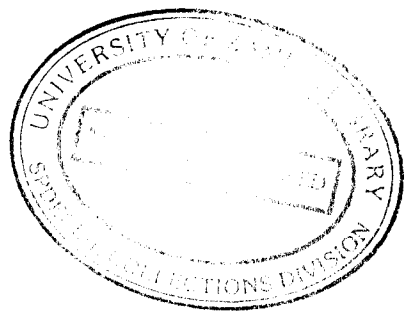


**COMPETITION IN TELEVISION BROADCASTING: ANALYSING THE  
INDEPENDENT BROADCASTING AUTHORITY (AMENDMENT) ACT  
2010.**

**BY**  
**KAPELWA SAMUEL LIPIMILE**  
**26130416**



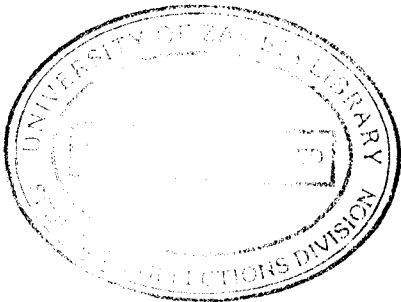
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the award of Bachelor of Laws Degree (LLB).

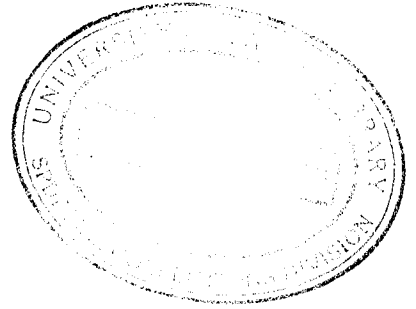
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**(Supervisor)**

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## **ABSTRACT**

This study is an analysis of whether the Independent Broadcasting Authority (Amendment) Act 2010 promotes fair competition the television broadcasting industry. The study applies a combination of critical analysis of the act, theories of regulation of media broadcasting as an analytical framework, and employs document analysis and case studies as methods.

The study finds that in relation to promoting fair competition the television broadcasting industry, the Independent Broadcasting Authority (Amendment) Act 2010 is to a large degree ineffective in the regulatory practices it employs to promote fair competition in the television broadcasting industry. The study identifies a number of weaknesses in the Independent Broadcasting Authority (Amendment) Act 2010, which include its failure to define key anti-competitive practices for the television broadcasting industry. In addition, a lack of clarity of mandate between competing regulators and powers regarding the regulation of competition in the television broadcasting industry, as well as a lack of adequate resources, has led to ineffective regulatory practices.

The study also finds that the Independent Broadcasting Authority (Amendment) Act 2010 provisions in general are characterized by a lack of proactive regulation in several areas. In this regard, the study demonstrates that Independent Broadcasting Authority (Amendment) Act 2010 has a regulatory practice that can be characterized as being ineffective in regards to the regulation of competition the television broadcasting industry. Finally the study makes recommendations for the strengthening of the Independent Broadcasting Authority so that it becomes in an effective regulator functioning in the public interest.

## **ACKNOWLEDGEMENTS**

My sincere heartfelt acknowledgement goes to my supervisor, Mr. Greenwell Lyempe, for all the academic guidance he rendered without which this directed research would not have been completed. I further express my gratitude to Professor M. Munalula, the course coordinator, for the guidance provided during this course. I would like to thank the Management and staff of the Zambia National Broadcasting Corporation, Muvi TV and the Competition and Consumer Protection Commission for the assistance in gathering data for this directed research. To Mr. Brian Mwanza and Ms. Ireen Nambule for their assistance and peer advice in the preparation of this directed research without which the task would have been much harder and to my mentor Mr. Peter Zulu who provided much needed support and guidance.

To my loving parents George and Diana Lipimile, for their constant encouragement and support throughout my studies. My grandmothers Doris Snapper and Inonge Sikota and to Ntwila, Poniso, Doris, Diana and Kwalela for being a constant source of inspiration, I love you. My good friends Fanwell, Mike, Chali and Felix. I also thank the Almighty God for His love and grace for enabling me to undertake this study up to its completion. To all the graduating class of 2012, I am grateful to them all for the help.

## **DEDICATION**

To my late grandparents, **Kwalela Lipimile** and **John Sam Snapper**, who have inspired me to carry on their legacy of hard work, perseverance, humility and patience.

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**LIST OF ABBREVIATIONS**

GRZ	Government of the Republic of Zambia
IBA	Independent Broadcasting Authority
ZICTA	Zambia Information and Communication Technologies Authority
CCPC	Competition and Consumer Protection Commission
TORs	Terms of Reference
UNZA	University of Zambia
OECD	Organisation for Economic Corporation and Development
WTO	World Trade Organisation
ZNBC	Zambia National Broadcasting Corporation
BBC	British Broadcasting Corporation
SABC	South African Broadcasting Corporation

## CHAPTER ONE

### INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.1 INTRODUCTION.

Democratic countries encourage and enforce competition in the media because a lack of competition in the media is widely considered to have a detrimental impact upon pluralism of views and opinions. In particular, lack of competition in the media market curtails the representation of a wide range of political and cultural societal views<sup>1</sup>. The Zambian Legislature enacted the Independent Broadcasting Authority (Amendment) Act<sup>2</sup> 2010 to amend provisions relating to licensing and matters connected with or incidental to licensing of broadcast institutions in the Independent Broadcasting Authority Act<sup>3</sup>. The primary purpose of the Independent Broadcasting Authority Act<sup>4</sup> is to provide for the control and regulation of broadcasting in Zambia and it empowers the Independent Broadcasting Authority to do so. The Independent Broadcasting Authority Act<sup>5</sup> mandates the Independent Broadcasting Authority ‘to promote a pluralistic and diverse broadcasting industry in Zambia’; the act<sup>6</sup> stipulates that in issuing licenses the Independent Broadcasting Authority has to give ‘due regard to the need to discourage monopolies in the industry in accordance with the Competition and Consumer Protection Act<sup>7</sup>’.

The development of regulations promoting fair competition in the broadcasting industry has often been left to the prevailing circumstances, political and economic dynamics. Therefore it is clear that there is an urgent need to formulate a broadcasting policy that would promote fair competition in

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1 Guy Berger. *Media Legislation in Africa A Comparative Legal Survey* (Grahamstown: Rhodes University Press, 2006), 15 - 17

2Act no. 26 of 2010

3Act no. 17 of 2002

4Act no. 17 of 2002

5Act no. 17 of 2002 Section 5(2) (a)

<sup>6</sup> Act no. 17 of 2002 Section 5(2) (b) (ii)

7Act no. 24 of 2010

the industry<sup>8</sup>. Media associations such as Media Institute of Southern Africa Zambia, Press Association of Zambia and also the Catholic Media Services have strongly campaigned for media pluralism in terms of diversity of both ownership and content formats<sup>9</sup>. The government, however, has not developed any structured policies to regulate or prevent unfair competition in the broadcast industry<sup>10</sup>. This is not in line with the Declaration of Principles on Freedom of Expression in Africa<sup>11</sup>, which provides that States should adopt effective measures to avoid undue concentration of media ownership, *although such measures should not be so stringent that they inhibit the development of the media sector as a whole.*

This Independent Broadcasting Authority Act is very important to media law in Zambia and as such, in view of the above, the following pieces of legislation will be also be reviewed and analyzed:

- a. The Constitution of Zambia<sup>12</sup>,
- b. Independent Broadcasting Authority Act<sup>13</sup>,
- c. Independent Broadcasting Authority (Amendment) Act<sup>14</sup>,
- d. Competition and Consumer Protection Act<sup>15</sup>.
- e. Information and Communication Technologies Act<sup>16</sup>
- f. Zambia National Broadcasting Corporation Act<sup>17</sup>

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<sup>8</sup> Musonda Mwape. "Independent Broadcasting Authority Act (2002) and the Zambia National Broadcasting Corporation (Amendment Act of 2002" (LLB dissertation, University of Zambia, Zambia,2003), 10

<sup>9</sup> Bright Phiri and Deanna Powers "Plurality and power relations in Zambian broadcasting" *Multimedia Publications* 6, no 3 (2006): 42 – 43

<sup>10</sup> Chris Chirwa, "Public Broadcasting in Africa: Zambia" *Open Society Foundation* 5, no 3 (2010): 41 – 52

<sup>11</sup> Declaration of Principles on Freedom of Expression in Africa (2002) Article 14(3)

<sup>12</sup> Chapter 1 of the Laws of Zambia

<sup>13</sup> Act no. 17 of 2002

<sup>14</sup> Act no. 26 of 2010

<sup>15</sup> Act no. 24 of 2010

<sup>16</sup> Act no. 15 of 2009

An analysis of the above pieces of legislation however revealed that there were still some gaps which need to be addressed if the Independent Broadcasting Authority (Amendment) Act<sup>18</sup> is to play its role in promoting fair competition in the broadcast industry and for the provisions of the Act to effectively discourage anti-competitive practices in the commercial broadcast industry. The aim of this study was to discuss if the Independent Broadcasting Authority (Amendment) Act<sup>19</sup> promotes competition in the broadcasting industry in Zambia. This study used two media institutions, Zambia National Broadcasting Corporation, a state owned broadcaster established under statute and Muvi TV a privately owned Television broadcaster as case studies to discuss whether the Independent Broadcasting Authority (Amendment) Act<sup>20</sup> promotes competition in the television broadcasting industry.

### **1.1.1 STATEMENT OF THE PROBLEM.**

There are growing concerns that there is no framework to promote fair competition in the television broadcasting industry in Zambia.

It has been observed that state-run media have neither been privatised nor granted editorial autonomy. They have continued in more or less the same vein they operated in under the one-party state<sup>21</sup>. It has further been asserted that ‘private efforts in broadcasting have been dismal there is virtually no private competitor in radio and television broadcasting in the country to the state-owned Zambia National Broadcasting Corporation<sup>22</sup>.

Using two broadcasters in the Country, Zambia National Broadcasting Corporation and Muvi TV as case studies, this paper therefore analysed and document the existing gaps and shortcomings in the

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<sup>17</sup> Chapter 154 of the Laws of Zambia

<sup>18</sup> Act no. 26 of 2010

<sup>19</sup> Act no. 26 of 2010

<sup>20</sup> Act no. 26 of 2010

<sup>21</sup> Innocent Phiri "Media in democratic Zambia: Problems and prospects." *Africa Today* 14, no 2 (1999): 52 - 53.

<sup>22</sup> Bright Phiri and Deanna Powers "Plurality and power relations in Zambian broadcasting" *Multimedia Publications* 6, no 3 (2006): 47 – 52

legislation relating to promoting fair competition in the television broadcast industry so as to provide the basis for advocating the enactment of a more modern and just legal framework that will address, in a more meaningful way, the contemporary concerns related to ensuring fair competition in the broadcast media. This paper also discussed whether the provisions of the Independent Broadcasting Authority (Amendment) Act<sup>23</sup> could play a role in promoting fair competition in the Television broadcast industry and whether the provisions of the Act were effectively discouraging anti-competitive and monopolistic practices in the television broadcasting industry.

## **1.2 HYPOTHESIS.**

The Independent Authority Act (Amendment) Act<sup>24</sup> does not promote fair competition in the television broadcasting industry in Zambia.

## **1.3 PURPOSE AND SIGNIFICANCE OF THE STUDY**

There are various media related legislation in Zambia which deals with the many aspects of the broadcast media. Despite having this legislation in Zambia, there is very little regulation regarding the promotion of fair competition in the television broadcast industry. . Most of these broadcast media – related legislations need to be reviewed so as to strengthen their legislative, regulatory and institutional framework.

It was therefore the aim of this study to highlight some of the weaknesses and discrepancies existing in these legislations and recommend some possible measures that can help in meeting in a more meaningful way, the contemporary challenges facing the promotion of fair competition in the television broadcasting industry.

This paper did not approach this question from the perspective of whether the Independent Authority Act (Amendment) Act<sup>25</sup> is relevant to the Zambian environment. The question of the

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<sup>23</sup> Act no. 26 of 2010

<sup>24</sup> Act no. 26 of 2010

efficacy of the Independent Authority Act (Amendment) Act<sup>26</sup> has been adequately researched and there is general consensus amongst scholars, both prior to and after the enactment of the Independent Broadcasting Authority act that the law on media regulation in Zambia needs further reform. There is further agreement that the Independent Authority Act (Amendment) Act<sup>27</sup> should provide for a coordinated approach to monitoring and enforcement of its provisions. The study looked at what effect the provisions of the Independent Broadcasting Authority (Amendment) Act<sup>28</sup> 2010 has had on the promotion of fair competition in the television broadcasting industry in Zambia. The research ultimately aimed to add to the body of knowledge in the area of media law in Zambia and to bring to the attention of policy makers areas in the new act which did not promote independent journalism and fair competition in the Television broadcasting industry.

The importance of the competitive effects of the Independent Broadcasting Authority act has not yet been researched on in Zambia. The significance of this study was to highlight some of the weaknesses and discrepancies existing in the Independent Authority Act (Amendment) Act<sup>29</sup> and recommend some possible measures that can help in meeting in a more meaningful way, the contemporary challenges facing the promotion of fair competition in the television broadcast industry.

#### **1.4 OBJECTIVES OF THE STUDY.**

The main objective of this research was to review and analyse selected broadcast media related legislation in Zambia using ZNBC and Muvi TV as case studies and to add to the body of knowledge of many previous researchers who have written on the subject with the view of

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<sup>25</sup> Act no. 26 of 2010

<sup>26</sup> Act no. 26 of 2010

<sup>27</sup> Act no. 26 of 2010

<sup>28</sup> Act no. 26 of 2010

<sup>29</sup> Act no. 26 of 2010



identifying the existing gaps and make recommendations for an effective review process. The specific objective included:

- a. The review of the selected pieces of the broadcast media-related legislation such as the Independent Broadcasting Authority Act<sup>30</sup>, Independent Broadcasting Authority (Amendment) Act 2010<sup>31</sup>, Competition and Consumer Protection Act<sup>32</sup> Information and Communication Technologies Act<sup>33</sup> and the Zambia National Broadcasting Corporation Act<sup>34</sup> and make recommendations for an effective review and reform process in relation to provisions that promote fair competition in the television broadcasting industry with ZNBC and Muvi TV being case studies.
- b. To analyze the existing gaps in the selected pieces of legislation and recommend for their harmonization and consistency with relevant international standards or instruments.
- c. To highlight problems faced in the implementation of measures put in place to ensure the promotion of fair competition in the broadcast industry.
- d. To compile a final obligatory Essay report and submit it to the School for Examination in partial fulfillment for the award of a Bachelor of Laws Degree (LL.B).

## 1.5 RESEARCH METHODS AND ANALYSIS

The potential benefits of a competitive market environment for stimulating economic efficiency, innovation, greater productivity and economic growth are now widely recognised. This is because greater competition sharpens incentives to cut costs, to innovate, and to improve productivity<sup>35</sup>.

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<sup>30</sup> Act no. 17 of 2002

<sup>31</sup> Act no. 26 of 2010

<sup>32</sup> Act no. 24 of 2010

<sup>33</sup> Act no. 15 of 2009

<sup>34</sup> Chapter 154 of the Laws of Zambia

<sup>35</sup> World Trade Organisation. *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy* (Geneva: World Trade Organisation, 2003), 66

### **1.5.1 METHODOLOGY AND SYNOPSIS OF RESEARCH**

This research will address the following research questions:

1. Whether the Independent Broadcasting Authority Act (Amendment) Act<sup>36</sup> promotes fair competition in the television broadcasting industry?
2. Whether the Independent Broadcasting Authority Act (Amendment) Act<sup>37</sup> can effectively discourage anti-competitive and monopolistic practices in the television broadcasting industry?

This research will be mainly done by review of published and unpublished work, interviews will be conducted and questionnaires will be sent to specific institutions dealing with specific topics under review, to institutions such as ZNBC, Muvi TV and the Competition and Consumer Protection Commission. Case law as well as other relevant pieces of legislation will be consulted. Three questionnaires will be sent to individuals in each of the institutions; including the Company Secretary or legal counsel and to the directors of programmes and public relations.

Thus primary research will be undertaken, involving data collection, consultation and analysis, with a view to providing stronger evidence on the impact that the Independent Broadcasting Authority (Amendment) Act has on competition and related policies in the television broadcasting industry.

### **1.5.2 THE QUALITATIVE RESEARCH TRADITION**

This study is primarily carried out within the qualitative research tradition. This tradition of conducting research is known for its substantial attention to detail in the research process, which makes it suitable for this study, as there is a wide range of documents to be analysed. The qualitative approach is appropriate in this study as it goes beyond pure descriptions and provides

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<sup>36</sup> Act no. 26 of 2010

<sup>37</sup> Act no. 26 of 2010

room to new analyses and insights<sup>38</sup>. In this study, the techniques of reading and mining of documents are central in understanding the origins and process of competition policies in the television broadcasting industry<sup>39</sup>.

## 1.6 THE CASE STUDY

This study will employ a case study method because of it is useful in attending to documentary evidence as it is a study of a bound system that emphasizes the unity and wholeness of that system by confining attention to only those aspects that are relevant to the research problem<sup>40</sup>.

The case study method usually takes place within five distinct stages namely design, pilot study, data collection, data analysis, and report writing. The case study method is also considered useful for this study as it generates new perspectives, new meanings and fresh insights, which can be used in improving future policy processes. This is because case studies are considered as a step into action. Their insights may be directly interpreted and put to use in democratising the decision-making process<sup>41</sup>.

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<sup>38</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 16

<sup>39</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 18

<sup>40</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 45

<sup>41</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 49

## 1.7 DOCUMENT ANALYSIS

Documents are considered an important source of information since they are most likely to reflect an authentic situation that occurred at some stage in the past<sup>42</sup>. The documents to be analysed in this data are widely available to the public as they can be easily obtained from the websites of different organizations. The study focused on whether the Independent Broadcasting Authority (Amendment) Act<sup>43</sup> promotes fair competition in the television broadcasting industry in Zambia and compares two Television Broadcasting Corporations as case studies, ZNBC and Muvi TV. In each case focusing on:

1. How the amended act affects the degree of competition observed in the television broadcasting industry.
2. The necessity of competition in the television broadcasting industry.

A detailed questionnaire with data required and factors to consider was drawn up to guide the research, and ensure that a common approach was used in all cases. Further information was obtained from:

1. Existing in-country data and information sources including national statistics, trade data, media reports, market research sources etc.
2. Interviews / meetings with the relevant government ministries, regulators, competition authorities, market players, commentators, academics, consumer groups etc.
3. Other available indicators and documents such as Investment Climate Assessments, Doing Business Indicators etc.

As much relevant data as possible was obtained to inform the analysis, although data availability was difficult to obtain. Much of the information underpinning the analysis was thus obtained

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<sup>42</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 450

<sup>43</sup> Act no. 26 of 2010

through interviews with stakeholders in the television broadcasting industry and review of available documents.

## **1.8 ANALYSIS OF THE RESPONSES FROM QUESTIONNAIRES**

The questionnaire was sent to Managers or senior staff involved in the legal and compliance departments and in different capacities in the following organisations:

- i) Competition and Consumer Protection Commission
- ii) Zambia National Broadcasting Corporation
- iii) Muvi Television.

Most participants requested anonymity as a key condition for participation in the survey. Few responses were obtained from the questionnaires as a result follow up interviews were done and the responses recorded. However a common theme could be obtained from the responses obtained.

In reading the answers, one should be aware of some important factors. For instance it was evident from the responses and inquiries carried out that in practice the Zambian government is the biggest proprietor of media in the country. It owns the ZNBC radio and television stations. Through ZNBC, it holds a 49 per cent share in the private subscription TV service MultiChoice Zambia<sup>44</sup>.

It was noted from the questionnaires that the perceptions on the responsibilities of the regulatory bodies vary from company to company as well as between the regulators and the stakeholders. Some answers relating to the monitoring of the industry to ensure fair competition by competition authorities based on the competition framework currently in force, seemed to indicate that very little or no monitoring is being carried out by stakeholders or the competition authorities.

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<sup>44</sup> Chris Chirwa, "Public Broadcasting in Africa: Zambia" *Open Society Foundation* 5, no 3 (2010): 52

A number of other observations were made from the questionnaires. It was noted that even though the Independent Broadcasting Authority Act<sup>45</sup> refers to competition. This aspect has not been widely discussed in the media with participants from the industry stating that they are not aware of any specific legislation promoting fair competition in the Television broadcasting Industry. It was proposed by some participants that recommendations be made to the Competition and Consumer Protection Commission to carry out a sensitization campaign among stakeholders to inform them on the competitive practices that they are forbidden from carrying out under the Act.

Some participants noted that the current wording of the Independent Broadcasting Authority (Amendment) Act<sup>46</sup> has been interpreted by some to give the Independent Broadcasting Authority unfettered discretion in the granting or withdrawal of licenses without referring to potential impact on competition in the industry. It is proposed that certain clauses that may create uncertainty be deleted or amended to remove the uncertainty.

It was also noted by some participants that Independent Broadcasting Authority (Amendment) Act<sup>47</sup> currently does not explicitly mention anti competitive practices as being one of the reasons for the withdrawal of licenses. It is recommended that this requirement be explicitly mentioned in the act to ensure fair competition is promoted in the Television Broadcasting Industry.

Furthermore some participants in the survey highlighted the fact that the current Independent Broadcasting Authority (Amendment) act<sup>48</sup> does not address issues relating to cross media ownership which could lead to media concentration and a lack of competition in the media. It is

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<sup>45</sup> Act no. 17 of 2002

<sup>46</sup> Section 6 of Act no. 26 of 2010

<sup>47</sup> Act no. 26 of 2010

<sup>48</sup> Act no. 26 of 2010

recommended that regulators follow the lead being followed in Western Countries and establish mechanisms to limit or eliminate all together cross media ownership.

Participants have expressed a concern that there is no clarity on the Independent Broadcasting Authority (Amendment) Act<sup>49</sup> regarding who potential applicants should approach regarding a possible violation or anti competitive practice as it would seem that both the Independent Broadcasting Authority (Amendment) Act<sup>50</sup> and the Competition and Consumer Protection Act<sup>51</sup> do not clarify who the first point of contact should be in any dispute relating to an anti competitive practice. It was also noted by many participants that in formulating the Independent Broadcasting Authority (Amendment) Act<sup>52</sup> consultations were not adequately carried out with key stakeholders regarding the formulation of competition regulations for the television broadcasting industry.

There were a few cases where a “yes” or a “no” was not clearly indicated. In some cases it has been easy to deduce the meaning of the missing answers; in other cases it has been difficult. In the latter cases no answer has been indicated or recorded.

## 1.9 CONCLUSION

This chapter gave an overview of the research methodology and analysed the responses from questionnaires, the following chapter will be a review of the legal theoretical framework for competition policy in the television broadcasting industry.

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<sup>49</sup> Act no. 26 of 2010

<sup>50</sup> Act no. 26 of 2010

<sup>51</sup> Act no. 24 of 2010

<sup>52</sup> Act no. 26 of 2010

## **CHAPTER TWO**

### **REVIEW OF THE LEGAL THEORETICAL FRAMEWORK FOR COMPETITION POLICY IN THE TELEVISION BROADCASTING INDUSTRY**

#### **2.1 INTRODUCTION**

The subject of the analysis of the law relating to competition in the broadcasting industry is one which has exercised the minds of some scholars however few studies have been done on policies that promote fair competition in the television broadcasting industry in Zambia. The review of the literature underpinning the theory of regulating competition in the television broadcasting industry and the theoretical framework which informs the study of competition policy in regards to the television broadcasting industry indicates that there is a lack of consensus among scholars and policymakers in defining what policies to pursue to promote competition in the television broadcasting industry.

In looking at the core competition policies that are been pursued in the television broadcasting industry it has been noted that different markets have taken widely divergent paths. Also it has been noted that in many instances, policy has been defined or implemented differently in the various markets. Furthermore the basic elements in promoting competition in the television broadcasting industry have been subject to these different policies.



## 2.2 PURPOSES AND FUNCTIONS OF POLICY REGULATING COMPETITION IN THE TELEVISION BROADCASTING INDUSTRY

There is a wide range of possible purposes and functions of competition policy in the television broadcasting industry. First, policy could be formulated in order to reward a certain group in society. Second, there are unforeseeable issues that arise in societies and in some cases such issues lead to conflicts. There is a need for the creation of policies that would handle these unavoidable necessities<sup>53</sup>. Such conflicts may arise when issues of market dominance arise in looking at the television broadcasting industry. Third, a possible purpose and function of policy is the creation of stability within the media industry<sup>54</sup>.

A number of scholars have discussed the basis for creating a policy to regulate competition in the media in Zambia. Pumulo<sup>55</sup> evaluated the effectiveness of the legislation that regulates competition in Zambia. The paper focused on the state of competition law in Zambia. The paper noted a number of deficiencies in the legislation that hampered the effectiveness of the competition regime in Zambia. Kajoka<sup>56</sup> observed that the current legislation namely the Independent Broadcasting Authority Act<sup>57</sup> and the ZNBC Amendment Act<sup>58</sup> failed to transform ZNBC into a truly public broadcaster and the current legislation failed to allow private media the opportunity to challenge ZNBC's dominant position in the market and concluded that the enacting of the Independent Broadcasting Authority Act<sup>59</sup> and the ZNBC Amendment Act<sup>60</sup> of 2002 did not guarantee the

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<sup>53</sup> Thomas Meenaghan and Keith Kilty. *Policy Analysis and Research Technology; Political and Ethical Considerations*. (London: Lyceum Press, 1994), 74

<sup>54</sup> Christopher Reed, "Regulating Relationships between Competing Broadcasters." *Kluwer Law International* 4, no 3 (2010):93

<sup>55</sup> Akapelwa Pumulo. "Anti-Competitive Law in Zambia, Its relevance and applicability". (LLB dissertation, University of Zambia, Zambia, 2000)

<sup>56</sup> Richard Kajoka "Media Law Reforms: The quest to transform the Zambia National Broadcasting Corporation from State Owned and Controlled Media to Public Broadcaster". (LLB dissertation, University of Zambia, Zambia, 2002)

<sup>57</sup> Act no. 17 of 2002

<sup>58</sup> Act no. 20 of 2002

<sup>59</sup> Act no. 17 of 2002

<sup>60</sup> Act no. 20 of 2002

participation of citizens in the democratic process as the their was insufficient diversity and plurality in the media despite the enactment of these laws.

### **2.3 MEDIA COMPETITION POLICY DEVELOPMENT PERSPECTIVE**

Competition policies are considered in the media policy development process as they directly impact on the media's structure and activities. In the case of Zambia, the national public service broadcaster, the ZNBC is largely funded through advertising with additional revenue from television licenses and government grants. There is need, therefore, to ensure that the power of dominant business entities in influencing the outcome of policy is eliminated and instead adopt a functionalist approach that would underscore the need to serve all.

There is little consensus on what constitute the best approaches to media competition policy development since guidelines are generally fragmented, ineffective and differ from one country to another. A number of scholars discussed the different ways in which the policies to regulate the broadcasting industry have been developed. Mwape<sup>61</sup> examined parliament's intention in implementing the Independent Broadcasting Authority Act<sup>62</sup> and the ZNBC Amendment Act<sup>63</sup> of 2002 and discussed whether the acts enhanced the freedom of expression in the media. It was pointed out that though the acts were passed, the intention of parliament to control and regulate the broadcasting industry has not been fully achieved. The author concluded that there was need for review of media law constantly, in order to ensure the adequate and democratic regulation of the media. Lesa<sup>64</sup> examined the policy underpinning the TV licensing requirements in the context of the

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<sup>61</sup> Musonda Mwape. "Independent Broadcasting Authority Act (2002) and the Zambia National Broadcasting Corporation (Amendment Act of 2002" (LLB dissertation, University of Zambia, Zambia,2003)

<sup>62</sup> Act no. 17 of 2002

<sup>63</sup> Act no. 20 of 2002

<sup>64</sup> Given Lesa "TV Licencing Law: Rationale and a Comparative Study". (LLB dissertation, University of Zambia, Zambia,2008)

Zambia National Broadcasting Corporation (Amendment Act of 2002)<sup>65</sup>. The author observed that the license requirements allow the state broadcaster a source of funds that isn't available to other broadcasters in the market. The author carried out a review of the Zambia National Broadcasting Corporation (Amendment) Act of 2002<sup>66</sup>. He came to the conclusion that though the act allowed the state broadcaster a source of funds, it has not done enough in practice in turning the state broadcaster into an independent and impartial public broadcaster.

## 2.4 POLICY IMPLEMENTATION, ITS SUCCESSES AND LIMITATIONS

The success of implementation depends on the attempts made to integrate it with policy objectives. One can argue that failure to implement policy might occur because an inappropriate implementation strategy was chosen, or that within an appropriate strategy an inappropriate implementation agency was selected<sup>67</sup>.

Hope and Maeleng<sup>68</sup>. in their text book “Competition and Trade Policies” focus on the continuing debate on whether to develop sector specific competition rules in the broadcasting and telecommunications industry. They addressed some of the problems that may arise as a result of a regulatory approach to promoting fair competition in the media. Robertson and Nichol<sup>69</sup>, in their text book Media Law, discussed the issues of promoting fair competition in the broadcasting industry. They detailed the prevailing laws currently in force in the United Kingdom and the European Union in trying to evaluating the development of present day policies and legislation that regulate competition in the broadcasting industry. Motta<sup>70</sup>. In his text book “Competition Policy”

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<sup>65</sup> Act no. 20 of 2002

<sup>66</sup> Act no. 20 of 2002

<sup>67</sup> International Telecommunication Union. *Competition Policy in Telecommunications* (Geneva: International Telecommunication Union, 2002), 21

<sup>68</sup> Einar Hope and Per Maeleng. *Competition and Trade Policies*. (London: Routledge Press, 1998)

<sup>69</sup> Geoffrey Robertson and Andrew Nichol. *Media Law*. (London: Penguin Publishing, 2000)

<sup>70</sup> Massimo Motta *Competition Policy*. (Cambridge: Cambridge University Press, 2004)

focused on principles surrounding Competition policy and attempted to define the subject of competition policy and then considers why such a study would be relevant. He further addresses how the law is used as an instrument to ensure fair competition and the mechanisms and forms this takes.

## 2.5 TOWARDS A WORKING DEFINITION OF POLICY

Policy may mean a plan or course of action, as of government, political party, business, or any other organisation, intended to influence and determine decisions, actions and other matters. Policy can as well be defined as “a public statement to the effect that something ‘ought to’ occur, and if it does, that it can be rational and instrumental in addressing some condition(s) in a society<sup>71</sup>”. Wood <sup>72</sup> looked at the interplay between regulation and competition in the media sector. The author concluded that most media regulations are too undeveloped to be considered as an alternative for or replacement to the application of the competition rules. The report also highlighted the fact that though recent examples suggest that there can be a role for the parallel application of both competition and regulation enforcement, it remains far from certain that a combination of regulation and competition enforcement will lead to the best market outcome. The Stream Secretariat <sup>73</sup> report highlighted the need for a critical review and overhaul of the legal and policy environment in which the media operates across Africa. The report noted that a strong media and communication environment are critical to a developed and prosperous Africa. The report among its many recommendations put forth the recommendation for the need to promote legislation that mitigate the negative impacts of media concentration, promotes fair competition and ensure diversity.

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<sup>71</sup> Thomas Meenaghan and Keith Kilty. *Policy Analysis and Research Technology; Political and Ethical Considerations*. (London: Lyceum Press, 1994), 61

<sup>72</sup> David Wood, "Regulation and competition in the media sector" *Competition Law Insight*. 11, no 15 (2005): 34-36

<sup>73</sup> "STREAM Secretariat Draft " waccglobal, Last modified October 5th 2011, <http://www.waccglobal.org/intl/draft>

Phiri and Powers<sup>74</sup> discussed the concept of pluralism in Zambian broadcasting and structured their discussion around the key elements of the definition of pluralism laid out in the Windhoek Declaration<sup>75</sup>. Essentially, these elements are the end of monopolies, a diversity of channels and a diversity of opinions. In relation to television and radio, the authors critically examined each of these points and demonstrated that Zambian broadcasting policies and operating principles fall short of achieving conditions for pluralism and thus fail in contributing to the democratic ambitions of the country. Berger<sup>76</sup> discussed the factors impacting on the development of the media sector of a society, highlighting the importance of the reigning legal regime in any country as being probably the most significant. The report discussed the fact that while state-owned media assets, especially in broadcasting, still predominate in many countries — and usually under political control, the motors of growth and pluralism are usually to be found located outside them.

Bibby<sup>77</sup> highlighted some of the challenges of a lack of an effective competition policy in the broadcast media which has a detrimental effect upon democracy, which vitally depends on diversity of opinion. The author highlighted the fact that a concentrated media market might not only have a disadvantageous impact upon pluralism and allow media owners a heightened influence on public Chirwa<sup>78</sup> gave an overview of the state of regulation, ownership, access, performance as well as prospects for public service broadcasting reform in Zambia.. The report made reference to the agreements, conventions, charters and declarations regarding media that have been developed at regional levels in Africa.

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<sup>74</sup> Bright Phiri and Deanna Powers "Plurality and power relations in Zambian broadcasting" *Multimedia Publications* 6, no 3 (2006):17-48

<sup>75</sup> Windhoek Declaration (1991)

<sup>76</sup> Guy Berger. *Media Legislation in Africa A Comparative Legal Survey* (Grahamstown: Rhodes University Press, 2006), 15 - 17

<sup>77</sup> Andrew Bibby. *Global Concentration in the Media*. (London: Union Network International, 2010), 67

<sup>78</sup> Chris Chirwa, "Public Broadcasting in Africa: Zambia" *Open Society Foundation* 5, no 3 (2010): 11 – 52

## **2.6 CONCLUSION**

This chapter has outlined that competition policy is the combined effect of all government policies that influence the level of competition in markets. It has been noted that many factors influence the level of competition, and a holistic approach is needed to assess the necessary policy for regulating competition in the television broadcasting industry. Barriers to competition stemming from inappropriate government policies or anti-competitive behaviour by firms diminish opportunities for innovation and growth, and make consumers worse off. The proceeding chapter will now assess the competition law enforcement regime in the television broadcasting industry.

## **CHAPTER THREE**

### **THE COMPETITION LAW ENFORCEMENT REGIME IN THE TELEVISION BROADCASTING INDUSTRY**

#### **3.1 INTRODUCTION.**

The laws and regulations applied in competition policy in the television broadcasting industry broadly take two forms: broadcasting regulation and competition law. With liberalisation and the introduction of competition, regulatory oversight has not disappeared. Liberalisation is about market opening which is an essential element to stimulating competition and market growth but that alone is not enough<sup>79</sup>. There is therefore need for effective regulation for factors that lead to anti competitive practices. This could be through economic regulations or competition based measures that curb anti competitive practices<sup>80</sup>.

#### **3.2 FUNCTIONS OF THE INDEPENDENT BROADCASTING AUTHORITY ACT**

The Independent Broadcasting Authority Act<sup>81</sup> establishes the Independent Broadcasting Authority (IBA). According to the Act the relevant competition regulatory functions of the Independent Broadcasting Authority are:

- a) To promote a pluralistic and diverse broadcasting industry in Zambia;
- b) To establish guidelines for the development of broadcasting in Zambia through a public process which shall determine the needs of citizens and social groups in regard to broadcasting .

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<sup>79</sup> Christopher Reed, "Regulating Relationships between Competing Broadcasters." *Kluwer Law International* 4, no 3 (2010):34

<sup>80</sup> Rachel Alemu, "Regulation of Competition in the Liberalised Telecommunications Sector in Sub- Saharan Africa: Uganda's Experience." *Africa Telecommunications Journal* (March 2011): 45 accessed March 21, 2012, <http://africa.ifj.org/assets/docs/093/156/f1f715d-008e69c.doc>

<sup>81</sup> Act no. 17 of 2002

- ii. For the issuing of licenses, giving due regard to the need to discourage monopolies in the industry in accordance with the Competition and Consumer Protection Act<sup>82</sup>
- iii. On the required levels of local content and other issues that are relevant for a pluralistic and diverse broadcasting industry;
- c) To safeguard the rational and efficient use of the frequencies allocated to broadcasters by developing a frequency plan for broadcasting, which shall be a public document, in compliance with international conventions;

### **3.2.1 THE ENFORCEMENT INSTITUTIONAL STRUCTURE**

The existence of a competition law and authority is only part of the overall policy and institutional environment which determines competition in a country, and other policies, such as state ownership, trade barriers, or regulation, can have a much bigger impact on market outcomes<sup>83</sup>.

Developing a culture of competition is an important first step in raising government awareness of the impact of policies on competition, of raising business awareness of what is and is not acceptable competitive behavior, and in helping to underpin the mobilisation of consumer groups who can take action and apply pressure to government in favour of pro-competition reforms<sup>84</sup>.

In 1994, Zambia adopted the Competition and Fair Trading Act, and Zambia's Competition Commission (ZCC) was created in 1997. In 2010 the act was amended to the Competition and Consumer Protection Act<sup>85</sup> and the Zambia Competition Commission was renamed the Competition and Consumer Protection Commission. The Competition and Consumer Protection Commission has

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<sup>82</sup> Act no. 24 of 2010

<sup>83</sup> Karen Ellis & Rohit Singh, eds, *Assessing the Economic Impact of Competition* (London: Overseas Development Institute, 2010), 11

<sup>84</sup> Karen Ellis & Rohit Singh, eds, *Assessing the Economic Impact of Competition* (London: Overseas Development Institute, 2010), 12

<sup>85</sup> Act no. 24 of 2010



the power to investigate anticompetitive behavior, request information and carry out market studies. It can start an investigation following a complaint or on its own initiative. Many interviewed stakeholders stated that the Competition and Consumer Protection Commission had an important role to play and were generally supportive of it.

However, most stakeholders perceived the commission as not being proactive in promoting competition policies in the Television Broadcasting Industry. Despite having substantial powers of investigating and imposing fines, it would appear that in practice the Competition and Consumer Protection Commission rarely uses these statutory powers, which may contribute to this perception.

### **3.3 REGULATORY APPROACHES IN THE ZAMBIAN BROADCASTING INDUSTRY**

In Zambia, the approach to regulate broadcasting has been to establish a regulatory framework providing for an independent regulator and a competition authority whose role extends to administering fair competition in the sector<sup>86</sup>. Therefore the regulatory framework has tended to incorporate provisions aimed at promoting competition and controlling market power in the broadcasting industry.

Three main types of anti competition rules that can be identified. That is<sup>87</sup>,

- i. Rules that prevent the conclusion of anti competitive agreements between broadcasters;
- ii. Rules which deal with firms in a dominant position with the objective of preventing those firms from abusing their position vis a vis end- users or other broadcasters
- iii. Rules which prohibit mergers which substantially lessen competition.

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<sup>86</sup> Karen Ellis & Rohit Singh, eds, *Assessing the Economic Impact of Competition* (London: Overseas Development Institute, 2010).26

<sup>87</sup> Rachel Alemu, "Regulation of Competition in the Liberalised Telecommunications Sector in Sub- Saharan Africa: Uganda's Experience." *Africa Telecommunications Journal* (March 2011): 45 accessed March 21, 2012, <http://africa.ifj.org/assets/docs/093/156/f1f715d-008e69c.doc>

While these rules are able to cover a variety of anti competition problems within the broadcasting industry, they have limits that limit their ability to play a role as the sole driving force behind a country's broadcasting policy. This is because of the two special characteristics of the broadcasting industry in Zambia firstly, the existence of an entrenched state owned Public Broadcaster with a very high market share and secondly, the barriers to market entry to build a national broadcaster are very high. These unique factors display the weaknesses of generic competition law. These are:

- i. An abuse can only be committed by an undertaking which is dominant in a relevant market. Normally only one undertaking is dominant in any market.
- ii. An abuse is 'nasty' economic behaviour- acts designed or likely to drive a competitor out of market or seriously weaken it. Not all behaviour that weakens competition is abusive
- iii. The concept of 'abuse of dominant position' is not enough where, as a matter of policy, you wish to deliberately stimulate competition, and encourage new entrants to the market.

Accordingly it would appear that special competition rules for the television broadcasting industry are important in addition to generic competition rules<sup>88</sup>.

### **3.4 ANALYSIS OF THE COMPETITION RELATED ASPECTS OF THE ACT**

This approach that pursued by the government is to introduce a generic competition law that applies to all sectors of the economy. This process was not without drawbacks. First, the competition clause in the license provisions were as per the Independent Broadcasting Authority Act<sup>89</sup> for the issuing of licenses, giving due regard to the need to discourage monopolies in the industry in accordance

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<sup>88</sup> Rachel Alemu, "Regulation of Competition in the Liberalised Telecommunications Sector in Sub-Saharan Africa: Uganda's Experience." *Africa Telecommunications Journal* (March 2011): 57 accessed March 21, 2012, <http://africa.ifj.org/assets/docs/093/156/f1f715d-008e69c.doc>

<sup>89</sup> Act no. 17 of 2002 Section 6

with the Competition and Consumer Protection Act<sup>90</sup>, this ambiguous statement did not clarify who the final body to determine who decides disputes relating to competition and left matters to be decided depending on the negotiation between the government and the operator. This is obviously undesirable as it would lead to disparate competition law enforcement against different operators.

It has also been opined that public enforcement of the license conditions is hampered by the fact that the act does not address the issue of non terrestrial broadcasters<sup>91</sup>. Therefore, if members of the public were aggrieved by an allegedly anti-competitive practice by a non-terrestrial broadcaster, it would be difficult for them to seek redress under Independent Broadcasting Authority (Amendment) Act<sup>92</sup>. In fact, strictly speaking, the license is a contract between the government and the licensee and it is not clear that a member of the general public has standing to enforce provisions in that contract<sup>93</sup>.

Furthermore the Independent Broadcasting Authority's failure to take into account the need to encourage competition in the television broadcasting industry is highlighted in the Independent Broadcasting Authority (Amendment) Act<sup>94</sup> which outlines eleven reasons why the broadcasting license can be suspended or cancelled – including 'in the interest of public safety, security, peace, welfare or good order' and where 'the Board considers it appropriate in the circumstances of the case to do so', the act does not explicitly give anti competitive practices as one of the causes for the withdrawal of a license.

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<sup>90</sup> Act no. 24 of 2010

<sup>91</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 319

<sup>92</sup> Act no. 26 of 2010

<sup>93</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 321

<sup>94</sup> Act no. 26 of 2010 Section 29

**3.4.1 THE RELEVANT STATUTORY PROVISIONS OF THE INDEPENDENT BROADCASTING AUTHORITY (AMENDMENT) ACT**

The next major step in the development of competition law in the sector took place in 2010, when the Independent Broadcasting Authority (Amendment) Act<sup>95</sup> was enacted. The amendment act addressed some competition-related concerns however certain aspects of the Competition and Consumer Protection Act<sup>96</sup> may have the potential to cause problems when applied with the Independent Broadcasting Authority (Amendment) Act<sup>97</sup>. For instance, the Competition and Consumer Protection Act<sup>98</sup>, under the section titled “Prohibition of anti-competitive practice, agreement or decision”, is concerned with concerted practices and restrictive agreements. The Competition and Consumer Protection Act<sup>99</sup> lists examples of prohibited practices in sections 9 to 15. However, the Independent Broadcasting Authority (Amendment) Act<sup>100</sup> allows the board to issue a broadcasting license subject to the provisions of the act and to such conditions as the board may determine. The Independent Broadcasting Authority (Amendment) Act<sup>101</sup> does not spell out the conditions or prohibited practices that must be considered before a licence is issued. the Independent Broadcasting Authority (Amendment) Act<sup>102</sup> implies that the board is simply allowed to grant exemptions ‘such conditions as the board may determine’. This open-ended language reflects the government’s desire to retain considerable discretion for the Board of the Independent Broadcasting Authority. This may lead to some interpretive difficulties for the Independent Broadcasting Authority in subsequent enforcement and may cause the Independent Broadcasting Authority board to arrive at some flawed results. This due to the non- sectoral nature of the

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<sup>95</sup> Act no. 26 of 2010  
<sup>96</sup> Act no. 24 of 2010  
<sup>97</sup> Act no. 26 of 2010  
<sup>98</sup> Act no. 24 of 2010 Section 8 of  
<sup>99</sup> Act no. 24 of 2010  
<sup>100</sup> Act no. 26 of 2010 Section 22 of  
<sup>101</sup> Act no. 26 of 2010  
<sup>102</sup> Act no. 26 of 2010 Section 22 of

provisions in the Competition and Consumer Protection Act<sup>103</sup>, it is inevitable that some provisions will not apply to the television broadcasting industry. If the Independent Broadcasting Authority (Amendment) Act<sup>104</sup> had drafted sections 8 and 16 of the Competition and Consumer Protection Act<sup>105</sup> into its provisions to apply to the television broadcasting market, much of the Independent Broadcasting Authority's difficulty would have been avoided.

Also, the Competition and Consumer Protection Act<sup>106</sup> states that 'An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general'. The Competition and Consumer Protection Act<sup>107</sup> defines "dominant position" to mean a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors<sup>108</sup>. To condemn a conduct as an abuse of dominance solely based on its purpose is inconsistent with the jurisprudence of both the United States and the EU and would practically result in a "per se" approach in some abuse of dominance cases<sup>109</sup>. Competition and Consumer Protection Act<sup>110</sup> defines the term "per se" in relation to a prohibited practice, as meaning a practice which is prohibited in all circumstances so that it is not necessary for the Commission to demonstrate that it has anticompetitive effects. This approach has been rejected by such prominent experts as Professor Richard Whish as inappropriate. Given the difficulty in

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<sup>103</sup> Act no. 24 of 2010

<sup>104</sup> Act no. 26 of 2010

<sup>105</sup> Act no. 24 of 2010

<sup>106</sup> Act no. 24 of 2010 Section 16(1)

<sup>107</sup> Act no. 24 of 2010

<sup>108</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 326

<sup>109</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 327

<sup>110</sup> Act no. 24 of 2010

distinguishing between legitimate competitive conduct and proscribed abuses by a dominant firm, a per se rule for abuse of dominance would result in over-deterrence and discourage dominant firms from competing vigorously<sup>111</sup>. In this respect, the failure by the Independent Broadcasting Authority (Amendment) Act<sup>112</sup> to define what would constitute abuse of dominant position in the Television Broadcasting Authority would pose further difficulties of interpretation when such matters arise.

It is noteworthy that the Independent Broadcasting Authority (Amendment) Act<sup>113</sup> does not address issues relating to intellectual property in the television broadcasting industry. This is important as the Competition and Consumer Protection Act<sup>114</sup> states that this Act shall not apply to an agreement or conduct insofar as it relates to intellectual property rights including the protection, licensing or assignment of rights under, or existing by virtue of, a law relating to copyright, design rights, patents or trademarks; This omission means that the intellectual property rights of a dominant licensee have not been clarified. Hence in the situation that copyrighted materials that have been deemed to be essential to competition, the act does not clarify if such material will be susceptible to compulsory licensing when they are in the possession of a non-dominant licensee. The case of *MCI v. AT&T*<sup>115</sup> illustrates this point when the court held that a monopolist's refusal to deal under these circumstances is governed by the so called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another and from one

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<sup>111</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 333

<sup>112</sup> Act no. 26 of 2010

<sup>113</sup> Act no. 26 of 2010

<sup>114</sup> Act no. 24 of 2010 Section 3 (3)

<sup>115</sup> 7 FCC Rcd.807 (1992)

market to another. Thus, the anti-trust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms<sup>116</sup>.

### 3.4.2 THE ROLE OF REGULATORY INSTITUTIONS

The changes in the economy gave rise to changes in the structure of the regulatory institutions governing the broadcasting sector. In many countries the broadcasting industry has been subject to separate regulatory regimes from other sectors of the economy, with distinct rules administered by separate regulators<sup>117</sup>. This might be labeled as a “vertical” structure of regulation, to contrast it with an alternative “functional” or “horizontal” structure of regulation under which one or more regulators have responsibility for specific functions across the broadcasting industry as illustrated in Table 2.

Aspects of the “vertical” approach to regulatory institutions can be found in the Zambia, as illustrated in the Table 1. The primary disadvantages of such an approach are that there is an increased the risk of conflicting or inconsistent regulatory demands. Furthermore, new firms may emerge which fall outside the scope of each regulator’s responsibilities. In brief, the vertical approach to regulation gives rise to the risk of both overlaps and gaps in the regulatory responsibility for the television broadcasting industry<sup>118</sup>.

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116 Christopher Reed, "Regulating Relationships between Competing Broadcasters." *Kluwer Law International* 4, no 3 (2010):44

117 International Telecommunication Union. *Competition Policy in Telecommunications* (Geneva: International Telecommunication Union, 2002), 21

118 Organisation for Economic Cooperation and Development. *Regulation and Competition Issues in Broadcasting in the light of Convergence* (Geneva: OECD, 1998), 125.

**Table 1: The Current Structure of Regulatory Institutions in the Television Broadcasting Industry in Zambia**

Type of Regulation	Regulator
Economic Regulation:	ZICTA, CCPC
Content Regulation:	IBA
Competition Regulation:	CCPC

**Table 2: Alternative Regulatory Structures**

“Vertical” Approach To Regulation	“Horizontal” Approach to Regulation	
Economic Regulator (CCPC)	Economic Regulator	Broadcasting Licensing  Control of prices; lines of business; regulation of access
Broadcasting Licensing  Control of prices; lines of business; regulation of access	Spectrum Manager	Allocation of spectrum
Allocation of Spectrum	Competition Regulator	Control of anticompetitive behaviour
Control of anticompetitive Behavior  Control of content; public service requirements	Content Regulator	Control of content; public service requirements



### **3.4.3 REVIEW OF THE ROLE OF THE INDEPENDENT BROADCASTING AUTHORITY IN PROMOTING COMPETITION IN THE TELEVISION BROADCASTING AUTHORITY**

Zambia has followed a “Vertical” approach in regulating competition in the television broadcasting industry which entails the involvement of a single regulator that governs different aspects of the television broadcasting industry. However, it can be argued that this approach has weakened the effectiveness of the Independent Broadcasting Authority (Amendment) Act<sup>119</sup> in promoting fair competition in the television broadcasting industry. This is due to the various factors that this vertical approach will fail to consider.

For instance; increasing interaction between the Independent Broadcasting Authority and the Competition and Consumer Protection Commission can cause conflict, confusion or inconsistency if the statutory duties of each are not clearly defined and rationally distributed in regards to the regulation of the television broadcasting industry. The duties of the Independent Broadcasting Authority and the Competition and Consumer Protection Commission regulators were drawn up for a range of service definitions. This risks, over time, failing to match the nature or range of services which are available, and assumes a conjunction of particular services with specific platforms which may not apply in the future. A firm operating in the television broadcasting industry potentially faces scrutiny by several different regulators, operating under specific regulatory functions. While this is not always reasonable, when coupled with an overlap of responsibilities, firms face regulatory double jeopardy, with the possibility of different decisions from different regulators and the threat of regulatory forum shopping by competitors seeking the ‘right’ regulatory decision<sup>120</sup>.

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<sup>119</sup> Act no. 26 of 2010

<sup>120</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 343

The specific statutory duties of each regulator tend to focus their attention of different subsets of the range of economic activities involved<sup>121</sup>.

It has also been noted that a failure for the Independent Broadcasting Authority (Amendment) Act<sup>122</sup> to adopt a sectoral approach to regulating competition in the television broadcasting industry poses a number of problems. For instance, while the Independent Broadcasting Authority (Amendment) Act<sup>123</sup> has a duty ‘to safeguard the rational and efficient use of the frequencies allocated to broadcasters by developing a frequency plan for broadcasting’, the act does not clearly define the role of the Competition and Consumer Protection Act<sup>124</sup> in the allocation of such frequencies. The Independent Broadcasting Authority (Amendment) Act<sup>125</sup> prescribes that broadcasters also have to comply with the Radio communications Act 1994 and the Information and Communication Technologies Act<sup>126</sup>. The new act established the Zambia Information and Communication Technology Authority which is responsible for allocating frequencies ‘in consultation with’ the Independent Broadcasting Authority<sup>127</sup>. The failure to follow a sectoral approach towards regulating competition in the allocation of frequencies has the potential to lead to future problems as issues of Market Dominance could arise if a majority of the frequencies fall under the control of a single entity. Some of the common differences between competition authorities and sector specific regulators are set out in Table 3

<sup>121</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 343

<sup>122</sup> Act no. 26 of 2010

<sup>123</sup> Act no. 26 of 2010

<sup>124</sup> Act no. 24 of 2010

<sup>125</sup> Act no. 26 of 2010 Section 49

<sup>126</sup> Act no. 15 of 2009

<sup>127</sup> Bright Phiri and Deanna Powers "Plurality and power relations in Zambian broadcasting" *Multimedia Publications* 6, no 3 (2006): 12

There are many international law precedents that promote a sectoral approach to the telecommunications and broadcasting regulation. For instance, in the case of *Richard Goldwasser, et al. v. Ameritech Corp*<sup>128</sup>, the US Seventh Circuit held that the plaintiffs had failed to allege any antitrust claim independent of the Telecom Act violations and that the “more specific legislation” must “take precedence over the general antitrust laws, where the two are covering precisely the same field. Furthermore in the case of *Law Offices of Curtis Trinko, L.L.P. v. Bell Atlantic Corp*<sup>129</sup>, the court noted that certain antitrust claims—for example, those stemming from the essential facilities doctrine or monopoly leveraging behaviour—could be pursued independently of the Telecom Act’s provisions. The Court concluded that unless there was a “plain repugnancy”—a clear clash between the intent of a sector-specific statute and an antitrust law it will not assume that a regulatory statute implicitly repeals the antitrust laws.

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<sup>128</sup> 222 F.3d 390(7<sup>th</sup> Cir. 2000)

<sup>129</sup> 123 F Supp 2d 738(S.D.N.Y 2000)

**Table 3: Typical Differences between a Competition Authority and Sector-Specific Regulator<sup>130</sup>**

Feature	Competition Authority	Sector-Specific Regulation
Timing/Process	<ul style="list-style-type: none"> <li>Typically applies remedies retrospectively.</li> <li>Specific complaint or investigation driven.</li> <li>Formal investigative, other procedures.</li> <li>Narrow scope for public intervention.</li> </ul>	<ul style="list-style-type: none"> <li>Prospective as well as retrospective.</li> <li>Decisions or other processes of general application, as well as specific issue proceedings.</li> <li>Mix of formal and less formal procedures.</li> <li>Typically broader scope for public intervention.</li> </ul>
Policy Focus	<ul style="list-style-type: none"> <li>Objective to reduce conduct, which impedes competition.</li> <li>Focus on allocative efficiency/preventing abuse of market power or other misconduct.</li> </ul>	<ul style="list-style-type: none"> <li>Typically applies multiple policy objectives</li> <li>Traditional (monopoly) regulation likely to pursue social objectives other than allocative efficiency</li> <li>Transitional regulation may focus on preventing anti-competitive behaviour as market becomes more competitive</li> </ul>
Scope	<ul style="list-style-type: none"> <li>Economy wide, multiple industries.</li> <li>Powers of intervention and remedies tend to be narrowly defined.</li> </ul>	<ul style="list-style-type: none"> <li>Usually industry-specific (usually develops greater sectoral expertise)</li> <li>Powers tend to be more broadly defined (correspond to breadth of policy objectives and procedures).</li> </ul>

### 3.5 ANALYSIS OF THE COMPETITION LAW ENFORCEMENT REGIME IN THE TELEVISION BROADCASTING SECTOR

Zambia has made very few attempts at competition law enforcement in the television broadcasting industry. The failure to incorporate a sectoral regime in regulating competition in the television broadcasting can be listed as one of the key weaknesses in ensuring an approach that promotes fair competition in the television broadcasting industry. The advantage of the sectoral approach has been illustrated in Table 3. It has been argued that it would make sense to leave regulation of competition in the television broadcasting industry in the hands of the regulator as it has more

<sup>130</sup> World Bank. *Telecommunications Regulation Handbook* (Washington, D.C.: World Bank, 2008), 11.

expertise in the sector and the financial capacity. Telecommunications and broadcasting regulators in Africa are one of the few well funded public institutions as a result of the booming telecommunications market. This is in contrast with competition commission on the continent riddled with institutional problems, lack of expertise for enforcement and poor funding<sup>131</sup>.

The fact is that the Independent Broadcasting Authority has largely been ineffective; apart from not been functional, its TORs are not focused on scrutinising whether the actions of participants in the television broadcasting industry are restricting competition. In fact, it can be argued that many of the provisions of the Independent Broadcasting Authority (Amendment) Act<sup>132</sup> have the potential to go against its mandate of promoting competition in the television broadcasting industry. This prompts the question whether Zambia needs to adopt competition law to regulate the television broadcasting industry.

Furthermore, the Independent Broadcasting Authority (Amendment) Act<sup>133</sup> appears to lack the capacity to deal with the competition related issues in the sector. It is questionable whether the act will enable the Independent Broadcasting Authority to have the resources to investigate complex competition complaints, more particularly; the act does not provide for the Independent Broadcasting Authority to have the necessary expertise to effectively deal with competition disputes in the television broadcasting industry.

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<sup>131</sup> Rachel Alemu, "Regulation of Competition in the Liberalised Telecommunications Sector in Sub-Saharan Africa: Uganda's Experience." *Africa Telecommunications Journal* (March 2011): 60 accessed March 21, 2012, <http://africa.ifj.org/assets/docs/093/156/f1f715d-008e69c.doc>

<sup>132</sup> Act no. 26 of 2010

<sup>133</sup> Act no. 26 of 2010

### 3.6 CONCLUSION

This chapter has outlined the fact that for the Independent Broadcasting Authority to be effective in fulfilling its broadcasting regulatory and supervisory responsibilities, it should consider the introduction of a number of interrelated activities, which include:

- i. establishing, monitoring, assessing, and reviewing, where appropriate, regulatory frameworks to meet its competition policy objectives;
- ii. implementing procedures for the efficient and effective resolution of competitive disputes; and
- iii. making determinations on industry mergers, acquisitions, and changes of ownership in the industry.
- iv. The Independent Broadcasting Authority should also monitor the programming and financial obligations of broadcasting undertakings to ensure compliance with regulations and conditions of license.

In the case of *Commission v. Sanders Radio Station*<sup>134</sup> the Court emphasized that the field of broadcasting is one of free competition, the competition policy's purpose is not to protect a licensee against competition but to protect the public

Therefore competition law and sector specific rules can be regarded as the main rules for regulating competition in the television broadcasting industry. The proceeding chapter will assess how the Independent Broadcasting Authority (Amendment) Act<sup>135</sup> plays a role in regulating competition in the television broadcasting industry using Muvi tv and ZNBC as case studies.

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<sup>134</sup> 309 US 470, 60 S. Ct. 693, 84 L. Ed. 869 - Supreme Court, 1940

<sup>135</sup> Act no. 26 of 2010

## **CHAPTER FOUR**

### **REGULATING COMPETITION IN THE TELEVISION BROADCASTING INDUSTRY: A CASE STUDY OF MUVI TV AND ZNBC**

#### **4.1 INTRODUCTION**

For a long time governments regarded the television broadcasting industry as a natural monopoly. Gradually, however, this concept was eroded. Governments came to realize that not all segments of the television broadcasting industry exhibited characteristics of a natural monopoly while at the same time technological advancements reduced previously prohibitive fixed costs and increases in demand required the installation of new capacity.

#### **4.2 DEVELOPMENTS IN THE TELEVISION BROADCASTING INDUSTRY**

Television has registered little growth in comparison with radio broadcasting. Television ownership in Zambia is at roughly thirty six percent. Telecommunications and broadcasting licensing regimes are still separate, demonstrating that Zambia is still some way from telecommunications-broadcasting policy and regulatory convergence. Also important here is that the Independent Broadcasting Authority (IBA), provided for by law since 2002, is not yet operational. As such, there is a legal and administrative impasse in the licensing of broadcasters, with that role now usurped by the Ministry of Information and Broadcasting Services<sup>136</sup>.

The ZNBC television channel continues to provide free-to-air broadcasting and claims to be a Public-service broadcaster. However, many commentators argue that it is run as an extra arm

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<sup>136</sup> Guy Berger. *Media Legislation in Africa A Comparative Legal Survey* (Grahamstown: Rhodes University Press, 2006), 33

of the Ministry of Information and Broadcasting Services (MIBS). Subscription digital satellite television (DStv) has provided an alternative to the ZNBC TV channel since 1995. Its share of the market, about six percent in 1998<sup>137</sup>.

There has been some competition to both the ZNBC TV channel and MultiChoice Africa (DStv providers). In 1998, the free-to-air Christian Trinity Broadcasting Network (TBN), allied with the American Trinity Broadcasting Network, was set up, mainly to “spread the Gospel”. Then, in 2002, Muvi TV, another free-to-air television channel, was established. One more free-to-air TV channel, CASAT TV, was, by 2005, carrying out test transmissions before its demise in 2006<sup>138</sup>.

Muvi TV is a competitor to ZNBC. However, that competition is mainly restricted to the Lusaka Province, where people can receive signals. Beyond urban Lusaka, signals, if not boosted by powerful aerials, cannot be received. In order to increase its coverage Muvi TV is also distributed via the satellite. This has given Muvi TV an even greater penetration into the most remote parts of the country. Even so, for the satellite signal to be received there must be some form of decoding technology, which most people in both urban and rural areas do not have.

Nevertheless, the free-to-air ZNBC TV has the greatest viewership figures across the country. The main conclusion to note here is that television is unlikely to grow at any faster rate; given its huge capital outlay and that the state seems reluctant to have a multiplicity of television channels<sup>139</sup>.

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<sup>137</sup> Guy Berger. *Media Legislation in Africa A Comparative Legal Survey* (Grahamstown: Rhodes University Press, 2006), 34

<sup>138</sup> Chris Chirwa, "Public Broadcasting in Africa: Zambia" *Open Society Foundation* 5, no 3 (2010): 52

<sup>139</sup> BBC World Service Trust *African Media Development Initiative: Zambia Research Findings and Conclusions* (London: BBC World Service Trust, 2006) 5



### **4.3 ANALYSIS OF THE ROLE OF THE INDEPENDENT BROADCASTING AUTHORITY (AMMENDMENT) ACT IN PROMOTING FAIR COMPETITION BETWEEN ZNBC AND MUVI TV**

The Independent Broadcasting Authority has been largely ineffective in regulating and ensuring fair competition between ZNBC and Muvi TV. In a number of areas the act has not adequately provided provisions or safeguards to ensure that there is fair competition. A number of anti-competitive practices have not been adequately addressed and this has the potential to cause future problems in the regulation of the television broadcasting industry. A number of areas have been highlighted below and these include;

#### **4.3.1 SOURCE OF FINANCES**

It has been stated that the inherent unfairness in the broadcasting industry lies in the state owned television broadcasters access to licence fees, state funding and advertising whilst the commercial broadcasters rely solely on advertising revenue, yet their content is regulated in the act<sup>140</sup>. In addition, they still have to compete with the state owned broadcaster, which is advantaged by law as a public service broadcaster. The public service broadcaster might charge advertisers lesser fees than it would have if it were a full commercial broadcaster. In fact, the public service broadcaster must attract viewers by broadcasting programmes in accordance with its mandate, which is to educate, entertain and inform the society. It must not attract viewers by commercially competing with other commercial broadcasters for advertising revenue<sup>141</sup>. In this regard the Independent Broadcasting Authority (Amendment) Act<sup>142</sup> has failed to ensure that the fees and advertising revenue that the Zambia National Broadcasting Corporation receives do not put commercial broadcasters like Muvi TV at a competitive disadvantage i.e. by putting in place provisions that

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<sup>140</sup> Act no. 26 of 2010 Section 24 (1)

<sup>141</sup> BBC World Service Trust *African Media Development Initiative: Zambia Research Findings and Conclusions* (London: BBC World Service Trust, 2006) 2

<sup>142</sup> Act no. 26 of 2010

regulate the advertising and other income generating activities of state owned or controlled television broadcasters. Zambia National Broadcasting Corporation is a public service broadcaster i.e. it provides service to the society, in order to better the lives of individuals within a community. In achieving that, the public service broadcaster should not operate in competition with other commercial broadcasters. Although the public service broadcaster can compete with other commercial broadcasters, as it is currently the position, this should not be the approach to follow in order to sustain public service broadcasting in Zambia. The ideology behind this is that, the public service broadcaster must fill the gaps which are not covered by commercial broadcasters<sup>143</sup>. In this regard there must be a complete separation between commercial and public service broadcasting. So, for the public service broadcaster to provide public service and commercial broadcasting is quite disturbing and contradictory.

#### **4.3.2 ABUSE OF DOMINANT POSITION.**

The Competition and Consumer Protection Act<sup>144</sup> states that a dominant position exists in relation to the supply of goods or services in Zambia, if thirty percent or more of those goods or services are supplied or acquired by one enterprise; In addition the Act<sup>145</sup> states that an enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.

The prohibited conduct that amounts to abuse of dominant position in the television broadcasting authority has not been defined in either the Independent Broadcasting Authority (Amendment)

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<sup>143</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 87

<sup>144</sup> Act no. 24 of 2010 Section 15

<sup>145</sup> Act no. 24 of 2010 Section 16(1)

Act<sup>146</sup> or the Competition and Consumer Protection Act<sup>147</sup> and as such abuses that includes price abuses through predatory pricing, price squeezes and cross subsidisation, predatory network alteration, refusal to supply or grant access to facilities and refusal to interconnect or act in good faith during interconnection negotiations are not been regulated<sup>148</sup>. ZNBC was mentioned by ninety two percent viewers and rated as one of the top three stations, followed by Muvi TV with thirty five percent. In addition ZNBC has embarked on a number of measures that has also enhanced its market dominance such as joint tv subscription or satellite broadcasting to cover remote area. Furthermore due its subsidized pricing policy it has monopolized the advertising position in the country leaving commercial broadcasters such as Muvi TV with a reduced market<sup>149</sup>

Competition principles require that the assessment of an undertaking's dominance of a market requires a definition to be made of the relevant market. In this regard the failure of the Independent Broadcasting Authority (Amendment) Act<sup>150</sup> to define what constitutes the relevant market dominance in the Television Broadcasting Industry and the failure by other institutions such as the Competition and Consumer Protection Commission to protect the interests of commercial broadcasters such as Muvi TV has led to the situation in which ZNBC abuse of its Market Dominance remaining unchallenged.

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<sup>146</sup> Act no. 26 of 2010

<sup>147</sup> Act no. 24 of 2010

<sup>148</sup> Dennis Jjuuko, " Understanding Editorial Independence and Public Accountability Issues in Public Broadcasting Service: A Study of the Editorial Policies at the South African Broadcasting Corporation (SABC) " (MA dissertation, Rhodes University, South Africa, 2005), 89

<sup>149</sup> BBC World Service Trust *African Media Development Initiative: Zambia Research Findings and Conclusions* (London: BBC World Service Trust, 2006) 3

<sup>150</sup> Act no. 26 of 2010

### 4.3.3 CONTROL OVER ‘ESSENTIAL FACILITIES’.

The Competition and Consumer Protection Act<sup>151</sup> states that “essential facility” means an infrastructure or resource that cannot reasonably be duplicated, without access to which competitors cannot reasonably provide goods or services to their customers; the Competition and Consumer Protection Act<sup>152</sup> also states that for the purposes of this part, “abuse of a dominant position” includes denying any person access to an essential facility.

Access is a central issue in the television broadcasting industry. Of particular concern in television is access to an ‘essential facility’ such as control of a bottleneck on the national system, through which all operators must pass. Ownership of this facility is of concern because it can put the owner in a position of super dominance. Zambia National Broadcasting Corporation enjoys access to government owned facilities such as the national satellite network at subsidized prices a facility that private commercial broadcasters like Muvi TV do not share or have to pay at a commercial rate in order to enjoy.

The Independent Broadcasting Authority (Amendment) Act<sup>153</sup> has no provision that requires broadcasters to share essential facilities to ensure fair competition. The Independent Broadcasting Authority (Amendment) Act<sup>154</sup> has failed to define what would constitute an essential facility in the television broadcasting industry and put in place provisions to ensure that there is adequate access to essential facilities i.e. to ensure that state owned enterprises such as Zambia National Broadcasting Corporation share access to essential facilities that they enjoy by virtue of these facilities also being state owned with commercial broadcasters such as Muvi TV do not have.

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<sup>151</sup> Act no. 24 of 2010

<sup>152</sup> Act no. 24 of 2010 Section 16 (2) (e)

<sup>153</sup> Act no. 26 of 2010

<sup>154</sup> Act no. 26 of 2010

#### 4.3.4 ANTI COMPETITIVE MERGERS AND ACQUISITIONS.

The competition and consumer protection act<sup>155</sup> states that a merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

Though the act deals with deals with the issue of merger control the Independent Broadcasting Authority (Amendment) Act<sup>156</sup> does not aptly deal with the issue of merger control. The Independent Broadcasting Authority Act and The Independent Broadcasting Authority (Amendment) Act<sup>157</sup> to are silent on anti-competitive mergers. There is no specific regulation that details how the Independent Broadcasting Authority will enforce merger control in particular, a definition of a merger in relation to the television broadcasting industry is not provided and the specific elements needed to establish contravention are not stipulated.

Given the absence of a competition regime for the broadcasting industry, definitions, guidelines and indication of how the Independent Broadcasting Authority would enforce the prohibitions are required to ensure that the sector specific regime is effective are not in place.

A clear legal regime on mergers and acquisitions is crucial given the fact that foreign direct investment in the television broadcasting industry is on the rise

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<sup>155</sup> Act no. 24 of 2010 Section 24 (1)

<sup>156</sup> Act no. 26 of 2010

<sup>157</sup> Act no. 26 of 2010

**4.3.5 EXEMPTIONS FROM ANTI COMPETITIVE CONDUCT.**

Just as under EU Competition law, the Competition and Consumer Protection Act<sup>158</sup> provides for exemptions from the applicability for anti competition rules to an operator. However, in contrast to EU law, the exemptions as stipulated in the Competition and Consumer Protection Act<sup>159</sup> are restricted to anti competitive agreements, under the act; the exemptions also apply to abuse of dominant position and anti competitive mergers. The Competition and Consumer Protection Act<sup>160</sup> provides for individual exemptions and block exemptions to be granted. in particular can cause a number of problems in relation to the television broadcasting industry. This section states that the act states that the Commission shall grant an exemption to an agreement that contributes to, or is likely to contribute to, or result in obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, from the agreement. In applying this section to the Independent Broadcasting Authority (Amendment) Act<sup>161</sup> the main problem that would arise is that there is no detailed definition of what ‘benefit to the public’ means in regards to the television broadcasting industry. This could leave open the possibility for a dominant player in the market like the Zambia National Broadcasting Authority to abuse this provision by giving a very broad meaning to ‘benefit to the public. Furthermore the Independent Broadcasting Authority (Amendment) Act<sup>162</sup> does not provide for the Independent Broadcasting Authority to grant any exemption orders or the basis on which such exemptions would be granted. In addition the Competition and Consumer Protection Act<sup>163</sup> also grants exemptions to activities promoting the competitiveness of micro and small business enterprises in Zambia. The Independent Broadcasting Authority (Amendment) Act<sup>164</sup> does not define what activities promote the

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<sup>158</sup> Act no. 24 of 2010  
<sup>159</sup> Act no. 24 of 2010 Section 19(1)  
<sup>160</sup> Act no. 24 of 2010 Section 19(2) (f)  
<sup>161</sup> Act no. 26 of 2010  
<sup>162</sup> Act no. 26 of 2010  
<sup>163</sup> Act no. 24 of 2010 Section 19. (2) (e)  
<sup>164</sup> Act no. 26 of 2010

competitiveness of the television broadcasting industry and this could lead to several difficulties in future and both ZNBC and Muvi TV could be granted exemptions to conduct activities that are uncompetitive in the television broadcasting industry but are not so in the wider media industry.

#### **4.3.6 CONSUMER PROTECTION**

The Competition and Consumer Protection Act<sup>165</sup> has a number of provisions that relate to consumer protection. However the Independent Broadcasting Authority (Amendment) Act<sup>166</sup> is silent on the rights of consumers or the provisions that ensure consumer interests are protected in the respect of the television broadcasting services they receive. This would pose a problem in that ZNBC and Muvi TV are providing a service and in the absence of standards to regulate this service, a consumer would have no legal means of ensuring that substandard services are penalised and curtailed.

Broadcasting is becoming more like other media industries such as newspapers and magazines. The focus of regulation is changing from direct control over to concern over competition and the control of market power. For the Independent broadcasting authority act to be effective in promoting consumer protection the Television Broadcasting Industry the definition of what acts are unfair and the definition of these acts will be critical<sup>167</sup>.

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<sup>165</sup> Act no. 24 of 2010

<sup>166</sup> Act no. 26 of 2010

<sup>167</sup> Thomas Cheng, "Competition Law Enforcement in the Television Broadcasting Sector in Hong Kong: Past Cases and Recent Controversies" *Kluwer Law International* 11, no 8 (2009): 337

#### 4.4 CONCLUSION

An overview of the regulatory framework for competition in the television broadcasting industry in Zambia indicates that areas critical for promoting competition such as preventing abuses of dominant position and access to essential facilities have not been provided for in the Independent Broadcasting Authority (Amendment) Act<sup>168</sup>. It is critical for the effectiveness of the IBA that the further provisions be put in place in the current legislation to make way for the IBA to transform itself into a regulator of a liberalised television broadcasting industry. Effective regulation requires the implementation of the legal and regulatory framework to create an environment that promotes competition and therefore improvements are needed in the institutional framework.

Furthermore, despite the enactment of a generic competition law, the Competition and Consumer Protection Act<sup>169</sup>, there is a need for sector specific competition rules which are governed by competition law principles provide obligations similar to the obligations found in generic competition legislation. In addition, some provisions of the law for example provisions on mergers and acquisitions require more detail to be in put in place to in order to be relevant to the television broadcasting industry. Legislation or guidelines on how the Independent Broadcasting Authority can deal with mergers and acquisitions in the television broadcasting industry should be enacted.

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<sup>168</sup> Act no. 26 of 2010

<sup>169</sup> Act no. 24 of 2010



## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

This paper sought to analyze whether the Independent Broadcasting Authority (Amendment) Act<sup>170</sup> promotes fair competition in the television broadcasting industry using Zambia National Broadcasting Corporation and Muvi TV as case studies. Competition is central to the operation of markets, and fosters innovation, productivity and growth, all of which create wealth and reduce poverty. However, markets do not always work well, and uncompetitive markets are often those that matter most for the poor<sup>171</sup>. Effective and fair competition is not automatic. Sound competition policy can help markets work better, and is a key part of the investment climate that can help investor confidence, and provide a level playing field for all television broadcasters. The prior chapters highlighted that the current state of the law does not fully promote fair competition in the television broadcasting industry.

#### 5.2 CONCLUSIONS

In conclusion, this paper is of the view that the current Independent Broadcasting Authority (Amendment) Act<sup>172</sup> is largely ineffective in regulating competition issues in the television broadcasting industry. A theme to emerge from the paper is that broadcasting regulatory structures currently in place are inappropriate or ineffective. Licensing requirements, controls on content, controls on advertising and subsidies to public broadcasters appear increasingly unjustifiable if fair competition is to be promoted in the television broadcasting.

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<sup>170</sup> Act no. 26 of 2010

<sup>171</sup> Department of Trade and Industry and HM Treasury, *Concurrent Competition Powers in Sectoral Regulation* (London: Department of Trade and Industry and HM Treasury, 2006) 9

<sup>172</sup> Act no. 26 of 2010

This paper therefore recommends the following:

- 5.2.1 The competition law enforcement capabilities of the Independent Broadcasting Authority, telecommunications regulators such as ZICTA and the Competition and Consumer Protection Commission should be combined within an agency that has oversight over competition in the television broadcasting industry. It is hoped that this approach will encourage the emergence of viable infrastructure for competition law enforcement in the television broadcasting industry in Zambia.
- 5.2.2 More investment in capacity building should be made to the Independent Broadcasting Authority to create an enforcement agency with the requisite expertise so that the quality of competition law enforcement in the television broadcasting industry can be further improved.
- 5.2.3 The Independent Broadcasting Authority should be granted powers to investigate infringements of the prohibitions highlighted in the Competition and Consumer Protection Act<sup>173</sup> which prohibit certain anti-competitive agreements between undertakings and abuse of a dominant position in a market by undertakings. The Independent Broadcasting Authority should be empowered to investigate breaches by undertakings who they suspect to have breached these prohibitions.
- 5.2.4 Furthermore, the Independent Broadcasting Authority should have the power to impose interim remedies, take decisions as to whether the prohibitions have been breached, and

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<sup>173</sup> Act no. 24 of 2010

require infringements to be brought to an end and to impose penalties in relation to infringements where regulations that govern competition have been breached.

- 5.2.5 Particular attention should be drawn to the importance of consumer protection as well as market definition and dominance in drafting competition policy for the television broadcasting industry. The way markets are defined and dominance identified can be critical to resolving a number of issues relating to obstacles to competition in the television broadcasting industry.
- 5.2.6 A greater focus by the regulatory authorities towards a competition law analysis of market definition and dominance as well as consumer protection may provide the solution to identifying obstacles to competition for the application of subsequent broadcasting regulation.
- 5.2.7 A sector-specific approach towards regulating competition in the in television broadcasting industry should be encouraged through the adoption of competition law concepts, such as market definition and dominance, and principles, such as an essential facilities doctrine and restrictions on state subsidies, in the existing regulatory regime i.e. the Independent Broadcasting Authority (Amendment) Act<sup>174</sup>. The licence conditions given in the Independent Broadcasting Authority (Amendment) Act<sup>175</sup> should impose obligations that promote competition on licensees that would cover relations between the licensee and other licensees, and between licensees and consumers. The licences should map out the operation

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<sup>174</sup> Act no. 26 of 2010

<sup>175</sup> Act no. 26 of 2010

of the market through specific performance requirements that will enhance competition in the television broadcasting industry.

- 5.2.8 The act should also mandate that the effect on the competitiveness of the industry will be one of the requirements for license issuance, especially in relation to the allocation of frequency spectrum.
- 5.2.9 The introduction of a competition regime for the television broadcasting industry needs appropriate supporting policies, and effective enforcement. Governments must show support and recognise adequately the impact of other legislation and regulations on competition in the television broadcasting industry. The design of an appropriate national competition policy for the television broadcasting industry must keep local realities in mind, and give sufficient weight to governance capabilities and institutions and to political realities that will often include the presence of small and frequently vulnerable domestic markets.
- 5.2.10 To be fully effective, a competition policy for the television broadcasting industry must be supported by a culture of competition, where the objectives of competition are widely understood by relevant stakeholders and form a natural part of the background to decisions by government, firms and consumers. Civil society and the development of an informed consumer movement in particular, can play an important role in the development of a culture of competition. In order to ensure a fair, competitive process, new licences should always be openly advertised to the public.

5.2.11 Finally, the growth of the television broadcasting industry will lead to a possibility of different forms of mergers in the industry. Provisions that regulate ownership in the television broadcasting industry should be introduced in the Independent Broadcasting Authority (Amendment) Act<sup>176</sup> to promote competition in the television broadcasting industry. The concern is that a concentration of media ownership could restrict the access of the public to a desirable diversity of opinion as well as lead to a lack of competition in the industry. Therefore the Independent Broadcasting Authority (Amendment) Act<sup>177</sup> must have provisions focused on the management of mergers, acquisitions and other corporate alliances under competition law.

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<sup>176</sup> Act no. 26 of 2010

<sup>177</sup> Act no. 26 of 2010

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**INDEPENDENT BROADCASTING AUTHORITY ACT**

**QUESTIONNAIRE**

**TOPIC: COMPETITION IN TELEVISION BROADCASTING: ANALYSING INDEPENDENT BROADCASTING AUTHORITY (AMENDMENT) ACT 2010**

**A. Implementation of the Act**

1. Are you aware of any legislation promoting competition among media companies? If so kindly provide details.

2. Which fields of your current services or operations are included in this legislation?

3. In your opinion does the current legal framework adequately promote fair competition in the Television Broadcasting Industry?

4. Are you aware of any bodies that monitor competition in the media?

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5. Kindly provide details of how this monitoring carried out?
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6. What type of information is included?
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7. Are the results made public, and if so, how?
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8. Is the monitoring connected to a right to intervene if legal requirements or other regulation is violated?
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9. Is the authority with the right to intervene the same as, or different from, the monitoring body?

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**B. Authority Competent to decide on Recognition and Enforcement**

10. Are you aware of any changes to the current legislation been discussed that would promote or impede fair competition in the broadcast media?

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11. What role doe the Independent Broadcasting Authority (Ammendment) Act of 2010 play in the Television Broadcasting Industry?

12. Are their any recommendations that you would provide to the Competition and Consumer Protection Commission to aid in promoting fair competition in the Television Broadcasting Industry? Kindly provide details

13. In your view does the Independent Broadcasting Authority Act and the Competition and Consumer Protection Act adequately provide for competition issues in the broadcasting industry?

14. In your view does the current competition and consumer protection act give the Commission sufficient power to act in promoting fair competition in the broadcast media?

**C. Procedural Rules**

15. In your view is their sufficient clarity in the Independent Broadcasting Authority Act and the Competition and Consumer Protection Act regarding the role of competition in the media?

16. Are you aware of any other policy or regulations that promote competition in the media?

17. In your view do media bodies such in Zambia such as MISA play a role in promoting fair competition in the Broadcast Media

**D. Comments**

18. In your view has there been adequate sensitisation regarding the role of competition in the broadcast media

19. In your view, does the current legislation in place adequately promote fair competition in the broadcast media? If feasible, please indicate the places where the legislation has weaknesses.

20. Do you have any additional comments with regard to the rules governing the implementation of Competition regulations in the Media in Zambia?