



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

**ZIMBABWE**

**Overview**



## NOTE

UNCTAD's voluntary peer review of competition law and policies falls within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (the "United Nations Set of Principles and Rules on Competition"), adopted by the General Assembly in 1980. The set seeks, inter alia, to assist developing countries in adopting and enforcing effective competition law and policy that are suited to their development needs and economic situation.

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ZIMBABWE

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## PREFACE

1. This report is part of the voluntary tripartite peer review of competition policies in the United Republic of Tanzania, Zambia and Zimbabwe. The purpose of this tripartite peer review is to assess the legal framework and enforcement experiences in each of the three jurisdictions; draw lessons and best practices from each jurisdiction; and examine the value-added of the harmonization of competition law and its enforcement in this sub-region, as well as increased cooperation. The national reports review the competition policy systems in each of the above-mentioned countries, and serve as a basis for comparative assessment report that addresses pertinent issues from a sub-regional perspective.

2. The report examines Zimbabwe's competition policy system. The report is based upon a review of the legal texts that supply the framework for the Zimbabwean competition policy system and of decisions issued by the Competition and Tariff Commission; study of other reports dealing with the Zimbabwean competition policy system; interviews with the leadership and staff of the Competition and Tariff Commission; officials from other government authorities and representatives of non-government organizations.

## **I. FOUNDATIONS AND HISTORY OF COMPETITION POLICY**

### **1.1 CONTEXT AND HISTORY**

3. The need for a formal competition policy was heightened by Zimbabwe's adoption of an IMF-sponsored Economic Structural Adjustment Programme (ESAP) in 1992, this was brought about by the growing concern within the business community that there was lack of domestic competition and that the country's industries were not competitive internationally. The Programme prompted for the establishment of a "Monopolies Commission" to monitor competitiveness and regulate restrictive business practices in the economy (Kububa, 2009).

4. Following the concerted need for having a monopolies commission, a study was carried out in 1992 whereby it was concluded that "while the combination of a high degree of industrial concentration and high barriers to entry does not automatically lead to abuse of market power by monopolists and oligopolists, the possibility for exercising market power existed and that there was some evidence and good reason to believe that Restrictive Business Practices (RBPs) were extensive in Zimbabwe". This conclusion later led to the adoption of the Competition Act (ZCA) in 1996.

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5. A few years after adoption and commencement of implementation of Competition law; Zimbabwe was involved in the war in the Democratic Republic of the Congo (1998-2002). Invariably, the Government's land reform program in 1999 had bad reception by actors within and outside Zimbabwe which resulted into imposition of economic sanctions by some of its key trading partners.

6. The two factors have badly damaged the economy, particularly commercial farming sector which is the traditional source of exports, foreign exchange and provider of 400,000 jobs. This worsened economic situation turned Zimbabwe into a net food importer.

7. Zimbabwe is faced with economic difficulties including a large external debt estimated at 241.6 per cent of GDP in 2010. In 2007 Foreign Direct Investment (FDI) was estimated at USD 30 million; this was a massive reduction as compared to a 1998 figure which was estimated at US \$400 million. In 2010, the country registered an estimated GDP USD 4.395 billion whereby the agriculture sector contributed 19.5 per cent of the total GDP, while industry and services sectors contributed 24 per cent, and 56.5 per cent respectively.

8. Most of Zimbabwe's contemporary economic problems have emerged from the sanctions. Invariably, like other Sub-Saharan African countries, the economy is characterized by features such as majority of the workforce engagement in agricultural production, limited formal employment, majority of population living below poverty lines, low capital formation and low FDI volumes. However, there is a renewed initiative in FDI through international partnership with South Africa.

9. Until early 2009, the Reserve Bank of Zimbabwe attempted to stabilize the economy through fiduciary acts to no avail, thus causing hyperinflation in the economy. In February 2009, Zimbabwe adopted a multicurrency<sup>1</sup> regime characterized by stoppage of use of Zimbabwean Dollar in the economy and removal of price controls. These measures have led to some economic improvements, including the cessation of hyperinflation; as such, in 2010 the economy registered its first growth in a decade. With the growing political consensus and further political improvement to which economic growth is significantly reliant, greater economic recovery and growth is expected.

## **1.2 POLITICAL CONTEXT OF THE ZIMBABWE COMPETITION LAW**

10. Generally there is wide political support for competition policy and law in

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<sup>1</sup> Refers to the introduction of South African Rand and United States of America Dollar as currencies in the Zimbabwean economy in February, 2009.



Zimbabwe. This is witnessed by the fact that there has never been any political interference with the work of the Competition and Tariffs Commission (“CTC”) even at the times of economic hardships that Zimbabwe underwent in the past decade of competition law and policy implementation.

11. Findings from interviewed stakeholder show that there was a comprehensive competition policy document prepared in late 1990s, but, neither the CTC nor the Ministry of Commerce can locate the same. In practice, it has not been used in providing guidance as expected. Instead, CTC has relied on the policy guidelines of the Memorandum to the Cabinet Committee on Development of 1992 in guiding its competition operations since its establishment.

### **1.3 COMPETITION POLICY IN REFORMS**

12. After its adoption in 1996, in 2001, ZCA was amended to provide for the combination of the Competition Commission and the Tariffs Commission, to form the Competition and Tariffs Commission. The rationale for the combination was cost saving to the Government by running one instead of two interconnected Commissions.

13. The Amendments Act also strengthened the Commission’s handling of mergers and acquisitions and expanded the list of restrictive and unfair business practices. It further gave the Commission the added functions of price surveillance and monitoring.

### **1.4 CURRENT ISSUES IN IMPLEMENTATION OF THE ZCA**

14. According to interview findings, Zimbabwe has been generally described as a less litigious society. Most enterprises summoned by the CTC in the past, appeared without legal representation. This trend has been changing from 2009 and increasingly, firms have been engaging high profile corporate lawyers mainly due to the severity of penalties which are now quoted in US dollars as compared to when they were quoted in Zimbabwean Dollars.

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## **2. LEGAL FRAMEWORK**

### **2.1 THE COMPETITION ACT (ZCA)**

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

#### **2.1.1 ANTI-COMPETITIVE AGREEMENTS**

16. While the ZCA distinguishes between various forms of objectionable conduct, namely unfair business practices, restrictive agreements and unfair trade practices, it does not contain a provision for general prohibition of anticompetitive agreements.

17. According to the current wording of the ZCA, only unfair trade practices, e.g. dumping of imported commodities, constitute an offence and are sanctioned by a fine or imprisonment as provided in Section 42 (3).

18. The category of unfair business practices, which according to Section 2 (1) comprises generally restrictive practices and specific practices that are individually listed in the First Schedule is only sanctioned by nullity as provided in Section 43 (a) and (b). This is a major shortfall in the ZCA, which was occasioned by possible drafting omissions at the time the ZCA was amended by the 2001 Amendment. Thus, according to the current wording of the ZCA, the CTC is only empowered to prohibit restrictive business practices on an individual basis according to Section 31 if it is satisfied that the restrictive practice is contrary to public interest.

##### **2.1.1.1 RESTRICTIVE PRACTICES IN THE ZCA**

19. Section 2 (1) ZCA defines restrictive practices as

- (a) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons, or
  - (b) any business practice or method of trading; or
  - (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or
  - (d) any situation arising out of the activities of any person or class of persons; which restricts competition directly or indirectly to a material degree, in that it has or is likely to have any one or more of the following effects - [...].
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20. Ideally Section 2 of the ZCA can be construed to provide for Rule of Reason issues. But as reported earlier, the ZCA does not contain such prohibition and Section 31 of the ZCA only allows for a prohibition on an individual basis, thus making the whole text on restrictive practices little deterrent.

21. Section 32 (2) of the ZCA provides that the Commission should regard a restrictive practice as contrary to the public interest if it is engaged in by a person with substantial market control over the commodity or service to which the practice relates. This is contrary to the ideal, whereby agreements to be examined under rule of reason are set to target competitors in a relevant market, hence a shortcoming in the ZCA.

22. Section 35 (1) and (2) of the ZCA provides for notification of rule of reason agreements. However, the timeframe for which the agreement will be reviewed is not stipulated. The provision also lacks a threshold for which the agreeing parties are prohibited in a particular transaction thus widening a room for agreements to be notified.

23. There is also a mix up of prohibitions under the restrictive practices, whereby it include what seems to refer to Output Restriction and Price Fixing which are issues dealt with under Per Se approach. There are also included exclusionary and exploitative conduct issues dealt with under Abuse of Dominance.

### **2.1.1.2 UNFAIR BUSINESS PRACTICES**

24. Section 2 of the ZCA defines unfair business practice as restrictive practice or other conducts specified in the First Schedule. The practices listed in the First Schedule are misleading advertising, false bargain, distribution of goods or services above advertised prices, undue refusal to distribute goods or services, bid rigging, collusive arrangements between competitors, predatory pricing, retail price maintenance and exclusive dealing. Despite their provision, it should be recalled that the ZCA in its current wording does not contain a prohibition of unfair business practices.

25. Save for bid rigging and collusive arrangements between competitors, the rest of the practices listed in the First Schedule are either consumer protection or typical abuse of dominance issues whose determination procedures are distinct from those invoked in dealing with Per Se prohibited agreements. Logically subjecting the issues under Per Se approach poises a potential for confusion to users of the ZCA.

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## 2.2 ABUSE OF DOMINANCE

26. The ZCA does not contain a general prohibition of the abuse of dominance. Section 2 contains a definition of monopoly situation and substantial market control. Section 31 (2) allows the CTC to declare a monopoly situation unlawful if it is satisfied that it is contrary to the public interest on individual basis.

27. The ZCA defines “Monopoly Situation” as a situation in which a single person exercises, or two or more persons with a substantial economic connection exercise, substantial market control. “Substantial Market Control” is given, where such person or persons has/have the power to profitably raise, maintain or lower prices above or below the competitive levels for a substantial time within Zimbabwe or any substantial part of Zimbabwe, Section 2 (2).

28. The ZCA does not provide for a level of market share that a person must attain to be considered dominant. While several competition laws contain a market share threshold for the finding of dominance, this is not compulsory and has also attracted some criticism<sup>2</sup> for being rigid and not allowing for the required economic assessment despite their inherent ability of creating legal certainty. A rebuttable presumption of dominance triggered by the achievement of certain market share thresholds appears to accommodate the concerns of both views.

29. In the absence of a comprehensive definition of dominance, CTC may consider a possibility of adopting guidelines on how it assesses market power focusing on the type of factors it takes into consideration in addition to market shares. However, given the low level of competition expertise in the developing world, the absence of a market share threshold that triggers a rebuttable presumption of dominance should be considered for future development of the ZCA.

30. As mentioned previously, the CTC can declare a monopoly situation unlawful on individual basis if it is satisfied that it is contrary to the public interest. Contradictorily, Section 32 (5) ZCA appears to bear a presumption that all monopoly situations are against public interest unless, certain conditions are met. This is contrary to the ideal prohibition that target certain conduct deemed abusive.

31. Therefore, the ZCA is ambiguous as to whether a dominant position as such or only its abuse is against public interest and can therefore be prohibited. It is recommended that the ZCA clearly prohibits the abuse of a dominant position as a general rule. This general rule can then be followed by a non-exhaustive list of examples for abusive behaviors that are universally agreeable based on best practices.

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<sup>2</sup> See the UNCTAD Model Law on Competition 2010 - Chapter IV, available at [http://www.unctad.org/en/docs/tdrbpconf7L4\\_en.pdf](http://www.unctad.org/en/docs/tdrbpconf7L4_en.pdf)<sup>2</sup>

## **2.3 MERGERS AND ACQUISITIONS**

32. At inception, Zimbabwe had a voluntary merger notification system which was changed by the Amendment Act of 2001. Section 34 of the ZCA provides for a pre-merger notification regime which requires mergers with values at or above a prescribed threshold be notified (currently US \$1 200 000 of the combined annual turnover or assets in Zimbabwe of the merging parties).

33. The term 'merger' as defined in the ZCA definitively covers both horizontal and vertical mergers. It however does not include pure conglomerate mergers and joint ventures resulting in the establishment of 'green field' enterprises and the general provision under Section 2 (l) cannot justify the omission of a specific provision to cover for such mergers. This is a shortcoming that should be rectified.

34. The Section 32 (1) of the ZCA prohibits mergers which are contrary to public interest. Section 32 (4) impliedly defines public interest to cover both creation and strengthening of dominance in the market. Nevertheless, the prohibition is scattered in Sections 2, 32 (1), 32 (4) and 34 of the ZCA, thus making the interpretation thereof a complicated undertaking.

35. Reading of Section 34A of the ZCA together with Statutory Instrument 270 of 2002 particularly Section 5 on "Determination of Notification" show that the ZCA does not provide for binding deadline for the CTC to assess a merger. This is a major shortcoming that should be rectified.

36. Furthermore, the provision does not clearly provide which among the merging parties (Acquiring or Target firms) is responsible for notifying the CTC of the intended merger transaction.

37. Failure to notify a notifiable merger attracts a penalty of up to 10 per cent of either or both merging parties' annual turnovers in Zimbabwe, Section 34 A (4). It is considered that this penalty is formulated too wide hence giving room for exercise of greater discretion than prudence would demand.

38. While the CTC is empowered to clear a merger conditionally under Section 31 (2) (e), there are no provisions to provide for a procedure to handle a breach of merger conditions.

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## **2.4 CONSUMER PROTECTION/UNFAIR COMPETITION ISSUES**

39. The ZCA does not have a specific Part devoted to consumer protection. It however has various Sections on consumer welfare and protection scattered within itself. These include:

- (i) misleading advertising,
- (ii) false bargains, and
- (iii) distribution of goods or services above advertised price.

40. Almost all consumer protection related provisions in other Parts of the ZCA are definitional and factors to be considered in issuing orders which are related to pricing of goods and services.

41. In practice, among the three unfair competition issues, it is only misleading advertising that has been dealt with by the CTC. There are 10 cases that have been disposed between 1999 and 2010.

42. Currently, the Ministry of Industry and Commerce is in the process of enacting a substantive consumer protection law for Zimbabwe which has been designed such that it is to be administered by a body to be established by itself and not the competition authority. Shall that be the case, these consumer related provision will be out of place in the ZCA.

## **2.5 PRICE CONTROL**

43. This function was introduced to the CTC in 2001 by the Competition Amendments Act. During the course of its insertion, there was a debate as to how to ensure that the CTC is not statutorily empowered to fix prices in the market. The compromise text is as provided in Section (5) (h) of the ZCA that the CTC shall “monitor prices, costs, and profits in any industry or business that the Minister directs the Commission to monitor, and to report its findings to the Minister”

44. Despite being provided for in the ZCA, this function has never been done as there has never been any Ministerial Directive to the CTC to execute such an activity for the past ten years; this is perhaps a good reason to drop the function from the ZCA.

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### **3. INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES**

#### **3.1 COMPETITION POLICY INSTITUTIONS**

##### **3.1.1 THE COMPETITION AND TARIFF COMMISSION**

45. CTC is established by Section 4 of the ZCA and it shall consist of not fewer than five and not more than ten members appointed by the President (Section 6) for a period not exceeding three (3) years (Section 8). Section 11 is controversial to the effect that the Minister may appoint a member to constitute a quorum in the event of death or vacation of office by a member, if such a scenario would affect a quorum. More controversy is observed when the Minister is empowered to suspend or require a member to vacate office (Section 9); basically having the powers to fire whereas the Minister is not the hiring authority. This is an anomaly that needs to be looked into as a matter of priority.

46. Regarding independency, Section 5 (3) provides that the Commission shall not be subject to the direction of any other authority, but the independency is silently withdrawn by Section 18 that the Minister may give the Commission such general directions in protection of the national interest which are not defined in ZCA.

##### **3.1.2 THE DIRECTORATE OF THE CTC**

47. The organogram of the CTC provides for the Board of Commissioners as the oversight organ which supervises the Directorate led by a Director and Assistant Directors. The internal structure of the Directorate is deemed to be ideal given the prevailing conditions that CTC also deal with Tariff, thus having a division of its own.

#### **3.2 SOURCES OF COMPETITION CASES**

48. Statutorily, CTC's major sources of competition cases are (i) complaints from the business community and the general public (ii) concerns learnt from the media (iii) issues identified from the sectoral studies (iv) ministerial instructions from the Government, and (v) referrals from sector regulators.

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### **3.2.1 HANDLING OF COMPETITION COMPLAINTS AT CTC**

49. CTC's Directorate undertakes preliminary investigation into the allegation in order to identify and assess the nature of competition issue so as to establish a prima facie case for a full-scale investigation. Draft reports on the preliminary investigations undertaken are debated by the Directorate's Operations Committee before they are submitted to the relevant Committee of the Commission and ultimately to the full Commission for determination.

50. The committees would basically sit to deliberate and sharpen recommendations emanating from Directorate's Operations Committee in the spirit of bettering the exercise of CTC's function as provided under Section 14 (1).

51. Full scale investigation is usually a follow up of establishment of a prima facie case by investigators as defined by Section 46 of the ZCA. As a general rule, cases involving unfair business practices listed in the First Schedule, and those involving other serious abuse of monopoly situation proceed to the full-scale investigation.

52. Some cases are closed under Section 30 of the ZCA following negotiations on the discontinuation or termination of the identified anti-competitive practices. A number of cases are also dropped at the preliminary investigations stage for various reasons, such as lack of evidence to support the allegations made, unfounded allegations or alleged practices not in breach of the ZCA using the de minimis rule.

53. 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.

### **3.2.2 HANDLING OF MERGERS**

54. 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. Additional information is obtained from submissions and interviews with the relevant stakeholders.

### **3.3 INVESTIGATIVE POWERS**

55. Section 28 of the ZCA empowers the CTC to make such investigation into any a merger, restrictive practice, agreement, understanding or method of trading which the Commission has reason to believe exists or may come into existence in order to ascertain whether it is anti- competitive or not.

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56. In the course of investigation the Commission may, conduct preliminary investigation without notice in accordance to Section 47. Where the Commission deems necessary that a full investigation should be conducted, the law requires that a notice is published in the Government Gazette and in National Newspapers circulating in the area covered, inviting interested parties to submit written representations within two weeks after the notice and publication.

57. The Commission statutorily ensures that rules of natural justice are duly observed; the Commission is also given the powers that are conferred upon a Commissioner by the Commissions of Inquiry Act, other than the power to order a person to be detained in custody.

58. Section 47 of the ZCA, gives CTC powers of entry and inspection, which can be interpreted to include the power to conduct effective dawn raids, even though those powers have still not been used.

59. ZCA does not provide for a leniency programme for which cartelists would voluntarily provide information to the CTC regarding collusive/concerted and other anticompetitive behaviours in the markets. These shortcomings are a potential for lessening of CTC's ability to investigate complex anticompetitive behaviours that require rectification.

### **3.4 SANCTIONS**

60. The style for which the offences are created and sanctions are levied in the same provision is good. However, the provisions on fines are by an Act which is administered by a different authority not within CTC's mandate. The ideal situation would be to allow ZCA to independently provide for penalties so as to ensure offences are accorded commensurate penalties.

### **3.5 ROLE OF THE COURTS**

61. Section 33 provides for enforcement of the orders of the Commission by the High Court or Magistrates' Courts.

62. ZCA also acknowledge the judicial review powers of the High Court in Section 33 (3) (a). The Administrative Court where appeals against decisions of the CTC lie is also part of the Courts.

63. There haven't been grave conflicts on the setup so far, but the existence of parallel appeals to the High Court and the Administrative Court opens up a potential for conflicts in practice.

64. The ideal situation would be to establish a specialized tribunal to handle competition and related issues as is the case in Tanzania and recently introduced in

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Zambia. Matters emanating from the regulated sector authorities' decisions should also be appealable at the tribunal so as to provide the tribunal with sufficient appeals. An alternative solution would be to limit the appeal to one jurisdiction, either High Court or Administrative Court and create a specialized competition chamber within the preferred Court.

### **3.6 AGENCY RESOURCES, CASELOAD, PRIORITIES AND MANAGEMENT**

#### **3.6.1 AGENCY RESOURCES**

65. CTC has a human resources base of 29 staff out of which 16 are technical and 13 support staff. There is the Director, Secretary of the Commission and 2 legal officers/counselors. Competition division is led by Assistant Director Competition together with 5 economists and 1 law officer, in total 7 staff are dedicated to competition. Tariff division is led by Assistant Director Tariff together with 4 economists; in total 5 staff are dedicated to tariff.

66. Most of the current competition experts are new to the Commission. The only experienced expert is the Director who was hired in 1999. Among experts, none has undergone competition training at University and internally there have not been any comprehensive in-house training of staff. At most, members of staff and Commissioners have attended short trainings of 2-3 days abroad.

67. According to the Director, there have been high staff turnover at the CTC, attributed to the economic turmoil the country has undergone since early 2000s; adding that in 2007/2008, CTC lost the entire competition division.

68. Staff at CTC are paid salaries pegged to civil service scales which according to sources that the consultant could not verify, the average difference between CTC and sector regulators scales is estimated at 700 per cent. Significant difference is also observed when comparing the CTC salaries to other competition authorities in within the Tripartite. This scenario can trigger staff turnover among other human resources problems.

69. There is limited use of ICT and electronic documentation of proceedings and archives that may lead to avoidable delays in implementation of CTC activities. There is no CTC website and just recently CTC managed to establish its own email domain.

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Table 1: CTC Income Distributed by Source

Source	2010 (Actual) (US\$)	2011 (Actual) (US\$)	2012 (Actual) (US\$)
Government Grant	114 154	210 405	319 000
Merger Notification Fees	154 986	267 402	368 450
Trade Development Levy	657 620	205 986	200 000
Investment Income	0	42 683	50 000
Sundry Income	1 211	5 492	-
Total	927 971	731 969	937 450

Source: CTC

70. Regarding financial resources, the CTC has limited funds to carry out its mandate. Table 1 below shows that merger notification fees are the main source of income for the CTC followed by Trade Development Levy<sup>3</sup>.

71. As per section 23, CTC receives money from Parliament, fees and any other moneys that may vest in or accrue to the Commission, whether in terms of the ZCA or otherwise. This can be construed too broadly to include sources inconsistent with the spirit and objectives of the ZCA hence requiring rectification.

72. There is evidence that regulatory authorities have excess money that emanate from their regulatory functions. Other jurisdictions (Tanzania and Turkey) have statutorily provided in their competition laws that they shall receive funds from the regulated sectors authorities.

### 3.6.2 CASELOAD

73. The CTC reports on cases that have been handled to mean all those that have been initiated irrespective of their closure. Table 2 below summarizes figures of competition matters handled over the years<sup>4</sup>

<sup>3</sup>The trade development levy is a surcharge on specific imports and exports in order to fund the promotion of export trade of Zimbabwe. To date, only ZimTrade and the CTC benefit from the trade development levy for the purpose of their trade development and promotion work.

<sup>4</sup>Note that the figures provided in Table 2 include all cases handled in the respective periods. For this reason, they are higher than the figures provided in Tables 3 to 4, which refer to matters that were actually decided and closed during the respective periods.

Table 2: Number of Competition Matters Handled During 1999 - 2010

Case Category	1999 2001	2002 2004	2005 2007	2008	2009	2010	Total
Restrictive Practices	58	61	54	14	15	18	220
Mergers and Acquisitions	24	78	81	16	9	14	222
Competition Studies	9	12	13	2	1	1	38
Totals	91	151	148	32	25	33	480

(CTC Annual Report, 2010)

### 3.6.2.1 RESTRICTIVE BUSINESS PRACTICES

74. Since the effective commencement of the Commission's operations in 1999, the Commission has made decisions on a total of 100 competition cases involving restrictive and unfair business practices (inclusion of anti-competitive agreements, and abuse of dominance), as summarized in table 3 below.

**Table 3: Summarised Commission Decisions on Restrictive Business Practices During 1999-2011 Period**

Commission Decision	No. of RBP Cases Decided Upon			Total	Percentage
	1999	2006	2010		
	2005	2009	2011		
Case closed for lack of competition concerns	14	3	3	<b>20</b>	20%
Case closed for lack of serious competition concerns	8	5	0	<b>13</b>	13%
Case closed for lack of evidence to substantiate the allegations	8	6	2	<b>16</b>	16%
Case closed for lack of jurisdiction	0	1	1	<b>3</b>	3%
Case proceed to full-scale investigation stage	12	2	4	<b>18</b>	18%
Case closed on conclusion of consent agreements and signing of Undertakings	10	4	1	<b>15</b>	15%
Case closed on discontinuation of alleged restrictive practices	4	1	0	<b>5</b>	5%
Case referred to Attorney-General's Office for prosecution	1	5	1	<b>7</b>	7%
Case referred to other relevant authorities	0	1	0	<b>1</b>	1%
Case shelved pending lifting of government price controls on relevant products	2	1	0	<b>3</b>	3%
<b>Totals</b>	<b>59</b>	<b>29</b>	<b>12</b>	<b>100</b>	<b>100%</b>

75. The above Table shows that 16 per cent of the cases were closed for lack of evidence to substantiate the allegations, which highlights the need for training in investigative techniques for officials of the Commission. Cases that were not definitely decided upon by the Commission were those closed for lack of jurisdiction (3 per cent), closed on discontinuation of the alleged restrictive practices (5 per cent), referred to other relevant authorities (1 per cent), and shelved pending the lifting of government price controls on the relevant products (3 per cent). The rest of the cases (72 per cent) were heard on merit by the Commission, and amply decided upon accordingly.

76. In this context, it should be pointed out that there are a number of success stories in the Commission's handling of competition cases:

- horizontal restraints arising from collusive and cartel-like behaviour were abolished in certain industries, such as the cement and the coal industry and the dry cleaning and laundry services sector;
- vertical restraints with substantial economic and efficiency benefits were however allowed, but under control, in other industries like the coal tar fuel industry;
- abusive practices of dominant firms in consumer products industries such as the alcoholic beverages industry and the cigarette industry, as well as in utilities sectors such as electricity and telecommunications that directly affect the consumer, were brought to an end; and
- entry barriers were removed in industries such as the cement industry, the coal industry, the sugar industry, and the fertilizer industry, resulting in the introduction of new economic players.

77. More recently, the Commission's intervention in the health insurance services sector, through its full-scale investigation into the abusive practices by Cimas Medical Aid Society against liver dialysis patients, resulted in the issuance of remedial orders that strengthened competition in that sector and had immense consumer protection benefits. Another full-scale investigation into abuse of monopoly position by the electricity utility also got acclaims from the government, the business community, and the general public.

78. Despite these success stories, given the architecture of the law with regard to issues is considered to be Restrictive Practices in ZCA and the nature prohibitions associated to the anticompetitive restrictive practices, without prejudice to the sovereignty of CTC's decisions, it is logical to conclude that there is need a new law to properly provide for restrictive practices, identify and sharpen offences associates to such practices and prohibit the same commensurately.

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### 3.6.2.2 MERGER CONTROL

79. The Commission has made determinations on a total of 137 mergers and acquisitions since it effectively commenced its operations in 1999 as shown in Table 4 below:

Table 4: Summarised Commission Determinations on Mergers Since 1999						
Commission Determination	No. of Merger Cases				Total	Percentage
	1999 2005	2006 2009	2010 2011	2012 (to date)		
Unconditional Approval	52	33	11	1	<b>97</b>	71%
Conditional Approval	11	11	5	0	<b>27</b>	20%
Not Challenged	6	5	0	0	<b>11</b>	8%
Rejected/ Prohibited	2	0	0	0	<b>2</b>	1%
Totals	71	49	16	1	<b>137</b>	100%

80. In the first study on the impact of the implementation of competition policy and law in Zimbabwe that was undertaken in 2006<sup>5</sup>, it was found that specific economic efficiencies that directly arose from the mergers that were conditionally approved by the Commission included the following:

- increased production efficiency and machine utilisation (Rothmans of Pall Mall/ British American Tobacco merger, BP Zimbabwe/Castrol Zimbabwe merger, Zimboard Products/PG Bison Mauritius merger);

<sup>5</sup> Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part I, November 2006 (unpublished)

- restoration of plant productivity (Portland Holdings/Pretoria Portland Cement merger, Zimboard Products/PG Bison Mauritius merger);
- procurement efficiencies from consolidation of requirements and leveraging advantage (Rothmans of Pall Mall/British American Tobacco merger, Shashi Private Hospital/PSMI merger);
- additional supply-chain efficiencies in product distribution (Rothmans of Pall Mall/British American Tobacco merger);
- increased competence and maintenance of market share through technical and commercial support (Portland Holdings/Pretoria Portland Cement merger);
- introduction of self-reliance in input requirements (Delta Beverages/Mr Juicy merger);
- improvement in product quality (Zimboard Products/PG Bison Mauritius merger); and
- effective turnaround from operating loss to operating profit (Zimboard Products/PG Bison Mauritius merger).

81. Subsequent conditionally approved mergers also produced more or less similar economic benefits.

### **3.6.3 PRIORITIES AND MANAGEMENT**

82. Currently, the focus is mainly on mergers and is being managed with the limited context the CTC operates. There is now need to open horizons and venture into area of cartels and abuse of dominance.

## **4. LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES**

### **4.1 ECONOMY-WIDE EXEMPTIONS AND SPECIAL TREATMENTS**

83. Section 3 (1) of the ZCA provides that it applies to all economic activities within or having an effect within the Republic of Zimbabwe but shall not be construed so as to limit some intellectual property rights.

### **4.2 SECTOR-SPECIFIC RULES AND EXEMPTIONS**

84. The ZCA does not provide for sector specific exemptions other than those provided in section 3 (1). Based on this provision; CTC is deemed to have jurisdiction over all the regulated sectors despite the fact that the sector regulators

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are also mandated by their laws to deal with competition issues.

85. ZCA has also overlooked commonly found phenomenon known as block exemption that exempts (after assessment) some identified activities in key sectors from competition law. Such activities include price setting for cash crops in agricultural markets.

#### **4.2.1 THE POSTAL AND TELECOMMUNICATION SECTOR**

86. Section 4 (1) (f) of the Postal and Telecommunication Act provides that one of the functions of the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) shall be to maintain and promote effective competition within the sector.

87. Section 4 (1) (g) of the Energy Regulatory Authority Act, 2011 provides that one of the functions of the Zimbabwe Energy Regulatory Authority (ZERA) shall be to maintain and promote effective competition within the sector.

88. Both the Acts neither stipulate how the functions shall be dealt with nor do they provide for a mechanism for the interaction with the CTC in competition matters. Interview findings, show harmonious co-existence between the two institutions and the CTC but the laws as they currently exist, provide for recipe for clashes.

#### **4.2.2 THE ENERGY SECTOR**

89. The Electricity Act, 2002 and the Petroleum Act, 2006 are read together with the Energy Regulatory Authority Act, 2011 as a sectoral legislation. The Petroleum Act, provided for competition issues in Section 52. The Electricity Act, 2002 has dedicated the whole of Part X for Competition and Market Power.

90. Furthermore Section 59 (8) (f) Electricity Act, 2002 provides for a referral mechanism for which competition issues are referred the matter to the CTC. This is a good model to be emulated by all other sector regulator legislation.

### **5. COMPETITION ADVOCACY**

91. The ZCA indirectly provides for advocacy as one of the functions of the CTC in Section 5 (1) (e) to advise the Minister in regard to all aspects of economic competition, and Government policy in regard to economic competition.

92. There have been a few advocacy activities with the media in the past but they stopped for unexplainable reasons. There are high potentials for advocacy with the Academia, Bar Association and the business organizations that are yet to be fully exploited in furtherance of competition culture in Zimbabwe.

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## **6. INTERFACE BETWEEN COMPETITION AND TRADE POLICIES**

93. Currently the presence of tariff division at CTC demonstrates the interaction between the two policies. The CTC is empowered to make investigations into any tariff charge or any matter related thereto, which threatens to harm local industry. The policy objective of tariff as administered by CTC is therefore geared towards protectionism which may operationally be reduced into barriers to entry.

94. In the contrary, the aim of competition policy and law is to promote effective competition in markets, whereby in assessing the level of competition in a market, factors such as barriers to entry i.e. ease of entry into the market, including tariff are considered.

95. While it is debated whether tariff measures are beneficial to the country or not; their co existence with competition under the administration of CTC pose a serious potential for conflicting policy objective which may defeat the very purpose of enacting a competition law in the economy. It should also be noted that the Zimbabwean case is peculiar in so far as statutory coexistence with Tariffs is concerned. There is no any other jurisdiction known for having such a practice.

96. According to findings from interviews with CTC staff, there has not been any open policy clash so far despite the existence of potential for such conflicts. As the Zimbabwean economic recovery deepens, it is expected that the volume of transactions will grow and increase the probability of controversial matters (in so far as coexistence of tariff and competition is concerned) that are lodged before the CTC.

97. The standard recommended practice is having a stand alone competition, for which Zimbabwe is close from its attainment since the common partner consumer protection is poised to have its own separate institution.

## **7. INTERNATIONAL RELATIONS AND REGIONAL COOPERATION**

98. On a bilateral basis, the CTC has cooperated with other competition authorities in the region, notably authorities in Kenya, Namibia, South Africa and Zambia, in exchange of information. The cooperation with the Zambian competition authority has extended to the handling and investigation of competition cases.

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99. At regional level, Zimbabwe is a member of the Southern Africa Development Community (SADC) and of the Common Market for Eastern and Southern Africa (COMESA). The Commission provided one of the regional competition experts that formulated COMESA regional competition policy and law, and sits on the Board of Commissioners of the COMESA Competition Commission. In SADC, the Commission is an active member of the Competition and Consumer Policy and Law Committee. Also, it is a member of both the African Competition Forum (ACF) and the Southern and Eastern Africa Competition Forum (SEACF).

100. Furthermore, the CTC has cooperated with a number of other competition authorities and international organizations, both as a technical assistance beneficiary and provider.

## **8. FINDINGS AND POSSIBLE POLICY OPTIONS**

### **8.1 RECOMMENDATIONS ADDRESSED AT THE LEGISLATURE (PROPOSALS FOR AMENDMENT OF THE CURRENT COMPETITION LAW)**

101. Considering the identified gaps in the ZCA in the context of the tripartite i.e. Zambia and Tanzania; the most of the reasons that made Zambia in 2010 and Tanzania in 2003 repeal their competition laws exist in the Zimbabwean competition and regulatory framework. Given the volume of issues that may require either introduction or amendments in the current ZCA and their resemblance with the gaps identified elsewhere in the tripartite as reported above; it is recommended that the ZCA be repealed and replaced with a new act that will address the gaps and other issues as proposed in the report.

102. For the ease of reference, Table 8 below provides a summary of the report's assessment of the various legal provisions of the ZCA and its respective recommendations. Note that the UNCTAD Model Law on Competition has served to structure this overview.

Table 8: Summary of the assessment of the main elements of the ZCA.

UNCTAD Model Law Provision	Provision in ZCA	Shortcomings	Recommendations
Title of the Law	Section 1	-	-
Objectives or Purpose of the Law	Preamble	No stand alone Section to provide for this important part of the Law.	Include a section providing for the objectives or purpose of the Law.
Definitions	Section 2	The language used providing for most definitions are not in concurrence with commonly used “competition language” and are used too interchangeably and are confusing.	<ul style="list-style-type: none"> <li>• Those definitions that are generally part of a substantive rule, e.g. the prohibition of restrictive practices, should be shifted from Section 2 to the part of the ZCA that contains the respective substantive provision.</li> <li>• Clearer definitions and use of important common competition language for terminologies should be introduced to avoid mix ups which may open unnecessary arguments.</li> <li>• Guidelines to be adopted by the CTC to explain core competition law concepts, such as the definition of the relevant market.</li> </ul>

UNCTAD Model Law Provision	Provision in ZCA	Shortcomings	Recommendations
Scope of Applications Definitions	Section 3	Economy wide with no limitations that provide for concurrent jurisdiction with sectoral regulators.	Clear separation of jurisdiction over competition issues in regulated sectors should be introduced in the Law.
Anti competitive agreements	Section 2	<ul style="list-style-type: none"> <li>• No clear line of demarcation between anticompetitive agreements, the abuse of market power and acts of unfair competition.</li> <li>• Absence of a general prohibition of anticompetitive agreements and the abuse of a dominant position.</li> <li>• Abuse of Dominant Position issues are provided for under Per Se prohibition rule and under Section 2, on restrictive practices.</li> </ul>	<ul style="list-style-type: none"> <li>• Introduce a general prohibition of anti-competitive agreements and concerted practices, followed by a non-exhaustive list of examples.</li> <li>• Clearly distinguish between agreements that are per se prohibited and those that fall under the rule of reason.</li> <li>• No mix of specific types of anti-competitive agreements with acts of unfair competition.</li> </ul>
	Part 8,9 and 10 of the First Schedule	<ul style="list-style-type: none"> <li>• The law has indirectly dealt with Rule of Reason referring to restrictive practices related to agreements as defined in Section 2 of the ZCA. Those which are provided under the First Schedule are called Unfair Business Practises and are Per Se prohibited.</li> </ul>	<p>The conduct listed in the First Schedule should be moved to the parts of the ZCA where it belongs (i.e. anticompetitive agreements or acts of unfair competition).</p> <ul style="list-style-type: none"> <li>• Introduce a general prohibition of the abuse of a dominant position, followed by a non-exhaustive list of examples.</li> </ul>
Acts or behaviours constituting an Abuse of dominant position of market power.	Section 2		

UNCTAD Model Law Provision	Provision in ZCA	Shortcomings	Recommendations
			<ul style="list-style-type: none"> <li>• The language used in defining dominance should be consistent with common competition language that is simply understood by users.</li> <li>• To be discussed whether a rebuttable presumption of dominance based on a specific market share threshold should be introduced.</li> </ul>
Notification, investigation and control of mergers.	Section 34 and 34A	<ul style="list-style-type: none"> <li>• Investigation procedure, in particular timelines, not specified.</li> <li>• Joint-ventures and pure conglomerate mergers are not captured by the definition of a merger.</li> <li>• Substantive merger control test spread over several provisions.</li> </ul>	<ul style="list-style-type: none"> <li>• Include a binding timeframe for the review of mergers.</li> <li>• Include the establishment of a full-function joint venture and pure conglomerate mergers in the definition of mergers.</li> <li>• Provide for substantive merger control test in a single provision.</li> </ul>
Authorisation or exemption	Sections 35,36,37,38 and 39	Investigation procedure, in particular timelines, not specified.	Include a binding timeframe for the review of agreements.

UNCTAD Model Law Provision	Provision in ZCA	Shortcoming	Recommendations
Some possible aspects of consumer protection.	Part 8 of the First Schedule	There is no clear demarcation of provisions to deal with competition and those which deal with consumer both are categorized under the First Schedule	Based on the finding that the Consumer Protection Bill will be administered by a different body, consumer protection aspects can be dropped from the competition law. This should only be done after the Consumer Law is out so as not to create a gap that will expose consumers to exploiters. Alternatively, a remedy can be by drawing a line of demarcation between the two.
Investigation Procedures	Section 34C	Lack of express provision on leniency programme for cartel members	Introduce express provision on leniency programme for cartel members.
Relationship between competition authorities and sector regulators	Section 3 (a) and (b)	Not provided for specifically, although one regulatory authority has specific provision on how competition matters should be referred to CTC.	The competition law should acknowledge the co-existence of sectoral regulators and limit itself accordingly. Section 59 of the Electricity Act should be strengthened and used as a model for interactions between sectoral regulators and CTC.

UNCTAD Model Law Provision	Provision in ZCA	Shortcomings	Recommendations
Establishment, functions and powers of the administering authority	Section 4, 5, 6 and the second schedule	<ul style="list-style-type: none"> <li>• Too much power is vested on the Minister responsible for the CTC and Minister for Finance; it poses a threat to the independence of the Commission.</li> <li>• Section 6 ZCA unclear as to who is vested with the power to appoint Commissioners</li> <li>• Tenure of Commissioners of a period of three years is too short to allow for Commissioners to acquire required competition law expertise and build up an institutional memory.</li> </ul>	<ul style="list-style-type: none"> <li>• Minister (s) should be stripped off some powers to ensure that members have a better security of tenure for them to function more efficiently.</li> <li>• Policy to place the competition and economic regulation institutions under one Ministry so as to easeen policy decision patterning the competition and regulatory interaction.</li> <li>• Clarify that the Minister in consultation with the President shall appoint the Commissioners.</li> <li>• Tenure of Commissioners to be extended to 5 to 7 years.</li> </ul>
Powers of enforcement	Section 30,31 and 32	The actual enforcement of Commission Orders is done by Courts. This may create multiplicity of procedures and may cause unnecessary delays in delivery of justice	CTC could assume some powers of actual enforcement and state those that the Courts should deal with, mostly the criminal sanctions, particularly imprisonment.



UNCTAD Model Law Provision	Provision in ZCA	Shortcoming	Recommendations
Sanctions and remedies (Actions for damages)	Section 31, 44 and 45	Provided in using a general and wide benchmark as a result there is no enough deterrence to offenders. Omission of some offences such as breach of a merger condition following conditional approval of a merger.	Provide ZCA specific sanctions to bring about deterrence to offenders.  Provide for the identified omitted offense in the ZCA.
Appeals	Section 40	Judicial review can be exercised by the High Court and the Administrative Court.	<ul style="list-style-type: none"> <li>• Only one Court should have jurisdiction over competition cases. Competition cases should be heard by specialised judges.</li> </ul>

## 8.2 RECOMMENDATIONS ADDRESSED AT THE GOVERNMENT

• Drafting of the new law should be preceded by a comprehensive study that should enlighten details regarding the economics and legal aspects of the competition regime based on requirements of the contemporary Zimbabwean social, economic and political contexts. The study should form basis for development of a comprehensive competition policy and eventually the new law. Furthermore, taking into account possible policy conflicts between the competition and the tariff mandate of the CTC, as well as the fact that combining these two mandates in one institution is highly unusual, the study should address the question whether or not to maintain the current mandates of the CTC. In fact, it is recommended to consider unbundling the two mandates and assigning only the competition mandated to the CTC.

- It is recommended that the Government increase CTC's budget to optimal levels based on the decade long experience of implementation under the prevailing limited budget. Comparisons should be with the sector regulators, owing to the fact that they save the same entities in the economy, more so that CTC's mandate is wider than the sector specific regulators. Among sources of the increase to be considered are Government Grants and introduction of a statutory regime that will provide for a mechanism for CTC to receive funds from the regulated sectors.
- Salaries for the CTC personnel should also be substantially increased for obvious reasons of motivation on their part and retention of staff on the CTC's part as an employer.
- Placement of competition and regulatory authorities under one central ministry, so as to avoid competing and conflicting policy objectives as well as the disjoint between competition and regulation in Zimbabwe. This will ease the implementation of the coexistence of competition and regulatory authorities as economic entities that serve the same consumer in the Zimbabwean economy, hence the need to share information, financial and other resources for the benefit of the consumer and the economy.

### **8.3 RECOMMENDATIONS ADDRESSED AT THE CTC**

- Establishment of a sound Information and Communication Technology department at the CTC, which shall take care of website, electronic documentation of proceeds and archives and a library.
- Tailor made training on competition to staff, Commissioners, appellant bodies, university staff, practising lawyers and regulated sector staff as a routine practise for between 3 to 5 years, so as to impart competition knowledge and skills in to the Zimbabwe competition and regulatory framework.
- The CTC Board revamps the advocacy component for competition issues. Opportunities readily available such as engagement with the Bar association, the Academia and the Trade and commerce should be ceased immediately because they can be carried out by resources compliment currently available at CTC.
- CTC should reorient its the enforcement practice by conducting its case determination function in an inquisitorial approach that shall exonerate itself from the liability of compliance to requirements of separation of powers currently haunting its functioning as explained earlier in this report.

### **8.4 FURTHER RECOMMENDATIONS**

- Establishment of a Competition Law and Policy Course at the University, so as to ensure availability of basic competition training in Zimbabwe.
-