had two serious flaws. First, the primary objective of the controlling prices. Second, in order to enforce the PFA's antimonopoly provisions, it first was necessary to enforce the price fixing provisions. These two flaws created tremendous legal and political difficulties for the Thai enforcement committee to enforce the PFA. In fact, since the enactment of the PFA, the enforcement agency has taken only one action against a price fixing cartel relating to ice-cube business.

The third explanation is based largely upon political pressure. Namely, it is argued that the International Monetary Fund (IMF) imposed this upon the Thai government as one of the conditions under the stand-by arrangement during the economic crisis (1997-2001). Some Thai business leaders believe that the Thai MOC officials initiated the idea of creating the Competition Act of B.E. 2540 (1999) under pressure from the major trading partners. The author learned from interviewing key members of the Working Committee that the Working committee modeled substantial parts of the THE COMPETITION ACT OF 1999 after the South Korean Monopoly Regulation and Fair Trade

Act (MRFTA), the Taiwanese Fair Trade Law (FTL), the Japanese Antimonopoly Law of 1947, and the German Act Against Restraints of Competition.

2. The Economic Setting of Competition Law of Thailand

In order to adequately understand the design of the current Thai Competition Act of 1999, the economic setting and the role of state enterprises during the period of 1992 – 1996 is important because the working committee had taken those factors into consideration during the drafting process.

2.1 The Economic Setting²

2.1.1 Social Character As of mid-1990, the population of Thailand was 56 million. Between 1980 and 1990 the population grew at an average annual rate of 1.8 percent, a reduction from 2.7 percent over the decade before. Population density was 107 persons per square kilometer of total area and 275 persons per square kilometer of cultivable land. In 1990 the urban population was 23 percent of the total, compared with 13 percent in 1965, and 69 percent of the population worked in agriculture, compared with 6 percent in industry and 25 percent in services. The corresponding data for 1965 were 82

² The economic setting part was largely drawn from Peter G. Warr and Bhanupong Nidhiprabha, THAILAND'S MACROECONOMIC MIRACLE, The world Bank, 1996. The reason is because this part of the book accurately describes the economic setting in Thailand during the drafting process of the drafting process of the Competition Act (1992-1995).

percent in agriculture, 5 percent in industry, and 13 percent in services. The degree of urbanization in Thailand is unusually low among countries in its income group, and the importance of agriculture in total employment is high. Even more unusual is the degree to which the urban population is concentrated in a single city, Bangkok.

2.1.2 Product Markets Like most low- and middle-income developing countries, Thailand has favored product market policies that implicitly tax agriculture and subsidize industry. In the past, the government levied export taxes on several agricultural export commodities, but these have been slowly phased out. Rubber is now the only commodity subject to an export tax. Tariffs and quantitative import restrictions are used to protect part of the manufacturing sector.

Although parts of the manufacturing sector are highly protected and inefficient, in general the sector is competitive and less highly regulated than its counterparts in some of Thailand's Southeast Asian neighbors. Thailand does not practice free trade, but its protection levels are moderate and quite stable.

There have been several empirical studies of protection policies in Thailand most of which have concentrated on estimating effective rates of protection (ERPs)—that is, the proportion by which the overall structure of protection raises

the value added received by an industry per unit of output in relation to what it would be under free trade. Unfortunately, these studies have used different types of data, different product definitions, and different methodologies. Some have used official tariff rates, whereas others have used tariff rates estimated from customs duty collections or from price comparisons. It is therefore difficult to compare the results of these studies over time. Nevertheless, the studies do show a similar pattern over the past three decades (their results are summarized in table 1 below namely, that the protective system has been biased against the agro-based industries

**Table 1: Thailand:
Effective Protection of Industry Groups by Levels of Fabrication and End Uses,
1964-84**

(percent)

<i>Industry group</i>	<i>1964</i>	<i>1969</i>	<i>1974</i>	<i>1984</i>
Processed food	47.47	-32.6	-19.41	7.93
Beverages and tobacco	215.45	241.3	2280.55	26.50
Construction materials	—	47.4	46.91	17.38
Intermediate goods, I	82.02	2.8	15.91	17.63
Intermediate goods, II	60.09	79.1	48.53	241.84
Consumer nondurable goods	70.95	32.5	90.63	23.84
Consumer durable goods	63.87	69.1	200.62	19.29
Machinery	37.48	30.6	30.02	32.40
Transport equipment	118.00	34.9	353.88	45.70

And toward the manufacture of both import-competing and non-import-competing goods. This is the typical pattern of protection found in developing countries.

2.1.3 Financial Markets Thailand's organized financial markets are made up of eight main financial institutions: commercial banks; finance, securities, and credit companies; specialized banks; development finance corporations; the stock exchange; insurance companies; saving cooperatives; and a variety of mortgage institutions. The commercial banks make up the largest component in terms of total assets, credit extended, and saving mobilized. In 1990 they accounted for 71 percent of total financial assets in the country. The second largest is the finance companies, which began operating in 1969. Thailand has three specialized banks—the Government Saving Bank (GSB), the Bank of Agriculture and Agricultural Cooperatives (BAAC), and The Government Housing Bank (GHB); and two development finance corporations—the Industrial Finance Corporation of Thailand (IFCT) and the Small

Industries Finance Office (SIFO). These specialized institutions are either owned or party owned by the government.

The financial market is dominated by the activities of commercial banks, which absorb roughly three—fourths of all deposits placed with financial institutions. There are therefore central actors in Thailand's financial system. A significant feature of the commercial banking industry in Thailand is the high degree of concentration in ownership. Ownership is dominated by sixteen families of Chinese origin (Naris 1993). Thai monetary authorities consider this concentration to be a problem, and attempts have been made to diversify bank ownership. The stock exchange has been the main venue for transferring ownership. Special legislation has limited the number of shares a person may own. This legislation has proved

ineffective, however, as banks have not been able to meet the deadlines for ownership diversification and the deadlines have had to be extended repeatedly.

The Thai commercial banking industry has a cartel-like structure with its sixteen banks organized loosely under the Thai Bankers Association, through which they collectively set the standard rates for service charges and loan rates. Because of this oligopolistic structure, it takes time for all the banks to agree on the same adjustment, particularly in the downward direction, with the result that interest rates (on loans and deposits) respond rather slowly to market conditions. As a collective body, however, Thai bankers possess substantial power in dictating the cost and the allocation of domestic credit and in influencing the effectiveness of monetary policies.

Within the banking system, firms vary greatly in size and market share. This feature is important to keep in mind in any attempt to understand the bank credit market in Thailand. At present, the market is led by four large banks whose market shares in deposits and credit totaled 70 percent in 1990. These four banks are the Bangkok Bank, the Siam Commercial Bank, the Thai Farmers Bank, and the Krung Thai Bank. They dominated the interbank loan market since they are the main suppliers of liquidity for smaller banks and the foreign banks. In addition, they are the leading players in foreign transactions and thus can exert a degree of control on the supply of foreign exchange. Important decisions regarding interest rates and other price-setting decisions in the money market

are influenced by these four banks, through the Thai Bankers Association.

2.2 Important Economic Regulations

2.2.1 International Trade Regulation

Apart from tariffs and export taxes, the trade regime in Thailand includes a number of restrictive measures such as quantitative import and export controls. At present, there are import bans on eighteen commodities, and special permission is required to import another thirty. The Ministry of Commerce imposes and supervises the import controls. Commodities under control include those produced in the socialist countries, weapons and strategic firearms, rice, and sugar. The controls on rice and sugar are designed to prevent reimporting after the products have been exported. Export controls are placed on thirty-eight commodities, sixteen of which are outright bans. The export controls are meant to ensure domestic supplies for local consumption at low prices. Items such as paper, pesticide, sheets of flat iron, polyfiber, and cement are regulated to ensure that local supplies are available.

Under the Price Setting and Antimonopoly Act of 1979, the Ministry of Commerce also administers price controls on "essential products." In 1986 thirty-four commodities came under price control. Such control has helped to keep down the cost of living, but it has been at the expense of shortages of these products in retail stores.

2.2.2 Exchange Rate Regulation
Exchange rate management is in the policy domain of the Bank of Thailand, but input from the Ministry of Finance is important. From 1955, when the multiple exchange rate system was abolished until the devaluations of 1981, the baht was maintained at more or less fixed parity with the U.S. dollar (20 to 21 baht per U.S. dollar). The main argument for this peg was the stability and the confidence it was believed to provide. Between 1955 and 1977, the dollar depreciated in relation to other currencies and the baht-dollar rate was adjusted five times, but these adjustments were all very small.

The volatility of the dollar and the enlarged trade deficits in the late 1970s following the second oil shock prompted the Thai government to reconsider its exchange rate policy. Although much of Thailand's trade is denominated in U.S. dollars, less than 20 percent of its export and import transactions are with the United States. Pegging to the overvalued dollar in the late 1970s had merely increased the country's balance of payment deficits. In March 1978 the Bank of Thailand announced that the baht would no longer be tied to the dollar but to a basket of currencies in which the dollar would be a major component. The new system was, however, short-lived. In November 1978, a system of daily fixing was introduced, in effect putting the baht back into parity with the dollar, at 19.8 baht per dollar.

In 1979 and 1980, Thailand encountered severe trade deficits, which reached a record 4.6 percent of GDP. The deficits resulted from an artificially strong dollar—to which the baht was still

pegged and which had mitigated against Thai exports—and a strong growth in domestic spending. In response, the government devalued the baht twice in 1981, bringing the rate to 23 baht per U.S. dollar. The government also abandoned the daily fixing system. Such a drastic move, particularly the second devaluation, which then was the largest in recent history (8.7 percent), proved to be politically unpopular and led to the resignation of a deputy finance minister. To build up confidence in the baht after two successive devaluations, the government introduced a currency swap in 1981 to guarantee that those bringing in foreign funds would not have to pay back more than the amount they had borrowed from abroad when their loans came due.

The abandonment of the daily fixing system was tantamount to returning to the old single-rate, fixed exchange system. In 1984 the baht was again devalued—this time by 14.5 percent—to curb the growing trade deficit. The fixed exchange rate system was also abandoned and replaced by a supposedly flexible exchange rate system, under which the baht is tied to a basket of currencies. This switch was to provide greater flexibility in the management of the country's foreign exchange. It is obvious that the basket is heavily dominated by the U.S. dollar. Approximate parity to the U.S. dollar has been maintained in spite of the dollar's realignment in relation to other currencies. This matter is explored further in chapter 9.

2.2.3 Financial Market Regulation
Regulation in the financial market is the responsibility of the Bank of Thailand, with the approval of the Ministry of

Finance. Financial regulations act both to stabilize the economy and to preserve the commercial viability of the financial system. The present regulations have four distinctive features.

First, entry to the financial industry, through the opening of new financial institutions—commercial banks, finance companies, and insurance companies—as well as branches of foreign banks, is regulated by the Ministry of Finance through licensing permits. In the case of commercial banks, this control, which is strictly enforced, is aimed at insulating the existing institutions from new competition in order to ensure their long-term viability and stability. In recent years, this tight control, together with the government's unwillingness to let ailing commercial banks collapse, has proved costly: government protection enabled mismanaged banks to continue their operation at public expense.

Second, until recently the Bank of Thailand regulated interest rates, by fixing the maximum deposit rates and maximum lending rates. Since June 1989 controls on the rates for time deposits have been relaxed. Commercial banks have been encouraged to vary their own rates voluntarily within the bounds prescribed in response to their liquidity positions. Individual banks, fearing that they would lose their market shares, competed for deposits by offering the ceiling rates for deposits. In situations of excess liquidity, this reduced bank profits. As a result, liquidity problems were prolonged until the Bank of Thailand eventually intervened, by adjusting the ceiling rates. The ceiling rates can thus be seen in part as a device for limiting the banks'

capacity to exploit their oligopolistic power.

A Third novel feature is that Thailand has no direct controls on capital inflows, whereas until recently capital outflow has been tightly regulated. In these circumstances, local liquidity becomes highly responsive to changes in foreign interest rates and the exchange rate. Since domestic rates are normally regulated at levels slightly higher than the foreign rates, commercial banks and large companies can freely adjust their liquidity position by borrowing abroad. This flexibility has helped ease the pressure on foreign reserves in times of balance of payments problems.

Fourth, regulations within the banking system are also plentiful. Besides the usual monetary policy controls, there are regulations requiring new bank branches to fulfill a variety of conditions, including compulsory holdings of government bonds. This makes the market for government bonds a captive one. There is also an institutional regulation known as "agricultural credit policy," which requires commercial banks to lend a fixed proportion of their previous year's deposits (currently set at 13 percent) to agriculture. This regulation, which came into effect in 1975, is designed to enlarge the flow of private credit to agriculture.

2.2.4 Labor Market Regulation
Government regulations in the labor market are under the jurisdiction of the Ministry of Interior, to which the Labor Department belongs. Labor regulations take two basic forms: the worker protection scheme and minimum wage regulation, which is more relevant to this study.

In response to an International Labor Office appeal for workers' rights and protection, the Labor Department introduced minimum wage regulation in 1973. It was intended to guarantee workers a daily income that would be sufficient to meet their basic needs. The regulation fixes a standardized minimum daily wage for industrial workers in Bangkok and in the provinces. The figure is revised annually by representatives from the government, the employees, and the employers. From 1973 to 1987, the figures were revised fourteen times. The 1987 rate was 73 baht for Bangkok and the five nearby provinces; 67 baht for the provinces of Chonburi, Saraburi, Nakorn Ratchasima, Chiangmai; and 61 baht for other provinces.

The effect of minimum wage regulations on labor market hiring has been slight, since only large companies and state enterprises adhere to them. According to a survey conducted in 1986, less than one-third of the firms in operation paid their workers the minimum level or higher. This means that fewer than half of the employed unskilled workers were paid the minimum wage. Firms paying less than the legal minimum are mostly small and medium-size firms. Obviously, the threat of unemployment leads workers to accept lower pay in order to secure employment. Only the large firms and state enterprises have formal worker organizations strong enough to police the full administration of the minimum wage regulations. Despite the limited coverage of the minimum wage regulations, revisions to the minimum wage do have an impact, by raising the entire wage structure within the formal sector, including that of the salaried that of the salaried

employees. An inflationary impact from such revisions would therefore seem a genuine possibility.

2.3 The Role State Enterprises (SOEs)

As in many other developing countries, public enterprises play a significant role in the Thai economy. The sector has grown rigidly in recent years and its role in resource allocation has become an important concern of economic policy. Far from being confined to infrastructure, the activities of Thailand's state enterprises stretch into many areas of business, including manufacturing, transport, hotels, services, trade, and finance. The Bank of Thailand is also formally a state enterprise. At present, there are sixty-eight state enterprises, seventeen of which operate in infrastructure. Most state enterprises began as special projects (revolving funds) under central government departments with their own staffs and financial accounts, then slowly graduated to the status of state enterprises when their activities expanded.

After the war, public enterprises became increasingly important in other sectors of the Thai economy because of the income they could provide for military officials and civilian politicians. By 1957, a large part of the country's industrial capacity was controlled by public enterprises. The industries they dominated included tobacco, paper, sugar, gunny bags, timber, tin, metal cabinets, pharmaceuticals, batteries, tanneries, textiles, cement, spirits, glass, rubber footwear, alum, and shoe polish (World Bank 1959: 90 - 91).

The growth of the public enterprises had been haphazard. Not only was there little economic rationale for the choice of industries entered by the public enterprises, but they had become uncontrolled in their operation, finance, and investment behavior. Furthermore, their practice of lending public funds to one another made their accounts difficult to interpret. The end result was that these enterprises became major vehicles for the purchase of political patronage. This was especially important for those Chinese businessmen whose interests were directly threatened by the public enterprises.

Because the management of a state enterprise comes under the jurisdiction of its parent ministry, its chairman is a political appointee. Following the move toward constitutional government in 1974 and the increased number of civilian politicians assuming ministerial portfolios, the political influence in state enterprises has continued to increase. In 1986, fifty-six out of sixty-eight chairmen of state enterprises were members of political parties. Through their control of state enterprises, the

political parties have therefore been exerting increasing influence on economic decisions. In the past, these chairmanships were dominated largely by senior bureaucrats and military officers. The increase in the overall importance of public enterprises within the Thai economy is shown in table 2. In 1970 the public enterprise sector was smaller than the central government, as measured by recurrent expenditures, capital expenditure, and revenue. By 1988, however, it was larger than the central government by all three measures.

The size and growth rate of public enterprises appears quite different when one looks at employment. Thailand's public enterprises tend to be capital intensive, in comparison with the central government. They employed almost 300,000 persons in 1988, which was approximately one-quarter the number employed by the central government. The rate of increase of employment in the public enterprise sector from 1970 to 1988 was 7 percent per year, which was slightly smaller than the 7.8 percent registered by the central government

Table 2: Thailand
Economic Importance of Public Enterprises, 1970 and 1988

(percent)

Year	<i>Recurrent expenditure/ GDP</i>		<i>Capital expenditure/ GDP</i>		<i>Revenue/GDP</i>	
	<i>Public enterprises</i>	<i>Central government</i>	<i>Public enterprises</i>	<i>Central government</i>	<i>Public enterprises</i>	<i>Central government</i>
1970	9.5	12.1	1.9	5.9	11.2	13.7
1988	18.9	15.9	7.7	2.7	20.8	16.3

3. Major Element of Thailand Competition Law

3.1 The Legislation Process: The Product of Political Compromise

In 1992, by the initiative of the permanent secretary of the Ministry of Commerce, the Working Committee consisted of a director of economic planning, Department of Internal Trade, an in-house lawyer of the Department of Internal Trade, a university law professor, was established in order to draft a competition law appropriate for Thailand. The Working Committee visited some countries in Asia and Europe and did a comparative study during 1992-1995. The draft law was submitted to the State Council, which functions as the governmental legislative bureau, for technical amendment and corrections. The draft was then submitted for deliberation in the Parliament. A number of amendments were made during the deliberation process in the Parliament, especially in the Senate. Finally, the Bill passed the Parliament and was enacted on March 31, 1999.

The Competition Act of 1999 is the product of political compromise. Below

are noted evidences of the said political compromise.

(1) The enforcement agency is not “independent regulatory body.” There are a number of indicators. Firstly, the ex officio members of the Competition Commission are high-level bureaucrats not independent experts. Secondly, the qualified members (outside members) must receive approval from the Cabinet,

their term of office is only two years, and they work on the part-time basis. Thirdly, the Chairman is the Minister of Commerce. Fourthly, the ex officio and secretary general of the Competition Commission is the Director-General of the Department of Internal Trade, a high-level bureaucrat under the Executive Branch. Finally, the 40 staffs at the office of the Competition Commission are officials of the Department of Internal Trade. They receive salary from the government just as regular civil servants of the Central Government. That means the Competition Commission does not have its own budget to hire its own staffs.

(2) The legislative intent of the draft Bill was to regulate conducts of business operators in Thailand. However, there was political demand in the Senate that structural control should be added to the Bill. Consequently, as a political compromise, Section 30 was incorporated into the Bill. Section 30 reads:

“The Commission shall have the power to issue a written order requiring a business operator who has market domination, with the market share of more than seventy five percent, to suspend, cease or vary the market share. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith.”

The fundamental thinking of the Working Committee about this political compromise is that it would be better to have an inadequate competition law and mediocre enforcement agency than not to have it at all. It is expected that there

would be probability to amend the law in the future.

3.2 Objective of the Act

The objective of The Competition Act of 1999 is mentioned in the note at the end of the Act. The note reads:

“The reason for enacting this law is that the Price Control and Antimonopoly Act of 1979 had been repealed and that law had both the price control provisions and anti-monopoly provisions. It is deemed appropriate to improve provisions relating to anti-monopoly and separate those provisions from price-control provisions. The purpose of this law is to prevent monopoly, restraint of business competition and that will lead to the promotion of free competition and prevention of unfair business practices. Therefore, it is necessary to enact this law.”

3.3 Statutory Framework

The Working Committee patterned The Competition Act of 1999 largely after the antitrust statutes of more advanced market economics, particularly those of South Korea and Taiwan. The Competition Act of 1999 reflects the Working Committee’s presumption that Thailand’s economic structure, where the majority of the domestic product markets are monopolistic or oligopolistic, is similar to South Korea’s. The Competition Act of 1999 therefore focuses on eliminating unreasonable or anticompetitive pricing behavior by dominant firms rather than directly prohibiting monopolization or monopoly itself.

The structure of the Thai economy falls somewhere in-between South Korea’s economic structure, where thirty *chaebols* dominate the domestic market, and Taiwan’s, where 98% of firms are small and medium-sized enterprises (SMEs). The Thai economy is closer to the Taiwanese economy because (1) there are fewer market dominant firms in Thailand than in South Korea and (2) most of the Thai firms are SMEs. Furthermore, unlike the South Korean government, the Thai government never has adopted nationalist economic policies to promote national champions. The hallmark of Thailand’s economic development is neoliberalism: trade and investment liberalization with few government industrial policies.

3.4 Administration

When a firm violates The Competition Act of 1999’s substantive provisions, the Competition Commission may issue a written order to the firm to suspend, stop, or correct its actions. In the order, the Competition Commission also may prescribe rules, procedures, conditions, and time restraints on compliance.

The Competition Commission possesses almost exclusive jurisdiction to enforce The Competition Act of 1999. The Thai Ministry of Justice does not have a unit specifically charged with enforcing the antitrust laws, and although the District Attorney may prosecute violations of The Competition Act of 1999, such prosecution is contingent on a request by the Competition Commission. A firm that is unsatisfied with the order of the Competition Commission may appeal to the Appellate Committee, whose ultimate decision is final.

There are several issues currently under debate in Thailand about judicial review of Appellate Committee decisions. First, is it legally permissible for an aggrieved firm or business operator to bring the decision of the Appellate Committee to a court for judicial review? Secondly, which court has competence to review such decisions? The court of justice or an administrative court?

3.5 Relations with Competitors

Public education about the objectives of The Competition Act of 1999 conducted by the Department of Internal Trade (DIT) within the MOC has helped the Thai public to understand that The Competition Act of 1999 will promote and maintain the *process* of fair and free market competition rather than the actual market competitors. In addition, the DIT emphasized that The Competition Act of 1999 aims to regulate the anticompetitive behavior of business operators rather than the actual structure of the businesses.

The Thai government has tried to promote SMEs after the 1997 crisis. However, its current promotional policy raises an important issue: how can the Competition Commission reconcile its promotion of SMEs with The Competition Act of 1999's objective of maintaining a free and fair competitive process without paying attention to the SMEs being wiped out by larger competitors?

3.6 Other Exemptions

The Competition Act of 1999 does not apply to acts of:

- (1) A central, provincial, or local administration;

- (2) State-owned enterprises regulated under the laws governing budgetary procedure;
- (3) Farmer groups, co-operative groups recognized by law and having business objectives for the benefit of farmers;
- (4) Businesses identified in the ministerial regulations, which may exempt the application of any or all provisions of The Competition Act of 1999.

Of the four exempted groups listed above, the state-owned enterprises (SOEs) are the most controversial. Large Thai firms believe that it is unfair that The Competition Act of 1999 regulates their conduct but exclude from its scope SOEs. Thailand's SOEs are concentrated in natural monopolies (i.e. the electricity, telecommunications, and railroad industries) and gradually are being "privatized" The current debate centers on whether these newly privatized firms should be placed under specific regulatory regimes similar to those in the United States and Europe or under the broad regulatory authority of The Competition Act of 1999. The current trend for the former SOEs doing business in the electricity, telecommunications, and railroad industries is to place them under specific regulatory regimes.

3.7 Conducts Prohibited by the Act

(1) Abuse of a Dominant Position

The Competition Act of 1999 does not directly prohibit the possession or acquisition of monopoly power. However, it does proscribe unreasonable or anticompetitive behavior by large firms with substantial market shares. Section 25 of The Competition Act of

1999 forbids “the abuse of a market dominant position. Sections 3 and 8 of The Competition Act of 1999 authorize the Competition Commission, with the approval of the Cabinet, to prescribe the market share and total sales above which a firm will be deemed a business operator with a market dominant position. The specific standard under the proposal that is currently awaiting Cabinet approval is a large firm with (1) more than a 33% market share, and (2) whose gross domestic sales total more than one billion Thai Baht (approximately US\$22 million). The Competition Commission specifically identifies market dominant firms in the Royal Gazette. Thus, Section 25 does not cover monopolistic behavior by an SME that does not fall within these criteria. However, unlike its model, the South Korean MRFTA, This behavior by Thai firms may not even fall within the category of unfair trade practices prohibited by Section 29.

Any firm designated by the Competition Commission as a market dominant firm will receive scrutiny. The commission of the following conduct by a market dominant firm constitutes an abuse of its dominant position in violation of Section 25 of The Competition Act of 1999 :

- (1) unfairly fixing or maintaining the levels of sale or purchase prices of goods or services;
- (2) setting conditions which , directly or indirectly, unfairly compel other business operators who are customers of the Business Operator to limit the provision of services, production, purchase or distribution of goods, or their opportunity to choose to buy or sell goods, accept

or provide services, or obtain credit from other business operators;

- (3) suspending, reducing, or limiting services, production, purchase, distribution, delivery, or importation into (Thailand) without reasonable grounds, or to destroy or damage goods in order to reduce supply to less than market demand;
- (4) interfering with the business operations of other people without reasonable grounds.

The striking similarity between Section 25 of The Competition Act of 1999 and Article 3 of the MRFTA reflects the fundamental presumption of the Thai Working Committee: The Thai economy is similar to the South Korean economy due to its monopolistic and oligopolistic markets. However, the Working Committee’s presumption was inaccurate, and it led to a wrong design of The Competition Act of 1999.

(2) Mergers and Other Business Combinations

The Working Committee modeled Section 26 of The Competition Act of 1999 after Article 6(1) of the Taiwanese FTL. The purpose of Section 26 is to prevent the creation of monopolies and the lessening of competition. It empowers the Competition Commission to regulate “business combinations,” Under Section 26 of The Competition Act of 1999, a business combination may take any of the following form:

- (1) a merger between manufacturer and manufacturer, distributor and distributor, manufacturer and distributor, or service provider and

service provider, which results in the continued existence of one business and the demise of another, or the establishment of a new business;

- (2) the purchase of assets, whether in whole or in part, of another business to gain control over business management policy, supervision or administration.
- (3) the purchase of shares, whether in whole or in part, of another business to gain control over business management policy, supervision or administration.

The Working Committee intended Section 26 of The Competition Act of 1999 to apply only to large business combinations. Currently, there is no official threshold for what constitutes a “large” business combination, but if the Cabinet approves the Competition Commission’s criteria proposed in Section 25, then a “large” business combination will be defined in terms of two cumulative criteria: (1) possess more than a 33% of market share, and (2) combined sales volume of the merged firm has at least one billion Thai Baht.

(3) Horizontal and Vertical Restraints

Section 27 of The Competition Act of 1999 prohibits the following horizontal and vertical restraints:

- (1) fixing the sales price of goods or services to be the same or at an agreed price, or limiting the sales volume of goods or services;
- (2) fixing the purchase price of goods or services to be the same or at an

agreed price, or limiting the purchase volume of goods or services;

- (3) entering into an agreement to take over or control the market;
- (4) fixing agreements or conditions in a collusive manner to enable the other party to win a bid or tender for the sale of goods or services or to prevent the other party from competing in a bid or tender for the sale of goods or services;
- (5) allocating areas where each Business Operator may distribute or reduce the distribution of goods or services, or specifying customers to whom each Business Operator may distribute goods or services without competition from the other Business Operators;
- (6) allocating areas where each Business Operator may purchase goods or services, or specifying customers from whom the Business Operator may purchase goods or services;
- (7) fixing the volume of goods or services which each Business Operator may manufacture, purchase, distribute or provide in order to keep the volume less than the market demand;
- (8) lowering the quality of goods or services compared with the previous manufacture, distribution or provision, but maintaining or raising the price;
- (9) appointing or assigning a person as sole distributor or provider of the same type of goods or services;
- (10) fixing conditions or methods of practice in the purchase or distribution of goods or services to be of the same pattern or as agreed.

In case business reasons necessitate any act under (5) , (6) , (7) , (8) , (9) or (10) in any certain period, the Business Operator shall file an application for permission with the Commission in accordance with Section 35.

It appears that Section 27 is a combination of South Korea's prohibition of undue collaborative activities and Taiwan's prohibition of non-price vertical restraints and exclusionary practices (i.e. territorial and customer restrictions).

(4) Restrictions in International Agreements

Section 28 of The Competition Act of 1999 reflects certain Thailand-specific consumer traditions that were prevalent when the Working Committee drafted The Competition Act of 1999. During the period of economic growth, a small portion of the new middle class Thai wanted to buy luxurious German automobiles (especially Mercedes-Benz) directly from dealers in Germany. However, the German dealers were unable to sell the cars to Thai buyers because of dealer contracts that prohibited them from doing so. The corporate headquarters of Mercedes-Benz in Germany wanted Thai buyers to buy directly from dealers in Thailand. Hence, Section 28 of The Competition Act of 1999 exists for the very specific purpose of forbidding Thai dealers from entering such contracts:

A Business Operator having a business relationship, whether by contract, policy, partnership, shareholding, or any other relationship of like nature with a

business operator outside (Thailand) is prohibited from performing any activity which will restrict the freedom of a person in (Thailand) desirous of purchasing goods or services for his/her own use, to purchase the goods or services directly from the business operator outside (Thailand)

Section 28 of The Competition Act of 1999 differs from Article 32(1) of the MRFTA, which applies specifically to agreements or business dealings between Korean firms and foreign firms. Unfair trade practices in import agency agreements under Article 32(1) include:

(1) unreasonably restricting the agent from handling competitive products; (2) imposing unreasonable requirements on the agent to purchase parts or supplies for the contract products from the foreign party or from a supplier designated by the foreign party; and (3) unreasonably restricting sales quantities or designating an unreasonably high minimum sales target.

In essence, Article 32(1) of the MRFTA aims to protect South Korean import agencies from unfair exploitation by foreign manufacturers while Section 28 of The Competition Act of 1999 aims to enable wealthy Thai to buy luxurious automobiles directly from foreign dealers.

(5) Unfair Trade Practices

It appears that the Working Committee patterned Section 29 of The Competition Act of 1999 after Article 24 of the Taiwanese FTL. Both contain a general rule prohibiting other methods of unfair competition. In addition, both provide that firms may not engage in any act that

adversely affects orderly functioning of the markets.

Section 29 of The Competition Act of 1999 states: “A Business Operator is prohibited from performing any act contrary to free and fair competition and which results in the destruction, damage, obstruction, hindrance or restriction of the operations of other business operators, in order to prevent them from operating their business or cause the dissolution of their business.

The South Korean MRFTA focuses primarily on regulating the behavior of the thirty largest Korean chaebols, but it also aims to regulate the unfair trade practices of a number of medium-sized firms. Article 23 of the MRFTA (Prohibition of Unfair Trade Practices) is patterned closely on the Japanese Antimonopoly Law. Between 1981 and 1990, there were only eleven complaints of abuses of market dominant firms while there were 2,592 complaints against unfair trade practices.

One of the substantive flaws in The Competition Act of 1999 lies in Section 29: it is too vague to be enforced. To remedy this flaw, the Competition Commission should adopt guidelines similar to the Japanese Fair Trade Commission’s (JFTC) 1982 General Designations of Unfair Trade Methods. This would clarify for the Thai business community the types of business behavior that are anticompetitive and likely to violate Section 29. However, there is one legal obstacle to adopting similar guidelines: unlike Section 2(9) of the Japanese Antimonopoly Law, Section 29 of The Competition Act of 1999 does not empower the Competition

Commission to designate unfair business practices.

(6) Special Issues Involving Intellectual Property Rights

Section 6 of the Antimonopoly Law and Articles 23 – 25 of the MRFTA reflect the Japanese and South Korean governments’ great concerns over the importation of technology. Both governments set up screening schemes to eliminate unfair clauses contained in technology inducement contracts. The Thai Competition Act of 1999, however, contains no similar provision, and Thailand benefits from its omission. Officials in charge of enforcing The Competition Act of 1999 would encounter too many difficulties if they had to screen unfair clauses contained in technology importation agreements between Thai buyers and foreign technology suppliers.

3.8 Other Exemptions

Unlike the Antimonopoly Law, The Thai Competition Act of 1999 does not exempt the following activities from its purview: export/import transactions; export cartels; import cartels; depression cartels; small business cartels; and insurance.

3.9 Enforcement

The competition Act 1999 provides in Art. 8(11) and 8(12) that:

Any person who discovers a violation of The Competition Act of 1999 may report it to the Office of the Competition Commission. The secretariat of the Office of the Competition Commission conducts investigations, but if necessary,

designated staff members may take appropriate measures, including collecting information from the alleged violator's business premises or summoning the parties for an investigative hearing.

Japan's enforcement procedure is well developed and is quite similar to a court proceeding. In contrast, Thailand's enforcement procedure is still in the early stages of development. Although Sections 8(11) and 8(12) empower the Competition Commission to prescribe enforcement procedure, the Competition Commission has made no progress in doing so.

3.10 Sanctions

Section 51 of The Competition Act of 1999 appears to follow the pattern of the Taiwanese FTL. The Competition Commission may impose a maximum three-year term of imprisonment, or a criminal fine of up to six million Thai Baht (approximately equal to US\$120,000), or both for either any violation of Sections 25 through 29 of The Competition Act of 1999 or a failure to comply with Section 39. The serious flaw with the penal provisions of The Competition Act of 1999 is that the Competition Commission may impose a maximum three-year term of imprisonment for either failing to apply to the Competition Commission for permission to merge businesses or violating the unfair trade practices provision. The Competition Commission should sanction violators of these particular provisions with nothing more than monetary fines.

3.11 Appeals

If the alleged party is not satisfied with the order of the Commission under Section 31 (the order requiring the business operator to suspend, cease certain business conduct), he may appeal against such order to the Appellate Committee.

The Appellate Committee consisted of not more than seven qualified persons with knowledge and experience in law, economics, business or public administration appointed by the Cabinet. One of the important function of the Appellate Committee is to consider and decide on the appeal against and order of the Commission under Section 31 or Section 37 mentioned above.

3.12 Private Suit

The Competition Act of 1999 does not allow a private party to initiate an action seeking injunctive relief in the court. However, the Act allows for private action seeking compensation from violator that should allow once a final decision is taken by the courts

3.13 The Competition Act and Consumer Protection Act

The objective of the Competition Act of 1999 is to maintain and promote free and fair competition. This free and fair competition will indirectly enhance consumer welfare. On the other hand, the objective of the Consumer Protection Act of 1979 is to protect consumer from business fraud and misleading advertisement. The Objective of the Unfair Clause Act of 1997 is to protect consumers from unfair contract clauses

relating to credit cards, high-purchase etc.

The relationship between the three Acts is that the Competition Act of 1999 allows the Consumer Protection Commission or legally-registered consumer association to initiating for claiming compensation on behalf of consumers or members of the association.

4. Thailand's Competition Authority

4.1 The Competition Commission

The Competition Commission is the only administrative agency in Thailand with direct enforcement authority over The Competition Act of 1999. The Public Prosecutor's office holds certain functions in the enforcement scheme as well, but these functions are narrowly drawn.

The Competition Commission is composed of the Minister of Commerce (who serves as Chairman), the Permanent Secretary for Commerce (who serves as Vice Chairman), the Permanent Secretary for Finance, and between eight and twelve experts appointed by the Cabinet to serve as commission members. The Cabinet must appoint at least half of the experts from the private sector, and they must have knowledge and experience in law, economics, commerce, business management, or government administration. Currently, the Competition Commission is composed of sixteen members, with three representing the FTI and three representing the Thai Chamber of Commerce. This gets to the heart of the

Competition Commission's serious flaws: (1) there are too many Competition Commission members; (2) many of the members are not qualified competition law experts; (3) the members only work on a part-time basis and convene only two meetings every eight months; (4) there is a vast overrepresentation of the private sector; (5) Competition Commission members receive an extremely low level of compensation; (6) there are no rules regarding how proceedings are conducted; and (7) the Competition Commission has weak administrative and secretariat support.

The Office of the Competition Commission is anchored in the DIT within the MOC. The director-general of the DIT is the secretary-general, in charge of the performance of the Office. The Office of the Competition Commission has a few serious flaws. First, there are only about forty-five officials who work within the Office, all of whom were transferred from the DIT while they were still government officials. The Competition Commission is supposed to be independent, but the Office and its staff are an administrative agency and therefore not independent. Second, the mentality of the officials in the Office cannot switch from market intervention to market promotion automatically. Most of them enforced the PFA before their transfer to the Office of the Competition Commission. In addition, most are new to the concept of handling competition cases. Third, hearing and investigative procedures are being developed by the competition bureau and their application is in the early stages.

The composition of the Competition Commission, its secretariat and administrative support make enforcement of The Competition Act of 1999 ineffective. The decision making process is long while the few decisions taken so far provide little reasoning for the decisions.

4.2 The Sub-Commission

Section 11 The Commission may appoint a sub-committee to consider and make recommendations on any matter or perform any act as entrusted and prepare a report thereon for submission to the Commission.

So far, the Competition has appointed two Sub-Committees to deliberate whether particular conduct violated the Competition Act or not. Those two Sub-Committees were (1) The Sub-Committee on Cable Television Case and (2) The Sub-Committee on Tying Arrangement in Whiskey and Beer Case.

4.3 The Specialized Sub-Commission

Section 12 The Commission shall appoint one or more specialized sub-committees consisting of, for each sub-committee, not less than four and not more than six persons qualified in the matter concerned and having knowledge and experience in various fields such as law, science, engineering, pharmacology, agriculture, economics, commerce, accountancy, or business administration as members, with the representative of the Department

of Internal Trade as a member and secretary.

The specialized sub-committee shall elect one member as Chairman.

So far, the Competition Commission has appointed two specialized Sub-Committees to deliberate whether particular conduct violate the Competition Act or not. Those two specialized Sub-Committee were (1) The Specialized Sub-Committee on Exclusive Dealing in Motorcycle Business and (2) The Specialized Sub-Committee on Unfair Trade Practice in Retail Industry.

4.4 Investigative Sub-Committee

Section 14 The Commission shall appoint one or more investigative sub-committees consisting of, for each sub-committee, one person possessing knowledge and experience in criminal cases who is appointed from police officials, public prosecutors and, in addition, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, as members, with the representative of the Department of Internal Trade as a member and secretary.

The investigative sub-committee shall have the power and duty to conduct an investigation and inquiry in connection with the commission of offences under this Act and, upon completion thereof, submit opinions to the

Commission for further consideration.

The investigative sub-committee shall elect one member as chairman.

It seems that the legislation intent of having this provision is for the purpose of investigating cartels. The Competition Commission may not have expertise and knowledge in criminal case. Therefore, it will be helpful to the competition commission to develop capacity to carryout Cartel investigations including in cooperation with outside sources, especially from the Police Department.

So far, the Competition Commission has not appointed any Investigation Sub-Committee to handle Cartel cases.

4.5 The Office of the Competition Commission

Section 18 There shall be established the Office of the Competition Commission in the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department of Internal Trade as the secretary-general, who shall be the superior official responsible for the official affairs of the Office, with the powers and duties as follows:

(1) to carry out administrative tasks of the Commission, the Appellate Committee and sub-committees appointed by the Commission;

(2) to prescribe regulations for the purpose of the work performance of the Office of the Competition Commission;

(3) to monitor the movement and oversee the conduct of business operators and report the same to the Commission;

(4) to conduct studies, analyses and research in relation to goods, services, and business conduct and make recommenddations and give opinions to the Commission on the prevention of market domination, merger of businesses and reduction and restriction of competition in the operation of businesses;

(5) to receive complaints by which it is alleged by any person that violation of this Act has occurred and to carry out its preliminary consideration for submission to the Commission, in accordance with the regulations prescribed and published in the Government Gazette by the Commission;

(6) to co-ordinate with Government agencies or agencies concerned, for the purpose of the performance of duties under this Act;

(7) to perform the acts in the implementation of Notifications, regulations and resolutions of the Commission and perform such acts as entrusted by the Commission, the Appellate Committee or the

sub-committee appointed by the Commission.

As previously noted, there are about 45 officials working at the Competition Commission, which is located in the Department of Internal Trade, Ministry of Commerce. The office of the Competition Commission budget is part of the overall resources allocated to the ministry. Strictly speaking, the office of the Competition Commission and its 45 officials are internal part of the Department of Internal Trade, Ministry of Commerce.

5. Handling of Competition Clauses

The Competition Act of 1999 was promulgated in the Royal Gazette on March 31, 1999 and becomes effective since May 1, 1999. The six year of enforcement experience (May 1999 February 2005) is not conclusive. So far there have been only three decisions rendered by the competition commission. Furthermore, the three decisions do not provide yet adequate jurisprudence for convincing authority and predictability.

5.1 The Proceeding

Procedural due process is one of the very fundamental legal principles which has been widely recognized in almost all jurisdictions around the world, including Thailand. Section 8 of the Competition Act reads:

“The Commission shall have the powers and duties as follows:

...

(11) to prescribe rules for the performance of work of the competent officials for the purpose of the executive of the Act;

(12) to perform other acts provided by the law to be the powers and duties of the Commission;”

In most advanced economies, the due process is closely followed by enforcement agencies. For example, there are provisions relating to procedural process in the Federal Trade Commission Act of 1914 in the United States. There is Section 76 of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade Act of 1947 in Japan. In accordance with the provisions of section 76, the Japanese Fair Trade Commission has established a number of important rules to safeguard the procedural due process. For examples, the Rules concerning Investigation and Hearing by the Fair Trade Commission (October 10, 1953). However, the Thai Competition Committee has not established any set of rules concerning investigation and hearing and other matters yet. It is imperative for a proper enforcement of the competition law that in order to safeguard the procedural due process, the Thai Competition Committee shall establish set of rules relating to investigation, hearing, making decision etc as soon as possible.

5.2 Cases Handled

5.2.1 Cases Handled with Decisions³

The followings are brief outlines of the three cases handled with decisions by the Competition Committee over the years (1999 – 2005)

(1) Allegation of Abuse of Dominant Position in Cable Television

In early 2000, the Competition Commission received complaints from consumer groups that a newly merged cable television company (UCB), formed as a result of a combination of two competitors, had unfairly increased its subscription charges to consumers. The two original companies were licensed and regulated by the Mass Communication Organization of Thailand (MCOT) and had previously competed vigorously for subscribers using a number of bundled programme packages of differing content and price. The merger was approved by MCOT, partly as a result of the deteriorating financial position of both companies as a result of far higher than expected operating costs of acquiring foreign

produced programmes, which had been caused by the collapse of the Thai currency in 1997. A condition of the approval was that the merged company would continue to offer a basic package of programmes intended for low income groups. After the merger had been completed UCB then sought regulatory approval to change the structure and content of its programmes packages, substantially increase installation charges for new subscribers, and also to increase the monthly subscription fee. The company also requested that it no longer be required to offer the original basic programmes package to new customers and that it would offer a suitable substitute, again at a lower price than the new standard package. The application was granted. Later, consumers complained to the Competition Commission that the new standard package price was unreasonably high and that UCB had not promoted the new basic package at all or had even concealed its existence from potential new customers. The Commission appointed Sub-Committee to deliberate whether or not such conduct violate the Competition Act and make a report to the Commission.

The Sub-Committee found that UCB was, after the merger, a monopolist in the national cable television market and was protected from new competitors by high physical, financial and regulatory barriers to entry. It also found that whilst the higher price charges relating to the new standard package was reasonable due to increase⁴d costs as a result of the currency depreciation and so did not breach Section 25(1) – unreasonable price fixing by a dominant operator, the refusal to supply the low cost package to new customers was

³ The three cases were largely taken from the paper of Mark Williams, who visited Thailand a few occasions, to gather materials and interviewed involved parties arranged by the author.

Dr. Williams's paper is published in *World Competition* 27 (3): 459 – 494, 2004. The titled is "Competition Law in Thailand: Seeds of Success or Fated to Fail".

potentially unlawful under Section 25(3) – reducing or restricting services without a justifiable reason. But the Sub-Committee took a very literalist view of Section 25, arguing that it did not apply here as, even after the merger, UBC still consisted of two separate legal entities and so did not qualify as a single dominant business operator as defined by Section 3 of the Act. Instead the Sub Committee considered that the actions of the merged but legally still separate companies that made up UCB, could violate Section 27 – agreements between business operators by fixing prices or restricting the volume of services provided or by fixing quantities of services supplied or by reducing the quality of the service offered. This conclusion may have been arrived at to allow the Commission power to take action under Section 27 which was operational, given that at the time of the investigation, the Cabinet had not promulgated the subordinate legislation necessary to define the market share of a business operator who was dominant under Section 25 and So it was effectively inoperable at the time.

These findings were presented to the Commission, who agreed with the findings of fact, the conclusion that the price increase for the standard package was justified and that the refusal to supply could breach Section 25(3). However, the Commission disagreed that UCB was to be treated as two operators, so allowing the use of Section 27. It decided that the UCB was a single business operator as the management, ownership and nature of business of the two legal entities was identical. Thus, Section 25 was the appropriate provision to catch the observed conduct, rather than Section 27. But due to the lack of

definition of market dominance in secondary legislation, which still await cabinet approval, no breach of the law was made out and thus no sanction could be applied. The Commission decided to report the conduct of UCB to MCOT to require UCB under the terms of its operating license to increase consumer choice”.

(2) Allegation of Tying Arrangement in Whiskey and Beer

In early 2000, Singha, the largest Thai beer producer, complained to the Competition Commission that its rival Surathip, the statutory monopoly Thai whiskey producer, who also manufactured Chang beer, had utilised unfair tie-in sale practices whereby all wholesalers of its monopoly whiskey product were required to acquire a fixed ratio of Chang beer for every quantity of whiskey ordered. The background to this situation was that the beer market was liberalised in 1992. Surathip decided to enter the beer market to compete with Singha. In order to gain market share, Surathip produced a high-alcohol beer with a lower price than the Singha product (anywhere between 28 percent to 45 percent cheaper) and used an aggressive advertising campaign to market the new beer. Singha's share of the beer market nationwide dropped from 85 percent in 1996 to 69 percent in 1997. In response, Singha introduced a new high-alcohol, low priced beer – Leo. As a result Surathip imposed the whiskey-beer tie, mentioned above. Singha then complained to the Commission about a tie-in sale.

A Sun-Committee was appointed to deliberate whether such conduct violate the Act and reported, that a whiskey-

beer tie was imposed by Surathip on its distributors, who it was found, were legally separate entities but very closely linked by cross-ownership of equity and common directorships. The Sub-Committee concluded that Surathip was an entity to which Section 25 applied, had breached Section 25 (2) – unreasonably fixing compulsory conditions of sale – and thus the conduct was illegal. However, as Section 25 was not operational due to the Cabinet not having set the statutory thresholds for the definition of market dominance, no penalty could be imposed. The Sub-Committee also considered whether the relevant conduct breached Section 27(3) – agreements to seek to achieve market domination or control and Section 27(10) – fixing conditions regarding the distribution of goods in order to achieve uniform or agreed practices. The Sub-Committee, concluded that the prohibited agreement must be between business operators who compete with each other in the same product market and at the same stage of the production or distribution, so leading to the operation of a monopoly in that product. Since whiskey and beer are different product markets, the operators involved were not at the same stage of production and there was a lack of evidence to show collusion to dominate the relevant markets or to fix similar supply conditions, no breach of Section 27 was made out. The Commission accepted these findings, merely stating that Surathip’s conduct was “inappropriate”

(3) Allegation of Exclusive Dealing in Motorcycle Business

On 30 April 2003, the Competition Commission made public its first decision to refer a case to the Public

Prosecutor for criminal enforcement under Section 29 of the Competition Act. Thai Honda, a subsidiary of the Japanese vehicle company, is the dominant motorcycle manufacturer in Thailand. The company’s market share has increased rapidly from 38 percent in 1990, to 56 percent in 1996 to almost 74 percent in 2003; total annual output is approximately 1.3 million units in 2002. As a developing country, motorcycles in Thailand are the mainstay of urban and particularly rural private transport, car ownership being restricted largely to the relatively small urban based middle class. The alleged unlawful conduct consisted of Honda requiring exclusive dealing agreements with its distributors, having competitors advertising hoardings removed, and persuading dealers to switch allegiance from other manufacturers. The Commission utilised the Guidelines on the implementation of Section 29, discussed above. However, the Guidelines were not made public until after the investigation had been completed, so that they appear to have been applied retrospectively by the Commission. The complainants were Honda’s business rivals Thai Suzuki Motors, Thai Yamaha Motors and Kawasaki. It appears that Honda was not provided with an opportunity by the Commission to know the nature of allegations or to answer the charges of unfair conduct before the announcement of the decision by the Minister of Commerce and the Chairman of the Competition Commission. A month after the announcement, Thai Honda’s President Reiji Matsura confirmed that the company had still not been officially informed by the Commission of the nature of the complaint, or the reasons for the decision, nor had Honda been given an

opportunity to rebut them. The head of the Department of Internal Trade did subsequently agree to a meeting with company lawyers but Honda continued to insist that the allegation against it remained vague with no specific information being disclosed by the government. The Sub-Committee held a series of about twelve meetings to deliberate whether or not the conduct of the Thai Honda violated section 29 (unfair competition practices) of the Act. The Sub-Committee made a report and submitted it to the Competition Commission. The Competition Commission agreed with the decision of the Sub-Committee and forwarded its file to the Public Prosecutor with a recommendation to take criminal proceedings; a decision on whether to prosecute or not may take up to two years, given the need for high standards of proof required for criminal prosecution.

5.2.2 Cases Investigated and Dropped

There were fifteen complaints that had been lodged and the officials at the office of the Competition Commission made preliminary probe into those allegations. However, after the preliminary investigation, the officials determined to drop those allegations on various reasonings and submitted reports to the Competition Commission for considerations. The Competition Commission agreed with the determinations of the officials and approved the requests of the officials to drop those allegations. The following brief outline of the allegations will give the general picture on Thai business operators' conducts which might run against the competition Act.

(1) Preliminary Probe into Allegation of Predatory Pricing in the Straw for Drinking Industry

In 2002, a company which manufactures straw for drinking complained to the office of the Competition Commission that one of its business rivals was engaged in predatory pricing, having drastically reduced the price of its product to the level that was unprofitable (about 35-40% lower than its total average cost). This kind of practice was maintained by cross-subsidizing the extra profit it gained from raising another product, UHT milk cartons. The intention of this practice, according to the complainant, was to drive competitors out of the market.

The investigation conducted by the officials at the office of the Competition Commission revealed that the market value of the product was about 98.73 million Baht. The market share of the alleged party's was 76.28% and the complainants were 23.72% respectively. However, the alleged party did not sell its product separately from its UHT milk carton. Also the price that the alleged company sold was 20.17-23.26% higher than the purchasing price. The investigation also revealed the fact that the complainant's annual profit (2003) increased 208% than the year it lodged the complaint.

The officials at the Office of the Competition Commission concluded that the conduct of the alleged company did not violate section 29 of the Competition Act. Furthermore, the complainant formally withdrew its complaint that it previously lodged to the office of the competition commission.

(2) Preliminary Probe into Allegation of Abuse of Dominant Position in the Steel Sheet Industry

In 2002, there was complaint lodged by end-users of steel sheet product that the alleged party and its wholesalers raised their hot-rolled steel sheet every week and certain hot-rolled steel sheet products were not available in the market. Those end-users who tried to import those products were threatened by the alleged party that if the supply would be cut off.

The investigations conducted by the officials at the office of the Competition Commission revealed that the alleged party distributed its steel sheet through three channels. The first one was through its distributors (12%). The second one was through wholesalers (26%) and the third one was the direct sale to end-users (62%). During August 2002-December 2000, the alleged party adjusted its price up and down within the controlled - price ceiling (steel sheet is a “controlled product” under the Price Control Act at 1999). The price adjustment of the alleged party led its distributors, wholesalers to do the same thing.

The officials concluded that the conduct of price adjustment the alleged party did not violate the Price Control Act of 1999 because the price was below the controlled-price ceiling for steel sheet. Also there was no evidence to support the allegation of abuse of market dominant position by setting up unjust high price.

(3) Preliminary Probe into Allegation of Price-Fixing by a Group of Television Manufacturers

In 2000, the Competition Commission, which has the power and duties under section 18 of the competition Act to monitor the movement and oversee the conduct of business operators, found that the price of Thai-made television sets with 25 inches screen or bigger was higher than comparable imported television sets, especially those that were imported from China. The officials were suspicious that a group of television manufacturers in Thailand engaged in a price-fixing cartel.

The investigation conducted by the competition commission found that the price of television sets imported from China was lower than domestically made ones. However, after further investigation, the officials found that the prices of various important parts of television sets were about 50% higher than those parts that were manufactured and sold in the Chinese market. The officials concluded that the substantial difference in the cost of production between domestic industry and foreign industry led to the substantial price difference between domestically-made television sets and imported ones. There was no evidence indicating that a group of television set manufacturers entered into a concerted action of price-fixing.

(4) Preliminary Probe into Allegation of Unjust High Price in the Al-Liseen Commodity

In 2003, the office of the competition commission received a complaint that alleged the market leader in Al-Liseen

commodity was engaging in predatory pricing practice by selling their products at unjust high price.

The investigation conducted by the Official at the office of the Competition Committee revealed the ... producer in Thailand was the only producer of such commodity in Thailand and enjoyed the market share of 44% in the Thai market. However, there were eighteen importers, among them, there were two large importers with market share of 21% and 13% respectively.

The competition commission concluded that it was not probable for the dominant firm to abuse its market power by setting the price of its commodity at will because of a number of reasons. Firstly, it was easy to import such a commodity and the tariff rate was only 1%. Secondly, the vast majority of its customers were feed producing factories which could use soy bean as the substitute in case where the price of Al-Liseen commodity went up. Thirdly, the pricing practice of the alleged company during 2002 – August 2004 reflected the demand and supply and was in accordance with the movement of the market. Furthermore the price of the commodity sold in the Thai market was lower than the export price.

(5) Preliminary Probe into Allegation of in Battery Industry

In 2003, the Competition Commission had reasonable information to believe that there might have been an agreement among four battery manufacturers to divide the market among themselves.

The investigation conducted revealed that there were four large manufacturers which dominated the battery industry in Thailand. Therefore, the battery market structure is oligopolistic one. However, the channels of distribution that the big four and other competitors employed were diversified and offered consumers a range of differentiated products and prices to choose from.

The commission concluded that there was no evidence showing that there was an agreement to divide the market among the big four producers. Also there were imported batteries that competed directly with the products of the domestic manufacturers. However, there was an exclusive agreement between the major convenient store chain and the largest battery manufacturers which might foreclose the channel of distribution of other business rivals. This practice continues to be monitored by the Office of the Competition Commission.

(6) Preliminary Probe into Allegation of Discriminatory Pricing Practice in Audio Appliances

In 2002, the office of the Competition Commission received a complaint from a group of audio-service centers (repair center) that the leading company in the audio market engaged in discriminatory pricing practices. Namely, it sold parts and components at specially low price to customers who brought their audio appliances to the leading company's service centers for repairment on the other hand, it sold parts and components to customers who did not use its service center at 50% higher than to those who used the repairment service of its centers.

The investigation conducted by the officials revealed the fact that there were three types of service centers (audio appliances repairment center). Firstly, there was service centers operated by the defendant. The second type was service centers which were authorized by the defendant. The last type was independent service centers. The alleged party operated twenty four service centers and authorized four service centers. The price of parts and components it sold to independent centers was 167% higher than the price it sold to authorized service centers.

The competition commission concluded that the discriminatory nature of the pricing practice was reasonable because the quality of repairment services at the two former types of service centers was much higher, well-trained technicians and modern facilities, than that of independent service centers.

(7) Preliminary Probe into Allegation of Tie-Out Arrangement in Shoe-Polishing Product

The complainant was a new entrant in shoe-polishing product by being appointed by a foreign trademark holder as a sole distributor in Thailand. One of the department store chains in Thailand notified the complainant that they wanted to remove the complainant shoe-polishing products from the shelves of their forty-six branches located all over Thailand. The reasons the department store gave to the complainant was that the existing distributor of shoe-polishing product request them to remove the complainant's products from the shelves and returned all of them to the complainant. The complainant lodged a complaint to the Thai Chambre of

Commerce. The Thai Chambre of Commerce then notified the Office of the Competition Commission about this conduct.

The competition commission investigated the case and found that the shoe-polishing market during the period of 1999-2001 was monopolized by one manufacturer, distributor, the defendant party. From 2001 on, there were two players in the market, the defendant and the complainant. The defendant and the complainant had 75% and 20% of market share respectively. The alleged party and the complainant competed with the other on price for a number of years. The investigation revealed that the department store chain and other department store chains still carried both brands in their department stores.

The competition commission concluded that the alleged conduct of tie-out by the alleged company in shoe-polishing product did not constitute a breach of the competition act. The forty-six branches of the department store chain still carried the new entrant's shoe-polishing product in their stores as usual. There was no evidence at all to show that the new entrant's products were pulled out of the aforementioned department store.

(8) Preliminary Probe into Allegation of Price-Fixing Cartel in Construction Cement Industry by Distributors

The Office of the Competition Commission had reasonable information to suspect that there might be a price-fixing or supply-restriction agreement among construction cement distributors.

The commission concluded that there was no evidence to indicate that there was price-fixing or supply-restriction agreement among cement distributors. Although, there was parallel price fixing because the cement market was oligopolistic one. The Competition on price among competitors was rigorous. Besides, the construction cement was one of the products under the Price Control Act of 1999. The Department of Internal Trade, Ministry of Commerce required the business operators to seek approval fifteen days prior to price adjustment and cement manufactures must report to the Department of Internal Trade about their monthly production and sales. Therefore, it was concluded that the conduct of cement manufacturers distributors did not violate Section 27 (1) (price-fixing cartel) of the Competition Act.

(9) Preliminary Probe into Allegation of Price-Fixing Cartel in Ethylene and Propylene Industry

The Office of the Competition Commission received a complaint lodged by a group of end-users (downstream industries) alleging that ethylene and propylene producers engaged in price-fixing cartel. This anti-competitive conduct drove the price of the two raw materials in the Thai market up.

The investigation conducted by the Competition Commission revealed the fact that there was only a few producers of ethylene and propylene in Thailand. However, the ethylene and propylene market has been fully liberalized, anyone could import ethylene and propylene freely without any tariff barrier. Therefore, price competition was

rigorous. The Thai producers sold their ethylene (one market) and propylene (another market) through two channels. The first channel was to sell directly to end-user industries (20%) and the second one was to sell their products through distributors (80%). The domestic price of the two products moved in accordance with Platts Price of Singapore and the world's oil price. The large end-user bought a large volume of the two products prior to price increase. The small end-user suffered the price increase because the lack of financial resources to stock those two products.

The competition commission concluded that the competition in ethylene market and propylene market were rigorous both domestically and in the international market. Producers could not set price differently from their competitors. There was no evidence indicating that there was a price-fixing cartel among the few producers.

(10) Preliminary Probe into Allegation of Abuse of Dominant Position, Price-Fixing and Unjust High Price in Movie Theater Industry

In 2004, The Office of the Competition Commission received a complaint from a group of movie-goers alleging that movie theater operators engaged in some kind of anti-competitive conduct that led to price increase in movie tickets.

The investigation conducted by the Office of the Competition Commission revealed the fact that there were ten movie theater operators. The market structure of movie-showing industry in Thailand was oligopolistic. The industry was dominated by the big three.

Each movie-showing operator set the price of its ticket independently. The price depends upon the location the facility of the theater and the category of seat. The competition among movie-showing operators was highly rigorous and various marketing strategies e.g. facilities, convenience, and services were fully utilized in order to get more business.

The competition commission concluded that although the concentration ratio was very high in this entertainment industry, competition in this market was rigorous. There was no evidence indicating that there was any anti-competitive conduct of abuse of dominant position (unjust high price), or price-fixing cartel among movie-showing operators as alleged by the complaint.

(11) Preliminary Probe into Allegation of Unjust High Price in Keycard by a Condominium Management Company Industry

In 2001, the Office of the Competition Commission received a complaint from a group of condominium residents that the management board, which managed the condominium where complainants were residents, was engaging in unfair trade practice by selling keycard (residents must use keycard in order to enter and park their vehicles in the condominium's parking lot) at unjust high price.

The investigation conducted by the Competition Commission revealed the fact that the defendant was the management board which managed a condominium. Most of the complainants were owners of condominium units in

that particular condominium and lived in that building. According to the Condominium Act of 1979, any dispute relating to the relationship between residents and a management board is under the jurisdiction of the Department of Land, Ministry of Interior. The dispute in this case was that the management board sold a parking keycard at 1,500 Baht whereas the market price for such keycard was only at 180 Baht each.

The competition commission concluded that this dispute fell beyond the scope of Section 29 (unfair business practices) because it was not the conduct employed by a business operator to compete with its business rivals. The alleged conduct was between a group of consumers (residents of the particular condominium) and a business operator (the project owner which built that particular condominium). Therefore, the enforcement agency of the Competition Act of 1999 does not have jurisdiction over this alleged conduct and referred the complainants to commercial courts.

The complainants later took the case to the court on the ground of breach of contract. The dispute ended up in the "out-of-court-settlement". The court decision number 823/2545 approved this compromise agreement between the complainants and the alleged party.

(12) Preliminary Probe into Allegation of Purchasing-Price Cartel in Processed Latex Industry

It was reported on January 2004 in one of the leading daily newspapers in Thailand that a group of major movie theater operators agreed to set a common

price on movie ticket and the “common price” would be higher than the current independently-set ones.

The office of the Competition Commission issued a warning letter informing the group of major movie theater operators that their conduct might run against the Competition Act of 1999.

(13) Preliminary Probe into Allegation of Unjust Low Price in Custom Clearance Forms Industry

In 2004, the Office of the Competition Commission received a complaint alleging that one of the distributors of custom clearance forms was engaging in unfair business practice by selling custom clearance forms at very low price.

The investigation conducted by the Competition Commission revealed that there were about ten distributors of custom clearance forms, which are used by exporters, importers freight forwarders etc. in the custom clearance procedure. Those ten distributors order the forms from various publishing companies. The price of the forms varies, depends on the quality of the product. The alleged party normally sell a set of forms at 3.08 Baht/per set. During July 1-10, 2004, the alleged party engaged in promotional activities by selling a set custom clearance forms at 2.65 Baht/per set and if a customer bought two sets, he would receive another set as the premium. This practice would drive down the price to 1.77 Baht per set. The purchasing price of the complainant was 2.43 Baht/per set. Therefore, the conduct of the alleged

party was unfair business practice and caused harm to the business of the complainant.

The office of the competition commission concluded that the promotional period was very short (only ten days) and the quality of the promoted goods was unacceptable to the customers. Therefore, the conduct did not violate Section 29 because it did not affect competition and did not cause harm to any competitor. Furthermore, the complainant notified the office of the Competition Commission in writing that he wished to withdraw the complaint.

6. Proposed Areas for Amendment to the Competition Act of 1999

The six-year experience (1999-2005) reveals some shortcomings of the Competition Act of 1999 which needs to be addressed in order to make it comparable to those in advanced economies.

6.1 Substantive law

(1) The definition of “business operator with market domination” should be amended by deleting reference to “with the approval of the Council of Ministers” from the existing one. The new definition shall read:

“business operator with market domination” means one or more business operators in the market of any goods or service: who have the market share and sales volume above that prescribed by the Commission and published in the Government Gazette, having regard to the market competition.”

The main reason for the proposed amendment to the current Competition Act of 1999 is because the current formulation of "business dominance" has made it difficult to enforce Act since its inception. The Working Group drafted the Act took the South Korean Monopoly Regulation and Fair Trade Act as a model. The Working Group wanted to adopt a competition law that would regulate abusive and anti-competitive conducts of big firms or large corporate groups in Thailand in a similar manner that the South Korean KTFC regulates abusive and anti-competitive conducts of Korean Chaebols. However, the crucial difference between the current Thai Competition Act and the South Korean Monopoly Regulation and Fair Trade Act is that the Thai Act requires two steps in order to designate whether a firm is a "business operator with market domination" or not. Firstly, the Thai Competition Commission prescribes thresholds of the market share and sale volume. Secondly, those thresholds must also be approved by the Council of Ministers (the Cabinet). On the other hand, under the South Korean Monopoly Regulation and Fair Trade Act, the status of being a market-dominating enterpriser is prescribed by the Act itself (statutory designation). Article 4 of the South Korean Monopoly Regulation and Fair Trade Act reads:

"An enterpriser whose market share in a particular business area falls under any of the following subparagraphs shall be presumed to be a market-dominating enterpriser as referred to in subparagraph 7 of Article 2:

1. Market share of one enterpriser is 50/100 or more; or

2. The total market share of not less than three enterprisers is 75/100 or more: provided that those whose market share is less than 10/100 shall be excluded."

There have been three attempts of the Thai Competition Commission to prescribe thresholds for being a business operator since 2000. In the first attempt, the Thai Competition Commission prescribed that (1) a business operator whose market share is 1/3 or more; and (2) sale volume of the previous year is Baht 1 billion or more. The Second attempt, the Thai Competition Commission prescribed thresholds for being a business operator in only two specific sectors -- motorcycle and retail business sectors. The latest attempt, done in March 2005, the Thai Competition Commission prescribed criteria for being a business operator with market domination by looking at the South Korean thresholds, especially the market share. The Screening Subcommittee of the Council of Ministers keeps refusing to forward the aforementioned proposed criteria to the Council of Ministers for approval by various reasons.

Since Section 25 (abuse of market dominant position) has been designed by the Working Group with the expectation that it would be the most crucial provision in the Competition Act on regulating anti-competitive conducts of the Thai large firms, but it has not been functioning adequately at all since its adoption in 1999. Now, it is obvious that this is one of the most serious flaws of the Thai Competition Act of 1999. In order to make its Competition Act comparable to others, Thailand needs to do something about this problem. Therefore, it is proposed that amendment

should be made in Section 3 regarding statutory steps required in making designation of firms with market domination. Specifically, the step pertaining to the Cabinet approval should be removed.

(2) Introduction of Leniency Program

The past six-year experience indicates that the officials of the Office of the Competition Committee could not prove any existence of alleged hard-core cartel. The task on proving the existence of cartel is extremely difficult, even for the most experienced enforcement agencies in advanced economies. Therefore, a number of the most experienced enforcement agencies in the United States, European Union, Japan (just amended the law and introduces leniency program into their competition laws. It is argued that the introduction of leniency program into competition law led to “competition law reform” in many jurisdictions. Thailand, the author argue, should take serious note on the issue of whether or not it should introduce leniency program into the Competition Act of 1999.

6.2 Procedural law

The author is of opinion that procedural due process is lacking in the whole legal process relating to the enforcement of the Competition Act of 1999. For instances, the Competition Commission has not issued official and written complaint against the alleged party. In most cases, the alleged party did not know the allegation lodged against them. Thus, the alleged party did not know how to defense or make arguments against the allegation. Therefore, in order to safeguard the procedural due process, the author propose that the

Competition Commission shall, based upon the power granted to it by virtue of Section 8 of the Competition Act, establish set of rules relating to how to lodge a complaint, investigation, hearing, making decision etc.

6.3 Enforcement Agency

There are two important issues relating to improvement of enforcement agency under the Thai Competition Act.

(1) The question on the autonomy of the Thai Competition Commission is crucial. In theory, the ideal enforcement agency of competition law should be “expert, independent regulatory regime.” In practice, however, one must also be realistic by recognizing a number of constraints relating to institutional arrangements, especially in developing economies. As the author previously noted, the institutional arrangement of the Thai enforcement agency is the product of a “political compromise.” That is, probably, it is better to have an inadequate competition law and mediocre enforcement agency rather than not having it at all. There are a number of questions pertaining to the current Thai Competition Commission.

Firstly, are all the members of the Thai Competition Commission experts in Competition laws? All members of the Thai Competition Commission are people who are outstanding in their professions – public administration, business administration, business, law teaching, and economic teaching. Although they are outstanding professionals but only half of them have adequate knowledge about the objective, substantive, and procedural elements of the Thai Competition Act. One of the

serious short-comings of the Thai Competition Commission is that all members (four standing commissioners and eight to twelve non-standing commissioners) work as commissioners on the part-time basis. There is no opportunity for any of them to develop their knowledge and expertise on enforcing competition law. Generally, by average, there are less than 5 deliberation meetings per year.

Secondly, all non-standing commissioners are appointed by the Council of Ministers (the Cabinet). Other three standing commissioners are high-ranking bureaucrats in the Ministry of Commerce and the Ministry of Finance. The Chairman of the Competition Commission is the Minister of Commerce. The legislative branch does not have any role in the process of appointing commissioners. The Office of the Competition Commission, which is integral part of the Department of Internal Trade, Ministry of Commerce functions as the standing and full-time enforcement agency by receiving complaints, investigating allegations and provides supporting services to the Competition Commission. It is only occasionally that a deliberation meeting is called upon. The Competition Commission does not have its own budget and its own staffs. The decision of the Competition Commission is a faceless and collective decision because, unlike in advanced economies where the enforcement agencies are expert, independent, full-time regulatory body, the decision is not written by a commissioner. In sum, the Thai Competition Commission fully belongs to the executive branch of government.

Finally, as the “political compromise”, at least one-half of all non-standing commissioners must be appointed from qualified members in the private sector. This political compromise leads to the problem of overrepresentation of the private sector (regulated parties) in the Competition Commission. The problem of this “political compromise” oftentimes obstructs in the deliberation of the Competition Commission. For instance, the commissioners who represent the private sector would oppose the Section 25 thresholds on market share and sales volume if they think those thresholds are too low.

Although, this author fully agrees that in order to make the Competition Act adequately functions, the “political compromise” is a must in Thailand. Someone who represents the interest of private sector should have seats in the Thai Competition Commission. However, six commissioners representing the private sector is the number that departs too far from international best practices. Within the authority framework of Section 6, this author proposes that the Cabinet should appoint at more than eight commissioners. Thus, the number of commissioners who represent the private sector will be cut down to four commissioners. The author thinks this number is more than enough to represent private sector’s interest.

(2) Adding flexibility to the power of Competition Commission. Currently, it is clear-cut whether the Competition Commission has the power to issue the warning notification, or to issue recommendation decision or to enter into the “consent decree” with the alleged party. In most major jurisdictions, the

enforcement agency has this kind of flexibility added to their power. The author argues that it will be very helpful if the provision of Section 8 is amended so that the power and flexibility of the power of the Competition Commission is clearly areas.

6.4 Administrative and Judicial Review

The process of enforcing the Thai Competition Act takes very long. The reason is rather simple. That is there are too many steps, from investigation to the final decision of the Supreme Court or Supreme Administrative Court. In order to shorten the process, while due process of law is still safeguarded, amendment should be made into the following items.

- (1) The Appeal Committee should be abolished.
- (2) All appeal matters should go to the Intellectual Property and International Trade Court.

There are a number of reasons. Firstly, the judges at the Intellectual Property and International Trade Court are familiar with domestic business and international business transaction than the judges at the Court of Justice (the Civil Court) or the judges at the Central Administrative Court. Secondly, the procedural process conducted in the Intellectual Property and International Trade Court is similar to “trial process” in the Common Law traditions – intensive.

6.5 Sanction

The sanction under the Competition Act of 1999 departs greatly from international norm. That is all violations of the Competition Act are criminal offenses. In order to bring the sanction of the Competition Act into the same line with almost advanced economies, the author propose the following amendments.

- (1) criminal sanction applies only to hard-core cartels and abuse of dominant position
- (2) civil liability shall apply to unauthorized merger and acquisition, unauthorized vertical restraints under section 27 (5)-(10), unauthorized parallel import under section 28, violation of Section 29 (unfair business practices).
- (3) introduction of new remedy to the Competition. Namely, the imposition of administrative surcharge on those who engage in hard-core cartels.

7. *Conclusion*

The Competition Act of 1999 is the product of political compromise. It is only the second-best or third-best choice for Thailand in the mid-1990s. Its current role is only supplementary to the Price Control Act of 1999. The dependency on the Price Control Act is fully understandable, rather easy to enforce in comparison to the Competition Act of 1999, the officials of the Department of Internal Trade are far much more familiar with enforcing it and more importantly, enforcement activities are remarkably visible to the

public. However, in the long run, it is important for Thailand to use the Competition Act as the main law to enhance the market mechanism of the Thai economy and reduce the role of the Price Control Act to the minimum. There is some room during this transitional period to improve the role of the Competition Act from supplementary role to the principle role. The proposed amendment in Chapter 6 should increase the role of the Competition Law in promoting and maintaining free and fair competition in the Thai economy.

Lao PDR

Introduction

Laos is a land-locked Least Developed Country (LDC), with a population of about 5.6 million. Approximately 83% of the population live in rural areas and depend on subsistence agriculture.

According to the United Nations, in 2003, Laos ranked 135th out of 175 LDCs in the UNDP Human Development Index (HDI), making it one of the poorest countries in Asia. As a country relatively recently embarking on an open market system of development, it faces many challenges. This is particularly so, when it has previously been a centrally planned economy and now is opening itself for regional and international trade integration. The fundamental strategy is to reduce widespread poverty through economic growth fuelled by trade.

This study looks at how competition and consumer protection policies, in that context, could help markets work better in Laos.

The study is divided into two parts and nine sections. Part I deals with the level of competition in the Lao economy, and examines the implications of



government policies for improving competition. Issues relating to consumer protection are discussed in Part II.

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***Part I:
Competition***

Theoretically, the higher the degree of competition in an economy the better will be the efficiency of its resource allocation, production and employment. Until recently, not many developing countries fully realised the importance of competition. Many of the non-communist developing countries, for instance countries like Sri Lanka, India and several others in Asia, preferred to experiment with what some politicians termed as the ‘democratic socialism’ model with a mixture of private and public enterprise. Not only natural monopolies and key utilities such as the railways, electricity, posts and communication, but also many commercial enterprises such as banks, insurance and even large manufacturing operations such as cement and steel production and trading operations like imports and exports which could more efficiently be run by private sector became part of the public sector. Most of them were run as monopolies and enjoyed preferential treatment from the government, and as such the level of competition in those economies was minimal. Mismanagement, political interference, and the lack of business motivation resulted in many public enterprises running at losses at enormous costs to the public purse. Naturally these economies failed to show a satisfactory growth, and their unemployment and poverty grew. Mixed economy model of development was a failure.

Over past few decades, having realised this failure, many developing countries

(eg the emerging economies) and some previously centrally planned economies (such as China, Vietnam and Laos) as well, began to adopt strategies of development that increasingly used expansion of private enterprise, trade liberalisation and greater integration with the world economy. In general these economies began to grow faster and their employment situation improved. What underpinned this success undoubtedly is competition in the market place. As mentioned earlier, competition is essential for efficient allocation of resources in the economy, which means that investment and other resources will flow into most productive economic activities. It increases factor productivity, creates more employment and income earning opportunities, and can be used as a powerful tool to reduce poverty by facilitating small and medium enterprises at rural level.

1. The Lao Economy

1.1 Economic structure and characteristics

Sectoral composition of Lao PDR’s gross domestic product (GDP) is shown in Table 1. Agriculture is the dominant sector of the economy contributing approximately 50% of GDP. However, over the past years its share has been falling slowly while the share of industry has been improving. Although agriculture contributes about 50% of the GDP, it provides employment to over 85% of the workforce, majority of whom are still engaged in subsistence farming.

During the three years 2000 to 2002, agriculture grew at an annual average of 4.2%, industry at 9.6% and services at 5.4%, indicating that the industry as a sector has been growing fastest. During the 5 years to 2002, annual economic growth remained at over 5.5%, which

can be considered satisfactory as it is comparable with the growth performance of the neighboring countries – Thailand, Cambodia and Viet Nam. However, per capita income still remains quite low.

Table 1: Main Economic and Social Indicators

	1995	2000	2002
Gross Domestic Product (US\$ mn)		1704	1809
Sectoral output as % of GDP-			
Agriculture	55	53	50
Industry	19	23	25
Services	26	24	25
Per capita income (US\$)		326	327
Economic growth rate (%)- GDP	4.0	5.8	5.9
Population growth (% per year)			2.3
Life expectancy (years)			58.9
Infant mortality rate(per 1000 live births)			82.0
Literacy rate (% of age >15)			66.4

Source: UN, World Bank and ADB country data, NSC and Bank of Lao PDR.

Poverty: Despite more than a decade of fairly high economic growth, following the introduction of market-orientated reforms under the NEM (see Section 1.2 below), Laos is still classified as an LDC, and as such is considered by the international community to be one of the poorest countries in the world. Although there are signs that poverty levels are falling, poverty remains widespread throughout the country. Poverty fell significantly from 39% in 1997/98 to 32% in 2002/03⁴. However, poverty levels are relatively high in the rural areas, particularly in the Northern Region. Many of the benefits arising from economic growth and socio-political reforms do not seem to have

reached a significant section of the population.

External trade: External sector of the Lao economy grew substantially after the NEM and the country's entry to ASEAN. However, merchandise exports are highly concentrated in a few product categories, principal ones being garments, electricity, wood products and coffee, which together account for over 90% of total merchandise exports. Of these (in 2002) garments contributed 34%, electricity 33%, wood products 21% and coffee 5.5%. For the first time in 2003 mining products became a major export contributing US\$28 million in the first half of the year, which would amount to over 15% of total exports.

⁴ Lao Expenditure and Consumption Surveys (LECS) 1997/98 and 2002/03.

Tourism is a major source of Lao PDR's foreign exchange earnings. Currently, tourist earnings contribute more than one fifth of the country's earnings from its total exports of goods and services, and ranked the highest in most years⁵ among the major exports of the country. Minor exports include handicraft, other agricultural products such as cardamom, maize, live animals (cattle and buffalo), chili, fruits, vegetables and various forest products. Potential exists for more diversified and processed agricultural export development. During the years 2000-2002, earnings from merchandise exports remained more or less flat at around US\$320, while earnings from services exports (mainly tourism) increased from US\$145.5 in 2000 to US\$175.9 in 2002. In 2002, total earnings from exports of goods and services amounted to US\$488 million – about 27% GDP.

A high proportion of imports (over 50%) is composed of consumption goods, mainly food, clothing and vehicles. Investment goods imports (machinery and equipment) account for about one third of total merchandise imports while the balance consists of intermediate goods imports (raw materials for garments and other industries).

Merchandise imports as usual remained much in excess of merchandise exports, which is not unusual for a developing country that receives substantial foreign aid and capital inflows. Together, exports and imports of goods and services have resulted in modest deficits as reflected in the current account balance (Table 2).

⁵ Except in 2003 when there was a substantial drop in number of tourist arrivals due to SARS.

Foreign Direct Investment (FDI) as shown in the Balance of Payments data indicates a sharp drop from 1999 to 2002⁶. On the other hand aid receipts (grants as reflected in the item Transfers, and loans included in item Other Capital transactions) have remained quite high. Overall, the balance of payments situation has been rather satisfactory with substantial additions to Reserves both in 2000 and 2002.

⁶ It should be noted that these FDI data differ widely with those reported in The World Bank Lao PDR Economic Monitor, Oct 2003, which says "In FY2002/03 the actual FDI inflow increased by 67%, from US\$93m in 2001/02 to US\$155m in 2002/03, with a big jump in mining investments".

Table 2

Lao PDR: Balance of Payments, 1999-2002 (US\$ million)

	1999	2000	2001	2002
A. Current Account Balance (1+2+3+4)	-75.7	-8.5	-56.1	-2
1. Trade Balance	-252.8	-205	-190.8	-209.7
Exports	301.5	330.3	319.5	312.3
Imports	-554.3	-535.3	-510.3	-522
2. Services (net) (tourism, insurance etc)	99	132.6	134.4	147.4
Receipts	145.5	175.6	166.1	175.9
Payments	-46.5	-42	-31.6	-28.6
3. Factor incomes (net)	-21.3	-52.4	-33.4	-26.1
4. Transfers (net)	99.4	116.3	33.7	86.4
B. Capital Account Balance (5+6+7)	69.9	115.2	130	76.6
5. FDI (net)	51.6	33.9	23.9	4.5
7. Other (govt, banks etc) capital transactions (net)	18.3	81.3	106.1	71.4
C. Errors & Omissions	-0.8	-72.1	-81.4	-16
D. Overall Balance (A+B+C)	-6.6	34.6	-7.5	58.6

Source: Bank of Lao PDR

Currently, Lao export destinations are limited to a few countries: Thailand and Viet Nam and the EU countries. However, because of proximity, rapidly growing domestic economy and the duty free access to over 200 items, China is becoming an increasingly important export market for Lao products. Potential exists for further diversification of Lao export markets as well as export products by taking advantage of the duty free access granted recently by Australia and Canada. To be successful in this respect, Lao government may need to further its trade policy reforms and remove remaining barriers to trade and competition; and also the exporters need to carryout market research, improve efficiency and product standards and learn to be more competitive.

1.2 Structure of the market and the level of competition

Economic reforms: By far the most significant reform that changed the economic system in Lao PDR was the

adoption of the New Economic Mechanism (NEM) in 1986. This resulted in a gradual and steady transformation of the economy from a centrally planned system to an open market system. Other important components of the NEM are: privatization of most of the State Owned Enterprises (SOEs), open-door policy towards both private domestic and foreign direct investment, and enactment of the necessary legal and regulatory framework for these measures. Majority of 640 SOEs have been sold, a few were be retained for strategic reasons, and the loss-making SOEs including State Owned Banks (SOBs) are being restructured with the assistance from the IMF and the World Bank. Other key reforms included the liberalization of prices; introduction of market orientated trading systems, a two-tier banking sector and an administrative framework needed to support a market economy.

Another significant step in the reform process was Lao PDR admission to ASEAN in 1997. This provided for

increased regional integration and further trade liberalization measures including the reduction and elimination of tariff and non-tariff barriers to regional trade required under the ASEAN Agreements and Protocols. In the same year Laos applied for accession to WTO, which has also prompted the Lao government to work towards WTO consistent trade and regulatory reforms.

The Constitution enacted in 1991 guarantees state protection to all forms of domestic and foreign investments in the country, guarantees to individuals and organizations the rights to property (right to possess, right to use, right to transfer and right to inherit), and encourages all economic sectors to compete and cooperate with one another in carrying out their production and business activities. Newly amended Land Law, enacted in November 2003, provides for the same property rights to land.

Thus the commitment to economic liberalization has been maintained and demonstrated. The economy was irreversibly transformed into a market economy where the private sector plays an increasingly significant role, and the SOEs plus the public sector have been reduced to a minor place in terms of its share (6%) in the GDP.

Level of competition: Competitive environment in the economy improved gradually and considerably after NEM. The government's monopoly on trade which was the case prior to NEM, has been removed. The private sector firms which dominate the manufacturing sector (over 80%) are predominantly small scale operators. About 98% of the firms are small scale firms who have less

than 10 employees. Similarly, most of the agricultural holdings in the country are small blocks of few acres cultivated by individual farmers. As such, the level of competition among the producers as well as traders is quite high.

Laos does not seem to have major problems of monopolization as yet, in terms of mergers, cartels, takeovers etc. This is largely due to the absence of large private sector players and the unsophisticated nature of the commercial structure.

This is not to say that Laos has no problems relating to competition. Most of the barriers to competition exist due to the nature of public sector policies and how they are implemented. Monopoly elements also exist in a few areas due to state ownership. These are discussed in more detail in Section 4.

1.3 National development and poverty reduction strategies

The Government's national development and poverty reduction strategies began to take shape with the adoption of *The National Socio-Economic Development Plan 1996-2000*. Subsequent work on formulating these strategies was supported by the IMF under its Poverty Reduction and Growth Facility (PRGF) as well as by the World Bank and the UNDP. The National Poverty Eradication Program (NPEP)⁷, finalized and presented to the 8th Round Table Meeting in September 2003, sets out the

⁷ NPEP has since been renamed as National Growth Development and Poverty Eradication Strategy (NGPES), and the new NGPES is being prepared.

goals and strategies for national development and poverty reduction.

Long-term national goals. Overarching national goal is poverty eradication through economic growth with distribution and exiting the group of LDCs by 2020. Key elements in this goal are:

- Sustain economic growth with equity at an annual average rate of about 7%.
- Halve poverty levels by 2005 and eradicate mass poverty by 2010.
- Eliminate opium production by 2005 and phase out environmentally harmful shifting cultivation by 2010.

The following guidelines were set out in formulating the strategies for achieving the above goals:

- Balance between economic growth, socio-cultural development and environment preservation.
- Harmonious distribution of development between urban and rural areas and among regions and sectors.
- Sound macroeconomic management and institutional strengthening.
- Regional and international economic integration.
- National security and stability.

Strategic development priorities. The following are the strategies to achieve the key national goals, within the above guidelines:

- Maintain an appropriate level of economic growth for the medium and long-term in response to demographic trends.

- Enhance human resource development through education, particularly basic education.
- Develop and modernize social and economic infrastructure such as roads, transport, warehousing, and communication.
- Facilitate access to electricity for people in all areas and regions.
- Promote industries utilizing domestic resources, and actively promote small and medium-sized enterprises (SMEs).
- Promote private sector development, promote foreign direct investment (FDI), and place emphasis on export-oriented sectors that have a comparative advantage.
- Enhance market linkages and trade facilitation.
- Create favorable conditions for improving financial institutions and capital market development.
- Promote international economic integration.

Trade sector-specific priorities: Most of the above mentioned priorities are related to trade development. In addition, specific priorities for the trade sector are:

- Accelerating the WTO accession process.
- Implementing the Common Effective Preferential Tariff (CEPT) Scheme under ASEAN Free Trade Agreement.
- Mainstreaming trade into national development and poverty reduction strategies.
- Improving and modernizing trade statistics.
- Rationalizing policies on protection.
- Continued trade liberalization on a sustainable basis

- Rationalization and simplification of trade related regulatory framework – export/import licensing and administration procedures, and customs and exchange controls.
- Facilitating the availability of banking, finance and credit facilities to SMEs.
- Improving trade information dissemination systems.
- Establishing legislative and institutional frameworks for competition and consumer protection.
- Introducing commercial law reforms.

Overall, the above goals and strategies for national development and poverty reduction are very impressive, ambitious and commendable. However, many challenges lie ahead for a successful achievement of the goals. Given the economic uncertainties and the weaknesses in government administration and policy implementation processes, an annual average economic growth rate of 7% would be hard to maintain.

Another recent policy initiative towards poverty reduction oriented development is the Integrated Framework (IF) of the Six Core International Agencies. At the request of the Government, Lao PDR was admitted to the IF initiative. Its main objective is to mainstream trade into overall national development plans and poverty reduction strategies of the country, and thus use the dynamics of trade to promote growth and help reduce poverty by involving rural and low income people in trade related activities. Activities under IF include identification of barriers to trade and taking remedial measures, and trade related capacity building. If properly carried out, and the

government implements the recommended remedial measures, IF can be expected to help in achieving the national goals on poverty reduction.

2. *Structure of government and administration*

2.1 Post-independence political and socio-economic developments.

Laos was under the French colonial rule since 1893. Independence from France was achieved in 1945, the Kingdom of Laos took over, but the conflicts continued between the royalists, neutralists and communist factions. The Kingdom of Laos, however, lasted till 1975. When South Viet Nam fell in 1975, most of the royalists left the country and Pathet Lao who fought alongside with the North Vietnamese, peacefully took control of the country and established the Lao People's Democratic Republic (Lao PDR) in December 1975. Lao PDR is a one party state. Until the Constitution was adopted in 1991, legislative power was with the Supreme People's Assembly.

There are four main mass organizations – Lao Front for National Construction, The Lao Federation of Trade Unions, The Lao Women's Union and The Lao People's Revolutionary Youth Union – which are given recognition in the Constitution as those, among others, that unite all ethnic groups for national defense and development.

An early attempt to decentralize financial and some administrative functions was made in 1986, as part of the New Economic Mechanism, but was

reversed in 1991 because of sharply reduced central government revenue collections due to provincial negligence and mismanagement. A new Decentralization Initiative was taken in March 2000 under the Prime Minister's Instruction 01. It is officially characterized as "making the province the strategic unit, the district the budget planning unit, and the village the implementing unit". The initiative was aimed at making more districts self-financing, giving them greater incentive to collect revenue and better manage their expenditures, and making budget preparation more participatory. Soon this Initiative too created problems for the Central government as transfers of revenue to it from surplus provinces fell far short of their targets. As a result, some measures were taken in the 2001/02 budget to discipline the provinces on fiscal management. These included recentralization of taxes on imports. In principle, decentralization is desirable. It would provide for more effective regional and rural development. However, its success would depend on the credibility of the provincial and regional officials. Decentralization of some monetary and fiscal responsibilities, could limit the government's ability for proper management of macroeconomic policies.

2.2 Constitutional and legal framework

The Constitution of Lao PDR was enacted in 1991. It provides for a Westminster style government with a legislature, an executive and a judiciary. Legislative organ is the National Assembly. Its members are elected through a popular vote every five years,

"in accordance with the provisions prescribed by law", which practically means a form of guided democracy. The National Assembly, with a two thirds majority, elects the President of the Republic whose term is five years.

The President with the approval of the National Assembly appoints the Executive, known as the government, which consists of the Prime Minister, Deputy Prime Ministers, and Ministers. The President also appoints the provincial Governors.

The Judiciary includes the People's Supreme Court, lower courts (People's Courts of provinces, municipalities and districts, and military courts), and the Office of the Public Prosecution. The Vice Presidents of the People's Supreme Court and the judges of the peoples courts at all levels are appointed and removed by the National Assembly Standing Committee. The Judiciary is thus independent of the Executive.

The Republic is divided into provinces, municipalities, districts and villages. Currently there are 18 Provinces (16 Provinces, Vientiane Municipality and one Special Region). Each province is subdivided into districts, and each district into villages. Provinces and the Vientiane Municipality are administered by the Governors and the Mayor respectively.

Fundamental civic rights are guaranteed in the Constitution. These include equality before the law, the rights to vote and to be elected, to education, to engage in economic activities, and freedom of worship, movement, speech, press and association.

Theoretically the rule of law and the independence of the judiciary exist. The Supreme Court also acts as the highest court of appeal. Judges and the senior public prosecutors are appointed by a committee of the National Assembly. The body of laws consists of laws enacted by the Supreme People's Assembly, and after 1992 by the National Assembly, the Decrees issued by the President and the Prime Minister, and the regulations made under the laws and decrees. Since the NEM of 1986 more than fifty laws, including the civil and criminal codes, have been enacted, and several decrees issued.

The government has publicly announced on many occasions that it is committed to establishing the rule of law. However, enforcing the rule of law has been limited by the lack of public availability of laws and regulations. Over 50 laws have been enacted so far, but many people are not familiar with them.⁸ Even many officials who are supposed to implement them are said to be unfamiliar with them due to both the non-availability of the documents and the lack of interest. Corruption among officials is said to be another factor, as those who are affected by the laws are said to bribe the officials not to apply them. No adequate facilities and funding are available to print, distribute and explain laws. Even though the country is keen to promote foreign investment, trade and commerce, most of the relevant laws are not translated into English. There are no effective arrangements to make the laws known to the people. As most people who live outside the main city centres cannot read, and as such they know very little

⁸ Vice Minister of Justice, Vientiane Times, 13 August, 2004.

about the existing laws in order to claim their legal rights.

The lack of clarity and precision is another problem in Lao Laws. This creates confusion and different interpretations often giving the officials wide discretion in applying the laws. Weaknesses in the Lao laws were recently admitted by the Vice Minister of Justice who indicated the need for overhauling the laws to make them more precise and devoid of loopholes. He stated that most laws contain general terms without explaining specifics particularly in the area of trade and investment laws, and that many "people use the gaps in laws to their benefit". He emphasized the need for revisions to improve the laws particularly to promote trade and investment.⁹

2.3 Administrative bodies

The structure of administrative bodies of Lao Government is given in Diagram 1. The Executive arm of the Republic consists of the Prime Minister's Office, other Ministries, other key government agencies, and the provincial administrations. The National Science Council which comes under the Prime Minister's Office is also responsible for technology and environment.

Of the Ministries, the Finance Ministry is responsible for both treasury and budget policy functions, as well as for customs and taxation. Ministry of Public Health, in addition to health administration, is also responsible for drug control, and quality control of food products. The State Planning Committee, which has the status of a Ministry,

⁹ Vientiane Times, 5 and 13 August 2004.

includes the National Economic Research Institute, National Statistics Centre, and Internal and External Investment Management and Promotion Department.

The Judiciary, which stands out as an independent entity, consists of the People's Supreme Court, Office of Public Prosecution, and the Provincial People's Courts.

The provincial administration system includes provincial offices of almost all central government line Ministries. These offices come under what is referred to as both 'vertical' and 'horizontal' control: vertically, they are subject to their respective line ministries, and horizontally to the provincial administration.

The key utility services providing SOEs, Lao Telecom, Lao Posts Enterprise, Lao Electricity Enterprise and the Water Supply Enterprise are also treated as public bodies.

3. *Implications of trade and investment regimes for Competition Policy and Law*

3.1 Decree on Competition

The Lao government is committed to ensure a fair trading and competition environment in the economy. As mentioned earlier, the Constitution states that "the State encourages all economic sectors to compete and cooperate with one another in expanding their production and business activities. All economic sectors are equal before the law".

Following this commitment, and with technical assistance from the UNCTAD and the involvement of the Consumers International Regional Office for Asia and the Pacific, the Ministry of Commerce has taken initial steps to set up a Fair Trading Commission to deal with issues of both unfair competition and consumer protection. As a first step in this direction, the Prime Minister's Decree on Trade Competition was issued in early 2004 and came into effect on 1 August 2004. It aims to provide for rules and regulations to deal with monopolization and unfair competition, to protect rights of consumers and to encourage business activities to compete and function efficiently.

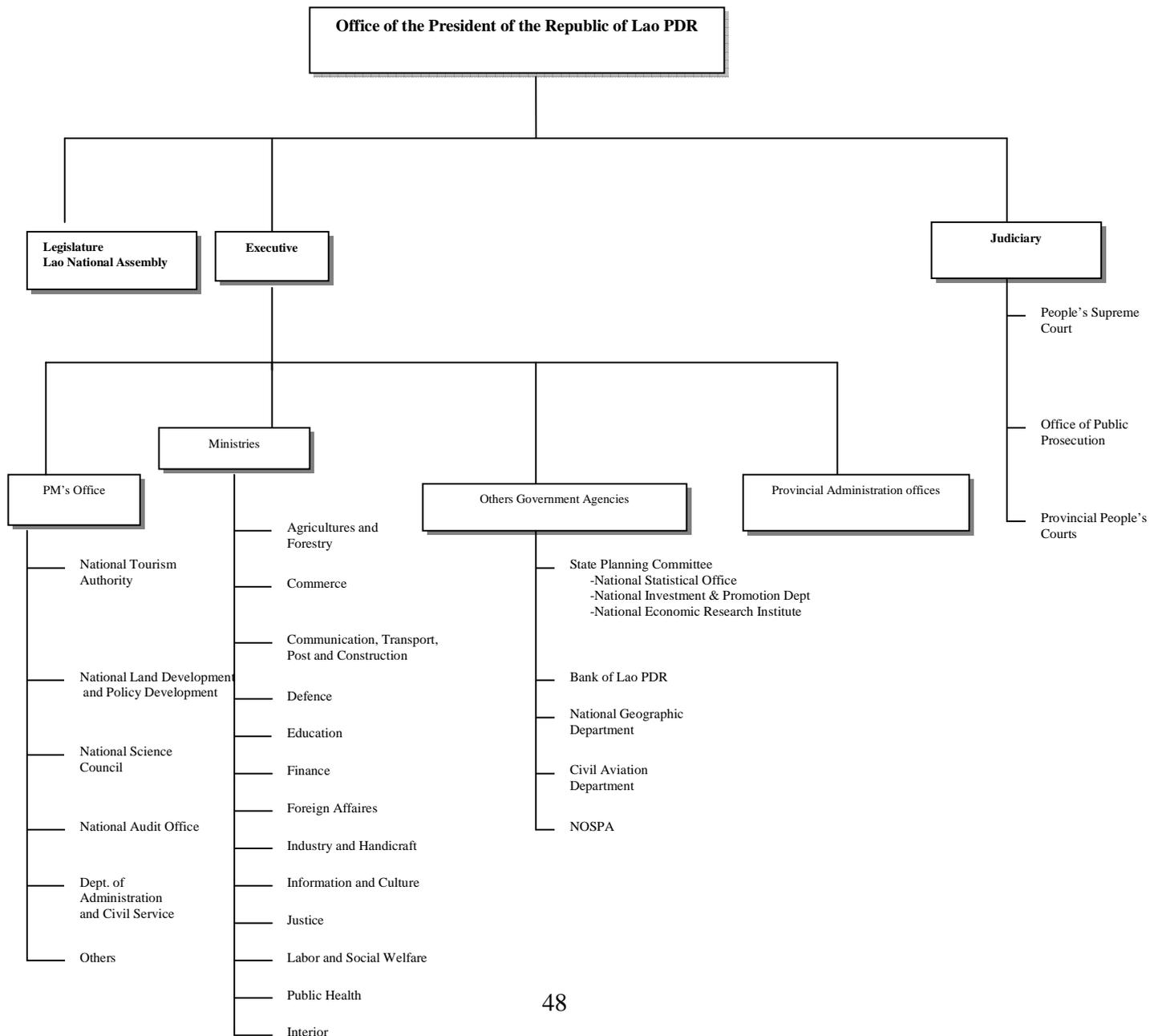
The Decree prohibits formation of mergers and cartels in order to eliminate competitors, unfair activities such as dumping, collusion, price fixing, and market allocative arrangements with the intention of eliminating other businesses. It provides for a Trade Competition Commission (TCC) with a Secretariat to be set up under the Ministry of Commerce to enforce the Decree and to formulate the necessary regulations for that purpose.

TCC's other key functions are to:

- Monitor activities of businesses and take actions against offenders
- Consider submissions from businesses and grant exemptions from prohibitions of the Decree on socio-economic reasons
- Consider appropriate market share for a business that dominates the market, and
- Examine complaints from businesses and consumers

An important point to note is that the Decree does not grant any exemptions from its application to any business entity, not even to SOEs and businesses that currently enjoy a high degree of monopoly under investment agreements such as the Beer Lao Brewery. Nor does it specify the level of market domination deemed unfair. These are left to the TCC to determine. In that respect the Decree is quite flexible and provides much leeway to the TCC.

Diagram I



Though the Decree is supposed to be effective as from 1 August 2004, the Ministry of Commerce (MOC) has yet to set up the institutional arrangements for its implementation. The Secretariat of the TCC has not been established, nor the TCC. It is essential for the Secretariat to be set up first and its officials selected and trained. This Secretariat is expected to not only implement the present Decree on Competition, but also to function as the key arm of the Ministry to initiate further policy and legislative developments leading to the expansion of this Decree into a legislative law both on Competition and Consumer Protection and ultimately setting up of a full-fledged Fair Trading Commission, as the MOC has announced.

3.2 Past practices and implementation of competition requirements prior to the new Decree

Until the new decree on competition was issued, there was no clear policy or law to ensure competition in production and sale of goods and services in Lao PDR. Nor was there a deliberate policy to prevent anti-competitive practices. In fact the Business Law of 1994 permits merger of companies, but does not restrict monopolization, or specify the permissible level of market share for a merger. However, various legal and regulatory provisions served to pave the way for greater competition and to prevent some anti-competitive behavior in certain sectors. These relate mostly to trade related legal and regulatory provisions and institutions.

Prime Minister's Decree on Goods Trading Business of 2001 aimed to provide for regulations to ensure adequate supply, fair prices, and better quality of goods in the market. It provided for setting up regulations requiring standards, quality of goods, trade marks, price limits and the margins of stocks accumulation periodically. MOC, together with the Ministry of Finance, concerned line ministries, and provincial administrations, is responsible for implementation of this decree.

3.3 Trade policy regime.

Under progressive transformation of the economy from a centrally planned to a market system, trade policy regime has undergone a considerable degree of liberalization. Export licensing is no longer required for exports except for logs, rough sawn timber and those restricted for reasons of security, public morale, and protection of wild life. As for imports, quantitative restrictions are applied for some goods for a variety of reasons. These are cement, steel bars, motor vehicles, foodstuffs, seeds, chemical fertilizers, casinos, guns, some audio-visual equipment, drugs, explosives, communication equipment, and fuels and lubricants.

Licensing, and not tariffs, is used as the means of restricting imports for protection purposes. The rationale for restriction of imports of cement and steel bars is stated to be the protection of local industries. Motor vehicles are said to be subject to licensing to prevent congestion on the still less developed road system. However, of late, licensing

of vehicle imports are used mainly for registration purposes and importers are allowed to import as much as they want to. Restrictions on imports of foodstuffs are both for reasons of food security and protection of domestic production. Others, except for fertilizer and fuels, are restricted on moral or security reasons. Except for these items, large importers no longer need to seek licensing for each shipment. Instead, they can each draw up an annual plan setting out the annual requirements and submit for approval. Once approved, the importer can import the products up to the approved amount without seeking licences.

Generally, restrictions on imports adversely affect competition due to the potential for supply shortages and consequent black market operations. In the case of Laos, except for cement and some foodstuffs such as rice, no major supply shortages have occurred in recent years. However, normally during the dry season housing construction activities increase creating a high demand for construction material. In particular products such cement, rice and meats have experienced seasonal shortages. The government's remedy in such situations has been to apply price controls in order to prevent the inevitable free market price increases. In principle, price controls are an inefficient remedy. It only creates black market operations and do not alleviate the difficulties of the consumer. It adversely affects competition and fair pricing. At least the second best remedy would have been to allow adequate imports during periods of shortages. The best remedy would have been not to apply any quantitative restrictions on imports.

All imports are subject to tariffs with certain exceptions. There are no exceptionally high tariffs aimed at restricting imports. They are used mainly for revenue and as a means of providing incentives to attract foreign investment and to promote some domestic economic activities. Current level of import duty rates can be said to be moderate for a developing country. There are six different customs duty rates - 5%, 10%, 15%, 20%, 30% and 40%, with a medium tariff of 5%, and an import-weighted rate of 14.7%¹⁰. Lower rates apply mostly to essential consumer goods while higher rates apply to luxury items. Intermediate rates apply mostly to imports of non-priority items and those competing with domestic production.

However, many duty exemptions are applied as incentives. Approved foreign investors and joint-ventures between foreign investors and local partners are allowed imports of machinery and equipment at a duty rate of only 1 percent. Foreign investors are also allowed the import of raw materials free of duty. Duty free imports of inputs and duty draw-back concessions are also provided to domestic enterprises producing for export, government agencies, and even some individuals. Similar concessions are also allowed to those who produce for import substitution (also see Section 3.4.2 on Investment Policies). These exemptions, together with AFTA (see below) concessions reduce the actual import duty revenue to as much as 3% of the total value of imports¹¹ whereas the import-weighted average is 14.7%,

¹⁰ IMF, "Lao PDR: Selected Issues and Statistics". IMF Country Report No.02/61, March 2002.

¹¹ UNIDO (Apr., 2003).

which implies that about 80% of import duty is foregone by way of various concessions.

Studies have shown that it is quite normal for a developing country to have imports in excess of exports, which means a trade deficit. This happens mainly because of the receipts of foreign aid. It can also happen when a country receives net inflows of FDI and other capital. So, under normal circumstances, such a trade deficit is not a matter for concern so long as imports approximate to the total value of exports of both goods and services *plus* net receipts of aid (including aid loans) and foreign capital. However, too excessive trade deficits (i.e. imports much in excess of the sum total of exports, FDI and aid receipts) can occur if a country resorts to large budget deficits or excessive bank lending.

Therefore, it is important for sustainable development that the country tries to live within its means. This means, the country's expenditure on its imports should approximate to its total income from exports, foreign aid receipts and net inflows of capital. Containing imports within the country's means is mainly a function of macroeconomic management (i.e. the management of monetary and fiscal policy). Excessive bank lending and too large budget deficits normally result in excessive imports, often much in excess of the country's capacity to pay. Such developments can cause severe balance of payments difficulties. Trade policy can help very little in such circumstances. Quantitative and other restrictions on imports are not the correct remedies and would be of little help in such situations.

Although the foreign exchange regime is somewhat liberal, foreign exchange rationing still exists both as part of the import policy regime and foreign exchange management. Currently the Central Bank allocates foreign exchange to importers of several priority items – about 20 – such as petroleum, fertilizer, milk products, capital equipment etc. The practice has forced importers of other items to buy exchange from the unofficial market at a higher rate. As a result, it has created a premium exchange rate in the unofficial market. This also encourages exporters and other recipients of foreign exchange payments to divert their foreign exchange earnings to the unofficial market through the back door. Under these circumstances, foreign exchange rationing and the consequent black market operations could affect competition due to the prevalence of dual pricing (official and secondary market rates) of foreign exchange. Because those who receive exchange at the cheaper official rate have an advantage over those who buy exchange at the higher unofficial rate.

Laos uses a policy of managed float under which the daily exchange rates vary practically according to supply and demand subject to some intervention by the Lao PDR when necessary. Under such a regime, there would be no need for exchange controls except in the case of large capital transactions, or in the event of severe balance of payments difficulties.

Lao PDR acceded to ASEAN in 1997. In fulfilling its ASEAN membership requirement, Laos started to implement the Common Effective Preferential Tariff (CEPT) scheme for ASEAN Free

Trade Area (AFTA) in January 1988 and is scheduled to complete by 2008. This will reduce tariffs on imports from ASEAN countries to 0-20% by 2005 and to 0-5% by 2008¹². This process of liberalization will pave the way for a gradual improvement of the competitiveness of Lao produces vis-à-vis its ASEAN counterparts. With a view to achieving greater integration with the international trading community, Laos is fully committed to acceding to WTO as soon as possible, and is now going through the phase of Working Party negotiations. It has also entered into bilateral trade agreements with 18 countries including the US, China, Australia and the EU, and has received GSP from 34 countries.

Domestic firms, to a large extent, operate on a free and open market system. Apart from the informal market operators, all businesses are required to register with the Ministry of Commerce or the relevant provincial authority. Subject to this requirement, people are free to engage in normal trading and business activities, and as such the level of competition in the economy and in trade is quite high, and the market sets the prices. However, by law the government may regulate the prices of some 20 products, which is said to be mainly for cost of living

¹² Applies to products in the “inclusion list” (IL). Three categories of imports are excluded from CEPT scheme: those in the “temporary exclusion list” - the products which are required to be transferred to IL within 8 years; those in the “sensitive list” which includes mainly agricultural raw materials and unprocessed products, but required to be transferred to IL by 2015; and those in the “general exception list” which includes items related to security, culture, health and environment, and are exempted from the scheme.

considerations. Of these only three products are currently subject to price control: they are fuel, cement and steel bars. Other products are only subject to price surveillance where the officials occasionally check prices of key consumer goods. Where prices are found to be too high due to short supply, which could happen mainly for items that are subject to import restrictions, more imports may be allowed.

Price control on cement and steel bars which are key building materials is meaningless and adversely affect competition as it could drive these goods into the black market. Restriction of imports, in principle, also affect competition as it prevents competition of domestic products with imports, a requirement to ensure efficiency and quality of domestic products.

3.4 Industrial and investment policies

3.4.1 Industrial Policies.

The industrial sector which includes mining, quarrying, manufacturing, construction, electricity, gas and water, contributes about 23.6% of GDP (2001), of which the manufacturing sector's contribution is 17.9%. Manufacturing industry is dominated by small scale processing, construction and assembly plants catering mainly to domestic consumption. Virtually there are no heavy industries except for a couple of cement factories. During the past decade manufacturing sector grew by 9.4% surpassing the GDP growth rate of 5.8% during the same period. Most of the value added comes from food and

beverages, garments, tobacco products and wood and wood products. About 99% of the number of firms and 55% of employment are in small and medium sized businesses.

Several documents outline the government's strategies and policies for industrial development in the country.¹³ Under the Constitution, Lao PDR is committed to pursuing the mechanisms of a market economy, with adjustment by the State. However, an analysis by UNIDO concludes that although significant progress has been made to transform the economy from a centrally planned to a market economy, "when it comes to manufacturing sector, the Government is still applying most of the concepts and approaches typical of a centrally planned economy"¹⁴. These characteristics used to include extensive government interventions by way of price controls, import controls and various forms of subsidies with the focus on protection of domestic industries, which are now being gradually phased out. In order to proceed on the path to a well functioning market economy with a high degree of competition, the Lao policy makers would need to improve their understanding of the concepts of a market economy and discard the remaining practices of a centrally planned one.

The key elements of the current industrial policy can be classified into (i) promotion of small and medium-sized

enterprises (SMEs), (ii) focus on import substitution, and (iii) targeting industries and specific products for promotion.

Promotion of SMEs. The Government's strategy for promoting SMEs is spelled out in a recent Decree by the Prime Minister¹⁵. It identifies the following as priority areas for SMEs:

- (a) creating an enabling regulatory environment;
- (b) enhancing competitiveness;
- (c) expanding domestic and international markets for their products;
- (d) improving access to finance;
- (e) encouraging and creating favourable conditions for establishment of Business Organisations; and
- (f) encouraging entrepreneurial attitudes and characteristics.

The decree reflects more policy development and less interventionist approaches to promotion of SMEs. The concerned government agencies and the SME Promotion and Development Office to be established under the Ministry of Industry and Handicraft are assigned the tasks of developing policies and programmes for the above priority areas. For enhancing competitiveness, the government will support and cooperate with all organisations, academia, research institutes for capacity building, upgrading skills of entrepreneurs and workforce in SMEs, improving technology and standards, and formulating programs. SME Promotion and Development Funds are to be set up for providing support for program development.

¹³ The Constitution; the Political Report and Resolutions from the 7th Congress of the Lao Revolutionary Party; Government's 2020 Vision with eight national goals; 5th Five-year Social-economic Development Plan 2001-2005; National Poverty Eradication Programme, 2003 etc.

¹⁴ UNIDO, (April 2003), p. ix.

¹⁵ Decree on Promotion and Development of Small and Medium Sized Enterprises, No. 42/PO, Apr 2004.

Focus on import substitution. As for the promotion of traded goods production, the short to medium term focus seems to be more on import substitution while export orientation is targeted for the longer term. This apparently resulted from the concerns the policy makers unnecessarily place on the merchandise trade deficit and the efforts to strike a balance in it at all costs. The Commerce Ministry was expected to target its policies at achieving a trade balance (see the discussion on this point under Trade Policy Section above). In this regard, import licensing, encouraging import replacement, and requiring importers to achieve certain export levels in order to qualify to receive import licenses have come to be silently applied practices.

The industrial development strategy contains strong measures in support of import substitution, such as increased tariff barriers on goods produced in the country, quantitative restrictions on imports of goods competing with domestic production, preferential tax concessions for domestic manufacturers, and preferential government procurement of domestically produced goods. These measures are anti-competitive in nature, and are counter-productive to government's efforts at trade liberalisation.

It is well documented that import substitution strategies have failed all over the world, and is an inappropriate industrialisation strategy particularly for small developing economies like Laos. As a development strategy import substitution has been abandoned in almost all countries. A recent study has found that the scope for import substitution is very limited in Laos and the potential lies much in export

expansion. Priority for Laos should be to pursue a clear export oriented strategy with "efficient" import substitution as a complementary orientation¹⁶, which means import competing industries should be allowed to face competition (may be except during their true infancy periods) from imports so that their products reach internationally comparable quality, and their operations become efficient.

Targeting industries and specific products for promotion. A key feature in the industrial development strategies in Laos is that officials try to identify the industrial sub-sectors and specific products so that they can be promoted by targeted incentives by the government. While there may be valid reasons for supporting or protecting infant industries based on economic rationale for infant industry protection, it is wrong to assume that government officials are more competent than the private sector investors to decide which industrial sub-sectors or products would have a potential for producing traded goods on a truly competitive basis. It would be far more productive if these officials concentrate on formulating a sound policy framework so that the private sector can operate with ease and little transactions costs. In such an environment, the private sector would be better able to find products in which Laos would have a comparative and competitive advantage. More effective incentives, however, would be to provide functional support for capacity building, upgrading skills and technology, improving market intelligence dissemination etc. Such support would be more competition

¹⁶ UNIDO (Apr 2003).

friendly and more efficient in achieving the government's objectives.

3.4.2 Investment policies

The Lao government recognises the importance of encouraging the private sector investment for market based development of the economy. It is keen to attract foreign direct investment (FDI) particularly as a means to overcoming capital and foreign exchange shortages, enabling transfer of skills and technologies, and improving access to overseas markets. As a matter of policy, foreign investment is welcome in all sectors of the economy¹⁷ and in all parts of the country, subject only to the consideration of national security. At the same time, the government provides many forms of incentives to encourage domestic investors. However, the current investment policy regime seems to give more priority to generous incentives to investors than to providing a conducive investor environment with features such as appropriate macroeconomic policies, a transparent effective legal system, well developed infrastructure and skills development which would serve to be essential ingredients for competition. The Lao government recognises the inadequacies in the latter areas and is committed to addressing them, though the progress so far has been slow.

Current investment incentive regime has evolved from a series of successive legislations over the last ten years¹⁸.

¹⁷ Except in tourism, where administrative restrictions seem to have barred direct and joint-venture foreign investment for several years (see section on Tourism in Chapter 5).

¹⁸ Foreign Investment Law of 1994, the Domestic Investment Law of 1995; Prime

Under this regime incentives provided to foreign investors are:

- Profit tax at 10-20% up to 1-7 years depending on geographical location and amount of investment, and unless tax holidays are granted which can be negotiated.
- Personal income tax at 10%.
- Accelerated depreciation and tax loss carry-forwards up to 3 years.
- Withholding tax on dividends, interest, royalties and fees paid abroad at 10%.
- Import of equipment, machinery, and vehicles for the enterprise at only 1% import duty.
- Duty and tax free import of raw materials, semi-finished products for use in the production of exports and import substituting goods, and duty and tax free exports.

Foreign investors are also entitled to following privileges:

- To possess, use and transfer property freely.
- To repatriate capital, profits from the enterprise and salaries of foreign employees.
- To have 100% foreign ownership or form joint ventures with domestic investors.
- To lease land for up to 20 years from Lao nationals and up to 50 years from the government.

Minister's Decree No 46/PM on the Implementation of the Law on Promotion and Management of Foreign Investment in Lao PDR, Mar 2001; Decision No.013/CPC by the Chairman of the Committee for Investment, Foreign Cooperation and Domestic Investment, Feb 2002; and Presidential Decree/Law No.01 on Foreign and Domestic Investment Incentives, June 2003.

- To bring in foreign expertise and managers if qualified Lao nationals are not available.

One-stop service facility that coordinates with other relevant agencies for speedy approval of foreign investment applications is set up within the Committee for Planning and Investment.

Investment laws also provide provisions that entitle domestic investors access to same or more generous incentives than foreign investors, and for projects involving large amounts of capital and advanced technology. In an effort to attract investments into rural and mountainous regions in the country, more generous incentives are offered to both domestic and foreign investors who invest in these areas.

In actual application, the incentives over and above what is stated in legal documents for both foreign and domestic investment seem to be subject to negotiation. The law allows for granting of special privileges and benefits in 'highly exceptional cases'. Thus discriminatory treatment is possible, and is said to be frequently used, which could distort resource allocation and thus affect efficient competition. Foreign investors can only use leased land for their enterprises, while the domestic investors can own land. Many developed as well as developing countries apply this discrimination relating to land use. This tends to allocate resources more in favour of domestic investors and to that extent affect competition.

3.5 Privatisation policy

Privatisation in Lao PDR emerged as a major component of the NEM introduced in 1986 referred to in Section 1.2. The economic reform process following the NEM included the reform of the SOEs. The policy was to privatise most and retain only the strategically important ones. Under privatisation, some were leased, and others were sold. These included most of the small and medium-sized enterprises. Majority of 640 SOEs have been privatized, and 55 retained as SOEs, the major ones being Lao National Tourism, Electricity Du Lao (EDL), Lao Trade Import-Export Company, Vehicle and Spare Parts Supply Co., and 8 commercial banks of which six were later consolidated into one. Some were partly sold and formed into joint-ventures with the state. Of the non-bank SOEs, five, including EDL, have been selected for commercialization. The strategy was to convert and register them as joint-stock companies, appoint Boards of Directors, and agree on performance criteria which set out commercial and financial objectives. Some progress has been made, but much remains to be done to complete the process. The present aim of the government is said to be to continue the privatization program and finally retain only 32 as SOEs.

However, because the largest SOEs are capital intensive and suffer from weak financial management, this sector accounts for about one-third of state owned bank (SCB) loans and nearly two-thirds of non-performing loans (NPLs). In order to overcome these weaknesses, five large non-bank SOEs including EDL are being commercialized (which mean that they

will be run by Boards of Directors, will have greater freedom to set their prices, and will be subject to financial discipline), and SCBs are being restructured which includes application of sound banking practices and credit discipline.

The underline principle for privatization in Lao PDR has been to eliminate the government's monopoly on trade and pave the way for a free market economy under the NEM. In that context, its outcome would have been to raise the level of competition in the economy. In fact today, due to privatization and other economic reforms the Lao economy is characterized by a fairly high degree of competition. Compared to other transition economies, the SOE sector in Laos is now relatively small, with only about 1% of total employment and 15% of industrial production¹⁹. However, elements of high monopolization exist in some sectors, due to large market share of some large SOEs and SCBs, in some cases due to joint-venture agreements which restrict market entry to others, as in the case of insurance, tobacco, and beer²⁰. In the case of banking, although the market is open for new entrants, foreign banks are restricted from opening branches in the provinces, and the SCBs still account for about 70% of total banking assets. In telecommunication, there are only 4 companies, out of which only one is fully privately owned, others a mixture of state and private ownership. Lao Telecom still dominates the market and has the monopoly of fixed line service. Services such as posts, aviation and electricity enjoy a high degree of

monopoly either due to being a natural monopoly or for reasons of economies of scale.

3.6 Labour policy

Labour policy in Lao PDR is generally conducive to competition in the private sector, which is free to recruit employees competitively. The Constitution guarantees gender equality, and the government is committed to promoting gender equality as a national goal. Foreign investors are entitled to employ foreign skilled personnel subject to work permits being obtained. They are, however, required to give preference to Lao nationals wherever possible, and are free to recruit locally as they wish. Domestic enterprises also can recruit foreign expertise if such expertise is not available locally, subject to prior approval and work permits from the Ministry of Labour and Social Welfare. However, the procedures for processing of work permits, visas, and foreign nationals' vehicle registrations are still cumbersome and time consuming. These could easily be streamlined in order to better facilitate engagement of expatriate expertise and reduce operational costs of foreign investors.

Employment in the Public Sector, however, does not appear to be on a competitive basis. Vacancies are not normally advertised in the press and are filled mostly through internal arrangements. This seems to have been the reason for the prevalence of widespread inefficiencies and over staffing in the public sector.

Labour productivity in the country is low largely due to skill inadequacies.

¹⁹ Source: IMF

²⁰ These restrictions are said to have been lifted, but a high degree of monopolization still exists.

Facilities for skills development seem to be inadequate with only a few technical colleges and training institutes. Private sector, however, is free to open up training centres and run them as businesses. Several such centres, providing academic and applied training in business subjects such as accounting, computing and English, have been opened up in main city centres in recent years by both foreign and domestic investors. Availability of proper library facilities with up-to-date publications is practically non-existent. These inadequacies may have contributed to the very low labour productivity that prevails in the country. A study reveals that labour productivity in Laos is among the lowest in the region²¹. In terms of salaries and wages, the labour costs in Laos are also among the lowest providing the country a considerable comparative advantage and international competitiveness. However, this advantage is eroded by low labour productivity.

Only officially and politically permitted trade unions exist in the country, which operate under the banner of Federation of Lao Trade Unions. This seems to contribute to general stability and industrial peace both in the public and private sector activities. Unlike in many other countries, there are no labour unrests, agitations, and strikes in Laos, which probably is a favorable factor for investment. Lao PDR is a member of the International Labour Organization, but is not a member of any labour market integration agreements

²¹ UNIDO (April 2003), p.10.

3.7 Government procurement policy

In Laos, government procurement has been governed by Implementing Rules and Regulations on Government Procurement of Goods, Construction, Repairs and Services (IRRs) issued under the Procurement Decree No.95/CM of 1996²². All government agencies are bound to adhere to these rules and regulations. The objectives of IRRs are to ensure transparency, achieve regularity, uniformity, economy, and efficiency, and to guarantee suppliers and contractors fair access to award of contracts. Invitations to bid are subject to clearly articulated notification requirements with respect to advertisements. Minimum time limits for bidding, locally and internationally, and processing of bids, as well as selection criteria are laid down. Government procurement policy and practices throughout the country are administered by the Procurement Monitoring Office (PMO) which operates within the Ministry of Finance.

Although on paper, the rules and regulations appear to be sound and well meant, there seem to be many loopholes that make it possible for officials to circumvent them and use discretion. A senior official of PMO recently admitted publicly that “contracts for projects such as road repairs or public consulting have not always been awarded to the lowest bidder but rather to the one with the close connection to those in charge of awarding contracts”, and that they are well known for “receiving cuts from the

²² Implementation of Rules and Regulations on Government Procurement of Goods Construction Repairs and Services No. 01639/MOF, adopted on 22 December 1998

deal”.²³ In an attempt to remedy the situation, the government has recently issued a new Decree²⁴ designed to create more efficiency and transparency in the way that private companies are contracted to do public work. It also lays down penalties for officials and companies who violate the law. If implemented properly, the new law and the regulations framed under it could serve to improve competition in government procurement. However, there is one anti-competitive element in the new law. It reserves the bids less than 300 million kip for local companies only.

3.8 Governance.

Good governance is essential to ensure a competitive environment in all economic activities. Governance does not relate only to the application of rule of law. It involves all aspects of government administration and operations as well.

In Lao PDR, since the introduction of the NEM and the promulgation of the new Constitution, governance has improved considerably, and is continuing to improve with more steps taken in that direction. These include legal reforms, macro economic policy reforms, trade policy reforms, and improvements in public administration. However, still there are many weaknesses and deficiencies that affect governance. These relate to accountability and transparency in the administration of laws (see Section 2.2), fiscal management, implementation of

trade policies, and so forth. Some of these weaknesses were referred to in previous sections.

In fiscal management, although the government is committed to maintaining a prudent fiscal policy, many weaknesses have been identified by the IMF both in revenue and expenditure. Weak central tax administration has caused poor revenue collection year after year. Tax system is not well designed; arrangements for tax collection are not clear cut and are open to abuse both by the tax payers and the tax collectors; and poor collections from large tax payers has been a persistent problem. Overly optimistic revenue projections have led to excessive bank financing of budget deficits, and ad hoc expenditure cutbacks affecting planned expenditures. Accountability and transparency in fiscal management is also affected by the lack of proper accounting and auditing procedures. Laos still does not apply, as a requirement, the internationally acceptable accounting and auditing practices. Although the government has taken a number of initiatives to improve fiscal management, much remains to be done in order to establish a system for expenditure tracking and to introduce greater transparency.

Weaknesses in public administration include the lack of procedures for performance assessment and accountability. Transparent procedures and guidelines for rewards for efficiency and good work performance are also lacking. In the implementation of trade policies particularly relating to import/export licensing, customs clearance, and business registration, the procedures are cumbersome and time consuming giving room for officials

²³ Vientiane Times, 4 Aug 2004.

²⁴ Decree of the Prime Minister on Government Procurement of Goods, Construction, Maintenance and Services, No. 03/PM, Jan 2004.

much discretion. These often lead to discriminatory treatment which adversely affects competition.

4. Barriers to competition in the Lao PDR

4.1 Barriers to competition from foreign suppliers

Barriers to competition in a country from its foreign suppliers could occur in a number of ways. A foreign supplier or suppliers could:

- (i) form agreements with its importing firms to fix prices, sometimes below cost, in order to undercut its competitors, eliminate them and capture the market;
- (ii) refuse to supply other potential importers than those already registered with it;
- (iii) form cartels, such as the OPEC, to prevent importing countries having access to cheaper suppliers;
- (iv) enter into joint-venture agreements with firms in the importing country, with favorable terms, and thus acquire a protected market, or even have monopoly rights;
- (v) make the supply of particular goods or services dependent upon the acceptance of or the restriction on the distribution or manufacture of competing goods;
- (vi) engage in dumping practices where the goods are sold at below cost in order to capture the market and eliminate competitors; and
- (vii) supply faked products.

The Lao market is still small and unsophisticated, and as such some forms of above practices are either non-existent

or not noticeable. Where there is any suspicion, there is no firm evidence to support it, except in the case of joint-ventures (which will be discussed in the next section). Also, there is no proper institutional arrangement yet to monitor or check them. One clear one, however, is the case of faked products. Lao market is full of imports of them, which include items such as watches, audio and video CDs, CD players, radios and several makes of electrical goods, and clothes which carry well known brand names. Apparently they are smuggled or illegally imported from neighboring countries, but there is no firm evidence as to their origin, or the overseas suppliers.

4.2 Anti-competitive practices of foreign firms operating in Laos

There aren't very many foreign firms operating in Laos, even though the market is open for them for many types of businesses. Most foreign firms are those in joint-ventures with the government or the private sector. As mentioned elsewhere, their anti-competitive practices relate many to the concessions received under either foreign investor agreements or joint-venture agreements that discriminate against other domestic firms. One example cited elsewhere in this Chapter is the case of the insurance firm, Assurances Generales du Laos. This firm practically has the monopoly of the local insurance market. It does not provide comprehensive insurance cover for vehicles other than those are brand new. It also does not supply many other forms of insurance that are normally available in other countries particularly to the private sector. Another case is the Lao

Telecom which is a joint-venture between the government and a private sector has the monopoly of the fixed line telephone service and a major share of the market for other services.

4.3 Cross Border Anti-competitive Practices

In order to improve its trade and competitiveness with its neighboring countries, Laos is anxious to transform itself from a land-locked country to a land-linked country. The strategy is to take advantage of the opportunities for increased river transport using the Mekong and increased road transport using the North-South corridor between Cambodia on the South, and China and Myanmar on the North, and the East-West corridor between Thailand and Viet Nam. Currently more than 90% of border trade is with Thailand through Nongkhai. Crucial to the strategy is the upgrading of the North-South and East-West highways, and addressing other factors relevant to border trade. The latter includes the improvements in the customs administration and arrangements with bordering countries, particularly with Thailand in order to reduce costs of transport and customs clearance. Currently, both transloading costs and transaction costs (customs and documentation costs), as well as the time taken at the border with Thailand are said to be much higher than those with Viet Nam²⁵.

One long-standing problem for Lao traders is the high cost of road transport

between Laos and Bangkok. In spite of inter-government agreements designed to eliminate the problem, most Lao registered trucks are not allowed to back-fill at Thai destinations, and therefore return empty. The same applies to Thai trucks returning from Laos. In customs administration, on both sides of the border, the key problems are cumbersome procedures requiring traders much costs in terms of time and documentation, and the valuations procedures. These need to be addressed in order to reduce clearance time and costs, which will serve to improve Lao PDR's competitiveness.

4.4 Barriers to competition from domestic anti-competitive practices

The most common domestic anti-competitive practices are collective price fixing, market sharing, bid rigging, tied selling, predatory behavior etc. Suppliers of a similar product or service may either tacitly or by forming associations fix prices for their products or services, thus avoiding competition among themselves. In Laos there is no evidence yet of such practices. Market sharing occurs when sellers of a product or a service form a franchise or come to an understanding that each will confine its operations to a certain geographical area, so they do not compete with each other in the same area. This practice which could deny competitive supply and pricing does not seem to exist in Laos yet. Same could be true of predatory behavior where s dominant firm will try to drive out competitors by selling at unrealistically low prices for a while until competitors are eliminated and then

²⁵ Ruth Bonomyong, Behind the Border Issues – Trade Facilitation”, presentation at the Trade and Integrated Framework Workshop held in Vientiane, in June 2004.

selling at near monopoly prices, and thus make excessive profits.

Nevertheless, a number of anti-competitive practices do exist in Laos. Cross border smuggling is a major problem that affects competition in the domestic market. Most of the smuggling is from Thailand involving products which are either restricted or subject to high import taxes and therefore are more expensive in the domestic market. In some sense illegal imports would enhance competition as they compete with legal but protected domestic supplies; and in some sense such imports would amount to unfair competition as they could drive out legally established suppliers.

Another form of anti-competitive practice arises from some of the joint-venture agreements between the state and foreign investors. Under the foreign investment policies, many of the terms under which agreements are concluded can be open for negotiation. Both the government and foreign investor stand to gain financially by the joint venture having a protected market. In particular the foreign investors try to exploit the government's short-sightedness by insisting on concessions in the form of special tax and tariff concessions, import restrictions and entry restrictions to other potential investors. Almost all foreign investors enjoy some concessions that are not available to domestic investors. Import and entry restrictions were granted to joint ventures such as Lao Cement and Beer Lao, which have been phased out later on. In insurance, Assurances Generales du Laos, a joint-venture between the state (49%) and a French investor (51%) is still the only insurance provider in the country. This is

said to be due to the absence of new entrants although the insurance is now open for competition.

SOEs normally enjoy concessions relating to imports, access to finance from SCBs and sometime preferential treatment for government contracts. Although banking business is said to be open to competition, SCBs still dominate the banking business with about 70% of total banking assets. A joint venture between a Thai and a local firm that produces roofing tiles is said to impose contractual conditions on its retail sellers to restrict import and the sale of other makes of similar tiles. Bilateral trade agreements have become a means of another form of anticompetitive practice. Some agreements, particularly those with China and Viet Nam, with very low tariff concessions, discriminate against imports from other countries. While access to cheaper imports under bilateral agreements is good for the domestic economy, still generous tariff concessions prevent competition from imports of better quality products from other countries. Another form of anti-competitive practice that prevails to a small extent in Laos is tied-selling where either a fast selling item is combined with a slow moving item, or a group of related items are bundled together and sold. This practice is found in mini-supermarkets and glossary shops.

4.5 Barriers to competition from government policies and practices

Policy barriers to competition are as important to be aware of as anti-competitive practices of firms. Particularly in developing countries,

they are a major obstacle to economic growth and poverty reduction. Sound policies, particularly those relating to macro-economic management, trade and investment, and their implementation with transparency and accountability are essential for promoting competition.

In Lao PDR, a number of policy related constraints to competitiveness exist. These relate to import and foreign exchange restrictions, measures of protection such as tariff and tax concessions, and subsidies. These were discussed in the section on Trade Policy Regime (see Section 3.3). In the past, under certain investment agreements, some industries have been given certain periods of protection from new entrants, e.g. beer and tourism. Except in tourism, entry barriers seem to have been since lifted. However, the possibility of granting entry barriers, if and when necessary, still exists in investment policies. In principle, all these measures create distortions in resource allocation within the economy and thus harm competition and efficiency both in production and trade. There are good reasons for a developing country like Laos to apply some forms of protection particularly in rural agriculture on which the mass majority of poor people depend, and the infant industries in order to promote industrial development. But they need to be phased out at some stage in order to make economic activities more efficient and competitive.

A study on AFTA benefits in agriculture recommends that Laos should move away from its policy goal of food self-sufficiency towards one of encouraging a globally competitive agricultural sector. Import substitution offers limited opportunities for growth. It can only be a

starting point so long as the policy does not lock in high costs for export industries.²⁶

Weaknesses in the government's policy implementation practices also affect competition. As referred to earlier, existing procedures for import/export trade administration, custom and business registration affect competition as they increase costs and potentially discriminate some businesses. Often officials tend to interpret rules and regulations as they wish and thus use wide discretion in the exercise of their duties relating to import/export licensing, and customs clearance. This leaves room for corruption which is well known to exist. In order to improve efficiency and competitiveness in the economy policy implementation procedures need to be simplified, streamlined and made fully transparent.

4.6 Entry barriers to competition

Barriers to entry refer to the factors which could prevent or deter new firms entering a particular industry. Generally these include:

- a) economies of scale which restrict the number of firms that can operate profitably. In Lao, as discussed earlier, this could be true of cement, beer, and insurance;
- b) bid rigging or collusive tendering, where a group of firms on a continuous basis arrange among themselves to agree on the bid prices and the winner for each tender for the supply of a particular product or service, and the winner then compensates the other firms in the group. This practice would prevent

²⁶ Lao PDR Government/UNDP, April 1998.

- new entrants to that particular business. In Laos, there is no evidence of this happening as yet;
- c) product differentiation where the new entrants will have to overcome the brand loyalty of existing products. Lao Beer is a good example which has cost advantages over a new comer. Same applies to new entrants that wish to compete with established brand names such as Coca Cola, Pepsi, Champaign etc.;
 - d) Government policies that may result in cost or market advantages to some firms, making it more expensive for new firms to enter a particular industry. Lao government's investment and industry assistance policies have caused such entry barriers. These are being now phased out, but the discretion to use them still exists.

Lao economy is still not mature enough to experience a high degree of barriers to entry caused by actions of domestic firms. The most likely are those caused by foreign suppliers that have the advantage of well established brand names.

5. Sectoral Policies

5.1 Utility services

Utility services such as electricity, water, and telecommunications, and also aviation, are provided by SOEs, with some elements of pricing subsidies. However, increasingly private providers are entering into these services. Recognizing the need to reduce subsidies and to encourage private investments in these sectors, the

government has begun to move towards more realistic pricing of their services. Tariff changes towards this end have been adopted in respect of power, water, telecommunication and aviation.

5.1.1 Power.

Two main sources of energy in Laos are hydro power and petroleum. A third minor source of energy is lignite deposits that can be used to produce electricity. The country is well endowed with hydro resources which are being harnessed through a number of projects to produce electricity. Laos' electricity production exceeds its needs for domestic consumption, the excess being exported mainly to Thailand. A new project, Nam Theun 2, capable of producing 995mw, is due to begin construction in 2004 and commence production by 2008 over 90% of which is to be exported. This project is a Build-own-operate-transfer (BOOT) arrangement between the Lao government and a private sector consortium. Currently, the country's electricity exports account for about one-third of the country's total exports. Petroleum products, needed mainly for transport, are imported.

Energy policies in Laos do not seem to hamper competition very much, except with respect to its pricing policy on electricity. One state owned company and two private companies (Shell and Caltex) compete freely in the distribution of petroleum products, while the same and a number of other private companies do the importation. Petroleum imports are subject to licensing and foreign exchange allocations; however there does not appear to be any quantitative restriction

on imports, as could be inferred from the fact that there are no shortages of supply in the market. Gasoline products are subject to price control for cost of living considerations. However, administratively set prices are allowed to vary from time to time to reflect the changes in the import prices.

Electricity supply is dominated by one SOE, Electricite du Lao. Like gasoline, electricity tariffs are also subject price control and differential pricing, and are subsidized. Tariff for embassies and international organizations is fixed in US dollars and reflect a much higher price than the average charged for domestic users. Different categories of domestic users are charged differently. Residential users and those who use for irrigation pay the least while commercial users pay higher tariffs. Among the commercial users, entertainment industry pays the highest tariff, with services, and industrial, handicraft and agriculture users paying lesser tariffs respectively. The tariff policy applied to commercial sectors is discriminatory, distorts resource allocation between the affected sectors, and therefore affects competition.

Since mid 2002, the government is allowing electricity tariffs to reflect cost recovery, but gradually. At present tariff is allowed to increase by 2.3% per month for all users, except for embassies and international organizations, and will be completed by April 2005, by which time subsidies are expected to be eliminated. Still electricity prices are low compared with most other ASEAN countries²⁷. With a view to providing subsidized electricity to rural areas and helping poverty reduction, the

government is giving priority to rural electrification under which grid supplies are to be extended to be accessible to rural areas and off-grid supplies to be initiated in remote areas.

5.1.2 Telecom

Government policy on telecommunication as a sector is to allow full commercialization. At present there are four companies, of which only one is fully privately owned, and the other three being a mixture of private and state ownership. Lao Telecom, a former SOE converted to a joint venture, still dominates the market, and has the monopoly of the fixed phone line service. The cellular/mobile service, however, is fairly competitive, and has been growing rapidly over the last few years, driven partly by foreign investments.

Regulatory arrangements for this sector do not appear to be very clear. The Ministry of Transport, Posts and Communications and a few other agencies seem to share responsibilities for this sector, and they do not seem to follow a coordinated set of rules for the sector's activities. Further growth of the sector would depend on the clarity and predictability of the policies on telecommunication.

Since 2002, tariffs for fixed line services have been adjusted upward to reach cost recovery levels, although these have not been reached yet. Domestic calls and telephone rentals are still subsidized while charges for international calls are excessively high compared to those in neighboring countries. In contrast, tariffs for cellular services are said to be less

²⁷ World Bank (Mar 2004)

regulated and closer to cost-recovery levels.

5.2 Health Services

Being an LDC, health services in Laos, as is evident from the health indicators, are obviously grossly inadequate²⁸, although there have been significant improvements in recent years. This is partly due to budgetary limitations for the government to provide adequate public health facilities particularly in the areas away from the urban centres, and partly due to poverty and low incomes of the people that make it difficult for them to purchase medical services from private providers.

Hospital care is available only in public hospitals, which operate at three levels of grading - regional, provincial, and district. There are no private hospitals as yet, even though hospital service is open for private enterprise. This may be due to inadequate effective demand and economies of scale limitations. Privately run clinics, however, are available in urban centres. As for funding of public health services the government has adopted a policy of partial cost recovery for provision of hospital services. At present about 60% of the major hospital budgets come from fees paid by the patients for hospital care, diagnostic examinations and drugs.

Pharmaceuticals. Both the public sector (two SOEs) and the private sector are involved in the domestic production of

drugs, which has developed substantially in recent years.

However, more than half of the country's supply is met from imports. As in production, both public and private sectors are engaged in imports. Sale of drugs, except at the hospitals, is largely in the hands of the private pharmacies that have sprung up in great numbers in urban areas. Even the state drug distribution network does not cover remote villages. As a result about 5400 villages do not have access to medical drugs. Furthermore, regulatory arrangements for drug safety seem to be grossly inadequate (this aspect is discussed in Section 7.2 under Consumer Protection).

5.3 Financial services

Properly regulated and supervised financial services, operating competitively, are necessary for promoting efficient development of any economy. In Laos, financial services sector is very small and undeveloped. It consists mainly of the banking system and one insurance service provider (referred to earlier in Section 4.4) which practically exists as a monopoly. Bank of Lao PDR (BOL), the central bank, has recently licensed three pilot credit unions, which, when operational, will add to the financial sector. Banking sector is now open for the private sector and foreign investments, as a result of which a few private banks have been opened. Yet, the banking business is still dominated by the state owned banks (SCBs) which account for about 70% of the total banking assets in the country. At present there are four SCBs, two joint-ventures between government and

²⁸ Life expectancy: 59 years; infant mortality: 82 per 1000; maternal mortality: 530 deaths per 1000; access to medical practitioner: 53% of population.

private investors, and about nine private banks some of which are foreign owned.

SCBs have been plagued with financial problems, due mainly to politically directed loans and poor and inefficient credit management practices. As a result, the SCBs have accumulated large amounts of non-performing loans (NPLs). These problems created further problems for fiscal and trade policy management. The situation is being remedied with a program of banking reforms with the assistance of IMF. These include restructuring of SCBs which included merging two smaller SCBs into one, improving banking regulation and supervision, introducing a system of rural and micro-finance to address the financing needs of the rural sector, and opening up the banking system. These reforms have progressed well but slowly; credit assessment and management procedures, with the supervision of international banking advisors, have improved; and in general the health of the SCBs has improved, but much more remains to be done. However, the problems of SCBs are not like to go away until most SCBs are fully commercialized and at least partly privatized.

The absence of competition in insurance industry is said to be due to the lack of new entrants although the insurance is now open for competition. As the business environment is still small, and the general public is not well aware of the advantages of insurance, the demand for insurance services could be inadequate for new entrants into the industry – may be a case of economies of scale limitation.

5.4 Transport

A well developed transport infrastructure is crucial for efficient economic development of any country, and particularly for Laos because of its land-lockedness. Transport inadequacies could adversely affect efficient geographical resource allocation, growth of trade and therefore competition within the economy. Laos, without access to sea and rail links with the networks in neighboring countries, has depended heavily on road for its transit trade with its neighbors. Currently the road network carries about 70% of freight traffic and 90% of passenger traffic, while river and domestic air transport accounts for about 28% and 0.2% of freight respectively, and about 8% and 2% of passenger traffic respectively. Freight road transport is privately owned and run competitively, while passenger bus service is subject to limited competition between state-owned and permitted private operators. Both services are available to cities and towns. Air conditioned bus services are also available for long distance travel to main cities in the country as well as to some nearby cities in Thailand and Viet Nam. In-town public bus services are available in main cities, and for short distance travel, the popular mode is the *tuk-tuk* (a three-wheel cab). As gasoline prices still contain some element of subsidy, transport is less expensive than in neighboring countries. State control of bus fares, which used to be the case until recently, no longer seems to exist practically.

The government's strategy is to transform its land-lockedness into a land-linked hub of the region by upgrading the north-south/east-west road

links with the neighboring countries, which will serve as major transport routes for trade within the region. This is expected to overcome to some extent its geographical isolation and help more effective economic integration with the region. Although arterial road network has been substantially rehabilitated and developed over the past two decades, it is still incomplete, and rural accessibility remains inadequate. Construction of new roads, particularly in rural areas, and upgrading the existing ones is ongoing.

In aviation, services are available between Vientiane and main cities within the country, and capital cities in Thailand, Viet Nam and Cambodia. The state-owned national carrier, Lao Airlines, competes with Thai Airways for flights to Bangkok, while its international services to Viet Nam and Cambodia are on the basis of joint-operations with their respective national carriers. However, Lao Airlines is said to be operating with losses rising over time. In an attempt to remedy the situation, government intends to restructure the enterprise by converting it into a joint-venture with a foreign airline as a strategic partner, and with Lao nationals owning 51% shares and the government as a minority shareholder. A privately owned helicopter service, used mainly for aerial work and remote area personnel transport, and a private air cargo transport service are also now operational.

Development of a railway service is part of the government's long-term plans for transport development, in order to link up with the services in the neighboring countries. A feasibility study has justified the project in terms of its regional and national importance, and

government is positively pursuing it, encouraged by the commitment of the ASEAN leaders to proceed with the Singapore-Kunming Rail Link project.

5.5 Cement and fertilizers

Of the construction materials, cement and steel bars are still subject to both import licensing and price control. Quantitative restrictions on imports are for the protection of domestic producers, while price control is to keep construction costs from rising in a supply restrictive environment. Both policies are ill advised and anti-competitive. Currently there are three cement factories in the country operating under government protection. One of them, a relatively new one in Savanakhet, is a joint-venture between government and a group of private domestic investors, with government owning 60%. The other two in Van Vieng are said to be operating at a loss and "the largest factory cannot even cover its financial costs (about half of its total costs)"²⁹. Although protected from imports, losses could be partly due to price control, and partly due to the lack of economies of scale, the scale of operation being not large enough for the venture to be profitable. It would be far better to allow both the imports and domestic production to be free from government intervention so that the supply and domestic production operate in a competitive environment which would ensure adequate supplies at competitive prices.

Despite the fact that Laos has deposits of lime stone, the main raw material for Portland cement, the government should

²⁹ UNIDO (Mar 2003)

refrain from supporting a less than economically sized factory. Should it protect such a factory by quantitative restrictions on imports or high import tariffs (which will not be possible under AFTA commitments after 2008) the result would be higher prices for cement which would increase the costs for building roads, irrigation systems, housing construction and other infrastructure development activities³⁰. Currently all the three factories are able to supply about 500,000 tons a year while the domestic demand is about 800,000 tons a year.

Fertilizer supply market too is uncompetitive. Imports are subject to quantitative restrictions, may be to protect the few government owned factories that produce organic fertilizer. Import restriction is likely to raise the domestic prices of fertilizer. Being a key input for agriculture, government policy goes counter to its drive for food production and poverty reduction through the promotion of rural agriculture.

5.6 Tourism

At present, in Laos, services as a sector contributes only 25% of GDP. This is quite low even by developing country standards. Most of the value added in the sector comes from tourism related activities. Tourism is a major source of Lao PDR's foreign exchange earnings. As a service export, tourism contributes significantly to Lao export earnings. In 2001 and 2002, tourist earnings amounted to US\$ 104 million and 113 million respectively, while in 2003, earnings dropped to \$ 87 million largely

³⁰ *Ibid*

due to the SARS outbreak and consequent drop in arrivals in that year.³¹ Currently, tourist earnings contribute more than one fifth of the country's earnings from its total exports of goods and services, and ranked the highest in most years³² among the major exports of the country. It is also a key sector that has a substantial potential to benefit the poor through the development of tourism related SMEs and thus taking it to the village levels as a means of reducing rural poverty, and also of preserving the environment. Lao National Tourism Authority and its provincial tourist offices are the government agencies responsible for promoting tourism and formulating policies for it.

Even though the government places a high priority to the development of tourism, unfortunately its policies in the past have not been very conducive to faster growth of the industry in the country. Until recently, foreign investment in tourism even on a joint-venture basis was not allowed. The registration requirements for domestic investors in tourist-travel businesses have been quite restrictive. With the result the participation of small investors and the level of competition in the industry have been quite low, although investment in motels and guest houses has been more open for small investors and therefore more competitive. However, after the ASEAN Tourism Forum that was held recently in Vientiane, the Lao government has realized these weaknesses, and is now

³¹ National Tourism Authority of Lao PDR, 2003 Statistical Report on Tourism in Laos.

³² Except in 2003 when there was a substantial drop in number of tourist arrivals due to the outbreak of SARS in that year.

taking steps to open up the industry to foreign investment as well as to small domestic investors. Plans are under way to amend the existing restrictions on foreign investment to allow gradual opening up of travel business for foreign investment, with initially allowing for joint-ventures with 49% foreign participation. As for hotels, motels and resorts in excess of 16 rooms, and restaurants with no night clubs, no restrictions for foreign investment apply.

Inadequate skills development and poor conditions of access roads to some of the remote tourist attractions seem to be the other factors that constrain the industry at the moment. The government is taking steps to encourage upgrading of accommodation and other facilities in and around places of tourist interest throughout the country and to improve the service standards in guesthouses through regulations and regular inspection. Road and air transport facilities for tourist travel are also to be improved and upgraded largely through private sector participation.

PART II: Consumer Protection

Many of the issues and problems dealt with in Part I on Competition also have much relevance for consumer problems and consumer protection. These will be referred to where appropriate in dealing with specific issues relating to consumer protection. As mentioned in Section 1.1, poverty is widespread in Lao PDR causing many consumer problems relating to access to basic consumer needs. According to latest data, 22% of the population lives in poverty³³.The

³³ LECS, 2002/03.

level of poverty is highest in the rural mountainous districts in the Northern Provinces where the availability of cultivable land and the access to roads is very low resulting in shortages of food (mainly rice) and other essential goods and services. Other key factors affecting the poor are inadequate health and education facilities which tend to reduce their employability.

The government recognizes the problem of poverty and has given high priority to its eradication. However, being an LDC with severe funding limitations, Laos is not able to provide an income safety net to the very poor as is being done in developed countries. The Lao government's overarching development priority is to eradicate mass poverty by year 2010 through a strategy of economic growth with distribution. A key element of this strategy is to provide an enabling economic and infrastructure environment within which the households would be able to take self-help initiatives to support themselves. To this end, a comprehensive National Growth and Poverty Eradication Strategy³⁴ has been formulated and is being supported by the Lao PDR's multilateral and bilateral donor partners. Poverty related consumer problems are issues largely to be dealt with by the government through its socio-economic development strategies and welfare programs. This section of the paper does not deal with these issues, but confines itself to market-related consumer problems that normally come within the purview of consumer protection policies and measures.

³⁴ NGPES (2004)

6. *Consumer Problems Relating to Goods*

In Laos, there are mainly three types of markets where consumer goods are sold: formal markets, less formal markets and informal markets. Formal are the mini supermarkets where mostly imported groceries are sold. Less formal are those such as the Morning Market in Vientiane, where some shops that sell expensive consumer durables like TVs, refrigerators, furniture etc, exist side by side with less formal shops that sell less expensive durables, and informal small shops and outlets which sell food, vegetables, fresh fruits and some groceries. Informal markets are those where the traders do not have established premises but use small space in the open market on a daily rent basis and sell mostly fresh foods, vegetables, fruits and meat. There is adequate competition in all these markets.

Normally competition in the market should ensure consumer sovereignty. He should be able to purchase from those sellers whose practices are better and more favorable. However, where there are no proper regulatory procedures and institutional arrangements to ensure good practices in the sale of goods, competition does not necessary guarantee protection from malpractices by the traders. This happens to be case in Lao PDR. Several laws and regulations have been introduced with good intentions. But the weaknesses and inadequacies in their implementation and institutional arrangements for it have made the laws and regulations ineffective. As a result many improper trading practices exist. The regulatory and institutional problems are dealt with in more detail in Section 8 below.

6.1 Weights and measures, and labeling

Many problems relating to the use of weights and measures, and labeling exist in Lao PDR. These are common mostly in the informal markets where most consumers purchase their day to day requirements of foodstuff and groceries. Often correct weights and measures are not used; goods on sale are not price marked, except sometimes in the mini-supermarkets. Even where proper weights and measures are available, some traders try to cheat customers by under-weighing or under-measuring, whenever they get the opportunity do so. However, in the case of items such as rice and eggs, unit prices of different grades are displayed in competitive sales points.

An interesting problem relating to the sale of gas in cylinders was reported in the press recently. Gas is subject to price control, and the current controlled price is said to be lower than the import price, making it impossible for the traders to stay in business unless they cheat the customers on the weight. Traders are reported to sell gas with less weight than what is stated on the cylinder in order to cover costs, and the consumers are advised by government to check the weight when buying gas cylinders, which is not possible for average consumers as they would not have the proper means to do so. This is a classic case of wrong government policy, unintentionally though, encouraging traders to be dishonest.³⁵

Proper labeling is found only sometimes on items produced or supplied by

³⁵ Vientiane Times, 29 Sep 2004.

reputed firms. Most grocery products are imported from Thailand. Of these, canned and bottled food items produced under international brand names carry full information with details on ingredients used, manufacture dates, expiry dates, nutritional facts, warnings etc. However, some food items produced in Thailand lack full information, particularly the expiry dates and warnings where relevant. Some locally produced and packed foods such as yoghurt do not carry expiry dates. Packed goods imported from Thailand are labeled in Thai which is understandable to many Lao consumers. Labels in Lao language are found in some grocery items and other goods produced in Laos.

Another related problem is the absence of the issue of sales documents by the trader to the purchaser. In the informal markets the issue of receipts is not practiced at all. Even in the formal markets receipts are not normally issued unless requested by the purchaser. Even when requested, the trader would try to issue a receipt without recording his address. No proper printed receipt books showing the address and other details of the seller are used. Instead, most traders use a common receipt form where details can be filled in. Often, the consumers, mainly due to ignorance of their rights, do not ask for receipts when purchasing goods. Traders conveniently try to avoid issuing receipts partly to evade responsibility and partly for tax evasion.

6.2 Safety and quality

Regular and reliable administrative arrangements to ensure quality and safety of both imported and locally produced consumer goods have been

lacking, even though some government agencies are charged with these responsibilities. There have been instances when fresh chicken and some types of fruits injected with formalin for preservation were imported from Thailand and some people falling sick after eating them. Only when such cases are reported, the officials would take action to crack them down. Recent outbreaks of the deadly bird-flue virus that infected many poultry farms in South-east Asia and many humans have prompted the government to ban imports of chicken from Thailand and Viet Nam. Yet illegal imports of chicken seem to have take place, as a few such cases reportedly have been detected at the border.

Adulteration of food, food outlets and chemical residue in food.

The contamination of food with harmful substances such as pesticides and chemical residues, formaldehyde, and food colors is said to be common through out the country. The producers and importers of such items do not always ensure the quality of their products and their safety to consumers. These weaknesses are due to the inadequacies of the laws and regulations concerning food and drugs, lack of trained personnel to carry out proper checks, and the lack of cooperation among concerned authorities.³⁶

Eating out and buying cooked foods from wayside food outlets is quite common in Laos, particularly in the urban areas. Small eating houses and pavement cooked food stalls are a common sight. These places do not

³⁶ Lao PDR Government, National Poverty Eradication Programme – Background Document, Sept., 2003.

appear to maintain proper standards of hygiene and safety in the handling of foods, nor are they regularly inspected by concerned officials. One often hears of stomach disorders related to food infections after eating out.

Most imported and locally produced food items are well packed with sealed packaging. However, packing and wrapping of fresh foods such as fish, meat and cooked foods are often not hygienically packed. The use of soiled newspapers and pages torn from used exercise books for wrapping of such food items is not uncommon.

Sale of imitation goods.

Laos PDR is not yet a signatory to standard conventions on intellectual property rights such as the Bern Convention. Although there are decrees on trade marks (see Table 3 in Section 8.1) and patents³⁷, they are either inadequate or not properly implemented to prevent import and production of imitations goods. As such, as yet there is no effective control over the sale of imitation and faked goods in Laos. In fact informal markets are full of such products. These relate mostly to wristwatches, music cassettes, audio and video CDs, ready-made garments, some electrical goods such as radios, food mixtures etc. that copy popular brand names. Given the low income levels of the people, many consumers would not be able to afford the genuine products of these fakes. Hence majority of consumers prefer to purchase the fakes knowingly. This is quite true in the case of items such as music and film CDs, wristwatches, and garments. Therefore, it is not seen as a serious problem as yet.

³⁷ Decree on the Protection of patents, petty patents, and industrial designs, No. 01/PM, Jan 2002.

However, with the ongoing process for WTO accession, the Lao government is being pressured to put in place appropriate legislation that will be consistent with WTO Trade Related Intellectual Property Rights (TRIPS) (see Section 8.1). Recently, the government has announced a new crackdown on pirate CD VCD trade under which shops have been noticed to replace the fakes with genuine ones before 30 September 2004³⁸. However, the sale of imitation goods does not seem to have disappeared from the market even after the deadline.

7. Consumer problems relating to services

In Laos the services sector is relatively small contributing only about 25 of the GDP as mentioned earlier. This is largely due to undeveloped nature of most of the services that are crucial to any economy, such as education, health, and banking. Most of the services related to consumer problems in Laos arise largely due to supply-side constraints that affect the availability of these services to meet the growing demand of the people.

7.1 Educational Services

In principle, universal access is available up to secondary education supplied by government. At tertiary level, entry is subject to success at entrance examinations. Private sector supply of education is available in main cities from primary to tertiary level. Foreign investment in education is permitted up to post-secondary including adult education. However, access to education is limited by many factors. In poorer and

³⁸ Vientiane Times, 28 Sep 2004.

mountainous areas, parents do not understand the value of education and consider children attending school as limiting family labor. For this reason, and for the reason of not having enough money to pay for basic fees for school necessities, enrolments in such areas are low. Other factors that limit access to basic education in rural areas include distance to schools, inadequate class room facilities, shortage of qualified teachers and government funding to construct more schools. Some rural schools have classes only up to five grades and children do not transfer to higher schools due to long distances for such schools, and as such dropout rates are high. In urban schools inadequate room and low income limit children seeking secondary education.³⁹

At tertiary level, university education is very limited with only one university in the country. There are only a few vocational and technical colleges providing professional courses such as accountancy, commerce, computing, engineering and other skills, and as such the supply of these skills in the country is very limited. In order to address the problems and to universalize basic education, to eradicate illiteracy and to increase training of skilled professions to meet the increasing demand, the government is initiating several aid-funded educational projects.

³⁹ Although the Decree No.138/PMO of 1996 mandates participation in primary schooling and does not allow students to drop out until the age of 14, about 20% of primary school age population does not attend primary schooling (NPEP, 2003).

7.2 Healthcare services

Sectoral issues relating to health services were discussed in Part I above (see Section 5.2). Major healthcare problems to consumers arise from the shortage of health facilities such as access to qualified medical practitioners, clinical facilities, and hospital care, and the proper dispensing systems for medicines and pharmaceuticals particularly in areas outside the main city centres. In some areas in the North the longest distance to a hospital is 96 km, and in the South 75 km. In the North, about 29% of the population lives 16 km away from even a health centre. In the central and southern areas, the situation is better only slightly. The supply of qualified medical practitioners is very limited. The annual intake to the Medical Faculty at the University is limited and bachelor's medical degree course is too long. Recently, the period for the basic degree has been extended from 7 to 9 years, probably as a substitute for inadequacies in the quality of secondary education, and the quality of teaching at the medical faculty. This has made the course too long and expensive for average students as it is subject to some fees.

The availability of health workers, traditional birth attendants, and health volunteers in the rural areas is very limited and insufficient. The availability of essential drugs such as chloroquine, paracetamol, antibiotics etc at the village level is about 52%. Health network does not reach the people in mountainous and remote areas effectively. There is gross inadequacy of health workers to meet the needs of the people. The available health workers tend to accumulate at provincial levels, leaving severe shortages at district and village levels. The lack of

female health workers in some areas make it less likely that women will seek care for pregnancy, childbirth, family planning, or gynecological problems, which probably account for high maternal mortality rates and high birth rates. The government spending on healthcare sector is said to be very low - at about US\$1.25 per person in 2000. Per capita spending from all sources - government, donors and out-of-pocket - amounting to US\$11.5 in 2000-01 is lower than in Cambodia (US\$16), Viet Nam (US\$19) and Thailand (US\$ 71).⁴⁰

Partial cost recovery policy of the government for public healthcare referred to in Section 5.2 is said to limit the low income people seeking medical services at all. In order to solve the problem of such people, the government is in the process of introducing a 'community health insurance (CHI)' scheme. The mechanism of CHI is for the government to initially contribute to the CHI fund which will also be contributed to by members of the community who then become members of the CHI scheme and become entitled to receive medical services from the local hospital. The extremely poor who are unlikely to be able pay membership fees are to be assisted through equity funds from the government and/or donors. It is anticipated that by the year 2005, the voluntary CHI will cover about 10-15 per cent of the population. 'Drug revolving funds', both in hospitals as well as at village level is another means of helping the poor to have easy access to medication.

As for pharmaceuticals, drug safety is a major problem for the consumer in Laos.

⁴⁰ NPEP (2003), and UNFPA, Lao Reproductive Health Survey 2000, Mar 2001.

Some drugs do not meet the required standards. Many drug stores obtain their supplies from illegal sources, and sell drugs without prescriptions and without receipts being issued. As many as 70% of the people buy drugs from pharmacies and drugstores without consulting a medical practitioner. For minor ailments they go direct to the drugstore and ask for a suitable cure, and pharmacists are not qualified to dispense drugs like that, let alone to sell drugs in a proper pharmacy. There is a government ban on the sale prescription-medicines without a prescription, but it is ineffective. Unregistered drugs are sold at drugstores many of which are not licensed or registered. The poor are the most vulnerable to the sale of illegal and faked drugs as most of them live in areas where regulation and inspection are weakest.⁴¹ Recently, it was reported that a child had to be hospitalized after taking medicine prescribed by a local pharmacy⁴².

7.3 Financial services

As with health services, many issues relating to financial services were dealt with in Part I (see Section 5.3). Consumer problems in the financial sector concerns mainly accessibility to financial services readily and at reasonable costs. Although the banking system is now open for foreign investment, foreign banks are not allowed to open branches in the provinces. Banking facilities in the rural areas are practically not available. Even where the banking facilities are available, access to bank credit is still

⁴¹ NPEP (2003).

⁴² Vientiane Times, 9 Aug 2004.

limited due to problems of providing security. This is due partly to insecurity of land tenure. Most property holders lack official recognition and long-term legal rights to their land. In both urban and rural areas, most property holders do not have the ability to make legally binding transactions and use their land as collateral for loans. This has driven many investors to seek very expensive credit from private money lenders which is very common in the country⁴³. This also seriously affects the growth of SMEs and their ability to compete. It also affects development of small rural and agricultural economic activities and the rural consumers' need for finance.

Generally Lao people are not used to banking practices. Many do not know even how to open an account with a bank. Majority of the people do not have even a bank savings account. Almost all the public servants and majority of private sector employees receive their pay in cash and keep it in cash until fully spent. Only a handful would save any balance in a bank account. The situation is worse when it comes to obtaining credit from a bank. Even advisory services for such people are not readily available. As a result most of their credit and savings needs go unfulfilled. There is a need for commercial banks to make banking habits more popular among the people through publicity activities and programs. However, as there is not much competition in the banking sector, banks are more interested in catering to the business and wealthy community than spending their energies resources on less lucrative low income clients.

Insurance. Insurance, as mentioned in Section 4.4, there is only one supplier

which enjoys the monopoly of the market. As a result, insurance needs of the people are not available on a competitive basis, and also are not fully met. For instance, the sole supplier Assurances Generales du Laos (AGL) does not accept comprehensive insurance of second-hand vehicles. It only provides the compulsory third-party to all vehicles and comprehensive insurance to brand new vehicles. This means, owners of second-hand vehicles who are mostly low income earners and small businesses cannot insure their vehicles, and therefore bear the risk of having to meet the full cost of repairs or loss of their vehicles. Other insurance facilities such as life and health are provided by AGL, but at a very high cost, and therefore are beyond the reach of the majority of the people.

7.4 Professional services

The supply of professional services such as accountancy, legal, engineering, information technology (IT), and consultancy is limited in Laos. This is mainly due to the lack of adequate academic facilities for training locally. Courses on legal and engineering studies are available at the Lao National University, and are subject to fairly high fees. Those who graduate from the University find it hard to proceed for higher studies overseas as the courses are conducted in Lao language only. Foreign supply of these services is permitted subject to the same criteria as for foreign investment.

Foreign law firms are permitted to open offices in Laos to provide advice to clients, and to form joint-ventures with local law firms. However, foreign layers

⁴³ World Bank (2004).

can practice law only as consultants, and cannot appear in courts. To appear in courts, lawyers must be members of the Lao Bar Association whose membership is not open to foreigners. At present, the availability of legal services for clients seems to be inadequate, and as such excessively expensive. As for accountancy services, facilities for training and obtaining qualifications are available at the University, technical colleges, and as well as at privately run commercial colleges. The supply of services seems to be adequate as there are both foreign and domestic firms established in the country. The same is true of engineering and IT services. In particular, private facilities for the use of Internet in the urban areas are quite good with many Internet Cafes being available at affordable fees.

7.5 Travel services.

Most of the problems relating to travel were discussed in Section 5.6 on Tourism. Subject to those facilities for both air and surface travel are adequate except in very remote areas where the road conditions remain undeveloped or inadequately developed. Good long distance private bus services, both with and without air-conditioning, are available between main cities catering to both local and tourist passengers at affordable fares. In the urban and surrounding areas, passenger bus services and tuk-tuk taxis are adequately available.

8. Existing Regulatory System

8.1 Legal provisions and policies for consumer protection

Legal provisions: Currently there is no comprehensive and coordinated legal and regulatory framework for consumer protection in the Lao PDR. However, there are a number of ad hoc legal provisions and regulations concerning the supply and marketing of goods and services that affect consumer interests. These relate largely to food and drug safety, quality and standard of products and their circulation, patents, and labeling. Legal instruments relevant to consumer interests are given in Table 3. The Decree on Goods Trading Business of 2001 provides for regulation of trade in goods to ensure sufficient supply and fair prices.

Legal provisions on 'quality control of domestically produced food products' of 1991, and the recommendation on foodstuffs No. 035/FMC of Aug 1991 had been designed to control quality of both domestically produced and imported foodstuff, to provide for proper labeling, to prohibit the sale of low quality, unsafe and unlabelled foodstuff, and for inspection by the Ministry of Health. However, as these regulations have been to be inappropriate to the current situation, they are expected to be revised under the new Food Law of April 2004. This law provides for regular inspection of production and sale of foods for quality and hygiene, and for investigation of any complaints from consumers on unsafe foods, by the Health Department. Also under the new law, both import and sale of foods and foodstuffs require a license from the

Health Department of the Health Ministry.

The Decree on Trade Marks of 1995 requires registration of trade marks to ensure the quality of goods, and protect the consumer from illegally traded goods. Decree on Patents 2002 provides the right to the owner of a patent to protect his/her invention from violations such as illegal production, importing, stocking, offering for sale, selling and using of the product or process, in accordance with the terms of Article 28.1 of the TRIPs Agreement.

The List of Medicines Prohibited based on the Decree of Ministry of Health of 1994 lists 65 items of medicines prohibited in the country. The Law on Drugs and Medical Products of April 2000 specifies the requirements for production, import and sale of drugs and medical products. Drugs are classified into four groups: those sold under prescription; those sold under a pharmacist's control; those safe to be sold without a prescription; and those which are toxic. Doing business in drugs and medicines (cultivation, production, sale, exportation and importation requires a license under the Business Law, and must be registered with the Ministry of Health; the producers and sellers must be or have a qualified pharmacist; advertisers must ensure that the drugs advertised are those licensed, and in accordance with the quality, contents and forms licensed by the Ministry of Health.

Under the Decree on the Management of the Standards and Quality of Goods and Services of 1995, a Central Management Agency was established under Science,

Technology and Environmental Agency (STEA) whose role is coordination of the management of standards and quality of goods in order to ensure the quality of goods and products, to expand international cooperation, to promote the production of high quality products and to protect consumer rights and benefits. The Decree on Goods Trading Business of Sept 2001 provides for sufficient supply and distribution of goods, promotion of production of goods, price and exchange rate stabilization, and improving living standard of people.

Table 3. Legal Provisions relevant to Consumer Protection

Agency Responsible	Legal Instrument
Ministry of Health	Elaborated Recommendations Relating to the Regulations on Quality Control of Export-Oriented and Imported Foodstuffs No. 035/FMC, 9 September 1991
Ministry of Health	Provisions on Quality Control of Domestically Produced Food Products No. 048FMC, 26 September 1991
STEA	Provisions for Quality Control of Domestically circulated Foodstuff, No. 105/FMC, 31 October 1991
Ministry of Health	Provisions on Quality Control of Domestically Produced Food Products, 048/FMC, Oct 1991
STEA	Additional Explanation on Regulation of Quality Control of Domestically Circulated Food products, No. 027/MOH, 1992
STEA	Decree on Patents, No. 01/PM of Jan 2002
Ministry of Forestry and Agriculture	Decree on the Quarantine of Plants in the Lao PDR No. 66/PM Adopted 23 March 1993
-do-	Decree on Livestock Management in Lao PDR No. 85/PMO. 31 May 1993
Health	List of Medicines Prohibited in the Lao PDR based on the Decree of the Ministry of Public Health No. 740/MPH, 3 April 1994
STEA	Decree on Trade Marks, No.06/PM, January 1995
STEA	List of Chemical Products Under Restricted Control No. 1364/95/DFM, September 1995
STEA	Decree on the Management of the Standards and Quality of Goods and Services, No. 85/PM of 2 November 1995
Department of Agriculture and Forestry	Regulation on Livestock Management in Lao PDR No. 0004/MOAF, 2 January 1997
-do-	Instruction for the Regulation on Livestock Management in Lao PDR No. 0005/MOAF Adopted on 2 January 1997
Ministry of Health	Law on Drugs and Medical Products, No.01/NA. Apr 2000
MOC	Decree on Goods Trading Business, No. 206/PMO of Sept 2001
Ministry of Health	Food Law, No 4/NA, Apr 2004

The Lao PDR is in the process of drafting a law on Copyrights and Related Rights based on WIPO Model Law and is preparing to adhere to the Bern Convention for the Protection of Literary

and Artistic Works by 2004. It is expected to become a member of the Patent Cooperation Treaty in 2003 and of other conventions no later than 2006. The Lao PDR has no bilateral

agreements that have special reference to consumer protection measures. However, it has entered into bilateral trade agreements with 17 countries, and receives GSP from 34 countries including China, Australia and the EU.

In addition Laos enjoys reciprocal Asian Integration System of Preferences (AISP) with Thailand, Cambodia, Myanmar, and Vietnam. Under the bilateral agreement with Viet Nam, Laos allows imports of certain items from Viet Nam at half the rates of tariffs applicable to imports from other countries. These arrangements benefit the Lao consumers in terms of relatively cheaper supply of imported consumer goods particularly from Viet Nam, and increased incomes made possible through expansion of exports under GSP facility. The same is true of ASEAN AFTA scheme (see Section 3.3) which will increase the supply of relatively cheaper goods from ASEAN countries.

8.2 Administrative system

As can be seen from Table 3, different government agencies are responsible for implementing different aspects of laws and regulations relevant to consumer protection. In some cases more than one Ministry shares the responsibilities. The Ministry of Health is responsible for matters such as quality control and safety of food and food products, drugs and pharmaceuticals, Ministry of Forestry and Agriculture for quarantine of plants and livestock, while STEA is also responsible for quality control of food products and for regulation of chemical products. Other consumer protection related responsibilities of STEA include trade marks, weights, standards, and also quality control of

goods and services. The Ministry of Commerce is responsible mainly for the administration of trade and price surveillance to ensure adequate supply of goods at fair prices to the consumer. In addition to these bodies, there is the Division of Economic Police whose main responsibility is to assist the other relevant authorities in dealing with the offending traders and businesses and to investigate any complaints relevant to economic activities brought to them by any person.

Thus, as yet there is no one government agency to coordinate and exercise overall responsibility for consumer protection in the country. However, as a matter of policy, the government has recently announced the need to establish an institutional arrangement and a legislative framework for consumer protection. The Ministry of Commerce (MOC) has been entrusted with the task of developing policies and legislative provisions, and to seek technical assistance, in order to establish institutional arrangements for consumer protection as well as for competition. Steps taken in this regard are dealt with in Section 9.

8.3 Existing redress mechanisms

Under the existing legislative provisions, there are no mechanisms for consumer redress under which consumers can be compensated for losses incurred due to malpractices by traders. However, Economic Police would investigate any complaint, brought to their notice, of malpractice or ill treatment by traders, and refer the matter to MOC or other government agency that may have a

direct responsibility regarding the matter.

The legislations, mentioned above, only provide for punishments to offending traders. For instance, those traders who do not use proper weights and measures can be either warned, fined, or their trading licenses cancelled, and similarly for those who engage in trading of unsafe foods, drugs, and other products. As for trading of illegal goods such as the import of unsafe or banned goods, the offenders can be warned, fined, goods confiscated, or trading licenses cancelled. However, administrative arrangements for monitoring the compliance of rules and regulations are weak, inadequate, and often ineffective. Often the staff in relevant agencies is insufficient, and those available are overloaded with activities related with food safety promotion, inspection and enforcement of food regulations, and they lack adequate training and expertise to carry out proper inspections relating to food and drug safety⁴⁴. In other areas such as the import or the sale of illegal goods, corruption too said to hamper effective enforcement or rules and regulations.

9. Proposed Regulatory System for Consumer Protection

As mentioned before, the Government has announced its intention to establish a Fair Trade Commission under the MOC which will have the overall responsibility for implementing laws relating to both competition and consumer protection that are to be introduced⁴⁵. The Decree on Trade

Competition (see Section 3.1) has already been issued, and the Trade Competition Commission (TCC) to implement it is yet to be established. MOC's intension is to expand TCC to include the functions on consumer protection and to rename it as Fair Trading Commission. A new Decree on Consumer Protection is being proposed, and when it has been issued the two decrees are expected to be combined into one law on Fair Trading, which will establish the Fair Trading Commission.

9.1 Draft Decree on consumer protection

The draft decree on consumer protection, prepared in consultation with Consumers International Regional Office for Asia and the Pacific (CIROAP), is being considered by the government for promulgation. The draft decree:

- gives the fundamental principles under which consumer protection is provided;
- indicates the types of goods and services prohibited for sale;
- defines the rights and obligations of the consumer;
- defines the obligations of the business entities;
- provides for the establishment of a Fair Trading Commission (FTC); and
- provides for penalties to offenders, and redress to aggrieved consumers.

FTC will be responsible for implementing the decree on Fair Trade Competition (see Section 3.1) as well as the proposed decree on consumer protection. Under the latter, its main responsibilities are:

⁴⁴ UNIDO, Dec 2002

⁴⁵ Government of Lao PDR, NPEP, Sep 2003.

- Initiating rules and regulations for consumer protection
- Providing for consumer education
- Considering complaints from consumers
- Enforcing measures against offenders
- Establishing redress mechanisms

The Commission has considerable flexibility and discretion in formulating rules and regulations for consumer protection as well as for imposing penalties for offenders as it sees fit from time to time. The main form of redress provided for in the draft decree is compensation from offenders to consumers who have suffered losses as a result of breaches or commission of offences. Other forms of redress and mechanisms for providing redress are left to be decided by the Commission.

will take shape only after the issue of the proposed decree on consumer protection. Until then, the Commission and its secretariat will confine their responsibilities only to the implementation of the decree on competition. This will of course provide for gradual capacity building and resource availability for ultimately the functioning of the Fair Trading Commission after the decree on consumer protection is issued and comes into force. Until then, it would be necessary for the MOC to commence initial steps in that direction, which would need to include selection of initial staff, soliciting technical assistance for their training, and obtaining the necessary resources and facilities.

9.2 Administrative system

As provided for in the draft decree, MOC, together with the Ministries of Finance, Agriculture and Forestry, Industry, Health, Science, Technology and Environment, National Tourism Authority, and other concerned Ministries and Provinces, is responsible for implementing the decree throughout the country. As provided for in the Decree on Trade Competition, the Minister of Commerce is responsible for the FTC who appoints its members. Both the FTC and its Secretariat are to function under the MOC. As mentioned earlier, entire administrative system for the implementation of the two decrees

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KENYA

BY

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PART I:

Introduction

Competition Law and Policy is relatively new to Kenya. Before independence, the colonial government applied patently anticompetitive laws and policies skewed towards favouring the settler community and disadvantaging the other sections of the national community. After attainment of independence, the same anticompetitive laws were simply adopted by the new government. A good example of an anticompetitive law which is still extant is the “Contracts in Restraint of Trade Act, 1932”. To demonstrate its notoriety as the veritable legal/statutory high priest of anticompetitiveness in Kenya, its section 2(i) is reproduced here-below:

“ 2. Any agreement or contract which contains a provision or covenant whereby a party thereto is restrained from exercising any lawful profession, trade, business or occupation shall not be void only on the ground that the the provision or covenant is therein contained:

Provided that-

(i) the High Court shall have power to declare the provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business or occupation concerned, and the period

of time and area within which it is expressed to apply, and to all the circumstances of the case, the provision or covenant is not reasonable either in the interests of the parties, inasmuch as it affords more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected, or in the interests of the public, inasmuch as the provision or covenant is injurious to the public interest;”⁴⁷

In other words, the agreements or contacts envisaged by the Contracts in Restraint of Trade Act are valid subject only to their invalidation upon review by the High Court.

It is only in 1988 that the Kenya government made its first serious attempt to dismantle the entrenched edifice of anticompetitiveness through the promulgation of the Restrictive Trade Practices, Monopolies and Price Control Act. The objectives of the law are to encourage competition in the economy by:

1. Prohibiting restrictive trade practices;
2. Controlling monopolies;
3. Controlling unwarranted concentrations of economic power; and
4. Controlling prices.⁴⁸

⁴⁷ Many enterprises purport to justify restrictive business practices such as exclusive dealing by leaning on this law.

⁴⁸ It is ironical that a law that sought to bring in a competition regime also sought to retain a price control arrangement. Although all price controls were done away with by 1994, the part on price controls is still in the statute books. Theoretically, therefore, it can be reactivated.

⁴⁶ The writer is the Commissioner, Monopolies and Prices Commission, Kenya.

Kenya's competition was, ab initio, intended to be transitional, that is, to move the structure of the economy from a price controlled one to a liberalized one. This reality notwithstanding, the law has not been reviewed, even once, since its promulgation in 1988 and operationalization on 1st February, 1989.

This paper will discuss the following areas:

1. The historical background upon which Kenya's lack of a competition culture is substructured;
2. The evolution that led to the introduction of a competition law;
3. A discussion of Kenya's competition law including its enforcement institutions and practical application;
4. A narration of selected important cases;
5. The ongoing measures to promulgate a new law;

PART II: The Need To Regulate Competition

The need to regulate competition is brought out clearly by the following statement made by Adam Smith: "It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner but from their regard to their own interest... people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."⁴⁹

⁴⁹ Adam Smith: The Wealth of Nations, (Harmondsworth, Eng: Penguin Books, 1982), page 782.

What Adam Smith observed in England in 1776 has indubitably and consistently proved prophetic over the last few centuries and withstands the test of time up to this day. As testimony to the immutability of Smith's statement, it has become one of governmental or intra-governmental regulatory functions to encourage fair and open Competition. This has been done through anti-trust laws.

There are inherently conflicting interests among businesses. As W.G. Shepherd and Clair Wilcox have opined: "The business Community is like a continent full of warlike tribes. There is strife among firms, among industries, among sectors; big versus small, and local versus international. Firm A's gain usually causes a loss to some firm B,C,H or Z. Good public policy recognized these natural contraries, and it often puts such opposed private interests to work. The deepest single contrast is between established firms and newcomers; between old-line, blue chip, established firms and new outsiders."⁵⁰

Businesses invariably have deep public effects. Businesses Commonly marshal and employ the capital of thousands of investors (Shareholders), employ thousands of workers, buy from hundreds of suppliers, and sell to thousands or millions of customers. They affect jobs, prices, local prosperity, future resources, national security, and often the quality and meaning of life. The behaviour of many business firms is properly a matter of public concern. To

⁵⁰ William C. Shepherd and Clair Wilcox, Public Policies Toward Business, (Illinois: Richard Irwin, 1979), chapter 4. The contents of the next paragraph are largely borrowed from this source.

take care of these disparate interests there is need for a macro-regulatory regime. This macro-regulatory regime is the Competition Authority. In Kenya, this is the Monopolies and Prices Commission.

Whereas political vibrance assures political democracy, robust competition assures economic democracy. Both political democracy and economic democracy buttress comprehensive democracy.

Competition is the best general process for optimizing efficiency and equity. Efficient producers can undersell others, who must cut costs or be weeded out. The fittest survive. Competition also forces sellers to advertise their wares informatively. Competition fosters progress, by giving a free run to new blood and new ideas. It rewards the innovator and compels the others to imitate rapidly. It spreads income and wealth widely, by averting monopoly for the few, and by feeding rewards to new operators and innovators. It provides the widest opportunity for seeking success. Competition enlarges freedom of choice for most citizens. It also gives a certain cultural richness by catering to the full range of consumer wants. To assure the sustenance of these benefits demands the existence of a competition regime.⁵¹

It is deemed necessary to mention the above positive attributes of competition, even though they may sound hackneyed. In any case, it is accepted, almost universally, that the culture of competition has not deeply set root in developing countries such as Kenya. It

⁵¹ The contents hereof are generic and are found in many competition and economic books including Shepherd and Wilcox, op. cit.,

may also not be bad to keep reminding others of the positive attributes of a good thing. After all, the Holy Bible is about two thousand years old. And yet reference is made to it every Sunday, indeed every day, minute, and second !

With the obtaining ubiquitous and untrammelled wave of liberalization-cum-globalization, promotion of competition has been internationally embraced. The International Community, through specialized agencies such as the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD), has accepted the supremacy of competition in the International Market place.

Kenya is part of the International Community. Relatively, and in juxtaposition with developed economies such as the USA, the UK and Japan, Kenya is a debutante in the competition matters domain. Kenya must, however, recognize that all the successful developed economies have vibrant competition authorities which dispassionately oversee the Market place. Kenya does not need to reinvent the wheel. For its economy to succeed, it requires a strong competition regime similar to the regimes subsisting in the developed World. As the rookie, Kenya must learn from the experience of the denizens and accordingly, take appropriate measures.

Internationally, in competitive trading terms, Kenya is a member of the World Trade Organization. Regionally, Kenya is a member of the East African Community and COMESA. Both groupings have embraced promotion of competition in their Charters. Specifically, Article 75 of the EAC-

Treaty recognizes the need for coordinated competition policies to be incorporated in the protocol that will establish the proposed East African Customs Union. Also, Article 55 of the COMESA Treaty obligates member states to promote competition within the trading bloc.

PART III: The Evolution And Status Of Competition Policy And Law In Kenya

1. Historical Foundation

A historical look at the roots of economic relations in Kenya does not evince a palpable Culture of Competition that compares favourably with that one envisaged by the American system sired by the Sherman Act of 1890 and which has evolved over the years to spawn a motley of hybrids that have been adopted by states and supranational institutions in places as diverse as Japan, the United Kingdom and the European Union(whose system now subsumes the UK one).At the onset of the colonial rule, the predominant aim of the colonizers was conquest, simple and clear. In this pursuit of conquest Kenya was in the ten years between 1895 and 1905 transformed from a footpath 600 miles long into a Colonial administration⁵². These British conquerors were preoccupied with the Creation of a hierarchy of self interest out of the existing network of authority⁵³. There was no place for

⁵² W.R. Ochieng (Ed.), A Modern History of Kenya 1895-1980, (Nairobi: Evans Brothers, 1989), page 6.

⁵³ Ibid.

competition as envisaged by the modern antitrust regimes in the nascent government's agenda.

This reality notwithstanding, first and foremost, the imposition of colonial rule engendered the process of Capitalist penetration of African economies. Colonialism, then affected the articulation of indigenous modes of production with the capitalist mode of production and the integration of African economies into the Western capitalist system. The Capitalist mode of production is characterised by, first, the exclusive appropriation by one class of means of production that are themselves the product of social labour; second, the whole of social production takes the form of commodities and, third, labour power itself becomes a commodity which means that the producer, having been separated from the means of production, becomes a proletariat⁵⁴. Hence, with all the disruptive revolutionary impact that it entailed, the advent of colonialism catapulted the African, albeit unwillingly, into a new world of economic relations. This new reality embraced a dual mandate. J. M. Lonsdale and B. J. Berman have concluded that the colonial state:

“...had to organize the reproductive conditions not of one dominant mode of production but of a capitalist mode not yet dominant whose social integument included the other modes to which capital was articulated and whose own social relations and ideological charters it therefore threatened... The colonial state indeed straddled not one but two levels of articulation: between the

⁵⁴ Claude Ake, A Political Economy of Africa (London: Longman, 1976), page 81.

metropole and the colony as a whole as well as within the colony itself. It was at once a subordinate agent in its restructuring of local production to meet metropolitan demand, yet also as the local factor of cohesion over the heterogeneous fragmented and contradictory social forces jostling within. The very Dual Mandate defines the dilemmas of the colonial state⁵⁵.”

In the facilitation of the penetration of Capitalism, the colonial state favoured the settlers and relegated the Africans to an inferior position. The Africans were only allowed on an experimental basis to grow coffee in 1933. Settlers were able to expand because they could obtain credit from British Commercial and Merchant Banks established in the country and from private money-lenders some of whom were Indians, whereas Africans could not⁵⁶. As a consequence of the great depression, many settler farms sank into bankruptcy. By a show of extreme favouritism, the colonial state directly intervened in the provision of credit to settler farmers through the creation of the Land Bank in 1931, through the Land and Agricultural Bank ordinance No.3 of 1931, which was not allowed to lend to Africans⁵⁷. These were no doubt anti-competitive practices. In any case under the Credit to Natives Act, 1903, no credit of more than £10 could be given to an African trader unless approved by a District officer.

Through the formation of bodies such as the Kenya Farmers Association (set up to handle maize and wheat) and the Kenya Cooperative Creameries (set up to handle milk and butter) a movement by the settlers, supported by the state, to control the internal market of key commodities and cushion themselves against the vagaries of international commodity fluctuations was instigated, and later on entrenched⁵⁸. These Organizations succeeded in pushing the state to erect barriers against imports of commodities they handled. The Africans were not allowed to join these Organizations and were thus disadvantaged.

Unorthodox measures were employed to assure settler farmers of cheap labour which effectively thwarted competition from African farmers. The settlers considered that the protectorate's administration should apply legislative, administrative and financial pressure on the Africans to induce them to go to work on European farms⁵⁹. In 1901 a Hut Tax was imposed, through the Hut Tax Regulations[1901], which was a financial inducement to work. Another example of these Unorthodox measures was the Promulgation of the Master and Servant Ordinance 1906, which imposed penalties of imprisonment or fine for negligent work on those already working. The Hut and Poll Tax Ordinance 1910 consolidated these measures. Another example was the Native Authority Ordinance 1912 which stipulated that commercial labour was compulsory for everybody, including men past working age, women and

⁵⁵ Ochieng, op.cit, page 38.

⁵⁶ R.M.A. Van Zwanenberg and Anne King, An Economic History of Kenya and Uganda, (London, 1975), page 296.

⁵⁷ Ibid., page 296.

⁵⁸ Ochieng, op. cit, page 43.

⁵⁹ Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya, (London: OUP, 1967),page 83.

children. Its stipulations amounted to forced labour for government purposes in the reserves. Instead of doing unpaid compulsory work it offered incentives to Africans to go and work for settler farmers at cheap rates.

The whole colonial era is replete with examples of practices and measures which were anti-African and antithetical to a culture of competition in economic relations. For example though most of the colonial states revenue went to develop the settler sector, by 1930 the Africans were responsible for 37 1/2 per cent of the colony's total revenue⁶⁰. Considering that additional revenue was indirectly collected from Africans through customs and Excise duties, Local Native Council Levies and other indirect taxation, it is evident that Africans contributed much more than was acknowledged. N. Swainson, has estimated that together hut, poll tax and customs duties were responsible for 60 to 80 per cent of the colony's revenue⁶¹. Paradoxically, the bulk of this income was pumped into the settler sector, at the expense of the African majority population.

The enormity of the taxation measures imposed on Africans denied them the savings upon which they could build up adequate capital to undertake competitive economic relations against the white settler farmers. The same settlers who benefited from the taxes exacted upon Africans had opposed taxation on the basis that it was only relevant where there was elective

representation⁶². As if the Africans were being represented at all, let alone in an electoral manner!

It is apposite to refer to two cases which show that egregious discrimination against Africans and other races was practised. Of course, in an atmosphere of discrimination, competition is trammelled. The first is the case of Mbiu Koinange V R⁶³. This case concerned an attempt to prevent Mbiu Koinange from planting coffee. The rules in Question conferred powers to limit the area within which certain crops could be grown. In blatant misuse of powers, the authorities sought to limit the classes of people who could grow the crops. This is a clear example of an attempt to forestall competition among coffee farmers.

The other case concerned the power of the Commissioner of Lands to impose restriction on who could bid at auctions for sales of crown land, and their use thereafter⁶⁴. The Commissioner had advertised the auction of town plots at which only Europeans were to be allowed to bid and purchase and had stipulated that during the terms of the grant the grantee should not permit the dwelling house or outbuilding thereon to be used for the residence of any Asiatic or African who was not a domestic servant employed by him.

The Commissioner's powers to dispose of the land was derived from the Crown Lands Ordinance of 1915. The Ordinance had made a distinction

⁶⁰ K. Ingham, A History of East Africa, (London: OUP, 1967), page 337.

⁶¹ Ibid.

⁶² Hay V. Commissioner of Income Tax, 1940, 7 E.A.C.A 7.

⁶³ [1951], 24(2), K.L.R. 130.

⁶⁴ The Commissioner of Local Government, Lands and Settlement V Kaderbhai, (1930), 12 K.L.R. 12.

between the disposal of agricultural and urban land, and the power to impose racial restrictions or covenants was expressly granted only in the case of agricultural land. It was argued by the appellants that, therefore, there was no power to impose these restrictions on the disposal of land in towns. The Judicial Committee, saying they were concerned with law and not policy, found for the Commissioner, holding that prima facie the rights of the Crown and its servants to dispose of Crown property were analogous to those of the private owners. They had to observe express terms of the statute, but apart from that they were free to impose what restrictions they choose. The learned Lords went on to argue that it would be valid to restrict the bidding to industrialists, or the trading community, in appropriate cases. Hence there was nothing wrong in extending this principle to racial groups!

By the time Kenya attained independence there had not developed a culture of competition as envisaged by modern antitrust regimes. The system of licensing, for example, was made use of to give leverage to British Capital so that it faced little or no competition. Indeed licensing encouraged “the movement of capital into large oligopolistic units and a highly concentrated industrial structure emerged”⁶⁵. With the advent of Independence the new ruling class took over the position hitherto occupied by the colonial ruling class and generally perpetuated the economic relations they inherited. The new ruling class was able to control directly and in great detail most of what went on in the country in the political, economic and social

⁶⁵ N. Swainson: The Development of Corporate Capitalism in Kenya, 1918-1977 (London, 1980), page 123.

spheres⁶⁶. Antitrust and other related policies were not an exemption! As Y. P. Ghai and J. P. McAuslan opine, “The Africans in Kenya came to political awareness within a legal system in whose rhetoric praised equality and justice but whose practice sharply distinguished between those with and those without power, wealth and influence... The law is seen solely as being a tool of the wielders of power who use it as they think fit, legalizing their own illegal exercises of power, and attempting to prevent the acquisition of power by, and the development, of the powerless”⁶⁷. Just as the Europeans had used the law to thwart African competition in economic relations, the new ruling class inherited their stance on attainment of Independence.

2. Kenya's Economic Environment Prior to the Introduction of the Present Competition Policy and Law⁶⁸

Prior to Kenya's attainment of Self-Rule in June 1963 and full Independence on 12th December 1963, the degree of industrialisation and monetization of the economy was rather basic. Most consumer items such as sugar, fats, razor blades, pangas, jembes, etc which were needed by the settler community were imported from U.K. in support of Her Majesty's motherland. In Kenya itself, the interests of the consuming settlers were protected through a Price Control Regime which ensured that consumers

⁶⁶ Ghai and McAuslan, op.cit., page 507.

⁶⁷ Ibid, page 508.

⁶⁸ The narration given in this part is a synthesitation of government papers, academic papers and books and material obtained from the Monopolies and Prices Commission.

of essential goods and services were not exploited by sellers through the Price Control Act of 1956.

Kenya embarked on a process of rapid industrialisation and indigenisation of the economy on attainment of independence on 12th December 1963 through the setting up of import substitution industries to meet Kenyan and East African Community requirements and the transfer of non-citizen firms to Kenyans. To this end, the independent Administration of Kenya enacted the Trade Licensing Act, Cap. 497 of the Laws of Kenya which legalised the take-over of non-citizen firms by citizens of Kenya through denial of Trading Licenses to certain Trades and Businesses. The Administration also legalised the control of the importation and exportation of goods of any description and the control of supplies essential to the life or well-being of the community through Legal Notice No. 303 of 1964 under the Imports, Exports and Essential Supplies Act, Cap.502 of the Laws of Kenya.

Briefly, therefore, the commercial activities of Kenya were regulated mainly through instruments provided under the Price Control Act, Trade Licensing Act and Imports, Exports and Essential Supplies Act which included among others the following instruments:-

- i) Fixing of prices of certain goods and services.
- ii) Transfer of certain businesses from non-citizens to citizens of Kenya.
- iii) Establishment of imports substitution industries.
- iv) Imports and Exports licensing.

- v) Establishment of import quotas for certain goods.
- vi) Complete banning of imports of certain goods.
- vii) Letters of No Objection.
- viii) Allocation of Foreign Exchange.
- ix) Fixed Exchange Rate.

Kenya's industrialization programme through imports substitution strategy reached saturation point in mid 1970s and the programme was hard hit by the collapse of the East African Community which resulted in Tanzania and Uganda opening their markets to imports from China, Taiwan, Korea, India, etc. with the loss of the larger captive East African market. Kenya's domestic industries found themselves with a very small domestic market and products which could not compete in the export markets because of their high prices, low quality, poor packaging, poor design etc. This was followed by falling (decreasing) employment opportunities and falling standards of living for Kenyans.

To reverse the trend of economic decline, it became abundantly clear that Kenyan industries must produce not only for domestic market but also for the export market. The Government therefore decided in the mid 1970s to expose them to competition first in the domestic market by allowing some imports so as to prepare them for export market competition. Competing imports were selectively allowed into the Kenyan market; banned items were progressively removed from the list of banned items and price controlled items removed from price control lists progressively. In addition, additional industries were licensed to boost domestic competition, lower consumer

prices, increase employment opportunities, improve the efficiency in the use and allocation of scarce resources to competing needs.

The policy was aimed at the improvement of the marketability (competitiveness) of Kenyan products in the export market, increase job opportunities, lower the cost of living and raise the standard of living for Kenyans throughout the Republic.

3. Evolution of Present Competition Policy and Law

The proposal for the Development of a Competition Policy and the enactment of a law to support the implementation of such a policy in Kenya was advanced in 1982 by the Working Party on Government Expenditures (WPGE). The proposal is contained in Chapter III, Pages 24-27 of the WPGE Report which noted that, as direct Government intervention in the economy via state-owned commercial enterprises diminishes, "more reliance will be put on policy instruments to influence farm management and industrial decisions on product choice, investment and employment." The Report further noted that, "as private sector activities and community efforts increase in scope and magnitude, opportunities for abuses, favouritism and exploitation may also increase."

More specifically, paragraphs 87-91 spelt out the WPGE views on the type of legislation and institutions that Kenya needed to facilitate the desirable changes from a controlled economy to a market oriented free economy. Paragraph 90 in particular stipulated that, "It is, therefore,

recommended that legislation with respect to unfair practices be enacted and that a Monopolies and Prices Commission be established to enforce it. This Commission should also assume the functions of the present Price Control Division. The Commission should be empowered to collect annually standardized financial information on all public companies and to investigate complaints relating to unfair market prices and practices. Such a commission should have quasi-judicial powers analogous to those of the Industrial Court, and should be able to impose sanctions for practices in restraint of fair trade as defined in the legislation."

Paragraph 91 touched on the manning of the institution that the economy would expect to be able to regulate the conduct and the structure of the market so as to obtain the desired performance in the market place and noted "The Commission will require a staff of economists and financial analysts to report on market conditions, paying particular attention to movements in prices and costs at all levels of production and distribution and their effects on both supply and demand. Apart from its regulatory function it should contribute to Government policy formulation in matters affecting trade, production and prices."

The WPGE principal objective in its recommendations for a competition policy, legislation and establishment of suitable institutions for the administration and enforcement of the Policy and Law, was to provide Kenya with an instrument for influencing resource allocation in constructive directions while helping to curb the

abuses associated with unbridled private enterprise.

The WPGE recommendations of 1982 gave the advocates of a liberalized economy both in Government and private sector food for thought and studies were undertaken between 1983 and 1985. Towards the end of 1985, a comprehensive Cabinet memorandum was prepared and submitted to the Cabinet proposing the enactment of a law prohibiting Restrictive Trade Practices and the establishment of a Monopolies and Prices Commission in Kenya. The Cabinet approved the proposal and mandated the then Ministry of Finance and Economic Planning to consult widely with other relevant Government Ministries and Departments so as to be able to draft a suitable bill for debate and enactment by Parliament.

Kenya's momentum for change from a controlled economy to a free economy was amplified by Sessional Paper No.1 of 1986 on "Economic Management for Renewed Growth," which noted on page 24 paragraph 2.53 that the "Government will establish the market-based incentives and regulatory structures that will channel private activity into areas of greatest benefit for all Kenyans. In doing so, Government will rely less on instruments of direct control and increasingly on competitive elements in the economy." At paragraph 6.31, page 100, the Sessional Paper also noted that, "At present, Kenya has no comprehensive legislation making restrictive practices illegal and no administrative or legal mechanism to prevent them". Therefore "Government will propose legislation prohibiting restrictive trade practices and

establishing an administrative mechanism to enforce it." This commitment by the Government resulted in the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya in 1988.

4. The Present Position

The Kenyan anti-trust position is encapsulated in the Restrictive Trade Practices, Monopolies and Price Control Act (Chapter 504 of the Laws of Kenya). Before 1989, Kenya had a Price Control Act which by and large sought to control prices of goods. The old Act did not by and large seek to Control Services. The provisions of the new Act have engendered the regulation of Mergers, control of unwarranted Concentrations of Economic Power and prohibition of Restrictive Trade Practices. It has, however, rather atavistically in this age of liberalization, contained virtually all the price control provisions contained in the replaced Act.

Sessional Paper number 1 of 1986 (op. cit) articulated unequivocally the path Kenya was destined to follow in the realm of competition. It said,

"Price Controls in Kenya are administered to stabilize the prices of necessities and to restrain monopoly producers from raising prices above competitive levels in the absence of sufficient import competition. To make price Controls more effective as a tool to increase productivity and growth, the functions of price control will be integrated with those of control over restrictive market practices; and to make controls more equitable for both

consumers and producers, the rules and procedures will be streamlined:

1. A department of Price and Monopoly Control (DPMC) will be created in the Ministry of Finance, under new legislation to be prepared, to monitor actions in restraint of trade and to enforce rules prohibiting unfair practices;
2. Administration of price controls will be streamlined and applications for adjustments acted upon within 90 days, in the absence of which price adjustments will be automatically permitted;
3. The Determination of Costs Order will be revised to include costs that are not currently a basis for price adjustments and will permit the introduction (on an experimental basis at first) of importality formulae on which to base adjustments; and
4. Items that are not produced by monopolies and are not essentials for low-income families will be considered for decontrol on a gradual basis”.

It is clear from the sessional paper that the restrictive Trade Practices, Monopolies and Price Control Act [Cap. 504 of the Laws of Kenya] was intended to be a transitional piece of legislation to enable Kenya move from a price control regime to a true Market (Competition) Regime. In the 1988 Budget Speech which announced the publication of the draft bill which eventually crystallized into Cap 504, the Vice President and then Minister for Finance, Professor George Saitoti, declared that Kenya was committed to a market driven

competition regime⁶⁹. This was evidence that Kenya was not only committed to a transitional promotion of competition arrangement; it was willing to eventually liberalize the market and fully embrace competition. This settled the matter internally: Kenya was poised to adopt a fully liberalized market regime to be regulated by a Macro Competition regulator, the present day MPC.

In the East African scene, Kenya is a member of the East African Community. Article 78(1) of the original draft Treaty of the East African Community which discussed competition at the formative stage provided that:

- “The partner states agree that any practice that adversely affects the objectives of free and liberalized trade shall be prohibited. To this end the partner states agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Community”.

Eventually, competition was subsumed by Article 75(7) of the Treaty for the establishment of the East African Community [EAC] which states that competition shall be one of the elements of the EAC Customs Union. In 2003, a draft competition policy and law was adopted by the Council of Ministers⁷⁰ and is awaiting promulgation by the EAC regional assembly. This proposed law obligates Kenya to promote competition and, by inference through

⁶⁹ Budget Speech, 1988, Government Printer, Nairobi.

⁷⁰ The Council of Ministers is the policy and decision making organ of the East African Community.

the Terms of Reference issued to the consultants who crafted the EAC draft competition law, to have an autonomous national competition authority.⁷¹

If one needs evidence of an unambiguous position that the Kenyan government policy articulates untrammelled competition in the market place, this is it. Unequivocally, the government has committed itself to prohibit any practice that adversely affects the objectives of free and liberalized trade.

To further buttress its commitment to local and international competition, the Kenya Government has stated that facilitation of both local and international trade will be two of its most important industrialization strategies. In a forward to Sessional Paper No 2 of 1996 on Industrial Transformation to the Year 2020, the then Minister for Commerce and Industry, Hon. Joshua Angatia, with regard to international trade, said: "... As a country, we must look outward to our neighbours and the world both to seek opportunities for our enterprises and to invite others to participate in building our economy. We cannot create a future if we can turn our backs on the challenges of international trade and commerce".

The sessional paper further reiterated the need to assure promotion of competition among local traders" through strict enforcement of anti-monopoly and anti-trust laws". The sessional paper also definitively stated:

⁷¹ The writer was one of the five consultants who wrote the draft EAC competition policy and law.

"The multilateral trade negotiations of the Uruguay round culminated in the establishment of the World Trade Organization (WTO). It set out an ambitious agenda which included reducing trade barriers further. Kenya is a signatory to this Agreement and must work within its trade regulations and recognize that international trade will become more competitive. However, new trade opportunities will emerge as a result of the new multilateral arrangements that will encourage international trade provided Kenya can establish export oriented industries. "

The above positions demonstrate that the government of Kenya is committed to the promotion of Competition. Sessional Paper No.1 of 1986 and the Budget Speech of 1988 committed Kenya to the promotion of competition internally. Sessional Paper No 2 of 1996 committed the government to promotion of competition through the path of comparative advantage and hence, internationally. The paper also committed Kenya to the World Trade Organization (WTO) agreement which arose from the Uruguay Round and stressed that Kenya would abide by WTO trade agreements which promoted international trade.

5. Legal Provisions and Procedures

Kenya's Antitrust Law

Kenya did not have an antitrust department before 1st February, 1989 which was the commencement date for the Restrictive Trade Practices, Monopolies and Price Control Act [Chapter 504 of laws of Kenya]. Instead, it had a Price Control Act. The said law

merely sought to control prices. The Price Control Act was repealed by the Restrictive Trade Practices Monopolies and Price Control Act.

The purpose of the Restrictive Trade Practices, Monopolies and Price Control Act is explained by its preamble as follows,“ An Act of parliament to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power, and prices and for connected purposes”.

The antitrust department is established by section 3 of the Act which:-

1. creates the post of Monopolies and Prices commissioner and allows the appointment of such other officers as may be necessary for the due administration of the Act.
2. stipulates that the monopolies and prices commissioner shall, subject to the control of the Minister, be responsible for the control and management of the monopolies and prices department of the treasury.
3. Allows the Commissioner to authorize any officer to exercise any of the powers conferred by the Act upon the commissioner subject to such limitations as the commissioner may think fit.

As said in the preamble, the Act seeks to encourage competition in the Kenyan economy by prohibiting restrictive trade practices and controlling monopolies and concentrations of economic power and prices and for connected purposes. “Restrictive trade practices” is defined

by section 4 as referring to an act performed by one or more persons engaged in production or distribution of goods or services which:-

- (a) In respect of other persons offering the skills, motivation and minimum capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate: or
- (b) In respect of other persons able and willing to pay fair market prices for goods and services, either for production, for resale or final consumption, reduces or eliminates their opportunities to acquire those goods or services.

The section also explains that reduction or elimination of opportunities is to be measured with reference to the situation that would pertain in the absence of the practices in question. Section 5 allows restrictive Trade practices which are sanctioned by parliamentary authority, professional licensing practices and certain trades which are licensed with the authority of parliament.

Section 6 enumerates what are deemed restrictive practices for the purpose of the Act and declares such agreements unenforceable. Section 7 applies the Act to restrictive trade practices conducted by or on behalf of a trade association. Section 8 deals with the issue of refusal or discrimination in supply as a restrictive trade practice. Section 10 prohibits predatory trade practices to repress competition and section 11 prohibits collusive tendering. Section 13 declares bidding at auctions criminal.

When complaints relating to restrictive trade practices arise, any person who considers himself to be aggrieved as a result of a restrictive trade practice, is allowed by section 13 to submit a complaint to the Minister, through the Commissioner, in the prescribed form. Where the Commissioner considers a complaint to have merit, the Act allows the commissioner to investigate. The commissioner may also initiate investigations into alleged restrictive practices when appropriate. A hearing may be required to be held following restrictive trade practices allegations. The complainant and the alleged malfeasor shall both be given reasonable advance notice of the holding of a hearing. Both may be represented by an advocate of each party's choice.

Upon the conclusion of the investigation, including the holding of a hearing, the commissioner is required by section 17 to present his report together with recommendations for action by the Minister. The Minister may by notice in the Kenya Gazette, make an order requiring a person committing or deemed to have committed a restrictive trade practice to desist from the said practice and such a person may also be required to take certain positive steps to assist existing or potential suppliers, competitors, or customers, in order to compensate for the past effects of these practices. Under section 20 aggrieved persons may appeal to the Restrictive Trade Practices Tribunal and if not satisfied they may lodge a final appeal in the High Court.

Part III of the Act deals with control of monopolies and concentrations of economic power. Section 23 requires the minister to keep the structure of

production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production and distribution. In identifying unwanted concentrations of economic power, the minister is required to pay particular attention to specific factors which are enumerated by section 23.

The Minister has the power to direct the Commissioner to investigate any economic sector which he has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power. For that purpose the Commissioner shall be entitled to require any participant in that sector to grant him or any person authorized in writing by him access relating to patterns of ownership and percentages of sales accounted for by leading enterprises in the sector. The commissioner may also require any person possessing relevant records to give him copies of the records or alternatively to submit the records to him for copying.

After receipt of the Commissioner's report, the minister may order that inimical interests be disposed. This, the minister may do under powers contained in section 24 of the Act. Of course, an aggrieved party, either with matters relating to restrictive trade practices or monopolies and concentrations of economic power, may appeal to the Restrictive Trade Practices Tribunal in the prescribed form. A second appeal goes to the High Court whose decision shall be final.

Section 27 outlaws mergers between two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities, or engaged in supplying substantially similar services unless there is an authorizing order from the minister. The takeover of one or more such enterprises by another such enterprise, or by a person who controls another such enterprise is similarly outlawed. No merger or takeover undertaken in contravention of section 27 is lawful or enforceable. Under section 28 any person is allowed to apply to the minister, through the commissioner, for an order authorizing a merger or a takeover. The commissioner is obliged by section 29 to investigate any application and he is required in his evaluation of the application to pay regard to the following criteria:-

- (a) Whether a merger or takeover will be advantageous to Kenya to the extent that the participants produce goods and services entering into international trade and the merger or takeover will yield a substantially more efficient unit with lower production costs and greater marketing thrust, thus enabling it to compete more effectively with imports, expand Kenya's exports and thereby increase employment.
- (b) Whether a merger or takeover will be disadvantageous to the extent that it reduces competition in the domestic market and increases the ability of producers of the goods or services in question to manipulate domestic prices in accordance with the principles of oligopolistic interdependence;

- (c) Whether a merger or takeover will be disadvantageous to the extent that it encourages capital-intensive production technology in lieu of labour-intensive technology.

Under section 31 the Minister, may, after considering the recommendation of the commissioner, make an order concerning the application for authorization of a merger or takeover. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High Court.

Procedures

There are three types of procedures followed to vindicate infraction of antitrust laws as follows:

a) Restrictive Trade Practices

In the case of restrictive trade practices any aggrieved person may submit a complaint to the Minister, through the Commissioner, in the prescribed form. The Commissioner investigates the complaint and may inform the person complained against about the allegations and the evidence adduced and invite the person to comment on the allegations and the evidence and to indicate what remedies the person would propose in order to bring his trade practices into conformity with the law. The Commissioner may also inform the person complained against that the weight of the evidence supports the allegations that have been made and request the person in question to take specific steps to discontinue the practice, and in addition, compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers,

competitors or customers to participate fully in producing or trading in the goods or services to which the allegations relate.

In case there is no response to the commissioner's communication by the indicated date or any ameliorative action taken is deemed by the commissioner to be inadequate, the commissioner is required to invite the person to negotiate a consent agreement satisfactory to the commissioner binding the person to desist from specified practices and to compensate for their past effect. Such agreement is gazetted and copies sent to any person complaining of the said practice/s and to any other persons the Commissioner deems to be affected by the agreement.

Should the preceding measures not be effective, either because of lack of satisfactory steps or because of breach of agreement terms, the commissioner informs the person in question that he proposes to recommend that the minister make an order regulating the practices in question and that a hearing on the desirability will be held on a specified date. Upon concluding the requisite investigation under section 16, including the holding of a hearing, the Commissioner presents his report together with recommendations to the Minister.

b) Control of unwarranted concentrations of economic power

In the case of abuse of monopolies and dominant positions, the Minister directs the Commissioner to investigate any economic sector which features one or more factors relating to unwarranted

concentrations of economic power. The Commissioner then reports back to the Minister who may make an order directing any person he deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or distribution or supply of services as the Minister deems necessary to remove unwarranted concentration. Any aggrieved person may appeal to the Restrictive Trade Practices Tribunal and finally to the High Court.

c) Control of mergers and takeovers

Mergers and takeovers effected without an authorizing order from the Minister are illegal ab initio and not justiceable. Any person intending to effect a merger applies to the Minister through the Commissioner for action by the minister. The minister may then make an order, by notice in the Gazette, requiring that ameliorative action, including specific requirements be undertaken within a given time which must be longer than twenty eight days of the publication of the order in the Gazette⁹⁴. The publication of the notice in the Gazette is an important act. This is because in the case of other infractions of antitrust law this matter is treated differently. In the case of control of unwarranted concentrations of economic power there is no requirement, whatsoever, that the Minister's order be gazetted⁹⁵. In the case of control of mergers and takeovers, the Minister is only required to cause an order to be published in the Gazette as soon as is reasonably practicable after it is made⁹⁶.

The Commissioner investigates the applications and gives his recommendations to the minister, who

may make an order of authorization either approving or rejecting the application. An aggrieved person has recourse to the Restrictive Trade practices Tribunal and finally to the High Court.

Intention

Kenya's antitrust position specifies the necessity of there being intention only in the case of predatory trade practices intended to repress competition. The intention to engage in the predatory practices may be an exclusive intention or an intention in common with other objects. The purposes covered are⁹⁷;

- (a) to drive a competitor out of business, or to deter a person from establishing a competitive business in Kenya or in any specific area or location within Kenya; or
- (b) to induce a competitor to sell assets to, or merge with another party, whether that party is the offender himself or a third person; or
- (c) to induce a competitor to shut down, whether temporarily or permanently an existing manufacturing facility or wholesale or retail outlets or outlet for the sale of services, or to deter a person from establishing any such facility or outlet in any one or more locations in Kenya; or
- (d) to induce a competitor to desist from producing or trading in any goods or services or to deter a person from producing or trading in any such goods or services.

Any person committing predatory practices with the above purposes is

guilty of an offence. Intention is not required in all other aspects of restrictive trade practices or in infractions of monopoly and dominant positions. In the case of mergers and takeovers, all unauthorized actions are prohibited per se.

Market Power

The Minister is given an imperative mandate to keep the structure of production and distribution of goods and services in Kenya under review in order to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production and distribution; and in identifying unwarranted concentrations of economic power. The minister is required, by section 23, to pay particular attention to the following factors:

- (a) a person controls a chain of distributing units the value of whose sales exceeds one-third of the relevant market for the category of goods sold by the chain, comprising the national market in the case of a national chain or a regional or urban market in the case of a regional or urban chain, respectively; or
- (b) a person, by virtue of controlling two or more physically distinct units which manufacture substantially similar products, supplies more than one-third of the value, at ex-factory prices, of the domestic market for the category of the goods into Kenya but excluding exports of goods from Kenya; or

- (c) a person has a beneficial interest, exceeding twenty per cent of outstanding shares, in a manufacturing enterprise, and simultaneously has a beneficial interest, however small, of outstanding shares, in one or more wholesale or retail enterprises which distribute products of the manufacturing enterprise; or
- (d) a person has a beneficial interest, exceeding twenty percent of outstanding shares, in a wholesale distributing enterprise, and simultaneously has a beneficial interest, however small, in one or more retail enterprises which distribute goods supplied by that wholesale enterprise.

Remedies

- (a) In matters concerning restrictive trade practices, the malfeasor is required by the Minister to desist from the trade practices prohibited by antitrust law and the Minister may also require the malfeasor to take specific steps to assist existing or potential suppliers, in order to compensate for the past effects of the particular infractions.

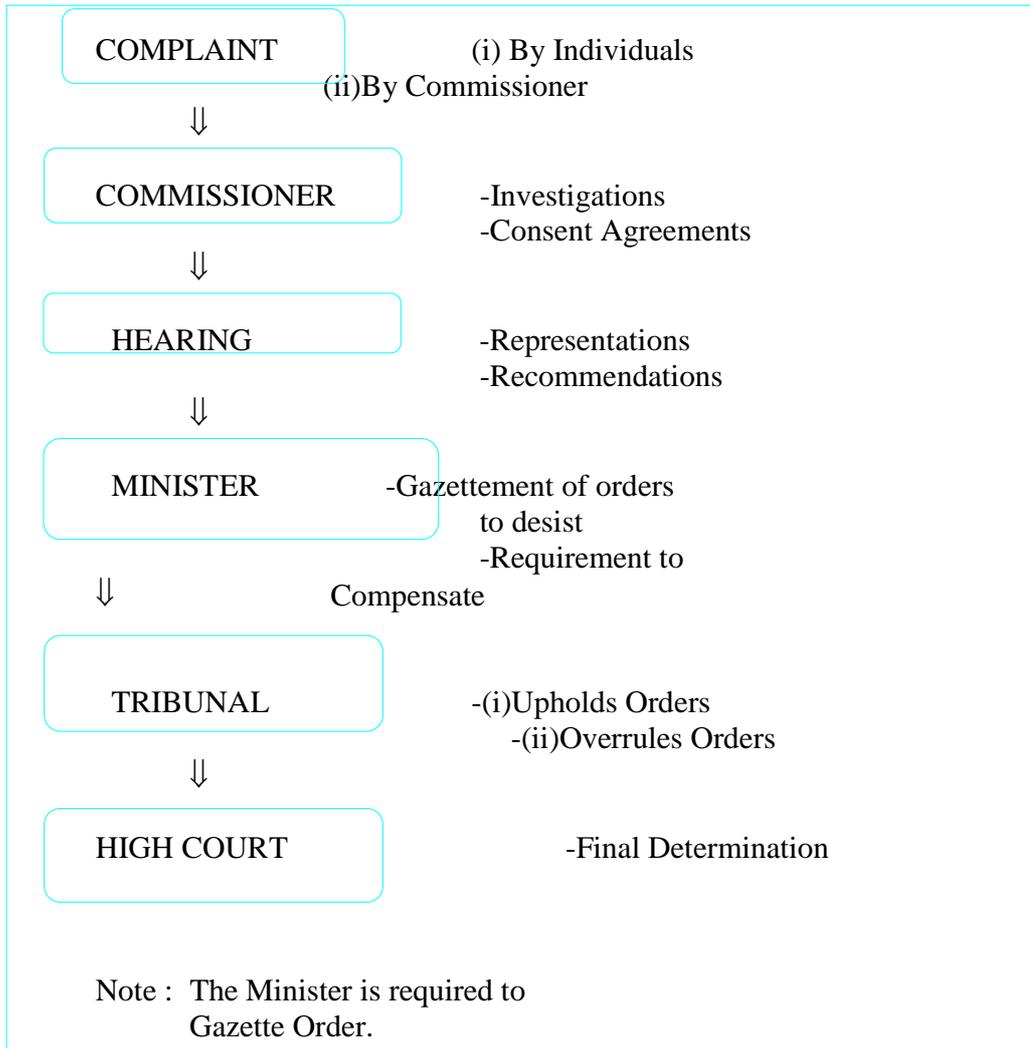
Interesting is a provision akin to the provision of the Clayton Act, one of the key antitrust laws of the United States of America. The Restrictive Trade Practices Tribunal, if satisfied that a monetary value can reasonably be placed on the damage, including loss of income, suffered by a person, as a result of restrictive trade practices committed by a person

Figure 1.1 - Restrictive Trade Practices (Kenya)

guilty under section 11 or 12 or subsection (1) of section 21, may order the convicted person, in addition to any other penalty which may otherwise be imposed, to pay a fine of two times such monetary value⁹⁸. This is analogous to the USA position with regard to suits instituted by private parties. See: *Westinghouse Electric Corp. V Rio Algon Ltd*⁹⁹. In the Clayton Act treble damages are provided for whereas in the Kenyan law, double damages are legislated for. Failure to comply with an order is also a criminal offence¹⁰⁰.

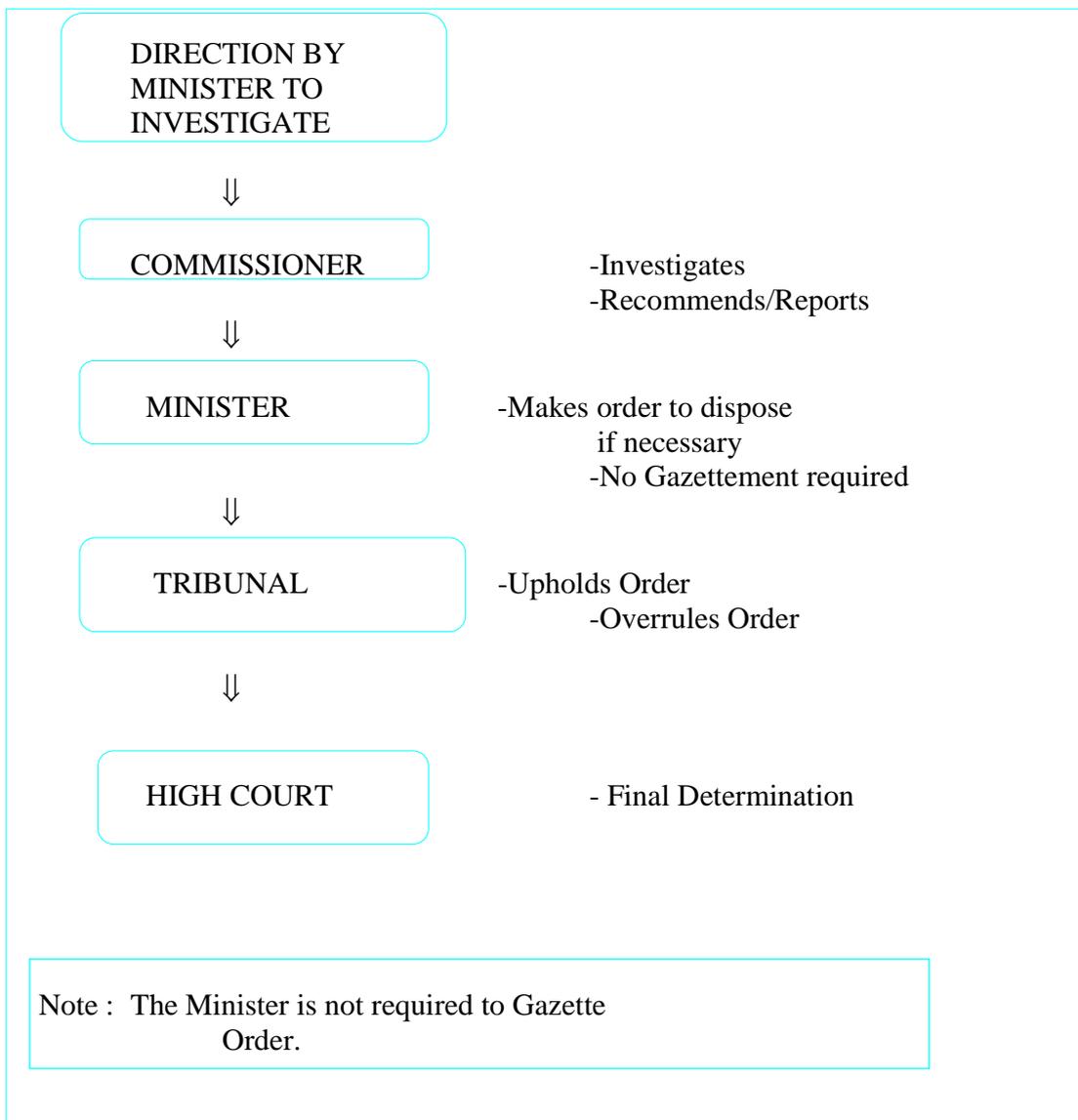
- (b) In the case of unwarranted concentrations of economic power (i.e. abuse of monopolistic and dominant positions), the Minister may direct the malfeasor to dispose of such portion of his interest in production or distribution or the supply of services as the Minister deems necessary to remove the unwarranted concentration¹⁰¹. It is also a criminal offence to contravene or fail to comply with the order of the Minister or any part thereof¹⁰².
- (c) In the case of mergers and takeovers, any action taken without the Minister's authority is void ab initio and unenforceable in legal proceedings¹⁰³. Any person contravening the law is also liable to imprisonment for a term not exceeding three years or to a fine not exceeding two hundred thousand shillings or both¹⁰⁴.

Figures 1.1, 1.2 and 1.3 here-below illustrate procedures relating to the enforcement of antitrust laws in Kenya.



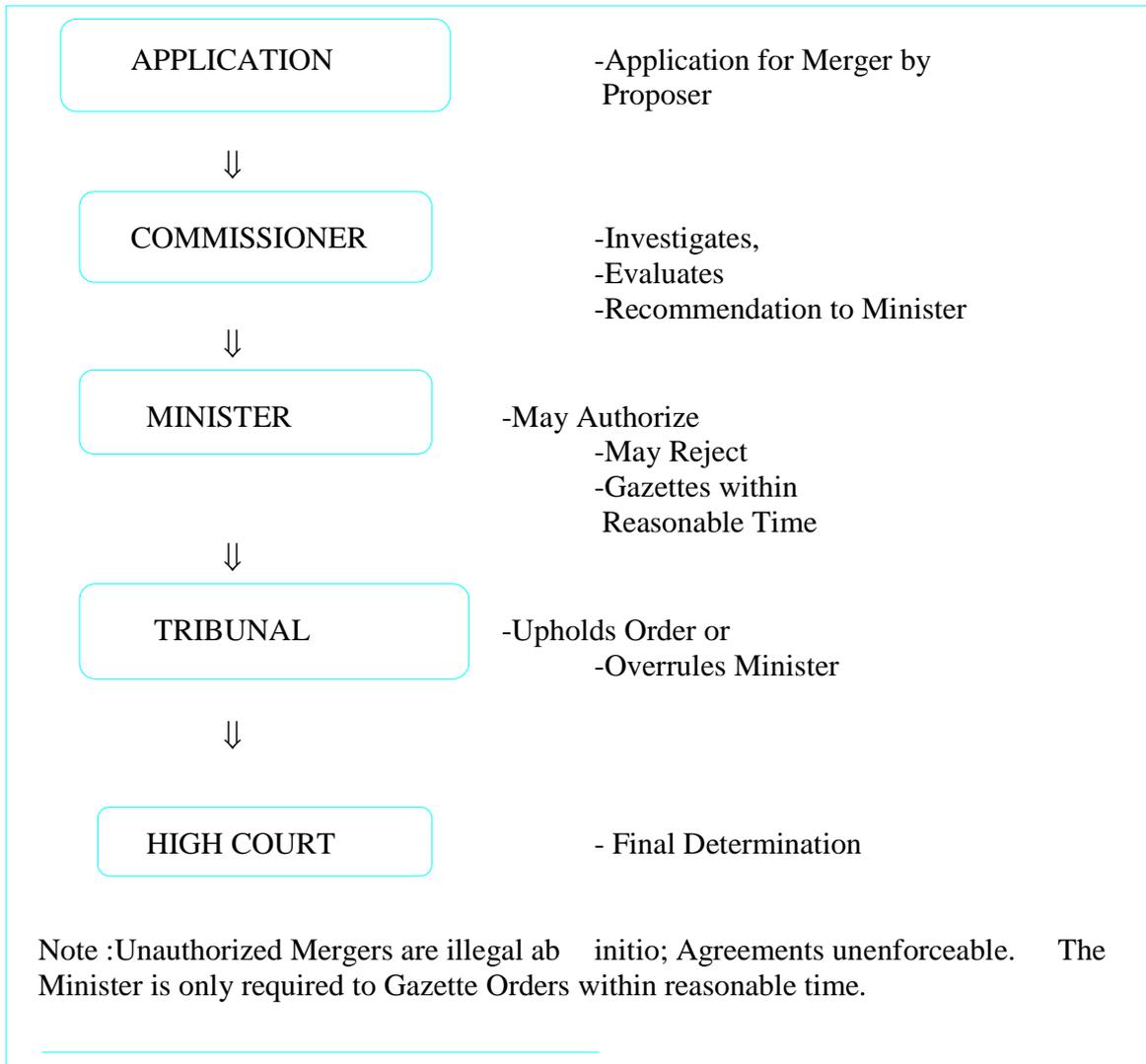
SOURCE: AUTHOR.

Figure 1.2 - Monopolies/Dominant Positions(Kenya)



SOURCE: AUTHOR.

Figure 1.3 - Mergers/Takeovers (Kenya)



SOURCE: AUTHOR.

PART IV: Enforcement Institutions

Competition cases in Kenya are handled by four principal institutions. These are Legislature (Parliament), Office of the Minister in-charge of Finance, the Office of the Commissioner for Monopolies and Prices, the Restrictive Trade Practices Tribunal and the High Court of Kenya. Each one of these institutions has its functions, responsibilities and powers clearly spelt out in the legislation.

Legislature (Parliament)

Parliament is the principal custodian of public interest in Kenya and it creates both the institutional and legislative frameworks for the promotion and protection of public interest. In the competition area, Parliament enacted the current legal instrument, i.e. the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya. And because the market is dynamic, the Law that regulates the functioning of the market must be reviewed from time to time so as to align it with the dynamic changes in the market place. My submission here is that Parliament has a functional responsibility of ensuring the updating of the country's Competition Law so that the Law is able to support and promote effective competition so as to further the economic interests of the public and the efficiency of business.

Office of the Minister for Finance

The overall responsibility for competition Policy in Kenya is in the

hands of the Minister for Finance. Section (3)(2) of the Restrictive Trade Practices, Monopolies and Price Control Act Cap.504 of the Laws of Kenya subjects the Commissioner for Monopolies and Prices to the control of the Minister and the Commissioner obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister relies heavily on the professional advice of the Commissioner for Monopolies and Prices, who, with a team of economists, financial analysts, lawyers and other necessary market analysts is the principal custodian of Kenya's Competition policy. The Commissioner, whose appointment is mandated under section 3(1) acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever situations demand. The Commissioner has the primary responsibility for conducting investigations into all possible situations of anti-competitive practices such as restrictive trade practices, abuse of dominant market power, mergers and take-overs. In practical terms, such investigations are carried out by the Commissioner's staff in the Monopolies and Prices Commission. The work involves responding to complaints by a company's competitors or customers, and carrying out informal research into markets where competition problems are thought or alleged to be present.

The Office of the Commissioner for Monopolies and Prices

The Commissioner for Monopolies and Prices is appointed in pursuant to the provisions of Section 3(1) of Kenya's Competition Law and he, in turn,

directly and indirectly controls, manages and influences competition in exercise of the powers conferred upon him by the Law and such limitations as the Minister may think fit. The Law does not provide the authority that is responsible for the appointment of the Commissioner for Monopolies and Prices. However, once the Commissioner is appointed he is independent and has a range of statutory duties and responsibilities. He heads the Monopolies and Prices Department of the Treasury and has responsibilities for efficient administration and enforcement of Competition Law. He has also responsibilities in the consumer protection field. He seeks to maximise consumer welfare in the long term, and to protect the interests of vulnerable consumers by:

- a) empowering consumers through information and redress.
- b) protecting them by preventing abuse.
- c) promoting competitive and responsible supply.

It must however be understood that the Commissioner has no powers to help individual consumers in their private disputes with traders. However, he may be able to suggest who would be in the best position to help.

The writer wishes to point out that the government of Kenya has unequivocally stated that in the near future, Kenya's Competition Authority will, through a new legislation, be accorded operational and financial autonomy. This decision has been published in the "Economic Recovery Strategy, 2003" at pages 18 and 75. The new law is at the drafting stage. During the 2003/4 Financial Year the

Competition Authority had a budget of K. Shs.30,000,000. It had 22 technical officers, all of whom had training in the requisite areas of apposite Law and Economics.

The Restrictive Trade Practices Tribunal (RTPT)

Pursuant to Section 64(1) of the Restrictive Trade Practices, Monopolies & Price Control Act, Cap.504 of the Laws of Kenya, a quasi-judicial authority, that is the RTPT, is appointed every other five years since 8th February 1991. The RTPT consists of a Chairman who must be an advocate of the High Court of Kenya of not less than seven years standing and four members. The members of the RTPT have a five years secure term of office and may be appointed for other terms of office at the expiry of the five years.

It must be stressed here that once constituted by the Minister for Finance, the RTPT is absolutely independent of the Office of the Minister and the Office of the Commissioner for Monopolies and Prices. The principal function of the Tribunal is to arbitrate our competition policy disputes resulting from ministerial orders made on the recommendation of the Commissioner for Monopolies and Prices. The RTPT has powers to overturn, modify, confirm and/or refer back to the Minister orders appealed against by aggrieved parties.

Orders and decisions of the Tribunal are only appealable to the High Court of Kenya and such appeals are only feasible within 30 days following the communication of the Tribunal's decisions/orders to the concerned parties.

The High Court of Kenya

All appellants to the RTPT in pursuant to the provisions of Sections 20(1), 251 and 31(1) in respect to ministerial orders made in pursuant to the provisions of Sections 18(1), 24(1) and 31(1) respectively who are dissatisfied with the decision of the RTPT may appeal to the High Court of Kenya against that decision within thirty days after the date on which a notice of that decision was served on him and the decision of the High Court should be final.

PART V: Practical Operation Of Kenya's Antitrust Department

As already seen, the Restrictive Trade Practices, Monopolies and Price Control Act became effective on 1st February, 1989 by converting the former Price Control Department into the present Monopolies and Price Commission (MPC). It also authorized establishment of a fairly autonomous Restrictive Trade Practices Tribunal (RTPT) to consider appeals against ministerial orders and the other ministerial actions as provided by the law.

In the developing world, Latin American countries were the first to establish such machinery, some doing so as early as the 1950s, modelling their legislation on United States antitrust law. In Asia, India and Pakistan adopted restrictive trade practices control laws in 1969-70, followed by Thailand in 1979 and South Korea and Sri Lanka in the 1980s. As at the end of 1992, Kenya was the only African country to have enacted a competition policy and to have

established enforcement machinery, although several other African countries were examining the possibility and at least one (Ghana) was reported to be drafting requisite legislation.⁷²

From 1989 to 2000, the Monopolies and Prices Commission has considered the following cases:

⁷² The source is attributed to the 1989-92 Report of the Monopolies and Prices Commission. Generally, the narration contained in this part is attributable to the reports of the Commission.

TABLE 1.1

Cases Considered by the Monopolies and Prices Commission (1989-2003)		
Year	Restrictive Trade Practices Cases	Merger and Takeover Cases
1989	7	6
1990	6	9
1991	6	10
1992	7	9
1993	7	7
1994	13	9
1995	15	14
1996	15	11
1997	10	11
1998	15	12
1999	8	24
2000	18	37
2001	18	23
2002	15	35
2003	19	20
Total	179	237

SOURCE : MONOPOLIES AND PRICES COMMISSION

It means that during the twelve year period spanning the years 1989-2000, the antitrust department handled an average of 10 cases per year in the area of restrictive trade practices. Although the 1982 report intimates that the government encourages dialogue in resolving competition cases, this is a very small number especially when it is considered that restrictive trade

practices, under the Restrictive Trade Practices, Monopolies and Price Control Act, have been given a very wide catchment area. In the area of mergers, the average is 13 mergers per year. As mergers and takeovers are ongoing businesses, this can not be said to be a very bad situation.

From the annual reports covering the twelve years, there was no indication that any merger or takeover application had been rejected by the Minister. The explanation in the annual reports was that all mergers had been found in order, meaning that they were not antitrust.

The Annual Report for the four years ending 1992 indicated that during that period only one Consent Agreement and one Order of the Minister were Gazetted. Under Consent Agreement GN No 6136 of 17th December, 1991, a carbonated soft drink manufacturer agreed to refrain from exclusive dealing as well as from predatory practices against the marketing of the competitors' products.

Under Order, GN No.5190 of 11th November, 1992, a distributor of tobacco products, was directed to continue supplying cigarettes to a particular stockist, and to any other stockists/traders he might have stopped supplying his allocated market.

One of the Restrictive Trade Practices Cases classified under exclusive dealing led to a High Court Case in 1991/92. A firm in the distilling sub-sector complained to the Commission of unfair business practices against it by a competing firm which had applied to the Minister for exemption from competition law under section 5 and which exemption had been granted inadvertently. The reports do not indicate that other cases have gone to the High Court since then.

It is clear from the annual reports that the area of control of unwarranted concentrations of economic power (monopolies) has not been activated. This is puzzling in view of the fact that

control and regulation of monopolies is one of the key areas of antitrust regulation.

According to the report covering 1989/92, the Minister of Finance constituted the Restrictive Trade Practices Tribunal through Legal Notice Number GN No.503 of 21st January, 1991. On the same date the Minister for Finance appointed a Secretary of the Tribunal. Earlier, by Legal Notice No.179 of 18th April, 1990, the Minister for Finance had enacted the Restrictive Trade Practices, Monopolies and Price Control (Appeals) Rules, governing procedures for presentation of appeals and their consideration by the tribunal.

As at the end of 1992, the Tribunal had held three organizational meetings but cases had not yet been referred to it. All indications tend to the conclusion that the Tribunal has not been active over the last five years. Indeed only one case has been referred to it since its inauguration. This related to the year 1998 International Merger of accounting firms PriceWaterhouse and Coopers. The case, however, did not proceed to its full hearing as the case was referred back to the Minister for Finance who approved the merger.

The 1996 Annual Report records the then Commission's Staff Complement as: The Commissioner, a Deputy Chief Economist, a Senior Assistant Commissioner and other officers of various cadres. In the later part of the year, a Deputy Commissioner replaced the Senior Assistant Commissioner.

The Commission, in the same year, saw the coming in of a Senior Principal State Counsel, to head the Legal Division, and

also the posting of Seven Monopolies and Prices Officers and an executive officer. Other officers included, 9 Economists, 38 Monopolies and Prices Officers, 1 Statistical Officer, 1 Senior Assistant Secretary, an Accountant II, 1 Executive Officer and several Support staff (i.e. drivers, clerical officers, secretarial staff, etc.)^{104c}.

The annual reports covering the period 1997-2000 express a recurring theme which bemoans that the Monopolies and prices Commission lacks autonomy, top-notch lawyers, top-notch economists and skills in other areas deemed crucial to the effectiveness of a competition authority.

Interestingly, the Annual Report of 1995 recorded that a merger involving Transnational Bank Ltd. and Transnational Finance Co. Ltd., was authorized by the Minister of Finance through the provisions of the Banking Act instead of the case of the Restrictive Trade Practices, Monopolies and Price Control Act. In another interesting happening, the 1996 Annual report had an item recording Tetra Pak and Alfa Laval as having entered into a merger which was detected by the Commission through the daily newspapers. When Tetra Pak was asked to furnish the Commission with information relating to the merger, it argued that the merger was consummated outside the country. The merger was found, however, not to be detrimental to competition.

PART VI: Selected Cases Handled By The Competition Authority

1. Case One- Mergers And Takeovers

The following case is intended to demonstrate how Competition Policy and Law can be used to ensure the achievement of intended public/political/governmental objectives. The new Kenyan Government had placed a premium on the creation of new employment opportunities and the protection of existing jobs when it took over power in January, 2003. To achieve this objective, the Monopolies and Prices Commission recommended conditional approval of the intended takeovers in order to protect existing employment. In a country where there is no competition law, the use of competition policy to achieve such public interest goals will not be possible.

TAKEOVERS OF THE ASSETS OF TRUFOODS LIMITED AND KABAZI CANNERS LIMITED BY PREMIER FOOD INDUSTRIES LIMITED

Introduction

Premier Food Industries Limited, an operating company of Industrial Promotion Services (Kenya) Limited applied to the Monopolies and Prices Commission on the 21st November, 2002 seeking approval to takeover the assets of Trufoods Limited and Kabazi Canners Limited in accordance with Section 28 of the Restrictive Trade practices, Monopolies and price Control Act, Cap 504.

Company Profiles

Premier Foods Limited

Premier Food Industries Limited is a limited local private company established on 28th December 1987 and is located in Baba Dogo Street (Ruaraka), Nairobi. Its business operations involve manufacturing, processing and selling of processed fruits, vegetable products and beverages. The Company is owned 75% by Industrial Promotion Services (Kenya) Limited and 25% by the International Finance Corporation (IFC) which is an arm of the World Bank Group in charge of encouraging private sector activity in developing countries. Industrial Promotion Services is an investment company whose sole shareholder is the Agha Khan Foundation and its main activity is the promotion of projects development within the private sector including industrial and infrastructural projects. It is situated in the City Centre.

Trufoods Limited

Trufoods Limited is a limited local private company not quoted in the Nairobi Stock Exchange. The Company started operations in November 1958 and is in the business of manufacturing food products. It is situated along Jogoo Road in Nairobi and sells its products in Kenya and the wider East African Community (EAC) market.

Kabazi Cannery Limited

Kabazi Cannery Limited is also a limited local private company and is also not

quoted in the Stock Market. It is located in Bahati Division of Nakuru District. The Company was established in November 1949. It also manufactures food products.

Rationale for the Takeovers

Some of the reasons given by the applicants for the proposed takeovers include:

- (i) It is envisaged that the acquisitions will greatly benefit the Kenyan consumers and enhance export potential for processed foods to EAC and COMESA markets. The acquisitions will also, as a consequence, contribute to the growth of the agricultural sector.
- (ii) Trufoods and Kabazi face dwindling low market shares resulting in lower economies of scale. Growth potential for both local and export markets is constrained and production costs and overheads are high for the two companies. This has prompted them to sell their businesses.
- (iii) To derive advantage through synergies to be spawned by combined operations with the resultant economies of scale being utilized to manufacture and process high quality products at competitive prices for the benefit of consumers. The resultant economies of scale will allow the acquiring entity to contract farmers directly and thereby improve the farmers income.

Research and Investigations

The Commission conducted the requisite research and the following was revealed

about the parties involved in this transaction and the entire sub-sector:-

- (a) There existed inter-locking directorships and shareholdings between Trufoods Ltd and Kabazi Cannery. The directors and shareholders were the same for both firms. Fifty percent (50%) of the two firms were owned by Someg Investments Limited-a Swiss firm. Someg Investments Limited did not have engagements in any other business activity hence dispelling any fear of occurrence of concentration of economic power. Twenty percent (20%) of the shares were held by one person while the rest of the shares were held by 16 individuals with none of them owning more than two percent (2%). The shareholders were all engaged in business activities which were substantially not similar to what Trufoods and Kabazi were involved in.
- (b) The specific products that Premier, Trufoods and Kabazi manufacture/process and sold could be divided into four broad categories, namely; spices and condiments, beverages, spreads, and canned products. Spices and condiments include Tomato Sauce and Tomato Ketchup; Beverages are juices, fruit drinks and concentrates; Spreads comprise jam and marmalade; and Canned products include corn, beans, peas and other vegetables.
- (c) Premier sold its products both in the local market - 4104 metric tonnes (Kshs 168 million) and export market - 218 metric tonnes (Kshs 12 million) in Tanzania, Zanzibar,

Somalia, UK and Uganda. Trufoods sold a value of Kshs 179,126,749 in the local market while Kshs 8 million was sold in the foreign markets (EAC). Kabazi's export sales were negligible while its local sales were estimated to be about Kshs 120 million. The negligible exports, alluded to herein, went to the EAC market.

- (d) The three firms had a very wide distribution network which involved over 200 distributors spread across the country. The companies also had numerous competitors in the same market. Notable among these were Cirio Delmonte Kenya Ltd, Bestfoods, Kenya Orchards Ltd, Excel Chemicals, East African Breweries Ltd, Kuguru Food Complex, Unilever, Nestle Kenya Ltd. More competition was posed by importers such as Heinz Ltd, Ceres Ltd, Robertson etc. Numerous Jua Kali sector [MSE's] players were also involved in this business.
- (e) The proposed new entity would lead to an increase in employment. At the time the takeover application was considered, Premier employed 223 people (90 casual and 133 permanent), Trufoods had 192 (113 casual/contract, 86 permanent), Kabazi 159 with 69 being permanent. The services of the staff of the two target firms, it was agreed, would be transferred to Premier Foods Limited. The 3 firms had human resource development programmes which included training on quality management, computers, ISO, HACCP, lean manufacturing, supervisory skills, waste

management, First Aid and personal health care and plant hygiene etc.

- (f) Premier Foods Ltd expected to increase the utilization of its plants to 90% after the take-over. Due to efficient purchase, manufacturing and distribution, the company expected to adopt competitive pricing mechanisms for its products which would eventually lead to increased exports.
- (g) The turnover levels for the three companies for 2001 were Kshs187,126,751 for Trufoods, Kshs 179,994,596 for Premier and Kshs 126,631,367 for Kabazi.

Analysis

The issue of inter-locking directorships and shareholdings showed that the two target firms were, for all practical purposes, one and the same and they thus were subject to the same management control on a day-to-day basis. Since the shareholders were engaged in businesses which were dissimilar to that of the firms involved in this transaction, there was little possibility that there could ensue unwarranted concentration of economic power.

Since the three firms manufactured and sold products to the wider EAC and COMESA markets, there was a real chance that with the takeovers and the possibility of a consequent improvement in efficiency, they would enhance their exports to these areas and this would go a long way into bringing more foreign exchange to the country and also spawn competitive prices for the Kenyan

consumers as a result of lower production and overhead costs.

Over 30 companies were operating in this sub-sector and none had any appreciable control of the market in any particular product. For instance, while Trufoods and Kabazi had a significant market share in the jam and tomato sauces segment, they only had a minimal market share in all the other products; Excel Limited had a bigger market share in squashes while Highlands Mineral water had more presence in mineral water and cordials. Milly fruit was a major player in the canned juices as compared to the other firms. In overall terms, there was no particular firm that could be said to be having any material dominance in the market that could lead to anti-competitive practices. Therefore, the takeover was unlikely to lead to any dominance by Premier Foods Limited. Premier's estimated market share of about 10% did not pose any competition concerns.

The survey also revealed that the market had a fair presence of the informal industries commonly known as the "Jua Kali Sector" who were now competing with the established formal industry. This enhanced competition in this market.

The two target firms were experiencing difficult times due to their ancient technology which was on the verge of becoming irrelevant and this meant that they faced the danger of closing down. The takeover looked likely to salvage this situation and thus ensure that those persons already in employment would retain their jobs. Further, the expected expansion would in the medium to long-

term create more employment opportunities in this sector for Kenyans.

Employment

Premier Food Industries Limited was only purchasing the assets of the two target companies. This being the case, it was not legally assuming any liabilities or any contractual-cum-legal responsibilities of the target companies. Such responsibilities subsumed employees. Although the proposed takeovers did not spawn any palpable competition concerns, the Monopolies and Prices Commission was cognizant of the government's commitment to creation of employment and the sustenance of existing employment. The Commission therefore obtained confirmation from Industrial Promotion Services (Kenya) Limited that it would, post-acquisition, ensure that the current employment levels would be maintained. Mr. Lutaf Kassam, the Managing Director, of Industrial Promotion Services was sanguine that the employment numbers would rise from the current 148 to about 500 in a short while as the new owners would take advantage of the EAC and COMESA integration initiatives. The Commission also obtained confirmation that all those existing employees of Trufoods and Kabazi who would wish to join Premier Food Industries would be given first priority before recruitment of any other employees by the acquiring enterprise. This would not include 3 senior managers and 4 directors.

Recommendation

In view of what is stated above, it was unlikely that the coming together of the

assets of the three firms would pose a threat to competition. In any case, Trufoods and Kabazi were owned by one group and had the same management with the result that their coming together did not change the market situation. There was also a great possibility that after being acquired by Premier, the almost obsolete technology of the two firms would be updated and this could only lead to greater and efficient production and more employment.

It should also be noted that with the emergence of the East African Community (EAC) and COMESA markets, there was need for Kenyan companies to compete in this arena effectively. The takeover would likely create a bigger, stronger and more efficient firm which was capable of penetrating and competing in the two markets and the wider global arena. This would spawn greater economic prosperity.

It was, therefore, recommended in terms of Section 29 of the Restrictive Trade Practices, Monopolies and Price Control Act (Cap 504) that the takeover be approved on the following conditions:

1. Trufoods Limited and Kabazi Canners Limited would pay all their pre-takeover employees their full employment benefits in accordance with the contractual arrangements governing their employment.
2. Premier Food Industries Limited would enter into new employment contracts with those of the said employees who would wish to become its employees.

3. Employment levels, post-acquisition, would remain at least at the same level as that subsisting at the time of the application for the intended takeover.

Source: Monopolies And Prices Commission

2. Case Two: Prevention Of Future Possible Abuse Of Dominance

The following case seeks to demonstrate that where a Competition Authority exists, its opinions are taken seriously by governments. In this case the recommendation that the National Social Security Fund should not be allowed to sell its shares in East African Portland Cement Company Limited to Bamburi Cement Company Limited was accepted by the government. The proposed sale evinced competition concerns.

The following narrative is the background and the opinion the Monopolies and Prices Commission gave to the government of Kenya. It is reproduced in its original form.

PROPOSED SALE OF 9,300,000 NSSF SHARES IN EAST AFRICAN PORTLAND CEMENT LTD AND 870,000 NSSF SHARES IN ATHI RIVER MINING LTD BY BLUE CIRCLE INDUSTRIES [BCI] OF UNITED KINGDOM

Introduction

By his letter dated June, 2000 the Managing Trustee of NSSF wrote to the Permanent Secretary, Treasury seeking approval to carry out the above-named

proposal. In this transaction the NSSF seeks to sell 9,300,000 shares which are part of its shareholding in EAPC Ltd and 870,000 shares, which is its total shareholding in ARML to Chanui Holdings Company.

The participating parties are NSSF and Chanui Holding Company. NSSF is a pension fund created by the Government of Kenya, while Chanui Holding Company is a local investment company, wholly owned by Associated International Cement (AIC). AIC is an international holding company owned by Blue Circle Industries (BCI) of United Kingdom.

This paper attempts to evaluate this proposal in accordance with the provisions of Cap. 504 of the Laws of Kenya. The paper is divided into the following three parts:

- i) Background of Cement Industry in Kenya.
- ii) Application of competition policy and law to this proposals
- iii) The way forward

cement manufacturing and marketing in Kenya

There are three factories, which produce cement in this country namely:-

- i) Bamburi Cement Limited (BCL).
- ii) East African Portland Cement Limited (EAPCL).
- iii) Athi River Mining Limited (ARML).

The three factories have annual capacity of production of 2.1 million tones while domestic consumption is 1.2 million

tones. In terms of export, it is only Bamburi which does exportation.

BAMBURI CEMENT LIMITED (BCL)

BCL is located in Mombasa and started its operation in 1954. It is a limited local public company quoted in the stock

market. It is one of the largest factories in the country with annual capacity of 1.2 million tones but sells approximately 600,000 tones annually. Currently it is commanding a market share of 54%.

The company has 13 directors as follows:

NAME	STATUS	NATIONALITY
Didier Tresarrieu	Managing Director	French
Alan Y. Lemeur (alt. Max Vogeli)	Director	French/Swiss
David Masika	Director	Kenyan
James M. Shiganga	Director	Kenyan
Geoffrey c.D. Groom	Director	Kenyan
Jean C. Hillenmeyer	Director	Kenyan
Solomon Karanja	Director	Kenyan
Joshua C. Kulei (alt. William Sambu)	Director	Kenyan
Mbuvi Ngunze	Director	Kenyan
Raphael M. Thyaka	Director	Kenyan
Richard Kemoli	Director	Kenyan
Toney Hadley	Director	British
Ronald Roy	Director	Canadian

In terms of shareholding Bamcem holding limited is leading with 73.3% of issued share capital. The shareholders are as follows:

No.	NAME OF SHAREHOLDER	No. OF SHARES	% SHARE ISSUED
1.	Bamcem Holdings Ltd.	265,907,994	73.3.
2.	National Social Security Fund	57,314,178	15.8
3.	Baloobhai Chotabhai Patel	8,249,741	2.3
4.	Barclay Trust Investment Patel	5,583,981	1.5
5.	Insurance Co. of East Africa	2,272,088	0.6
6.	Kenya Reinsurance Corporation	2,735,748	0.8
7.	Old Mutual Insurance Co.	2,347,740	0.6
8.	Others	18,537,255	5.10
9.	Total	362,942,725	100

Bamcem holding is an international company registered in jersey, Channel Islands. Its shareholders are:

- i) Cementia 40%
- ii) Costal 20%
- iii) Association International Cement (AIC) 40%

Cementia is an international holding company 100% owned by LaFarge of France.

It should be noted that the leading world cement producer namely Blue Circle of United Kingdom and LaFarge of France have an indirect shareholding in BCL making BCL more of a foreign company. It trades its products under a

brand name Boabob Cement and its market includes the Coast, Rift Valley, Western and Nyanza provinces. For its export market it relies on Uganda, Indian Ocean Islands of Mauritius, Comoros, and Madagascar. In order to capture the Nairobi Market, BCL has set up a grinding plant at Athi River and this plant was commissioned in 1999.

Recently, BCL has invested Kshs.189 million in ARML through a one year convertible bond. This will result in BCL having a shareholding of 19.4% in ARML. In order to supply the Ugandan Market better, and also capture the Democratic Republic of Congo market, it has acquired Hima Cement Ltd in Uganda.

EAST AFRICAN PORTLAND CEMENT LTD. (EAPC)

This is the second largest factory in the country with a production capacity of 800,000 million tonnes annually contributing approximately 500,000 million tonnes to the domestic consumption. It is a limited local public

company quoted in the Nairobi Stock Exchange. Its factory is located in Athi River and was commissioned in 1958.

EAPC is a Kenyan Company as the citizens have a combined shareholding of about 53%. Its shareholders are as follows:

No	NAME OF SHAREHOLDERS	NO. OF SHARES	% OF ISSUED SHARE CAPITAL
1.	NSSF Board of Trustees	24,300,000	27
2.	P/S to the Treasury	22,799,505	25.33
3.	Cementia Holding AG	13,180,442	14.64
4.	Associated International Cement Ltd	13,144,442	14.60
5.	Bamburi Cement Ltd. (Nairobi Norminees Ltd)	10,016,068	11.13
6.	Public Thro' N.S.E.	6,559,543	07.29
	Total	90,000,000	100.00

In terms of directorship EAPC has eight directors. Apart from one, all the others are Kenyans. Their names as follows:

No.	NAME OF DIRECTOR	STATUS	NATIONALITY
1.	A.M. Lulu	Chairman	Kenyan
2.	T.K. Barmazai	Managing Director	Kenyan
3.	T.K. Ibui	Director	Kenyan
4.	M. Chemengich	Director	Kenyan
5.	T. Hadley	Director	Kenyan
6.	M.L. Oduor-Otieno (Alt. G.M. Mitine)	Director	Kenyan
7.	G.C. Groom	Director	Kenyan
8.	D.W. Masika	Director	Kenyan

In 1986, the management of EAPC realized that there is need to replace its plant, as it was old (38 years). Plans were made to rehabilitate the plant and various financing agents were approached. Among those approached include Blue Circle and Cementia and they were not willing to fund the project. In 1994 the government opted to seek a loan from Japan, under Overseas Economic Corporation Fund (OECF) worth K£2,254,435 (U.S. Dollars 65 Million). This loan is fully guaranteed by the Government for seven years. The new factory was completed on December, 26, 1997 and commissioned in early 1998.

In the same period the government decided to diversify from EAPC and

started looking for a strategic partner. Two partners were approached namely, Commonwealth Development Corporation and Pretoria Portland Cement Co. of South Africa. However, this process stalled and the company is still being controlled by the Government. EAPC has a technical agreement with Blue Circle Industries where they provide advice on technical matters related to its cement and clinker manufacturing. However, under the current Government policy of divestiture, the EAPC, is targeted for privatization.

The traditional market, for EAPC is Nairobi and its surroundings. However this market has been threatened by entry of ARML and also BCL. The company

is now trying to venture, in other areas outside Nairobi, and also exploring ways of entering the export market.

ATHI RIVER MINING LTD. (ARML)

This is one of the smallest cement manufacturing plants in the country and started producing cement in 1985. However, the company started its operation in 1973 and it has been producing chemicals and minerals. It has two factories, one located in Athi River in Machakos District and the other is based in Bondora, Kilifi District.

ARML is a limited local public company and is quoted in the stock market. Its estimated annual capacity is 100,000 tones and it commands a market share of 8%.

Its Directors and Shareholders are as follows:

NAME OF DIRECTOR	NATIONALITY	STATUS	% SHAREHOLDING
Brian Rogers	Kenyan	Chairman	Nil
Harjivandas J. Paunrana	Kenyan	Vice-Chairman	28.256
Pradeep H. Paunrana	Kenyan	Managing Director	25.619
Sudhir A. Tanna	British	Director	0.270
Wilfred Murungi	Kenyan	Director	1.112
Palle J. Rune	Kenyan	Director	0.453
The Acacia Fund Ltd.	Kenyan Corporate	Director	8.162
Total			63.872

The other shares are held by about 4,000 plus shareholders, who brought shares, when the company offered for sale 23 million new shares in the Nairobi Stock Exchange in 1997.

In April 2000 ARML proposed to issue 18 million new shares, via convertible bonds to Bamburi Cement Ltd. which will give them 19.35% of the total expanded capital of the company upon conversion after one year. This proposal

has already been executed and is saving ARML three million shillings per month in terms of interest cost. As a result, Bamburi will be represented in the Board of ARML.

APPLICATION OF COMPETITION POLICY AND LAW

Under Section 23 of the Competition Law, the Ministry of Finance is expected

to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentration of Economic power exists, whose detrimental impact on the Economy outweighs the efficiency advantages, if any, of integration in production and distribution. In identifying the concentration of Economic power, the following factors are considered:

- i) A Person controls a chain of distributing units, the values of whose sales exceed one-third of the relevant market of category of goods sold by the chain.
- ii) A person by virtue of controlling two or more physically distinct units, which manufacture substantially similar products, supplies more than one third of the value.
- iii) A person has beneficial interest, exceeding twenty per cent of outstanding shares, in manufacturing enterprises, and has a beneficial interest however small of outstanding shares in one or more wholesale or retail enterprises which distribute the products of the manufacturing enterprise.

In the same law, control is defined as power to make major decisions in respect of conduct of affairs of an enterprise, after no more than nominal consultations with other persons, whether directors or other officers of the enterprise.

An unwarranted concentration of Economic power is prejudicial to public interest if having regard to the existing economic conditions in the country and all other factors which are relevant in the

particular circumstances, the effect thereof is or would be:

- a) To increase unreasonably the cost relating to the production, supply or distribution of goods or the provision of any service.
- b) To increase unreasonably the price at which goods are sold and profits derived from the production, supply or distribution of goods from the performance of any service.
- c) To reduce or limit competition in the relevant market.
- d) To result in the deterioration in quality of goods or in the performance of any service.

Looking at these provisions of the law, the main parameters to determine whether an enterprise has economic power are control and the market share. This proposal of the NSSF therefore would be evaluated under the two parameters, and the main focus will be Bamburi Cement Ltd which has a shareholding in the other two cement factories.

CONTROL

If the proposal of the NSSF to sell shares to Chanui Holding Company, is executed. The shareholding of the two companies, will change as follows:

EAPC

No.	Name of ShareHolder	Current % issued share Capital	% Shareholding after proposal is executed
1.	NSSF Board of Trustees	27	16.67
2.	P/S to the Treasury	25.33	25.33
3.	Cementia Holding AG	14.64	14.64
4.	Associated Internaional Cement Ltd. (AIC)	14.6	24.93
5.	Nairobi Nominees Ltd. (Bamburi C. L.)	11.14	11.14
6.	Public thro' NSE	07.29	07.29
	Total	100	100

Chanui is a local holding company owned wholly by Associated International Cement Ltd. (AIC). AIC is owned by Blue Circle of U.K. It is therefore assumed that the shares owned by Chanui are directly owned by AIC. From the above BCI's and Lafarge's ownership of EAPC, will increase from 40.38% to 50.70% while the Local Holding, will decline form over 52.33% to around 42%.

For the two foreign investors, Blue circle will increase its shareholding to 24.93% from 14.60% while LaFarge shareholding will remain 14.64%.

BAMBURI CEMENT LTD.

No.	Name of ShareHolder	Current % issued share Capital	% Shareholding after proposal is executed
1.	Bamcem Holding Limited	73.3	71.89
2.	National Social Security Fund	15.8	17.25
3.	Baloobhai Chotabhai Patel	2.3	2.3
4.	Barclay Trust Investment	1.5	1.5
5.	Insurance Co. of East Africa Ltd.	0.6	0.6
6.	Kenya Re-insurance Corporation	0.8	0.8
7.	Old Mutual Insurance Co.	0.6	0.6
8.	Others	5.10	5.10
	Total	100	100

NSSF will buy 5,276,315 units of shares in BCL which translates to 1.45% shareholding. After sale of these shares, the shareholding of Bamcem, will change to 71.8%. This means that the

co-sharing of Bamcem in Bamburi Cement Ltd will change among the three holding firms as follows:

No.		Current % Shareholding	After Implementation of Proposal
1.	Cementia	29.32	29.32
2.	Associated International	29.32	27.87
3.	Coastal	14.66	14.66
	Total	73.3	71.85

In Bamburi Cement Ltd the leading shareholder will be Cementia, which is a holding company owned by LaFarge.

In terms of shareholding, it can be concluded that the two leading cement manufacturing plants in the country will be owned by foreign investors who already control BCL, the leading cement

manufacturer. Again, Blue Circle will be the leading shareholder in EAPC while LaFarge will be leaders in Bamburi.

It should be noted that there is a cross directorship (inter-locking directorates) in the two companies whereby three directors of EAPC are also directors in BCL. If the proposal is executed, it will also increase this cross directorship. BCL will also be represented in the Board of ARML. This state of affairs is inimical to competition as none of the three cement manufacturing companies

in Kenya can strategize on itself as the Board member/s representing the competitor/s will avail any important information to the competitor/s.

MARKET SHARE

Currently BCL is a market leader with an estimated average market share of 55%. However, this share has been reducing over the years as the following table indicates:

ESTIMATED MARKET SHARES

FACTORY	1994	1995	1996	1997	1998	1999
BAMBURI	63.8	74	74.3	57.3	55.6	58.5
EAPC	36.2	26	23.0	36.7	37.0	34.6
ARML	2.2	6	2.2	6.0	7.4	6.9

On the other hand EAPC has a market share of 35% currently and its share has been fluctuating between 23% and 37%.

Bamburi's traditional exports market has been the Indian Ocean Islands. Due to collapse of the Asian Economies, this market has become uncertain. The Asian countries have increased their exports to these islands. The next alternative was Tanzania but there is

excess capacity in that country. The only solution for BCL is to consolidate its domestic market share and increase its exports to Uganda. In Uganda, this has been achieved by acquiring Hima Cement Ltd.

The table below shows annual disposal of Kenyan cement for the last six years in both domestic and export markets:

YEAR	1994	1995	1996	1997	1998	1999
Domestic Sales x 1000 tones	848	1,044	1,148	1,252	1,352	1,447
Export Sales x 1000 tones	616	514	447	683	748	703
Total x 1000 tones	1,464	1,558	1,595	1,935	2,100	2,150

Bamburi is the only company which exports cement in the country. From the table, it is clear that from 1997, it has been increasing its export sales.

Looking at the two parameters, control and market share, it can be concluded that Bamburi Cement Limited has dominant economic power as it controls more than 50% of cement sales in the country and, therefore, may exercise

control over the conduct of the other two factories in the area of pricing. If the NSSF proposal is carried out, it will increase further its control in EAPC and Athi River Mining Ltd.

How BCL will use its enhanced economic power may be presumed from its past activities, especially in terms of price and profit. BCL has been a price leader while the others were followers. It incurs lower cost of production than the other two factories. The cost of production in EAPC is 80% higher than that incurred by the BCL. The main contributors to this cost differential are:

Raw Materials	31%
Furnace Oil	33%
Labour	6%

YEAR END	1995	1996	1997	1998	1999
BAMBURI	1,325	1,453	1,477	563	890
EAPC	93	105	111	499	(1,294)
ARM	19	28	60	12	19

Profits in Kshs. x 1000

From the above table it can be concluded that BCL has been making substantial profits throughout the five years. The profits have also been increasing. The other two factories have been making minimal profits compared with Bamburi.

As mentioned earlier, Bamburi has bought convertible bonds in ARML. One of the conditions given to ARML was that they should buy clinker from Bamburi. This resulted in ARML closing down its clinker plant. This resulted in reduction of competition in the production of clinker as for now only EAPC and Bamburi are producing clinker. Clinker is an essential raw material in production of cement.

Grinding and packing	5%
Factory overheads	5%
Total	80%

The cost differential between EAPC and Bamburi in 1999 was estimated at about Kshs. 2,500 per tonne. The implication of this is that the BCL products should be cheaper than EAPC. The obvious deduction is that BCL Cement is priced unreasonably high.

The profits for the two factories during the 1995 to 1999 period are shown here below:

Profit before tax for Kenya Cement Industries

THE WAY FORWARD

Cement is a basic input in construction and building industry which plays an important role in economic development of the country. This product has no substitutes and due to its importance in national economic growth, it has been referred to as a "strategic material". There is need therefore to keep the structure of the cement market efficient and competitive.

EAPC is controlled and managed by Kenyans. The Government has been granting loans to the company although and currently EAPC has a government guaranteed loan from OECF. The Company is financing its obligation without any recourse to the Government. Despite the foreign exchange losses, the

company has been paying dividends to the Treasury almost every financial year. It has a state of the art modern factory at Athi River.

In terms of marketing, the company has a strategic position compared to BCL. It is near Nairobi, the most lucrative market for cement. With improved financial and technical management, EAPC can check the monopoly position currently enjoyed by BCL.

Arising from this therefore, the NSSF proposal to sell shares to Chanui Holding Company should be shelved for the time being. Members of the public should be given the first opportunity to subscribe to these shares through IPO at the Nairobi Stock Exchange.

Therefore, NSSF should be advised to sell these shares in an open market through Nairobi Stock Exchange. This will achieve accountability and transparency in the disposal of these shares and create opportunities for Kenyans and other investors to buy them. It will also promote competition in the cement manufacturing industry.

POSTSCRIPT

1. The Government accepted the advice of the Monopolies and Prices Commission and NSSF was denied authority to sell its shares in EAPC as per its original proposal.
2. Around July, 2001 LaFarge acquired Blue Circle worldwide to create the world's biggest cement group. The acquisition agreement had been reached during the first week of

January, 2001.⁷³ Automatically LaFarge took control of BCL. Through this acquisition LaFarge took charge of 41.7 per cent shareholding in EAPC, BCL's competitor. Through the same deal LaFarge acquired 19 per cent in the shareholding of BCL's third, albeit small, competitor. This had the effect of allowing representatives of LaFarge to sit in the Boards of all the three cement manufacturing companies in Kenya. Had the proposal to sell NSSF shares as originally planned been approved, the control of the cement industry by LaFarge would have been tighter.

PART SIX

Like many other developing countries, it is difficult to get good and very reliable market data in Kenya. In some Merger and takeover cases competition authorities merely rely on information provided by the applicants. This is a very undesirable position. The same situation exists in the area of restrictive business practices. Concerned governments should address this problem. An indicative Market structure for Kenya is proffered here-below.

⁷³ See Financial Times, 9th January, 2001.

Indicative Market Structure for Kenya: 1992 and 2000.

S/no.	Item	Specific/Good/Service	Indicative Nature of Monopoly/Competition	
			1992	2000
1.	Petroleum	Imports/Wholesale supply	Public monopoly	8 firm oligopoly
		Distribution	No monopoly	8 firm oligopoly
2.	Fertilizer	Imports	No monopoly	Competitive
		Distribution	No monopoly	Competitive
3.	Exports of crops	Tea	No monopoly	Competitive
		Coffee	No monopoly	Competitive
4.	Production Activities	Wheat Flour Milling	No monopoly	Competitive
		Maize Milling	No monopoly	Competitive
		Sugar Production	Public monopoly	Competitive
		Vegetable Oil production	No monopoly	Competitive
		Textile production	No monopoly	Competitive
		Cement production	Public monopoly	3 firm oligopoly
		Mineral Extraction	No monopoly	Competitive
5.	Import Trade	Wheat	Public monopoly	Competitive
		Rice	No monopoly	Competitive
		Sugar	No monopoly	Competitive
		Other Staple Foods	No monopoly	Competitive
		Vegetable Oil	Private monopoly	Competitive
		Medicines	No monopoly	Competitive
		Textiles	No monopoly	Competitive
		Cement	No monopoly	Competitive
6.	Services	Banking	No monopoly	Oligopolistic Competition
		Telecommunications	Public monopoly	Duopoly
		Hiring of Labour	No monopoly	Competitive
		Personal Insurance	No monopoly	Competitive
		Import Insurance	No monopoly	Competitive
		Urban Bus Transport	No monopoly	Competitive

Source: Adapted from World Bank 1994, Table A. 11

**PART VII:
Kenya's Approach To Extra
Territorial Issues**

Internationally, Kenya is a member of the World Trade Organization. Regionally it is a member of both the East African Community and COMESA. It has obligations emanating from its membership of these bodies. At the WTO level, Kenya effectively participated in the proceedings of the Fifth Ministerial Conference which took place in Cancun, Mexico, in September 2003. At the National Level, the Commissioner of Monopolies and Prices chairs the Trade and Competition Working Group of the National Committee on the World Trade Organization. This gives the competition authority an opportunity to advocate its mandate nationally. The Kenyan position towards the Cancun Conference as articulated by this working group was as follows:

“As a developing country, Kenya notes that it is still grappling with the tremendous challenges of establishing viable, effective and efficient structures for a national competition regime. These structures should subsume the creation of a strong competition policy and law. In juxtaposition with countries from the developed world, exemplified by countries/unions such as the USA, Canada, and the EU, Kenya has only experimented with a national competition regime for only a decade, while all the others have had effective competition policies and regimes for fifty years and above. Indeed, most, if not all, developing countries are either striving to improve their domestic Competition Regimes’ institutional

capacities or even attempting to establish them, as no Competition Regimes exist at all in many of the developing states. Like other developing countries, Kenya requires time and resources to nurture effective policies and structures and also to reflect upon the effects of a multilateral agreement in this area. Kenya, therefore, subscribes to the notion of progressivity and flexibility in all matters apposite to competition to allow it time and space to nurture a firm and sustainable competition culture and to build institutional capacity for the enforcement of competition principles and rules.

“Kenya, the above view notwithstanding, is a member of WTO and will participate fully in its affairs and will embrace those facets of such affairs which will spawn benefits to its people. In any such matters, Kenya’s position will be as follows:

“That Kenya:

- i) Supports the good work being undertaken by the Inter-Governmental Group of experts [IGE] and the Working Group on Interaction Between Trade and Competition Policy [The Working Group]. Taking note of the fact that the two groups have not completed their work. It recommends that the two bodies be allowed time to complete their work. Pending submission and consideration of their reports, Kenya’s position is that no definitive decision should be reached.
- ii) Recognizes that the conduct of TNCs, hardcore Cartels and Cross-Border Mega Mergers may spawn

deleterious effects the world over and supports the IGE'S resolution that the UNCTAD secretariat should instigate and facilitate a study on the anti-competitive effects of unwarranted economic concentrations. Kenya will, in all circumstances, retain its independence of action and decision-making in relation to restrictive trade practices and other forms of assault by TNCs on its sovereign economic space.

- iii) Regarding other restrictive trade practices, Kenya is of the view that as a developing country there is need for its enterprises to be afforded time and resources to create critical masses which will allow them to marshal some muscle in the world competition arena.
- iv) Subject to its unequivocal stand encapsulated under paragraph 1 hereof, Kenya supports the activities of IGE under UNCTAD geared towards the promulgation of a possible multilateral arrangement which should take into account the diversity of member states, both developing and developed, in levels of development, institutional capacities and structures. Any such multilateral arrangement should subsume, and be predicated upon, the principles of diversity, progressivity and flexibility alluded to earlier. In addition, any such arrangement should not be employed as a way of "clipping the wings" of comparatively stronger firms in the developing countries by well established firms of the developed world. Before actualization of any such multilateral arrangement,

developing countries should be accorded requisite assistance in strengthening their expertise and to buttress their effectiveness during multilateral negotiations and when called upon to cooperate in issues germane to competition policy. Furthermore, Kenya feels that a system to monitor and evaluate the short-term and long-term implications of a multilaterally negotiated Trade and Competition Policy, particularly on Developing Countries, must be integrated into any eventual agreement, if ever one is reached, with corrective measures prescribed on a diversity-progressivity-flexibility principles basis.

- v) Is of the view that in order to come up with appropriate and harmonized policies on both Trade and Competition, there is need for improvement of co-operation at three levels. One, among national competition authorities particularly on information exchange. Two, among governments. Three, between competition agencies and enterprises. This co-operation will promote a harmonized approach to issues such as cross-border mergers, hardcore cartels, dumping, subsidies, deferential tariffs etc. Requisite consultations should be encouraged and dispute resolution mechanisms should be embraced. This co-operation will assure equality of treatment for member states.
- vi) At the national level subscribes to the practice of governments to ensure that competition policy considerations are taken into account in the formulation and

implementation of trade and other related policies.

- vii) Will apply the provisions of safeguards and special and differential treatment (S&D) in the WTO agreement to cushion its infant industries for purposes of protecting its fundamental interests in areas such as agriculture and security and in any other area which may affect the social and economic stability of the country.
- viii) Supports the resolution of the Fourth UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. It also supports the proposal that UNCTAD should initiate a study to consider the possibility of the establishment of a completely new organ for the promotion of consumer interests.
- ix) Is of the view that labour standards, environment and human rights issues are well addressed by other UN Agencies such as the ILO and UNEP and should therefore not be linked to Trade or Competition.
- x) Furthermore, Kenya feels that a system to monitor and evaluate the short-term and long-term implications of a multilaterally negotiated Trade and Competition Policy, particularly on Developing Countries, must be integrated into any eventual agreement, if ever one is reached, with corrective measures prescribed on a diversity-progressivity-flexibility principles basis.

- xi) Supports the view that competition policy should be juxtaposed with a comprehensive adoption of consumer protection measures. Countries should be allowed time to establish consumer protection laws to safeguard the welfare of their citizens. This is of utmost importance since competition is meant to enhance community benefits.
- xii) Requests WTO to collaborate with UNCTAD in all matters germane to the proposed multilateral arrangement on Competition Policy.
- xiii) Supports co-operation between members states in technical assistance, training and in all forms of capacity building but any such assistance to developing countries must not be predicated upon the condition that the member states must subscribe to any multilateral agreements.
- xiv) Recommends that a mechanism be established to operationalize the existence of Bilateral, Regional and Multilateral Peer Review Sessions with a view to the achievement of eventual global convergence on Trade and Competition Policy.”

PART VIII: Challenges

Although Kenya was one of the first African Countries to enact a competition policy and also establish an enforcement machinery (the MPC), the transitional arrangement promulgated through Cap.504 still obtains. Countries such as

Zimbabwe and Zambia whose Competition Authorities were established much later, are now autonomous Competition Authorities. The New South African Competition Authority which was established only a few years ago is both financially and operationally autonomous. It also enjoys concurrent jurisdiction with sector regulators in all matters germane to competition law and policy.

The MPC, by law, is a department of the Treasury. Although the law has bestowed upon the Commissioner the Control and Management of the MPC, his legal remit is subject to the control of the Minister for Finance. Furthermore, although Cap 504 was intended to be a transitional piece of legislation, it has not been reviewed since its promulgation. Although all prices were decontrolled before the end of 1994, Cap 504, still retains the price control provisions. A recrudescence of this price control recently manifested itself in the Kenyan Parliament in the form of the Joe Donde bill intended to regulate interest rates and in the proposed bill intended to regulate the prices of petroleum products. It should be cautioned that Kenya has obligations both regionally and internationally to promote competition and to enforce anti-monopoly/anti-trust law!⁷⁴. The legal provisions encapsulated in Cap 504 are rather convoluted. The provisions of the existing law do not provide for elaborate and definitive enforcement procedures. For instance in the EU Countries,

⁷⁴ The Bill proposing statutory controls on Bank Interest Rates was actually passed by Parliament. It has, however, been mired in litigation at the High Court and some of its provisions were declared unconstitutional. It has, therefore, not taken effect.

competition authorities have powers to conduct dawn raids. Nearer home, the South African and Zambian authorities have been granted wide-ranging and effective powers. In Kenya, MPC is reduced to the position of being reliant upon the information given by the “suspects”. The Law also does not clarify how MPC should relate to the Police Department or the Attorney General’s Chambers. In the EU a legal framework has been promulgated to capture extra territorial infractions of antitrust law, including Mergers, and Acquisitions. The Kenyan law should accord the MPC such a legal framework to handle anti-trust cases which spawn international ramifications.

It is through the same spirit of promoting whimsical subjectivity that section 16 of the act allows the Commissioner to authorize any person in writing to conduct all or any portion of any hearing on his behalf. The person in question does not have to be an officer of MPC. He or she can be an unemployed graduate or even a messenger. He or she could be indigent. The options are legion!

Whereas many Competition Authorities from the developed World have provisions for application of the de Minimis rule when dealing with mergers, this is not the case in Kenya. The Kenyan system prohibits relevant horizontal mergers per se. This is a system that may be abused by egregious subjection of businessmen and businesses to negative bureaucracy.

In matters of economics and business, time is of the essence. When dealing with restrictive trade practice complaints, when controlling

concentrations of economic power and when controlling mergers/takeovers, the time within which investigations should be completed should be established by law, subject to the caveat that the period may be extended where the parties do not fully cooperate with MPC.

The existing provisions of the law do not give the Kenyan competition authority a legal framework to delve into the areas of Advocacy, Education and Publicity. During a recent regional seminar⁷⁵, it was acknowledged that Advocacy, Education and Publicity are key to the success of competition Authorities. The success of both the UK and the South African Competition authorities was ascribed to their successful education and publicity programmes.

In the recent past, and particularly due to liberalization of state enterprises, there has been a proliferation in the number of sector-regulators. A legal mechanism should be provided to allow coordination and cooperation between the Macro-Regulator (MPC) and sector regulators to ensure that competition principles are systemically upheld.

With regard to consumer welfare, the law should give the competition authority a legal operational framework. This is not the case today. A simple example is apposite. Under the Trade Descriptions Act (Cap 505), false or misleading indications as to price constitute an offence. Even though price is involved here, the Monopolies and Prices Commission has no mandate. Rather it is the Weights and Measures

department which deals with such infractions.

A plethora of Laws spawn anti-competitive tendencies. These, inter alia, include, many of the Acts establishing professional societies such as the Law Society of Kenya, the Industrial Property Act, the Seeds and Plants Varieties Act, the Coffee Act, the Trade Licensing Act etc. These Laws should be harmonized so that they accord with modern competition laws.

The provisions of the law establishing the Trade Practices Tribunal expose members to intimidatory possibilities. They are paid on ad hoc basis. The remuneration is in the form of subsistence and travelling allowances determined by the Minister. Yet they are supposed to handle appeals against the Orders of the Minister.

The members of the Tribunal are appointed by the Minister. And yet the aggrieved persons appeal against the Minister's orders to the Tribunal. This is against natural justice. It is like the judge (Minister) appointing a prosecutor (the Commissioner) who prosecutes the case before the judge (Minister) having the appeal from his case heard by an appellate judge (the Tribunal) appointed by the judge (Minister) himself. The basic checks and balances are lacking. To make matters worse, the Minister makes the rules that regulate the operations of the tribunal.

The enforcement of antitrust law inexorably requires the antitrust staff to interact with businessmen who are being investigated. Businessmen who attract the attention of the antitrust authority are almost invariably the successful ones.

⁷⁵ Report of the Regional Seminar on Competition Policy and Law, Mombasa, Kenya, March, 2001, sponsored by UNCTAD.

The government of Kenya has stated that overwhelming bureaucracy and corruption are considered by many entrepreneurs to be a major source of frustration to the business community. The Government has also stated that it is determined to root out corruption .

PART IX: The Way Forward

It has been demonstrated that the government of Kenya has committed itself to the promotion and sustenance of a Competitive Market place nationally, regionally and Internationally. The need for a regulatory regime has also been discerned. In order to successfully police antitrust issues, the deficiencies identified above and any others which have not been pointed out should be remedied. More particularly the following recommendations are made:

1. The MPC should be granted financial and operational autonomy. There is also need to establish a Board of Directors/Commissioners.
2. The Tribunal should be accorded full autonomy.
3. Both the Competition Authority and the Tribunal should be manned by a cadre of professional staff who should be well remunerated.
4. There is need to harmonize various laws so that anticompetitive practices can be adequately policed. These laws, inter alia, include, the Banking Act, the Seeds and Plant Varieties Act, the Trade Licensing Act, Laws establishing deregulated public corporations, etc.
5. The Law should provide for the application of the de minimis rule in the area of Mergers. A minimum threshold should be established.
6. The Law should provide for the capture of extra-territorial infractions in merger cases.
7. Provisions which contain non-transparent procedures e.g. Sections 18, 24 and 31 of Cap 504 should be amended to obligate the Minister to take appropriate action as and when necessary. This suggestion will become superfluous once the Competition Authority is made autonomous. Similarly Section 16 of the Act which allows the commissioner to authorize "any person" to conduct a hearing should be amended to usher in objectivity in the enforcement of antitrust law.
8. The time frame within which cases should be investigated should be provided for.
9. The retention of Part IV of Cap. 504, which relates to the Control and Display of Prices should be done away with. Through Legal Notice No. 382 dated 28th October, 1994, the government removed petroleum products as the last item from the price control regime.
10. Even though competition should be allowed to rule supreme in an untrammelled manner, unfair competition is one of the areas that should be overseen by an antitrust authority. Kenya is a member of the World Trade Organization (WTO) and is bound by the Organizations

antidumping provisions. As the antidumping international perspective is a possibility in the area of international trade, an antidumping legislative regime should be promulgated for the Kenyan antitrust agency.

11. A legal framework to enable the Kenyan Competition Authority to handle Consumer Welfare Issues should be established.
12. A legal mechanism of Coordination and Cooperation between MPC and Sector Regulators to ensure that competition principles are systemically upheld should be established.
13. The Competition Authority should be strengthened through conferring effective enforcement powers to it.
14. There is need to provide for the advocacy role of the Competition Authority both as the adviser of the Government and as the protector of the competition interests of enterprises and consumers.
15. The envisaged new law should embrace a flexible macro-dynamic framework by making it possible for the Competition Authority to promulgate requisite regulations as changing circumstances demand instead of unnecessarily resorting to parliamentary amendments.
- 16.

PART X: Latest Developments

We have seen that Kenya's Competition Policy is committed to the promotion of

competition nationally, regionally and internationally. However, the existing law denies MPC legal, financial and operational autonomy. The law contains convoluted provisions which render its enforcement cumbersome and sometimes even impossible. Section 5 validates antitrust conduct done under legal veil. It is necessary for the law to be reviewed so that this unnecessary veil is lifted. The present law needs to be harmonized with sectoral laws so that the MPC, as a macro-regulator, is bequeathed with a legal framework for cooperation with Sector Regulators. The enforcement procedures contained in the present law are veritably inadequate. In the realm of consumer protection, the present law is completely silent and this is an undesirable state of affairs. More apposite, during the obtaining Information Super-highway Age, Kenya's competition law needs to embrace E-Commerce and other modern Information Systems predicated ramifications, including an Information Technology mechanism for cooperation with other Competition Authorities.

The realm of International Trade continues to offer challenges of unparalleled enormity. There has been an ubiquitous influx of cheap imports into the local markets. This has spawned competition concerns and more so because the cheap imports are posing a threat to many local companies which are finding it difficult to compete. There is an urgent need to level the playing field to obviate the spectre of unemployment which is already high in Kenya.

This problem is compounded by the on-going attempts by the developed world to introduce global competition rules

through the World Trade Organization. Some Kenyans have interpreted this to be an indirect way of giving the developed world's multinationals untrammelled access to the markets of the least developed and developing countries. This is in spite of the uncontroverted fact that in at least one area, rich countries have been overtly protectionist. This is the area of agriculture. Rich countries spend over 300 billion US dollars a year supporting their farmers⁷⁶. This is as much as the entire national product of sub-Saharan Africa! This frightening possibility buttresses the urgent need for strengthening Kenya's Competition Authority so that it is well placed to not only handle domestic competition concerns but to also embrace future realities in a fast changing world.

The Monopolies and Prices Commission has striven to play its part as a veritable impartial arbiter in the market place. In doing so, it has, all along, subscribed to the belief that competition is the best all-round economic framework for resource allocation and development. However the MPC requires legislative, financial and operational reinvigoration if it has to effectively and efficiently consummate its mandate. Through the strengthening of the Macro Regulator (MPC) or its successor by whatever other name it is to be called, the country will enhance its fulfillment of national, regional and international obligations relating to competition matters.

It is heartening to note that recent pronouncements by the government have rekindled the hope that Kenya will soon

⁷⁶ The figure of 300 billion dollars is liberally mentioned in WTO and other publicly accessed documents including International magazines.

be having a robust and effective Competition Authority. The Ministerial Rationalization Report of the Ministry of Finance and Planning, prepared as part of the Civil Service Reform Programme, has stated:⁷⁷

The following functions have also been proposed for granting of Autonomous status as Government Agencies:

- Kenya Institute of Public Policy Research and Analysis
- Insurance Department
- Monopolies and Prices Commission. ”

The same Ministerial Rationalization Report has also recommended, in respect of the Monopolies and Prices Commission, that:

- the staff establishment be reviewed in order to provide for senior positions in the fields of Law, Trade, Commerce and Economics.
- The Restrictive Trade Practices, Monopolies and Price Control Act [Cap. 504 of the Laws of Kenya] be replaced with a Competition and Fair Trade Act.
- The Commission's institutional set up or framework should be accorded autonomy with proper legal jurisprudence to perform its mission more effectively; and
- Legislation on Competition and Fair Trade should also provide for the assignment of mandate over policy responsibility in government.

⁷⁷ Ministry of Finance Rationalisation Report, Civil Service Reform Programme, Government of Kenya, 2000.

It is quite clear that more and more Kenyan Policy Makers do now understand the importance of an effective competition policy and law.

PART XI: Conclusion

We have seen that Kenya is quite young in the area of competition policy and law. The paper has traced Kenya's evolution from the open culture of anticompetitiveness, which was intentionally embraced by the colonial government, to the present culture of limited, though growing, appreciation of the need for open and competitive markets.

The law enacted in 1988 and operationalized in 1989 allowed Kenya to regulate competition in the generic areas of Restrictive Business Practices, Monopolies and Concentration of Economic Power. The law, however, failed to give autonomy to the competition authority which remains under the control of the central government. The act contains contradiction and vague provisions which make it difficult to enforce. There are also many other laws which require harmonization with the competition law. These weaknesses notwithstanding, the competition authority has handled 179 Restrictive Trade Practices cases and 237 Mergers and Takeovers cases from 1989 to 2003. It has also conducted frequent sectoral studies which have provided invaluable data for use in market analysis. The competition authority has also continued to surveil the market and in this role has no doubt discouraged many enterprises and individuals who would have otherwise

assaulted the competitive process in Kenya.

Finally, the paper has demonstrated the determination of the government of Kenya to promote competition in the national economy. This commitment towards effective regulation of competition is buttressed by the ongoing review of the existing law with a view to granting the competition authority effective autonomy and amending the Act to reflect modern competition principles.

: Annex I: Selected cases by the Monopolies and Prices Commission

3. Case Three-Collusion/Price Fixing

The Commissioner of Monopolies and Prices and The Association of Kenya Insurers

1. This case addresses the problem created by a powerful Cartel in the Insurance Industry in Kenya.
2. The case also addresses the problem posed where there is a sector regulator in the particular industry being investigated by the Competition Authority.

The Association of Kenya Insurers is one of the strongest industry associations in Kenya in terms of financial clout and a hundred per cent membership of the actors in the Insurance Industry. Its rules required all members not to reveal the decisions and strategies of the association. Hefty fines were imposed on those members who failed to abide by the prices and practices decreed by AKI. The fixing of insurance premium prices

had been taking place for quite some time. However, as happens with cartels, it was difficult to get hard evidence.

The repression of competition in the insurance industry in Kenya caused uproar. Insurance brokers and players in the transport industry protested. At one time, all Matatus (minibuses used in an estimated over 90% of public passenger transportation in Kenya) threatened to remove their vehicles from the Kenyan roads. The Association of Kenya Insurers called a truce and started negotiating with the Matatu Welfare Association quietly regarding reduction of the fixed prices. At this point, the Monopolies and Prices Commission made a break through and obtained a copy of the AKI Motor Rating Schedule dated 4th June, 2002 which set rates, terms and benefits to apply to all motor policies issued after 1st July, 2002. The Commission also obtained a copy of AKI Resolution 07/2002 wherein it was resolved and agreed that other supplementary rates would apply with effect from 1st January, 2003.

The Commission wrote the following letter to AKI:

7th February, 2003

Restrictive Trade Practices

In accordance with Section 15 of the Restrictive Trade Practices, Monopolies and Price control Act, Cap 504 of the Laws of Kenya, I wish to inform you that allegations have been made that you have been engaging yourselves in Restrictive Trade Practices and specific evidence has been presented to substantiate those allegations. The allegations are:

1. You have been making, directly or indirectly, recommendations to your members which relate to the prices charged or to be charged by your members.
2. You have been making, directly or indirectly, recommendations to your members which relate to the terms of sale of insurance services and those recommendations directly affect prices, profit margins included in the prices or the pricing formula used in the calculation of prices.

I, therefore, invite your association to comment on the above allegations and the evidence provided to us, and to indicate what remedies (if any) you propose in order to bring your trade practices into conformity with the Restrictive Trade Practices, Monopolies and Price Control Act. The evidence relates to the rates, terms and benefits contained in the AKI Motor Rating schedule effective from 1st July, 2002. By powers conferred upon me by Section 15 of the Restrictive Trade Practices, Monopolies and Price Control Act, I request you to furnish your response to me, latest, by 24th February, 2003.

COMMISSIONER
MONOPOLIES AND PRICES
COMMISSION

AKI replied as follows:

19th February, 2003.
RESTRICTIVE TRADE PRACTICES

We refer to your letter dated 7th February, 2003 regarding allegations

made against this body concerning alleged restrictive trade practices. We observe that your letter does not disclose the identity of the complainant or the nature of the evidence presented to you, as required by law. In any event, we now wish to address you as follows:

1. The Association of Kenya Insurers

1.1 The Association of Kenya Insurers (“AKI”) is a Society registered under the Societies Rules (1968) and under Certificate of Exemption for Registration number 2166 of 5th January 1988. Its objects include:

“Protecting, promoting and advancing the common interests of members including the taking of such concerted measures as may be deemed expedient whenever the business of the members of the Association may be affected by the action or proposed action of any authority, organization, body or person; and to acting as a medium of consultation and communication with the Government.”

2. The Insurance Act

2.1 The insurance industry is regulated by the Commissioner of Insurance appointed by the Minister of Finance in accordance with Section 3 of the Insurance Act. Section 5 of the insurance Act (the “Act”) further provides that:

(1) Subject to this Act, the duties of the Commissioner shall include:

a) the formulation and enforcement of standards in the conduct of the business of insurance with which a

member of the insurance industry must comply;

b) directing insurers and reinsurers on the standardization to contracts of compulsory insurance;

c) directing an insurer or reinsurer, where he is satisfied that the wording of a particular contract of insurance issued by the insurer or reinsurer is obscure or contains ambiguous terms or terms and conditions which are unfair or oppressive to the policy-holders, to clarify, simplify, amend or delete the wording, terms or conditions, as the case may be, in respect of further contracts;

d) the approval of tariffs and rates of insurance in respect of any class or classes of insurance;

e) such other duties as the Minister may assign to him.

(1a) The Commissioner may, with the approval of the Minister make regulations for the purpose of giving effect to the provisions of this Part.

(2) The Commissioner shall, as soon as reasonably practicable after each year ending on 31st December, furnish to the Minister a report on the working of the Act during that year together with summaries of returns and documents deposited with him under Part VI during that year; and the minister shall lay the report before the National Assembly as soon as reasonably practicable thereafter.”

2.2 It will be noted that Section 5(1) (d) imposes a duty on the Commissioner

of Insurance to approve tariffs and rates of insurance in respect of any class or classes of insurance and Section 5 (1A) permits the Commissioner to make regulations for the purpose of giving effect to the provisions of that Part.

Each insurer in Kenya is required to present its proposed rates to the Commissioner of Insurance for approval. In actual fact it is the Commissioner who specifies the range within which such rates may be levied (see Section 5 (1) (d) set out a paragraph 2.1 above) and no insurer is permitted to charge rates outside those parameters. It is therefore mandatory for insurers to charge premia within those specified parameters under the Act.

2.3 Section 75 of the Act requires an insurer carrying on general insurance business to file with the Commissioner a schedule or manual of rates of premia, proposed to be used by each insurer for each class of business. The Commissioner is entitled under Section 75 (5) to require an insurer to modify or revise the schedule or manual of rates filed with the Commissioner for his approval. As part of its self-regulation procedures AKI requires each of its members (which are all insurers licensed and registered to conduct insurance business in Kenya) to comply with the rates and terms set out therein.

2.4 The Insurance Advisory Board created by Section 157 of the Act has, as amongst its functions set out in Section 163 of the Act;

- (a) to advise the Minister with regard to any matter regarding the insurance industry, including rates, terms and conditions of policies, operation of the act whether arising from the Commissioner, the industry or other source, or as may be referred to the Board by the Minister;
- (b) assist the Commissioner in matters relating to the insurance industry including formulation of standards in conduct of business; and
- (c) deliberate and advise the Minister on disputes between the Commissioner and the insurance industry.”

The Commissioner of Insurance carries out his duties under Section 75 of the act in accordance with the advice given to him by the Insurance Advisory Board under this Section 163.

3. The Restrictive Trade practices, Monopolies and Price Control Act

3.1 The Restrictive Trade Practices, Monopolies and Price Control Act states that:

“(1) For the purposes of this act, “restrictive trade practice” refers to an act performed by one or more persons engaged in production or distribution of goods or services which:

- (a) in respect of other persons offering the skill, motivation and minimum seed capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate; or

(b) in respect of other persons able and willing to pay fair market prices for goods or services, either for production, for resale or final consumption, reduces or eliminates their opportunities to acquire those goods or services.

(2) For the purposes of subsection (1) reduction or elimination of opportunities is to be measured with reference to the situation that would pertain in the absence of the practices in question.

(3) Subject to exemptions set out in Section 5, the practices enumerated in Section 6 to 12 are declared to be restrictive trade practices for the purposes of this Act.”

3.2 It is doubtful that the provision of insurance business as defined in Section 2 of the Insurance Act, falls within the ambit of Section 4 of the Restrictive Trade Practices, Monopolies and Price Control Act.

3.3 In any event, Section 5 of the Restrictive Trade Practices, Monopolies and Price Control Act exempts from the provisions of the Act;

“(a) trade practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred on any person by an Act of Parliament or by an agency of the Government acting in accordance with authority conferred on it by an Act of Parliament;

(b) trade practices which are directly and necessarily associated with the

licensing of participants in certain trades and professions by agencies of the Government acting in accordance with authority conferred on them by an Act of Parliament.”

Insurers in Kenya clearly fall within both limbs of Section 5 (i.e. sub-section (a) and sub-section (b) and can only be licensed to practice if they comply with the requirements of agencies of the Government, which in this context are the Minister of Finance and the Commissioner of Insurance who are so authorized to act by the Insurance Act. When acting in compliance with the rates specified by the Commissioner of Insurance for particular classes of insurance, Insurers would be exempt from the Restrictive Trade practices, Monopolies and price Control Act.

3.4. The specification of the applicable rates for any class of insurance is to

provide protection for the consumer of those services and not the provider (insurance companies) and to guarantee sustainable solvency of insurance companies (which ultimately enhances the protection of the policyholder, as a consumer). It is therefore our submission that the protection offered by the Restrictive Trade Practices, Monopolies and Price Control Act was not intended by Parliament to be applicable to the insurance industry. This submission acquires overwhelming support from the fact that both Acts (i.e. the Restrictive Trade Practices, Monopolies and Price Control act and the Insurance Act)

and both Commissioners (the Commissioner of Insurance and Commissioner of Monopolies and Prices) fall under the authority of the minister of Finance and it could not have been intended that the two Acts would contradict each other. Parliament could not have intended the Minister of Finance to compel the performance of a particular act under one Statute, whilst at the same time making the same Minister responsible for enforcing the prohibition of the same act under a second statute.

3.5. Insurance claims emanating from motor vehicle business are a sensitive and emotive subject in the context of the Kenyan economy and it is for the protection of those injured by motor vehicles and in particular commercial motor vehicles that the Commissioner of Insurance requires rates to be approved by his office.

4. Conclusion

We hope that the above is a sufficiently adequate response to your invitation to us to comment on whatever allegations have been made. If you wish us to make a more comprehensive verbal presentation, we would be happy to do so.

Yours sincerely,

WILFRED R. NJERU
G. EXECUTIVE DIRECTOR

Copy to:

Commissioner of Insurance

Ministry of Finance

AKI also provided a letter in which the Commissioner of Insurance had requested AKI to come up with premium guidelines. AKI took advantage of the innocent requests to justify and to practice price fixing.

The said letter is reproduced below:

20th August, 2001

PREMIUMS RATES

Please refer to my address to the Chief Executive Officers of Insurance Companies of 8th August, 2001.

It is appreciated by all that one of the biggest problems facing the Industry today is that of premium rate undercutting.

I did in my referred address require that AKI comes up with rating guidelines on all classes of General Insurance Business for the market.

Underwriters will thereafter be required to file with this office rates to be charged by them w.e.f. 1.1.2000 in accordance with Section 75 of the Insurance Act.

This is therefore to request you to expeditiously draw up the guide stated above.

SAMMY M. MAKOVE
COMMISSIONER OF INSURANCE

The Commission's position was that it did not agree with AKI and replied as follows:

5th March, 2003

RESTRICTIVE TRADE PRACTICES

I acknowledge receipt of your letter dated 19th February, 2003.

Please note that our letter of 7th February, 2003 made reference to two specific allegations made against you which principally related to the AKI Motor Rating Schedule effective from 1st July, 2002. The said schedule is in your possession as you authored it, vide your letter AKI CIRCULAR NO. 86/2002/MNW of 4th June, 2002. Among the complainants are the Kenya Transport Association and the Federation of Kenya Employers.

We do not agree that the Restrictive Trade Practices, Monopolies and Price Control Act and the Insurance Act contradict each other. We also do not agree that when fixing prices or when recommending prices, your Association is exempt from the application of the Restrictive Trade Practices, Monopolies and Price Control Act. We also note that you do not deny the allegations made against you.

In accordance with Section 15(3) of Cap 504, I deem your Association's response as contained in your letter of 19th February, 2003 not sufficient to remove the grounds for the allegations made against you as contained in our letter of 7th February, 2003. Consequently, I invite your Association, through its legally mandated officers, to negotiate with the Commissioner, who is the undersigned, a Consent Agreement satisfactory to the Commissioner. The said Consent Agreement will be

negotiated within the law as laid down by section 15 of Cap. 504. The negotiation for the Consent Agreement to which you are being invited will take place on Tuesday, 25th March, 2003 at 11.00 a.m.

COMMISSIONER MONOPOLIES AND PRICES COMMISSION

On 23rd April, 2003, the Commissioner of Monopolies and Prices and the Association of Kenya Insurers signed a Consent Agreement in the following terms:

“THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT, CAP. 504, LAWS OF KENYA)

In accordance with Section 15(3) of the Restrictive Trade Practices, Monopolies and Price Control Act, the Monopolies and Prices Commissioner and the Association of Kenya Insurers have this 23rd day of April, 2003 negotiated a Consent Agreement stipulating as follows:-

1. That the Association of Kenya Insurers undertakes to withdraw, with immediate effect, all its present and past Decisions on Premium Rates which purport to recommend prices chargeable for insurance services by its members. The Association of Kenya Insurers also undertakes to desist from making such decisions and from issuing such Premium Rates recommendations in future.
2. That the Association of Kenya Insurers undertakes to observe, with

effect from the date of this Consent Agreement, all the Provisions of the Restrictive Trade Practices, Monopolies and Price Control Act.

3. That the Association of Kenya Insurers will diligently and strictly observe the terms of this Consent Agreement in order to compensate for the past effects of the said past Decisions.”

It is worth noting that since abolition of this insurance cartel there has been peace amongst the players in this industry, i.e. the Insurance Companies, the Insurance Brokers, the transport industry (the matatu sector especially) and the public. The dismantling of this hardcore cartel must have spawned immense benefits for the Kenyan economy as eventually it is the consumers (the public) who eventually suffer the consequences of repressed and/or distorted competition.

Annex II: Moderation of the Kenyan Restrictive Trade Practices, monopolies and Price Control Act 504

For example, in 2003 Hon. Gor Sungu, a member of Kenya's Parliament moved the following motion:

“THAT this House do grant leave to introduce a Bill for an Act of Parliament to repeal the restrictive Trade Practices, Monopolies and Price Control Act (Cap 504 of the Laws of Kenya) and to replace the same with appropriate law entitled the Competition Act in order to reduce monopolization and collusive behaviour between firms and for matters incidental therewith.”

The answer drafted by the government of Kenya was:

“MOTION ON THE REPEAL OF THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT (CAP. 504)

Background

The Government supports the Motion since the action contemplated is in line with the Economic Recovery Strategy for Wealth and Employment Creation document (2003-2007) which was launched by H. E. The President in June, 2003. The Government has stated in this important document that for Kenya to succeed as a market economy and for it to enhance the gains from liberalization, there is need to regulate and manage competition policy. The Government notes that the challenges that have undermined the effectiveness of the

Monopolies and Prices Commission (the Competition Authority) include the outdated Restrictive Trade Practices, Monopolies and Price Control Act; inadequate financial resource allocation to the Commission therefore hampering its effectiveness; and lack of harmony between sector regulatory laws and competition law itself.

The Government has, at page 18 of the Economic Recovery Strategy for Wealth and Employment document, indicated that it will:

- a) Enact and enforce relevant and appropriate laws supportive of competition. The law will aim at checking, among others, abuse of dominance, collusive behaviour etc. It will, at the same time, be geared towards the reduction of barriers to entry in the market and promoting the competitiveness of our industries locally and internationally;
- b) Harmonise the Competition Law with sector regulatory laws;
- c) Accord the Competition Authority requisite autonomy and adequate budgetary provisions to build the necessary capacity to enable it regulate all sectors of the economy.

At page 75 of the Economic Recovery Strategy document, the Government has indicated that enactment of the intended law will take place during the 2003/2004 financial year.

Amendment

Arising out of the foregoing, the Government seeks the amendment of this Motion to read:

THAT, this House do grant the Government time to introduce a Bill for an Act of Parliament to repeal the Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504 Laws of Kenya) and to replace the same with an appropriate law to enhance gains of liberalization by effectively prohibiting all unfair business practices, including collusion by oligopolies, by controlling monopolies, by regulating Mergers and Acquisitions and by according Kenya's Competition Authority requisite autonomy.

Unfortunately, due to parliamentary technicalities, the motion lapsed. However, it is clear that the draft answer captures the mood of the Kenyan government towards its commitment to have in place an effective competition policy and law.

Another question was asked by another member of Parliament, Hon. Raphael Muriungi in April, 2004. The question and the answer given by the Minister for Finance through his assistant Minister is reproduced here-below:

“Question No. 078

The Member for Igembe (Mr.Raphael Muriungi) to ask the Minister for Finance:-

- (a) Is the Minister aware that some multinational companies are using unfair trade practices to kill locally incorporated enterprises?

- (b) When is the Government going to introduce "Anti-trust Regulators" to the Monopolies Act to control unfair trade practices? [*Perhaps he meant “effective antitrust regulations” including requisite autonomy*]

REPLY

- a) The Government is not aware that some Multinational companies are using unfair trade practices to kill locally incorporated companies. Nevertheless, the Government has put in place appropriate legislation to cater for any unfair trade practices, which might be meted to any enterprise operating in the Kenyan economy. This is because we are committed to ensuring that all investors have equal and unfettered freedom when conducting their businesses. The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 prohibits restrictive trade practices and also controls monopolies so as to eliminate abuse of dominance. Section 10 (1) of the said Act is very explicit on what is outlawed. It is illegal for any enterprise to commit a practice which is aimed at:
- i) driving a competitor out of business;
 - ii) inducing a competitor to sell assets to, or merge with another party;
 - iii) inducing a competitor to shut down; and
 - iv) inducing a competitor to desist from producing or trading in any goods or services.

- b) The current Competition Law, The Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 540 was transitional in nature. It was meant to be transitory; from a controlled regime to a liberalized regime. Due to increased private sector participation and also increased enterprise activities in view of the changing global economic and trade environment, the Government has noted that the current law is not effective enough to enhance fair competition and accord consumers adequate protection.

To this end, the Narc Government in its Economic Recovery Strategy for wealth and Employment Creation 2003-2007 has committed itself to reviewing the current legislation. The Government realizes that for Kenya to succeed as a market economy and enhance the gains from liberalization, we have to encourage fair competition by enhancing capacity to regulate and manage it.

What hampers effective regulation of competition currently, is outdated legislation. Consequently, the Government has committed itself to improve competition by enacting and enforcing relevant and appropriate law supportive of competition, according the Monopolies and Prices Commission more autonomy and enhanced budgetary provisions. To this end, I am in the process of constituting a Task Force to review the current legislation.

The Government envisages that the resultant law will cover all the main provisions of an effective

Competition Law and be in tandem with the best regulatory practices. These are, regulation of market structure (all mergers/acquisitions), control of abuse of dominance and all other anti-trust activities (prohibiting predatory practices, cartelization and other restrictive trade practices) while at the same time addressing consumer protection.

We are also committed to separating the policy, management and regulatory functions of the Monopolies and Prices Commission to enhance its flexibility and buttress its credibility and integrity in its decision making. This is important in the ever-changing World of business.”

Both COMESA and the East African Community have decided to promulgate regional Competition Policies and Laws. The East African Community’s Council of Ministers has boldly decided that the Community will have an autonomous Competition Authority. In accordance with the principle of subsidiarity, Member Countries will be required to have autonomous and effective Competition Authorities. Kenya will be required to honour its obligations both under COMESA and under the East African Community.

The operationalization of the proposed changes will grant the future Kenyan Competition Authority requisite legal, operational and financial autonomy to effectively consummate its national, regional (including COMESA and the East African Community) and International mandate.

In May, 2004, the Minister for Finance approved a Task Force to be chaired by the Commissioner of Monopolies and Prices to manage the process of reviewing the Restrictive Trade Practices, Monopolies and Price Control Act [Chapter 504 of the Laws of Kenya] and the promulgation of a new competition law. The Task Force's membership includes a representative of the Attorney General who is in charge of the drafting work.

The Terms of Reference issued to the Task Force are to:

1. Review of the institutional framework to provide for an autonomous Competition Authority with an established mechanism for management and technical manpower. This is in line with the Government commitment contained in the Economic Recovery Strategy for Wealth and Employment Creation (pages 18 and 75).
2. Review the enforcement procedures to make them easy to follow by the competition authority officials, the courts and also the business community.
3. Provide for time frames and thresholds for merger and take-over cases.
4. Clearly spell out Litigation Procedures and each institution to be assigned specific action. (See sections 16, 18, 24 and 31 of Cap. 504.
5. Harmonise existing laws with the competition law. Consideration should be given to the repeal of the

Contracts in Restraint of Trade Act, 1932 (Chapter 24 of the Laws of Kenya) which has spawned veritable problems in the enforcement of competition law in Kenya. As mentioned elsewhere in this paper, this law validates anticompetitive contracts subject only to the powers of the High Court to declare such contracts void. The area of sector regulation is of particular importance in this area.

6. Provide for the advocacy role of the competition authority as an advisor of Government in competition matters. This should enable collaboration between sector regulators and the competition authority and also in the privatisation of public utilities. This role should embrace articulation of Kenya's Competition positions both domestically and internationally.
7. Review part IV on Price Controls with a view of removing it and if found desirable to replace the Part with consumer protection and price surveillance provisions.
8. Review the functions of the Competition Tribunal and to provide apposite provisions.
9. Review the relevance of Exemption provisions.
10. Review the Provisions dealing with RTPs and group them into "*per se*" illegal and others for case-by-case analysis. Also to bring in simplified provisions, which are easy to follow. Specific prohibition should be clearly spelt out in "*per se*" harmful

infractions such as cartels, price fixing, market sharing etc.

11. Include a confidentiality clause in the revised law and provisions empowering the Commission to get information and also provide a leeway for negative clearance.
12. To align the law with the best international practices and more specifically with the proposed EAC and COMESA Laws.
13. To align the Law with Kenya's international obligations in the Competition area.
14. To provide a legal framework for co-operation and networking with regional and international bodies on Competition issues. The bodies include the EAC, COMESA, UNCTAD and WTO.
15. As part of the advocacy role, alluded to in paragraph 5 above, and for avoidance of any doubt, to allow the Competition authority to publicly comment when competition issues are being discussed in the media or elsewhere and to articulate the official positions of the Government in such matters.

Kenya is grateful that UNCTAD has in the past assisted, and is willing to assist in the future, towards the drafting of a new competition law in Kenya.

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ZAMBIA

George Lipimile*

Executive Summary

Governments rely on several policy tools to ensure that their markets remain contestable and that competition in markets is maintained as far as possible, so that economic growth and welfare are not adversely affected by the inefficient allocation or use of resources. The tools of such policy include trade policy, Foreign Director Investment (FDI) policy, regulatory policy with respect to domestic economic activity, and competition policy.

While the first three comprise rules and regulations that serve several purposes and not only that of maintaining competition with a view to fostering efficiency, the last relates specifically to the competition rules and regulations with respect to arrangements among firms/suppliers and the conduct of individual firms/suppliers, generally but not exclusively, in national markets. In response to the need for creating a market economy, Zambia in 1994 enacted the Competition and Fair Trading Act.

The Competition and Fair Trading Act preserves market processes by preventing firms from engaging in activities which undermine rather than enhance overall economic efficiency. The Act prevents firms from distorting the competitive process through agreements designed to exclude actual or potential competitors. In this regard, the law essentially addresses the problems of monopoly power in three formal

settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, agreements, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms which refers to implicit or explicit arrangements between firms competing with identical or similar products in the same market (section 9), and “vertical” agreements among firms which refers to agreements between operators at different stages of the production and marketing chain (section 7(2)). The second category is termed “monopolisation”, in the Act referred to under section 7(2) as abuse of dominant position”; a practice employed by dominant firms to maintain, enhance or exploit a dominant position in a market. The third category, under section 8, often called “mergers” or “concentrations” refers to horizontal, vertical and conglomerate mergers. The determination is whether a proposed merger will have the effect of substantially lessening competition in the relevant market or substantially increase the ability to exercise and abuse market power.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome horizontal agreements are those that prevent rivalry within the fundamental dynamics of market competition, price and output. The Act under section 9 prohibits naked agreements to fix prices, limit output, rig bids, or divide markets. To enforce such agreements, competitors may also agree on tactics to prevent new competition or

* Executive Director, Zambian Competition Commission

to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, the law deals with these other kinds of agreements by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same – that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical

agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuses of dominance or monopolisation are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output: it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions, or other structural combinations, or undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence

of effective barriers to new entry. The Act applies some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. The Act provides for a pre-notification requirement for mergers.

The scope of application

The law applies to all market transactions and to all entities engaged in commercial transactions irrespective of ownership or legal form. All exceptions to the application of the law are explicitly identified in the law.

There are two broad principles which will underline the competition law:

- that any behaviour which has the object, or effect, of substantially lessening competition in a market should be prohibited; and
- such behaviour should be able to be authorised on the basis of “economic efficiency”.

The main types of anti-competitive conduct which are prohibited include:

- anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts, with a per se ban on price fixing and boycotts;
- misuse of substantial market power for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct;

- exclusive dealing which substantially lessens competition, with third line forcing prohibited per se;
- resale price maintenance for goods; and
- mergers and acquisitions, which substantially lessen competition in a substantial market.

The law establishes the Zambia Competition Commission, which is functionally and operationally independent from government. The Commission does not operate in a political vacuum, but nonetheless enjoys significant autonomy and parochial political concerns do not play a role in its decision making process. However, for accountability purposes, the Commission is created by an Act of Parliament under the Ministry of Commerce Trade and Industry. The Commission is a public enforcement agency and has power to seek injunctions, penalties, damages, and other appropriate remedies from the High Court. Divestiture is also provided for. The Commission has both enforcement and adjudicative role. Private enforcement action is possible under the proposed Act.

Under section 13, conduct that may substantially lessen competition under the proposed Act may be granted authorisation. Authorisation is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act. In practice, authorisation is granted on the ground of public benefit. Depending on the arrangement or conduct in question, the Commission must be satisfied that the arrangement results in a benefit to the public that outweighs any anti-

competitive effect; or that the conduct results in such a net benefit to the public that the conduct should be allowed to occur. The decisions made by the Commission in relation to all matters brought before it and to the application for authorisations can be appealed against to the High Court within thirty days.

The competition law deals directly with the interests of consumers. It provides a means of promoting fair competition by protecting consumer's right, especially the right to full or accurate information when purchasing goods and services. It provides a safety net in markets where vigorous competition might tempt some businesses to cut corners to gain a competitive advantage e.g. by making misleading claims about a product's value, quality, place of origin or impact on the environment.

Introduction

The advent of economic and political liberalisation in Zambia dating from 1991, has witnessed the adoption of three inter-related major policy reforms, which include the liberalization of the economy, promotion of private sector participation, and the enactment of modern legislation. A new industrial policy is founded on the tripod of deregulation, commercialisation and privatisation.

To achieve this, it was necessary to have in place appropriate legislation and establishment of institutional and regulatory frameworks. This meant that some new legislation had to be enacted, while some old laws needed to be amended and/or updated in line with the new economic order.

Some of the new legislation that came into force included the Privatisation Act of 1992, which provided for the privatisation and commercialisation of state owned enterprises; and also provided for the establishment of the Zambia Privatisation Agency and defined the functions of the Agency.

In September 1993, the Parliament of Zambia enacted the Investment Act (1993), which amended the earlier Investment Act (1991). This is an Act to provide for the legal framework for investment in Zambia, and in particular to constitute and foster the Investment Centre. The Act further provides procedures for evaluating applications for investment licences and also provides for investment guarantees, tax incentives and other allowances.

The Securities Act of 1994, provides for the establishment of stock exchanges and rules and procedures of stock markets, while the Pensions and Insurance Act of 1996 provides for regulation of insurance companies as well as pension funds. Other Acts such as the Energy Act, Export Processing Zones Act, and Communications Act have also come into existence, liberalising the specific sectors and establishing appropriate institutions for the regulation of the sectors.

Other pieces of legislation were amended and these included the Companies Act, Copyright Act, the Banking and Financial Services Act and the Standards Act to name a few.

It is clear from these sweeping changes in the regulatory framework of the economy and the establishment of statutory bodies that the economic focus of Zambia has changed from the command government control economy to a more liberal, free market economy.

1.0 Zambia's Position In Southern Africa

Zambia is a Southern African landlocked country whose neighbours are:

- Zimbabwe and Botswana to the South
- Angola to the West and Namibia to the South-West;
- Malawi to the East and Mozambique to the South-East

- Democratic Republic of Congo to the North and Tanzania to the North East.

The Southern Africa sub-region itself comprises six (6) landlocked countries, namely: Botswana, Zimbabwe, Lesotho, Swaziland, Zambia and Malawi and five (5) maritime countries namely: Angola, Namibia, Tanzania, Mozambique and South Africa. The sub-region represents a potential market of over 120 million people. Zambia lies 15 degree South and 30 degrees East on a plateau between 915 to 1500 metres above sea level. The total country area (land and water) is approximately 752,614 square kilometres, roughly three times the size of the United Kingdom (UK) or Texas State in the United States of America (USA).

Zambia enjoys a reasonably good climate and topography for agricultural investment and comfort. The climate is marked by a seasonal rhythm with summer falling between August and October and winter between May and July. The rainy season occurs between November and March. Temperature ranges between 10 degrees Celsius in winter and 30 degrees Celsius in summer.

The population in Zambia (2000) is about 10.7 million of which about 55% is urban. Lusaka, the capital city, accounts for more than 1.7 million people while the Copperbelt towns have a combined population of about 1.7 million people. Ndola, the second largest city in Zambia, accounts for more than a quarter of the population on the Copperbelt. Annual population growth rate for the country from the year 2000 is in the region of 1.3%.

1.1 Zambia's Economy at a Glance

In the first decade after independence (1964-73) Zambia followed a development policy of import substituting industrialization, and nationalization of enterprises. This was supported by the abundant mining revenues which contributed half of GDP and almost all export earnings. However, from 1973 Zambia began to experience a massive deterioration in terms of trade, collapsing copper prices and soaring oil prices - and significant internal mismanagement. The situation was further aggravated by drought. Zambia believed that the shocks were temporary, and would be reversed, and therefore, undertook huge external borrowings (which peaked in 1985) to avoid having to restructure the economy. Exchange and trade controls were strengthened as the foreign exchange shortages became more severe.

However, external lending dried up as commercial lenders realized that Zambia's capacity to repay debt was seriously compromised. Debt repayment problems quickly emerged. A state led industrialization was no longer affordable. Policies to support the diversification of the economy in favor of the agriculture sector, which had been analyzed and debated since independence - but which had not begun - were now urgent. During the 1980s, some sporadic policy reform efforts were made. But there were many setbacks and reversals; too little reform occurred and came too late. From 1985 to 1989 public enterprise losses were estimated at USD 455 million. A breakdown in dialogue and support from the donor community in the mid/late 80's

compounded the economic problems.

By the time of political transition in 1991, the new Government faced a daunting task. Huge budget deficits, largely due to the state owned enterprises, were financed by printing money and borrowing on the local market, leading to galloping inflation and excessively high interest rates. Private sector investment remained depressed. Zambia had already faced two decades of steady declines in per capita income, (US \$900 in, 1970, US\$ 600 in 1980 and US\$ 450 in 1990).

Mining has traditionally been central to the Zambian economy. However in 2003, the picture changed dramatically, with mining being relegated to fifth place and accounting for only 8% of Gross Domestic Product (GDP). This decline was due to the overall decline in the production of Copper, Cobalt and Coal, lead and Zinc. However mining is still the largest foreign exchange earner for the Country. Wholesale and retail ranked highest at 15% of GDP in 2003 (due to trade liberalisation).

Agriculture has grown steadily to attain second largest contribution to GDP in 2003 with 15%. The contribution of the manufacturing sector to total GDP has been third largest at 10.9%, while Real Estate and Business Services have increased steadily registering a fourth largest contribution to GDP at 9.5%. Main imports include crude oil, chemicals and machinery. The United Kingdom (UK), South Africa, Malawi, Germany, Zimbabwe, Italy, Burundi, Zaire, Tanzania, Holland and Japan are some of the Zambia's main trading partners.

Non-traditional exports have been growing over the years and contributed about 39 percent to GDP. These exports, made up of different products from different sectors amounted to US\$400 million in 2003. The increased exports are as a result of increased agricultural production and export capacities of coffee, tobacco, cotton yarn, and copper cables.

Other principal non-traditional exports include:

- Primary agricultural products (paprika, etc)
- Fresh fruits and vegetables
- Building materials
- Semi-precious stones
- Timber and wood products
- Animal products and processed foods
- Cut flowers
- Textiles
- Sugar
- Electricity

The country's currency is the Kwacha (1Kwacha – 100 ngwee). Currently, the currency exchange rate has been stable about one (1) US\$ to Five Thousand (5000) Kwacha.

The GDP has recorded a steady growth since 1999, reaching a peak of 5.2% in 2001. It dropped to about 4.8% in 2002, and was estimated at about 5% for 2003 and 5.5% in 2004.

1.2 Economic Policies Supporting Investment in Zambia

The adoption of economic liberalisation has witnessed the adoption of three key inter-related economic policy thrusts

under the Structural Adjustment Programme (SAP). These are:

- Deregulation
- Commercialisation; and
- Privatisation

1.2.1 Deregulation

Deregulation meant that quantity licensing, statutory protection of parastatals monopolies and barriers to entry to the Zambian market had to be removed. The Zambian industry has been subjected, henceforth, to a tougher and more comprehensive application of market forces. Almost all entry barriers to markets have been removed through appropriate legislation and policy guidelines.

1.2.2 Commercialisation

The economic policy thrust of commercialisation has two main objectives. At macro-level, it has entailed reduction of public expenditure and removal of subsidies from parastatals. At micro-level, this is a preference for consumer sovereignty as opposed to central or local government allocation of resources. Parastatals and quasi-government enterprises had wastefully devoted resources to maintaining services at higher costs for which, in some cases, there was questionable demand. This, in turn, ossified both the set of services provided and the technologies used to the ultimate disadvantage of the final consumer.

1.2.3 Privatisation

Zambia's economic development has

been dominated by two realities: first a secular decline in the price of copper since its peak in 1973, and second a corresponding decline in Zambian per capita income. The privatization program was begun in 1988/89, but it took on greater vigor after 1991 when the declining government budget could not provide the investment capital needed to enable profitable companies to grow; neither could it finance the losses of those which were not profitable. Privatization of these enterprises was therefore the only available option for their survival. This was the dominant reason for the privatization decision.

This was also the economic context for the privatization program launched in 1992, which gravely threatened the survival of the enterprises. The context was similar to that seen in Eastern Europe, where economies were painfully transformed from a socialist system to a market economy. In all cases, the transition costs are huge but Zambia's situation was uniquely difficult and painful because revenues from copper, its key domestic resource, were also rapidly declining.

The privatization program was clearly a 'damage control' exercise, undertaken during a period of extreme economic stress in an effort to enable enterprises to survive. As will be seen further below, almost all of the enterprises which were privatized after 1991 survived and now employ about 39,000 people in the formal sector, after having reduced their excessive workforce. New investment in these enterprises since privatization amounts to about US\$990 million. This is a promising outcome considering the general difficulties experienced in the economy over the privatization period.

The passing of the Privatization Act in 1992 and the subsequent establishment of the Zambia Privatization Agency (ZPA) reflected the Government's acceptance that the heavy burden placed on the Government's budget by the state-owned enterprises was unsustainable and that their survival could not be assured unless they were placed in private hands. The bulk of the enterprises, numbering around 150 (which were later split into individual operating entities for subsequent privatization), were insolvent and many were technically bankrupt, being plagued by over-employment and operational inefficiencies. Creditors were threatening loss-making enterprises with receiverships, and some 38 enterprises had already been forced into liquidation before the privatization program was launched, including United Milling, United Bus Company of Zambia and Zambia Airways. Even enterprises with simple trading operations, such as National Import and Export Corporation (NIEC) and Zambia

Consumer Buying Corporation (ZCBC) stores, had to close down.

Since then, some 254 state-owned entities (including mining) have been privatized, the bulk through a relatively transparent and competitive tendering process. Although initially slow, privatizations peaked in 1996 when 125 transactions were completed. Some of the enterprises - 12 in all - had to be liquidated at the time of privatization as there were no buyers willing to resuscitate them. There are currently three remaining state enterprises for which negotiations for privatization have been completed (including Zambia Railways) and a further 23 are being prepared for some form of private sector involvement (including state monopolies namely: Zambia National Commercial Bank (ZANACO), Zambia Telecommunications Company Limited (ZAMTEL), Zambia Electricity Supply Corporation Limited (ZESCO), and INDENI Petroleum Refinery Company Limited / TAZAMA Pipelines Limited).

Mode of Privatisation

Mode of Privatization	No. of Privatized Units	Value of Transactions		
		ZMK	US\$	SAR
Competitive Tender	180	21,799	372	28
Liquidated	12	0	0	0
Pre-emptive Rights	43	689	44	0
MBOs	18	1,914	9	0
Floatation	1	0	0	0
Total	254	24,402	425	28

Most of the sales in number terms were to Zambians, and these were mainly in the smaller-scale trading, service and agriculture sectors.

Ownership

Ownership	No. of Units	Transaction Values (million)		
		ZMK	US\$	SAR
Foreign	83	2,816	39	28
Zambian	28	0	368	0
Joint	143	21,587	18	0
Total	254	24,403	425	28

The "bigger-ticket" state-owned enterprises in mining, energy, manufacturing and agro-based activities were sold to foreigners, mostly through joint ventures with Zambians.

The number of privatized entities that have closed down is relatively small. Only 19 have failed since privatization, with 12 of these now being resuscitated by new private sector interests. *This means that at least 235 of the 254 entities privatized to date are still operating*, a surprisingly strong showing in light of the economic difficulties facing Zambia.

1.3 Specific Economic Policy Measures

Against this background, the government has put in place specific economic measures including:

- Limiting the growth of money supply in order to arrest inflation and provide stable economic conditions for investments;
- Liberalising and freeing interest rates;
- Reducing the budget deficit to prevent the "crowding out" of the private sector by the public sector and imposing market disciplines upon the public sector by removal of subsidies;

- Adopting flexible foreign exchange policies and phasing out price controls and government quantity licensing and promulgated tariffs so that key resource allocation decisions are the domain of the market place. (In January 1994, government repealed the Exchange Control Act);
- Formation of capital and money markets e.g. the Lusaka Stock Exchange (LuSE);
- Liberalisation of the export and import regime; and
- Reviewing of all business related legislation in favour of private sector development such as the Zambia Privatisation Act (1992) and Investment Act of 1993. The Investment Act provides substantial incentives and statutory protection to investors such as the right to repatriate profits and dividends in addition to customs duty and income tax concessions. In a bid to reduce red tape and bureaucracy, an Investment Centre has been established under the Investment Act to serve as a one-stop facility for investment licences and incentive applications.

2.0 Performance And Competitiveness Of The Industrial Sector

Scott and Lodge (1985) define national competitiveness as the ability of national states to produce, distribute and service goods in the international economy in competition with goods and services produced in other countries, and to do so in a way that earns a rising standard of living.

The competitiveness of the Zambian industry as stated before has been influenced largely by economic reforms embarked upon in 1992, which saw the shifting of the industrial and commercial policy from import substitution, protectionism and heavy public sector involvement to the promotion of an open liberalised market economy. The reduction of trade tariffs, however, opened Zambian companies to foreign competition before they had the chance to re-tool and upgrade equipment. This led to a shift in demand from local to foreign cheaper products. The delay in privatizing Zambia Consolidated Copper Mines (ZCCM) for instance affected the sector's performance as most companies particularly on the Copperbelt, were established primarily to supply ZCCM. Regional conflicts have also hindered efforts to explore the export potential in the region.

The industrial sector in the context of this paper comprises agriculture, manufacturing and related commercial services. Agriculture relates to economic activities leading to the production of crops and livestock. Manufacturing is the commercial transformation of raw materials into semi-finished and finished products. Commercial services on the other hand include among others the

banking sector, insurance, transport services, communication and consultancy services.

There is a close correlation among these sectors. The performance of one automatically affects the others. For example, the good performance in the agricultural sector in the 1999/2000 season contributed to a corresponding good performance in the manufacturing sector in the year 2000.

According to the 2004 Budget Speech, agriculture value added grew by 5% in 2003. Its share of aggregate domestic output increased to 15% from about 12.1% in 2003 making it the second largest contributor to GDP. Positive growth was registered in maize, tobacco, cotton and paprika. There was no reference made to livestock production where the major constraint continued to be Foot and Mouth Disease, East Coast Fever and Contagious Bovine Pleuropneumonia (CBPP) in the Southern and Western provinces, which account for 70% of Zambia's cattle population.

The manufacturing sector is the third largest contributor to GDP averaging around 10-11% and employing 47,782 people in 2000, which has been the average for the period 1997-2000. There were 1,049 registered manufacturing firms in 1999. The composition of the manufacturing sector includes food, beverages and tobacco, textiles and leather, wood and wood products, paper and paper products, chemicals and pharmaceuticals, non-metallic mineral products, basic metal products and fabricated metal products as well as other manufacturing.

The performance of the manufacturing sector showed steady growth in 2000 registering a 13.4% growth. The good performance in the sector in 2000 was attributed to maturity in the private sector, increased domestic demand for manufactured goods, good agricultural season and fiscal incentives. The increase in demand for manufactured goods is attributed to the revival of mining activities following the sale of ZCCM assets. Impressive growth was recorded in basic metal products (23%), food beverages and tobacco (19.6%), non-metallic mineral products (11.4%), fabricated metal products (8.1%), chemical, rubber and plastics (6.5%), textiles and leather (4.2%). Negative performance was however, recorded in the wood and wood products, paper and paper products and other manufacturing.

According to the 2004 budget, manufacturing value added in 2003 increased by 6.3 percent. The growth continues to be represented by the food, beverages and tobacco sectors with textiles and leather sub-sectors also registering positive growth. The strong correlation between agriculture production and agro-processing is represented by the positive results shown by the food sub-sector.

The good performance recorded between 2000 and 2003 in the manufacturing sector should be seen against a background of economic hardships brought about by the restructuring in the period 1991 – 2001.

Among examples of companies that closed before 2000, are Reckitt and Colman, Dunlop, Mansa Batteries, Kapiri Glass and most of the clothing factories. In the more recent past, the

agro-processing sub-sector has seen some companies close down some of their production lines. Amanita closed the wheat processing plant in Lusaka and were planning to close oilseed processing citing stiff competition from Malaysian “OKI” cooking oil, opting to import crude and finished cooking oil and wheat flour. National Milling Corporation had also opted to import wheat flour rather than processing local wheat.

It has been generally observed that those industries that depend on raw materials and other inputs imported outside the Common Market for Eastern and Southern Africa (COMESA) and target the local market have had problems surviving in the liberalised market environment. The COMESA Free Trade Area is expected to benefit firms sourcing inputs from within COMESA where duty on raw materials is zero-rated. This measure is expected to reduce production costs thereby making locally produced products competitive. According to the 2000 Economic Report, 50% of manufacturing inputs in Zambian firms are procured from outside COMESA.

Other factors that have been cited as having adversely affected manufacturing firms in Zambia include high transport costs, obsolete machinery, communication and energy costs, high interest rates, lack of development finance, unfair trade practices by some COMESA member states, poor economic infrastructure, high taxes and lack of capacity to enforce quality assurance and standards. Distorted duty structure, lack of a strategic plan and vision and shortage of critical raw

materials also contribute to Zambia's uncompetitiveness both locally and abroad. We shall refer to these economic growth constraints later in the text.

Clearly, firms can meet the challenges of competition by identifying new opportunities, including innovations so as to effectively exploit these opportunities. Further, they can minimize marketing and technology development costs through networking and forging ties with other firms. In order to facilitate this, there is need for a coherent policy environment which links macro-economic and sectoral policies with firm level efforts to attain and maintain competitiveness. More importantly, there is need for a systematic approach to facilitating competitiveness.

3.0 The Need For A Competition Law And Policy In Zambia

There is a strong argument opposed to the development and enforcement of competition law in the least developed countries like Zambia. It is argued that the scarce, skilled labour required for the effective enforcement of competition law is vastly disproportionate to its proven positive impact on economic development. Most, if not all, of the least developed countries have embarked on a liberalised industrial policy regime where private corporate sector is strongly encouraged. Trade liberalisation is sufficient, along with other moves towards deregulation, to create a competitive domestic market. Liberalisation of international trade is relatively simple to implement and does not require expenditure of scarce skills. In essence this argument regards

liberalisation of trade as a substitute for domestic competition law. The common example given is that of Asian countries which have no competition laws but are fully developed. The current trend is however that countries such as Hong Kong, Japan and South Korea have in the last decade introduced major measures that include competition law principles.

It is further argued that competition law limits the ability of the least developed country governments to introduce pro-development industrial policy and prevents firms from achieving the economies of scale necessary to compete with the developed country multinational corporations. Competition law is seen as a danger to competitiveness. Competition law is also seen to limit the ability of domestic firms to become internationally competitive because it makes it difficult to coordinate their business policies and strategies with domestic rivals by agreement. This argument as we shall observe later, has been frequently advanced against the inclusion of merger regulation in a developing country's Competition Laws.

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 being increasingly recognised:

- 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 fact the foregoing considerations suggest that in making the case for an effective competition law, it is important to stress that the design of competition law has to take appropriate account of Zambia's level of development and the long-term objective of the country's economic policy. As part of this document, it shall become vital to focus on the key competition issues facing or likely to face the Zambian economy, such as impact of public monopolies as well as private ones in pre and post-liberalisation, over and/or under regulation of main economic sectors, size of the economy and its import/export dependence, as well as the development of a competition culture.

Zambia has realised that competition policy and industrial/trade policy should serve complementary roles in creating an environment that promotes growth and productivity on the one hand, and free and fair competition on the other. It is not a question of one replacing the other. Competition law and policy is 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 of today has 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 has a significant effect on the local market. Under these conditions the adoption of a national competition law and policy has become necessary. If Zambia's economic productivity is to continue increasing so that the nation can maintain its competitive edge, adopting a national competition law is the pressing task at hand. It is expected that the Commission through its enforcement of competition law and policy will continue to search for and find solutions to problems confronting the Zambian economy such as the current concerns in sectors dominated by private monopolies.

From the foregoing, it is necessary that Zambia establishes an effective competition law regime in order to ensure that the benefits of liberalisation and market reform are not undermined or completely lost due to the establishment of private anti-competitive restraints in the place of former institutional distortions of competition. In fact, competition policy itself is an important element of a successful industrial strategy since it opens up markets and places appropriate pressures on producers to become more efficient. In addition, the existence of a competition policy enhances a country's credibility and attracts foreign direct investment since, from the perspective of prospective investors; it helps to create a stable and predictable environment.

4.0 developing public awareness and government support for competition enforcement

In Zambia, the implementation of competition law has not received the necessary support from the government policy makers. There has been great reluctance by government to act upon the advice of the Commission. This is despite the Commission availing government with competition opinions on various sectors. The opinions and recommendations to policy makers are not effectively observed due to discretionary policy making by government institutions.

The government is not bound by the decisions or recommendations of the Commission. This is unlike the Competition Law of Malawi which contains a specific provision which binds government to the decisions of the competition authority. In Zambia, there are several instances; the Commission is generally left out from participation at public forums where key economic issues are discussed. Sometimes this is as a result of general ignorance of the role of competition policy in economic development by the concerned government officers.

A recent case in point was the failure to invite the Commission to an economic symposium where the government was holding the mid-term review of Poverty Reduction Growth Facility. The Ministry of Finance and Economic Development who were hosting the meeting invited most of the institutions involved in the formulation and economic management of the country. The Commission was not invited and attempts to attend and

contribute to the discussion were thwarted by the organisers.

It was clear from discussions with Ministry officials that there was lack of understanding of the interrelationship of competition, economic growth and poverty reduction. The Commission was determined to participate at this symposium, as it believes that the competitive environment within which firms make decisions on production, distribution and investment is directly linked to enterprise productivity, and thus to growth and poverty reduction.

The Ministry of Commerce, Trade and Industry despite being the parent ministry under which the Commission operates, has shown instances of disregard to the existence or the role of the Commission. For example, the Commission, despite attempts to attend, was deliberately not invited to the Government – Private Sector Development Forum.

These are not the only instances where the government has not involved or consulted with the Commission. There is generally lack of support and understanding of competition policy by government. Consequently, it has not been possible for the Commission to participate by its own right or by request of government in the formulation of high-level policy. The Commission has to enhance its role of ‘competition advocacy’ in all government institutions. The effective enforcement of competition policy will be more effective if there exists in other government institutions policy makers who understand and support the concept of competition policy. There is need for a systematic consultation between

government and the Commission. To this end, a provision that would make the Commission part of the consulting mechanism within government would be extremely helpful.

The first priority in a paradigm shift toward national competition policy is the incorporation of the competition principle into all aspects of the Zambian government's policy formulation. First, all the processes involved in policy-making, implementation, legislation and enforcement should be imbued with the competition principles. It should not be limited to economic policy. Because education, culture and public welfare involve social policies that support the economic system, all these areas should be examined from the perspective of competition. This would necessarily require that the competition principle be applied at both local and central government levels.

Second, all government institutions in Zambia should be equipped with the competition principles so that they can make their own competition policy decisions. It is unrealistic to expect the Commission to enforce the broad concept of competition policy at each and every stage of policy legislation and practice. Unless the relevant government agency is pro-active in adopting the competition perspective, their policies are more likely to cause market inefficiencies.

Thirdly, the shift to national competition policy requires an institutional framework to ensure that competition is applied in all of government process. This requires the identification of laws, regulations and other government

policies which harm the competitive process and reduce economic efficiency.

Competition law and policy are among several economic tools the government through its policy makers may utilize in the economic management of the country. Given the above paradigm, the emerging challenge for policy makers in Zambia at present, is to ensure that regulatory reform and the implementation of competition policy are complementary strategies for the attainment of competitiveness and economic growth. The existence of a coherent and consistent mechanism to regulate competition constitutes a necessary condition for companies to achieve increased levels of competitiveness. The country's economic reforms should aim at realising the efficient operation of the Zambian economy by removing obstacles to free and fair competition in the market and ensuring the sound operation of the market mechanism.

It is also expected that the government should accept that a well designed, competition policy should be accorded a central place in economic framework policies. An effective competitive policy prevents artificial barriers to entry and facilitates market access. It complements other policies, particularly trade liberalisation, and domestic and international market integration. It is evident that the continued absence or ineffective application of competition law and policy in Zambia might in itself pose a barrier to entry. As we have already stated, while free trade is important, it is equally clear that it is not sufficient to ensure competition – it must be supplemented by an active competition policy.

Having a national competition policy indicates a country has an economic system based on the competition paradigm. Competition principles are an integral part of how a government runs the country. As with all reforms, however, resistance is inevitable. Those who enjoy the benefits of government protection and support fret about the possibility of losing privileges if a national competition policy is adopted. This is, of course, precisely why gaining public support and forming a national consensus is a prerequisite for pursuing a national competition policy.

It is evident from government, non-governmental organisations and companies that the Commission's achievements in its efforts to build a competition culture in Zambia is likely to be slow and tenuous at best unless stakeholders understand the benefits of competition. The stakeholders should be at least aware of some of the important links between competition policy and other important economic policy areas, and believe that greater competition in the economy will in fact add to the improvement of the well being of the Zambian people.

The responses coming from the Commission's dealings with key policy makers still exhibit great ignorance on the subject matter of competition law and policy and lack of interest to learn about it. There is both insufficient knowledge from government officials and uncertainty among businesses. Given such an audience, it is important that the key stakeholders who include politicians, public servants, the business and legal communities, sectoral and other regulators, academics and the press

understand and support the concept of competition policy. If any of these stakeholders does not understand the benefits that are typically associated with greater competition, or if they are sceptical about the prospects for those benefits to materialise within an acceptable timeframe, the process of transitioning to a competitive market may be difficult and characterised by regressive periods along the way.

5.0 A Comprehensive National Competition Policy

Competition policy is sometimes equated with the traditional competition law or trade practice laws of a country. However, many other policies affect competition. A comprehensive competition policy thus includes all government policies – both those that restrict as well as promote competition. It extends well beyond traditional competition law.

There are several pieces of legislation in Zambia, which will require review, amendments and repeal to give way to an effective enforcement of competition law. At the moment, institutional restraints are likely to continue to have a far greater distorting impact on competition in addition to private restraints. This is in part because distortions of competition brought about by laws and regulations and other institutional restraints typically exist in basic infrastructure industries such as telecommunication, electricity, banking, water services and a broad range of professional services.

Accordingly, a legislative audit in the area of competition policy requires to be

done in Zambia by way of a review of the extent to which competition may be distorted by laws, regulations, supply management schemes, licensing regimes, procurement policies, investment restrictions, product standards and other institutional mechanisms.

A comprehensive competition policy includes:

- Prohibition of anti competitive conduct (traditional competition laws)
- Liberal international trade policies
- Free movement of all factors of production (labour, capital etc) across internal borders
- Removing government regulation that unjustifiably limits competition e.g. Legislated entry barriers of all kinds, professional licenses, minimum price laws, restrictions on advertising.
- The reform of inappropriate monopoly structures, especially those created by governments
- Appropriate access to essential facilities
- A level playing field for all participants, including competitive neutrality for government businesses and an absence of state subsidies that distort competition.
- Separation of industry regulation from industry operations, e.g. Dominant firms should not set technical standards for new entrants.

In Zambia there already exists a legal framework for competition law and regulatory laws. The necessary laws and institutions, which affect the administration and enforcement of competition law and policy, are already

in existence. What is required is to enhance the performance of these institutions. A spectrum of competition policy in existence include: international and regional trade, intellectual property, foreign ownership and investment, tax; small business, stock exchange, public and private ownership, licensing; contracting out, tender and public procurement rules, and a range of other policies.

It is worth noting that some of the above policies have a very direct effect on competition, whilst others affect the general economic environment and the general climate of competition of the country, e.g. foreign ownership and investment restrictions.

Where does the Commission fit into this picture? The Commission mainly regulates conduct in market. It prohibits anti-competitive agreements, abuse of market power, anticompetitive vertical trade restraints, resale price maintenance, certain kinds of boycotts etc.

Competition law only has a limited direct effect on market structure. Merger control policy has a substantial effect on the structure of a market. The divestiture powers can be applied by the Commission, and this was done in the takeover of Zambia Bottlers PLC by Zambian Breweries PLC. Sometimes the application of competition law to anti-competitive conduct may have structural effects. Nevertheless, the impact of competition law on key structural variables, e.g. entry and the number of players in a market is often relatively small. In particular traditional competition policy does not override anti-competitive laws and regulations

e.g. laws that restrict entry into a particular industry. This is not to say that competition law is not a vital element in a comprehensive competition policy.

6.0 A Strategy For Competitiveness In The Manufacturing Sector

The existence of a coherent and consistent mechanism to regulate competition constitutes a necessary condition for companies to achieve increased levels of competitiveness. The Commission aims to realise the efficient operation of the Zambian economy by monitoring, controlling and prohibiting acts or behaviour which are likely to adversely affect competition and fair-trading in Zambia.

Notwithstanding this recognition, the reality is that most of the manufacturers in the country do not share a common and full understanding of the importance of competition law and policy. This may be because there seem to be deep-rooted fears among some manufacturers that local firms could be overpowered by foreign counterparts when competition laws and policies are effectively enforced. While it is widely acknowledged that domestic competition, enhanced by competition law and policy, would contribute to the growth of the national economy, they fear that competition with foreign firms would also be facilitated, which might hamper the development of local firms.

It has become evident that Zambian companies cannot compete effectively in the region. Equals have to be treated equally and unequals, unequally. Since the domestic companies are unequal to

the other companies especially the multinationals in the region, they need special treatment.

The Government's main task can thus be seen as the establishment of a more favourable environment within an active policy approach. A favourable environment must not be confused with one, which simply ensures higher profits for local companies. One would say that negative real interest rates, downward wage trends and subsidized energy prices favour company profitability. But these cannot be considered suitable elements of a favourable environment, which is sustainable in macro-economic, social or environmental terms.

An active policy approach would be the elimination of a restrictive environment, including price liberalisation and macro-economic stabilization; the elimination of protectionist trade policies and arbitrary and unclear trade and industrial policies; the removal of market monopolies; the modernisation of the civil service.

It is necessary to observe that the existence of a free market system by itself can be seen as a necessary but not a sufficient precondition for national and international competitiveness. Government intervention itself is not simply to be condemned. It is the way it is carried out that matters. It can be an essential ingredient of the achievement of comparative advantages or, ultimately, international competitiveness in the long run.

However, under present Zambian conditions, it is evident that complete freedom of trade would not be desirable. Even if international trade serves to

sharpen competition in the domestic market in terms of price, quality and incentives towards innovation and the development of new products and production processes, individual countries like in the case of Zambia might not be ready for it. Thus, although barriers to trade sheltering particular domestic industries may have anti-competitive effects on national markets, they may provide domestic firms with the time needed to increase their ability to compete internationally. Protection of domestic industries can therefore be an important component of a growth-enhancing trade policy. Consequently, the government will continue giving the necessary protection of course without undermining the liberalisation process.

Market failure is the major reason justifying Zambia's protection of its domestic industry. Zambia does not possess efficient financial institutions and this makes it difficult to draw savings from the traditional sector to finance investment in manufacturing. Low initial profits are always an obstacle for long-term investment. Many investments as we shall observe cannot be taken unless the government supports the infant industry.

7.0 Competitiveness Of Zambian Companies

Competitiveness is the capability that companies have to satisfy the different needs of the consumer, be it final or intermediate. Zambian companies will be more competitive in the market if they can reduce their prices in relation to their competitors, if they are capable of offering a better quality product or if they are able to differentiate themselves

for purposes of positioning in a specific segment of the market. This is to say that what defines their competitiveness is the greater or lesser capability to satisfy consumer needs.

This capability can be achieved through improvements in the productivity of companies, reflecting itself through lower prices or better quality of the products or services offered. This, in the end, allows companies to expand their markets and/or achieve better results. In the long term, the principal factor that promotes competitiveness is the productivity and efficiency of the companies.

In order to enable companies to compete successfully on a macro economically, socially and environmentally sustainable basis, there is need for government and/or the firms themselves to provide to companies the elements needed to face competition on open markets. The protection of competition is seen as crucial to the protection of consumers' interest and the efficient allocation of resources. Policy reasons for protecting competition are thus considered to include improving consumer value and choice, providing incentives to innovate and invest, and making Zambian companies more attractive in the global market. All these goals usually are thought to be best achieved through:

- Improvement of the physical, economic and social infrastructure to support production
- Create or innovate the technology for the transformation of the raw materials
- Differentiate its product from the companies

- Improve their distribution and sales systems
- Intensify the learning process i.e. quality circles
- Skilled human resources
- Promotion of improved entrepreneurial capacity.

Some of these elements could be developed through collaboration between the public and private sector, and some by strengthening relations between the educational and research institutions and production activities.

It is now accepted that the international competitiveness of domestic firms is more likely to be enhanced than undermined by the existence of vigorous competition in home markets, in that the exposure to competition domestically assists firms in upgrading their products and marketing techniques and adapting quickly to changing market conditions.

Whereas it is not the intention of this document to examine the concept of 'national competitiveness' further, it must be stressed that it is companies, and not nations, which compete, and thus an economically successful country is one which hosts many internationally competitive firms. This is to some extent attributable to the economic growth seen in South Africa, Kenya and Zimbabwe. The majority of multinational companies in the region are housed in these countries. Such firms are able to create and sustain competitive advantage against the world's top competitors in a particular field and to do that they need to attain a high and rising level of productivity.

8.0 Constraints To The Competitiveness Of The *Zambian Industrial Sector*

8.1 Geographical position (landlocked) resulting in high transport costs

Zambia is a landlocked country covering an area of 752,614 sq.km. It shares borders with Malawi, Zimbabwe, Tanzania, Mozambique, Botswana, Namibia, Democratic Republic of Congo and Angola. Zambia continues to use the road and railway network as the main modes of transport for its imports and exports through neighbouring countries to the ports of Dar Es Salaam in Tanzania, Durban in South Africa and to a lesser extent Walvis Bay in Namibia. Government has realised the importance of opening other routes to the sea. This is why there is need to complete the Chipata-Mchinji Railway, which will link Zambia to the ports of Nacala and Beira in Mozambique. These ports are currently under-utilised and yet they could be the most direct and economical routes to the sea. The planned bridge across the Zambezi to link Zambia by road to Walvis Bay on the west coast in Namibia has been completed with the help of the German Government and was commissioned in May 2004. Seaports on the west coast would shorten the distance covered by vessels from the Americas and Europe.

Government has realised that lack of well-organised and coordinated transport in a land-locked country can be a serious retarding factor to development as it increases transaction costs for business. In Zambia, inland transport (rail/road) is by far the most expensive. Inadequate

and poorly maintained secondary and tertiary transport networks undermine national efforts to engage in regional and international trade. Moreover, Zambia by virtue of being a landlocked country is at an acute disadvantage. For example, the price quotes for a container shipment from United States reveal that the cost of shipment to Namibia shall be far much less to the cost of shipment to Zambia via Namibia – a landlocked ‘penalty’.

8.2 High energy (electricity and fuel) costs

There has been an outcry from the manufacturing sector alleging that electricity tariffs in Zambia are very high and have contributed to the high production costs making Zambian products uncompetitive locally and abroad. However, statistics show that except for Malawi (2 cents/kWh) Zambia has one of the lowest tariffs in the region at 3.4 Cents/kWh compared with Zimbabwe (4.3 Cents/kWh), South Africa (4.7 Cents/kWh), Mauritius (12.4 Cents/kWh), Botswana (5.5 Cents/kWh) and Kenya (9.2 Cents/kWh).

In spite of the tariff structure in the region, the manufacturing and agricultural sectors in particular still claim to have been hurt by the high electricity tariffs. However, it may be that high production costs generally contribute to uncompetitiveness. The low-income levels also make electricity appear to be expensive. The obsolete machinery still being employed by industry is inefficient in the usage of electricity. The low-income levels and obsolete machinery may have contributed to electricity being perceived

as an expensive input in the production processes.

The high price of fuel largely composed of government taxes and levies has also been cited as one of the major factors contributing to uncompetitiveness. The excise duty on fuel is considered to be too high.

There is need for government to analyse the alleged inefficiencies in the electricity supply, telecommunications and water supply and launch long-term measures to deal with them.

8.3 Bureaucratic and Excessive Licensing Requirements

The current practice, rules and regulations are based on the misconception that the right to do business is a privilege conferred by the state. An enterprise may require up to six different types of licenses for it to commence business. Further, most of these licenses require to be renewed annually at great expense to the investor. The bureaucracy involved in the procedures for applying and renewing the licenses is not only time consuming i.e. up to seven days to register a company, but is also undefined.

It has become imperative that the government should take audit of the various licenses required under the various legislations. The government should eliminate all out-dated licenses and/or review unwanted systems, procedures or licensing requirements. The scope of licenses should be confined

to regulatory areas of specific public interest i.e. environmental protection, public health and safety, consumer protection etc.

8.4 Undeveloped Road, Rail network and other infrastructure

The lack of competition in supporting sectors limit the capacity of Zambian firms to adapt and meet challenges of international competition. In particular, high transport costs feed into import and export prices. With increased competition facing firms to adapt to just-in-time production and management systems, flexibility, speed and reliability regarding the delivery of goods have assumed significant strategic importance and are a key source of dynamic competitiveness. For instance, because of unreliable and infrequent transport services or the lack of third-party logistics providers who can efficiently handle small shipments, inventory holdings in the manufacturing sector in Zambia are two to five times higher than in South Africa. It is estimated that cutting inventory levels in half could reduce unit costs (and free up scarce capital) of production by over 20% per cent.

8.5 Poor and Inadequate Economic Infrastructure

The competitiveness of Zambian firms is severely constrained by poor and inadequate economic infrastructure. The lack of technological infrastructure, in terms of tertiary institutions and business development services, and problems with access to technology are major

obstacles to the ability of firms to innovate.

Acquiring technological capabilities is not an automatic process in response to market signals. It is a costly and invariably time-consuming process very much dependent on country-specific factors that influence the ease and cost of the upgrading process and the time it will take. Since new technology and ideas are at the heart of innovation, which is the key source of dynamic competitiveness, intellectual property becomes a primary asset of the firm and plays a major role in competitive strategy.

Zambian firms are furthermore disadvantaged not only by a lack of domestic suppliers but also by the means available to get their products to markets. Numerous impediments prevent investments in technology, human resource and improvements in the efficiency with which resources are used throughout the economy. Moreover, competition in the transport and communications sector, the financial sector and the insurance sector, key supporting sectors for producers and exporters, is limited if not totally absent.

8.6 Weak Private Sector Support

The government has recognised the private sector as the engine for growth and as such it requires strengthening. Coming out of a state-dominated economic environment, the private sector is somewhat still asserting its position and role in the economy.

Private sector support includes provision of development finance, capital markets and support to business associations. This support has been weak in Zambia. Development finance has not been forthcoming since the Development Bank of Zambia ran into problems. Even though the Development Bank of Zambia has been recapitalised it still cannot satisfy demand, as its balance sheet is weak. The only source of finance has been the commercial banks, which have been charging high interest rates currently standing at 30% per annum having dropped from 47% in 2003. This kind of finance is not suitable for long-term investment and export pre-financing.

The Lusaka Stock Exchange has been in operation since 1994 but only 13 companies are listed with another 10 quoted. A few companies have been able to utilise it as a source of capital. This low utilisation could be attributed to the poor incentives for doing so and also due to limited knowledge about the workings of a stock exchange by most firms in Zambia. It could also be because institutional investment guidelines do not exist 10 years after the establishment of the stock exchange. Existing business associations in Zambia are still financially weak probably due to little understanding of their benefits by industry.

The private sector has continued to complain about the unfavourable investment climate. The private investment that comprises of both the Zambians and foreigners has stayed below 6% of GDP over the last five years. This does not augur well if we compare with other COMESA member states. For instance, in Uganda the

private sector investment has been 16% of GDP and in Tanzania 19% of the GDP.

The labour laws requiring mandatory termination benefit of as much as 60 months of pay for 20 years of service in Zambia has been a major constraint for private investment entry. The rules surrounding retrenchment regulations still remain unclear. This has raised expectations of retrenched workers and has also raised contingent liabilities for government. But the worst part is that they raise many doubts in the minds of potential investors in Zambia's infrastructure. It is essential that the retrenchment rules be clarified and the necessary legislation be reviewed.

In addition, because of a thin financial sector and macro economic difficulties, the private sector has to borrow at very high interest rates.

There has also been criticism from the private sector in Zambia that government has concentrated on foreign investors at the expense of local investors.

8.7 Insufficient Private-Public Sector Interface

Several economic reports on Zambia have observed that the present institutional set-up does not provide for effective dialogue between government and the private sector or within the private sector. The liberalisation process has witnessed several initiatives by government where the private sector has been invited to discussions to map-out the economic path of the country. Although the efforts of government

seem to have achieved results, there is still a lot of effort required into this area. It is important to ensure that the government is fully aware of the needs of foreign and local investors and able to respond to them, and that foreign enterprises understand the policy objectives of government and feed into the design of new policies.

There are currently several trade associations which are actively involved as advocates or lobbyist before government bodies. However, there has been general disquiet among indigenous Zambian businessmen. This disquiet has arisen because the foreign businessmen based in Zambia have appeared to be more vocal than Zambians in lobbying both the government and foreign donors. Consequently, the Zambian businessmen have over the years attempted to form splinter trade associations representing indigenous Zambian business. Their efforts have been thwarted and accused by some opposing groups of being racial. This is unfortunate, as the problem appears to have some considerable merit.

The government should establish an effective forum for continuous interactions with the main constituents of the private sector including the small-scale sector. This can be a major step in improving the foreign investment climate.

8.8 High Taxes

The principal taxes in Zambia are income tax, customs and excise duty and the value added tax.

The corporate tax in Zambia ranges from 15% for the agricultural sector, 35% for non-agricultural incomes and up to 45% for commercial banks. Manufacturing firms would like to pay lower taxes so that enough funds are left in firms for re-investment and declaration of dividends. Returns on investments and ability to pay dividends are prime movers of private sector investment.

Those in agro-processing and gemstone sub-sectors have been requesting government for the same treatment given to agricultural companies. The basis of the argument is that agricultural processors have critical links with agricultural firms in that they provide market for farm produce, which would otherwise go to waste without them. Processors also add value to agricultural produce while others such as stock feed producers provide vital inputs for the livestock sector. Gemstone producers also need to be considered for a tax cut so that they are left with sufficient funds to procure equipment and also to encourage them to register with authorities and use transparent channels for marketing their products.

THE CURRENT TAX REGIME IN ZAMBIA: 2004		
1 PROPERTY TRANSFER TAX		
.		
	2005	2204
	%	%
Rate of tax	3	3
2 PLANT AND EQUIPMENT FOR USE IN FARMING AND TOURIST ENTERPRISES		
.		
	2005	2004
Farm plant and equipment	50%	50%
Tourism	50%	50%
3 FACTORY PLANT		
.		
Wear and tear	5% per annum on the Straight line basis	
FACTORY BUILDINGS		
Wear and tear	5% per annum on the Straight line basis	
Initial and investment allowance	10% on cost in year of acquisition only	
4 COMPANIES – TAX RATES		
.		
FINANCIAL YEARS ENDING ON 1 st April 2004 – 1 st April 2003		
ANY DATE BETWEEN	31 st March 2005 – 31 st March 2004	
TYPE OF INCOME	RATES OF TAX %	
Farming	15	15
Rural manufacturing business	30*	30
Manufacturing and others	35	35
- Turnover K200 million and below	3	35
	35	35
Banks-income up to K250 million	45	45
	15	15
- Excess Income		
Fertilizer manufacturing	33	33
Companies listed on Lusaka	33	-
Stock Exchange: -	13	15
- Manufacturing and others	13	15
- Banks		
- Agricultural sector	28	-
- Non-traditional exports		

-	Company with more than 33% shares taken up by Zambians	15 25	15 25
	Rates for 2005 available in the year of listing only Export of non-traditional products Mining *First five years of operations		
	Foreign resident companies which trade in Zambia through a branch	35	35
5	WITHHOLDING TAX	RATES OF TAX %	
.			
	Dividends declared	15*	Note 1
	Rent		
	Interest - Individuals	15	Note 2
	- Others		Note 1
	Management and Consultancy fees	25	Note 1
	Royalties	15*	Note 1
	Foreign road haulage contractors	15*	
	Commission to non-employees		
	Entertainers and sports persons	15	
	1. Rates are lower for residents of some treaty countries	15	
	2. Interest and dividends paid by mining companies are subject to 10% withholding tax	15	
	3. The withholding tax is the final tax		
6	VALUE ADDED TAX		
.			
	Standard rate		17.5%
	Registration level K200 million p.a. achieved or likely to be achieved		
	NOTES:		
	1. Excludes a trust.		
	2. The deduction for pension contributions is an amount which is the lesser of K180000 or 15% of taxable income (before this deduction).		

8.9 Reliance on imported raw materials and other inputs, most of which originate outside the Common Market for Eastern and Southern African (COMESA) countries

Due to traditional bonds with the West and South Africa, most Zambian firms have continued to procure their inputs from outside COMESA, thus subjecting themselves to import duties which they would not otherwise pay if they imported from COMESA-FTA. It is also true that some of the raw materials and critical inputs such as concentrates are not available in COMESA. At national level priority should be given to utilisation of local raw materials but there are limitations in this area. Zambian firms will continue for quite some time to rely on importation of raw materials.

8.10 Rampant Incidences of Dumping and Subsidization

With the implementation of the COMESA Free Trade Area, some companies have complained that some COMESA member states are taking advantage of the liberal policies Zambia is pursuing and are dumping goods in Zambia. Dumping refers to the practice of pricing goods at a lower price than their value in the country of origin. Subsidizing in this sense could be in the form of government in the exporting country giving cash incentives to exporting firms to make up for the price difference between the price in the home country and the landed price in the target market. Reports of such practices have been made to governments and

sometimes directly to COMESA. However, it has been difficult to prove these allegations. The option is therefore to enforce legislation where proof is not a requirement.

8.11 Distorted Duty and Tariff Structures on raw materials and intermediate goods, which disadvantages local producers in some sectors

The current tariff structure has been simplified into a four-tier 0%, 5%, 15% and 25%. There has also been progressive reduction of duty on imported inputs whereby raw materials attract 0% - 5%, intermediate goods 15%, and finished products 25%. The distortion is that some raw materials may be goods, which have been fully processed ready for consumption and are for that reason classified under 15% or 25% duty thereby hurting those industries using them as inputs. The Ministry of Commerce, Trade and Industry has been working together with the Ministry of Finance and Economic Development on a reclassification of goods and many products have been reclassified.

8.12 Lack of incentives to encourage firms to target the export markets

Export growth can be an indicator of competitiveness. For successful economies, a key inducement to effect the restructuring process and stimulate learning and international competitiveness is the exposure of domestic firms to international markets through export promotion.

Zambia needs to increase foreign exchange earnings in order to pay for imports and to stabilize the exchange rate. When copper production and prices were good in the 70s and 80s, Zambia did not need to borrow to pay for her imports primarily because the Kwacha was very strong. This is no longer the case as can be evidenced from the staggering foreign debt and high and unstable exchange rate. This makes it difficult for industry to plan as planning for Kwacha cover is rendered impossible. Kwacha prices of imported inputs continue to rise making Zambian products uncompetitive. There is need therefore to encourage firms to produce for the export market and especially that COMESA, SADC and AGOA have opened new opportunities that were never there before.

8.13 Influx of imported products due to liberalization, which may lead to transmission of plant, animal and human diseases

The liberalization of trade means that no licences are required to import or export goods and services. The license system was used as a means of controlling what goods should be traded in under given conditions. With liberalization, licensing is basically abolished thereby weakening government's ability to check goods being traded in. This is the desirable situation in international trade being championed by the World Trade Organisation (WTO). The COMESA FTA is a building block for the ideals of free trade.

The liberalization of trade has led to an influx of imports and in the absence of proper import inspection, may end up

allowing contaminated products and disease entering the country. The problems of CBPP and Foot and Mouth disease in Western and Southern Provinces and the large grain borer are cases in point.

8.14 Weak Government support systems

There is still considerable 'red tape' in the government delivery of services system which requires to be addressed. This is in most cases attributed to a high turnover of staff (e.g. MCTI) which in turn impacts negatively on institutional memory, lack of computerised system to retain vital data, the required coordination among different government institutions to address cross cutting issues. The most affected areas requiring attention are:

- Land titling; is cumbersome and up to now can take to over one year.
- Residence and work permits: these are surrounded by uncertainty and wider discretionary powers to the issuing authority.

The red tape related to the above issues introduced an unnecessary element of risk for investors when first investing or expanding. A written policy on work permits (and associated rights for residence permits) that is attractive to investors should be developed. As regards land titling, the land system should permit a sensible land market to develop in which investors and other requiring land are able to freely acquire or purchase and encumber titles from others and put the land to improved commercial use.

9.0 Competition And Regulation

9.1 Improving Market Conduct and Competition Enhancing Regulation

The Commission has a diverse and active role in the various reform processes set in motion to enhance or introduce competition in key sectors of the economy. This role complements its core investigation and enforcement functions. Reforms often have different objectives, some purely economic or efficiency driven, others to do with quality or service and facilitating innovation. For example, section 6(g) of the Act requires the Commission to 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 the Act. Because of the complexity of issues, the Commission is often asked to become involved in matters that go beyond the strict application of the Competition principles. The Commission views this as entirely appropriate. To improve market conduct, it must consider the full range of competition, social, equity and public interest issues and have the opportunity to influence these aspects of market reforms.

Reform processes and accompanying changes to markets have resulted in various new formal regulatory roles for the Commission. These flow from legislation, decisions of the Government, public business reform and privatisation. For example in the emerging national markets for gas, electricity, telecommunications and airports, the Sector Regulator has been given specific

regulatory functions for such aspects as reference tariffs, revenue caps, access arrangements, ring fencing requirements, record keeping and service standards. Much of the Commission's work revolves around the administration of regulations and laws. However, industry codes of conduct are also important in providing some of the framework for market reforms. Recognizing this and the contribution of codes to increasing awareness of the Competition and Fair Trading Act, the Commission is an active participant in their development.

The Commission recognises that market reforms, privatisation and deregulation can result in risks and costs for users of public utilities as well as efficiency, price and service quality gains. It will continue to follow progress in the reform agenda to identify the potential for adverse side effects on competition and consumer interests and will work to promote the objectives of the Act in market reforms.

The inevitable result of any competition is a winner and loser. Maintaining market stability requires a social policy that provides a safety net for the latter. Attempts to protect the socially disadvantaged, however, can sometimes be at odds with principles of equity. Such quandaries are not insurmountable, though as long as policies of equal or similar importance are reconciled by way of compromise and combination.

9.2 The Interface Between the Commission and Regulatory Bodies

There is already a significant debate in Zambia as to the most appropriate

framework for administering economic, technical and competition regulation. Economic regulation involves directly controlling or specifying production technologies, eligible providers (granting and policing licenses), terms of sale (output process and terms of access) and standard marketing practices (advertising). Technical regulation involves setting and enforcing product and process standards designed to deal with safety, environment and switching cost, externalities, as well as the allocation of publicly owned or controlled resources. Competition regulation involves the adoption, interpretation and enforcement of the framework and rules that ensure markets are as efficiently 'self regulating' as possible. It also prevents firms from concluding anti-competitive agreements, abusing dominant positions and carrying out anti-competitive mergers.

The debate seeks to pursue the question of where to place the responsibility for competition policy in public utilities such as electricity, water services, communication, transport, telecommunications, banking and insurance industries, to mention a few. This question has two dimensions. The 'horizontal' dimension concerns the relationship between the Commission and other government institutions with similar or overlapping responsibilities. In particular, those authorities responsible for the regulation of specific industries. The industry regulators often have broad responsibilities that include competition policy consideration. It is therefore necessary when enforcing competition law to make clear the division of labour between the Commission and the industry regulators.

Closely connected to this issue is the 'vertical' dimension of the question of government organisation, concerning the delegation of responsibility and the autonomy of the regulation and the Commission. Acknowledging the necessary trade-offs between competition policy considerations on the one hand, and other policy considerations on the other, to what extent shall it be possible, and, indeed, desirable, that the Commission be given discretionary decision making power?

Where does regulation fit in? In principle, there is really no clear distinction between 'competition policy' on the one hand and 'regulation' on the other. The overall policy objective in both cases is to further the efficient use of economic resources. Regulation is typically viewed as aiming to alleviate market imperfections by substituting regulatory measures for the working of market forces. In the view of competition policy, market forces are instruments that may be improved upon by strengthening competitive conditions.

Regulation may, of course, serve a number of legitimate objectives such as environmental safety or income redistribution goals which may seem as lying outside the field of competition policy. However, the way in which these objectives are pursued may have effects on competition and to that extent these elements of regulation cannot be excluded from consideration as part of a comprehensive competition policy.

Regulated sectors are becoming an increasingly important part of competition policy. Zambia has specific sector regulators in the Banking, Energy, Telecommunication, Water and

Sanitation, Insurance etc. It is often in these sectors that market power is strongest. The processes of deregulation and privatisation has created industry structures in which there are powerful dominant incumbent firms at the outset of the process. So powerful may their position be that reliance on traditional competition law may be insufficient and may need to be complemented by various forms of regulation designed to protect or bring about greater competition and to curb the abuse of market power.

Zambia has a general competition law that applies across all industries and is administered by a single competition authority, the Zambia Competition Commission. It has found this approach workable as it promotes consistency, certainty and fairness in the application of competition law. However, this approach recognises that there may be advantages in having industry-specific competition regulation in industries characterised by complex technology or having natural monopoly or other special elements. The industry specific regulator in this case complements rather than replaces general competition law.

With this 'division of labour' between various regulators, there is potential for some degree of overlap of functions between the competition authority, which administers competition regulation across all sectors of the economy, and those technical and economic regulators that operate within specific industries. For this reason, there are special provisions in the legislation establishing specific technical regulators which minimise uncertainty regarding the jurisdiction of each particular

regulator and avoids confusion for consumers and the business community.

Much regulation in Zambia involves restricting entry into industries, setting minimum or maximum prices and imposing obligations in an anti-competitive manner, thus, at the most general level, regulation may be seen as sometimes being an integral part of competition policy, sometimes as complementing it, and sometimes as conflicting with it.

9.3 Concurrent Jurisdiction

Although the Commission has primary responsibility for the day-to-day enforcement of the Act, the enforcement of competition in a number of industries may be carried out by the sector regulator concurrently with the Commission.

Most of the statutes establishing sector regulators provide for concurrent jurisdiction between the Commission and sector specific regulators. This has resulted into concerns expressed by industry players who argue that concurrent jurisdiction with the Commission on matters affecting the respective sectors may lead to uncertainty.

It was recognised from discussions with regulatory officials in Zambia that there is a need for some kind of economic regulation that shall extend beyond the usual bounds of the competition legislation. The question of how to allocate tasks and responsibilities for competition and regulation policies falls under the more general issue of the optimal organisation of government. The jurisdictional boundary between the

Commission and regulators in promoting competition varies from sector to sector, depending on the statute creating the regulatory institution. The major question to consider is whether the statute creating the sector regulator gives power to the regulator to deal with competition matters. If the answer is 'yes' then we have a situation of concurrent jurisdiction. That is, both the sector regulator and the competition authority shall administer or enforce concurrently, competition in that given sector. This is the case of the telecommunication and the energy sector. If the statute is silent or does not give any powers to the sector regulator to administer and/or enforce competition, then the Commission shall be responsible for competition in the given sector. This is the case of the water and sanitation sector. Consequently, for concurrent jurisdiction to materialise, there ought to be an enabling provision in the relevant statute.

For a number of industries, the enforcement of the Competition and Fair Trading Act is carried out by the sector regulator concurrently with the Executive Director of the Zambia Competition Commission. The industry sectors where a regulator has concurrent powers with the Executive Director of the Zambia Competition Commission are:

In general, an agreement or conduct which relates to a specific industry sector of a regulator will be dealt with by the respective regulator, although in some cases the Executive Director of the Zambia Competition Commission will also involve himself with such a case. Consequently, both the regulator and the Executive Director of the Zambia Competition Commission may seek intervention in the same case. The concerned regulator and the Executive Director will always consult with each other before acting on a case where it appears that they may have concurrent jurisdiction. The general principal will be that a case will be dealt with by whichever of the two is best placed to do so. The factors considered in determining who deals with the matter include sectoral knowledge of a regulator, any recent experience in dealing with any of the undertakings or similar issues.

Although Zambia has a short history of the regulatory regime, it has become necessary to address the need for coherence and integration in the Zambian regulatory framework, which has remained fragmented and often contradictory. Furthermore, a need to clearly differentiate types of regulation has emerged. Both the Commission and sector regulators, despite having concurrent jurisdiction in certain sectors, need to develop approaches and strategies in dealing with broad issues affecting regulation in the country. The pursuit of competition should be fully compatible with other public policy goals. There is need to establish mechanisms to balance these other public policy objectives alongside

competition objectives. More importantly, it is clear that the proper facilitation of concurrent jurisdiction requires cooperation between the sector regulators and the Commission. For instance, the Banking and Financial Services Act has a provision which allows for the required flexibility, an example of the cooperation alluded to.

9.4 Pensions And Insurance Authority

The Pensions and Insurance Authority regulates and supervises the pensions industry in Zambia. Prior to the enactment of the Pension Scheme Regulation Act 1996, there was no specific pension legislation. Most pension schemes sought approval of the Commissioner of Taxes under the Income Tax Act ultimately for the purposes of obtaining some tax relief if they complied with certain provisions of the Act.

The Pension Scheme Regulation Act 1996 seeks to ensure that pension schemes are managed in accordance with financially sound and actuarially accepted principles and practices with the major objective being to ensure that the interests of scheme members are not at risk and the safety of their accrued benefits is guaranteed. Accordingly, pension funds that are managed in a financially sound manner are a recipe for the growth of an economy if the finances are invested in a well-functioning financial market.

The Act applies to all occupational pension schemes including the Public Service Pensions Fund and the Local Authority Superannuation Fund. It does not, however, apply to the National Pension Scheme under the National Pension Scheme Authority (NAPSA).

Establishment

The Authority was established in February 1997 and derives its mandate from the Pension Scheme Regulation Act No. 28 of 1996 and the Insurance Act No. 27 of 1997.

Under the current legislation however, the authority does not exist as a separate legal entity but exists as Office the Registrar of Pensions and Insurance, which is an agency of the Ministry of Finance and National Planning.

The office nevertheless enjoys operational autonomy.

Background to Establishment of PIA

Insurance and pension business in Zambia dates back into the pre-independence period. However, the regulatory framework is not as old.

Legislation to regulate the conduct of insurance activities in Zambia can be traced back to the Insurance Act of 1968. Pensions activities were generally unregulated until the enactment of the Pension Scheme Regulation Act in 1996.

At nationalization of the insurance industry in 1971 there were at least 26

insurance companies doing business in Zambia. Among these was the Zambia State Insurance Corporation (ZSIC) as the only indigenous insurer. ZSIC was established in 1968 as a state owned company.

The rest of the insurance companies in the market were foreign owned and were mostly based either in Europe or South Africa. Their operations in Zambia were limited to branch offices only. The insurance industry was regulated, by the Registrar of Insurance at the Ministry of Finance, under the Insurance Act of 1968.

In 1971 the insurance industry was nationalized in line with the sweeping economic changes that had began in 1968. This left the industry with only one insurance company ZSIC, and one insurance broking company, the Zambia National Insurance Brokers (ZNIB). ZNIB was established as a subsidiary of ZSIC.

As far back as the late 1980s the Government of Zambia was already holding consultations on liberalizing the insurance market again. The budget speech by the Finance Minister in 1989 had spelt out some of the government's intentions to liberalise the insurance market.

The change of Government in 1990 and more liberal approach to economic management that followed led to quick re-organization of the insurance market and the national economy as a whole.

The proliferation of insurance and pension business houses precipitated a need for establishment of a regulatory

authority. The government with the support of various bilateral and multilateral partners embarked on working out the necessary regulatory framework.

In 1996 the Pension Scheme Regulation was enacted to establish the office of the Registrar of Pensions and Insurance. This also set the statutes for regulating pensions business in Zambia for the first time.

Prior to regulation by the Pensions and Insurance Authority most pension schemes merely sought approval of the Commissioner of Taxes under the Income Tax Act for the purposes of obtaining some tax relief.

The Pensions and Insurance Authority was established in February 1997 to supervise pensions and insurance activities in Zambia. The office of the Registrar of Pensions and Insurance administers both the pension Schemes Regulation Act of 1996 and the Insurance Act of 1997.

It is worth noting that though the Authority enjoys operational autonomy, it does not exist as a separate legal entity. It is established as an agency of the Ministry of Finance and National Planning.

Functions of PIA

The Authority was established to protect the interests of pension scheme members and insurance policy holders. The functions of the Pensions and Insurance Authority include the following:

- (i) Registration of pension schemes, insurance companies and other related entities.
- (ii) Formulation and enforcement of standards regarding the conduct of pension and insurance business.
- (iii) Development of the pensions and insurance industry.
- (iv) Conduct education campaigns and sensitization programmes for stakeholders to increase awareness of the importance of saving through pensions.
- (v) Advise government on pension related issues affecting the country.
- (vi) Advise government on adequate insurance protection of national assets and properties.

9.5 National Water Supply And Sanitation Council

Background

The Government of the Republic of Zambia has commercialised water supply and sanitation service provision and devolved the responsibility to the local authorities and the private sector. Various options for private sector participation have been given within the confines of the law. Realising that water supply and sanitation service provision is a natural monopoly the government has established the National Water Supply and Sanitation Council (NWASCO) under the Water Supply and Sanitation Act of 1997 to regulate all water and sanitation services provider in

the country for improved efficiency and sustainability.

This major policy shift by the government is as a result of many years of failure to provide a good and adequate service to the Zambian people. The poor services have been a result of many problems including a multiplicity of organizations serving the sector without a clear allocation of responsibilities; inadequate financial resources to meet the costs of extending coverage and operation and maintenance; shortage of qualified and experienced manpower; and poor operation and maintenance of facilities. As a result of these problems more than 30% of urban and 65% of rural communities have no access to safe and adequate water while more than 45% and 70% of urban and rural communities respectively have no access to adequate sanitary facilities. These figures are way below the international averages. These problems have been analysed and largely point to weaknesses in legislative, institutional and organizational set-up of the sector.

In order to reverse the situation the government of Zambia set out in 1994 to reorganize the sector and defined policy sector principles as follows:

1. Separation of water resource management from water supply and sanitation.
2. Separation of regulatory and executive functions.
3. Devolution of authority to Local Authorities and private enterprises.
4. Achievement of full cost recovery for the water supply and sanitation services through user charges in the long run.

5. Human Resource Development leading to more effective institutions.
6. The use of Technologies more appropriate to local conditions.
7. Increased Government priority and budget spending to the sector.

It is hoped that the benefits of improved efficiency in the management of water services will accrue to consumers in terms of quality and assured services at affordable costs.

In order to achieve this new policy direction new techniques and instruments for regulating the water providers are required. NWASCO will regulate all aspects of the water supply and sanitation in both public and private institutions.

The issues of water affect a wide spectrum of stakeholders and the independence and representation of regulatory institution is important, hence all key stakeholders from government ministries, the private and consumer groups are represented on NWASCO.

Policy Framework

The Zambia government adopted the National Water Policy in 1994, which clearly stated that the regulatory and executive functions of water supply and sanitation services must be separated. The executive functions take account of infrastructural development, operation, maintenance and management of water supply and sanitation services. Regulatory functions comprise licensing service providers, defining the service area and standards for a utility, determining allowable adjustments in water supply and sewerage tariffs, monitor service standards, customer

protection, imposing sanctions for failure to meet agreed standards, etc.

NWASCO having been newly established and regulation being a new concept in the industry is not fully appreciated by most stakeholders, hence this treatise to highlight its mandate, benefits and role in sector development.

The Mandate – Legal and Institutional Framework

The National Water Supply and Sanitation Act has been established under the Water Supply and Sanitation Act No. 28 of 1997. It is a statutory body with a Board (Council) of fourteen whose membership by institution is enshrined in the Act with the nominations from these institutions having to be adopted by Cabinet through the Ministry of Energy and Water Development. The Council is represented by seven key government ministries and eight private institutions or individuals that have a direct consumer interest in service provision. The Council is responsible to the government through the Minister of Energy and Water Development. It submits annual reports to the Minister for presentation to Parliament.

The chief mandate of the Regulator NWASCO is outlined in the aim or long title of the Act: that is, to ensure efficiency and sustainability of water supply and sanitation service provision. In seeking to attain this goal, NWASCO therefore concerns itself with the setting of quality and service standards, regulating the levels of capital expenditure associated with meeting these standards, evaluating efficiency levels; giving incentives for improved

performance and penalising defaulters for negligence.

The Water Supply and Sanitation Act, 1997 gives powers to the Council to direct service providers to carry out water supply and sanitation services in compliance with the Act; to take such actions as may be necessary to enable government to comply with international agreements to which government is part; and to submit such information as may be necessary to enable the Council to monitor the performance of providers.

Functions of NWASCO

The functions of NWASCO are clearly outlined in section four (4) of the Water Supply and Sanitation Act. NWASCO has been mandated to do all such things as are necessary to regulate the provision of water supply and sanitation services. The functions could be subdivided into three: advisory, regulatory and support to sector development. Specifically the functions of NWASCO are:-

- (a) advise the Government on water supply and sanitation matters; as related to the policy to improve efficiency, accessibility and sustainability of service delivery by the providers. It will also advise on the policy changes for increased and most optimal investments in water and sanitation infrastructure.
- (b) advise local authorities on commercially viable institutional arrangements for the provision of water supply and sanitation services; For the local authorities that have not yet established CU's, NWASCO will advise on the most viable institutional setup and support their establishment process. In cases

where local authorities that have either on their own or have gone into joint venture to establish commercial utilities need to look at other options of institutional setup, NWASCO will advise on the best options.

- (c) license utilities and other service providers as well as other activities relating to the provision of water; The service standards and terms of running the water supply and sewerage services within an agreed area for providers will be elaborated in the license. It will elaborate the obligations of the providers to the consumers as well as the regulator. While the management of the water companies is the responsibility of the Board and the management team, NWASCO will have to ensure that whatever management system is put in place increases efficiency and does not unnecessarily increase costs.

- (d) develop sector guidelines, establish and enforce standards:-

The guidelines and standards developed by NWASCO will be to foster improvements in service delivery by providers. NWASCO will ensure improved efficiency and access to water and sewerage services by all within the service boundaries.

- (e) NWASCO regulates both the technical and economic aspects of water supply and sanitation service provision and hence will develop and enforce guideline and standards for all aspects of service provision. The guidelines and standards will form a key part of the license. Minimum

service levels will be agreed upon with each provider and new targets set during the review period. The implementation for adherence to these standards and guidelines will be monitored by NWASCO and defaulting providers will be liable for prosecution on conviction.

- (f) advise utilities and other service providers on procedures for handling complaints from consumers; NWASCO with its wide knowledge from other parts of the region and the world on good customer relations will prepare guidelines to help the providers. Some of this information will be made in form of reference material.

- (g) Disseminate information to consumers on matters relating to water supply and sanitation services; NWASCO will keep the consumers informed of who the service provider is and the service boundaries; the cost recovery strategies and the need for all who receive a service to pay for it and being vigilant in stopping vandalism as it is a cost that consumers pay for; consumers' responsibilities and rights and the obligations of the providers. In addition, NWASCO will update the consumers on the problems, the benchmarks and progress achieved by utilities through the annual utility performance report.

Instruments for Regulating

The Water Supply and Sanitation Act gives NWASCO powers to ensure that service providers comply with all the requirements of the law aimed at improving the efficiency and

accessibility to water supply and sanitation services. NWASCO has within the provisions of the law four main ways to ensure that this objective is achieved:-

- a) Licence process: All persons giving water supply and sanitation services to others besides the person's own use shall not operate except under the authority of a licence issued by NWASCO. In order for a provider to be issued a licence they have to comply with certain minimum requirements and agree to abide by them and the law. Failure to comply or meet these minimum requirements could result in NWASCO's refusal to issue a licence to a provider. There cannot be a transfer or amendment of a licence without prior approval of NWASCO, but such approval shall not be unreasonably held. This allows NWASCO to regulate monopolistic practices. Providers who have been issued with licences but continually neglect to observe the requirements may have the licence suspended.
- b) NWASCO will set guidelines and standards on tariff setting, investment, business planning, and minimum service standards. The providers will have to follow the set guidelines from NWASCO and go through a negotiation process before implementation. The providers will have to show improvement in their performance before any tariff increment can be agreed to by NWASCO in order to avoid passing on their inefficiencies to the consumers.
- c) Enforcement notices and Penalties: Enforcement notices will be issued to all providers who are non-

compliant on any aspects of the law relating to the provision of water supply and sanitation. Failure to perform or deliver services to agreed standards after two notices would result in penalties being enforced as provided for in the Act. Though this is a last resort NWASCO will not hesitate to use it to ensure compliance

- d) Publicity: NWASCO will publicise the ratings of providers according to performance in the Annual Utility Performance Report. This transparency should coerce providers to improve for fear of bad publicity.

The Set up of the Regulator

Autonomy

The Act gives powers to the Council to regulate water supply and sanitation service provision without interference. Where a provider is aggrieved with the decision of the Council, he can seek recourse from Ministry of Energy and Water Development and if not satisfied could go to the High Court.

The water supply and sanitation sector functions are spread across several Government ministries and organisations. Its regulatory function should therefore give all stakeholders an opportunity to participate in the decision making process. Besides representation on the Council stakeholders will have opportunities to contribute during the consultative fora on various issues of water supply and sanitation.

The major source of financing of the regulatory work comes from the licence fees levied on providers. A licence application fee is charged to go towards

the processing of the licenses and a monthly licence fee of between 0.6 and 1.0% is charged to support the regulatory work. The government has been giving grants to the institution in the set-up stage, which should cease once NWASCO becomes financially self-sustaining.

The Cost of Regulating

The provision of water supply and sanitation services is a natural monopoly being run on commercial basis. The quality of the service and the pricing therefore need to be regulated to protect the consumers from exploitation. Left to themselves providers would want to operate in financially lucrative areas only. In addition, investment in water and sanitation infrastructure need to be encouraged and monitored. The water companies need to be monitored for monopolistic behaviour.

Non-commercial Providers

The Water Supply and Sanitation Acts requires that anybody who provides water supply and sanitation services to any other persons be licensed whether for profit or otherwise. There are institutional providers such as ZESCO in Namalundu and Zambia Sugar in Nakambala who provide the service as a fringe benefit. They too need to be licensed for the purpose of monitoring the quality of service provided and ensure that they do not provide poor standards since the consumers do not pay for it directly.

9.6 Energy Regulation Board

Background

Rationale

In 1994, The Government of the Republic of Zambia (GRZ) promulgated the National Energy Policy (NEP). The objective of the NEP with respect to electricity is to increase accessibility and developing the most cost effective sites for the domestic and export market. The NEP sets a number of policy measures including; restructuring of the electricity industry, improving accessibility to electricity, promoting electrification of productive areas and social institutions, and developing hydro power generating potential. To achieve these objectives, the government's main strategy is to open up the power industry to the private sector, thus abolishing the statutory monopoly of the state-owned utility, ZESCO Limited.

The NEP also sets the institutional framework under which these policy measures would be implemented. The policy defines the roles of the Ministry of Energy and Water Development (MEWD), the Department of Energy and recommends the establishment of the sector regulator namely, the Energy Regulation Board (ERB). One of the recommended functions of the ERB in the NEP is to regulate against monopolistic tendencies of energy undertakings. In 1998, the government launched the Framework and Package of Incentives (FPI) for private sector participation in hydropower generation and transmission development. The FPI, among other things, established the

Office for Promoting Private Power Investment (OPPI) within the MEWD. The OPPI is responsible for promoting the FPI, soliciting and evaluating proposals, negotiation and award of contracts, and finalizing implementation and power purchase agreements.

The ERB was established, as a statutory board, under section 3 of the Energy Regulation Act, CAP 436 of 1995 of the Laws of the Republic of Zambia. The ERB is the independent regulator of the entire energy sector in Zambia (comprising of electricity, petroleum, and new and renewable energy sources). Although the Energy Regulation Act was passed in 1995, the ERB only came into existence in 1997 after the appointment of four Board Members (one full-time and three part-time) by the Minister of Energy and Water Development. The functions of the Board that would be relevant to restructuring the electricity market include:

- Monitoring of efficiency and performance of energy undertakings. The objective of this function is to promote rational and efficient allocation of scarce resources in production and provision of energy, thereby contributing to improving national welfare. It is also meant to protect consumers from unfair practices and pricing by energy undertakings that may have market power, and
- Monitoring the levels and structures of competition within the energy sector with a view to promoting competition and free entry in the energy industry for persons that meet requirements for operating business

in Zambia. In other words, the Board acts as a referee to ensure that there are no barriers to entry, all players in the market are fairly treated and rules that promote competition wherever possible are set so as to improve efficiency in production and provision of energy.

In order to achieve effective regulation, promote private sector investment and improve efficiency in the electricity market, the need for restructuring the market to allow competitive components of the market to freely and fairly compete, while keeping regulation to monopolistic components cannot be over emphasized.

Functions of the Board

The overriding objectives of the Energy Regulation Board shall:

- (a) monitor the efficiency and performance of undertakings, having regard to the purposes for which they were established;
- (b) receive and investigate complaints from consumers on price adjustments made, or services provided, by any undertaking, and regulate such adjustments and services by the attachment of appropriate conditions to licenses held by undertakings;
- (c) receive and investigate complaints concerning the location or construction of any common carrier or any energy or fuel facility or installation or the carrying out of any works by any undertaking, and regulate such location and construction by the attachment of

appropriate conditions to licenses held by undertakings;

- (d) 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;
- (e) in conjunction with the Zambia Standards Bureau established by the Standards Act, design standard with regard to the quality, safety and reliability of supply of energy and fuels;
- (f) in conjunction with other Government agencies, formulate measures to minimize the environmental impact of the production and supply of energy and the production, transportation, storage and use of fuels and enforce such measures by the attachment of appropriate conditions to licenses held by undertakings; and
- (g) make recommendations to the Minister as to the measures to be taken through regulations to be made under this Act.

9.7 Communications Authority

Introduction

Communications Authority was established pursuant to section 3 of the Telecommunications Act, Chapter 469

of the Laws of Zambia to assume the regulatory functions of the telecommunications industry, which had been, until 1st June 1994, performed by the Posts and Telecommunications Corporation Limited.

Objectives

The Telecommunications Act confers upon the Communications Authority the mandate to supervise and regulate the provision of telecommunication goods, services and products, to promote competition and to ensure that the benefits of this sector accrue to the citizens of Zambia and its economy. In addition, the Authority is mandated under the Radiocommunications Act chapter 169 to administer the radio frequency spectrum in Zambia.

Functions of the Authority

The Authority is mandated to supervise and promote the provision of telecommunication goods and services throughout Zambia and to:

- (a) take reasonable steps to extend the provision, throughout all urban and rural areas of Zambia of such telecommunication services, to satisfy all reasonable demand for them including, in particular emergency services, public call boxes, directory information services and machine services.
- (b) Promote the interests of consumers, purchasers and other users of telecommunication services (including in particular those who are disabled or of pension able age) in respect of the prices charged, the quality and variety of such services.

- (c) Promote and maintain competition among persons engaged therein.
- (d) Exercise general control and supervision of radio communications and radio communication services.
- (e) Promote research into and the development and use of new techniques in telecommunications and radio communication services.
- (f) Encourage major investors in and users of telecommunications.
- (g) Promote the provision of international transit services by persons providing telecommunications services in Zambia.
- (h) Enable persons providing telecommunications services in Zambia to compete effectively in the provision of such services outside Zambia; and
- (i) Enable persons producing telecommunications apparatus in Zambia to compete both inside and outside Zambia.

Policy Framework

In accordance with the mandate of the Communications Authority as provided under the Telecommunication and Radiocommunications Acts the Board of Regulators approved with effect from 1st September 1996, a policy framework and licensing structure designed to provide a fair, transparent and predictable regulatory environment in Zambia.

The policy framework and licensing structure are intended to achieve among other things the following goals:

- The introduction of competition in all segments of the telecommunications sector, as appropriate. The implementation of national telecom development programs that entice participants to implement sub-economic services and rewards them for doing so.
- The establishment of a regulatory system that implements policy through incentive, rather than coercive methods.

Communications Authority will initiate programs for national telecommunications development and will focus on the expansion of service access to residential as well as business customers. Parallel special emphasis will be placed on providing basic services to un-served or underserved segments of the Zambian population including rural areas and economically depressed urban areas.

For this purpose, Communications Authority is in the process of creating a Rural Telecommunications Development Fund (RTDF) that will be used to provide seed funding for development projects in these areas. The RTDF will be financed in part from operating fees paid by service providers.

Upon careful evaluation and deliberate judgments of the merits of various approaches to achieving the above, Communications Authority has determined that the introduction of appropriate levels of Competition in the telecommunications sector will provide

the broadest benefits to the people of Zambia and its government, as well as provide the most appropriate advanced telecom infrastructure for the development of its economy.

To accomplish these goals, and as a prerequisite for the establishment of a transparent regulatory environment,

Communications Authority intends to implement the spirit and substance of the principal of equal treatment of all service providers. To that end, Communications Authority will issue licenses for telecom services based on guidelines and licensing regimes that will ensure a level playing field.

10.0 Zambia Competition Commission

Institutional Framework

Section 4 of the Competition and Fair Trading Act:

(1) There is hereby established the Zambia Competition Commission which shall be 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.

(2) The provisions of the Schedule shall apply as to the constitution of the Commission and otherwise in relation thereto.

The Zambia Competition Commission (hereinafter referred to as “The Commission”) is an autonomous statutory authority established under Section 4 of the Competition and Fair Trading Act (hereinafter referred to as “The Act”). It falls under the auspices of the Ministry of Commerce, Trade and Industry for its general policy direction. It is established as a body corporate with perpetual succession, capable of suing and being sued in its corporate name.

It is the only national agency given the key responsibility to deal generally with competition matters and is responsible for enforcing the competition provisions of the Competition and Fair Trading Act. The Commission’s consumer protection work complements that of several other statutes that administer consumer rules and laws. The Government is considering the desirability of enacting a comprehensive consumer law.

10.1 Functions of the Commission

Section 6

- (1) It shall be the function of the Council to monitor, control and prohibit acts or behaviour which are likely to adversely affect competition and fair-trading in Zambia.
- (2) Without limiting the generality of subsection (1), the functions of the Council shall be-
 - (a) to carry out, on its own initiative or at the request of any person investigations in relation to the conduct of business, including abuse of a dominant position, so as to determine whether any enterprise is carrying on anti-competitive trade practices and the extent of such practices, if any;
 - (b) carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;
 - (c) to take such actions as it considers necessary or expedient to prevent or redress the creation of a merger or the abuse of a dominant position by any enterprise;
 - (d) to provide persons engaged in business with information regarding their rights and duties under this Act;
 - (e) to provide information for the guidance of consumers regarding their rights under this Act;
 - (f) to undertake studies and make available to the public reports regarding the operation of the Act;
 - (g) to co-operate 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
 - (h) to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

The above functions empower the Commission to commence investigations on its own, receive complaints and above all to carry out the competition advocacy work. The Commission recommends to the Board what action should be taken. The functions above are the guiding principles of the operations of the commission. All the work of the Commission is centred on these functions and every action would have to follow these provisions as a guide.

10.2 Organisation of Work

The organisation of work of the Commission is largely influenced by legislative change, global influences and marketplace dynamics which continue to change its operating environment. This has made the nature of the Commission's work unpredictable.

The Commission's establishment is in itself a product of this climate of change – in particular the domestic and

international pressures for markets generally being governed by competitive rather than explicit regulation. The volatility of the present market requires flexibility in the determination of priorities. Essentially, the Commission is 'event driven', reacting to the market place and developing strategies to pre-empt and hence prevent market failure. The Commission's primary responsibility is to secure compliance with the Competition and Fair Trading Act, by means of persuasion, education and litigation.

The Commission relies heavily on complaints and inquiries to identify breaches of the Act and to provide the information and evidence needed to successfully pursue these. Adequate information must be obtained to determine if there has been a breach of the Act and to assess if it meets the Commission's priorities.

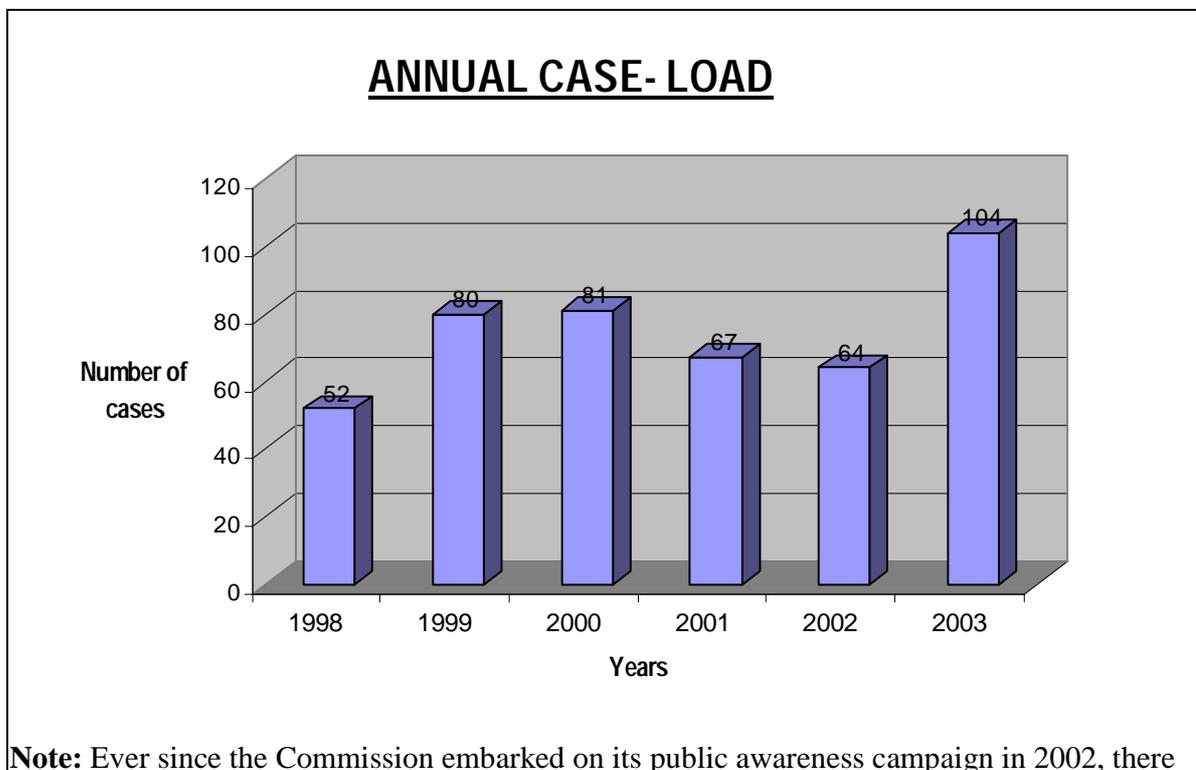
10.3 Sources of complaints and inquiries

Complaints and inquiries are received from a wide variety of sources:

- Consumers or customers (most common)
- Competitors (most common)
- Referrals from other government agencies
- Politicians
- Media reports or advertising monitored by the Commission staff.

Forms of complaint and inquiry are:

- By telephone (most common)
- Written complaints
- Off the street
- From ministries.



has been a drastic increase in a number of cases reported to the Commission as indicated by the figure for 2003.

10.4 Advice and responses

Complaints will fall into one of these categories:

- Breach of the Act is evident
- Breach of the Act is evident but not likely to meet the Commission's priorities
- Referral to another agency or Ministry

The Competition and Fair Trading Act does not empower the Commission staff to provide legal advice. Commission staff may only advise if the conduct described indicates a possible breach of the Act and if the Commission is likely to be interested in investigating the matter.

Complainants are told whether or not:

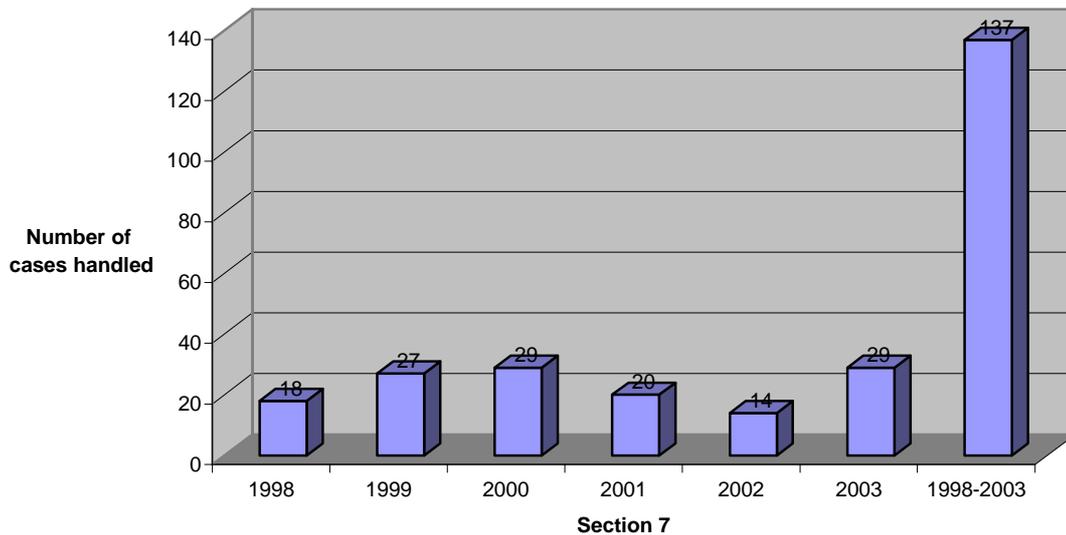
- The alleged conduct is likely to breach the Act; and
- If it is likely to meet the Commission priorities

The Act, under Section 6 provides for the various activities that the Commission is required to undertake. These activities are aimed at regulating, monitoring, controlling and preventing acts or behaviour, which are likely to adversely affect competition and fair-trading in Zambia. The Act further sets out specific provisions to deal with anti-competitive issues in Part III of the Act.

As a result of the foregoing, the Commission's role in securing compliance with the Competition and Fair Trading Act shall focus on four (4) parameters:

- Enforcement and investigation
- Mergers
- Authorisation/Adjudication
- Small business

**CASES OF ANTI - COMPETITIVE CONDUCT HANDLED UNDER
THE COMPETITION & FAIR TRADING ACT
(1998 - 2003)**



Note: The number of anti-competitive cases being reported is dependent on the business activities taking place in the economy.

11.0 Enforcement And Investigations

The Commission has since its establishment received many complaints and inquiries and this has continued to increase, as its operations become known to the public. The Commission has continued to analyse these complaints for trends and emerging problems. These may affect its priorities. Recurring issues include many matters under Section 12, reflecting in particular, a disappointing tendency for familiar forms of misleading and deceptive business conduct to emerge in new markets (e.g. utilities, telecommunications, health and electronic commerce).

Wider responsibilities and growing public expectations of the Commission's ability to deliver, underscore the importance of securing speedy resolution of matters – where possible without resort to litigation. The available 'tools' in addition to litigation are varied – administrative settlement, adjudication, promotion of self-regulation, compliance programs, information and liaison. Frequently, the most appropriate response to a particular market problem is a combination of these tools in an integrated strategy. For example, completed litigation invariably triggers information and liaison activities to maximise its deterrent and educative effect.

11.1 Conduct of Investigations

Investigations necessarily centre on the search for evidence of a breach, regardless of whether subsequent action involves litigation or some alternative strategy. The Commission has published detailed guidelines on its powers to seek information and updates them regularly. Resource constraints demand cost effective remedies and processes.

The Commission has established a 'fast track' strategy to stop offending conduct quickly and cost effectively and achieve satisfactory outcomes for consumers. These strategies are particularly appropriate for breaches of Section 12 of the Act. The 'fast track' process will normally begin with a letter of demand or verbal complaint, setting out the alleged breaches of the Act and remedial action. Common requirements are cessation of the conduct, corrective advertising, recompense to consumers or businesses for losses and the establishment of a trade practices compliance program.

11.2 Selection of matters

The Commission shall necessarily be selective in its choice of enforcement actions. It must give priority to action that is likely to have the greatest positive influence on compliance generally and, where possible, will achieve redress or compensation for interests adversely affected. The Commission shall not take litigation action unless it believes there is a breach of the law or likely breach appropriate for pursuance by a public agency.

In broad terms, the Commission's selection of enforcement actions is influenced by whether a particular matter involves:

- apparent or blatant disregard of the law;
- a history of previous contraventions of the law, including overseas contraventions;
- significant public detriment and/or a significant number of complaints;
- the potential for action to have worthwhile educative or deterrent effect;
- a significant new market issue; and
- a likely outcome that would justify the use of the resources.

11.3 Specific Enforcement Priorities

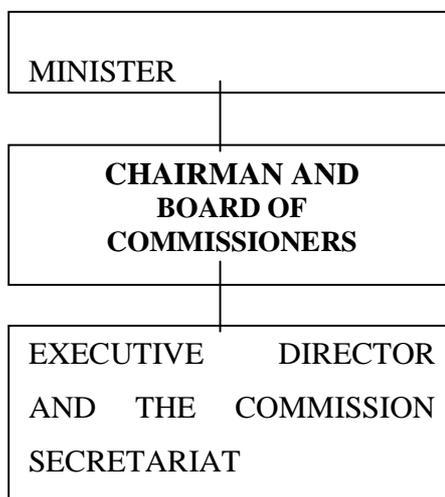
The Commission cannot pursue all matters referred to it and many do not fall under the Act or are better handled by other agencies. They may also not be Commission priorities and, if this is the case, it will advise complainants.

The specific priorities and selection criteria the Commission will apply to:

- anti-competitive conduct;
- consumer protection;
- mergers;
- small business issues; and
- adjudication.

12.0 The Institutional Framework

The institutional framework comprises of three key institutions namely:



12.1 The Minister

The office of the Minister is defined in the Act, and it refers to the Minister of Commerce, Trade and Industry. The Act provides specific functions for the Minister:

- The Minister shall, under Regulation 1 (2), appoint members of the Board of Commissioners after receiving nominations from their respective institutions.
- The Minister shall determine allowances to be paid to the Members of the Commission (Regulation 3).
- On matters pertaining to the non-application of the Act, Section 3(h) of the Act specifies that the Minister may exempt a business or activity from the application of the Act and

publish in the *Gazette*. Exemptions and exceptions from the application of competition law is one of the controversial areas in the implementation of competition laws in many countries. To avoid a situation where the Minister succumbs to political pressure and gives unwarranted exceptions, which may hurt other market players or even the consumer, there is need for transparency in the manner the Minister may grant such exemptions. The requirement for publishing in the gazette makes the process open to public scrutiny.

- In relation to the funds of the Commission, Regulation 11 states that one source of its finances is the ones to “*be appropriated by parliament for the purposes of the Commission.*” As a public institution established by an Act of Parliament and drawing its finances from the

general government budget, the Commission has a duty to spend its finances within certain government regulations and also account for the expenditures of the funds allocated. This establishes a link between the Commission and the Ministry of Commerce and Industry under whose budget provisions the Commission falls.

- The Commission is required under Regulation 14 to submit to the Minister, a report concerning its activities of the previous year as soon as practicable, but not later than six months after the end of the financial year in this case 30th June.
- The Minister under Regulation 14(3) is required to submit the annual report of the Commission to the National Assembly for approval before it is published. Therefore, the Minister shall be well informed of the contents of the annual report to be able to support it in the National Assembly.
- Section 13(2) allows the Minister upon recommendations of the Commission, by statutory instrument, to make regulations prescribing the particulars to be furnished to the Commission for the purpose of authorizing any act, which is not prohibited out rightly by the Act.
- Section 17 states that the Minister may, on the advise of the Commission, make regulations for carrying into effect the provisions of the Act, including anything to be prescribed under the Act advise, forms required for the purpose of the Act and fees payable in respect of any services provided by the Commission.

Section 17

The Commission may, with the approval of the Minister, by statutory instrument, make regulations governing-

- (a) anything which under this Act is required or permitted to be prescribed;
- (b) any forms necessary or expedient for purposes of this Act;
- (c) any fees payable in respect of any service provided by the Commission; or
- (d) such other matters as are necessary or expedient for the better carrying out of the purposes of this Act.

12.2 Board of Commissioners

The Board of Commissioners is the adjudicating body of the Commission. It is the decision making body of the Commission and its decisions can only be appealed against in the Court of Law. The Board is free from political influence on its decisions and has significant degree of independence from other arms of government.

The Board is given powers to appoint the Executive Director and other key staff of the Commission.

The Board of Commissioners carries out both the policy and adjudicator functions. In its adjudication functions, the Board:

- issues determination on any conduct prescribed under Part III of the Act;
- adjudicate on any matter that may, in terms of the Act be considered by it and make any order as provided for under the Act;
- make any ruling or order necessary or incidental to the performance⁴ of its functions in terms of the Act.

12.3 Composition of the Board of Commissioners

The composition of the Board of the Commission is broad based. It consists of persons from government and non-governmental organizations (NGOs). All prominent trade and professional associations in the country are represented on the Board. This was a deliberate policy by government to allow maximum participation in decision-

making. It provides the necessary key linkages with government, industry and civil society.

The Act does not specify any special qualifications for appointment to the Board, although it would appear from the current composition that knowledge or experience in industry, commerce, economics, law, labour or consumer protection is required.

Members of the Board, known as Commissioners, are drawn from Trade and Professional Associations.

- A representative of the Law Association of Zambia
- A representative of the Zambia Federation of Employers
- A representative of the Zambia Congress of Trade Unions
- A representative of the Economics Association of Zambia
- A representative of the Zambia Institute of Chartered Accountants
- A representative of the Engineering Institution of Zambia
- A representative of the Zambia Association of Chambers of Commerce and Industry
- A representative of the Zambia Association of Manufacturers
- A representative of the Zambia Bureau of Standards
- Two persons representing Consumer Interest and appointed by the Minister

The Government is represented by:

- A representative from the Ministry of Commerce, Trade and Industry
- A representative from the Ministry of Finance and Economic Development

The Act also provides for the terms of appointment, remuneration, removal of members, resignation, and validity of determinations.

All members of the Commission are nominated by their respective Institutions and formally appointed by the Minister of Commerce, Trade and Industry. The Board members serve for a period of three (3) years. They appoint, among themselves, a Chairman and Vice Chairman.

The Board meets as often as necessary or expedient for discharge of its business. The Board has also powers to invite any person whose presence is in its opinion desirable, to attend and to participate in the deliberation of a meeting of the Board.

Members of the Board under Regulation 6 are further required to disclose personal interest in any matter before the Board for consideration in which matter the member may have direct or indirect interest.

The Act under Regulation 5 further provides for the establishment of committees to perform any functions of the Board or any function the Board might deem necessary.

There has been some dissatisfaction from the public who are claiming that the current decision-making procedure by the Board of Commissioners does not guarantee procedural fairness, since the parties to the matter do not enjoy the 'rights to defense' i.e. there is no requirement for the parties to appeal before the Board to defend their position. The Board has considered the

matter and it has been agreed that in the next review of the Act, the 'rights of defense' in favour of firms involved in administrative proceedings before the Board should include for instance:

- (i) the right for parties to proceedings under the Act to have access to the Board and to be informed of the objections of the authority to their conduct,
- (ii) the right for such parties to express their views within a fair and equitable procedure in advance of an adverse decision addressed to them,
- (iii) the right to be notified of a reasoned final decision detailing the grounds on which such decision is based.

However, the inclusion of the principles of 'procedural fairness' and 'transparency' requirements should take into account or consider the costs and benefits of doing so.

12.4 Appointment and Powers of the Executive Director

Regulation 7 and 8 of the Act provides for the creation of the Commission's Secretariat. The Secretariat shall consist of the Executive Director and his/her staff.

The Commission is headed by the Executive Director who is its Chief Administrator. The Commission is the administrative authority charged with the primary enforcement of the Competition and Fair Trading Act.

The Executive Director is appointed by the Board of Commissioners. This is a

key position in the establishment of the Competition Commission. The position provides a strong, decisive and visible leadership capable of promoting impartiality and objectivity.

The enforcement and implementation of the Act is vested in the Executive Director. The Executive Director has the primary responsibility for conducting initial inquiries into possible monopoly situations and anti-competitive practices. In practical terms, such enquiries are carried out by the Executive Director's staff in the Commission. This work typically involves responding to complaints by a company's competitors or customers and carrying out informal research into markets where competition problems are thought or alleged to be present. The Executive Director has a further role to play in the implementation and subsequent monitoring of any undertakings, which may be given to remedy competition problems. The Act, under Section 14, bestows upon the staff of the Commission and the Executive Director, wide powers of investigation, search of

premises and seizure and for inspection of documents. The Executive Director can carry out all necessary investigations into undertakings, having regard to any special features of a particular case. Sometimes, this will be done in the form of a dawn raid; on other occasions, it will provide the parties with advance warning of its intended visit.

Section 14

- (1) Where the Executive Director or any officer has reasonable cause to believe that an offence under this Act or any regulations made hereunder has been or is being committed, he may seek from a court a warrant granting-
 - (a) authority to enter any premises;
 - (b) access to, or production of, any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any such books, accounts or other documents: Provided that any books, accounts or other documents produced shall be returned forthwith if they are found to be irrelevant.
- (2) In the exercise of the powers contained in subsection (1), the Executive Director or other officer of the Council may be accompanied or assisted by any such police officers as he thinks necessary to assist him to enter into or upon any premises.

Under his powers of investigation, the Executive Director can, with a Court warrant, examine books and other business records of the parties, take copies or extracts from the books and business records of parties, ask for oral explanations on the spot and enter any premises belonging to the undertaking concerned. There is no express right in Law to have a Lawyer present for such meetings, although normally the Commission will allow a limited time to elapse for the parties to acquire legal representation.

Although the Commission must specify the subject matter and purpose for its investigations, it does not have to identify in advance the information it is seeking. It can require the undertaking concerned to provide all the necessary information and documentation in its possession.

The Commission can call for the assistance of the Police, where an undertaking refuses to co-operate with officers of the Commission. Moreover, failure on the part of an undertaking being investigated to produce relevant documents to the Commission can render it liable to fines or imprisonment.

Private enforcement of the Act is also generally possible, i.e. individuals and corporations with an economic interest or individuals who have suffered a personal loss can take action under the Act and may be entitled to certain remedies.

12.5 Secretariat

The Secretariat staff is appointed by the Board of Commissioners through the relevant committee of the Board established under Section 14, responsible for the recruitment and staff welfare. The Executive Director, through the Commission's staff Conditions of Service is given powers, with the approval of the Board, to appoint such other officers and staff as may be necessary for the exercise and performance of the functions of the Commission.

The Secretariat offers the technical competence of the Commission. There is nothing that will undermine the standing and reputation of the Commission more rapidly than persistent displays by the Secretariat of technical incompetence. Indeed, the less competent the Commission, the more likely it is to deploy its powers in a 'gate-keeping' and bureaucratic manner.

In practice, it is the secretariat that investigates alleged contraventions of the Act and it decides whether and what form of enforcement action should be undertaken. Accordingly, the secretariat has considerable discretion as to what sort of matters are placed before the Board for adjudication. The secretariat also plays a crucial role in administering the allowable acts under section 13 of the Act.

In order to maintain and enhance technical competence, the Commission has been able to attract and retain quality

staff from the private and public sector by paying competitive salaries. Given the inevitable disparities between private and public sector salaries, the Commission will have to accept that it is the reputation or standing of the Commission among the ranks of professional lawyers and economists that will determine its ability to attract quality professional staff. The emphasis has been less on retaining staff but more on ensuring that high quality staff are constantly attracted to the Commission. The quality staff should be attracted to the Commission not because of salaries or the prospects of lifetime employment but rather because the Commission offers a stimulating working environment, one in which they will be able to hone their skills and reputation. In this regard, the Commission has developed training programmes for its staff which are funded and managed to a greater extent by UNCTAD.

The Secretariat of the Commission is provided for under Section 19 of the Act. A vital aspect in the formation of the Secretariat is the provision of an adequate number of qualified experts to staff the office. The Commission has employed two types of experts: Economists and Lawyers. Competition policy is grounded in economic analysis of complex economic situations. Correct decisions in competition enforcement require at least a basic understanding of microeconomics. The office staff include an adequate number of expert economists who are consulted in the decision making process on most matters.

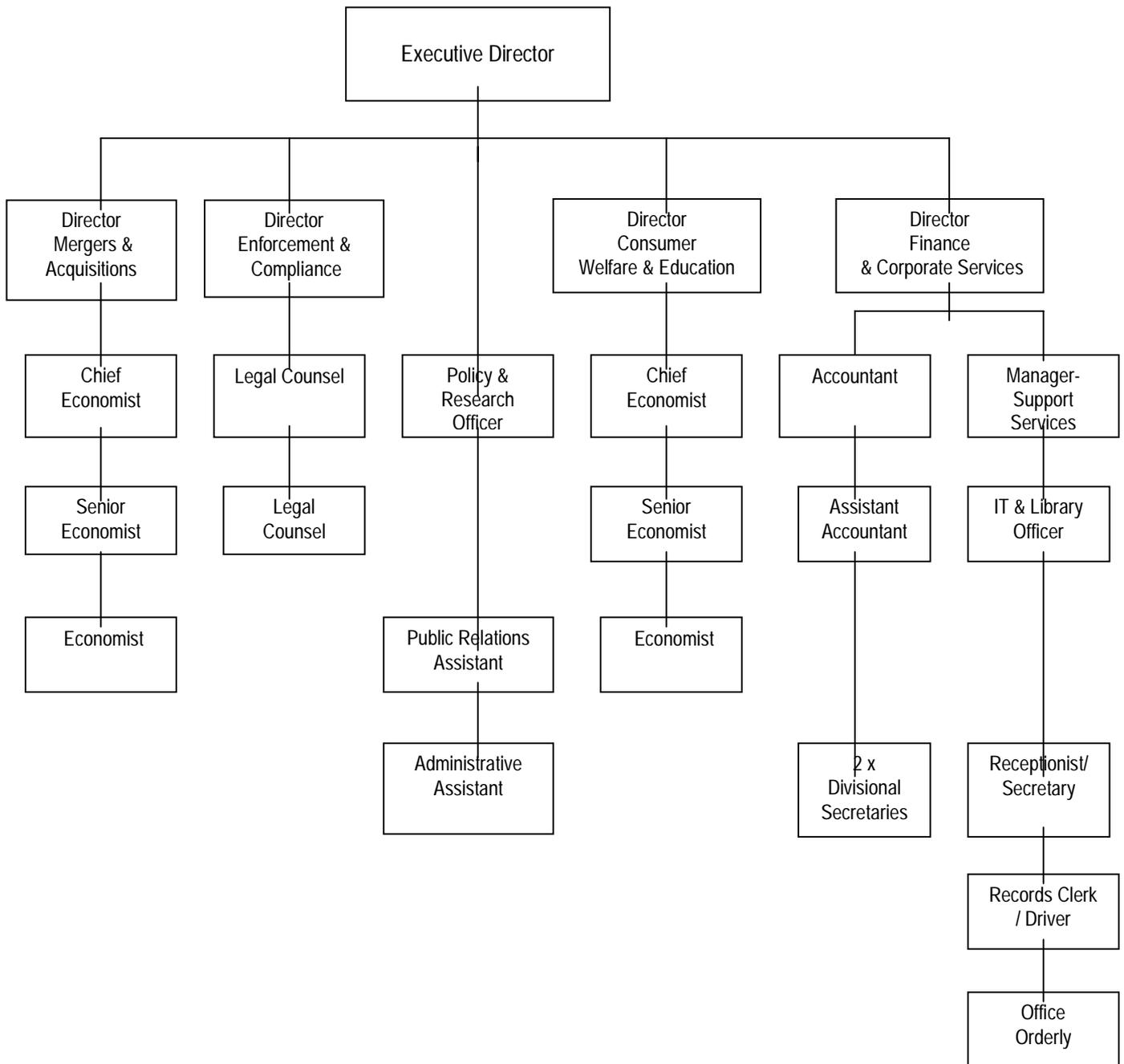
Lawyers are also required and important both to ensure the proper application of the competition law within the country's constitutional and legal framework and to present the Commission's cases in court, when required. Other experts include statisticians, personnel and computer experts and technical experts in particular industries or sectors, depending upon the workload of the Commission. Alternatively, in one case, some experts were acquired from independents on a contractual basis.

The management structure of the Commission is modelled on the type of executive functions that the Act has allotted to the Commission. In this regard, the tasks can be grouped as follows:

- Controlling, regulating and prohibition of anti-competitive practices.
- Assessment and authorisation of mergers and takeovers.
- Enforcement and administration of competition law and policy.
- Management and the administration function of the Commission.

12.6 The Organisational Chart

(2004)



13.0 The Autonomous Status Of The Commission

For maximum effectiveness and impartiality, the Commission enjoys a significant degree of autonomy from other organs of government. Although the Commission is established within the Ministry of Commerce Trade and Industry, there is still room for the Commission to enjoy a significant degree of autonomy as opposed to independence. Further, it should be appreciated that the Commission does not operate in a political vacuum. It is for the Commission to establish its independence and 'parochial' political concerns should not play a role in the competition analysis process. This is so, because the Commission, like in most countries, is essentially a Government institution with delegated authority, through an Act of Parliament, to administer and enforce a government economic programme namely, competition law and policy.

The autonomy of the Commission is assured, inter alia, by the procedures of appointing the members of the Board and by the eligibility criteria used in their selection. The autonomy of the Commission is further achieved by the Commission's decisions which are based upon sound competition principles, not political expediencies, and that the Executive Director's appointment and removal is governed by the Board as opposed to government. The Executive Director is an employee of the Commission not the Government; hence, the government cannot remove him easily.

It is difficult to define the degree of autonomy of the Competition Commission. Moreover, autonomy can be interpreted in legal, political and economic as well as in factual terms. The autonomy of the Commission is important in order to shield its decisions from outside interventions.

The appointment and the actual composition of the Board of Commissioners are closely related to the question of the autonomy of the Competition Commission.

It is important that the Commission is functionally and operationally independent from government. If this independence is not achieved or compromised, both in fact and in the perception of the community, then the Commission will be or be seen to be influenced by the politics of the day and therefore subject to other political agendas. Without independence, the Commission may lack credibility and both the public and the business community will not have the requisite degree of faith that their complaints or problems will be dealt with on the basis of sound competition principles alone. Without this element of trust, the result may be a sceptical public and an ineffective Commission.

Consequently, the composition of the Board should inspire confidence and respect in society. It is important to appoint members who command respect and who can uphold the autonomy of the Commission.

In principle, the current structure of the Commission promises to be the most effective enforcement mechanism. Independence gives the Commission a

single-minded focus on promoting competition. By divorcing the Commission from government bodies that oppose or are indifferent to reform, independence provides a sturdier platform for challenging government impediments to competition.

In practice, one should not underestimate the problems associated with creating a new “independent” government institution. This is particularly true where the Commission has assumed an institutional form, such as an independent regulatory authority, that lacks a predecessor in the structure of government. In no case can one reasonably expect existing government bodies to cede power willingly to the Commission. Given this expected friction, the inherent fragility of a new institution should be taken into account in deciding the enforcement agenda of the Commission. This will require government support and commitment.

14.0 The Stated Objectives Of Competition Law And Policy

The stated objectives of Competition Law and Policy reflect some key concerns of the given country. The development needs of Zambia can be said to be reflected in the objectives of the competition law. At the most basic level, a core objective of competition policy in most countries having such policy is to maintain a healthy degree of rivalry among firms in markets for goods and services. In Zambia, however, the goal of maintaining inter-firm rivalry is also linked to broader economic and social policy objectives. Whereas this may be true for developed countries, most developing countries have moved

from a “narrow concept of economic efficiency” to a broad public interest approach. It is important to note that the Zambian Competition Law does not refer directly to the promotion of public interest. This has always been referred to as an anomaly to be rectified in the next review of the Law. The Preamble of the Competition and Fair Trading Act states its objectives as follows:-

- to encourage competition in the economy by prohibiting anti-competitive trade practices;
- to regulate monopolies and concentration 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; and
- to expand the base of entrepreneurship.

It is evident from the above objectives that the major concern of government in the enactment of the competition law was to mitigate the possible negative effects of privatization. Privatization of public companies was the main priority of government in the liberalization economic reforms. The government was cognisant of the fact that the public monopoly could transform itself into a private monopoly. Consequently, the objective of the competition law was to address the negative effects of post privatization.

It was also evident that the government was concerned with the entrenched concentration of economic power to few companies and lack of liberal trade policies. It was the government’s desire to open up the economy to more actors

including participation by Zambians themselves.

The government had further recognized that an active competition policy remains a key guarantor to economic efficiency and consumer welfare and contributes to greater availability to the consumer of a broader range of products and services at lower prices. An open competitive environment also fosters innovation and efficiency, thereby contributing to overall competitiveness of producers. By promoting optimal allocation of resources, competition policy contributes to economic growth and development and supports other objectives of macro economic policies.

15.0 Application Of The Act

The matter of exclusion from the application and scope of competition law is of great importance from both a competition and a trade perspective. It must be understood that the introduction of competition law in a least developed country like Zambia will obviously be met with great resistance. Competition was and is still regarded as a World Bank conditionality as opposed to an accepted 'home grown' economic policy. In order to gather consensus and acceptability for the introduction of competition legislation, it was necessary to introduce certain sectoral exclusions and exemptions.

The Act applies to all enterprises in relation to all their commercial transactions regarding goods and services. All businesses, whether trading as companies, partnerships, state corporations, cooperatives, trade associations or sole traders and whether

for profit or not, must have regard to the competition law.

There are various legal and economic reasons why it is necessary that competition law and policy should be of uniform application. The general principle in all competition laws is that all persons or enterprises are equally subject to the competition law, without discrimination. This is because firms or enterprises engaged in the same or similar business activities should be subject to the same set of legal principles and standards in order to ensure fairness, equality and non-discriminatory treatment under the competition law. Such an approach, as we shall see later results in greater predictability and consistency in the interpretation and application of the Act, and fosters "due process" under the Act.

The economic reasons relate to the interdependent nature of economic activities conducted in different markets and the promotion of allocative efficiency. Exemptions from the application of the Competition Regulations in one sector may perpetuate or induce distortions that can affect the efficiency of economic activity conducted in other sectors hence, the need to implement and apply the same set of competition regulations in the market.

The importance for a uniform application of competition rules is fundamental to the effective implementation of competition rules in the country. The advantages include:

- The protection and promotion of the competition process throughout the country to safeguard against

misallocation of resources and inefficiency, which adversely affect the economic development in the country and the welfare of the citizens. Exemption of particular businesses, sector of business/industry or kinds of conduct has potential to induce misallocation, inefficiency and disadvantage to consumers.

- Exemption from competition law can be discriminatory and inequitable as between market operators. Hence, competitive market conduct rules should apply uniformly to all businesses irrespective of whether they are public, private, foreign, domestic, corporate, big, small or otherwise. In this way, the rules will be fair, be seen to be fair and avoid giving privileged positions to those not subject to the competitive conduct rules; and
- The efficiency justification for uniform application of competitive market rules in the country is particularly important in view of the recent globalisation of the markets. The country is under pressure not only to increase intra-state trade but also to improve its international competitiveness so as to increase its share of the world markets for goods and services originating from the country. In this regard, exemptions should be subjected to the closest scrutiny under the approved criteria before authorisation.

The existence of exceptions and exemptions from the application of competition law is attributable to a range

of factors depending on the desire of government.

While 'best practice' advice suggests that competition law and policy should apply to all sectors and firms in the economy engaged in commercial economic activity, in practice various types of exemptions and exclusions are granted for social, economic, and political reasons.

The existence of exceptions from competition law is an important factor that can limit their overall effectiveness. However, this does not necessarily imply or mean the weakening of the enforcement of the Act in the country. Such exemptions and exclusion provisions are necessary for furthering the objectives of the Act. The competition rules are based on the fundamental principle that any conduct which has a purpose of substantially lessening competition in the relevant market should be prohibited, while recognising that, in certain circumstances full competition may not deliver the most desired outcome. Not all agreements that perceptibly restrict competition are prohibited. The law recognises that some objectives of the different institutions and certain transactions in the market may not always be met by the operation of the competitive markets. To secure such objectives, exemptions and exclusions from the application of the Act are available.

There are basically two major categories of exceptions and exemptions:

- (1) Explicit Exemptions: These are given in Legislation or Regulation; and

(2) **Implicit Exemptions:** These are when the application of competition law is displaced by industry – specific regulatory regimes or other manifestations of state ownership or direction.

Thus, banking, communication, water and sanitation, energy and electricity are further governed by their own law as regards the application of the competition law because they have specific sector regulatory framework. As mentioned earlier, they have concurrent jurisdiction power to enforce competition.

Explicit Exemptions

Section 3

Nothing in this Act shall apply to:

- Activities of employees for their own reasonable protection as employees;
- Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
- Activities of Trade Unions and other Associations directed at advancing the terms and conditions of employment of their members;
- The entering into an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by a virtue of, any copyright, patent or trademark;
- Any act done to give effect to a provision of an agreement referred to in Paragraph (a);
- Activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party;
- Activities of professional associations designated to develop or enforce professional standards reasonably necessary for the protection of the public; and
- Such business or activity as the Minister may, by Statutory Instrument, specify.

The exclusion provision contained in section 3 of the Act entails that the specified sector of the economy is completely excluded from the overall application of the Act. In other words,

any activity done in the specified excluded sector shall not be challenged in any way under the Act.

The basic thrust of these exclusions is to facilitate the legitimate exchange of information, reduce risk, counter balance the uneven bargaining or economic power, permit co-operation and foster innovation so that markets can function better and more efficiently.

The exclusions provided under the Act include the following exemptions:

15.1 The Explicit Exclusions

Section 3 of the Act provides for sectors that are entirely excluded from the application of Competition Act. These specific sectors are provided under the Act as follows:

- “Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
- Activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- Activities or agreements to which the government is a party;
- Activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public interest”; and
- Matters related to the existence and grant of intellectual property rights.

The first two explicit exclusions above focus mainly on the activities involving collective bargaining between the employer and the employee. The exclusion aims at counter-balancing the superior economic power and bargaining position most firms or employers have vis-à-vis individual workers, and to

prevent exploitation of labour. The employment exemption seeks also to ensure that industrial laws rather than competition laws deal with any disputes about employment conditions.

The third exclusion has the effect of making the whole privatisation process of state enterprises not subject to competition law. This is so, because in all or most of the sale agreements, the state through the Ministry of Finance and National Planning is the other party. The state enterprises were majority owned by government.

The fourth exclusion covers professional occupations such as lawyers, physicians and accountants to ensure qualified and ethical services. The exclusion is aimed at protecting the consumer from the potential exploitation, which would arise in the absence of regulations. There is no requirement under the Competition Act for the notification of professional bodies to, and designation by, the Commission.

The fifth exclusion is in relation to the existence and grant of intellectual property rights. The exclusion in relation to intellectual property rights is aimed at striking a fair and justifiable ‘balance’ between the competing claims of those who have developed intellectual property and those who need to have benefits of it. The provision expressly exempts from the application of the exclusive rights inherent in intellectual property protection granted by the respective legislations, which are considered to justify restrictions that would otherwise be subject to controls. The protection and the conferring of statutory monopoly rights over patents, trademarks and copyright are needed in

the country. Such protection has positive effects in the national economy of the country as it creates incentives for inventive activity and encourages technological advancement for the benefit of the people.

15.2 The De Minimis Exemption

It is important to address the de minimis doctrine vis-à-vis the application of the Act. Under this doctrine an agreement that has only a small effect on competition in the relevant market may be regarded as 'de minimis' and, as such, outside the scope of section 7(1) of the Act. There must be an 'appreciable' effect upon competition.

There is a condition that the restriction of competition and the possible effect on competition should be noticeable. De minimis exemptions are those which are granted for transactions involving firms with turnover or market share below the stipulated threshold, which are not considered to affect competition significantly enough to make it necessary for the law to be made applicable to them or to be applied by them. A good example is that of the application of competition rules to small and medium sized enterprises. Although the Act contains no express provisions regarding SMEs, they may receive favourable treatment de facto because they fall below the thresholds over which certain procedures or prohibitions are applied or because their activities are assessed as having a de minimis effect upon competition.

15.3 The 'Rule of Reason' Exemption

Upon the face meaning of the words: "Any category of agreements, decisions and concerted practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or in any substantial part of it are declared anti-competitive trade practices and are hereby prohibited", in section 7(1) of the Act, every contract for purchase or sale, every partnership, every merger, every joint venture arrangement and indeed the vast majority of everyday commercial contracts would be unlawful, since they all involve some restraint of trade.

Exemptions apply to specific business arrangements or practices that, although prima facie anti-competitive or potentially so, are deemed in particular circumstances to enhance efficiency and/or strengthen competition. This is the case of vertical arrangements and certain mergers. Such arrangements or practices may, alternatively, be considered to have negative effects with respect to competition and, therefore shall be subjected to a case-by-case analysis to determine whether or not they are prohibited.

The 'Rule of Reason' treatment of a practice means that the legality of the practice is evaluated with reference to its economic effects in the relevant markets. This approach is used when evaluating the prohibitions relating to vertical restraints, which are contained in section 7(2) of the Act. Although vertical arrangements put restrictions on the firm's ability to compete freely, they may be exempted on account that the detriments resulting from the conduct, including the lessening of competition,

are outweighed by public benefits. Most of the common vertical restraints dealt with in this manner include exclusive dealing conduct (restrictions on a firm's choice of buyers or suppliers), exclusive territories (restrictions on the firm's choice of location), tying arrangements (restrictions on the source of suppliers for particular inputs used by firms), and resale price maintenance (restriction on the price to be charged by downstream firms).

15.4 Definitions

Apart from the above exemptions, it is also important to refer to Part 1 of the Act which comprises of definitions. It is important to appreciate definitions given in the Act as they play an important role in the interpretation and application of the law. The following definitions of key concepts are found in the Act. The definition of manufacturing is given as: "transforming, on a commercial scale, raw materials into finished or semi-finished products, and includes the assembling of inputs into finished or semi-finished products but does not include mining." It is important at this moment to appreciate the importance of the mining sector to the economy of Zambia. This exclusion most probably reflects the country's desire to pave way to the smooth privatisation of the mining sector without being caught into the legal competition complications.

Monopoly Undertaking: means a dominant undertaking or an undertaking which together with not more than two independent undertakings:

- (a) produces, supplies, distributes or otherwise controls not less than one

half of the total goods of any description that are produced, supplied or distributed throughout Zambia or any substantial part of Zambia; or

- (b) provides or otherwise controls not less than one-half of the services that are rendered in Zambia or any substantial part thereof;

In practice, the definition of "Monopoly Undertaking" has led to the capturing of a broader number of transactions in the market especially, takeovers and mergers. This is because of the Oligopolistic nature of the Zambian market where there is almost single firm dominance in any given sector.

Consumer includes any person:

- (a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale.
- (b) To whom a service is rendered;

Consumer: means any person who purchases goods or services

Distribution includes any act by which goods are sold or services supplied for consideration.

Distributor: means a person who engages in distribution;

Manufacturing: means transforming, on a commercial scale raw materials into finished or semi-finished products, and

includes the assembling of inputs into finished or semi-finished products but does not include mining;

Service: includes the sale of goods where the goods are sold in conjunction with the rendering of a service

Supply: in relation to goods, includes supply or re-supply by way of sale, exchange, lease, hire or hire purchase.

Trade Practice: means any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service.

16.0 The Main Elements Of Competition Law

Part III of the Act defines the framework for the operation of the competition rules. The main elements of competition law are found under Part III of the Act and include:-

- Section 7(1) Prohibitions of Anti-competitive trade practices
- Section 7(2) Prohibition of Abuse of a Dominant position
- Section 8 Merger/Takeover control regulation
- Section 9 Prohibition of horizontal restrains
- Section 10 Prohibition of anti-competitive trade practices by associations
- Section 12 unfair trading

The Prohibitions

There are several prohibitions under the Competition and Fair Trading act.

16.1 Section 7 Prohibition

“Any category of agreements, decisions and concerted practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or in any substantive part of it are declared anti-competitive trade practices and are hereby prohibited.”

Terms used in the Section 7 Prohibition

Zambia is a common law country. Consequently, the legal interpretation of the various terms used in the law can be adopted from other common law countries especially the United Kingdom and Australia, which in turn have also adopted the European Court decision. The common law countries’ interpretation in the absence of the Zambian court is persuasive. The Commission’s approach has been to borrow the interpretation given to these terms in as far as there is no related decision by the Zambian courts. The legal concepts and terms used under Section Seven (7) are as follows:

“Agreement”

Agreement has a wide meaning and covers agreements whether legally enforceable or not, written or oral; it includes so-called “gentlemen’s agreements”. There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange

of letters or telephone calls may suffice if a consensus is arrived at as to the action each party will, or will not, take. The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement.

“To an appreciable extent in Zambia”

There is an implied condition that the restriction of competition and the possible effort on trade should be noticeable. The Commission has tried to reduce the uncertainty surrounding this *de minimis* rule.

An agreement will infringe the Section 7 prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition in Zambia. Any agreement, which does not have an appreciable effect on competition in Zambia, should not be notified to the Commission. The Commission takes the view that an agreement will generally have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 50 percent, although there will be circumstances in which this is not the case. The Section 7 prohibition applies only if the agreement is, or is intended to be implemented in Zambia – this includes any part of Zambia where an agreement operates or is intended to operate.

“Decision”

A decision may cover the constitution or rules of an association, decisions, which are binding on its members and

recommendations. A decision may be a resolution of the management committee of an association or of the action of the members in some respect. Trade associations have on several occasions received advice from the Commission to desist from making decisions affecting their members with anti-competitive effects.

“Concerted Practice”

The Section 7 prohibition applies to concerted practices as well as to agreements. The boundary between the two concepts is imprecise. The key difference is that a concerted practice may exist where there is informal cooperation without any formal agreement or decision.

In considering if a concerted practice exists, the Commission has to make an economic assessment of the relevant market and two main elements will need to be established.

The existence of positive contacts between the parties, and secondly, 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.

The following are examples of factors which the Commission may consider in establishing if a concerted practice exists:

- Whether the parties knowingly enter into practical cooperation;
- Whether behaviour in the markets is influenced as a result of direct or indirect contact between Undertakings;
- Whether parallel behaviour is a

result of contact between undertakings which leads to conditions of competition which do not correspond to normal conditions of the market;

- The structure of the relevant market and the nature of the product involved;
- The number of undertakings in the market, and where there are only a few undertakings whether they have similar cost structures and outputs.

“Have as their object the Prevention, Restriction or Distortion of Competition”

The Section 7 prohibition applies where the object or effect of the agreement is to prevent, restrict or distort competition within Zambia. To be caught, arrangements must have ‘as their object’ the prohibited effects on competition. It

is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. Any agreement between undertakings might be said to restrict competition to some degree, in that it restricts the freedom of action of the parties. The competition in question must be understood within the actual context in the absence of the agreement in dispute. It will assess the effect of an agreement on competition in Zambia or a part of it, by examining it in its market and economic context.

We foresee a problem with the wording of Section 7(1). It shall be difficult to establish that an entity acted for prohibited objective. Consequently, the Commission shall propose amendments to the legislation to require an effects test rather than requiring proof of improper objective.

16.2 Abuse of Dominant Position and Vertical Restraints

Section 7(2)

Subject to the provisions of subsection (1), enterprises shall refrain from the following acts or behavior if through abuse or acquisition of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effect on trade or the economy in general.

The Zambian Competition Law contains the concept of ‘single firm dominance’ and ‘joint dominance’, which involves multiple firms. In Zambia, most key economic sectors are still subject to single dominance. This is historical, as

these sectors were formerly a preserve of government. After the privatization of the public enterprises, the monopoly positions still continued under private ownership. Consequently, dominant positions by firms are a common

phenomenon on the Zambia market. The market structure is such that it will be difficult to expect easy entry of other firms in these sectors. The single dominance characterizing sectors will remain for a long time.

Section 7(2) prohibits conduct by 'enterprises', which amounts to abuse or acquisition of a dominant position. It is therefore possible for the behavior of two or more independent undertakings jointly to be an abuse of a collective dominant position.

To find joint dominance, the Commission has to find some kind of economic link between undertakings which enables them to present themselves to act together on a particular market, independently of their competitors, their customers, and consumers; parallel behavior alone is not sufficient. This link might take the form of some kind of agreement or license, or a common trade association, or some other factor-giving rise to a connection between the undertakings which allows them to adopt a common policy on the market.

The above concepts under competition policy are variously called 'abuse of dominant position' or 'monopolisation' or 'misuse of market power' or other similar terms. Specifically, Section 7(2) of the Zambian Competition and Fair Trading Act prohibits conduct by one or more firms that amounts to the abuse of a dominant position in a market in Zambia, or a part thereof.

“Enterprises shall refrain from the following acts or behavior if, through abuse or acquisition of a dominant position or market power:

- *They limit access to markets, or*
- *Otherwise unduly restrain competition, or*
- *Have or are likely to have an adverse effect on trade or the economy in general.”*

The Act, under Section 7(2) is concerned not with the fact that a firm is dominant, but rather the abuse of that dominant position. Holding a dominant position jointly, a monopoly or a position of substantial market power is generally not abusive.

The prohibition addresses the abuse of dominant position, not its existence simpliciter. Not all agreements which have a restrictive effect on competition are prohibited by the law. Equally, market dominance is not in itself unlawful under section 7(2). The legal provision endeavours to establish a system of workable competition to maintain a choice for consumers, purchases and suppliers, and to ensure that market entry remain unhindered by anti-competitive practices while at the same time supply and demand are allowed to operate freely, so ensuring that prices at which goods are sold in the marketplace are competitive.

The Commission has demonstrated through its decisions that, irrespective of how undertakings become dominant, such undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition within the market. Assessing whether conduct amounts to a breach of Section 7(2) thus involves two distinct issues:

- Whether an undertaking is dominant; and
- If it is, whether it is abusing that dominant position.

16.2.1 The Assessment of Dominance

An undertaking may be dominant if it has substantial power in the relevant market. It is now accepted that a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.

Determining whether a firm has a dominant position is done with reference to a defined market. That is, the firm has a dominant position or is a monopoly or has power only in respect to a market. It is therefore necessary to look at factors such as market shares, barriers to entry and other constraints.

(i) Market Share

Market share alone does not determine dominance and has to be assessed in the context of general market conditions, e.g. it is necessary to consider the market share of competitors and whether shares change overtime. However, the Competition and Fair Trading Act defines a monopoly undertaking as “*a dominant undertaking or an undertaking which, together with not more than two independent undertakings controls not less than 50% of the total goods and services supplied, distributed in Zambia, or any substantial part thereof.*”

(ii) Barriers to Entry

If entry barriers are low, then this may prevent the undertaking concerned from enjoying market power. Entry barriers may be divided into three categories:

Absolute advantages – which may include regulatory barriers to entry.

Intellectual Property Rights – include preferential access to important inputs.

Strategic Advantages – Advantage which an undertaking enjoys by virtue of being first on the market, or by tying-up distribution with exclusive distribution contracts and predatory behavior. This is common in Zambia, as most of the firms enjoy single dominance position.

(iii) Other Constraints

The other principal constraint is a strong buyer power, as the market power of undertaking will be reduced if their customers are large and enjoy a stronger bargaining position than they do.

In assessing whether there is dominance, the Commission considers whether and to what extent an undertaking will face constraints on its ability to behave independently. Those constraints might be:

- Existing competitors according to their strength in the market; this may be shown by market shares
- Potential competitors: This may be shown by a lack of significant entry barriers and the existence of other takings which might easily enter the market; and
- Other constraints such as strong buyer-power from the undertakings customers (which may include

distributors, processors and commercial users)

16.2.2 What constitutes abuse?

The Commission's approach to the concept of abuse is by determining whether an undertaking in a dominant position has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

Practices, which may not otherwise be restrictive of competition, may be abusive in a highly concentrated market since undertakings in a dominant position have to discharge the burden of proof that their dominance does not have the effect of impeding effective competition in the relevant market.

Section 7(2) contains a non-exclusive list of abusive practices, when an undertaking's behaviour might be regarded as crossing the line into abuse of dominant position.

The Act lists broad categories of business behaviour within which particular examples of abusive conduct are most likely to be found rather than specifically prohibited business practices. Conduct may be abusive when, through the effects of conduct on the competitive process, it adversely affects consumers directly (through the prices charged, for example) or indirectly (e.g. conduct which raises or enhances entry barriers or increases competitors' costs). However, an abuse can be exempted because it produces benefits.

A conduct for which there is an objective justification is not regarded as an abuse even if it does restrict competition. It will be necessary for a dominant undertaking to show that the behaviour is proportionate to the justification. Further, conduct which stems from superior efficiency of an undertaking is not an abuse – the purpose of competition policy is to encourage, not to penalize, efficiency.

16.2.3 The Commission's Approach to Vertical Restraints

It is generally accepted by the Commission that restriction in vertical agreements are unlikely to harm competition unless they have a significant foreclosure effect.

Foreclosure is only likely if one of the parties to the agreement has substantial market power or there exists a large network of similar agreements between undertakings, which collectively possess substantial market power.

Thus, if a party with a high market share in a particular product (Zambian Breweries – beer) agrees to supply that beer exclusively to another (Shoprite), this may foreclose access to clear beer by Shoprite's competitors. However, if Zambian Breweries does not have market power, then Shoprite's competitors are not harmed by the exclusive arrangement as they easily will be able to obtain the same product elsewhere.

Vertical arrangements generally refer to agreements between undertakings operating at different stages of the production and marketing chain.

Examples of activities at different levels of the production or distribution chain include supplying raw materials, manufacturing, wholesaling and retailing. An agreement between a sugar supplier (Zambia Sugar PLC) and a retail (Shoprite) would be an example of a vertical agreement between undertakings operating at different levels of the production and distribution chain. Such arrangements as we shall observe later are also dealt with as possible instances of abuse of dominant position under a 'rule of reason' or 'case-by-case' approach.

Once more, it is important to note that vertical agreements do not generally give rise to competition concerns unless one or more of the undertakings involved possesses market power on the relevant market or the agreement forms part of a network of similar agreements.

The main examples of vertical arrangements include exclusive dealing (restriction on a firm's choice of buyers or suppliers), exclusive territories (restriction on the firm's choice of location), tying arrangements (restrictions on the source of suppliers for particular inputs used by firms), and resale price maintenance (restriction on the price to be charged by downstream firms).

The subject of vertical restraints is controversial because most of the examples given above entail claims of

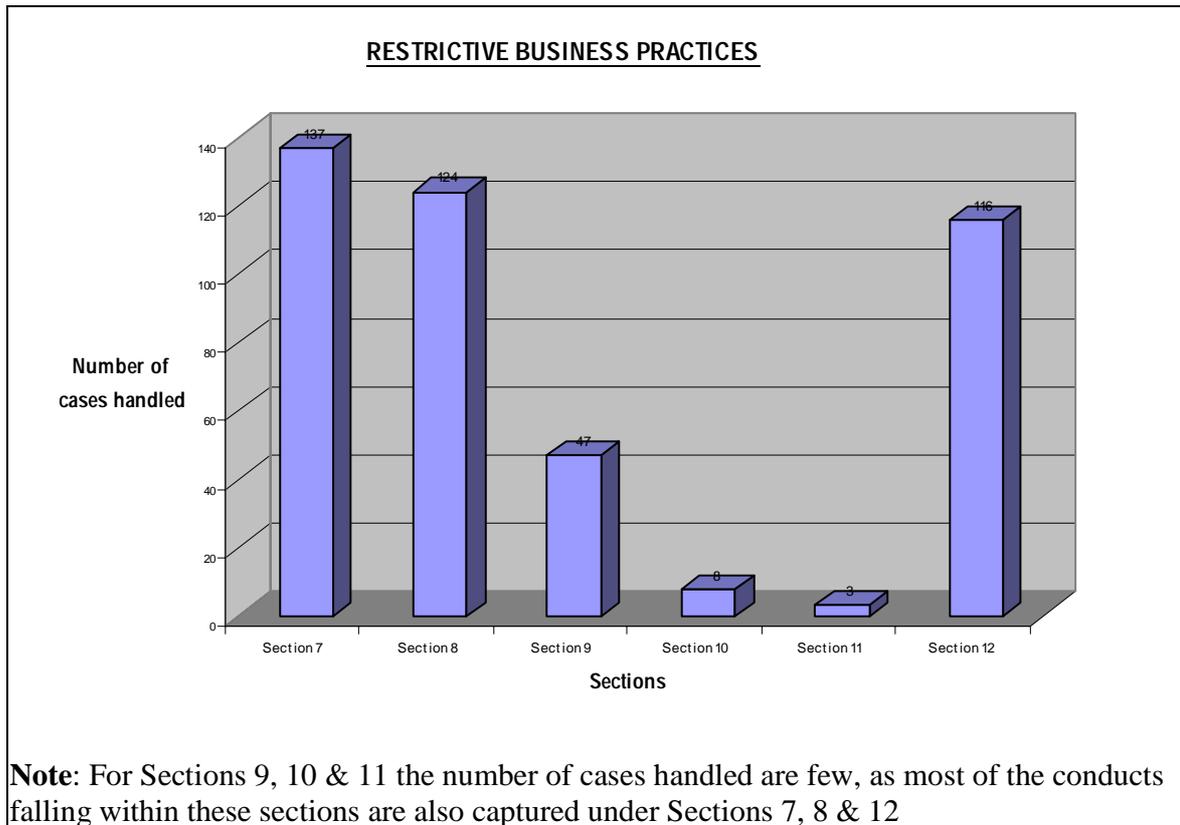
efficiency gains (i.e. removal of pricing distortions, optimised investment levels and avoidance of transaction costs) that must be offset against alleged anti-competitive consequences. The difficulty in evaluating these types of arrangements lies also in the fact that, while they arguably put restrictions on the firm's ability to compete freely, they may at the same time be efficiency enhancing. The later claim will be explored in greater detail herein below.

The Commission has taken the view that vertical restrictions usually are regulated best under the prohibition of abuse of dominant position rather than the section 7(1) prohibition which applies to restrictive agreements generally. The Act under section 7(2) gives examples of conduct, which may amount to abuse of a dominant position:

- Predatory behaviour – (S. 7(2)(a))
- Discriminatory pricing or other terms of conditions – (S. 7(2)(b))
- Exclusive dealing – (S. 7(2)(c))
- Tie-in sales and bundling – (S. 7(2)(d))
- Quantity forcing – (S. 7 (2)(e))

This list is not exhaustive, others are:

- Reciprocal exclusivity
- Resale price maintenance
- Territorial restraint
- Full-line forcing
- Transfer pricing
- Premium offers or Loyalty rebates



The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices different from those normally adopted in the course of competition in the market, with the effect of restricting the degree of competition, which it faces, or exploiting its market position unjustifiably.

It will be necessary for a dominant firm to show that the behavior is proportionate to the justification. Further, conduct which stems from superior efficiency of a firm is not an abuse, for the purpose of competition policy is to encourage, not to penalise, efficiency.

It is not possible to obtain an exemption from the prohibition against abuse of dominant position. However, a conduct for which there is an objective justification is not regarded as an abuse even if it appears to restrict competition.

16.2.4 Predation

Section 7(2) (a)

Predatory behavior towards competition including the use of cost pricing to eliminate competitors.

Predatory pricing is a situation in which the predator, already a dominant firm, sets its prices so low for a sufficient period of time that its competitors leave the market and others are deterred from entering. Assuming that the predator and its victims are equally efficient firms, this implies that the predator as well as its victims has incurred losses and that these losses are significant. For the predation to be rational, there must be some expectation that the present losses (or forgone profits), like in any investment, will be made up by future gains. This in turn implies that the firm has some reasonable expectation of gaining exploitable market power following the predatory episode, and that profits of this later period will be sufficiently great to warrant incurring losses or foregoing present profits. The concept of predatory behaviour implies that some method exists for the predator to outlast its victims, whether through greater cash reserves, better financing or cross-subsidization from other markets or other products.

The fact that an undertaking is being run at a loss is not in itself an infringement of the Act. The Commission will inquire whether this has an anti-competitive effect. The key issues, which the Commission has to consider, are the undertaking's costs, the intentions of the undertakings, and the feasibility of the strategy, i.e. whether the undertaking would be able to recoup losses by charging excessive prices in the future.

A South African multinational, Metpress, was found to have abused its dominant position in a beer distribution market by reducing its prices with the objective of driving out of business its competitors in the market in which Metpress held a dominant position. The Commission in its decision emphasized that the selective nature of the price cuts, and the circumstances in which they were made, amounted to 'loss leader' tactics making it impossible for the much smaller distributor competitor in the market place to stay in business.

16.2.5 Price Discrimination

Section 7(2) (b)

Discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods or services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises.

Price discrimination involves applying different conditions (normally different prices) to equivalent transactions: It can take two basic forms: -

The charging of different prices to different customers, or categories of customers, for the same product-where the differences in prices do not reflect the quantity, quality or any other characteristics of the items supplied.

The charging of the same prices to different customers, or categories of customers, even though the cost of supplying the product where different.

The Commission has received a good number of complaints alleging price discrimination. These have been stopped immediately the Commission starts its inquiries. However, the discrimination has been done on account of nationality, kith and kin' relationships etc.

Allegations of Predatory Pricing Conduct against Metpress Zambia Limited t/a Metro Wholesalers

Introduction and Relevant Background

On 8th June, 2001, the Official agents of the Zambian Breweries lodged a complaint, with the Commission alleging that MetPress Zambia Limited, t/a Metro Wholesalers was wholesaling the Zambian Breweries “Mosi” and “Castle” clear beers at prices lower than the manufacturer’s i.e. predatory pricing. This conduct was allegedly pushing members out of business. It was observed that the firm was actually taking over business in various parts of Lusaka. The complainants alleged further that the local distributors did not have the financial power to compete with such pricing strategies from Metro. Metro is part of the Metro Cash and Curry, which operates in at least 15 countries.

The conduct by Metro appeared to be in breach of Section 7(2)(a) of the Competition and Fair Trading (the Act), which requires enterprises to refrain from predatory behaviour towards competition including the use of cost pricing to eliminate competitors.

Findings

Metro was a new entrant in the market and was growing at a fast rate aided by its below-cost pricing (which was used as a market penetration strategy). It purchased its clear beer from Zambian Breweries as other distributors did. However, it appeared their selling price was below the purchase price and there appeared to be no objective justification for the conduct. Zambian Breweries confirmed that they had no unique “trade arrangement” with Metro. The selling price from Zambian Breweries was uniform.

Commission Decision

The Commission considered that while Metro was not a dominant player, its pricing strategies had an effect on the smaller distributors, hence the intervention. Although the Competition and Fair Trading Act provides that any form of price resale maintenance is anti-competitive it was in this situation found to be special to justify its continuity. A resale price maintenance was proposed (the “minimum price”) to avoid future breaches.

As noted already, the business relies heavily on volume sales and small disparities in price can and do have significant effects on other players. The favourable credit period awarded to Metro by Zambian Breweries was ordered to be discontinued and or be extended to all the other distributors.

Source – Zambia Competition Commission

16.2.6 Exclusive Dealing

Section 7(2) (c)

Making the supply of goods or services dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods.

A producer supplies distributors and guarantees not to supply other distributors in a given region. The Commission has intervened in several cases involving unjustified exclusive distribution arrangements, mostly in the beer sector, sugar, energy and services. The Commission had determined that the exclusive supply agreements of the type entered into by breweries and the

poultry firms with their respective retail outlets, affected trade for the purposes of section 7(1) if market analysis shows that the overall effect of the agreements is to shut off a substantial proportion of the market from other suppliers, and if, in view of the dominant market position of these companies and the duration of the agreement, they contribute significantly to the effect of foreclosure.

Box 9: Exclusive Dealing Arrangements between Hybrid Poultry Farm and Galaunia Farms Limited

During investigations into alleged cartel activities in the poultry industry in Zambia in 1998, the Commission became aware that there existed restrictive business arrangements involving Hybrid Poultry Farm (HPF – a day old chicks rearer with 60% market share then), Galunia Holdings Limited (GH – a commercial chicken broiler rearer), and Tamba Chicks (Tamba – a day old chicks rearer with 30% market share then). ZCC advised the parties to notify the said exclusive agreements as required under the Competition and Fair Trading Act Cap 417 of laws of Zambia. At the time, parallel investigations were launched on the sale of Tamba Chicks. GH management was interviewed.

During the investigations it was revealed that in the sale of Mariandale Farm, which specialises in the raising of Day Old Chicks (DOC) into table birds, HPF required GH to only purchase DOC from itself. Further, GH was also required to consider HPF's right of first refusal should it intend to resell Mariandale Farm. GH was also not allowed to raise any type of poultry, at the farm, apart from broiler chickens, including the provision not to go into business of a chicken hatchery. The parties also agreed that GH should be accorded the right of first refusal should HPF intend to sell some of its shares and that HPF should be given the first right of refusal to participate in an out-growers scheme should GH come up with one. The ZCC noted that the parties to this transaction are the two leading players in the poultry sector's upstream (HPF) and downstream (GH) sub sectors. HPF is the dominant producer of DOC in Zambia with a 60% market share. GH with its Mariandale and Diamondale Farms has an uptake of 48,000 DOC per week and hence the largest buyer in the poultry sector.

The exclusive dealing arrangements appear to have been over and above the offers each party made and hence the considerations made by the other. The excesses hinge on the ulterior motives of the parties in as far as the poultry sector is concerned. The parties seem to have taken advantage of their dominant market positions upstream and downstream – where each party was dominant. The parties were, both by motive and concerted practices, foreclosing competition both in the DOC, table birds (broiler) and frozen chicken.

These practices were in direct contravention of Section 7 of the Act and have the tenets of distractive cartel behaviour. The Board of Commissioners found all the exclusive dealing provisions in the sale and purchase agreements by the parties, anti-competitive and nullified them.

Source – Zambia Competition Commission

16.2.7 Tie-in Sales and Bundling

Section 7(2) (d)

Making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee.

Producers force purchases to buy goods they do not want as a condition to sell them those they do want, or force resellers or wholesalers to hold more goods than they wish or need. The Commission has stopped instances of tie-in sales and bundling, more especially where the sellers had unjustifiably included in the sale price the transportation costs. The buyer is

precluded from making his own transport arrangements (which may be cheaper and convenient) and forced to use the transport provided by the seller (in most cases unjustifiably costly). In some other cases, distributors have been coerced through the costing and pricing systems which are unfavourable when the distributor opts to provide his own transportation system.

16.2.8 Quantity Forcing

Section 7(2) (e)

Imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported.

A supplier requires distributors, for access to any product, to carry all of the suppliers' products. This is done mostly by offering lucrative discounts to buyers who buy or sell certain minimum quantities. This is imposed upon the distributors of beer i.e. those who sale above agreed targets.

It should be emphasized that the provisions in the Act on vertical restraints are illustrative only; there may be many other types of agreement that will 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 is whether the agreement has the object or effect of preventing, restricting or distorting competition.

16.3 Merger Control Regulation

The Zambian merger control regime is primarily governed by the Act. This establishes a procedure for merger control involving the Commission, the Board of Commissioners and the High Court. The Act gives the responsibility for investigating mergers to the Commission and the ultimate decision about whether a merger should be blocked, cleared, or cleared subject to

conditions to the Board.

The Zambia Competition Law is one of those which require pre-merger notification, that is, notification of intent to merge in advance of consummation. The merger control provision is very important in the implementation of competition law and policy especially in transition or developing economies. This is so in Zambia, where the markets

were highly concentrated prior to the commencement of the liberalization process and because of privatisation, which has resulted in a single leading or dominate firm.

Post privatisation mergers or acquisitions involving new and potentially more efficient competitors have continued to raise competition concerns.

Section 8

- (1) Any person who, in the absence of authority from the Commission, whether as a principal or agent and whether by himself or his agent, participates in effecting-
 - (a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;
 - (b) a takeover of one or more such enterprises by another enterprise;

Shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten million Kwacha or imprisonment not exceeding five years or to both.

- (2) No merger or takeover made in contravention of subsection (1) shall have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable.

The merger regulation is an important element of any law aiming to preserve levels of competition. Mergers can lessen competition, potentially providing increased scope for price rises or collusive behaviour and lessening dynamic factors such as the rate of innovation. These possible detriments provide the rationale for government intervention in the area of mergers or takeovers.

Some mergers and takeovers are prohibited outright by the Competition and Fair Trading Act. Others can be authorised by the Commission and

others are legal and do not need to be authorised.

Outright prohibition applies to any merger or take-over, which has the object of preventing, restricting or distorting competition “to an appreciable extent in Zambia or any substantial part of it,” (s.7 (1)). It is also an offence, under sub-section 8(1), to effect a merger between two or more enterprises engaged in manufacturing or distributing substantially similar goods or services (horizontal mergers). The illegality also applies to take-overs of one or more such enterprises.

The prohibition of horizontal mergers is qualified by the fact that the Commission is empowered to authorise such a merger where it considers such action appropriate. The criteria that the Commission will take into account in determining whether to authorise a horizontal merger or take over are outlined later.

Business enterprises contemplating a merger with, or the acquisition of, an enterprise producing substantially similar goods or services are advised to consult the Commission at the earliest opportunity and must complete the necessary application form in advance of the acquisition or mergers if they wish to obtain authorisation.

Where the proposed merger or acquisition involves firms which are engaged in manufacturing or distributing dissimilar goods or dissimilar services, an application for authorisation is not needed. Thus, many vertical and conglomerate mergers or acquisitions are legal, unless it can be shown that they are intended to restrict or distort competition.

16.3.1 What is a Merger?

The Competition and Fair Trading Act does not define the term 'merger'. Consequently, the Commission view a 'merger situation' to be very wide and covers several different kinds of transactions and arrangements. A company that buys or proposes to buy a majority shareholding or a significant minority shareholding in another company provides the most obvious example, but the transfer or pooling of

assets or the creation of a joint venture may also give rise to a merger situation. The Act's provisions apply to mergers that are proposed or in contemplation.

Different Merger Situations

- (i) **Acquisitions of Sole Control:** where one undertaking acquires more than 50% of the voting capital of another, or where a minority shareholding is so large compared to all the others that it would be likely to achieve a majority in the shareholders' meeting;
- (ii) **Acquisition of Joint Control:** where two or more undertakings must reach agreement in determining the commercial policy of the entity in question, examples include where two parent companies of a joint venture share equally the voting rights in a joint venture, or where two parent companies have unequal rights, or where there are more than two parents, but the minority shareholder(s) are able to veto decisions which are essential for the strategic commercial behaviour of the joint venture, or where there is a legally binding agreement between the shareholders on the common exercise of voting rights, or where in exceptional cases the common interests of the shareholders are so strong that they would not act against each other in exercising their rights in relations to the joint venture;
- (iii) **Transition from Joint to Sole Control:** where a joint venture partner acquires the other partner's interest in the venture;
- (iv) **Division of a Business:** where a joint venture is dissolved and each of the partners acquire sole control of businesses in respect of which they had had joint control before;
- (v) **Acquisition of Assets:** where assets, such as branded products or licenses, are acquired provided the assets constitute a business to which a market turnover can be clearly attributed.

Source: Richard Whish, Competition Law, 4th Ed, Butterworths, London, 2001, p.746-748

16.3.2 The Zambia Nexus

The merger provision of the Act only applies if at least one of the enterprises is carried on in Zambia or by, or under the control of, a body corporate incorporated in Zambia. "When a transaction has a significant anti-competitive effect on the local economy in any given jurisdiction, the local competition authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's centre of gravity (whether determined by reference to the nationality of the parties, location of

productive assets, or preponderance of sales) has outside its national boundaries."

The Act does not define when an enterprise is considered to be carried on in Zambia. It appears, however, that a foreign company with a Zambian subsidiary will be considered to carry on business in Zambia for these purposes. Thus, the Commission considers that a merger between two foreign companies may still qualify for investigation where either company controls any enterprise which is carried on or incorporated in Zambia.

The situation is still less clear if the foreign company trades with Zambia but has no office or subsidiary in Zambia. In this situation, we can borrow from the Zambian tax statutes which make a distinction between carrying on business 'in' and 'with' Zambia e.g. a Zambian established enterprise whose trading links with Zambia comprise the sale of goods to customers located in Zambia would not be regarded as carrying on business in Zambia, provided that it did not negotiate or conclude the sale contract in Zambia.

16.3.3 The Basic Criteria

In considering whether to grant authorisation to a proposed merger, takeover or any other form of acquisition, the Commission's main concern will be 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, 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.

Further, when considering a proposed merger or takeover, the Commission will usually approach it on the basis of a consultative process with the parties and

the relevant industry, in order to determine the potential market place effect of the merger. In most cases it will not be an adversarial process but one of consultation as no offence has been committed and parties will often seek the Commission's informal opinion well before proceeding with a merger or takeover proposal.

One can distinguish between three fundamental types of mergers, namely: horizontal, vertical and conglomerate mergers. The markets in which the parties to the merger are engaged have to be identified. Plainly, it is where markets directly overlap – in a 'horizontal merger' – that there is the most obvious possibility that there will be a reduction in competition. But competition issues may also arise where the merger involves markets that are "vertically linked" (affecting different stages of the production or supply of the same goods or services). Where there is no overlap or connection between the markets of the parties to the merger, there is little likelihood that the merger will adversely affect competition in those markets.

Under the Act, the Commission is responsible for conducting investigation either on its own initiative or following notification by the parties, into any potential merger situation qualifying for investigation. A merger situation that qualifies for investigation must generally meet the following criteria:

- Two or more enterprises (that is, business activities of any kind) must cease to be distinct or there must be arrangements in progress or in contemplation which will lead to enterprises ceasing to be distinct;

- At least one of the enterprise must be carried on in Zambia or under the control of a body corporate incorporated in Zambia (which means that a merger between two foreign companies may still qualify for investigation if either of them controls any enterprise which is carried on in Zambia or by a Zambian company).
- The enterprises which cease to be distinct must supply or acquire goods or services of a similar kind and must together supply or acquire at least 50% of all those goods or services supplied in Zambia or a substantial part of it.
- The enterprises must be engaged in manufacturing or distribution of substantially similar services.

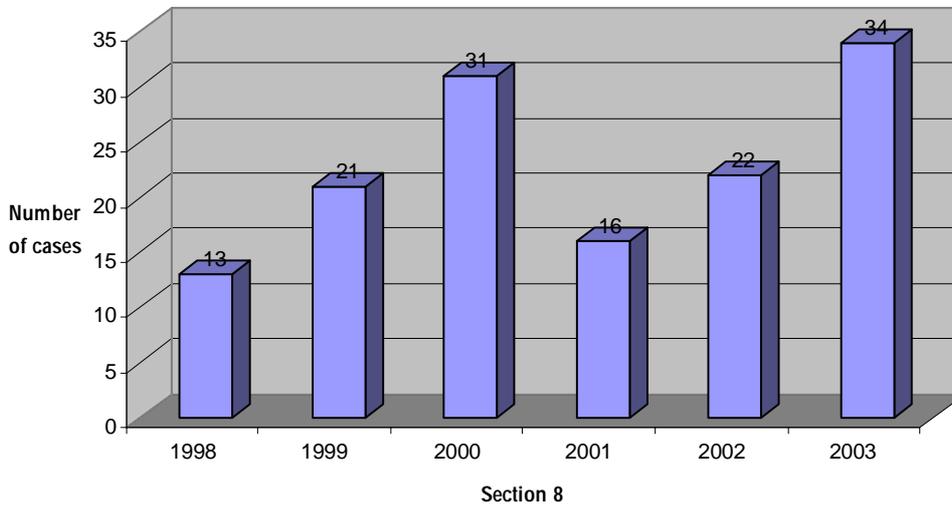
At the end of its investigation, the Commission ultimately will produce a report advising either that the merger should be cleared or that remedial action should be taken. It is up to the Board to decide whether to allow the merger to proceed.

The Commission on several instances has been challenged on the need to notify a merger. The argument by the lawyers is that the Act does not compel the parties to notify where they think there is no likelihood to breach section 7 of the Act.

There is need to clear the controversy on the need to notify mergers. The Commission has now recommended reviewing the merger control provision. There is need to introduce clear notification threshold which foster

certainty for merging parties and the Commission through the use of objective measures (based on revenue or other financial statement data) rather than the current non-objective criteria (i.e. market shares, which require both the definition of relevant markets and estimation of competitors' sales. Further, a provision should be inserted which empowers the Commission to request parties to notify a non-notifiable merger where it appears to the Commission that the proposed merger is likely to substantially prevent or lessen competition. It may also be necessary to bring in a provision which shall empower the Commission to object to a measure on public interest criteria.

**MERGERS & ACQUISITIONS CASES HANDLED UNDER THE COMPETITION
& FAIR TRADING ACT (1998 -2003)**



Note: The number of Mergers & Acquisitions cases is depended on the business activities taking place in an economy in a particular year

16.3.4 The Competition Assessment

In assessing the implications for competition of different mergers, the Commission does not adopt a rigid or mechanistic approach. No two cases are identical and weight is given to various factors according to the circumstances. Nevertheless every assessment always follows a similar basic pattern.

In determining whether the acquisition would have the effect, or be likely to have the effect of substantially lessening competition in a market, the following matters must be taken into account:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;

- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.

16.3.5 The Commission's Process for Evaluating Mergers

The Commission has adopted a five-step process that it uses to evaluate mergers.

1. Defining the market

This frequently is a subject of disagreement between the Commission and parties to the transaction, with the Commission tending to adopt a narrower rather than broader definition of markets.

Two factors have to be taken into account in market;

(a) the product dimension is determined by products that are close substitutes for each other. When purchases or users look on one product as a possible substitute for another, both products are normally seen as forming part of the same market, in which case the producers will be in competition with each other. Substitutability itself depends upon such things as:

- Characteristics of the products themselves;
- Brand loyalty;
- The ease with which a switch could be made.

(b) Geographic dimension – is often defined as Zambia as a whole, it can be narrower or wider than that. The limits are determined by how rapidly customers in any particular area will switch between local suppliers and those based elsewhere if there is a change in the relative prices charged by the two groups. The regional market dimension has started to play a role as a result of several initiatives enhancing regional economic integration.

The Takeover of Chilanga Cement by Lafarge of France

The Commonwealth Development Corporation (CDC) and the Pan African Cement (PAC) notified the Commission under Section 8 of the Act to sell their 50.1% shareholding in the Chilanga Cement PLC to Lafarge SA of France pursuant to a Sale and Purchase Agreement entered into by the parties on the 4th December 2000. The Commission first rejected the transaction because Lafarge had failed to show how the transaction was to produce benefits to the economy. Lafarge did not also give undertakings that guaranteed continued operation of the Chilanga Cement plants in the presence of fears Lafarge using Chilanga Cement as a raw material source with supply of cement in Zambia coming from outside. Chilanga Cement is the only cement producer in Zambia, with substantial upstream and downstream integrations to SMMEs

The Board of Commissioners reviewed the second submission from Lafarge and conditionally authorised the transaction after Lafarge gave substantive Undertakings to the Commission, which included the parties committing the following:

- To increase production at Ndola to 85% capacity utilisation within the next 3 years of date of this Undertaking.
- To supply cement to Burundi at an ex-works price no higher than Mbeya's ex-works price for the Burundi or Great Lakes Regional market.
- Recognising the fact that Chilanga has capacity constraints, the supply of cement will be on a priority basis as follows: the first priority will be the local market, particularly on the Copperbelt, the second will be DRC and third priority will be Burundi for Ndola works.
- While in pursuit of its corporate goals, Lafarge and Chilanga Cement PLC will endeavour to be compliant with the Competition and Fair Trading Act, CAP 417 of the laws of Zambia and implement a compliance programme under the management of a senior executive at both works as the Compliance Officer.
- Not to use methods of price announcements which have the effect of price fixing.
- Not to operate exclusive distribution contracts without notification with the Zambia Competition Commission.
- That within 3 months of the signing of this Undertaking, develop for consideration by the Commission, a Trade Practices Program.

Further, Lafarge was to make a mandatory share offer to the minority shareholders who would want to sell their shares, in accordance with the stock exchange regulations.

Source: Zambia Competition Commission

2. Market shares and concentration analysis

The combined market share of the merging companies provides an important indicator of whether a horizontal merger creates or increases market power. But other relevant factors are the size of the increment to market share produced by the merger, and the number of competitors that remain and their market shares. In general, the higher the merging companies' market share and the fewer their remaining competitors the more probable it is that the Commission would view the merger as adversely affecting competition, either because it would give the companies a dominant position in the market or because it could result in a handful of firms with similar market share (an oligopoly) between whom competition might be muted. Assessment of the likely strength of competition between the remaining firms in a market after a merger takes place is always a crucial consideration.

The Commission generally has no concerns about mergers in unconcentrated markets or mergers between small participants in a relevant market. It has two 'safe harbours'. Should a merger fall within one of these 'safe harbours', the Commission will generally not consider it a problem merger, although this may not always be

the case. The relevant boundaries of the safe harbour are expressed in form of threshold.

Thresholds: The Act has set two thresholds, one to deal with the situation of unilateral market power (i.e. single firm dominance) and the other to deal with the situation of concentrated markets, where there may be combined or oligopoly market power. The thresholds are set so that the Commission would look at mergers, which have:

- Unilateral market power: the merged firm has more than 50% of the market; and
- Combined market power: a dominant undertaking which together with more than two independent undertakings have more than 50% of the market.

The fact that a merger might breach these threshold does not automatically mean that the Commission will oppose the merger. The Commission will tend to look at the merger more critically in these circumstances. It will then examine the transaction under the criteria of section 7(1) (substantially lessening competition) referred to earlier, and section 7(2) (dominance test).

The Takeover of Cadbury Schweppes by Zambia Bottlers Ltd

Introduction and Relevant Background

The Coca-Cola Company (TCCC) and Cadbury Schweppes (CS) Plc signed an agreement for the purchase by TCCC of the CS commercial beverages brands and the trademarks outside the United States, continental Western Europe and a few other countries. In Zambia, TCCC lodged a notification under Section 8 of the Act to acquire Cadbury Schweppes Zambia (CSZ) Limited. TCCC produces carbonated soft drinks in Zambia, while Cadbury Schweppes produced both carbonated and non-carbonated drinks, as well as clear beer (whisky black).

Major Findings

TCCC had a 92% market share in carbonated soft drinks in Zambia, while CSZ had 8%. Their products are almost perfect substitutes. Imports of competing products are negligible and are mainly done by Kazuma Enterprises on a niche market basis, including Pepsi products from Namibia. The takeover of Cadbury Schweppes brands in Zambia by TCCC was to effectively eliminate competition and any possible entry into the carbonated soft drinks market in Zambia, especially that ownership and or authorised use of patents and know-how are key to success in the sector. However, Cadbury Schweppes Plc had not made substantial investments in Zambia and had only awarded the Zambian operation a franchise to use its trademark and beverage brands. The Zambia operation needed re-capitalisation. The parties submitted that TCCC would infuse its expertise in the beverage sector and assist CSZ achieve efficiencies. Third party concerns were raised regarding the concentration of economic power in TCCC in Zambia as well as the future of Goldspot in Ndola, which is an SME with a TCCC franchise for secondary brands.

Commission Decision

There existed entry barriers in the carbonated soft drinks market in Zambia, even before the notification of this transaction. In Zambia, the transaction entailed elimination of a vigorous competitor by TCCC and consolidation of TCCC market power and likely abuse of the same in relation to distributors and retailers. However, CSZ required recapitalisation. CS had already sold the brands to TCCC and CSZ did not have the franchise to produce the brands. Closure of CSZ would have had worse effects on both the social and economic spheres in the country. The transaction was authorised with conditions, which included the following:

- TCCC was to cease operation of any exclusive dealing and territorial restraint arrangements in Zambia;
- TCCC shall not fix prices or excessively advertise the recommended price;
- TCCC and cooperating bottlers in Zambia would continue to comply with the provisions of the Competition and Fair trading Act.

Source: Zambia Competition Commission

3. Import Competition

Merger factor requires the Commission to consider the actual and potential level of the import competition in the market. In an open and landlocked economy such as Zambia, the importance of giving special consideration to the role of actual and potential import competition in considering the likely effect of a merger on competition is widely recognised. The last decade has seen the gradual reduction of import tariffs and dismantling of quantitative constraints on imports which previously protected much of the country's manufacturing industry.

The assessment of actual and potential import competition needs to be undertaken with are:-

- Information that domestic suppliers are consistently inhibited in their pricing by the pricing of actual or potential imports.
- The extent to which imports are independent of domestic suppliers or the extent they are brought in order the licence of the merging firms and/or other domestic suppliers.
- Tariff levels and non-tariff barriers to trade.
- Information about the availability and potential availability and influence of import in different parts of Zambia.
- Changes to tariff levels and other forms of protection which are likely to occur over the next two or three years.

If it can be shown that imports sufficiently constrain the domestic competitors, the Commission may conclude that the merger does not substantially lessen competition. The Commission often states that it may not oppose a merger in a market with more than 15-20% imports. However, the Commission has not always followed this rule of thumb, and often needs convincing that there will be no effect on competition. Any argument for potential competition provided by imports must be strong.

4. Entry Barriers

The most important of the other factors that the Commission's assessment invariably takes into account is the possible existence of barriers to entering the particular market under review. The effects of a merger must be assessed in a dynamic context. The Commission does not focus solely on current market shares and market structure. The impact of a merger on competition is likely to be affected by the ease with which other suppliers can enter the market. Where entry is easy for potential competitors, a high market share will not give lasting market power.

Entry barriers clearly exist in any situation where a new entrant would have to spend heavily in order to establish itself in a market and where that expenditure could not be recovered if it later decided or was forced to withdraw. Such costs include R & D, advertising or the need to invest in specialized assets – in production, distribution or other essential facilities.

Even where any such costs are largely

recoverable, there can be other barriers. For example, established firms may control the necessary inputs, know-how and technology, including patents and other intellectual property rights. Legal and regulatory requirements, such as the need to obtain special approvals and licences, may also create entry barriers.

The Commission should be able to oppose efforts by government ministries, often acting at the behest of incumbent state-owned enterprises, to withhold approvals for new entrants or discriminate in favour of incumbent suppliers that are not efficient market players. Government denials of licenses and permits can be powerful barriers to new competition. It is common for national and local officials to sometimes withhold necessary approvals from private entrepreneurs because the market in question “contains too many firms” or suffers from “excess capacity”. This was a case of where an investor in telecommunication had his application for a license pending because the government through the sector regulator was not sure of issuing such a license.

In considering the likely effect of entry barriers, the Commission takes full account of the experience of any firms that have entered or withdrawn from the market in question in recent years and of that market’s rate of growth or decline.

5. Countervailing power

Merger assessment requires the Commission to consider the degree of countervailing power in the market. Countervailing power exists where a supplier (buyer) faces a buyer (supplier) with market power or a credible threat of vertical integration or direct importing. In such cases, the ability of the merged

firm to increase (decrease) prices may be constrained and the likelihood of a substantial lessening of competition diminished.

16.3.6 Pre-notification of a Merger to the Commission

There is no express requirement to notify merger to the Commission which qualify for investigation. Accordingly, the parties often will make a notification of their merger to the Commission in order to obtain the required authorisation under section 8 of the Act or to obtain legal certainty.

If a merger requires authorisation and is not authorised by the Commission, the parties take the risk that the said merger may not have any legal effect in Zambia, and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable.

The Commission may investigate the merger on its own initiative, either as a result of monitoring the press for merger announcements or of a third party drawing the transaction to its attention.

16.4 Horizontal Agreements

Section 9 Prohibition

Section 9

- (1) It shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in the practices appearing in sub-section (2) where such practices limit access to markets or otherwise unduly restrain competition

Provided that this subsection shall not apply where enterprises are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.

- (2) This section applied to formal, informal, written and unwritten agreements and arrangements.
- (3) For the purposes of subsection (1), the following are prohibited:
- (a) trade agreements fixing prices between persons engaged in the business of selling goods or services, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
 - (b) collusive tendering;
 - (c) market or customer allocation agreements;
 - (d) subject to the Coffee Act, 1989, allocation by quota as to sales and production;
 - (e) collective action to enforce arrangements;
 - (f) concerted refusals to supply goods and services to potential purchasers; or
 - (g) collective denials of access to an arrangement or association which is crucial to competition.

The prohibition deals with horizontal agreements. Horizontal arrangements refer to implicit or explicit arrangements between firms competing with identical or similar products in the same market. Such arrangements serve no purpose other than to shift surplus from consumers to producers, at the cost of dead-weight losses, organisational

inefficiencies, and rent seeking. These arrangements unlike vertical restraints are out-rightly prohibited under the Act; they cannot be authorised by the Commission. The Act specifically prohibits the following trade agreements:

- Price fixing
- Collusive tendering

- Market or customer allocation
- Sales/production quotas
- Refusal to supply
- Collective denials of access to an arrangement or association, which is crucial to competition.

The Commission has defined a number of instances where restrictive agreements or arrangements fall outside the scope of the application of section 9.

First, there has to be an agreement between economically independent undertakings. Where one party has no commercial autonomy vis-à-vis another, it is treated as part of the same economic grouping and therefore not subject to section 9, although if it is in a dominant position section 7(2) may apply. Thus, depending upon the circumstances of the case, an agreement between a parent and its subsidiary or between two companies which are under the control of a third party will not be prohibited by the Act if the subsidiary has no real freedom to determine its course of action on the market and, despite having separate legal personality, enjoys no economic independence.

The Commission has not intervened in several transactions involving a holding company and its subsidiaries. This was in case of the notification of the restructuring of shares in the Anglo-American Group of Companies, the internal share transfer in Madison Insurance Company, and the sale of 9.8% shareholding in Metal Fabricators of Zambia (ZAMEFA) Limited to Erabus BV of the Netherlands. The Commission determined that the relationship of the parties was that of a

holding company and its subsidiary hence, the transaction was not investigated or assessed by the Commission. Enterprises captured have to be independent of each other. Secondly, the Commission will look at the impact or effects the practice has had, or is likely to have in the particular relevant product or geographic market. Thirdly, the level of the free flow of the process of competition is considered. The effects would either be seen through a complaint from a competitor, a consumer or from the Commission's own observations.

The Restructuring of shares in the Anglo-American Corporation Group of Companies

On 30th December 2002, the Commission received a notification for the proposed restructuring of the Anglo-American Group of Companies (Anglo-American). Anglo-American operating in Zambia as Zamanglo Industrial Corporation Limited (ZAMIC) applied for necessary approval from the Zambia Competition Commission in accordance with section 8 of the Act.

In the proposed restructuring, ZAMIC's 26.4% shareholding in Boart Longyear Zambia Limited (Boart Zambia), comprising 76,724,023 shares of K1 each, were to be transferred to Boart Longyear International BV of the Netherlands (Boart Netherlands). In order to comply with the Companies Act, which requires that a limited company must have at least two members, one share will be held by a nominal shareholder, namely Boart Zambia. Boart Netherlands will therefore own 99% of shares in Boart Zambia.

ZAMIC's 6.25% shareholding in Afrope Zambia Limited (Afrope), comprising 3,774,000 shares of K1 each, were to be transferred to Boart Zambia which will entail Boart Zambia owning 12.5% of shareholding in Afrope Zambia. Because the restructuring was within the same Anglo-American group, there were no likely structural-market effects as a result of this transaction. Further, there was no concerted practice within the meaning of section 7 of the Act. The Board granted full authorisation to the transaction.

Secondly, where an agreement does not produce an appreciable extent on competition in Zambia, section 9 shall not apply.

The agreements referred in section 9 apply to formal, informal, written and unwritten agreements and arrangements. These anti-competitive practices are outrightly prohibited by the Act. The case of the oil marketing companies illustrate the typical operation of a cartel in the fuel sector. Although the Commission did not at the end of its investigation prosecute the companies involved, the publicity which was given to the case and a threat to prosecute was sufficient to stop the practices.

The alleged Collusion and Price Fixing Cartel in the Petroleum Sector by Oil Marketing Companies (OMCs)

There was a fire incident at the Indeni Petroleum Refinery in May 1999 in Ndola, Zambia. Following this incident, the Government of the Republic of Zambia (GRZ) issued a statutory instrument no. 119 of 1999, which reduced the customs duty on imported petroleum products from 25% to 5%. Consequently, the Energy Regulation Board (ERB) issued licences for the importation of petroleum products to nine (9) OMCs, namely BP, Caltex, Mobil, Agip, Total, Jovenna, Engen, Ody's and Agro-fuel. Following the resumption of production at Indeni, the government of the republic of Zambia issued Statutory Instrument (SI) No. 54 of 2001 that reinstated the 25 % import duty on all petroleum products effective 18th May 2001. On 29th May, 2001 the ERB received a joint written complaint from the OMCs about the effects of the S.I. on their business. On receipt of the letter from the OMCs, the ERB brought to the attention of the government through the Ministry of Energy and Water Development (MEWD) the concerns raised by the OMCs. The Ministry in turn assured the OMCs that it would take up their concerns on customs duty to relevant authorities. However, while the government was in the process of holding consultations with all stakeholders, the OMCs unilaterally increased the prices of petroleum products on 30th May 2001.

On 31st May 2001, ERB wrote to all OMCs individually directing them to revert to the old prices. The OMCs responded by asking for a meeting on 1st June 2001. Consequently, on 1st June 2001, the ERB held a meeting with OMCs. The OMCs stated that they would maintain the new prices for the next three weeks to recover anticipated losses. The ERB informed them that the directive to revert to the old prices while their complaint was being looked into remained in force. After the meeting, the OMCs responded through a joint letter informing the ERB that the new prices would remain in effect for four to six weeks thereby continuing to defy the directive given by the ERB. The ERB then responded to the joint letter individually restating that the directive remained in force.

The ERB Board Chairman further reiterated this directive during a press conference on 1st June 2001. During the press conference, he directed the OMCs to reduce the fuel prices to original levels or risk having their licenses suspended or revoked. By Monday 4th June 2001 none of the OMCs had complied with the ERB order. In order to address this act of defiance from the OMCs, the ERB held consultations with ZCC. The two institutions reviewed the conduct of the OMCs.

The investigations conclusively determined that the OMCs were acting collusively in conduct of their businesses as evidenced through their spokesman's letters to the ERB several times. The ERB had cautioned the OMCs but they defied it. The **motive** has been clearly to prevent competition amongst themselves and especially, price competition. During the period January to May, 2001 it was demonstrated that price competition was possible in Zambia but was short-lived as the big players on the market managed to put it off through predatory pricing to the point when it hurt all OMCs.

Cartel conduct was perpetrated under the leadership of BP and Caltex and the ultimate aim was to prevent competition amongst the OMCs.

Recommendations

All the OMCs, more especially BP, Caltex and Total, should be prosecuted under the Competition and Fair Trading Act for price fixing. There is evidence to show that:

- (i) there was an agreement on price increases;
- (ii) there was an agreement on a standard formula according to which prices will be computed;
- (iii) there was an agreement to adhere to published prices;
- (iv) there was an agreement to use a uniform price as the starting point for negotiations;
- (v) there was an agreement not to sell unless agreed-on price terms are met.

It was recommended that the trade association by the OMC serviced by Caltex should be abolished. The evidence induced so far shows that this association provides a forum for cartel activities. The association facilitates information sharing, adopting particular contracting or pricing practices that make it easier for a cartel to operate of for the OMCs which are in an oligopolistic market to avoid competing with each other, even without any explicit cartel agreement.

Source: Zambia Competition Commission

Agreement Fixing Prices: Price fixing is among the most common forms of restrictive business practices and irrespective of whether it involves goods or services, is considered in many countries, Zambia included, as illegal per se. Price fixing can occur at any level in the production and distribution process. It may involve agreements with respect to prices of primary goods, intermediary inputs or finished products. It may also involve agreements relating to specific forms of price computation, including the granting of discounts and rebates, drawing up of price lists and variations there from, and exchange of price information.

Importantly, however, it would appear the prohibition does not apply to agreements which fix resale prices. Thus, the prohibition may not be

available where the agreement directly or indirectly has the object or effect of fixing recommended resale prices.

Zambia has a history of price controls. The legislation on price control entailed government fixing prices of all commodities. This was made possible as most of the major manufacturing companies and retailers were government owned. The legislation on price control was repealed in 1992 and the Department of Price Control was abolished the same year.

The culture of fixing prices has remained with the people. There is a strong belief that if government does not intervene in the pricing of commodities, the businessman will charge exploitative prices. Companies such as the Zambian Breweries and the Coca-Cola Company

have responded by excessive advertising of the recommended prices, which has the effect of price fixing. Further, due to the oligopolistic nature of the markets in the banking, fuel, and cellular phones providers, the actors have managed to collude on price without agreements.

Collusive Tendering: In such a scheme, the buyer who invites competitive offers or quotations through a tendering procedure, will receive offers solely from members of the cartel, who have secretly arranged among themselves as to which enterprise will make the lowest offer. The other cartel members will either decline to participate in the tender or they will make fake offers, called “cover bids”. Often those who know they are not going to be awarded the contract simply inflate their price in order to make a less interesting offer.

However, things get complicated for the cartel when an outsider (non-member) makes a genuinely competitive offer. In that case, the only solution for the cartel is to lower their offer price as much as necessary for the outsider to be kept out. This may include making offers at a loss, which are usually financed through reserves put aside each time the cartel is awarded a contract, precisely with the aim of combating outsiders.

Given this, collusive tendering is inherently anti-competitive, since it contravenes the very purpose of inviting tenders, which is to procure goods or services on the most favourable prices and conditions.

The cases of collusive tendering are comprehensively dealt with by the legislation establishing the Zambia

National Tender Board, which is an autonomous institution dealing with public procurement. Further, most of the cases of collusive tendering border on the offences of corruption. Hence, the Corrupt Practices Act which is enforced by the Anti-Corruption Commission plays a major role.

The Commission has always referred to the Zambia National Tender Board complaints relating to tender procedures, especially where public institutions are involved.

Restraints on Production or Sales: Market sharing arrangements are devised on the basis of quantity allocations. Such restrictions are often applied in sectors where there is surplus capacity or where the object is to raise prices. Under such schemes, enterprises frequently agree to limit supplies to a proportion of their previous sales. In order to enforce this, a pooling arrangement is often made whereby enterprises selling in excess of their quota are required to compensate other members, who maybe selling less than their agreed quotas, by making payments to the pool.

Concerted Refusal to Purchase or Supply: Concerted refusal to purchaser or to supply is one of most common means employed to coerce those who are not members of a group to follow a prescribed course of action Group boycotts may be horizontal, where cartel members may agree among themselves not to sell to or buy from certain customers or vertical, where parties at different levels of production and distribution stages refuse to deal with a third party, normally a competitor of one of them.

16.5 Anti-Competitive Practices by Trade Associations

The Commission is cognisant of the fact that trade associations are expected to carry out many legitimate, positive functions, such as advocating to its members about technological and other advances in the industry, identifying potential problems with services, facilitating training on legal and other administrative issues, and acting as advocates and lobbyist before government bodies.

There are several trade associations representing different sectors in Zambia. For instance, there is the United Taxis and Transport Association (UTTA) in the passenger transport sector, the Zambia National Union of Farmers (ZNUF) in the agriculture sector, the

Manufacturing Association of Zambia (MAZ) in the manufacturing sector, the Zambia Association of Chambers of Commerce which is an umbrella body representing business interests of the private sector etc.

The Commission is, however, wary of the fact that trade associations can provide a forum for cartel activities, and the trade associations themselves may be involved in anti-competitive activities. To address this situation, the Act specifically prohibits:

- (i) unjustified exclusion of a potential member from a trade association, and
- (ii) recommendation to the trade association members on prices to be charged or terms of sale.

Section 10

The following practices conducted by or on behalf of a trade association are declared to be anti-competitive trade practices:

- (a) unjustifiable exclusion from a trade association of any person carrying on or intending to carry on in good faith the trade in relation to which the association is formed; or
- (b) making of recommendations, directly or indirectly, by a trade association, to its members or to any class of its members which relate to-
 - (i) the prices charged or to be charged by such members or any such class of members or to the margins included or to be included in the prices or to the pricing formula used or to be used in the calculation of those prices; or
 - (ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such member or any class of members and which directly affects prices or profit margins included in the pricing formula.

The Commission has on several instances encountered resistance from trade associations from stopping them to

recommend to their members prices to be charged. There are always public interest issues which justify the setting

of minimum floor price for agricultural price especially maize which is a staple for Zambians. There has also been an outcry from the public to regulate public transport fares. In both instances, the public and government have observed the exploitative tendencies by the businessmen due to the high demand experienced in the said sectors.

In the case of the pricing of maize, the sector has continued to experience the presence of middlemen who buy maize from the farmers at very low prices and sell to the millers at exorbitant prices. This has resulted into very high prices for the final commodity, maize-meal, which is sold to the public. The producer who is the farmer in this instance is being exploited with a very low price for his commodity and, the consumer is forced to pay a higher price to the miller.

The Zambia National Farmers Association has in this instance lobbied government to regulate the floor price for maize. This is because the association cannot in itself set up the floor price of maize to be charged by its members for fear of violating the Act. The government through the section 3 exemption has continued to intervene in this sector.

Further, anti-competitive concerns arose from the passenger transport association. The association was recommending passenger fares to be charged by its members who were bus operators. The recommended bus fares which were exorbitant attracted an outcry from the public. The Road Traffic Commission, a government department which regulates the sector, reacted by fixing the maximum fares on all routes. The Commission found itself with two institutions intervening in the market through fixing the fares. Whereas it was easy to stop the practice by the trade association, there were policy contradictions when it came to the Road Traffic Commission.

It was found that actually the Commissioner of the Road Traffic Commission had legal powers to regulate bus fares. Consequently, the Commission was precluded from exercising its powers to stop the practice. The Commission wrote to the Commissioner of the Road Traffic Commission to exercise caution by taking into account competition concerns when exercising his bus fares regulatory powers.

Section 186 (b) of the Roads and Road Traffic Act

If it shall appear to the Commissioner from any information given to him by a concession holder under the provisions section 179 or from any representations made to him by any person that -

(b) any of the fares charged or proposed to be charged for the carriage of passengers on any service provided or proposed to be provided under or by virtue of any concession is unreasonable.

The law under section 10(b) further addresses common situations by associations where they collectively deny an enterprise access to an association, which is crucial to competition. Members of professional and commercial associations is common in the production and sale of goods and services. Such associations usually have certain rules of admission and under normal circumstances those who meet such requirements are allowed membership. However, admission rules can be drawn up in such a manner as to exclude certain potential competitors either by discriminating against them or acting as a closed shop. Collective denial of access to an arrangement may also take the form of denying access to facility that is necessary in order to compete effectively in the market.

The Commission has not dealt with many cases of anti-competitive practices by trade associations. The case, which continues to come up more often, involves the United Taxis and Transport Association (UTTA). This association represents the providers of passenger transport. On several instances the association has fixed transport fares for its members contrary to Section 10 of the Act.

The Commission has always intervened through the sector regulator, the Road Traffic Commissioner to stop the implementation of the uniform price by the association members.

16.6 Authorisation of Allowable Acts

Section 13

- (1) The Commission may authorise any act which is not prohibited outright by this Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of this Act.
- (2) The Minister may, on the recommendations of the Commission, by statutory instrument, make regulations prescribing the particulars to be furnished to the Commission for the purposes of subsection (1).

Part III of the Competition and Fair Trading Act is based on the fundamental principle that any conduct which has the purpose of substantially lessening competition in the market should be prohibited, while recognising that, in certain circumstances full competition may not deliver the most desirable outcome.

The Act, however, recognises that some objectives of our society may not always be met by the operation of the competitive markets. To secure such objectives, exemption from the application of the Act are available. The adjudication (Authorisation and Notification) procedures under section 13(1) of the Act provide for the exemptions. It is important to note that

the adjudication procedures apply only to specific parts of the Competition and Fair Trading Act. For example, they do not apply to any of the consumer protection provisions under section 12 of the Act and cartel behaviour under section 9 of the Act.

To spare people the process of undergoing an investigation by the Commission or risking an action being brought on by a third party, the act provides a mechanism for authorization by which the Commission may grant immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act. The outcome provides a greater degree of business certainty, important when a major investigation decision or other market initiatives are proposed.

There is no express statutory requirement to notify agreements or conduct to the Commission. It is for the parties to an agreement or conduct themselves to take on the responsibility of ensuring that their agreements and conduct are lawful and to decide whether notification is appropriate in any particular case.

Notification is usually made for guidance or for a decision. Notification to the Commission is necessary if a decision is sought granting an individual exemption. Guidance may indicate whether or not the agreement or conduct would be likely to infringe the relevant prohibition.

A decision may be that the agreement or conduct is (i) outside the relevant prohibition, or (ii) that it is prohibited, or (iii) that it is exempt. The decision entails an assessment of the relevant

market and of the individual circumstances of the case, including the economic effects and any views received from third parties.

Anyone who wishes to take part in an anti-competitive conduct may apply to the Commission on the basis that he can satisfy the Commission that the benefit to the public of the particular conduct outweighs the detriment to the public caused by any likely lessening of competition.

Authorisation is granted on the grounds that conduct has no effect of substantially lessening competition. Depending on the arrangement or conduct in question, the Commission must be satisfied that the arrangement results in a benefit to the public that outweighs any anti-competitive effect, or that the conduct results in such a net benefit to the public that it should be allowed.

Although the Commission has on several occasions taken into account public interest arguments, it is still doubtful whether there is any legal basis. It is hoped that the position shall be made more clear in the forthcoming law review. Nevertheless, economic efficiency considerations have continued to play a major role in competition analysis.

The Commission's practice is to subject the authorisation process to a very public process and is not granted lightly nor very often. If it were, the aims of the legislation could be undermined. More common is the authorisation of anti-competitive agreements and exclusive dealings, and such behaviour that is prohibited per se but that does not lessen competition substantially.

Authorisation differs from the exemption provisions under section 3 of the Act. In the latter circumstances, certain conduct is declared as a matter of law to be outside the scope of competition law. (Please see discussion, supra, regarding Zambia's section 3). However, the authorisation process requires that there be an affirmative showing by the party seeking authorisation that the activity at issue produces benefits which outweigh any negative competitive impact.

In other words, whereas the underlying rationale is the same for both exemption and authorisation, i.e. there is overwhelming social benefit by allowing a particular practice, exclusion presumes that such a benefit exists whereas with regard to authorisation that benefit has to be demonstrated. Additionally, exclusion is done at the legislative level whilst authorisation is assessed via an administrative process.

As stated before, the authorisation process is an administrative one. To minimise any chance of abuse, it is required that this process be fair, transparent and equitable to all applicants. Also, given the dynamic nature of market conditions, the assessment process is periodically reviewed and any authorisation granted is subject to review.

It must be stressed that for the authorisation programme to be efficient, there must not be undue delay between submission of the application for authorisation and the ultimate determination by the Commission. In addition, the process should be open to the public, flexible and responsive and fair to all parties. This results in greater

business certainty and provides an appropriate framework for accountability.

The Commission is not able to re-open a case once guidance or a decision has been given unless it has reasonable grounds for believing that there has been material change in circumstances or it has reasonable suspicion that materially incomplete, misleading or false information has been given.

Certain types of conduct referred to under Section 9(3) of the Act (horizontal restraints) are inherently anti-competitive. The Commission is not likely to grant immunity from prosecution in respect of such conduct. They types of restrictive business practices mentioned in Section 7 (2) of the Act (vertical restraints) may not be anti-competitive depending on the precise circumstance of each case, and negative clearance for such conduct under Section 13 is possible.

17.0 Competition Policy And Consumer Welfare

Unlike other Competition Authorities, in Zambia, the Commission has also the legal mandate to deal with matters pertaining to consumer welfare. Firstly, you will observe that there is a large number of consumer organisations, both governmental and non-governmental, business interests, enforcement bodies and other interested parties, which are active in the field of Consumer Affairs. On the Board of the Commission, there are two representatives from the national non-governmental consumer associations.

Section 12

A person shall not-

- (a) withhold or destroy producer or consumer goods, or render unserviceable or destroy the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing about a price increase;
- (b) exclude liability for defective goods;
- (c) in connection with the supply of goods or services, make any warranty-
 - (i) limited to a particular geographic area or sales point;
 - (ii) falsely represent that products are of a particular style, model or origin;
 - (iii) falsely represent that the goods are new or of specified age; or
 - (iv) represent that products or services have any sponsorship, approval, performance and quality characteristics, components materials, accessories, uses or benefits which they do not have.
- (d) engage in conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any products or services; or
- (e) supply any product which is likely to cause injury to 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.

The Commission has identified what work on consumer affairs it should engage in, and how it should allocate resources between different types of activities. It has also developed a strategy aimed at providing the various bodies with guidance on how they might be affected by the work undertaken by the Commission.

Experience has shown that most of the consumer complaints arise from the following:

- (i) Price – this includes:
 - Misrepresentation about ‘discounts’ or ‘price reductions’
 - The non-disclosure of non-avoidable costs to the consumer over which the seller has control (such as mandatory

delivery costs) or for which the seller is liable (such as taxes payable by the seller and associated with the use of the good or service that the consumer will have to pay prior to the transaction being complete); and

- Representations that disclose part of the full price but not the full price or total cost.
- (ii) Quantity;
 - (iii) Standard, quality, value, grade, composition, style or model
 - (iv) History (including whether goods are new or second hand), previous use or date of manufacture, place of origin, manufacturing process;
 - (v) The existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

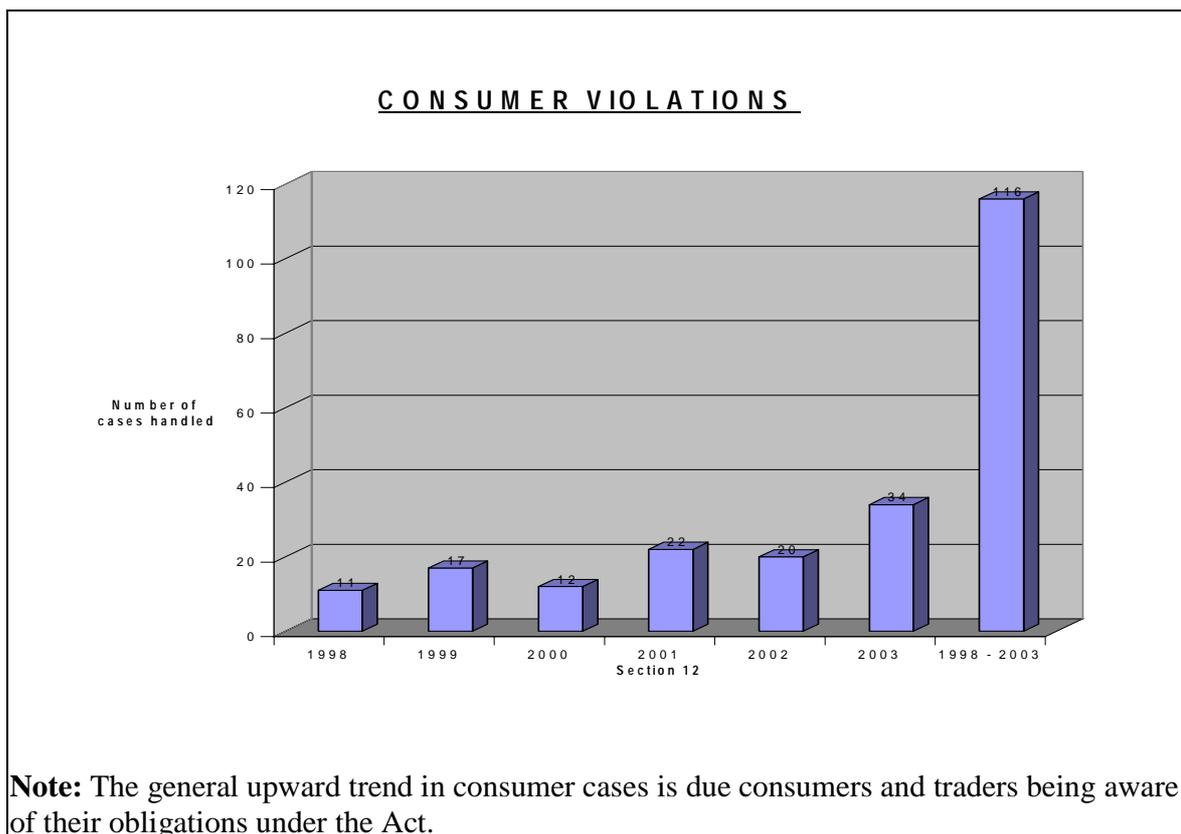
The Commission's work links the competition and consumer protection issues leading to an overall increase in consumer sovereignty. The Commission will continue to select its consumer protection priorities according to whether or not:

- The conduct in question is national;
- Significant consumer detriment is involved;
- A significant new market issue, for example, resulting from economic or technological change, has arisen.

The Commission will attach particular

importance to:

- Misleading or deceptive conduct and claims in relation to:
 - Price
 - Health
 - Safety
 - Country of origin
 - Technology industries; and
 - Electronic commerce;
 - Product liability and product standard
 - Major consumer and business scams
 - Issues arising from globalisation of markets and new technology; and
 - Debt collection practices



The Commission's strategy has taken into account the need to work effectively with those other bodies. This strategy by the Commission aims to help maximise

consumer welfare in the longer term, subject to protecting the interests of vulnerable consumers, by:-

- empowering consumers through information and redress;
- protecting them by preventing abuse; and
- promoting competitive and responsible supply

The Commission recognises the fact that, in general, consumers are the best judges of their own interests: consequently, it is for them to make choices for themselves, based on those interests and accordingly to their own values.

While direct intervention by the Commission may be necessary when things go wrong, the main thrust should be directed at empowering consumers to look after themselves. The main tool needed to enable them to do this is information. Consequently, the essential part of the Commission's work is to promote the availability of information, either by encouraging others to provide it, or by doing do itself.

It is always evident that where there is effective competition and sufficient information for consumers, dishonest traders cannot thrive. It is in this regard that because of imperfect markets, that regulation sometimes is necessary to ensure that consumers are adequately protected. The Commission also in a way provides an effective and accessible redress mechanism, which forms an essential element of good consumer protection.

Small Business

There is a paucity of industrial entrepreneurship in Zambia. Though there are many micro enterprises which

have mushroomed as a result of the job losses which followed the privatisation of the parastatal sector, these have failed to meet the standard of an organised modern industry. Further, the presence of foreign firms has not made possible the growth of a modern small-scale sector. The Small Enterprises Development Board which is charged with promoting SMEs has continued to face lukewarm support from government and is plugged into serious financial crisis.

The Commission has an important role in fostering a fair and competitive operating environment for small business. Small business issues permeate all of its work. The Small Business Program goal is to enhance the economic welfare of small businesses through education about, and enforcement of, the Competition and Fair Trading Act. The objectives of the Act specifically address the enhancement of the small business: "To expand the base of entrepreneurship". Consequently, the Commission has over its existence directed its efforts to:

- Educate small businesses about rights and obligations under the Act
- Promote small businesses aspects of Commission activities; and
- Enforce the Act in relation to small business activity – with the awareness that a small business can be both a business operator and consumer of goods and services.

In particular, attention will be paid to:

- Franchising;
- Misuse of market power
- Other forms of unconscionability or economic duress;

- Major business scams; and
- Commercial retail tenancies.

18.0 Competition Advocacy And Compliance

Under Section 6 of the Act, the Commission is empowered to carry out competition advocacy work. The Commission achieves transparency through a range of different mechanisms and places a high priority on its information, compliance and media

strategies. The principal objectives of the Commission's guidance and information activities are to:

- increase knowledge of rights and obligations under the Act,
- increase public understanding of the Commission's procedures and policies,
- contribute more generally to public awareness of competition regulation issues to enhance the development of a competition culture.

Advocacy Functions of the Commission

Section 6(d): To provide persons engaged in business with information regarding their rights and duties under this Act.

Section 6(3): To provide information for the guidance of consumers regarding their rights under this Act.

Section 6(f): To undertake studies and make available to the public reports regarding the operation of the Act.

Section 6(g): To 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.

Competition advocacy refers to those activities conducted by the Commission related to the promotion of a competitive environment for economic activities by means of a non-enforcement mechanism, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition.

Since its establishment, the Commission has continued to face a formidable but highly important task in building awareness and support for competition policy among the public and within the business community. The

existence of a 'competition culture' within the country is vital to the success of the Commission and ultimately to the effectiveness of the competition law. The Commission has, over the years, employed various means for promoting of competition policy within the country.

In a society faced with diminishing resources, voluntary compliance becomes an increasingly important activity in the Commission's overall enforcement of non-compliance of business related laws has a much more severe impact on the overall economy than other laws. This is particularly true

of some laws like the competition law, where it forms part of the government's basic economic framework policy. To the Commission, compliance with the legislation includes activities covering investigations and enforcement. However, the Commission's approach has been to focus on compliance activities that are voluntary and those activities that are mainly non-coercive.

The Commission's compliance and information strategy includes educating and informing the public through the use of media releases, press articles and interviews, speeches, publications and guidelines, maintaining a comprehensive and up-to-date internet website (www.zcc.com.zm), and having effective liaison programs with all the District Councils in the country.

The website contains a detailed range of information including an overview of the role and functions of the Commission, the legislation that it administers, copies of press releases and speeches, electronic copies of the majority of the commission's publications, contact information and details of the Commission's decisions.

The Commission generally issues about 50 press releases every year. The Executive Director and senior staff deliver about two speeches every month to a wide range of audiences. The Commission produces a wide range of publications, including an annual report on the Commission's activities. There are currently the following publications:

- A. Lodging in a Complaint and Redress
- B. Consumer Beware. A Guide for Consumers

- C. Market Interventions
- D. A Comprehensive National Competition Policy
- E. A Guide to Merger Control Regulation
- F. A Guide to Notification of Mergers and Acquisitions
- G. Trade Agreements: A Guide for Traders
- H. ZCC Its Functions and Objectives
- I. Consumer Legislation and Consumer Rights

Both the advocacy and compliance activities have included:

- providing as much information as possible about the Competition Commission
- educating the consumer and business communities about the competition law – the meaning and purpose of it's provisions and the procedures through which the law is enforced.
- Developing public support for competition enforcement, by demonstrating how consumers and the country at large benefit from a strong competition policy.
- Fostering the developing of competition expertise outside the commission – in the legal, education, business and governmental institutions.

As previously stated, the power of the Commission to engage in advocacy is explicitly provided for under Section 6 of the Act. Advocacy, as the term implies, is an effort at education and persuasion rather than an exercise of law enforcement powers. Targets of competition advocacy have included

other ministries, independent regulatory bodies, parliament, etc. The Commission understands that competition enforcement will be more effective if there exists outside the agency, a business community whose members understand and support the concept of the competition policy. It's members should include private lawyers whose practice in the competition and regulatory arenas, academics with expertise in business and economics, consumer organizations responsible for protection of consumer interests, politicians who are interested in market-oriented reforms and the business community itself.

The Commission has a very broad range of stakeholders, all of which have very different information requirements. It is therefore important that the Commission's information and compliance strategy be sufficiently diverse that it meets the needs of all of its constituents. This issue is exacerbated in Zambia by its immense geographic, economic and cultural diversity. The Commission's advocacy and compliance activities have over the years focused on:

- Encouraging compliance,
- Facilitating compliance,

- Monitoring compliance, and
- Responding to non-compliance

The above, has been successfully implemented by utilising the following tools to publicise compliance and advocacy activities:

(a) **Mass Media**

- Press bulletins
- Electronic media (radio and TV)
- Website

(b) **Official**

- Annual Report on the commission's activities
- Guidelines
- Publications of decisions taken

(c) **Selective**

- Seminars/workshops
- Presentations by the Executive Director
- Interviews
- Articles in specialized journals
- Newsletters
- Business meetings

(d) **Studies**

- Discussion papers
- Study groups
- Survey reports

19.0 Handling Of Confidential Information

Prohibition of publication or disclose of information to unauthorised persons

No person shall, without the consent in writing given by or on behalf of the Commission publish or disclose to any person, otherwise than in the course of his duties, the contents of any document, communication or information which relates to and which has come to his knowledge in the course of his duties under this Act.

Regulation 9 of the Act provides for the prohibition of publication or disclosure of information by unauthorized persons. There is need to provide comprehensive access to information to the public, while of course making provision for the protection of confidential information.

Underlying the basic premise of Regulation 9 is the important need for the Commission to be able to protect confidential information provided to it during the course of its investigations. If the Commission was not able to protect such information, it would seriously jeopardise its ability to collect such information in the first place, therefore undermining its ability to conduct thorough investigation of the facts of a case.

The Commission has been strict with the need for maintaining confidentiality. A critical element of building trust amongst the corporate community is the ability to maintain confidentiality. This applies to all information provided to the Commission that contains business secrets. It also extends to investigations and reviews where the Commission has pledged to maintain confidentiality of the process (for example, this would include a commitment by the Commission not to make public, the information of a proposed merger, until a particular date or event has occurred such as the public announcement of a merger by the merging parties)

Submissions of applicants and interested parties may contain sensitive information that they wish to be kept confidential. Under the common law, legal principles, it is a requirement for the Commission to exclude information

from the public on confidentiality grounds. Applicants and interested parties who lodge submissions containing confidential information should clearly mark that information as such and ask that it be excluded from the register. This was the case during the assessment of the application by Lafarge for the takeover of Chilanga Cement PLC.

If a request for confidentiality is made subsequent to the submission being placed on the public file, it will be removed pending consideration of the request. Administratively, the Commission, upon request may be required to exclude from the public particulars of:

- A secret formula or process;
- The cash consideration offered for the acquisition of shares in the capital of a body corporate as requested during the sale of Indeni Oil Refinery to Total (Zambia) Limited or assets of a person; and
- The current costs of manufacturing, process or marketing goods and services

The Commission may also exclude from the public any documents or submissions or parts of them if it is satisfied that it is desirable to do so because of the confidential nature of their content. The description of the conduct for which authorization is sought will not be confidential.

The Act in order to enhance the confidentiality requirement, provides for both a penalty of a fine and/or a criminal

sanction of three years for any person who knowingly contravenes the confidentiality requirement or having information which to his knowledge has been published or disclosed in contravention of the confidentiality requirement.

However, Regulation 10 of the Act provides for immunity to action or proceedings against the staff or representatives of the Commission for or in respect of any act done or omitted to be done in good faith in the exercise or purported exercise of his functions under this Act.

Regulation 9 of the Act controls officers as regards the use of information they obtain by virtue of the office. Their powers under the Competition and Fair Trading Act are covered by an Obligation of Professional Secrecy.

Moreover, any information the Commission obtains must be used exclusively for the purpose of the investigation for which it was acquired, although the Commission can legitimately initiate an investigation prompted by the information acquired accidentally in the course of a previous investigation.

The Commission and its staff will not disclose to any persons, information about the proposed merger. However, if the Commission considers that the merger or takeover is likely to have anti-competitive effects it will usually be assisted by market place inquiries. To facilitate those inquiries and to determine the outcome of the authorization applicants as speedily as possible, the Commission will seek the applicant's consent to such market

inquiries, which will necessarily involve disclosing the nature, but not the detail or the financial terms of the proposed merger or takeover.

The Act under Regulation 9 requires the officers of the Commission not to disclose information they have acquired through the course of their duties under the Act. If the client believes that his interests would be harmed is any of the information you are asked to supply were to be published or otherwise divulged to other parties, the client should submit this information separately with each page clearly marked "Business Secrets". You should also give reasons why this information should not be divulged or published.

If confidentiality is granted, the relevant materials shall be placed on a separate file. Only the Commission, its advisors, consultants and its staff will have access to that material. The Commission will use that material when reaching its decision. When the Commission denies a request for confidentiality, the party who made the submission has to request the return of the material. If a request is made for the return of the materials, the Commission will return it, destroy all copies of the submission for which confidentiality is claimed and not use that material when reaching its decision.

20.0 Funds Of The Commission

Regulation 11 of the Act specifies the Commission's sources of funding as:

- moneys appropriated by Parliament for the purposes of the Commission;
- grants and donations paid to the Commission;

- any moneys that vests or accrue to the Commission.

In practice, the Commission's budget solely depends on money appropriated to it by government. The Commission also receives money through lodgement and application fees. This source of income has been insignificant. The Commission does not currently sell its publications. The publications are given free as part of the awareness and advocacy programme.

21.0 The Commission's Enforcement Tools

The vision of a flourishing, competitive economy will remain nothing more than a mere aspiration, however, if competition law is not effectively enforced. Any regulatory regime has at least two components: a body of regulation and an enforcement regime. Effective regulation depends on the effective operation of both components. As Pengilley has observed: "the life blood of the Act is enforcement. If the court process cannot deliver efficient and effective enforcement, the Act becomes somewhat pointless".

It is vitally important for an emerging competition law regime, like in Zambia, to generate institutional confidence. Business and Government needs to be assured that a regime of competition law adjudication is effective and fair in generating economic benefits for consumers and society. An essential element of a stable and effective competition law regime is an effective enforcement regime.

For the purpose of the report, 'enforcement' of competition law is

broadly defined as a means by which compliance with part III of the Act is encouraged and achieved. A broad and generalised review of all the activities that could conceivably be encompassed within the broad definition of enforcement is not pursued. Rather, we shall focus on three specific areas of competition law enforcement, which since the Commission became operational have been the subject of public disquiet.

The Commission's principal tools for enforcing the Act, especially Part V, can be divided into three categories:

- Litigation
- Simple administrative resolutions; and
- Decisions of the Board of the Commissioners

The above tools have different legal and functional characteristics, and vary in severity, their reliance on suasion or coercion, degree or formality and in the publicity of process which accompanies their use.

21.1 Litigation

In its enforcement role, the Commission has power to take civil or criminal action for penalties against parties for violations of part III of the Act, pursuant to section 16 of the Act. The Commission, however, has no powers to impose penalties or take any other action, that role is left to the courts.

Section 16

- (1) Any person who-
- (a) contravenes or fails to comply with any provisions of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made hereunder, for which no penalty is provided;
 - (b) omits or refuses-
 - (i) to furnish any information when required to do so by a notice sent by the Commission; or
 - (ii) to produce any documents when required to do so by a notice sent by the Commission: or
 - (c) knowingly furnishes any false information to the Commission;
shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding ten million Kwacha or imprisonment for a term not exceeding five years or to both.
- (2) If the offence is committed by a body corporate, every director and officer of such body corporate, or if the body of persons is a firm, every partner of that firm, shall be guilty of that offence provided that such director, officer or partner shall be guilty of the offence if he proves on a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence.

Litigation against alleged contraveners constitutes the most formal and legally coercive way for the Commission to seek to secure compliance with the Act. Successful litigations results in court orders against the respondent, and may typically include a declaration that the respondent has contravened the Act, injunctions restraining the respondent from engaging in unlawful conduct of the kind complained of, and under Section 14 of the Act, the imposition of pecuniary penalties and jail sentence. In terms of legal severity and coercive force, degree or publicity and financial cost to the respondent, litigation although not yet used, is the most powerful tool in the Commission's direct enforcement armoury.

Although the Commission will normally look to avoid costly and lengthy litigation, lawsuits remain a major focus because of the broad effects of court decisions, including deterrence publicity, punishment, authoritative statements on the seriousness of breaches and clarification of points of law.

Litigation has not up to now been used by the Commission. This is because of the severity of its consequences and its resource intensive nature. The use of competition advocacy has been the major focus by the Commission.

21.2 Simple Administrative Resolution

The least severe way the Commission resolves complaints of alleged contraventions of the Act is by simple administrative resolution. Such resolutions may include accepting assurances from the suspect firm to cease the conduct or otherwise modify its commercial behaviour in the desired manner. Such resolutions lack formal legal enforceability, although they may provide relevant evidence in proceedings against the firm if subsequent enforcement litigation ensues.

Administrative resolutions, rather than litigation comprise the most frequently used method of resolving complaints. They attract minimal, if any, publicity and constitute the least costly way for the Commission to seek compliance with the Act. Administrative resolutions are generally arrived at after a process of dialogue and inquiry between the Commission and the party the subject of the complaint. This is particularly important not only for dealing with anti-competitive practices complaints, but more so with the fast-track desk for consumer welfare complaints.

Despite their informality, administrative resolutions have nonetheless been effective in preventing future contraventions, particularly when the firm involved has displayed a high degree of co-operation with the Commission and demonstrated a genuine commitment to future compliance. The informality and relatively inexpensive nature of administrative resolutions means they may also resolve complaints quickly.

21.3 Decisions of the Board of Commissioners

As an enforcement tool, Board decisions are legally binding on the party they are addressed. When the Board makes a decision after the determination of the case, the party shall be legally required to abide by the obligations. Contravention of the Board decision entitles the Commission to bring court proceedings against the contravener.

The acceptance of the Board decision does not generally involve the same degree of publicity or expense which is typically associated with litigation. Section 14 of the Act allows any person who is aggrieved by a finding of the Commission may within thirty (30) days appeal to the High Court.

21.4 Existence and Practical Availability of Private Rights of Action

The Act does not contain any express right to bring private civil actions for breach of pat III prohibitions of the Act. 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.

As the legislation is still untested, it is difficult at this stage to estimate the extent to which third parties will seek to use the rights. In parallel, or by way of alternative, it is also possible to complain to the Commission and request that it investigate the agreement or conduct in question and, where appropriate, seek measures requiring

termination or modification of the agreement or conduct.

22.0 Challenging Commission Decisions Before The High Court

There may be occasions on which a company feels aggrieved because a complaint to the Commission about the conduct of another company has been rejected. For instance, a retailer may have been refused access to a selective distribution network on grounds which his lawyers advise the retailer are inadequate. In some cases, a company

may have complained to the Commission that the conduct of a business competitor amounted to a breach of section 7(1) and 7(2) of the Act.

In each case the Commission may have rejected the complaint and may also have granted an exemption to the company in respect of the conduct of which complaint has been made. Such decisions of the Commission may be challenged under section 14 of the Act before the High Court, provided that the complainant company has been directly and adversely affected by the conduct of which complaint has been made.

Section 15

Any person aggrieved by a decision of the Commission made under this Act or under any regulations made hereunder may, within thirty days after the date on which a notice of that decision is served on him, appeal to the High Court subject to a further appeal to the Supreme Court.

In order to secure the option of a judicial challenge to the Commission's determinations in such cases, a company would be well advised to challenge the decision formally before the High Court within thirty (30) days from the time the Commission's decision is communicated to them. The Act does not provide for an opportunity to petition to file an appeal out of the thirty days. Consequently, an opportunity to appeal may be lost forever, if the thirty day deadline is not adhered to.

23.0 Assessment Of A Notification

Upon receipt of a notification of a conduct under Part III of the Act, the Commission will usually make a

preliminary assessment of the competition implications of the conduct. The assessment will be made from the information submitted with the notification or available within the Commission. If necessary, low-key market inquiries may also be undertaken. Notifications submitted to the Commission for consideration will normally include:

- a description of the goods and services, the subject of the notification and their users
- a summary of the conduct that may or would constitute the practise which contravenes the Act.

- comments on the market (including definition, competitors, market shares, level of imports, barriers to entry);
- comments on the likely effect on the competition

24.0 Timetable For Decisions On Authorizations

The Commission recognizes that the business community is anxious to avoid delay in obtaining regulatory approval for planned merger or takeovers. Such delay can mean a loss of business opportunity as it may permit other bidders to make a higher offer for the target enterprise. The Act does not provide for or stipulate time limits in which the Commission is required to carry out its work. Accordingly, the Commission will establish in the next law review, indicative time-tables which would allow most merger proposals to be authorized promptly and major complex mergers to be investigated thoroughly within a reasonable period.

In its assessment work, mergers and takeovers, which are unlikely to have anti-competitive consequences and are below the concentration thresholds will be authorized by the Commission within 7 days of the receipt of the formal application. Major complex mergers may involve extensive market inquiries, but a decision on the authorization application is normally arrived at within 3 months of the receipt of the application.

Major complex mergers may involve extensive market inquiries, but a decision on the authorization application

should be made within 90 days of receipt of the application. Authorization is a public process allowing for the views of the interested parties to be considered and providing a window for the public input. The procedure is flexible, with the onus being on the applicant to satisfy the appropriate test.

The Commission has recognised the need to impose in the next law review legal deadlines on how long an investigation should take. It is accepted that undue delays hurts parties who may be harmed by the conduct at issue and creates uncertainty, ultimately imposing unwarranted costs on the subjects of the investigations.

In addressing the concept of timeliness, the Commission shall take into account the need for sufficient flexibility so as to reflect the reality that some competition matters are more complex and take longer to investigate and resolve than others. Similarly, some competition matters require expeditious review, and a lengthy investigation may, in and of itself, force an outcome. For example, if the Commission does not reach a decision on a merger in a timely fashion, the delay can delay an otherwise legitimate deal.

25.0 The Role Of The Judiciary In Competition Law And Policy Enforcement

The effectiveness of the competition law in addressing anti-competitive practices depends on the actual degree of enforcement action by the Commission and the role of the Courts or the judiciary in the enforcement of the competition law. The law under section

16(1) stipulates offences and penalties for persons who contravene or fail to comply with the provisions of the law or any regulations made there under, or any person who omits or refuses to furnish any information or produce any document required by the Commission.

Enforcement issues represent the main difficulty in introducing competition law. The available enforcement capabilities and approaches must dictate the substantive approach of the law. It would be counter productive to introduce a sophisticated piece of legislation that would be difficult or impossible to implement by the competition authority. However, establishing an efficient enforcement agency capable of implementing sophisticated competition legislation should be seen as a long-term objective. Even the competition authorities of developed countries have many years to perfect their enforcement capabilities.

26.0 Judiciary System In Zambia

The word “judiciary” in its strict meaning refers to the “judges of a state collectively.” It is often used interchangeably with “judicature,” a wider term embracing both the institution (the courts) and the persons (the Judges) who compose it. In this paper the work “judiciary” is used to refer to judges collectively. In Zambia, the Judiciary is recognised as one of the three branches of Government. The other two branches are the Executive Legislature and Parliament (National Assembly). It is also a well-settled legal principal that the Judiciary in the discharge of its functions is independent of the other branches of Government.

Article 91 (3) of the Constitution of Zambia states that “the judicature shall be autonomous and shall be administered in accordance with the provisions of an act of Parliament.” The Judicature Administration Act Chapter 24 of the Laws of Zambia grants the Judiciary administrative autonomy including the power to recruit personnel and manage its financial resources.

Composition of the Judiciary

The Judiciary in Zambia consists of the following courts:

- (a) The Supreme Court;
- (b) The High Court;
- (c) The Subordinate Courts (also known as Magistrate Courts); and
- (d) The Local Courts

The Supreme Court

The Supreme Court is established under Article 92(1) of the Constitution. It is the final court of appeal in both civil and criminal matters. It is composed of the Chief Justice, Deputy Chief Justice and seven Supreme Court Judges. All the Judges of the Supreme Court are appointed by the President subject to ratification by the National Assembly. All Judges enjoy security of tenure and may vacate office on attaining the age of sixty-five years or for misconduct.

The High Court

Article 94 of the Constitution establishes the High Court of Zambia whose operations are governed by the High Court Act Chapter 50 of the Laws of

Zambia. The High Court has unlimited and original jurisdiction to hear and determine any civil or criminal matter. It also determines appeals in civil and criminal cases from the subordinate courts. The judges of the High Court are appointed by the President on the advice of the Judicial Service Commission. The appointment is subject to ratification by the National Assembly.

The Subordinate Courts

The Subordinate Courts also known as the Magistrate Courts are established by Chapter 45 of the Laws of Zambia which also provides for their jurisdiction. Magistrates preside over the Subordinate Courts. There are two classes of magistrates: professional (with law degree qualification) and lay magistrates (without law degree qualifications). Magistrate Courts have jurisdiction in civil and criminal matters except for cases where the High Court has original jurisdiction.

The Local Courts

At the base of the Zambian Judicial system are the local courts, which are presided over by local court justices. Local courts deal with customary law cases. Appeals from local courts lie to the magistrates court where the cases are heard anew (de novo) since local courts are not courts of record.

The Duty of Adjudication

The Zambian judiciary, acting through the various courts of law, has the responsibility of determining alleged violation of the law in cases properly brought before it.

The nature of the alleged violation of the law

Only disputes of a legal nature may be adjudicated by the Zambian courts. A dispute is of a legal nature if it affects a person's legal rights or relations. The matter in dispute must affect a party's recognised legal rights, either proprietary, personal or jurisdictional rights. The dispute may involve a breach of a statutory right or duty, breach of a contract, personal injury, damage to reputation or to property etc.

In Zambia, judicial power, unlike political or administrative power, is not self-activating. It cannot be exerted at the instance of the court itself but only at that of a person asserting a legal right. The judiciary is not given the initiative which the political and administrative organs possess to originate action. It cannot undertake to conduct adhering into any matter, but must wait until a person interested in the matter comes along to ask for its intervention.

A case affecting the legal rights of a person may, however, be brought before the judiciary even though it does not involve opposing parties. The adjudication of the court may be given in proceedings inter parties or ex parte.

The application of the law

The judiciary has the responsibility of administering justice in cases brought before it. The administration of justice entails the power to determine authoritatively (i.e. conclusively) the facts and the law relevant to the dispute. The decision arrived at by the court by

the application of the relevant law to the facts, and which, by declaring the rights in question, finally disposes of the whole dispute.

The Interest of the Parties to the dispute

It is not enough that a violation of the law has been committed. A person making the allegation must be able to show that the violation has injuriously affected his legal rights or relations by the infliction of actual harm or a threat of it. But even when injury or the threat of it has occurred, a question may arise whether a particular complainant among the several persons affected by the injury or threat is the appropriate person to raise the ultimate issue in the case, or whether the timing of the action is premature or otherwise inopportune.

The Procedure of the Court

The procedure of the judiciary in Zambia is characterised by the following attributes:

- (i) absence of bias, i.e. a court of law is required to be free of bias or even an appearance of bias, which means in practical terms that a judge should be independent of the disputants in the case, and should have no interests of his own in the subject matter of the dispute;
- (i) openness, i.e. proceedings must be in public, unless the interests of justice or other public interest dictates otherwise;
- (ii) the presentation of their case by the parties to the dispute;

(iii) the ascertainment of facts in issue by means of evidence given on oath or affirmation by the parties, and other witnesses whose attendance upon the court's summons is compulsory;

(iv) the submission of argument on the facts and on the law by or on behalf of the parties;

(v) a binding decision which disposes of the whole matter by a finding upon the facts and an application to the facts so found of the law as interpreted by the court.

The available remedies

The final determination by the judiciary of a dispute binds the parties in the dispute. The successful party may invoke the judiciary's power to enforce compliance with or obedience in the decision. In the ordinary course of discharging its functions the judiciary may give a judgement requiring an award of process or execution to carry it into effect. There are, however, other instances where a decision of the judiciary may stop short of giving a judgement requiring an award or conviction for offences and the imposition of punishments. It may simply ascertain and declare an existing right.

The Role of the Judiciary in Competition and Fair Trading Cases

The role of the judiciary in respect of competition and fair trading cases is the determination of alleged violation of the Competition and Fair Trading Act. A natural or legal person may bring a civil suit to seek the court's intervention in respect of any act done or omitted to be

done by the Zambia Competition Commission or any other person purporting to act in accordance with any right or duty derived from any provision of the Competition and Fair Trading Act. The civil suit may take the form of judicial review of the act or omission complained of. In this regard, Section 15 of the Act provides that any person aggrieved by a decision of the Commission made under the Act or under any regulations made in accordance with the Act may, within thirty days after the date on which a notice of the decision is served on him, appeal to the High Court subject to a further appeal to the Supreme Court.

Conversely, the Commission is not precluded from seeking the court's intervention in a dispute involving the application of the provisions of the Act. It may, for example, seek a declaratory judgement confirming its duties, powers or rights under the Act.

In addition to the determination of disputes in civil proceedings involving the enforcement of the provisions of the Act, the judiciary may also be called to adjudicate over disputes concerning violations which constitute criminal offences. The enforcing of the provisions of the Act by the court through penal sanctions is provided under Section 16 of the Act which provides as follows:

“16(1) Any person who –

(b) contravenes or fails to comply with any provision of this Act or any regulations made hereunder, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or regulations made hereunder, for which no penalty is provided:

(c) omits or refuses –

(i) to furnish any information when required by the Commission to do so; or

(ii) to produce any document when required to do so by a notice sent by the Commission; or

(d) knowingly furnishes any false information to the Commission.”

A person found guilty of any of the offences is liable upon conviction to a fine not exceeding one hundred thousand penalty units or imprisonment for a term not exceeding five years or to both.

If any of the offences is committed by a body corporate, every director and officer of such body corporate, or if the body of persons is a firm, every partner of that firm is guilty of the offence unless the offence was committed without his/her knowledge or consent, or that he exercised all due diligence to prevent the Commission of the offence.”

The judiciary in Zambia can play an important role in ensuring Competition and Fair Trading by effectively and efficiently enforcing the provisions of the Competition and Fair Trading Act in both civil and criminal proceedings. However, the challenge still remains in the provision of adequate training opportunities in the area of competition law for judges, prosecutors and officers of the Zambia Competition Commission. Training will not only enable the various institutions concerned to achieve good results but also to identify weakness in the existing law and provide suggestions for possible reform.

27.0 Sanctions And Remedies

The Commission has at its disposal an array of remedies and sanctions that it

can impose as circumstances warrant. Unless the Commission has adequate powers to redress competition harm that results from violations of the competition law and to prevent recurrences of those violations, the law will quickly become ineffective.

If prohibited behaviour is detected by the Commission, it will play a role analogous to that of police. In an event of an appeal by an aggrieved party, the Commission shall be required to prove its case in Court and, if so, can win penalties and remedies from the Court.

The legal system in Zambia provides for various penalties and remedies for breaches of the law, including:

- penalties (civil) fines
- injunctions
- damages
- divestiture in relation to mergers; and
- various ancillary orders such as rescission and variation of contracts, orders for specific performance of contracts etc.

Zambia, for instance, has criminal sanctions for hard-core contraventions such as cartels. This is the case in the USA and the OECD recommendations.

Civil penalties are available and have same advantages, in terms of the evidentiary tests (the burden of proof is the civil one of balance of probabilities) and a far more economic underpinning.

It has become acceptable to most countries that criminal sanctions and imprisonment should be an additional option available for offences under the Act.

Private individuals (third party) may also take action under the Competition Act to obtain remedies against anti-competitive conduct.

However, private actions may not be as frequent in Zambia as compared to say, United States of America. The reason is that incentives for pursuing cases privately are less strong since, under the cost rules, the loser of a case must pay the cost of the winning side.

Actions under the Competition Act will be taken in the High Court of Zambia or a commercial court (when established) with specific competition law expertise.

The objectives of the proposed national competition law suggest that action taken in response to an alleged contravention should be designed to serve one or more of the following purposes:

- (i) to compensate a person or business who has suffered loss or damage as a result of the contravention of the national competition law;
- (ii) to undo the effects of the contravention;
- (iii) to prevent a future contravention of the act, both immediately and in the longer term, and to promote and encourage community-wide compliance with the national competition law; and
- (iv) to provide deterrence and, as a secondary or incidental outcome, retribution.

Broadly, these purposes address both the immediate issue, that is, the specific contravention and its effects, and the longer term implications of non-compliance on the competitive processes in the markets.

Most responses to contraventions, whether they involve the Commission or not, will have as a purpose the prevention of further contraventions. Many are also likely to seek compensation for persons who have suffered loss or damage as a result of the contravention.

28.0 Conclusion

It has become evident that the current Act shall require a comprehensive review. The Board of Commissioners have on several occasions stated that it was timely to review some key provisions of the competition law in view of the significant structural economic reforms that are occurring in Zambia that impact on the competitiveness of Zambian businesses, economic development and affect consumer interests.

In calling for the review, the Board made reference to:

- Zambian businesses being increasingly faced with regional global competition;
- the fact that excessive market concentration and power can be used by businesses, especially foreign multinationals, to damage competitors; and

- the need for business to have reasonable certainty about the requirements for compliance with, or authorisation under, the Act.

There is now a need to appoint a consultant or a committee to examine the operations of the Commission, the suitability of the Act and the appropriateness of the competition policy whether they:

- inappropriately impede the ability of Zambian industry to compete locally and internationally;
- provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration of power i.e. S.A. Breweries, Chilanga Cement, Illovo Sugar;
- promote competitive trading which benefits consumers in terms of services and price;
- provide adequate protection for the commercial affairs and reputation of individuals and co-operations;
- allow businesses to readily exercise their rights and obligations under the new Act, consistent with certainty, transparency and accountability;
- are flexible and responsive to the transitional needs of our local industries undergoing, or our communities affected by, the structural economic reforms;

In the review process, the Consultant or the Committee shall be guided by the

core principles of transparency, non-discrimination and procedural fairness. The core principles are the key factors that influence the development of effective competition regulatory structures, and if any one of them is neglected, it may well result in a competition regime that lacks substance, public acceptance or that is difficult or impossible to enforce.

Annex 1: Competition Sector Regulation Laws in Zambia

Statute	Regulatory Body	Enabling Competition Provision	
The Telecommunications Act, Cap 469	Communications Authority (CA)	s.5(2)(c) :	“To promote and maintain competition among persons engaged in commercial activities for or in connection with the provision of telecommunication services, and promote efficiency and economy on the part of persons so engaged.”
		s.5(2)(h) :	“To enable persons producing telecommunication apparatus in Zambia to compete effectively in the supply of such apparatus both inside and outside Zambia.”
The Energy Regulation Act, Cap 436	Energy Regulation Board (ERB)	s.5(1)(f):	“In conjunction with the Zambia Competition Commission established under the Competition and Fair Trading Act –

			(i) investigate and 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 requirement for operating as a business in Zambia, and develop and implement appropriate rules to promote competition in the energy sector.”
Banking and Financial Services Act, Cap 21	Bank of Zambia	s.42:	The provisions of this part are in addition to, and do not limit the operation of any other law in force for the promotion of competition and free trade.
The Water Supply and Sanitation Act, 1997 Cap 239	National Water and Sanitation Council (NWASCO)	R. 2(1)(n)	The Council shall consist of the following members appointed by the Minister: “a representative of the Zambia Competition Commission”
The Pensions and Insurance Act	Pensions and Insurance Authority (PIA)		No enabling provision
The Privatisation Act, Cap 386	Zambia Privatisation Agency (ZPA)	s.8(2):	“ensure that monopolies are not created in the process of privatization.”

ZIMBABABWE

Alex Kubab*

Section 1: Introduction

Zimbabwe formally adopted competition policy in 1996 with the enactment of its competition law, the Competition Act, 1996 (No.7 of 1996). The broad objectives of the law as outlined in the preamble to the Act are:

- to promote and maintain competition in the economy of Zimbabwe;
- to establish a competition authority and to provide for its functions;
- 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 business practices; and
- to provide for matters connected with or incidental to the above.

In adopting competition policy and law, Zimbabwe became the fifth country in southern and eastern Africa after South Africa, Kenya, Tanzania and Zambia. The practical implementation of the law since 1998 led in 2001 to substantial amendments to the Competition Act under the Competition Amendment Act, 2001 (No.29 of 2001). The Amendment Act not only broadened the Commission's merger control activities and strengthened its investigative powers, but also gave the Commission additional functions in the field of trade (tariffs) policy and of price monitoring.

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This paper reviews and analyses competition policy and law in Zimbabwe. The review will cover the following areas:

- (i) the development and implementation of competition policy and law in Zimbabwe;
- (ii) an outline of anti-competitive practices prohibited or controlled under the Competition Act, an analysis of key decisions taken by the Competition Commission on the practices, and an assessment of sanctions provided for under the Act;
- (iii) an examination of consumer protection mechanisms in the Competition Act and in other regulations;
- (iv) consideration of the adjudicative processes employed by Zimbabwean competition authorities; and
- (v) other issues related to the implementation of competition policy and law in Zimbabwe.

The review draws heavily on various studies and papers on competition in Zimbabwe undertaken by various consultants, academics and officials of the Competition Commission itself. Internal Zimbabwe Government position papers and memoranda on the establishment of a competition authority in the country were also studied, and interviews were held with some of those Government officials involved in the formulation of the competition policy and the drafting of the law. Competition cases handled by the Competition Commission since its establishment were

also analysed against the relevant provisions of the Competition Act.

Section 2: Development Of Competition Policy And Law In Zimbabwe

Background

Upon attaining Independence in April 1980, Zimbabwe inherited from the white-controlled regime of Rhodesia a relatively advanced and diversified economy despite the fact that the country had been under international economic sanctions for the previous fifteen years. The economy was however also highly regulated and controlled in response to the economic sanctions.

The backbone of the economy was the commercial farming sector, which produced for both the domestic and export markets a wide range of crops and livestock products such as tobacco, maize, coffee, tea, sugar, cotton and beef. Agriculture contributed about 12% of the country's Gross Domestic Product (GDP) and produced over a quarter of the country's exports. The manufacturing sector contributed nearly 25% of GDP and produced over 7 000 different products. The sector was also highly diversified with strong sub-sectors in metal products, clothing and footwear, chemicals, food and drink. The mining sector contributed about 10% of GDP and was an important foreign exchange earner from exports. The wide range of minerals produced included asbestos, chrome, coal, gold and nickel. The other important sector was the financial services sector, which included commercial banks, merchant banks, building societies, insurance companies and a thriving Stock Exchange.

Zimbabwe also inherited a country manifested by a high degree of racial inequality in which a small white population (about 5% of total population at Independence) owned nearly half of agricultural land and dominated the industrial and service sectors.

In addressing the new economic policy issues confronting it, the new Government of Zimbabwe was therefore faced with many needs and realisations, some of which were in conflict with each other. These included:

- (i) the need to meet the aspirations for better living standards of the previously disadvantaged black population;
- (ii) the desire to reduce foreign influence over the economy and to introduce socialism;
- (iii) the realisation that the existing economic structure was strong and should be sustained in order to provide the necessary resources for the required social policies;
- (iv) the need to honour the obligations on land ownership that it undertook at the pre-Independence negotiations; and
- (v) the need for direct State participation in economic activities.

The Government of Zimbabwe maintained during the 1980s the highly regulated and controlled economic system that it inherited from the former Rhodesian regime, but for completely different reasons. For the Rhodesian regime faced with crippling international economic sanctions, the system was necessary to direct scarce foreign currency and other resources to those private sector companies that were

involved in sanctions busting and in the country's import-substitution industrial policy. The system was therefore used to protect business, particularly big business capable of sustaining the country under economic sanctions. The new Zimbabwe on the other hand was highly suspicious of business, which was then white-dominated, and used the regulatory system to limit the ability of business to capture monopoly and oligopoly rents.

Regulatory policies pursued by the new Government among other objectives to limit restrictive business practices and control the exercise of market power by monopolies and oligopolies included the use of price controls, the fixing of minimum wages, the foreign exchange allocation mechanism, and the creation of public enterprises:

- Price controls were extensively used to limit the ability of firms in monopoly or dominant positions to exercise market power by charging consumers high monopoly prices. Even though price controls had numerous other anti-competitive effects, their use was effective in countering the exploitative practices of firms in dominant positions.
- Labour regulations fixed minimum wages and salaries and limited the ability of firms to dismiss workers, and were also used for equitable allocative purposes. Again, the objective was redistribution of rents from big business to the previously disadvantaged black population,

and to stop business exploiting the workers.

- The foreign exchange allocation mechanism, put into place in order to preserve scarce foreign exchange and to ensure best use of the available foreign exchange, was informally used as Government's leverage against business practices felt to be exploitative.
- Public enterprises were created, or formed in conjunction with existing private companies, in the industrial and commercial sectors to counter and limit the ability of monopolies and oligopolies to abuse their dominant positions. While all sectors were targeted, emphasis was placed on the manufacturing, distribution, trading and financial services sectors because of their consumer connotations.

The above sowed the seed and laid the ground for the formulation of competition policy in Zimbabwe. The need for such a policy was heightened with Zimbabwe's adoption in 1992 of an Economic Structural Adjustment Programme (ESAP). ESAP called for the establishment of a "monopolies commission" to monitor competitiveness and regulate restrictive business practices in the economy. The issue of restrictive business practices in Zimbabwe was of great concern to the Government, and there was also a growing concern within the business community that there was a lack of competition in Zimbabwe domestically and that the country's industries were not competitive internationally.

Formulation of Competition Policy

An Inter-Ministerial Committee on the Monopolies Commission under the chairmanship of the then Ministry of Industry and Commerce was established by the Government to work on the formulation of competition policy in Zimbabwe. Other members of the Committee included the then Ministry of Finance, Economic Planning and Development, the Zimbabwe Investment Centre, the Department of Customs and the Reserve Bank of Zimbabwe.

In a May 1991 minute to the then Permanent Secretary for Finance, Economic Planning and Development, the then Permanent Secretary for Industry and Commerce clearly spelt out the need for the establishment of a 'Monopolies Commission' as follows:

"I am writing to seek your concurrence in having the necessary expertise engaged for the establishment of a Monopolies Commission.

Background

As you know, monopolistic conditions in the Zimbabwe market are the result either of Government granting a parastatal the sole rights to a product, franchising or the size of the market which restricts competitors from entry. In the case of parastatals, Cabinet in essence controls the prices the monopolies can charge with the stated principle of allowing them to break even. Until now Government has controlled the potential monopolistic tendencies of other firms through the price control mechanism. As we lift price controls, monopolies will tend to improve their profit picture. In the

absence of a regulatory body the end result will probably be lower output levels and higher prices for those products which enjoy a truly monopolistic market. The following are the issues among others, which a study team will have to address:

1. Defining a Monopoly

We have to establish the ground rules of what constitutes a pure monopoly. There may be only one producer of a good but it may be incorrect to describe the company as a monopoly because there are substitute products. The definition of what a product is and how far we are willing to consider substitutes will be important in the application of the rules. This should therefore be explicitly determined.

2. Monopoly Power

There are known cases of dominant price leadership in Zimbabwe, i.e. the largest firm sets a price and the others proceed to agree to it. An example of that, prior to controls, was petrol. There are other forms of collusion which result in a monopoly situation even though there may be more than one producer. We need an appropriate legal framework and practical guidelines to deal with this issue.

3. Pricing Goals

As direct price controls are removed there is a need to establish guidelines for determining pricing decisions. In the case of monopolies the impact of various pricing methods (cost plus mark-up, average or marginal cost pricing) need to be examined so the Commission has clear directions on how to set prices.

4. Price Determination

There is need to establish a mechanism whereby monopoly prices are regulated. In some countries the Monopoly Commission would not act until a monopolist had set prices. The Commission then review those prices (by holding hearings) to decide on their appropriateness. In still some cases (particularly for public utilities) the corporation would have to apply to the Commission for any rate change. Given the definition of monopoly to be decided, it is necessary to establish the most appropriate approach to pricing. Such issues as how costs and the appropriate rate of return on capital as well as the capital base to be used in such computations, have to be fully explored.

5. Any Other Pertinent Issues

The approach we envisage is in two stages. First, we need a team to study the Zimbabwe situation in light of the above issues. Their report should take, say, 4 months to complete and should provide information on what exactly are the current monopoly areas and how best to deal with them while maintaining efficiency. The personnel required is a team of three experts in regulation of industry.

This report, when approved, should be the basis for constituting the Commission's terms of reference, scope of work and operational method as well as preparing the necessary legal framework. Because of its importance we would retain the right to ask for a proposal submission from the team put

forward to do the study. I would suggest we move expeditiously”.

In June 1991, the Ministry of Industry and Commerce approached the British and German Governments for technical assistance in connection with the establishment of a ‘Monopolies Commission’. A similar request was sent to the United States Agency for International Development (USAID). From the three approaches, the response of USAID in August 1991 was prompt and the quickest. The Agency submitted three different proposals on the undertaking of the study on competition policy in Zimbabwe, and the one from Implementing Policy Change (IPC) led by Management Systems International (MSI) was selected by the Inter-Ministerial Committee on the Monopolies Commission.

During the same period in November 1991, the Friedrich Naumann Foundation of German and the Indigenous Business Development Centre (a local black empowerment group) organised a workshop on “Competition and Economic Development in Zimbabwe”. The workshop was attended by representatives from a number of Government Ministries, the Parliament of Zimbabwe, business organisations, the University of Zimbabwe, the Consumer Council of Zimbabwe and some parastatal organisations. Competition experts from the German Federal Cartel Office, the Sweden Competition Ombudsman and the Kenyan Monopolies and Prices Commission were also invited. The workshop confirmed the need for competition policy and law in Zimbabwe

implemented by an independent competition authority.

The IPC *Study of Monopolies and Competition Policy in Zimbabwe* was carried out between January and March 1992. The Study Team was comprised of: (i) Mr Antony Davis (Team Leader), Competition Specialist (Abt Associates); (ii) Dr Clive Gray, Restrictive Business Practices Regulation Specialist (Harvard Institute for International Development); (iii) Dr David Gordon, Political Economist (Abt Associates); (iv) Prof William Kovacic, Legal/Judicial Specialist (George Mason University School of Law); Dr Eugenia West, Business Economist (consultant); (v) Mr David Hatendi, Economics Specialist (Merchant Bank of Central Africa, Zimbabwe); and (vi) Mr Andrew Chataika, Economics Specialist (Merchant Bank of Central Africa, Zimbabwe). The objectives of the study were to:

- assess and analyse industrial concentration, restrictive business practices (RBPs) and regulation in Zimbabwe, and the impact of ESAP (Economic Structural Adjustment Programme) on RBPs and their regulation
- identify and analyse worldwide experiences with regulating RBPs, especially within the context of simultaneously introducing structural adjustment programs, so as to draw implications for Zimbabwe
- recommend policy actions and institutional, legislative and procedural options to regulate market power and RBPs in Zimbabwe.

In conducting the study, the Study Team held meetings in Zimbabwe with members of the Government, the private sector and academia. In addition, selected interviews on competition policy and restrictive business practices regulation were conducted in the United States, the United Kingdom and Switzerland. A literature search was also conducted to facilitate the team drawing upon the competition policy experience of other countries.

The Study Team presented its final report to the Inter-Ministerial Committee on the Monopolies Commission in September 1992. Its main findings on the degree of competition in the Zimbabwean economy are summarised in Box 1 below.

Box 1: Main IPC Study Findings on Degree of Competition in Zimbabwe in 1992

(a) The manufacturing sector in Zimbabwe is highly concentrated. Of the 7 000 plus items produced in Zimbabwe, half of the items were produced by only one producer. Approximately 80% of all items were produced by three firms or less.

Analysis of the four-firm concentration ratio (CR4): 45 industrial sectors, or nearly 80% of all sectors, had concentration ratios equal to or in excess of 75%, a level which is considered highly concentrated or oligopolistic; 12 industrial sectors, or over a fifth of all sectors, had concentration ratios of 100%, indicating that there were four firms or less in the entire industry; only 7 sectors had concentration ratios less than 50%.

Analysis using the Herfindahl index further indicated the high degree of concentration. In Zimbabwe, of the 57 industrial sectors, 46 had indices above 1,800 (considered as highly concentrated and likely to be uncompetitive), and 49 above 1,000 (fairly concentrated and potentially uncompetitive). Five industries were pure monopolies with a Herfindahl index value of 10,000.

In addition, 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. A large number of commercial and services sectors were also dominated by parastatals, which had the sole right to provide a given good or service, or were placed in a “privileged” position.

(b) There had been significant barriers to entry in Zimbabwe in the past. These had served to increase or maintain high levels of industrial concentration, preclude entry by other firms, and had furthered the creation of uncompetitive market structures which served to increase prices and restrain output to the detriment of consumers. These barriers had taken many forms:

Government-erected barriers: these had included an extensive system of price controls, strict labour market regulations, foreign exchange controls and trade policy, and direct ownership of sectors of the economy through public enterprises;

Industry structure barriers: such as limited supplies of raw materials, economies of scale and scope, and product differentiation and brand loyalty;

Business practices: such as price fixing, collusive tendering, tied sales, and allocation of market and customers.

The Study Team concluded that “while the combination of a high degree of

industrial concentration and high barriers of entry does not automatically lead to

abuse of market power by monopolists and oligopolists, the scope for exercising such power exists. There is some evidence and good reason to believe that RBPs are extensive in Zimbabwe”.

The recommendation of the Study Team included the adoption of competition policy and law in Zimbabwe and the creation of a competition authority to administer that policy and law.

In a Memorandum to Cabinet Committee on Development on 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 following:

“Need for Competition Policy

Although it is agreed that the Economic Structural Adjustment Programme through trade liberalisation, price decontrol, domestic deregulation and public sector enterprise/parastatal reform will address and remove some of the factors that have protected monopolies, encouraged restrictive business practices that hampered competition, monopolistic tendencies and RBPs will persist beyond 1995. There will therefore need to be regulated and controlled. It is imperative to note that although ESAP will open up the economy even the relatively open trade systems and market-based economies (e.g. USA, UK, Germany) still have enforcement agencies, laws and regulations to control monopolies and RBPs.

Regulations and controls are moreover needed during the ESAP period in order to guide the economy’s transition to a market-oriented one. The regulations and controls will be complementary to Zimbabwe’s efforts to protect consumer welfare, promote economic efficiency and competitiveness and to expand the entrepreneurial base.

Dimensions and Principles of Competition Policy

An effective competition policy is necessary to create a competitive economic structure. Its main focus in general and in the context of the economic structural adjustment programme should be to:

- ensure that government policy reform and regulations that positively impact on competition and competitiveness are well designed and fully implemented;
- provide a code of conduct for business which clearly establishes the rules of the game;
- alter market structure through appropriate monopoly, mergers and acquisition regulations;
- promote innovation;
- facilitate new entries;
- stimulate export performance; and
- enhance consumer sovereignty.

In formulating an effective competition policy some key issues should always be borne in mind. It is important to note that the aim of competition policy is to protect the process of competition and not individual competitors and hence the need to reduce barriers to entry and RBPs without discrimination. Public sector enterprises should be governed by

the same competition regulations and policies. The existence of a monopoly or oligopoly does not necessarily mean that harm is being done to the market. However, it is the abuse of market power that is harmful. For any competition policy to succeed, transparency and impartiality are crucial and it should be shielded from the influence or special interests. Furthermore the competition policy should be designed in such a way that it is not static.”

The Government’s adoption of the IPC Study led to the formation of an independent ‘Competition Council Committee of Zimbabwe’. The Committee was led by a Parliamentarian and included experts from Zimtrade, Zimconsult, Consumer Council of Zimbabwe and Air Zimbabwe, with observers from USAID and the Friedrich-Naumann Foundation. The objective of the Committee was to follow up, select and implement the recommendations of the study of the Monopolies and Competition Policy in Zimbabwe.

The Legislative Process

Following the approval by Cabinet of the establishment of a “Monopolies Commission”, work begun on the drafting of the appropriate legislation. In the process, study visits were made to the Federal Trade Commission and the Anti-Trust Division of the U.S. Department of Justice, and to the Monopolies and Mergers Commission and the Office of Fair Trading in the United Kingdom, as well as the then Competition Board of South Africa. Competition. Kenya and Zambia were also consulted in the process.

The underlying principles of the proposed legislation were drafted by the Ministry of Industry and Commerce with the assistance of two seconded competition law 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.

In a February 1994 minute to the Director of Legal Drafting in the Attorney General’s Office, the Ministry of Industry and Commerce responded as follows to the first draft Competition Bill prepared by that Office:

“This Ministry prefers the new body to be called the Competition Commission. We would like to stress that the Competition Commission should be an independent/ autonomous body although funded by Government. In order to preserve that autonomy we feel that there should be no secondment of staff from Ministries to the Commission ... There is a need for dedicated staff within the Competition Commission. In any case, there is too much reference to the Minister in the draft Bill which does not auger well for autonomy. This is why we think the Commissioners must be Presidential appointees.

With regards to appeals on the Competition Commission’s decisions, it is recommended that such appeals be dealt with by a higher court than the Administrative Court. We envisage an administrative court arrangement within

the Competition Commission as the first appellate tier before the Commissioners themselves. We feel that within the Commission itself there should be clear separation between the investigative and adjudicative functions such that the investigative division is concerned with making the evidence available without the possibility to influence the outcome of the Commission's decisions. We would stress that in handling investigations both lawyers and economists should be involved, the latter assisting attorneys with economic analysis of the practices being investigated".

With regard to representation of business people, consumer groups and other interested parties on the Competition Commission we feel that the President in consultation with the relevant Minister chooses Commissioners from as wide a cross-section of society as possible ... On the proposed list of scheduled unfair trade practices we propose additional unfair trade practices to include the following:-

- a) any form or agreement of market division by competitors such as are market restriction and discriminatory pricing according to type of customers
- b) any form or agreements of price fixing and or output quotas
- c) any form of collusive agreements among competitors which reduces or eliminates competition among them
- d) agreements among competitors to unreasonably exclude competitors from outside the group such as coordinated predatory pricing
- e) unreasonable exclusion by a dominant firm such as through unilateral predatory pricing

- f) agreements with suppliers or customers relating to the terms of purchase, sale, or resale of goods such as resale price maintenance, conditional sales, exclusive supply, exclusive dealing and partial or complete refusal to deal under normal commercial terms.

"Let me deal with some of the specific issues highlighted in your letter, limiting myself to those where we hold views different from yours. I have already dealt with the issue of the name and the composition of the Commission ... While the Commission may not be fully fledged on day one we feel that it should have its own budget, separate from that of the Ministry".

While the Director of Fair Trading is important to the Commission we do not agree that he be called "Director of Fair Trading" as if he would have a role in ensuring fair trading. He is not involved in investigations as is the case with the Director of Fair Trading in the United Kingdom legislation. It should be clear that he would only be concerned with administrative, financial and other support functions for the Commission.

"It might be important to highlight the fact that the debate at the Cabinet Committee on Development was part of the process of institutional evolution. Therefore to a large extent we have to be guided by the final position adopted by Cabinet. For instance while it had been suggested that the Attorney General's Office be "enhanced" so that its officers are assigned to the Commission we believe that this would not give the necessary autonomy. This is why we feel that the Commission should have its own dedicated staff who would develop

and concentrate expertise in one organisation as specialist attorneys on competition promotion and trade restricting issues.

It might be worth your while to bear in mind the British experience where it is not a legal requirement to get authorisation for mergers before the event. The possibility exists for the Monopolies and Mergers Commission's opinion to be sought. Our understanding is that the British legislation defines what might turn out to be monopolistic or restrictive trade practices. The critical determination of whether a particular merger is injurious to the public interest defined very widely follows from an actual investigation. It can be argued that this amounts to light regulation that does not inhibit business activity, allowing entrepreneurs to take the risk of later prohibition. The other side of course is that later dismantling of a merger is costly. Our suggestion at this stage is that it is better to incur costs later than to seek prior authorisation as long as the rules of the game are clear.

We hope you can now proceed further with the drafting as the matter is urgent ...”.

The Competition Bill that was drafted by the Attorney General's Office underwent a long-winded consultative process involving major stakeholders. A number of seminars and workshops were held in this regard. Big business, particularly those companies enjoying monopolies or near monopolies in industries such as beer brewing and cigarette manufacturing, were very much against the introduction of competition policy and law in Zimbabwe and therefore

heavily lobbied 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 relatively small economy did not need competition policy and law, and saw a competition authority as yet another unnecessary regulatory body. Even in the public sector there was some disquiet over the inclusion under competition jurisdiction of parastatal organisations with public monopolies in certain economic activities.

The Confederation of Zimbabwe Industries (CZI) and the Zimbabwe Congress of Trade Unions (ZCTU) in particular submitted to Government written comments on the draft Competition Bill. The CZI generally felt that the Bill was a most positive contribution to the economic interests of Zimbabwe, and contained enough flexibility to play a major role in the economic system of Zimbabwe. The Confederation noted that by producing the Bill, the Government was acknowledging a number of fundamental economic principles as follows, which the new legislation would seek to give effect:

- that competition plays a central role in the operation of a free market economic system and that the system is a valid one;
- that competition is the means by which Government can ensure the optimum division of labour, productivity in the economy, the satisfaction of demand and the preservation of the private enterprise system;

- that competition is a means by which unemployment can be cured and general economic development enhanced;
- that small to medium sized enterprises and the informal sector should be ‘nurtured’ and not ‘persecuted’ and competition law is a vehicle for achieving this objective;
- that established business enjoy, to an appreciable degree, a substantial measure of protection from competition through regulations or the lack of an appropriate legislative framework in the sphere of competition;
- that competition should be maintained at a ‘workable level’ in recognition of the fact that the guiding principle is not ‘as much competition as possible’ but rather ‘as much efficient competition as possible’;
- that the *de minimis* rule should apply in order to ensure that anti-competitive practices are not prohibited if the enterprises involved are weak and therefore unlikely to restrict or distort competition or to affect commerce in any significant manner;
- that the way to fight inflation is by competition-induced cost reduction and not price controls thus making it

imperative to remove in the medium term, all legislation concerned with price and wage controls.

The specific comments by the CZI and ZCTU on the draft Competition Bill are summarised in Table 1 below.

Table 1: CZI And ZCTU Comments On Draft Competition Bill

	<u>CZI (Business) Comments</u>	<u>ZCTU (Labour) Comments</u>
Short Title and Preamble	<ul style="list-style-type: none"> • Short and appropriate title of the Bill. • However, while appreciated that Bill a move in the right direction at that stage of Zimbabwe’s development, its weakness may lie in addressing too many issues in one piece of legislation. 	No comments
Definitions	Definitions such as ‘substantial market control’ require greater precision in order to avoid problems of interpretation.	Need for more concrete guidelines in the definition of such terms as ‘controlling interest’, ‘monopoly situation’, restrictive practice’ and ‘substantial market control’.
Application	No comments	Provisions should be made to the effect that the Competition Act shall not regulate Trade Unions.
<i>Establishment of Competition Commission</i>	<ul style="list-style-type: none"> • Commission functions of encouraging and promoting competition appear to be in contradiction to the other functions of preventing restrictive practices and monopoly situations (experience in small developing countries shown that unrestrained attempts to promote internal competition by restricting size of companies have resulted in uneconomic small producers. • Provisions that clearly state that the Commission should not be subject to direction or control of any other person or authority in the exercise of its functions very important since they confer an independent status on the Commission. • Desirable to circumscribe the 	<ul style="list-style-type: none"> • The President should appoint members to the Commission from lists submitted to him through the Minister of Industry and Commerce by various interest groups, e.g. the Trade Unions, commerce, the professions, the Consumer Council of Zimbabwe, etc. – essential if the autonomy of the Commission is to be credible. • Appointed members of the Commission should elect their own

	<p>President's discretion in making appointments to the Commission by inserting a clause to the effect that the President should appoint Commission members from lists submitted to him by organised industry, commerce, the professions, the Consumer Council and other appropriate institutions – this would avoid possibility of purely political appointments being made.</p> <ul style="list-style-type: none"> • Not necessary for the President appointing Chairman and Vice Chairman of the Commission – Commission members should appoint their own presiding officers. • Infrequency of meetings of Commission (at least six times each year) hardly adequate if Commission to carry out its functions effectively. 	<p>Chairman and Vice Chairman.</p> <ul style="list-style-type: none"> • The Commission should be obligated to meet much more frequently than the provided for six meetings a year given the wide range of its obligations. • The Commission should also be serviced by a professional full-time Secretariat if it is to discharge its obligations well.
<i>Director of Commission</i>	<ul style="list-style-type: none"> • Commission should fix the terms of employment of the Director without need to formally involve the Minister. • Director of Commission should have more discretionary powers than merely performing certain functions conferred on him by the Commission. 	<p>Director of the Commission should be given specific powers to initiate investigations into routine issues – substantive investigations into mergers, takeovers and monopolies should however remain the exclusive domain of the Commission.</p>
Financial Provisions	<p>Funding of Commission by the State naturally weakens its independence – “he who pays the piper calls the tune”.</p>	<p>No comments</p>
<i>Investigations of Restrictive Practices, Mergers and Monopoly Situations</i>	<ul style="list-style-type: none"> • Director of Commission, and not the Commission, should be given discretion of instituting investigations – Commission should only be required to deal with more important matters of monopoly situations or with matters referred to them by Director. • Commission's powers of investigating restrictive practices and mergers which might occur in the 	<ul style="list-style-type: none"> • Principle of publishing notices in the <i>Gazette</i> and newspapers of Commission's intention to undertake investigations an honourable one because the greater publicity the more chances there are of interested people getting notice to make

	<p>future not desirable – great difficulty and inconvenience likely to the experienced if investigations into intentions of future courses of conduct are allowed.</p> <ul style="list-style-type: none"> • Requirement for Commission to publish notices in the <i>Gazette</i> or newspapers on its intentions to undertake investigations not desirable because enterprises would be unnecessarily exposed to public scrutiny, ridicule or even boycott before any facts are established. • Commission’s powers to issue temporary orders prohibiting certain acts of parties being investigated before the conclusion of the investigation quite in order. • Provisions providing for Commission to negotiate with any person with view to ensuring discontinuance of any anti-competitive practice very good – the provisions should constitute the first line of approach of the Commission. • Commission powers to issue orders aimed at regulating the price of any commodity or service highly undesirable – the Commission would only become yet another authority empowered to control prices of goods and commodities in addition to the Minister of Industry and Commerce under the Control of Goods Act. • Pre-merger notification provisions not necessary in view of criminal penalties imposed for engaging in anti-competitive practices and also in view of provisions permitting merging parties to seek authorisation. • Provisions on authorisation of restrictive practices and mergers very good and necessary – since the provisions allows a person to seek authorisation for a proposed merger or for entering into an agreement or 	<p>written representations to the Commission.</p> <ul style="list-style-type: none"> • Provisions that allow Commission to prohibit certain economic activities pending investigation basically grant Commission power to issue provisions injunctions – important to note that such orders can cause severe prejudice not only to the proprietor of the affected firm in terms of loss of production but can also result in staff retrenchments and loss of livelihood.
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	<p>arrangement or engage in a practice which he considers may be prohibited, they obviate need for the Commission to investigate intentions or future courses of action.</p> <ul style="list-style-type: none"> • Fixed figure penalties for infringing competition law much too low – fines based on gross turnover of the business (say 25%) would be a more appropriate deterrence. 	
<i>Public Interest Considerations</i>	The definition of ‘public interest’ quite wide and therefore a workable one – the guidelines determining public interest adequate enough to assist Commission to determine limits of its operations or demarcate line between practices that should and should not be prohibited.	The definition of ‘public interest’ adequate.
Appeals	No comments	While making Commission decisions appealable to the Administrative Court slightly better than to the High Court, a special Tribunal should be established to deal initially with appeals from the Commission.

While some views and comments made by organised business and the labour movement on the early drafts of the Competition Bill were taken on board in the final draft that was presented to Parliament, others were not incorporated as analysed in the following Section 3 of this paper. It should be noted that in view of different interests of various stakeholders, some of them conflicting, 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 more broad 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 authorised by other Acts of Parliament should be exempted.

was *gazetted* and came into force on 31 May 2002.

The wide consultations and compromises made on the Bill made it possible for its smooth passage through Parliament in 1996.

The coming into operation of the Competition Act, 1996 on 9 February 1998 was fixed by the President through Statutory Instrument 21A of 1998 (Date of Commencement: Competition Act, 1996) that appeared in the Supplement to the Zimbabwean Government Gazette Extraordinary of 6th February 1998. The Competition Act, 1996 (No.7 of 1996) was amended in 2001 after three years of practical implementation in order to widen and strengthen its scope and application. The relevant Competition Amendment Act, 2001 (No.29 of 2001)

Section 3 Major Elements Of Zimbabwe's Competition Law

Zimbabwe's competition legislation, the Competition Act, 1996 (as amended by the Competition Amendment Act, 2001) is in nine parts, whose main provisions are analysed below. The analysis will also include other related consumer protection legislation such as the Consumer Contracts Act and the Small Claims Court Act.

Part I: Preliminary

This Part cites in section 1 the short title (i.e., the Competition Act, 1996) and provides for the coming into operation of the Act on a date fixed by the President by statutory instrument (i.e., 9 February 1998 through Statutory Instrument 21A of 1998).

The Part also interprets and defines in section 2 some of the terms used in the Act and provides in section 3 for its application.

(a) Interpretation

In section 2(1), the term 'merger' is defined as to mean:

“[T]he direct or indirect acquisition or establishment or a controlling interest by one or more persons in the whole or part of the business of a competitors, 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 paragraph (a) or (b)”.

The above definition of 'merger' is an amended version brought about by the Competition Amendment Act, 2001. It improves upon the original definition in the Competition Act, 1996 by including in the definition not only horizontal and vertical mergers but also conglomerate mergers, as well as by covering all other possible business combinations. The Commission had spent considerable time and resources in arguing and trying to convince the business community that business combinations such as joint ventures and strategic alliances have the same effect as 'pure' mergers and should therefore be examined as mergers for their possible competitive effects.

The term 'controlling interest' in relation to any undertaking is defined as to mean “any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking”, and in relation to any asset to mean “any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset”.

The term 'restrictive practice' is defined in the Act as to mean:

- “(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”.

The definition of ‘restrictive practice’ covers virtually all the anti-competitive practices that are prevalent in Zimbabwe. The restrictive practice of tied or conditional selling was specifically included in the definition by the Competition Amendment Act, 2001 because it was becoming prevalent and gaining notoriety as evidenced by the increasing number of complaints received by the Commission of such practices by the business community in attempts to take advantage of shortages of basic commodities on the market. The definition also incorporates the *de minimis* rule by providing that the conduct must materially restrict competition to fall under the definition of ‘restrictive practice’. It further provides that restrictive practices should generally be considered using the ‘rule of reason’ principle.

The Competition Amendment Act, 2001 introduced a new section 2(3) which provides that an agreement, arrangement or understanding to engage in a restrictive practice is presumed to exist between two or more persons if (a) any one of them owns a substantial shareholding, interest or similar right in the other or they have at least one director in common; and (b) any combination of them is involved in such restrictive practice. This was in response to the prevalence of cross-directorships in Zimbabwe which were resulting in companies acting as *de facto* cartels.

‘Monopoly situation’ is simply defined as to mean “a situation in which a single person exercises, or two or more persons with substantial economic connection exercise substantial market control over any commodity or service”. Section

2(2) of the Act provides that a person has substantial market control over a commodity or service if:

- 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; or
- 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.

The Competition Amendment Act, 2001 redefined the term 'unfair trade practice' as to mean: (a) the dumping of imported commodities; (b) the granting of a bounty or subsidy with respect to imported commodities; and (c) any other practice in relation to the importation of commodities or services or the sale of imported commodities or the provision of an imported service where such practice is declared to be unfair by the Minister responsible for industry and international trade. The redefined term therefore refers to trade policy malpractices as opposed to the original definition that referred to those more serious competition policy restrictive practices that are criminal offences and

attract fines and/or prison sentences, which are now referred to in the Amendment Act as 'unfair business practices'.

New definitions arising from the Competition Amendment Act, 2001 include that of 'tied or conditional selling' as to mean "any situation where the sale of one commodity or service is conditional on the purchase of another commodity or service".

(b) Application

The application provisions of section 3 of the Act read as follows:

"(1) This Act applies to all economic activities within or having an effect within the Republic of Zimbabwe but shall not be construed so as to –

(a) limit any right acquired under –

- (i) the Plant Breeders Rights Act [*Chapter 115*]; or
- (ii) the Copyright Act [*Chapter 200*]; or
- (iii) the Industrial Designs Act [*Chapter 201*]; or
- (iv) the Patents Act [*Chapter 202*]; or
- (v) the Trade Marks Act [*Chapter 203*];

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, 1985 (No.16 of 1985).

(2) Except in so far as criminal liability is concerned, this Act shall bind the State to the extent that the State is concerned in the manufacture and distribution of commodities.

(3) Where a statutory body established to regulate the activities of any person or class of persons authorises a merger between two or more such persons, such body shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission in terms of this Act for the final authorisation of the merger.”.

The above provisions are important in the application of competition law and implementation of competition policy in Zimbabwe in two significant ways. Firstly, competition law in Zimbabwe applies to all economic activities, even to those activities undertaken by the Government and other statutory bodies (parastatal organisations). This was made absolutely by the Competition Amendment, 2001. In addition to making it clear that the Act applies to “all economic activities”, the Amendment Act repealed the previous provisions of section 3(3) that had exempted from the application of the Act those activities of statutory bodies that were authorised by other enactments. The Amendment Act went on farther to give the Commission primary and overriding authority on mergers and acquisitions over other statutory bodies. Before the amendments, such sector regulators as the Registrar of Banks and Financial Institutions and the Insurance Regulatory Authority used to have concurrent jurisdiction with the

Commission over the examination of mergers in the banking and insurance sectors.

Secondly, while Zimbabwe’s competition legislation adopts the general principle that the law should be a general law of general application, i.e., it should apply to all sectors and to all economic agents engaged in the commercial production and supply of goods and services, it also recognises that certain exemptions and exclusions from the application of the law are necessary in circumstances where full and unhindered competition may not deliver the most desired outcome of competition policy. As such, intellectual property rights are exempted from the application of the Act, but only in as far as they are not used as anti-competitive restrictive practices. Union and other collective bargaining activities are also excluded from the application of the Act in recognition of the fact that individual workers are mostly in weaker positions than their employers in negotiating conditions of service.

Part II: Competition and Tariff Commission

Part II of the Act provides for the establishment and functions of the Commission, as well as the appointment, terms and conditions of office of members of the Commission. It also provides for the conduct of business of the Commission. It further provides for the appointment and functions of the Commission’s Director.

Establishment of Commission

Section 4 of the Act establishes the Competition and Tariff Commission as a

body corporate capable of suing and being sued in its corporate name. The Competition Amendment Act, 2001 changed the Commission's name from 'Industry and Trade Competition Commission' in order to accommodate the Commission's merger with the Tariff Commission.

It is provided for in section 6 of the Act that the Commission should "consist of not fewer than five and not more than ten members appointed by the Minister in consultation with the President". The appointment of members of the Commission by the Minister was provided for by the Competition Amendment Act, 2001. Before that, the President was the only authority on the appointment of Commissioners. It is not clear why the change was made since it technically weakens the independence of the Commissioners. The reason might have been that the appointment of Commissioners, particularly replacement Commissioners, by the President often took long. For example, of the original five members of the former Competition Commission in 1998, there were only three by the time of the merger with the Tariff Commission in 2002 since the two who had resigned had not been replaced even though the first resignation was two years before. For two years the Commission was therefore technically operating without its statutory quorum.

Section 6 of the Act further provides that persons appointed as Commission members should be "chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment". It is also provided that in selecting such persons, the Minister should ensure that

"so far as possible all interested groups and classes of persons, including consumers, are represented on the Commission". A person shall not be appointed as a member of the Commission if he or she (i) is not a citizen or resident of Zimbabwe; (ii) has been declared insolvent or bankrupt; or (iii) has been convicted of an offence involving fraud or dishonesty and sentenced to a term of imprisonment. Members of Parliament are also not qualified for appointment as a member of the Commission.

Commission members hold office for periods not exceeding three years but are eligible for reappointment upon expiration of their terms of office. At the expiry of his term of office, a member of the Commission can continue to hold office until he has been re-appointed or his successor has been appointed, provided that a member shall not continue to hold office after the expiry of his term of office for a period exceeding six months. A member of the Commission can resign from the Commission after giving one-month notice. The Minister may also require a member to vacate his office, or may suspend a member, on clearly defined grounds. The relevant provisions of section 10 of the Act read as follows:

"(1) The Minister may require a member to vacate his office if the member –

- (a) has been guilty of improper conduct as a member or guilty of conduct that is prejudicial to the interests or reputation of the Commission; or
- (b) has failed to comply with any condition of his office fixed by the

President in terms of subsection (3) of section *eight*⁷⁸; or

(c) is mentally or physically incapable of efficiently performing his functions as a member.

(2) The Minister, on the recommendation of the Commission, may require a member to vacate his office if the Minister is satisfied that the member has been absent without the permission of the Commission from three consecutive meetings of the Commission, of which the member was given not less than seven days' notice, and that there was no just cause for the member's absence.

(3) The Minister -

- (a) may suspend from office a member against whom criminal proceedings have been instituted in respect of an offence for which a sentence of imprisonment without the option of a fine may have been imposed; and
- (b) shall suspend from office a member who has been sentenced by a court to imprisonment without the option of a fine, whether or not any portion has been suspended, pending determination of the question whether the member is to vacate his office;

and while the member is so suspended he shall not exercise any functions or be entitled to any remuneration as a member."

⁷⁸ Subsection (3) of section *eight* read as follows: "Subject to this Part, a member shall hold office on such terms and conditions as the President may fix for members generally".

The Minister is required to designate one of the appointed members of the Commission to be the chairman of the Commission and another to be the vice-chairman. The Minister may also "at any time for good cause" terminate the appointment of the chairman or the vice-chairman and designate other members to those positions.

Section 13(1) of the Act provides that the Commission should meet at least six times in each financial year but may convene special meetings at any time. Section 14(1) empowers the Commission to establish committees for the better exercise of its functions "provided that the vesting of any function in a committee shall not divest the Commission of that function, and the Commission may amend or rescind any decision of the committee in the exercise of that function." While non-members of the Commission may be appointed to the Commission's committees, they are not eligible to chair the committees.

Members of the Commission and its committees are required to disclose certain connections and interests. The relevant provisions of section 16 of the Act read as follows:

"(1) If a member of the Commission or of a committee or a spouse of such a member-

- (a) knowingly acquires or holds a direct or indirect pecuniary interest in a company or association of persons -
- (i) whose conduct is the subject of an investigation or order under this Act; or
- (ii) which is applying or negotiating for a contract with the Commission;

or

- (b) tenders for or acquires or holds a direct or indirect pecuniary interest in a contract with the Commission; or
- (c) owns immovable property or a right in immovable property or a direct or indirect pecuniary interest in a company or association of persons which results in his private interests coming or appearing to come into conflict with his functions as a member of the Commission or of the committee, as the case may be;

the member shall forthwith disclose the fact to the Commission or the committee, as the case may be.

- (2) A member referred to in subsection (1) shall take no part in the consideration or discussion of, or vote on, any question before the Commission or the committee, as the case may be, which relates to any investigation, order, contract, right, immovable property or interest referred to in that subsection.
- (3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.”.

Operational Functions of Commission

The operational functions of the Commission are provided for in section 5(1) of the Act as follows:

“(a) to encourage and promote competition in all sectors of the economy; and

(b) to reduce barriers to entry into any sector of the economy or to any form of economic activity; and

(c) to investigate, discourage and prevent restrictive practices; and

(d) to study trends towards increased economic concentration, with a view to the investigation of monopoly situations and the prevention of such situations, where they are contrary to the public interest; and

(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;

and

(f) 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; and

(g) subject to Part IVB to undertake investigations and make reports to the Minister relating to tariff charges, unfair trade practices and the provision of assistance or protection to local industry; and

- (h) to 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; and
- (i) to perform any other functions that may be conferred or imposed on it by this Act or any other enactment.”

While most of the Commission’s functions above are standard competition functions, those related to tariffs and price monitoring have links with the Government’s other economic policies and are new additions under the Competition Amendment Act, 2001.

The functions to “undertake investigations and make reports to the Minister relating to tariff charges, unfair trade practices and the provision of assistance or protection to local industry” were inherited from the defunct Tariff Commission following the merger with that Commission. Even though the merger of the Competition Commission and Tariff Commission was directed by the Government with the primary objective of cutting its costs of funding the operations of the two Commissions under the policy guidance of the Ministry of Industry and International Trade, the Competition Commission did not object to the merger since it did not see any serious contradictions between its functions and those of the Tariff Commission. Instead, it saw some complementarities in the functions as competition policy interacts more and more with trade policy. It also saw the opportunity of using trade policy measures to advance competition objectives and to ensure that trade policy does not harm competition. In particular, there was a realisation that

remedies under certain competition cases handled by the Competition Commission required import tariff adjustments handled by the Tariff Commission. Possible conflicts between competition policy and trade (tariffs) policy were however noted, particularly in cases where the need to protect local industry through high import tariffs conflicted with the need to counteract monopolistic supplies on the local market with import competition.

The merger of the Competition Commission and Tariff Commission was consummated in July 2002 with the amendment of the Competition Act, 1996 and the repeal of the Tariff Commission Act [*Chapter 14:29*]. The experiment of combining the implementation of the two sets of complementary but yet sometimes conflicting policies under one authority seem to be working, and has not yet produced any serious adverse effects on either policies.

The added functions of price monitoring are more controversial. It will be noted from Section 2 above that the need to fight and control commodity price distortions under monopolistic conditions was one of the primary movers of competition policy in Zimbabwe on the part of the Government. To the Government, the exploitative practices of monopolies were leading to high commodities prices on the local market. With the dismantling of formal price controls under the country’s Economic Structural Adjustment Programme, Government viewed competition law’s prohibition of anti-competitive practices arising from abuse of dominant positions as a vehicle to control prices, when the need arose.

On the other hand, the private business sector saw and expected competition policy and law to effectively end the era of price controls.

Commencing in 2000, there was a sudden spate of increases in prices of basic commodities in Zimbabwe, which Government felt was unwarranted and not based on economic considerations. While the economy was shrinking and inflation rising, the rapid increase in prices of some of the basic commodities was not commensurate with the economic downturn. The fact that the price increases coincided with General Elections led Government to conclude that the increases were more political than economic. Serious consideration was therefore given to introducing price controls, and the Government saw the country's competition law as the most effective legislation to do so.

The Government's preference was not price monitoring but that the Commission should directly be involved in controlling prices of basic commodities. The Commission strongly resisted moves to turn it into a price control authority since that could have contradicted its basic competition objectives. The Commission's views were that instead of resorting to formal price controls under its authority, the present provisions of the Competition Act, 1996 should be used to monitor prices and to take the necessary corrective measures if distortionary prices are a result of anti-competitive practices. In this regard, it was noted that one of the functions of the Commission as outlined in section 5 of the Act is "to investigate, discourage and prevent restrictive practices". Section 2 of the Act defines the term "restrictive

practice" to include a business practice or method of trading which restricts competition in that it has or is likely to have the effect of *enhancing or maintaining the price of any commodity or service*. The same section also defines the term "unfair business practices" as meaning a restrictive practice or any conduct specified in the First Schedule to the Act. The following are some of the unfair business practices specified in the First Schedule to the Act: (i) failing or refusing to distribute any commodity to another person unless the other person distributes the commodity at a specified price or at a price which is not less than a specified minimum price; and (ii) collusive arrangements or agreements between producers or distributors of a similar commodity or service *to* distribute the commodity or service at a particular price or within a particular range of prices.

The manipulation of prices of commodities and services therefore amounts to a restrictive practice or an unfair business practice in respect of which the Commission can carry out an investigation in terms of section 28 of the Act. While an investigation is underway in terms of section 28, the Commission may prohibit or stay any restrictive practice pending the outcome of the investigation. After an investigation if the Commission is satisfied that a restrictive practice exists or may come into existence, it may issue an order in respect of that restrictive practice regulating the price at which any person named in the order may charge for any commodity or service (provided however that the Commission should not make any such order unless it is satisfied that the price being charged

by the person concerned is essential to the maintenance of the restrictive practice to which the order relates). While the Commission has powers under the Competition Act to investigate prices, such powers may however only be exercised insofar as the pricing has the effect of restricting competition. Unless there is reason to believe or it is proved that the pricing amounts to a restrictive practice or unfair trade practice, the Commission has no power to investigate or give any order in respect of any price increase. Also under the Act, the Commission has no powers to: (i) call upon business organisations to justify price increases on receipt of a complaint by consumers or on its own initiative; (ii) vet proposed price increases of business organisations placed under price surveillance and, where it is desirable to do so, regulate the price which may be charged for commodities or services supplied by those organisation; and (iii) generally monitor prices *vis a vis* the costs and profits of business organisations.

For the effective performance of its new price monitoring functions, the Commission agreed with the Ministry of Industry and International Trade, and the Consumer Council of Zimbabwe that was strongly lobbying for the introduction of price controls, on a Price Monitoring Mechanism shown in Box 2 below:

Box 2: Price Monitoring Mechanism

(a) It shall be the function of the Competition Commission “to monitor prices, costs and profits in any industry or business that the Minister of Industry and International Trade directs the Commission to monitor, and to report its findings to the Minister” as provided for in the Competition Amendment Act, 2001.

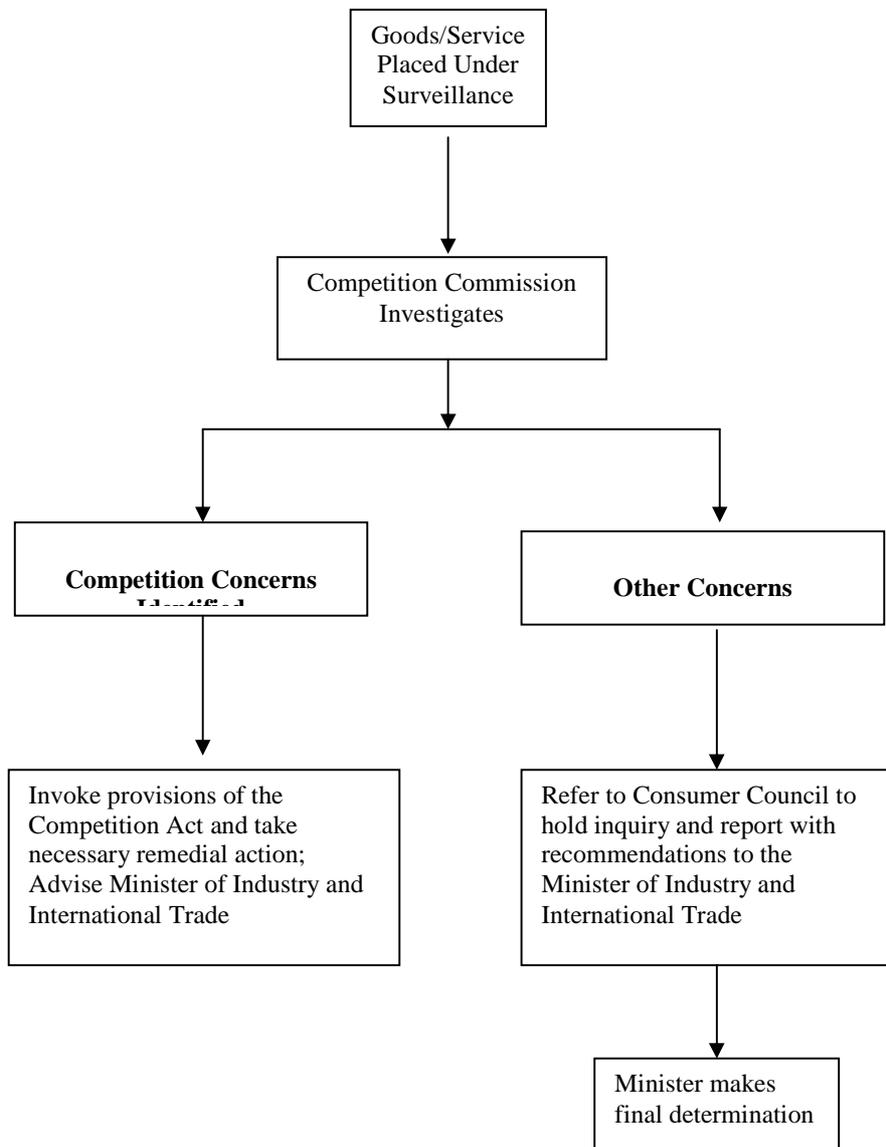
(b) If from the price monitoring exercise the Commission discovers that a case of excessive pricing is related to a restrictive or unfair business practice, or any other anti-competitive practice, it shall forthwith investigate the practice in accordance with the provisions of the Competition Act and take the necessary remedial action, and advise the Minister accordingly.

(c) If the Commission finds from its price monitoring exercise no serious competition concerns in the high prices of the concerned commodity or product, the matter shall be referred to the Consumer Council of Zimbabwe to hold an inquiry into the matter and to report to the Minister the results of such an inquiry. All the major stakeholders such as the relevant business associations and the labour movement shall actively participate in inquiries held by the Consumer Council on matters related to commodity prices.

(d) The Government through the Ministry of Industry and International Trade shall make final determinations on commodity prices on the basis of inquiries held by the Consumer Council of Zimbabwe.

The structure of the agreed Price Monitoring Mechanism is shown in Figure 1 below.

Figure 1: Structure of Price Monitoring Mechanism



The Commission has made it known that it intends to perform its additional price monitoring functions along the same lines as the Australian Competition & Consumer Commission (ACCC) administers Australia's Prices Surveillance Act. The ACCC's administration of the Prices Surveillance Act is best described by the ACCC itself as follows:⁷⁹

“The Prices Surveillance Act

The Prices Surveillance Act enables the Commission to examine the prices of selected goods and services in the Australian economy.

The three pricing functions assigned to the Commission are:

- to vet the proposed price rises of any business organisations placed under prices surveillance;
- to hold inquiries into pricing practices and related matters, and to report the findings to the responsible Commonwealth Minister; and
- to monitor the prices, costs and profits of an industry or business and to report the results to the minister.

Prices surveillance

The minister determines which organisations, goods or services should be subjected to prices surveillance. These are formally ‘declared’. In cases where an organisation is specified, the minister must nominate how long the declaration must remain in effect.

A declared organisation cannot raise the price of a declared product beyond its peak price of the previous 12 months unless it fulfils the requirements of the Act. The maximum penalty for an individual is \$11 000 and for a corporation \$55 000.

The declared organisation has to notify the Commission of a proposed price rise and the terms and conditions of supply. The prohibition on supply ceases if:

- the Commission advises it does not object to the proposed increase; or
- the declared organisation agrees to implement a lower price specified by the Commission; or
- the prescribed period – initially 21 days – expires.

The Commission has the option of recommending an inquiry – and an extension of the prohibition on a price rise – to the minister in cases where the outcome of the prices surveillance procedure is perceived to be unsatisfactory.

The Commission maintains a public register of surveillance matters showing price notifications, the Commission's deliberations, the outcome and the reasons for the outcome.

Inquiries

The minister determines the subject of a Commission inquiry. The Commission has to give widespread and reasonable notice of the inquiry and widespread and reasonable notice of the inquiry and serve individual notices on any

⁷⁹ ACCC Journal, Issue 37: November – December 2001

organisations specially identified in the minister's directions.

During the period of the inquiry, an organisation that has been served with the notice cannot raise its price beyond its peak price of the previous 12 months unless it fulfils the requirements of the Act. The maximum penalty for an individual is \$11 000 and for a corporation \$55 000. However, the Commission can authorise interim price increases.

A report of the Commission's findings and recommendations is submitted to the minister and a copy is sent to any notified organisation on the same day. Any notified organisation has to advise the Commission of its proposed prices within 14 days of receiving a copy of the report. It could be fined \$1 000 if it fails to do so. The Commission has to make public those prices within another 14 days.

Monitoring

The Commission can monitor the prices, costs and profits of an industry or business. The minister determines which industries or businesses are monitored and how often the Commission should report. The report is submitted to the minister and copies are sent to the monitored organisations on the same day. Inquiry and monitoring reports are to be made available to the public as soon as possible after they have been submitted to the minister.”.

Section 5(3) of the Act entrenches the independence of the Commission in the performance of its functions. The section provides that “in the lawful

exercise of its functions under this Act the Commission shall not be subject to the direction or control of any other person or authority”.

Other Administrative Functions of Commission

For the better exercise of its operational functions, section 5(2) of the Act gives the Commission “power to do or cause to be done, either by itself or through its agents, all or any of the things set out in the Second Schedule, either absolutely or conditionally and either solely or jointly with others”. Commission powers set out in the Second Schedule to the Act include powers to acquire premises and other property necessary or convenient for the exercise of its functions, and to employ such persons as are necessary for carrying out its functions and conducting its affairs.

The Commission's powers set out in the Second Schedule to the Act are standard powers given to almost all statutory bodies in Zimbabwe.

The Commission is also required under section 22 of the Act to submit to the Minister as soon as is practicable after the end of each financial year a report on all its activities during the year ended on that date. In turn, the Minister should lay that report before Parliament. In addition to the annual report, the Minister may require from the Commission any other reports on its operations and activities.

Policy Directions to Commission

Under section 18(1) of the Act, 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 to be necessary in the national interest". However before giving the Commission such policy directions, he is required to first inform the Commission in writing of the proposed direction to enable the Commission to give its views on the proposal.

Since the effective coming into operation of the Commission in 1998, no Ministerial policy directions in terms of section 18(1) of the Act have been given.

Appointment and Functions of Director

Section 17(1) of the Act provides for the appointment of a Director "who shall be responsible for administering the Commission's affairs, funds and property and for performing any other functions that may be conferred or imposed upon him or under this Act or that the Commission may delegate or assign to him". The delegated or assigned functions of the Director may however be revoked by the Commission at any time, and shall not preclude the exercise of the functions by the Commission itself.

The terms and conditions of the Director's appointment are fixed by the Commission with the approval of the Minister. Members of the Commission are not eligible for appointment as the Director. The Director's appointment is terminated if he (i) becomes a Member of Parliament; and (ii) is no longer ordinarily resident in Zimbabwe, has been declared insolvent or bankrupt, or has been convicted of an imprisonable offence.

The Competition Amendment Act, 2001 made provision for the appointment of at least two Assistant Directors to assist the Director in the performance of his functions, one of whom should be responsible for tariffs and the other for competition.

Part III: Financial Provisions Relating to Commission

Section 23 of the Act provides that funds of the Commission consist of:

"(a) moneys payable to the Commission from moneys appropriated for the purpose by Act of Parliament;

(a1) fees payable to the Commission in terms of the Act; and

(b) any other moneys that may vest in or accrue to the Commission, whether in terms of this Act or otherwise."

Government appropriations are by far the largest source of the Commission's funds. During the Commission's 2003 financial year ended 31st December 2004, such appropriations constituted [%] of the funds utilised by the Commission during that year. Fees payable to the Commission include merger notification fees, authorisation fees and []. They also penalty fees for not notifying mergers or proceeding to implement mergers without the approval of the Commission. Merger fees as a source of the Commission's funds are expected to rival, or even overtake, Government appropriations with the increase in the Commission's merger activities. The Commission is also authorised to invest moneys not

immediately required by it “in such manner as the Minister, acting on the advice of the Minister responsible for finance, may direct”.

The Commission is required under section 24 of the Act to “ensure that proper accounts and other records relating to such accounts are kept in respect of all the Commission’s activities, funds and property, including such particular accounts and records as the Minister may direct”. At the end of each financial year, the Commission is required to prepare and submit to the Minister a statement of accounts in respect of that financial year. The statement of accounts must be audited in terms of the provisions of the Audit and Exchequer Act [*Chapter 168*].

Part IV: Investigation and Prevention of Restrictive Practices, Mergers and Monopoly Situations

Part IV of the Act contains provisions related to the investigation of restrictive practices, mergers and monopoly situations. It also contains provisions on the treatment of anti-competitive agreements and arrangements, and of dominance and its abuse.

Investigations

Section 28(1) of the Act on Commission powers to investigate restrictive practices, mergers and monopoly situations provides as follows:

“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.”

In terms of section 28(2) the Commission is however required before embarking on an investigation to publish notices in the *Government Gazette* and in national and/or community newspapers stating the nature of the proposed investigation and calling upon any interested party who wishes to do so to submit to the Commission written representations in regard to the subject matter of the proposed investigation. These provisions had serious practical limitations and problems. They not only required the Commission to publicly announce its intentions to undertake investigations before even commencing the investigation, a practice that seriously constrained its investigations into cartels and concerted agreements,

but also publicly indicted suspected companies before the establishment of *prima facie* cases against them.

The Competition Amendment Act, 2001 solved the above problems by making provision for the undertaking by the Commission's investigation officers without public notice of preliminary investigations before the undertaking of full-scale investigations.

In undertaking full-scale investigations into restrictive practices, mergers and monopoly situations, the Commission has powers conferred under the Commissions of Inquiry Act [*Chapter 10:07*]. The following are the main relevant elements of that Act:

- Inquiries should be held in public, but the commissioners are nevertheless entitled to exclude any particular person or persons for the preservation of order, for the due conduct of the inquiry or for any other reason.
- Commissioners may make such rules for their own guidance and the conduct and management of proceedings before them and the hours and times and places for their sittings as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they think fit.
- Commissioners have powers to summon witnesses, to cause the oath to be administered to them, to examine them and to call for the production of books, plans and documents.

- Any witness who, after having been sworn, gives false evidence before the commissioners concerning the subject-matter of the inquiry, knowing such evidence to be false or not knowing or believing it to be true, shall be deemed guilty of perjury and may be punished accordingly.
- Any person whose conduct is the subject of inquiry ... or who is in any way implicated or concerned in the matter under inquiry, is entitled to be represented by a legal practitioner at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the same manner.

The Commission is also required under section 28(4) of the Competition Act to ensure that rules of natural justice are observed in the conduct of its investigations by taking "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".

Section 29(1) of the Act gives the Commission wide powers to stay restrictive practices or mergers pending the completion of its investigation. The relevant provisions read as follows:

"At any time after publishing a notice in terms of subsection (2) of section *twenty-eight* in regard to any investigation, the Commission may publish a notice doing either or both the following –

- (a) prohibiting or staying any restrictive practice or merger that is the subject of the investigation;
- (b) directing that any action be taken which, in the Commission's opinion, will prevent or stay any restrictive practice or merger that is the subject of the investigation;

pending the outcome of the investigation.”

Notices made in terms of the above provisions remain in force until the completion of the Commission's investigation into the concerned matter(a) or for at least a period of six months from the date of its publication in the *Government Gazette*. While it is not(b) necessary for the Commission to notify or receive representation from any person before publishing a notice in terms of section 29(1) if it is its opinion that to do so would unduly delay the publication of the notice or defeat its purpose, it is required in terms of section 29(6) to provide without delay a written statement of its reasons for having published such a notice upon being requested for such a statement by “any party to the restrictive practice or merger to which the notice relates, or any other person, where the statement is requested for the purpose of any judicial review or other legal proceedings instituted in regard to the notice”.

It is 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.

Section 30 of the Act provides that the Commission can at any time during the course of its investigations negotiate the termination or discontinuation of identified restrictive practices, anti-competitive 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 –

- ensure the discontinuance of any restrictive practice which exists or may come into existence; or
- 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.”

Commission Orders

Orders made by the Commission in relation to identified restrictive practices, anti-competitive mergers and monopoly situations that are contrary to public interest are provided for under section 31 of the Act, and are summarised in the Box 3 below.

Box 3: Summary of Commission Orders

<p>Orders in terms of section 31(1) against Restrictive Practices</p> <p>(a) Prohibiting any person named in the order, or any class of persons, from engaging in the restrictive practice or from pursuing any other course of conduct which is specified in the order and which, in the Commission's opinion, is similar in form and effect to the restrictive practice.</p> <p>(b) Requiring any party to the restrictive practice to terminate the restrictive practice, either wholly or to such extent as may be specified in the order, within such time as is specified therein.</p> <p>(c) Requiring any person named in the order, or any class of persons, to publish a list of prices, or otherwise notify prices, with or without such further information as may be specified in the order.</p> <p>(d) Regulating the price which any person named in the order may charge for any commodity or service (provided that the Commission shall not make any such order unless it is satisfied that the price being charged by the person concerned is essential to the maintenance of the restrictive practice to which the order relates).</p> <p>(e) Prohibiting any person named in the order, or any class of persons, from notifying persons supplying any commodity or service or a price recommended or suggested as appropriate to be charged by those</p>	<p>Orders in terms of section 31(2) against Anti-competitive Mergers or Monopoly Situations</p> <p>(a) Declaring it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to make or to carry out any agreement or arrangement which is specified in the order and which, in the Commission's opinion, will lead to or maintain the merger or monopoly situation.</p> <p>(b) In the case of a monopoly situation, requiring any person who exercises control over the business or economic activity concerned to take such steps as are specified in the order to terminate the monopoly situation within such time as is specified in the order.</p> <p>(c) Prohibiting or restricting the acquisition by any person named in the order of the whole or part of any undertaking or assets, or the doing by that person of anything which will or may result in such an acquisition, if the acquisition is likely, in the Commission's opinion, to lead to a merger or monopoly situation.</p> <p>(d) Requiring any person to take steps to secure the dissolution of any organisation, whether corporate or unincorporated, or the termination of any association, where the Commission is satisfied that the person is concerned in or a party to the merger or monopoly situation.</p> <p>(e) Requiring that, if any merger</p>
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<p>persons.</p> <p>(f) Generally, making such provision as, in the opinion of the Commission, is reasonably necessary to terminate the restrictive practices or alleviate its effects.</p>	<p>takes place or any monopoly situation exists, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which he carries on business as are specified in the order.</p> <p>(f) Generally, making such provision as, in the opinion of the Commission, is reasonably necessary to terminate or prevent the merger or monopoly situation, as the case may be, or alleviate its effects.</p>
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Section 31(3) of the Act further provides that Commission orders made in respect of an anti-competitive merger or monopoly situation may provide for any of the following matters:

- the transfer or vesting of property, rights, liabilities or obligations;
- the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise;
- the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.

Section 32 outlines factors that the Commission must consider when making orders. The relevant provisions read as follows:

“(1) 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, the Commission shall take into account everything it considers relevant in the circumstances, and shall have regard to the desirability of –

- (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; and
- (b) promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services; and
- (c) promoting, through competition, the reduction of costs and the development of new techniques and new commodities, and of facilitating the entry of new competitors into existing markets.”

The Act is mainly concerned over abuse of dominant positions, rather than on the existence of dominance. Section 32(2) 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 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:

- 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;
- 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 therefrom;
- 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;
- 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;
- the restrictive practice is reasonably required to maintain an authorised practice or any other restrictive practice which, in the Commission's opinion, is not contrary to the public interest;
- 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.

Section 32 (3) provides that restrictive practices that are unfair business practices (i.e. those that are specified in the First Schedule to the Act) are absolutely contrary to the public interest. To a certain extent, these practices are *per se* prohibited under the Act.

In terms of section 32(4) mergers are regarded as contrary to the public interest if the Commission is satisfied that the merger “has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe, or has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest”. The Competition Amendment Act, 2001 made provision for the following factors to be considered by the Commission in determining whether or not a merger is likely to substantially prevent or lessen competition:

- the actual and potential level of import competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level, trends of concentration and history of collusion in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the merged parties having market power;
- the dynamic characteristics of the market including growth, innovation and product differentiation;
- the nature and extent of vertical integration in the market;

- whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
- whether the merger will result in the removal of efficient competition.

Monopoly situations are regarded in terms of section 32(5) as contrary to the public interest unless the Commission is satisfied as to any one or more of the following:

- the monopoly situation, through economies of scale or for other reasons, has resulted in or is likely to result in a more efficient use of resources in any business, trade or industry than would be the case if the monopoly situation did not exist;
- the monopoly situation is or is likely to be necessary for the production, supply or distribution of any commodity or service in Zimbabwe, regard being had on the one hand to the resources necessary to produce, supply or distribute the commodity or service and, on the other hand, to the size of the Zimbabwean market for that commodity or service;
- termination or prevention of the monopoly situation would deny to consumers or users of any commodity or service, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them, whether by virtue of the monopoly situation itself or by virtue of any arrangement or operation resulting therefrom;
- the monopoly situation is or is likely to be reasonably necessary to enable the parties to it to negotiate fair terms for the distribution of a commodity or service: (i) from a person who is not a party to the

monopoly situation and who exercises complete or substantial control over the distribution of the commodity or service; or (ii) to a person who is not a party to the monopoly situation and who exercises complete or substantial control over the market for the commodity or service;

- termination or prevention of the monopoly situation would be likely to have a serious and persistently adverse effect on the general level of employment in any area in which a substantial proportion of the business, trade or industry to which the monopoly situation relates is situated;
- termination or prevention of the monopoly situation would be likely to cause a substantial reduction in the volume or earnings of any export business or trade of Zimbabwe.

The following provisions of section 33 of the Act deal with the enforcement of orders made by the Commission:

“(1) The Commission or any person in whose favour or for whose benefit an order has been made may lodge a copy of the order, certified by the Director or a person authorised 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.

(2) An order that has been recorded under subsection (1) shall, for the purposes of enforcement, have the effect of civil judgment of the High Court or the magistrates court concerned, as the case may be.”

Part IVA: Notifiable Mergers

Part IVA is a new part added by the Competition Amendment Act, 2001. The part deals with notifiable mergers.

The original section 34 of the Act that was repealed by the Amendment Act provided for pre-merger notification of mergers and acquisitions, but only “if the Commission is satisfied that any class of merger, if carried out, is likely to reduce competition to a material extent in Zimbabwe or any part of Zimbabwe, the Commission may publish a notice in the *Gazette* requiring the parties to any such merger to obtain the Commission’s approval before concluding the merger”. The onus was therefore on the Commission to identify those classes of mergers that were likely to be anti-competitive and to *gazette* notices requiring such mergers to be notified to it before being consummated. While the Commission identified some likely anti-competitive classes of mergers that required pre-merger notification, the task was beyond the resources of the Commission and it is mostly likely that a number of other harmful mergers slipped through the Commission’s net. The provisions of the repealed section 34 of the Act were also limited in that they did not specifically provide penalties for contravention *gazetted* pre-merger notification notices.

The following are the *Gazette* notices that the Commission published in terms of the repealed section 34 of the Act:

- Statutory Instrument 63A of 2000: Competition (Notification of Mergers) (Health Care Industry) Notice, 2000
- Statutory Instrument 177 of 2000: Competition (Notification of Mergers) (Financial Services) Notice, 2000
- Statutory Instrument 226 of 2000: Competition (Notification of Mergers) (Telecommunication Services) Notice, 2000
- Statutory Instrument 323 of 2001: Competition (Notification of Mergers) (Retail Chain Store Services) Notice, 2001
- Statutory Instrument 351 of 2001: Competition (Notification of Mergers) (Tourist Facility) Notice, 2001.

The amended section 34(1) of the Act provides for the prescription of thresholds of combined annual turnover or assets in Zimbabwe, either in general or in relation to specific industries, at above which mergers should be notified to the Commission. In July 2002, the Commission *gazetted* under Statutory Instrument 195 of 2002 the Competition (Notifiable Merger Thresholds) Regulations, 2002 which prescribed the merger notification thresholds either as (i) the combined annual turnover in Zimbabwe of the merging parties at a value of Z\$500 million or more; or (ii) the combined assets in Zimbabwe of the merging parties at a value of Z\$500 million or more.

Section 34(3) also provides that the Commission may however require

parties to a 'non-notifiable' merger (i.e., one with a value below the prescribed threshold) to notify that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest.

The new section 34A of the Act provides that a party to a notifiable merger must notify the Commission in writing and in a prescribed form of the proposed merger within thirty days of either the conclusion of the merger agreement between the merging parties or the acquisition by any one of the parties to that merger of a controlling interest in another. The prescription of a merger notification fee is provided in the Act, and this has been prescribed in the Competition (Notification of Mergers)(Amendment) Regulations, 2004 (No.1) that were *gazetted* in January 2004 as Statutory Instrument 11 of 2004 at 0.05% of the combined annual turnover or combined value of assets in Zimbabwe of the merging parties, whichever is higher (the current merger notification fees were increased from the 0.01% of the combined annual turnover or combined value of assets of the merging parties prescribed in the Competition (Notification of Mergers) Regulations, 2002 that were *gazetted* in October 2002 as Statutory Instrument 270 of 2002 in order to take account of Zimbabwe's high inflation rate).

Failure to notify a notifiable or proceeding to implement the merger without the approval of the Commission attracts a penalty not exceeding 10% of either or both of the merging parties' annual turnover in Zimbabwe. Factors which the Commission must consider in determining an appropriate penalty are

provided for in section 34A(5) of the Act, and these are the following:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the parties concerned;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the parties have co-operated with the Commission; and
- whether the parties have previously been found in contravention of the Competition Act.

The Commission may institute civil proceedings for the recovery of any penalty imposed for failure to notify a notifiable merger or proceeding to implement a merger without the approval of the Commission.

Part IVB: Investigation of Tariff Charges and Related Unfair Trade Practices

Part IVB is another new part that was added by the Competition Amendment Act, 2001 to provide for the handling of the Commission's new tariffs functions.

Section 34C(1) of the Act gives the Commission powers to undertake investigations into tariff charges and related unfair trade practices. The relevant provisions read as follows:

“Subject to this Act, the Commission may make such investigation as it considers necessary –

- (a) into any tariff charge or any matter related thereto, which the Commission has reason to believe is causing or threatens to cause detriment to local industry;
- (b) 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 additionally, or alternatively, redressing any imbalance in trade between Zimbabwe and any other country;
- (c) into any application for assistance or protection to local industry;
- (d) into any complaint that, as a result of the importation, actual or prospective, of any goods -
 - (i) detriment has been, or will be, caused or threatened to an established local industry; or
 - (ii) the establishment or expansion of local industry has been, or will be, detrimentally affected;

where the commodities concerned –

- A. are or may be found to have been dumped as described in subsection (1) of section 90 of the Customs and Excise Act [*Chapter 23:02*]; or
- B. are goods in respect of which a bounty or subsidy has been or will be granted within the meaning of subsection (1) of section 92 of the Customs and Excise Act [*Chapter 23:02*];
- (e) into any complaint of an unfair trade practice;

- (f) into any practice in connection with the importation of commodities or services or the sale of imported commodities or services for the purpose of determining whether it should be declared an unfair trade practice ...”.

The term ‘tariff charge’ is defined in this Part as to mean “any duty, tax or charge levied by the State in connection with commodities or services imported into or exported from Zimbabwe”, while the term ‘unfair trade practice’ is defined as to mean “(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 or the sale of imported commodities or the provision of an imported service where such practice is declared to be unfair ...”.

Section 34C(3) provides that upon completion of an investigation into tariff charges or unfair trade practices, the Commission must make a report of its findings and recommendations to the Minister responsible for industry and international trade. In turn, the Minister must do any one of the following:

- refer the matter to the Minister responsible for finance in terms of subsection (4) of section 90, section 91 or subsection (2) of section 92 of the Customs and Excise Act [*Chapter 23:02*];
- by notice in the *Gazette*, declare any practice in relation to the importation

of commodities and services or the sale of imported commodities and services to be an unfair trade practice;

- recommend that the Minister responsible for finance impose, abolish or amend any tariff charge to the extent that he is empowered by law to do so;
- take such other action in connection with the report as he thinks fit.

It will be noted that unlike the Commission's competition operations in which it has full decision-making autonomy, the Commission only has recommendatory authority in its tariffs operations. The reasons are that the administration of tariffs has wide implications in the implementation of trade policy under the Ministry of Industry and International Trade, and of fiscal policy under the Ministry of Finance.

Part V: Authorisation of Restrictive Practices, Mergers and Other Conduct

Part V of the Act deals with the authorisation on application of restrictive practices, mergers and other anti-competitive conduct. It is therefore the 'exemptions' clause of the Act.

Section 35 of the Act provides that:

- “(1) Any person who proposes to –
- (a) enter into, carry out or otherwise give effect to any agreement or arrangement; or
 - (b) engage in any practice or conduct;

which he considers may be prohibited, restricted or otherwise affected by this Act shall apply to the Commission for its authorisation of such agreement, arrangement, practice or conduct.

(2) An application under subsection (1) shall be made in such form and manner as may be prescribed and shall be accompanied by the prescribed fee, if any, and such information and particulars as may be prescribed or as the Commission may reasonably require.”

The Act also provides in section 35(3) that “any person who, in or for the purposes of an application under subsection (1), makes a statement which he knows to be false or misleading or does not believe on reasonable grounds to be true, shall be guilty of an offence and liable to a fine ... or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment”.

Upon receiving an authorisation application, the Commission is required to publish a notice in the *Government Gazette* and in the national or relevant community newspapers stating the nature of the authorisation being sought and calling upon any interested parties to submit to the Commission written representations in regard to the authorisation being sought. The Commission however need not publish notices for authorisations of mergers if it considers that publication of such notices may prejudice the parties to the merger and is not likely to produce representations or information that would materially assist the Commission in its determination of the application.

Section 36(2) provides that:

“After conducting such investigation as it considers necessary into any application under section *thirty-five*, and taking into account any representations received in response to the relevant notice published under subsection (1), the Commission shall either –

- (a) grant the authorisation sought by the applicant, subject to such terms and conditions as the Commission thinks appropriate, if the Commission is satisfied that the agreement, arrangement, practice or conduct concerned is not contrary to the public interest; or
- (b) refuse to grant the authorisation sought by the applicant, if the Commission is not satisfied as provided in paragraph (a).”

Section 37 provides that as long as the authorisation granted by the Commission is in force “nothing in this Act shall prevent the person to whom it was granted from entering into, carrying out or otherwise giving effect to the agreement or arrangement to which the authorisation relates, or engaging in the practice or conduct to which the authorisation relates, as the case may be.”

The Commission is required under section 39 of the Act to keep a register of applications for authorisation it receives and its decisions on those applications. The register should be kept open to inspection by members of the public.

Part VI: Appeals

Appeals against any decisions of the Commission are made to the Administrative Court. The relevant provisions of sections 40 and 41 of the Act read as follows:

“40. (1) Any person who is aggrieved by a decision of the Commission under Part IV or V may appeal against it to the Administrative Court.

(2) An appeal under subsection (1) shall be made within such period and in such form and manner as may be prescribed in rules made under the Administrative Court Act, 1979 (No.39 of 1979).

41. (1) For the purpose of hearing any appeal under this Act, the Administrative Court shall consist of a President of the Administrative Court and two assessors appointed by the President of the Administrative Court from the list of persons referred to in subsection (2).

(2) The Presidents of the Administrative Court, with the approval of the Chief Justice and the Minister, shall draw up a list of names of not fewer than ten persons who have ability and experience in commerce, industry, agriculture or administration or who have professional qualifications and are otherwise suitable for appointment as assessors, but who are not members of the Public Service.”

Part VII: General

The last Part VII of the Act contains general provisions, such as on unfair business practices, private right of action, investigative activities, confidentiality and exemption from liability, and prescriptive regulations.

Unfair Business Practices

Section 42(1) of the Act declares restrictive practices specified in the First Schedule to the Act as unfair business practices, and section 42(2) provides for the addition or deletion of specified unfair business practices. The relevant provisions read as follows:

“(1) The acts or omissions specified in the First Schedule shall be unfair business practices for the purposes of this Act.

(2) The Minister, on the recommendation of the Commission, may by statutory instrument amend the First Schedule -

- (a) by adding any restrictive practice thereto, where the Minister is satisfied that the restrictive practice concerned, if engaged in by any undertaking, would be unfair or deceptive and contrary to the public interest;
- (b) by altering any provision therein;
- (c) by deleting any provision therefrom;

Provided that no such amendment shall have the effect of rendering criminal anything done or omitted before the date of commencement of the amendment”.

The following are the specified unfair business practices that are provided for in the First Schedule to the Act:

- misleading advertising
- false bargains
- distribution of commodities or services above the advertised price
- undue refusal to distribute commodities or services
- bid-rigging
- collusive arrangements between competitors
- predatory pricing
- resale price maintenance
- exclusive dealing.

The last three practices (i.e., predatory pricing, resale price maintenance and exclusive dealing) were added to the list under the Competition Amendment Act, 2001.

Section 42(3) makes it a criminal offence, which attracts a fine and/or imprisonment, to engage in an unfair business practice. Section 43 further provides as follows:

“Any agreement, arrangement, undertaking, act or omission which –

- (a) constitutes an unfair business practice or which is entered into in furtherance of an unfair business practice; or
- (b) is entered into in contravention of this Act of any order or notice under this Act;

shall be void with effect from the date on which the conduct concerned became an unfair business practice or the order or notice concerned was made or issued, as the case may be”.

Private Right of Action

Section 44 provides the private right of action under the Act. The relevant provisions read as follows:

“(1) Any person who suffers injury, loss or harm as a result of any agreement, arrangement, undertaking, act or omission referred to in section *forty-three* may recover damages, by proceedings in a court of competent jurisdiction, from every person responsible for the agreement, arrangement, undertaking, act or omission.

(2) Subsection (1) shall not limit any person’s remedy under any other law for injury, loss or harm that has been or may be occasioned to him by any agreement, arrangement, undertaking, act or omission referred in section *forty-three*.”

Investigative Activities

Section 45 gives the Commission the necessary powers to gather information in the course of its investigative activities. The relevant provisions read as follows:

“(1) Subject to subsection (3), for the purpose of investigating and detecting restrictive practices and monopoly situations, the Commission may serve a written notice on 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 in 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 five thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.”

Section 45(3) however provides that “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”. Information that one is not required to disclose in a Zimbabwean court of law includes: (i) client-to-attorney information; (ii) spouse-spouse information; (iii) self-incriminating information; and (iv) information in public interest (e.g. of a national security nature).

The designation by the Director of any employee of the Commission, or any other member of the Public Service, as an investigating officer for the purposes of the requirements of the Act is provided for in section 46.

Section 47(1) gives the Commission powers of entry and inspection. The relevant provisions read as follows:

“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 trade 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).”

The Commission’s powers of entry and inspection can however only be exercised with the consent of the owner or person in charge of the premises concerned. The relevant provisions of section 47(2) read as follows:

“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 ... or for the obtaining of evidence relating to such an offence.”

Confidentiality and Exemption from Liability

Section 48 provides for secrecy to be observed in the conduct of the Commission’s business. The relevant provisions read as follows:

“(1) The Director and every member of the Commission or of a committee thereof, and every investigating officer and other person appointed or employed under this Act shall not disclose to any person, except in the performance of his functions under this Act or when required to do so by any law, any information which he may have acquired in the course of his duties in relation to the financial or business affairs of any person, undertaking or business.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

A new section 49A added under the Competition Amendment Act, 2001 however exempts the Commission from certain liability. The provisions of the section read as follows:

“No liability shall attach to the Commission, employee or agent thereof for any loss or damage sustained by any person as a result of the *bona fide* exercise or performance by the Commission, employee or agent thereof of any power or duty conferred or

imposed upon the Commission by this Act:

Provided that the provisions of this section shall not be construed as to prevent any person from recovering compensation for any such loss, injury or damage caused by negligence or breach of contract”.

Regulations

Section 50 of the Act provides for the promulgation of regulations necessary for the effective execution of the provisions of the Act. The relevant provisions read as follows:

“(1) The Minister, after consultation with the Commission, may by regulation prescribe anything which by this Act is required or permitted to be prescribed or which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations made under subsection (1) may provide for -

- (a) the procedure to be followed in investigations carried out by the Commission;
- (b) the form of notices, orders, applications and authorisations made or issued under this Act;
- (c) fees and charges for any information given, authorisation granted or any other thing made or done under this Act.”

Regulations made so far under the provisions of section 50 include the following:

- Competition (Authorisation of Mergers) Regulations, 1999, *gazetted* as Statutory Instrument 295 of 1999, that prescribed the merger notification form;
- Competition (Authorisation of Mergers)(Amendment) Regulations, 1999 (No.1), *gazetted* in October 1999 as Statutory Instrument 372 of 1999, that amended the prescribed merger notification form;
- Competition (Notifiable Merger Thresholds) Regulations, 2002, *gazetted* in July 2002 as Statutory Instrument 195 of 2002, that prescribed the merger notification thresholds of combined annual turnover or assets in Zimbabwe of the merging parties, and the method of calculation of the annual turnover and assets;
- Competition (Notification of Mergers) Regulations, 2002, *gazetted* in October 2002 as Statutory Instrument 270 of 2002, that prescribed the merger notification fee of 0.01% of combined annual turnover or assets of the merging parties, and the merger notification form;
- Competition (Notification of Mergers)(Amendment) Regulations, 2004 (No.1), *gazetted* in January 2004 as Statutory Instrument 11 of 2004, that amended the merger notification fee to 0.05% of the combined annual turnover or assets of the merging parties

Consumer Protection Provisions

While the Competition Act does not have a Part or Section that is specifically devoted to consumer protection, it does have a number of provisions on

consumer welfare and protection that are scattered in its various Parts.

Three of the unfair business practices specified in the First Schedule to the Act are directly related to consumer protection. These are: (i) misleading advertising; (ii) false bargains; and (iii) distribution of commodities or services above advertised price. The practices are described in the First Schedule as follows:

“Misleading advertising

(1) For the purposes or in the course of any trade or business, publishing an advertisement –

- (a) containing a representation which the publisher knows or ought to know is false or misleading in a material respect; or
- (b) 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
- (c) 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.

(2) For the purposes of subparagraph (1), 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.

False Bargains

Advertising any commodity or service for distribution at a price –

- (a) which is represented in the advertisement to be a bargain price; or
- (b) 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.

Distribution of Commodities or Services above Advertised Price

(1) 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) Subparagraph (1) shall not apply in any case where -

- (a) the advertisement prominently stated that the price of the commodity or service concerned was subject to error or alteration without notice; or

(b) the advertisement was immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(3) For the purposes of subparagraph (1), the market to which an advertisement relates is the market to which it could reasonably be expected to reach, unless the advertisement defines its market specifically by reference to a particular area, store, outlet or otherwise.”

The fact that the above anti-consumer welfare practices are classified as unfair business practices shows that the Government of Zimbabwe considers them as serious restrictive practices that should be subject to criminal sanctions.

It should also be noted that in Zimbabwe protection against high product and commodity prices, or arbitrary charging of such prices, by business concerns is one of the greatest needs of consumers. This is because of the structure of the market, which is dominated by public monopolies and private oligopolies. It is therefore no wonder that consumer protection provisions in other Parts of the Competition Act are almost all related to pricing of goods and services. The following are some of those provisions:

- The definition of ‘restrictive practice’ in section 2 includes as one of the effects that determine a restrictive practice the “enhancing or maintaining the price of any commodity of service”.
- Orders made by the Commission in terms of section 31 against restrictive

practices include: (i) requiring any person named in the order to publish a list of prices, or otherwise notify prices; (ii) regulating the price which any person named in the order may charge for any commodity or service (provided that the Commission should not make any such order unless it is satisfied that the price being charged by the person concerned is essential to the maintenance of the restrictive practice to which the order relates); and (iii) prohibiting any person named in the order from notifying persons supplying any commodity or service of a price recommended or suggested as appropriate to be charged by those persons.

- Factors considered by the Commission when making orders in terms of section 32 include the promotion of “the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services” as one of the determinants of whether or not any restrictive practice, merger or monopoly situation is or will be contrary to the public interest. As such, the Commission does not regard a restrictive practice as contrary to the public interest if:
 - 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*
 - 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, whether by virtue of the restrictive practice itself or by virtue of any arrangement or operation resulting therefrom.

The Commission also does not regard a monopoly situation (or merger) as contrary to the public interest if “the termination or prevention of the monopoly situation (or merger) would deny to consumers or users of any commodity or service other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them, whether by virtue of the monopoly situation itself or by virtue of any arrangement or operation resulting therefrom”.

Section 4: Institutional Arrangements

The competition authority of Zimbabwe has two principal arms – the Board of Commissioners and the Directorate. The authority is autonomous and totally independent and does not report to, or refer its decisions to, any other authority in Zimbabwe⁸⁰.

The Board of Commissioners

Members of the Commission constitute the Commission's governing Board. The first Board of Commissioners, whose members were appointed by the President on part-time basis in February 1998, comprised four lawyers and one economist. That Board was chaired by a sitting Judge of the High Court of Zimbabwe, and its vice-chairman was another lawyer.

The present Board of Commissioners has the full statutory complement of ten members, also appointed on a part-time basis with effect from 1 July 2001. It is chaired by a prominent Industrialist with strong economics qualifications. Other members have diverse qualifications in the fields of economics, law, accounts and business administration and are all senior executives in various sectors such as banking, legal practice, financial services and the parastatal sector.

The Board of Commissioners hold its regular meetings once every two months to adjudicate and make determinations

⁸⁰ The tariffs authority part of the Competition & Tariff Commission however only has recommendatory powers and refers its decisions to the Minister responsible for industry and international trade.

on competition cases, as well as to consider other issues related to the operations of the Commission. The Board also hold special meetings, such as public and stakeholder hearings.

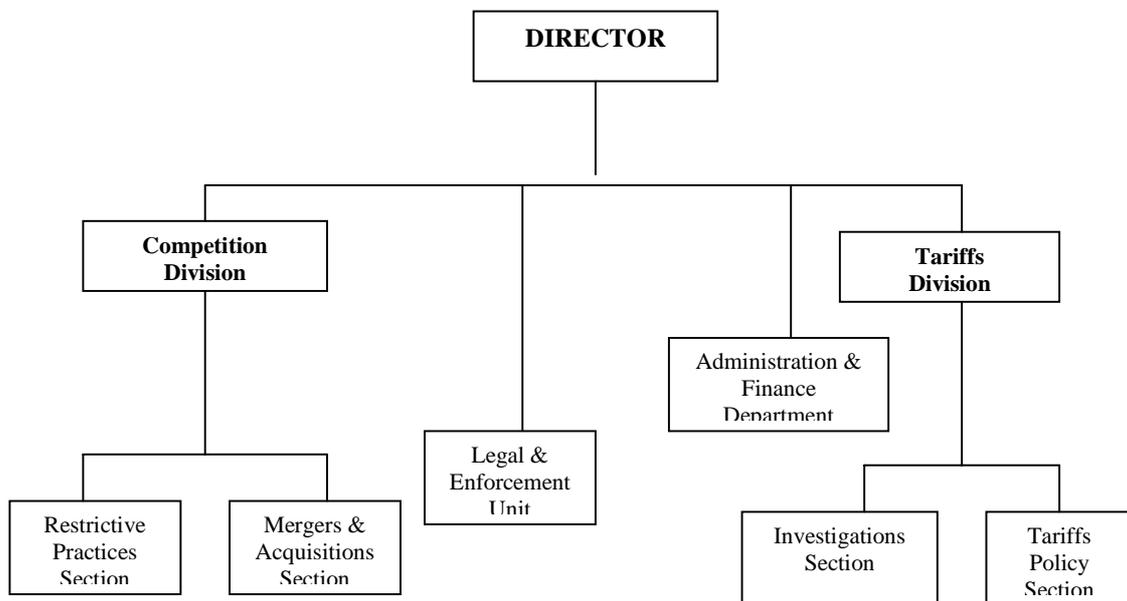
For the better exercise of its functions, the Board has established five standing Committees, namely: (i) the Mergers & Acquisitions Committee; (ii) the Restrictive Practices Committee; (iii) the Legal & Enforcement Committee; (iv) the Tariffs Committee and (v) the Audit & Administration Committee. Members of the Committees are presently all Members of the Commission. The Board's Committees meet more often as and when required.

The Directorate

The Commission has a Directorate headed by the Director. The Directorate has a small staff complement of professional and administrative support staff. All the professional staff are University graduates with varied qualifications in economics, law, accounts and business administration.

The Directorate has two divisions, each headed by an Assistant Director, one department headed by a Manager and one unit: (i) the Competition Division; (ii) the Tariffs Division; (iii) the Administration & Finance Department; and (iv) the Legal & Enforcement Unit. The Competition Division has two sections – the Restrictive Practices Sections and the Mergers & Acquisitions Section. Figure 2 below shows the organisational structure of the Directorate.

Figure 2: Directorate's Organisational Structure



The Director has established a number of committees to assist him in managing and administering the affairs and operations of the Commission. One of the committees is the Competition Operations Committee that critically considers reports on competition investigations and/or studies made by individual members of the Competition Division's professional. The committee meets once a week. All the Directorate's professional staff can attend and participate at the committee's meetings.

Separation of Functions

The Board of Commissioners, as comprised of the appointed members of the Commission, is the major institution recognised under the Competition Act to perform the Commission's statutory functions provided for in terms of

section 5 of the Act⁸¹. The Act therefore does not specifically provide for a separation of the Commission's investigative and adjudicative functions.

The problems arising from the Act's apparent oversight in providing for an effective separation of the Commission's investigative and adjudicative functions arose soon after the coming into operation of the Commission in 1998 when the Board of Commissioners decided to undertake before the appointment of the Director and the establishment of the Directorate investigations into monopolistic and

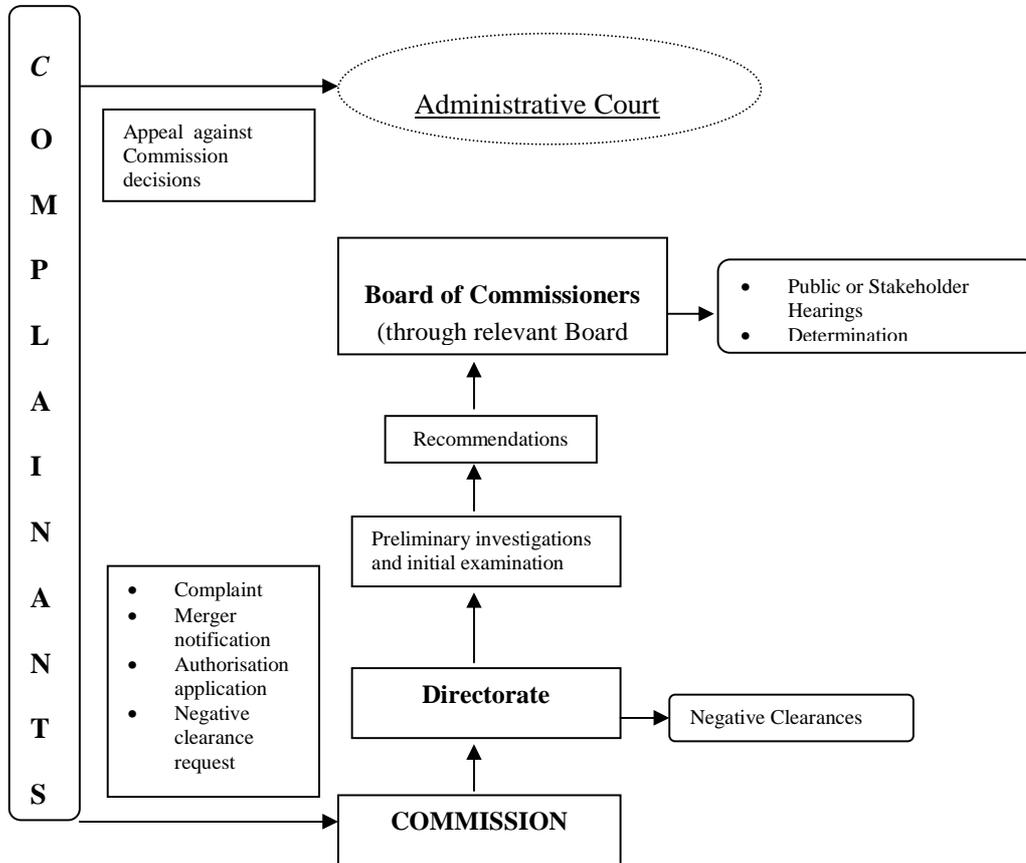
⁸¹ The Director of the Commission does have some statutory functions in terms of section 17 of the Competition Act, 1996 but these mainly relate to administering the Commission's affairs, funds and property, with any other functions delegated to him by the Board of Commissioners.

restrictive practices of producers of basic commodities such as maize meal, bread and cooking oil, as well as into the procurement of oil by the National Oil Company of Zimbabwe (NOCZIM). The investigations had to be suspended at stakeholder hearings stage when the Board of Commissioners realised that it neither had the time (being composed of part-time members) nor the expertise to gather and analyse the multitude of information on the matters under investigation.

Soon after the appointment of the Director towards the end of 1998, the Board of Commissioner delegated to the Director its investigative functions to leave the Board to concentrate on considering and making determinations on the findings of the Directorate's investigations. The Board has also delegated to the Director powers of considering and giving negative clearances on practices that do not substantially reduce competition in Zimbabwe and therefore are not in breach of the provisions of the Competition Act.

Figure 3 below shows the current working relationship between the Directorate and the Board of Commissioners aimed at effective a clear separation of functions between the two institutions.

Diagram 3: Working Relationship Between Directorate and Board of Commissioners



Section 5: Handling Of Competition Cases

The Commission's major sources of competition cases are complaints from the business community and the general public, competition concerns picked from the newspapers or identified from the Commission's own sectoral studies, and referrals from Government Ministries and other sector regulators.

Procedures Followed

Upon receiving a competition complaint or identifying a competition concern related to a restrictive practice, the Commission's Directorate undertakes a preliminary investigation into the allegation in order to identify and assess the competition concerns involved and/or to establish a *prima facie* case for a full-scale investigation in terms of section 28 of the Competition Act. The investigations undertaken involve information gathering and interviews with major stakeholders (competitors, customers, suppliers, public policy makers, etc.) and analysis of the information gathered. Before submission with appropriate recommendations to the relevant Committee of the Commission, and ultimately to the full Commission for determination, draft reports on the preliminary investigations undertaken are thoroughly considered and debated by the Directorate's Operations Committee.

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 Act using the *de minimus* rule. Some cases are closed in terms of section 30 of the Competition Act following negotiations on the discontinuation or termination of the identified anti-competitive practices. Only a few cases are presently proceeding to the full-scale investigation stage requiring public notices and public or stakeholder hearings because of their serious effect on competition in Zimbabwe. As a general rule, cases involving unfair business practices prohibited in terms of section 42 of the Act, and those involving other serious abuse of dominant positions, proceed to the full-scale investigation stage.

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.

Draft reports on the merger examinations are first discussed and debated within the Directorate's Operations Committee before being

submitted to the relevant Commission Committee and ultimately to the full Commission for final decision.

Following the coming into force of the Competition Amendment Act, 2001 with its broadened merger control provisions, the Commission adopted its *Merger Control Guidelines Rules*, which are reproduced in Appendix II. The guidelines cover various aspects in the Commission's merger processes, such as merger notification requirements, merger examination proceedings and consideration of mergers.

None of the Commission's decisions have so far been challenged in the Administrative Court, or any other law court in Zimbabwe. The Commission therefore has no case law upon which to base its interpretation of the Competition Act, and has to largely rely on the interpretation of its Legal & Enforcement Committee. It however sometimes uses other countries' case laws, particularly those with similar competition laws to Zimbabwe's, but purely for persuasive purposes.

Cases Handled

The Commission effectively started investigating competition cases in January 1999 following the appointment of the Director and the first group of the Directorate's professional staff. Since then, the Commission has handled over 200 different competition cases, of which about 60% involved restrictive and unfair trade practices and the remaining 40% were mergers and acquisitions. Industries and sectors investigated have included the financial services sector, the health care sector, the telecommunication services sector,

the tobacco industry, the chemicals industry, the cement industry, the coal industry, the beverages industry and the textile industry.

The following are brief outlines of some of the major cases handled by the Commission over the years.

Mergers and Acquisitions

Of the many cases of mergers and acquisitions that the Commission has examined since its coming into operation, five have been selected for analysis in this review because of their regional implications and/or clarity in showing how the provisions of the Competition Act were used in coming up with the relevant decisions.

(a) Rothmans of Pall Mall/ British American Tobacco Merger

In January 1999, British American Tobacco Plc of the United Kingdom announced that it had reached an agreement with the shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and Rembrandt Group Limited of South Africa to merge their international tobacco businesses. Subsequent to the completion of the international merger between British American Tobacco Plc and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited in September 1999 applied to the Competition Commission in terms of section 35 of the Competition Act, 1996 for authorisation to acquire the entire issued share capital of British American Tobacco Zimbabwe Limited.

The merging parties gave as one of the reasons to merge the declining market

for cigarettes in Zimbabwe. It was presented that the Zimbabwean manufactured cigarette market had declined to such an extent that it was no longer big enough for the continued viability of two manufacturers as evidenced by the poor performance of British American Tobacco Zimbabwe Limited in its financial year ended 31 December 1998.

The case was evaluated as a horizontal merger as defined in section 2 of the Competition Act. The examination of the proposed merger was based on information supplied by the merging parties, stakeholders (major customers, input suppliers and other tobacco manufacturers) and relevant associations in the tobacco industry. A cigarette consumption survey was also conducted in both urban and rural areas of Zimbabwe and this was an important source of information on product substitutability, brand loyalty, consumption patterns and smoking habits. The survey assisted the Commission in identifying the relevant product market under investigation as *manufactured cigarettes*. The merging parties had submitted that the relevant product market included all types of tobaccos including snuff and untreated tobacco leaf smoked as “roll-your-own” cigarettes.

The Commission noted that although the merger would result in a creation of a monopoly situation in the relevant market (i.e. the manufactured cigarette market), it had other public interest benefits. Section 32(5) of the Competition Act includes as such benefits the creation of greater economies of scale resulting in more efficient use of resources, the generation

of foreign currency through exports, and the stabilisation of product prices on the local market. The *failing firm* defense put forward by the merging parties was also considered a strong point in this connection.

The Commission therefore authorised the merger with certain conditions aimed at alleviating the adverse effects of the monopoly situation created. The conditions related to the disposal of surplus cigarette making equipment to third parties interested to enter the Zimbabwean cigarette making industry and constant surveillance by the Competition Commission of future cigarette price increases, with price rises needing the Commission’s justification, while the monopoly situation created remains in existence.

The above conditions were fully met. The merged party disposed of its surplus cigarette making equipment to a third party, Cut Rag Processors (Pvt) Limited, which went on to introduce a new *Remington Gold* cigarette brand in effective competition with the merged party. With the coming into operation of Cut Rag Processors (Pvt) Limited, the cigarette price surveillance condition imposed on the merged party fell away after only two price increase exercises.

(b) Coca-Cola Company/ Cadbury-Schweppes Merger

In December 1998 Cadbury Schweppes Plc of the United Kingdom sold to The Coca Cola Company of the United States of America its commercial beverage brands outside the United States, Continental Western Europe and certain other territories worldwide. In December 2000 The Coca Cola

Company submitted to the Competition Commission in terms of section 35 of the Competition Act a merger application for authorisation of its proposed acquisition in Zimbabwe of beverage brands owned by Cadbury Schweppes Plc.

The brands acquisition transaction was evaluated as a horizontal merger as defined in section 2 of the Competition Act. The examination of the transaction was largely based on information supplied by the merging parties themselves. Additional information was obtained from other stakeholders in the local beverage industry (franchised bottlers, competitors, raw material suppliers, etc). Other competition authorities that had also considered the transaction in terms of their countries' competition legislation (i.e., the Australian Competition & Consumer Commission, the Zambian Competition Commission and the Competition Commission of South Africa) were also consulted. A small beverage consumption survey covering some urban and rural centres of Zimbabwe was conducted in order to obtain information on product substitutability.

The Commission identified from a consumer survey undertaken that the relevant product market as *'ready to drink' soft drinks of a carbonated and non-carbonated nature* (The Coca Cola Company had submitted that the relevant product was all beverages, including tea and coffee, and even bottled water). In that market the merging parties' pre-merger market shares were 76.9% (Coca Cola brands) and 12.5% (Cadbury Schweppes brands) resulting in a combined post-merger market share of 89.4%. It was however found that the

proposed merger will not create a monopoly situation in the relevant market, which is highly contestable, nor will it lessen actual competition in the soft drinks bottling and distribution industry. It was also found that the proposed merger had considerable public interest benefits in the form of generation of foreign currency from the continued export of local beverage brands such as the *Mazoe* brand, creation of employment, more efficient use of resources and continued availability of Schweppes brands on the market. Stakeholder concerns were however expressed and noted on the fate of Cadbury Schweppes' Zimbabwean bottling plant and local beverage brands, as well as of the local suppliers of inputs into Schweppes' local beverage brands.

The Commission therefore authorised the transaction subject to the following conditions:

- (i) that The Coca Cola Company undertake to purchase Schweppes Zimbabwe Limited as a going concern and to establish an appropriate shareholding structure (to include indigenous shareholders) to oversee the operations of the new company to be formed;
- (ii) that The Coca Cola Company undertake to maintain the local *Mazoe* and *Calypso* brands on the Zimbabwean market and develop them into regional brands with wider circulation; and
- (iii) that The Coca Cola Company undertake to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials

necessary to produce the finished product brands.

An Undertaking to the above effect was signed between the Competition Commission and The Coca Cola Company in May 2001. Specifically, Undertaking provided, *inter alia*, as follows:

Acquisition and Operation of Schweppes Zimbabwe Limited

- (a) Competition Commission approves the brand transaction conditioned upon the acquisition by The Coca Cola Company of all the shares of Schweppes Zimbabwe Limited or the bottling business of Schweppes Zimbabwe. Failure by Cadbury Schweppes and The Coca Cola Company to complete the bottler transaction will nullify the approval of the brand transaction.
- (b) Cadbury Schweppes and The Coca Cola Company will complete the brand and bottler transactions simultaneously.
- (c) The Coca Cola Company will endeavour to complete all necessary due diligence in connection with the bottler transaction within 60 days from Date of Signature. If, during the due diligence investigation, The Coca Cola Company discovers information it believes would prevent any of the transactions described herein from being consummated, The Coca Cola Company will notify the

Competition Commission of such discovery.

- (d) The Coca Cola Company will endeavour to negotiate and complete the purchase documents for the brand and bottler transactions within 60 days from the completion of all necessary due diligence.
- (e) After the date of execution, The Coca Cola Company will operate the business of Schweppes Zimbabwe Limited as a going concern, consistent with The Coca Cola Company's general commercial practices.

Local Investment

- (a) The Coca Cola Company undertakes to carry out its local investment plan by offering investment opportunities in Schweppes Zimbabwe Limited by way of either issuing new shares in Schweppes Zimbabwe Limited or the sale of The Coca Cola Company's shares in Schweppes Zimbabwe Limited to empowerment (indigenisation) groups in Zimbabwe. The Coca Cola Company will operate Schweppes Zimbabwe Limited for a period of approximately 24 months before offering investment opportunities to local investors. After 24 months, The Coca Cola Company will offer a majority of its shareholding to local investors.
- (b) With 2 years after completion of such investment referred to above,

The Coca Cola Company plans to dispose of additional and/or remaining shares in Schweppes Zimbabwe Limited to other empowerment (indigenisation) groups of Zimbabwean investors.

Maintenance of Certain Brands

- (a) The Coca Cola Company undertakes to maintain the *Mazoe* and *Calypso* brands within the Zimbabwean market in their present formulation. In addition, during the 2 year period following the date of execution, The Coca Cola Company will develop the *Mazoe* and *Calypso* brands into regional brands with wider distribution.
- (b) The Coca Cola Company shall not dispose of the *Mazoe* and *Calypso* brands by sale or otherwise without express approval of the Competition Commission.
- (c) The Coca Cola Company agree to maintain the registration of the trademarks for the *Mazoe* and *Calypso* brands within Zimbabwe, in accordance with generally applicable laws and regulations.

Suppliers

The Coca Cola Company will promote and develop Zimbabwean suppliers with respect to the raw materials necessary to produce the finished product brands distributed by Schweppes Zimbabwe Limited.

In conformity with the conditional approval of the merger, The Coca Cola Company acquired and modernised the bottling plant of Schweppes Zimbabwe Limited before disposing it to an indigenous Zimbabwean company, Fidelity Life Asset Management Company (Pvt) Limited (FLAM).

(c) Dairibord/ Lyons Zimbabwe Merger

In April 2001 Dairibord Zimbabwe Limited applied to the Competition Commission in terms of section 35 of the Competition Act for the Commission's authorisation of its acquisition of the business and assets of Lyons Zimbabwe (Pvt) Limited, including the trade marks and other intellectual property rights used in that enterprise. The *failing firm argument* was put forward as the major reason for the merger since Lyons Zimbabwe had been losing money over the years. The other reasons given for the merger were increased efficiencies resulting from the merged company sharing costs by combining and consolidating their production and manufacturing bases and the strategic positioning of the merged enterprise as a stronger competitor in regional and international markets.

The case was examined as a conglomerate merger. The Commission identified ice cream and non-alcoholic beverages as the relevant market since it is in these areas that the products of the merging companies overlapped. It was found that the merger would not create a monopoly situation in the relevant market because of the existence of other players in the market. For example, the merged company's share of the hand-

held ice cream market was found to be less than 65%. While it was found that the merger would create a dominant player in the ice cream market in the form of Dairibord/Lyons Maid, the Commission was of the opinion that dominance *per se* is not anti-competitive but its abuse, and that neither Dairibord nor Lyons Zimbabwe has a recent history of having abused its dominant position in that market. The Commission also accepted the efficiency reasons given for the merger and found other public interest benefits arising from the merger in the form of employment creation, foreign currency generation and localisation of the control of Lyons Zimbabwe (Pvt) Limited, which will continue operating as a separate company after the merger.

The Commission therefore unconditionally authorised the merger in terms of section 36 of the Competition Act.

(d) Pretoria Portland Cement/
Unicem Merger

In August 2001, Pretoria Portland Cement Company Limited (PPC), a leading cement manufacturer incorporated in the Republic of South Africa, filed an application with the Commission in terms of section 35 of the Competition Act for authorisation to acquire the entire issued share capital of Portland Holdings Limited (Porthold or Unicem), the leading cement manufacturer in Zimbabwe. Anglo American Corporation, the largest shareholder of Porthold, wanted to re-focus its operations on its core business activities (principally mining) and was disposing of its non-core investments. PPC on the other hand wanted to

increase its cement investments in the Southern African region in the face of stiff competition from Lafarge S.A. of France, which had recently acquired Blue Circle Industries' cement plants in Zambia, Tanzania, Malawi and Zimbabwe.

The Commission examined the transaction as a horizontal merger as defined in the Competition Act. The analysis of the merger was largely based on information supplied by the merging parties themselves in the relevant application form and from a presentation made at the Commission's offices, as well as from interviews held with their officials. Porthold's cement plant in Bulawayo and limestone quarries in Colleen Bawn, where it makes its clinker, were also visited to get the feel of cement manufacturing operations. Views of other cement manufacturers in Zimbabwe were obtained, as well as those of other stakeholders such as construction companies and other major cement users. Consultations were also held with South Africa's competition authority.

It was found that the merger did not change the structure of the cement industry in Zimbabwe. Porthold remained the leading player with about 50% share of the market, followed by Circle Cement (28%), Sino-Zimbabwe (15%) and ZimCement (7%). The merger therefore did not create a monopoly situation nor did it lessen the degree of competition in Zimbabwe since PPC was then not a participant in the Zimbabwean cement market. PPC was only stepping into the shoes of Anglo American Corporation. The Commission also accepted the efficiency reasons given for the merger and found

other public interest benefits arising from the transaction such as: (i) additional efficiencies in production; (ii) introduction of a wider range of cement products; (iii) significant inflows of foreign currency into Zimbabwe from PPC's plant modernisation programme; and (iv) promotion and maintenance of effective competition in Zimbabwe and the region.

One concern raised from stakeholder submissions however was the possibility that PPC, or any other company that could subsequently acquire Porthold from PPC, could close down the Zimbabwean plant and supply cement from South Africa given the surplus capacity existing in the South African cement market.

The Commission therefore authorised the merger on two conditions, that:

- (i) PPC should honour its commitment to maintain Porthold and continue the production of cement in Zimbabwe; and
- (ii) should PPC in future decide to dispose of Porthold by sale or otherwise, such disposal should be subject to the condition that Porthold will be maintained and continue producing cement in Zimbabwe, and that PPC should inform and consult the Commission of any such disposal before proceeding.

The conditional authorisation of the merger was accepted by PPC and was embodied in a written Undertaking between that company and the Commission.

(e) Strategis Insurance Company/
Central African Insurance Brokers
Merger

In May 2001, the Commission picked up from the newspapers that a company called Strategis Insurance Zimbabwe (Pvt) Limited was acquiring another existing company called Central African Insurance Brokers (Pvt) Limited. The Commission brought to the attention of the merging parties the existence of Statutory Instrument 177 of 2000 and advised that to proceed accordingly. Statutory Instrument 177 of 2000 provides that "parties to any merger of undertaking that provide financial services shall obtain the Commission's approval before concluding the merger". 'Financial service' is defined in the Statutory Instrument to include "the carrying on in Zimbabwe of insurance business as defined in the Insurance Act [*Chapter 24:07*]".

This was the first time that the Commission used its investigative powers under section 28 of the Commission Act to examine a merger, instead of using the provisions of section 35 or 34 of the Act. The reason was that because the merging parties disagreed with the Commission that the transaction was a merger and therefore subject to the provisions of Statutory Instrument 177 of 2000 (Competition (Notification of Mergers) (Financial Services) Notice, 2000.

The merging parties submitted that Statutory Instrument 177 of 2000 did not apply to their transaction because of a number of reasons, including that the transaction was not a merger since "each company will retain its separate identity", that "brokerage is a

complimentary business to an insurance company as opposed to a competing business and there is therefore no question of any competition as between two such organisations”, and that “Central African Insurance Brokers is a broker falling within the definition of ‘Insurance Broker’ in the Insurance Act as opposed to falling within the definition of the term ‘Insurance Business’ as contemplated in Statutory Instrument 177 of 2000 and defined in the Insurance Act”.

The Commission did not agree with the merging parties’ interpretation of both the Competition Act and Statutory Instrument 177 of 2000 but at that stage, the parties had already consummated the merger and the pre-merger notification provisions of section 34 of the Act, under which Statutory Instrument 177 of 2000 was enacted, were therefore no longer applicable. The Commission therefore had no option but to invoke the provisions of section 28 to examine the merger.

The examination of the merger itself was a simple and straightforward affair. Notices were published in the *Government Gazette* and national newspapers calling upon interested parties and persons to submit to the Commission written representations on the matter. Additional evidence was also collected from various stakeholders in the insurance business (mainly, the merged parties’ competitors, the relevant sector regulator and the relevant associations).

From the evidence collected, the relevant market was identified as *the provision of short-term insurance and insurance broking services in Zimbabwe*. In that

market, the merged party only had a 1% share of the market in the short-term insurance portion and 2.5% in the insurance broking portion. None of the merged parties’ competitors felt threatened by the merger. An analysis of the likely unilateral effects and coordinated interaction effects of the merger showed that the merged parties were not likely, nor was it in a position, to adversely competition in the relevant market because of their relatively small sizes in that market.

The Commission therefore closed the case on the grounds that the merger raised no serious competition concerns.

(f) Proposed Merger of Colcom Holdings and Cattle Company Holdings Limited

In July 2003, Colcom Holdings Limited, a meat processing company, notified in terms of section 34A of the Competition Act its proposed merger with the Cattle Company Holdings Limited to create a new holding company called CC Holdings.

Colcom Holdings controlled a number of subsidiary companies in the meat processing company, such as Colcom Foods (with abattoirs in Harare and Bulawayo, factor in Harare that produced fresh pork, bacons, fresh sausages, pies and canned meats, and wholesale distribution centres all over the country), Danmeats, a recent acquisition, (involved in the manufacture of hams, bacon and cooked sausages, and the processing of cold meats), Triple C Pigs (a joint venture with another company called CC Sales Auctions involved in breeding and rearing pigs) and Freddy Hirsch (a manufacturer and

supplier of natural sausage casings). The Cattle Company Holdings also had a number of subsidiary companies, such as CC Sales Auctions (that handled cattle auctions throughout the country, and involved in semen sales), Montana Meats (involved in the slaughter of cattle and retailing of beef in Harare and Gweru), Livestock Trading (that operated cattle feedlots and supplied slaughter cattle to Montana Meats) and Savanna Leather (that processed hides to wet blue state for export, and also exported beef).

The relevant product and functional markets were identified as the supply of pigs and cattle for slaughter and the supply and distribution of pork and beef. In the slaughter pigs market, Colcom Holdings was found to be dominant with a 60% market share. The company was also dominant in the bacon (90%), hams (90%) and cooked meats/polonies (50%) markets. On the other hand, the Cattle Company Holdings was dominant in the slaughter cattle market, a dominance that was strengthened by its acquisition (not notified to the Commission because it was then not compulsory to notify mergers) of its main competitor, Zimstock Sales.

All the stakeholders approached by the Commission on the proposed merger expressed competition concerns over the merger. The Commission's own analysis of the merger also identified a number of competition concerns. The issue of joint dominance to be created by the merging parties in the supply of beasts for slaughter was of particular concern. Past attempts by both merging parties to eliminate effective competition in their respective relevant markets by acquiring their closest competitors were

also noted with concern. It was therefore felt that there was a high likelihood that the merged entity could engage in the following anti-competitive practices:

- manipulating prices in the meat industry, and unilaterally raising them to levels not related to market forces;
- foreclosing the supply to cattle to competitors; and
- preventing new entrants or creating barriers to entry into the relevant markets.

The Commission therefore made it a condition that the merging parties should divest from the cattle auctioneering business if the merger was to be approved. The merging parties did not accept the approval condition and abandoned the transaction.

Restrictive and Unfair Business Practices

The five cases of restrictive practices analysed in this review are only a fraction of the number of cases handled by the Commission. The five have been specifically selected because they are representative of the way the Commission interprets and implements the Competition Act.

(a) Investigation into Allegations of Restrictive and Unfair Trade Practices in the Cement Distribution Industry

In December 1998, the Competition Commission commenced a preliminary investigation into various allegations of restrictive and unfair trade practices in the cement industry, which were leading

to shortages and excessive prices of cement on the local Zimbabwean market. The allegations came from complaints made to the Commission by the cement trade and the general public, as well as from newspaper reports.

Four companies were involved in the production and distribution of cement in Zimbabwe: (i) Portland Holdings Limited (Unicem) of Bulawayo; (ii) Circle Cement Limited of Harare; (iii) Zimbabwe Cement Company (Pvt) Limited (ZimCement) of Norton; and (iv) Techniks (Pvt) Limited of Gweru. Only Unicem and Circle Cement were involved at all stages of cement production, from the quarrying of limestone to the final product. The other two companies were more involved in blending operations. A new cement manufacturing plant, under a joint venture between China and the Industrial Development Corporation (IDC), was nearing completion in Lalapanzi. The cement industry was found to be highly concentrated, with a Herfindahl-Hirschman Index (HHI) of 4602. The two largest players in the industry (Unicem and Circle Cement) controlled a combined market share of over 90%.

The preliminary investigation established a *prima facie* case for a full-scale investigation into the matter in terms of section 28 of the Competition Act. At that stage, evidence gathered pointed to the following:

- vertical restraints in the delivery of cement between Unicem and two downstream companies in Harare and Bulawayo
- discriminatory distribution of cement by both Unicem and Circle Cement

- bundling or tying of cement sales to Circle Cement's commercial transport services
- refusal by both Unicem and Circle Cement to supply cement for the construction of a potential competitor's plant (the Sino-IDC cement plant) or attempting to rise the potential competitor's entry costs
- collusive and cartel-like behaviour between Unicem and Circle Cement.

Over forty different companies and organisations (comprising cement merchants, construction companies, local authorities and government departments) situated all over Zimbabwe gave oral and written evidence during the investigation. Decisions made by other countries' competition authorities on similar cases were also analysed for guidance.

The evidence gathered confirmed some of the allegations levelled against Unicem and Circle Cement, and others which came up during the course of the investigation, such as: (i) restricting the distribution of cement; (ii) enhancing or maintaining the price of cement; and (iii) supporting or promoting the distribution of cement by inefficient and uneconomical means. No evidence was found to support the allegations of: (i) prevention or restriction of entry into the cement industry; (ii) undue refusal to distribute cement; and (iii) collusive arrangements between the cement producers. With regards allegations of collusion between Unicem and Circle Cement, it was found that the fact that Unicem was a more efficient producer than Circle Cement was clearly reflected in that company's lower retail prices on the market. It was also found that even though the two companies had natural

markets in the northern and southern parts of the countries because of high transport costs of distributing their products, the companies' products were sold in either of their 'natural' markets.

The Commission therefore ordered Unicem and Circle Cement in terms of section 31 of the Competition Act to discontinue and terminate the identified restrictive practices.

The Commission's investigation also identified other public interest concerns in the distribution of cement on the local Zimbabwean market, such as lack of transparency in the distribution of the product, lack of distribution outlets in remote rural areas, high import duties on cement raw materials and discriminatory sales tax regime in favour of large buyers. The Commission made appropriate recommendations to the relevant authorities and parties on the alleviation of the concerns.

(b) Preliminary Investigations into Allegations of Predatory Pricing in the Clear Beer Brewing and Distribution Industry

In December 1999, Nesbitt Brewery (Pvt) Limited of Chiredzi complained to the Competition Commission that National Breweries Limited was engaged in predatory pricing, having drastically reduced the price of its clear beer in Chiredzi to levels that were unprofitable, with the intention of driving Nesbitt Brewery out of the market.

The investigations conducted by the Commission revealed that the clear beer industry in Zimbabwe is highly concentrated with an HHI (Hirschman-

Herfindahl Index) concentration index in excess of 8,000. Nesbitt Brewery was a new entrant into the clear beer market challenging the long-standing monopoly position of National Breweries, which held a market share of 90%. National Breweries has a national distribution network while Nesbitt Brewery only operates in Chiredzi. The investigations further revealed that the National Breweries had ran a beer promotion in Chiredzi from May 1999 to April 2000 when the Competition Commission started gathering information on the case. The promotion included free snacks and T-shirts, lucky-draw tickets, free beers and substantial price reductions. The promotion was only held in Chiredzi where Nesbitt Brewery is based and sells the bulk of its beer. The National Breweries retail prices for its beer in Chiredzi during the promotion period were below its normal landed prices in that town.

The Commission found the alleged practices to be predatory within the terms of section 2 of the Competition Act. Although National Breweries stopped the practices as soon as they became aware that the Competition Commission was investigating them, the Commission made them to formally undertake that they would desist from future practices aimed at driving Nesbitt Brewery out of the market.

(c) Preliminary Investigations into Allegations of Restrictive Practices in the Pork Products Industry

In January 2000, the Competition Commission received a complaint from a whistle-blower in the local pork products industry alleging restrictive practices in Colcom Foods Limited's

Export Contract with pig producers. It was alleged that the contract restricted pig producers to selling their entire production of pigs to Colcom.

Investigations found that Colcom Foods Limited is a dominant player in the pork products market, processing about 70% of the national herd of pigs. It was also found that while its Export Contract with pig producers was restrictive in nature, the producers are free to enter into such a contract with Colcom Foods and have several other less restrictive options open to them in their business dealings with Colcom Foods or other processors. It was further found that the Export Contract is meant to ensure production of export quality pigs in accordance with international requirements.

The Commission concluded that the restrictive nature of Colcom Foods' Export Contract with pig producers is reasonable in order to maintain quality pig hers, maintain export competitiveness and ensure a reasonable return on assistance given to pig producers by Colcom Foods. It was also noted that the Export Contract is only one of other options to pig producers in marketing their animals and appears reasonably flexible. It was recognised that market dominance in itself is not anti-competitive but its abuse. The case was therefore closed after Colcom Foods were advised to amend some provisions of the Export Contract to make it less restrictive. Colcom Foods agreed to make the advised amendments.

(d) Preliminary Investigations into Allegations of Restrictive and Unfair Trade Practices in the Cigarette Distribution Industry

In October 2001, the Commission received a complaint from British American Tobacco Zimbabwe (Holding) Limited (BAT Zimbabwe) that a new entrant into the Zimbabwean cigarette manufacturing industry, Cut Rag Processors (Pvt) Limited (see merger analysis at 5.2.1. (a) above), was engaging in restrictive and unfair trade practices in the distribution of its new *Remington Gold* cigarette brands by not printing on its cigarette packs the correct health warning clause that was agreed with the Ministry of Health and Child Welfare. The Ministry approved health warning clause was agreed in 1995 with the then two local cigarette manufacturers. It read, "Smoking May Be Hazardous To Health". Cut Rag Processors' new warning was stronger and read, "Tobacco Seriously Damages Health: Underage Consumption Prohibited".

At the initial stages of the Commission's preliminary investigation into BAT Zimbabwe's complaint, Cut Rag Processors submitted a counter-complaint to the Commission that BAT Zimbabwe was attempting to drive it from the market by enticing retailers to remove Cut Rag Processors' products from the shelves on the strength of a written directive to Cut Rag Processors from the Minister of Health and Child Welfare to do so pending its conformity to the agreed cigarette health warning clause.

The two complaints were investigated as 'restrictive practices' as defined in section 2 of the Competition Act. The alleged practices of Cut Rag Processors were treated as misleading advertising (an unfair trade practice while those of

BAT Zimbabwe were treated as abuse of dominant position (predatory behaviour).

Background to the case was that the merger in 2000 of the then Rothmans of Pall Mall (Zimbabwe) Limited and the then British American Tobacco (Zimbabwe) Limited to form BAT Zimbabwe created a virtual monopoly in the local manufactured cigarette industry. The merger was however conditionally authorised by the Commission because of its other efficiency and public interest benefits. One of the conditions was that the merged company's surplus cigarette making equipment should be sold by tender to a third party interested in entering the local cigarette manufacturing industry. The merged company's surplus equipment was ultimately acquired by Cut Rag Processors who launched its new '*Remington Gold*' cigarette brands in August 2001. It should however be noted that even though BAT Zimbabwe agreed to the equipment disposal condition attached to the authorisation of its merger, it was reluctant to sell the equipment to Cut Rag Processors (or to any other company), preferring to scrap it instead. The Chief Executive of that company at one time during the Commission's examination of the merger commented that he should "not be expected to assist in the formation of a competitor".

In investigating the restrictive practices case, the Commission obtained oral and written evidence on the matter from the two complainants-cum-respondents. Valuable information was also obtained from the internet on the international practices and corporate policies of BAT's parent company on health

warning clauses. The Zimbabwean Ministry of Health and Child Welfare was also interviewed on its cigarette health warning policy. Since there was no dispute over the relevant market under investigation, which was identified as the distribution of manufactured cigarettes on the local Zimbabwean market, the Commission did not undertake a consumer survey.

The Commission found that the relevant market was highly concentrated, with a Herfindahl-Hirschman Index (HHI) of 9224. BAT Zimbabwe dominated the market with a market share of about 96%. Cut Rag Processors' market share was about 2.5% and imports took up the remaining 1.5%. It was also found that while BAT Zimbabwe failed to provide evidence to support their claims that Cut Rag Processors' new cigarette health warning was misleading and harming their business, Cut Rag Processors supplied a lot of evidence showing that their health warning clause was not a misrepresentation of facts and was indeed a requirement in most international markets. The fact that cigarette smoking seriously damages health was confirmed by BAT's own parent on its website. Evidence was also given that BAT Zimbabwe itself was distributing on the local market imported cigarettes with a different and stronger health-warning clause than the one it agreed with the Ministry of Health in 1995. On the other hand, the alleged practices of BAT Zimbabwe were found to be anti-competitive in that they had the effect of driving Cut Rag Processors out of the relevant market. The seriousness of the predatory actions of BAT Zimbabwe against Cut Rag processors was compounded by the fact that BAT Zimbabwe was the dominant

firm on the market. It was also seen as a subtle way of BAT Zimbabwe trying to nullify the Commission's conditional authorisation in 2000 of the Rothmans/BAT merger.

The Commission concluded that while the complaint by BAT Zimbabwe against Cut Rag Processors had no merit in terms of the Competition Act, that of Cut Rag Processors raised serious competition concerns in that BAT Zimbabwe was trying to thwart competition from a new and weaker entrant in the market. The case against Cut Rag Processors was therefore closed. With regards the case against BAT Zimbabwe, the Commission agreed to invoke the provisions of section 30 of the Competition Act and negotiate with BAT Zimbabwe appropriate arrangements that ensured the discontinuation of that company's identified restrictive practices before embarking on a full-scale investigation in terms of section 28 of the Competition Act into the matter, should such negotiations fail to produce the required results. The negotiations were successfully concluded. The Commission also agreed to 'censure' the Ministry of Health and Child Welfare over that Ministry's directive to have Cut Rag Processors' products removed from the market.

(e) Investigation into Allegations of Restrictive and Unfair Trade Practices in the Coal Industry

In January 2001, the Commission embarked on a full-scale investigation in terms of section 28 of the Competition Act into allegations of restrictive and unfair trade practices in the distribution of coal on the local Zimbabwean market

following a preliminary probe into the matter that established a *prima facie* case for such an investigation.

The allegations of restrictive practices that were brought to the attention of the Commission included the following:

- that Wankie Colliery Company Limited (WCC), the country's sole coal producer, was putting barriers to entry into the coal distribution industry and was not applying its requirements for appointment as a Coal Merchant in a fair and transparent manner;
- that WCC was unfairly allocating coal, particularly the popular 'washed peas' grade, amongst the appointed Coal Merchants;
- that WCC was abusing its monopoly position in the supply of coal on the local market by arbitrarily imposing exorbitant coal price increases; and
- that bottlenecks in the transportation of coal from the Colliery by rail, which is the most economical method of coal transportation, were contributing to the shortage of the product on the local market.

As is all section 28 investigations, notices were published in the *Government Gazette* and in all the major national newspapers announcing the commencement of the investigation and calling on interested persons or parties to submit written representations on the matter. Public hearings were also held on the matter. A total eleven companies and organisations submitted written representations on the matter, and sixteen gave oral evidence at the public hearings.

The investigation identified a lot of problems in the supply and pricing of coal in Zimbabwe. While all the problems identified were found to have serious competition implications, it was also found that their causes were both of a micro and macro nature, with the negative macro-economic fundamentals currently in force in Zimbabwe being the major cause of the problems. The investigation's specific findings were that:

- (i) WCC allowed the bad blood that was created between its management and that of one of the applicants to become Coal Merchant, a small company called RAE (Pvt) Limited, to influence its partial treatment and determination of RAE (Pvt) Limited's application;
- (ii) the zoning provisions in WCC's Memorandum of Agreement with its appointed Coal Merchants, which limit the merchants to certain geographic areas (but which had since been removed) created an anti-competitive market-sharing cartel in the coal distribution industry;
- (iii) WCC was abusing its monopoly position in the local coal industry by engaging in conditional selling of its popular 'washed peas' coal grade in order to move its other less popular coal grades;
- (iv) save for the conditional selling of its 'washed peas' coal grade, WCC was not engaged in other anti-competitive practices associated with abuse of monopoly position;
- (v) the investment made by WCC in a new coal crushing and screening

plant at the Colliery would go a long way in alleviating the acute shortage on the local market of the popular 'washed peas' coal grade;

- (vi) most of the problems in the local coal industry could be adequately addressed if that industry was included under the proposed Zimbabwe Energy Regulatory Commission.

Based on the findings of its investigation, the Commission:

- (a) made the following orders in terms of section 31(1) of the Competition Act, 1996:
 - (i) that WCC should resume and complete within thirty days its consideration of RAE (Pvt) Limited's application for appointment as a Coal Merchant on the basis of its *Requirements for Appointment as Coal Merchant* already submitted to RAE (Pvt) Limited, and that the results of the such consideration, and full reasons of the decision taken, should be communicated to the Commission before being implemented; and
 - (ii) that WCC disengages itself from the restrictive practice of selling any of its grades of coal on condition that the buyer also purchase any other grades of coal;
- (b) requested WCC in terms of section 30(1) of the Act to give an Undertaking that it will not re-introduce market-sharing provisions in its Memorandum of Agreement with appointed Coal Merchants or any other coal merchants, and to

continue discussing with other stakeholders the identified problems in the distribution of coal with a view to reaching amicable solutions to those problems;

- (c) made recommendations to the Ministry of Mines and Energy that the coal industry should be included under the proposed Zimbabwe Energy Regulatory Commission, and that the Competition Commission should be consulted on competition issues in the establishment of that regulatory authority.

(f) Investigation into Allegations of Restrictive Practices in the Zimbabwean Sugar Industry

The Commission in March 2002 resolved to undertake a full-scale investigation in terms of section 28 of the Competition Act, 1996 into allegations of restrictive and unfair business practices in the sugar supply and distribution industry of Zimbabwe. The resolution to undertake the investigation followed preliminary investigations into the industry that established a *prima facie* case for such an investigation.

A sugar trading company called Frontline Marketing Services (Pvt) Limited had complained through the Ministry of Finance and Economic Development that:

- the role and involvement of ZSR Corporation Limited, a major exporter of sugar, in the process of issuing sugar export permits to other sugar exporters who are its potential competitors on the export market was restrictive and anti-competitive;

- small sugar exporters are being discriminated against in the allocation of Zimbabwe's sugar export quotas for the European Union (EU) and the United States of America (USA);
- small sugar exporters are being offered different ex-factory prices of sugar for different export markets; and
- the existence of a monopoly in the distribution of sugar is resulting in the excessive pricing of the commodity on the domestic market.

Notices announcing the commencement of the investigation and calling upon interested persons and parties to submit written representations on the matter were published in the *Government Gazette* and the major national newspapers in July 2002. The investigation's Stakeholder Hearings were held in Harare in August 2002.

A total of ten written representations were submitted on the matter. These came from the major players in the sugar industry (Zimbabwe Sugar Sales (Pvt) Limited, ZSR Corporation Limited, Triangle Limited and Zimbabwe Sugar Association), some industrial users of sugar (Schweppes Zimbabwe Limited), and sugar traders and consumers (Matabeleland Registered Traders Association, Odzani Trading Company and individuals). Twelve companies and organizations gave oral evidence at the investigation's Stakeholder Hearings. These were the complainants (Frontline Marketing (Pvt) Limited and other commodity brokers), large industrial users of sugar (Cairns Foods Limited and Delta Corporation), consumer representatives (the Consumer Council of Zimbabwe), the respondents (Hippo

Valley Estates Limited, Triangle Limited, Zimbabwe Sugar Sales (Pvt) Limited, ZSR Corporation Limited and Zimbabwe Sugar Association) and sector regulators (the Ministry of Industry and International Trade and the Ministry of Lands, Agriculture and Rural Resettlement).

The allegations of anti-competitive practices in the sugar industry were treated as 'restrictive practices' as defined in terms of section 2 of the Competition Act, 1996. The competition analysis under the investigation was split into anti-competitive agreements and/or abuse of dominant position.

Regarding anti-competitive agreements, the horizontal agreement or arrangement between Hippo Valley Estates Limited and Triangle Limited to supply raw sugar to Zimbabwe Sugar Sales at uniform prices and terms was found to constitute a *collusive arrangement between competitors*, which is *prima facie* illegal under the Competition Act⁸². The relationship between Hippo Valley Estates Limited and Triangle Limited on one hand and Zimbabwe Sugar Sales on the other hand, under which Zimbabwe Sugar Sales has the exclusive right to sell the millers' raw sugar on both the local and export markets, was however also found to be a vertical restraint to competition, so was the vertical relationship between Hippo

Valley Estates and Triangle Limited on one hand and ZSR Corporation Limited on the other hand on the distribution of refined and *SunSweet* brown sugars on the domestic market through a subsidiary company of ZSR Corporation Limited, Sugar Distributors.

The horizontal agreement or arrangement between Hippo Valley Estates Limited and Triangle Limited to supply raw sugar to Zimbabwe Sugar Sales at uniform prices and terms however has an allowable efficiency defense under the Competition Act in that the arrangement is meant to ensure equitable returns to both the two millers and the cane growers from the sale of the processed product. The vertical arrangements between Hippo Valley Estates Limited and Triangle Limited and ZSR Corporation Limited on the distribution of refined and *Sunsweet* brown sugars on the domestic market also has an efficiency defense element in that ZSR Corporation Limited has a country-wide distribution network which would be costly to duplicate.

Regarding dominance and its abuse, both Zimbabwe Sugar Sales (Pvt) Limited and ZSR Corporation Limited were found to be in dominant positions in their respective sectors. It was however only ZSR Corporation Limited that was found to be abusing its dominance in the domestic sugar distribution sector by engaging in exclusionary behaviour aimed at suppressing competition from new entrants.

Even though the vertical integration in the sugar industry, under which most players in the industry are linked to one another through interlocking directorships, was found to have some

⁸² It was nevertheless noted that Hippo Valley and Triangle Limited do not actually sell raw sugar to Zimbabwe Sugar Sales. The structure of that arrangement was that Zimbabwe Sugar Sales (which is owned 50/50 by the mills) was the appointed raw sugar sales agent for the two producers. Zimbabwe Sugar Sales sold the bulk of its raw sugar to a single domestic customer, ZSR Corporation.

competition concerns linked to horizontal and/or vertical agreements and arrangements, it also served a number of important public interests such as:

- safeguarding the interests of small cane growers by ensuring that they get fair and equitable returns from the sale of raw sugar on the domestic and export markets;
- cushioning sugar producers from the unstable and low prices of sugar on the world market;
- enabling the country to meet its preferential sugar export quotas, which earns the country valuable foreign currency; and
- enabling sugar to be marketed on the domestic market at prices which cushions consumers in rural areas from high transport costs and unscrupulous traders.

The regulatory framework in the sugar industry was found to be governed by an old and obsolete Sugar Production Control Act, 1964. The Act, which was enacted when the intention then was to curtail sugar production in response to international calls reduce over-production of sugar on the world market, was no longer addressing the current needs to increase local production of sugar in order to meet increased demand on domestic and regional markets. The Act was also highly anti-competitive since it over-protected traditional players in the sugar industry and discourages new entrants. It also gave too much power to the Zimbabwe Sugar Association, an association of traditional players that does not represent all the players in the industry.

Having fully investigated the allegations of restrictive and unfair business practices in the sugar industry and examined evidence submitted on the matter, the Commission took the following remedial actions to promote competition in the industry and to prevent and control the identified restrictive practices in the industry:

- the Commission indicated its preparedness to formally accept the vertical integration in the sugar industry on condition that the industry introduces new entrants and allows fair competition in the distribution of refined sugars on the domestic and export markets;
- the Commission recommended that the Ministry of Industry and International Trade urgently reviews the Sugar Production Control Act in line with developments and advances made in the sugar industry, and that the Commission should be consulted in the review exercise in order to ensure that the new provisions of that Act are not anti-competitive; and
- the Commission also recommended that the Ministry of Industry and International Trade take over from the Zimbabwe Sugar Association the functions of issuing 'Blue Certificates' required for monitoring the export of sugar as an interim measure while serious consideration is given by the same Ministry to establish an independent sector regulator in the sugar industry.

The above remedial actions were fully accepted and implemented by all concerned parties.

The use by the Commission of the Herfindahl-Hirschman Index (HHI) in measuring market concentration is only for guidance purposes. The Commission is aware that HHI was specifically designed for developed economies such as that of the United States of America, and that its applicability in developing economies like Zimbabwe's is limited. In most cases, the four-firm concentration ratio (CR4) is also used to corroborate the findings of the HHI. In the final analysis however, the Commission looks at the situation on the ground on each particular competition case, such as the actual number of competing firms, the type of business being considered, economies of scale and entry barriers.

An analysis of the competition decisions made so far by the Commission show that the Commission is not concerned over the existence of dominance itself but over the abuse of dominant positions, or the exercise of market power. This is clearly shown in cases such as the Pork Products Case and the Coal Distribution Case in which the practices of dominant firms were found not to be anti-competitive, and in cases such as the Clear Beer Distribution Case and Cigarette Distribution Case in which the Commission was prepared to come heavily on the dominant companies' exclusionary practices. On one hand, the Commission has allowed certain mergers such as the Rothmans/BAT merger and the Coca-Cola/Cadbury-Schweppes merger which while creating dominant companies the dominance was not seen as causing serious competition concerns, while on the other hand, it ordered divestiture of a key operation in the proposed Colcom Holdings/Cattle Company merger on the grounds of high

probability that the merging parties could abuse their joint dominance in that operation.

While tolerating dominant companies, the Commission has also been conscious of the need to encourage and facilitate new entrants in concentrated industries and to prevent exits from markets. Again the Rothmans/BAT merger is a point in case in which the Commission facilitated the entry of Cut Rag Processors (Pvt) Limited into the cigarette manufacturing industry by making it a condition of its approval of that merger that the merged party should dispose of its surplus cigarette making equipment to an independent third party. The Commission's conditional approval of the Coca-Cola/Cadbury-Schweppes merger also prevented exit from the beverages industry of Schweppes Zimbabwe Limited and facilitated FLAM's entry into that industry.

The Commission has also been cautious of not being used to protect individual companies to the detriment of the competition process. A good example of this is found in the Cigarettes Distribution Case. The Commission not only dismissed the complaint by BAT Zimbabwe against Cut Rag Processors as a baseless attempt of getting protection against its competitor but instead took action against the complainant's anti-competitive practices.

The Commission has allowed certain mergers with substantial pro-competition elements and public interests to proceed even though such combinations increase economic concentration. For example, it allowed the Commercial Union Insurance/General Accident Insurance

merger (not outlined above) because of its countervailing effect in the short-term insurance sector on an earlier merger between Zimnat Insurance and Lion of Zimbabwe Insurance, which was consummated before the effective coming into operations of the Competition Commission. It also authorised the Dairibord/ Lyons Zimbabwe merger because of its many efficiency elements and the localisation of the control of Lyons Zimbabwe (Pvt) Limited.

The treatment of multinational mergers by the Commission is also worth noting. The problem of developing countries like Zimbabwe with relatively small markets influencing large multinational mergers such as the Rothmans/BAT merger and Coca-Cola/Cadbury-Schweppes merger is currently under discussions in organisations such as the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organisation (WTO) and far from being resolved. The Commission's position has been to examine the competitive effects on the Zimbabwean market of such mergers the same way it examines any other local mergers. The Commission has also taken an opportunity of these mergers to promote direct foreign investment and other pro-competitive practices through its conditional approval of the mergers.

On the whole, the Competition Commission's handling of competition cases has gone a long way in promoting competition in the Zimbabwean economy. The investigations held have not only exposed serious restrictive and unfair trade practices in some industries and economic sectors, leading to the elimination of such practices, but have

also highlighted the need for the business community to comply with the provisions of the Competition Act. The findings of the investigations have also enabled the Commission to advocate Government to include competition provisions in a number of new legislation.

Section 6:
***Proposed Amendments To The
Competition Act***

While the Competition Amendment Act, 2001 went a long way in modifying some provisions of the Competition Act, 1996 in line with practical requirements, the Commission in its ongoing implementation of the Act keep on identifying other provisions of the Act that need to be amended. In this regard, the Directorate of the Commission has already proposed to the Board of Commissioners amendments related to the definition of ‘controlling interest’, the treatment of monopoly situations, the appointment of Vice Chairman of the Commission, the investigative and adjudicative functions of the Commission, ‘rule of reason’ and *per se* prohibitions, and control of conglomerates.

Definition of ‘Controlling Interest’

The definition of the term ‘controlling interest’ in the Competition Act, which simply states that the term means any interest which enables the holder of the interest to exercise any control over the activities or assets of an undertaking, has been criticised by the business community for its vagueness and ambiguity.

The proposed amendment to the definition of ‘controlling interest’ is therefore aimed at clearly illustrating situations of control, e.g. in terms of percentage shareholding in an undertaking or in terms of voting power.

Treatment of Monopoly Situations

Monopoly situation is dealt with in a number of provisions of the Competition Act, such as (i) section 2, which defines the term ‘monopoly situation’; (ii) section 28, which empowers the Commission to conduct investigations into monopoly situations; and (iii) section 31, which authorises the Commission to issue orders against monopoly situations that are contrary to public interest.

The present provisions of the Act however do not state the factors the need to be assessed in determining the substantial prevention or lessening of competition by monopoly situations. The wrong impression is therefore given that all monopoly situations are *per se* harmful to competition, while a ‘rule of reason’ approach aimed at identifying possible abuse of dominance is more suitable in considering such situations.

The proposed amendments are aimed at clarifying the treatment of monopoly situations using the ‘rule of reason’ approach.

Appointment of Vice Chairman

Both the Chairman and Vice Chairman of the Commission are appointed by the Minister in accordance with the provisions of the Competition Act. While the current Chairman was re-appointed in 2002, his vice has since not been appointed. The absence of a substantive vice chairman is making it difficult for the Commission to effectively operate during the absence or otherwise unavailability of the Chairman.

It is therefore proposed that members of the Commission elect from amongst

themselves the vice chairman of the Commission in order to speed up the appointment of such a key member of the Commission.

Investigative and Adjudicative Functions

While the Commission has gone some way in separating its investigative functions from its adjudicative functions by delegating to the Director some of the investigative functions, there are still some grey areas which need to be clarified. For example, while it is clear that the Directorate is responsible for undertaking preliminary investigations, its role in the undertaking of full-scale investigations requiring public or stakeholder hearings is not clear. As a result, the Directorate serves as the Board of Commissioners' secretariat in such investigations, thereby also being involved in the Commission's adjudicative functions.

The delegated investigative functions of the Director are also not specifically enshrined in the Competition Act and can therefore be taken back any time.

The following are therefore the proposed amendments to the Competition Act that are aimed at effectively separating the Commission's investigative and adjudicative functions:

(a) The Act should specifically make provision for two distinct operating arms of the Commission: (i) a Directorate with investigative functions; and (ii) a Board of Commissioners with adjudicative functions.

(b) The Directorate should have the following primary responsibilities:

- undertaking investigations into complaints of anti-competitive practices and conduct, mergers and acquisitions, and monopoly situations;
- making determinations on the application or breach of the provisions of the Act;
- considering and making recommendations on applications for authorisations of restrictive practices;
- giving negative clearances on practices exempted under the Act;
- negotiating and concluding undertakings and consent agreements;
- administering the Commission's affairs, funds and property.

(c) The Directorate should consist of permanent staff. While the Director and the Assistant Director should be appointed by the Board of Commissioners, the other members of staff should be appointed by the Director.

(d) The Board of Commissioners should have the following primary responsibilities:

- adjudicating on anti-competitive practices and conduct, and monopoly situations and taking appropriate remedial action as provided for in the Act;
- approving, with or without conditions, or prohibiting mergers and acquisitions;
- granting or refusing authorisations of restrictive practices;
- hearing appeals against, or reviewing, decisions of the Directorate that may be referred to it.

The proposals are also that the Board of Commissioners should have at least three full-time members, and a small secretariat of its own, to enable it to perform its full adjudicative functions.

'Rule of Reason' and Per Se Prohibitions

The Competition Act, 1996 effectively does not provide for *per se* prohibitions, i.e. declaring any anti-competitive practice or conduct illegal without attempting to evaluate the anti-competitive effects of the practice or conduct against any of its pro-competitive features. In the Act, all anti-competitive practices and conduct are grouped under the term 'restrictive practice'. The definition of restrictive practice in terms of section 2 of the Act makes it clear that only those restrictive practices that *materially* restrict competition are prohibited under the Act. This automatically introduces a 'rule of reason' approach before declaring any restrictive practice as prohibited under the Act.

However, certain restrictive practices, that are termed 'unfair business practices' in the Act, are illegal practices in terms of section 42 of the Act, and the intention was that these should be the Act's *per se* prohibitions. Declaring unfair business practices such as collusive arrangements and resale price maintenance in the Act as *per se* prohibitions confirms with practices in many other jurisdictions. The complication is that this not only contradicts the spirit of the 'rule of reason' approach in the definition of the term 'restrictive practice' in the Act, but also that the description in the Act of some of the unfair business practices

have rule of reason connotations. For example, the description of the unfair business practice of *collusive arrangements between competitors*, which are generally *per se* prohibited in many jurisdictions, has a clear 'rule of reason' proviso that they can be allowed if "*bona fide* intended solely to improve standards of quality or service in regard to the production or distribution of the commodity or service concerned".

The proposed amendments are therefore to clearly 'rule of reason' and *per se* prohibitions in the Act.

Control of Conglomerates

Serious concern has been raised in some quarters of the Zimbabwean business community that some companies were becoming too big in such a small country with a shrinking economy. Similar concerns were also being expressed in Government circles⁸³. Appeals were therefore increasingly being made to the Commission to control conglomerates.

The Commission looked at the matter from the point of view of dominance and its possible abuse to see whether the perceived threat from conglomerates could not be addressed from the present provisions of the Competition Act, 1996. It was noted that the essence of dominance is the power to behave independently of competitive pressures.

The Commission concluded that instead of controlling firm sizes and being

⁸³ Government concerns over the emergence of strong conglomerates resulted in the recent (early 2004) creation of a new Department of Anti-Corruption and Anti-Monopolies in the President's Office.

concerned over dominance *per se*, it is abuse of dominance that should cause competition concerns. In this regard, it was noted that the present provisions of the Competition Act adequately addressed the issue of abuse of dominant positions. However, what seems to be missing from the Act is some form of market share thresholds for defining dominance, which could trigger off the assessment of their competitive effects.

**Section 7:
Conclusion**

The implementation of competition law and policy in Zimbabwe is still in its infancy. The competition authority has however learnt a lot from the experience gained so far in the implementation of the law and policy, and has taken great strides in promoting competition and building a culture of competition in Zimbabwe. In this regard, it is worth noting that of the private sector monopolies that existed in 1992 at the time of the *IPC Study of Monopolies and Competition Policy in Zimbabwe* virtually none exist now, largely due to the efforts of the competition authority in facilitating new business entrants and fighting exclusionary practices of dominant companies.

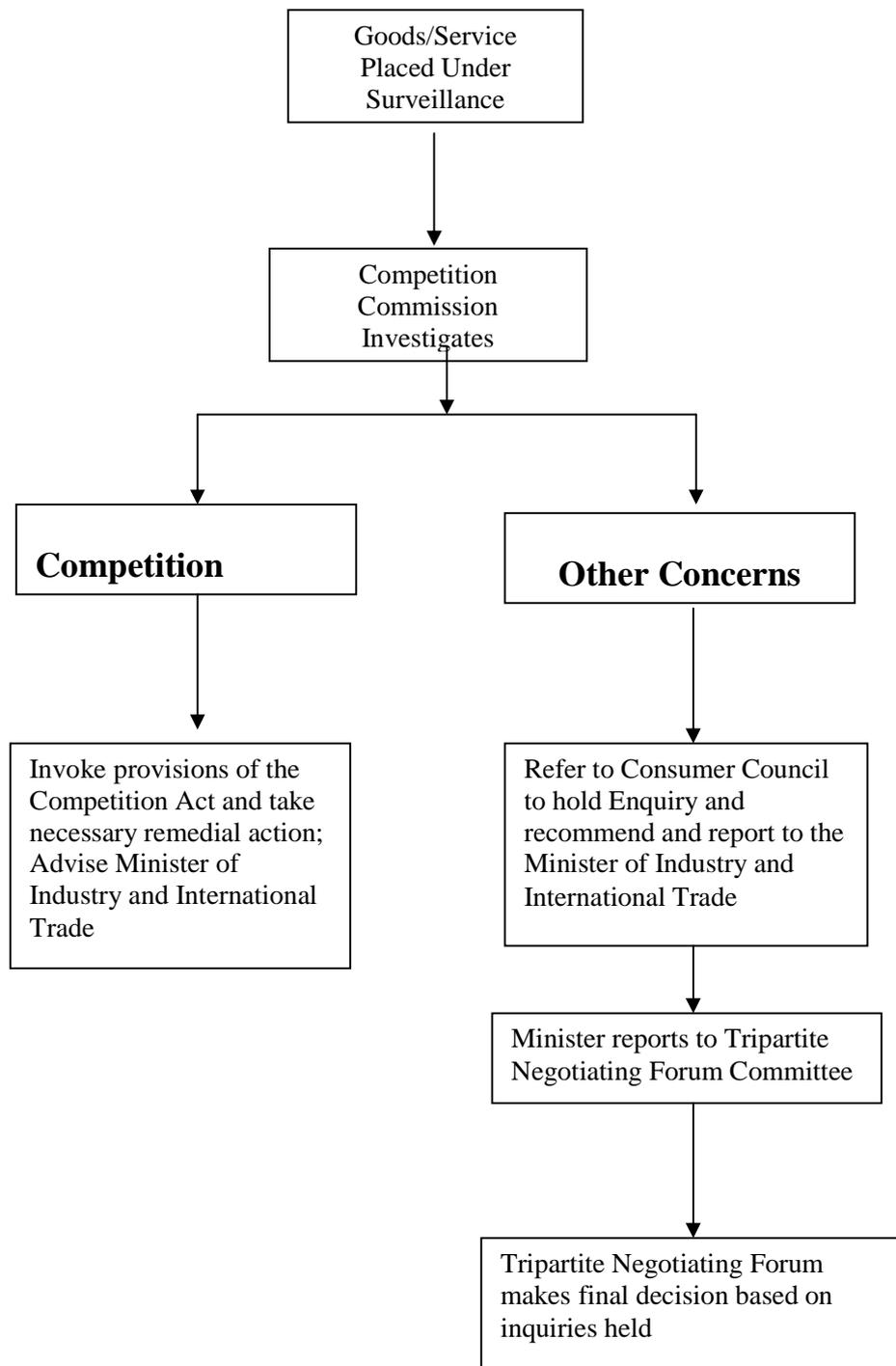
The competition authority's implementation of competition law and policy has also enabled the authority to identify shortcomings in the law and to propose the necessary amendments. It is an interesting fact that some of the amendments to the Act proposed, and being proposed, by the competition authority on the basis of the practical experience gained from its implementation of the law address concerns expressed by the private sector during the formulation of the competition policy and law in the 1990s. Such amendments include the separation of the investigative and adjudicative functions of the Commission, and the need for greater precision in the definition of 'controlling interest'. Other concerns of the private sector, such as those on pre-merger notification, have

however been found not to have been substantiated as the competition authority's merger control activities are now of its most effective in addressing competition concerns and promoting investment and new entrants.

Challenges facing the competition authority are many. They include the Commission's new functions of tariffs and price monitoring, and the establishment of a new Department of Anti-Corruption and Anti-Monopolies in the President's Office. With the support and assistance of organisations like the United Nations Conference on Trade and Development, these challenges are however not insurmountable.

Annex I

STRUCTURE OF THE PRICE MONITORING MECHANISM



MERGER CONTROL GUIDELINES RULES

These guidelines are produced to inform interested parties on the law governing mergers and acquisitions in Zimbabwe. The guidelines are however not a substitute for the Competition Act, 1996 (No.7 of 1996), the Competition Amendment Act, 2001 (No.29 of 2001) and related regulations. Readers may need to seek their own legal advice on the application of the law.

1. Short Title

These guidelines may be cited as the 'Merger Control Guidelines'.

2. Interpretation

In these Guidelines unless the context indicates otherwise:

“Act” means the Competition Act, 1996 (No.7 of 1996) as amended;

“acquiring firm” means a firm: (i) as a result of a merger, which directly or indirectly acquire, or establish direct or indirect control over the whole or part of the business of another firm; (ii) that has direct or indirect control over the whole or part of the business of a firm contemplated in (i);

“Commission” means the Competition and Tariff Commission established by section 4 of the Act;

“Committee” means the Mergers & Acquisitions Committee established by

the Commission in terms of section 14 of the Act;

“International Accounting Standards” (or “I.A.S.”) means the standard set by the International Accounting Standards Association from time to time, and adopted by the Zimbabwe Public Accountants and Auditors Board;

“Merger Notice” means a notification of a merger or acquisition;

“target firm” means a firm: (i) as a result of a merger, the whole or part of whose business shall be directly or indirectly controlled by an acquiring firm; (ii) as a result of a merger, shall directly or indirectly transfer direct or indirect control of the whole or part of its business to an acquiring firm.

3. Scope and Application

(1) These Guidelines cover both 'notifiable' and 'non-notifiable' mergers:

- (a) a 'notifiable merger' is a merger or proposed merger with a value at or above the prescribed threshold indicated in sub-Rule (2) below;
- (b) a 'non-notifiable merger' is a merger or proposed merger with a value below the prescribed threshold indicated in sub-Rule (2).

(2) The threshold for a notifiable merger applies to any party whose combined annual turnover in, into or from Zimbabwe of the acquiring firm and the target firm is valued at or more than Z\$500 million, or whose combined assets in Zimbabwe of the acquiring firm

and the target firm is valued at or more than Z\$500 million.

(3) The annual turnover and assets of a firm at any time will be calculated in terms of the International Accounting Standards (I.A.S.) and based on the firm's income statement and balance sheet as at the end of the immediate previous financial year.

4. Merger Notification Requirements

(1) Parties to a notifiable merger must notify the Commission of that merger by filing a Merger Notice in *Form CTC: Merger.1* in triplicate within thirty (30) days of the conclusion between the merging parties of the memorandum of agreement to merge or of the acquisition by any one of the parties to that merger of a controlling interest in the other party.

(2) A Merger Notice filed in terms of sub-Rule (1) above must include the following basic information:

- (a) names and addresses of the firms involved in the transaction;
- (b) description of the transaction, for example: (i) whether the transaction is a 'true merger' (i.e., a fusion between two or more enterprises whereby the identity of one or more is lost and the result is a single enterprise), acquisition of assets or shares, joint venture, etc.; (ii) value of assets or shares acquired; and (iii) copies of any relevant documents relating to the transaction, such as the merger agreement;
- (c) timing of the transaction;
- (d) financial information on the merging firms, including sales or turnover and

total assets, and copies of relevant annual or other financial reports;

- (e) details of the organisational structure of the merging firms and of affiliated firms, and details of significant ownership interests;
- (f) description of the products or services supplied by each of the merging firms;
- (g) description of the relevant markets served by each of the merging firms and their shares in each of the markets;
- (h) reasons for the merger and its expected benefits;
- (i) annual reports and financial statements of the merging firms and internal documents analysing the merger prepared for corporate decision-makers.

(3) The Commission will assign distinctive case numbers to each Merger Notice and must ensure that every document subsequently filed in respect of the same proceedings is marked with the same case number.

(4) A person who files any document in terms of this Rule must provide to the Commission the following details on that person:

- (a) legal name;
- (b) physical address for service; and
- (c) telephone number(s) or other electronic addresses (e-mail address, facsimile transmission number(s)).

If the person who files the document is a company or corporate body, the name and address of the individual authorised to deal with the Commission on behalf of the person filing the document must be provided to the Commission.

(5) Notification of a notifiable merger must be accompanied by a fee calculated at 0.05% of the combined annual turnover or combined value of assets in Zimbabwe of the merging parties, whichever is higher.

(6) The fee payment in respect of a merger notification may be payable by:

- (a) a cheque or money order in payment of that fee delivered to the Commission; or
- (b) a direct deposit or an electronic transfer of funds in the amount of that fee to the account of the Commission.

(7) The Commission may require parties to a non-notifiable merger to notify the merger to the Commission by filing a Merger Notice in *Form CTC: Merger.2* in triplicate if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest in Zimbabwe.

No fee shall be payable for filing a Merger Notice for a non-notifiable merger.

(8) The Commission strongly encourages the merging parties to make pre-notification presentations on the proposed merger transactions for the Commission's non-binding opinion on the transaction.

5. Merger Examination Proceedings

(1) Upon being notified of a proposed merger in terms of Rule 4(1), the Commission will examine and consider the proposed merger with all due expedition in two stages as follows:

(a) Stage One

The initial stage of the merger examination begins on the working day following the date on which a merger notification is filed, and the examination must take a maximum of 30 (thirty) days subject to the Commission having received from the merging parties all the necessary information required to make such an examination. If the information supplied with the notification is incomplete, the examination period begins on the day following the receipt of the complete information.

At this stage, the Committee, must make a determination whether the merger raises any competition concerns. Where the Committee determines that the merger does not raise serious competition concerns and is not contrary to public interest, the examination shall be closed and the merging parties shall accordingly be informed in writing.

(b) Stage Two

The second stage begins when the Committee finds that the merger raises serious competition concerns or is contrary to public interest, and a thorough examination of the merger is therefore required.

This stage must take a maximum of 60 (sixty) days, which can be extended by the Commission for a further period of 30 (thirty) days. The reasons for the extension must be given in writing to the parties to the merger.

(2) The Commission will endeavour to consider mergers notified in terms of Rule 4(8) within 60 (sixty) days, which

period may be extended by the Commission by a further 30 (thirty) days.

(3) At any time during a merger examination the Commission may request additional information from a party to a merger, or require a party to a merger to provide additional information.

A request for additional information made under this sub-Rule shall not result in the suspension of the merger examination periods provided for in sub-Rules (1) and (2) above.

6. Consideration of Mergers

(1) In considering a merger, the Commission initially determines whether or not the merger is likely to substantially prevent or lessen competition in Zimbabwe or any part of Zimbabwe by assessing the following factors:

- (i) the actual and potential level of import competition in the relevant market;
- (ii) the ease of entry into the market, including tariff and regulatory barriers;
- (iii) the level, trends of concentration and history of collusion in the market;
- (iv) the degree of countervailing power in the market;
- (v) the likelihood that the merger would result in the merged party having market power;
- (vi) the dynamic characteristics of the market including growth, innovation and product differentiation;
- (vii) the nature and extent of vertical integration in the market;

(viii) whether the business or part of the business of a party to the merger or proposed merger has failed or likely to fail;

(ix) whether the merger will result in the removal of efficient competition.

(2) If it appears that the merger is likely to substantially prevent or lessen competition in Zimbabwe or any part of Zimbabwe, the Commission will then determine whether the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the merger is prevented.

The Commission will also determine whether the merger can or cannot be justified on public interest grounds.

(3) In determining whether a merger is or will be contrary to the public interest, the Commission takes into account everything that it considers necessary and relevant in the circumstances and shall have regard to the desirability of:

- (i) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe;
- (ii) promoting the interests of consumers, purchasers and other users in Zimbabwe in regard to the prices, quality and variety of commodities and services; and
- (iii) promoting through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.

(4) In determining whether or not to approve any merger, the Commission investigates the merger, or undertakes a public inquiry, to ascertain any competition or public interest concerns for the purposes of determining whether or not to approve any merger. In its investigation, or inquiry, the Commission is obliged to ensure 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 merger determination is given an adequate opportunity to make representations on the merger.

(5) The Commission's merger analytical process covers the following areas:

- (i) market definition and description (product market definition, geographic market definition, functional market definition, firms that participate in the relevant market, market shares and concentration levels);
- (ii) potential adverse competitive effects (lessening of competition through coordinated interaction or through unilateral effects);
- (iii) market entry analysis (entry alternatives, timeliness of entry, likelihood of entry, sufficiency of entry);
- (iv) identification of possible efficiencies; and
- (v) failure and exiting assets (the 'failing firm' principle).

(6) After the investigation and examination of the proposed merger, the Commission will make a decision on the

merger. In this regard, the Commission may approve the merger either conditionally or unconditionally, or may prohibit the merger.

Conditional approvals of mergers should include remedies aimed at alleviating the competition concerns identified during the investigation and review. Such remedies may be structural or behavioural. Structural remedies often entails divestiture (e.g. sale of some parts of a multi-product firm in order to reduce its market power in a specific market). Behavioural remedies require a commitment on the part of the merged entity to behave or not to behave in a particular way (e.g. obligations not to increase quantity produced above a certain level, or not to raise prices above a certain level, or to supply certain customers).

(7) All decisions made by the Commission on merger notifications must be communicated in writing to the parties to the merger as soon as they are made.

(8) The Commission may amend or revoke any merger approval if the Commission establishes that the approval was granted on the basis of information that was false or misleading, or that there has been a breach of any terms or conditions subject to which the approval was granted.

7. Abandonment of Merger

(1) The acquiring firm may at any point during the examination of the merger transaction notify the Commission in writing that it has abandoned the transaction and has no intention to implement it.

(2) Upon the filing of the merger abandonment notice:

- (a) the parties to the merger will remain in the same position as if the merger had never been notified; and
- (b) the merger notification fee paid in respect of that merger, if any, will be forfeited to the Commission.