

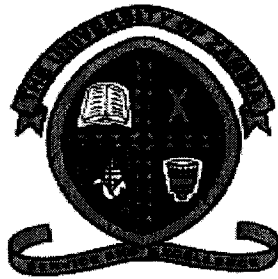
THE UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW  
DIRECTED RESEARCH (L410)

OBLIGATORY ESSAY

TITLE: A critical analysis of the competition legal framework in Zambia in relation to the monopoly, and dominance by Zambia Telecommunications Company Limited (Zamtel) of the international gateway in the telecommunications industry.

NAME: CHANDA MUSONDA  
COMPUTER NO: 29112613  
SUPERVISOR: DR. MATIBINI  
DATE: 9<sup>TH</sup> APRIL 2010

A dissertation submitted in substantial fulfillment of the requirement for the award of the Bachelor of Laws (LLB) degree in the School of Law, University of Zambia.



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April 2010

### DECLARATION

I, CHANDA MUSONDA, solemnly declare that this work represents my own ideas, and is not a production of any other work produced or submitted by any other person to the University of Zambia or any institution for the award of a Bachelor of Laws degree. All other works referred to in this dissertation have been duly acknowledged.

Made on this <sup>8<sup>th</sup></sup>..... Day of April, 2010 by the said CHANDA MUSONDA at Lusaka

Signed.....

A handwritten signature in black ink, consisting of a stylized 'C' followed by a series of loops and a long horizontal stroke.

University of Zambia

School of Law

Lusaka.

I recommend that this dissertation prepared under my supervision by:

**Chanda Musonda**

Computer No. 29112613

Entitled: **A critical analysis of the competition legal framework in Zambia in relation to the monopoly, and dominance by Zambia Telecommunications Company Limited (Zamtel) of the international gateway in the telecommunications industry.**

Be accepted for examination. I have checked it carefully, and I am satisfied that it meets the requirements relating to the format as laid down in the regulations governing dissertations.

Date: 8<sup>th</sup> APRIL, 2010

  
Supervisor: **Dr. Patrick Matibini**

## **ABSTRACT**

The aim of this research was to establish the purported dominance by Zamtel of the international gateway, in light of Zambia's Competition Laws. In this regard, the Competition legal framework in Zambia was reviewed in light of this dominance of the international gateway by Zamtel. Following the research into the competition legal framework, it was concluded that indeed, Zamtel, does have an anti-competitive dominance over the international gateway, which has the effect of not only stifling competition in the telecommunications industry, but the economy in general.

(Key words: competition, anti-competitive, abuse of dominant or monopoly power, international gateway)

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## CHAPTER ONE

### INTRODUCTION

The research aims at examining the purported dominance and monopolisation by the Zambia Telecommunications Company Limited (“Zamtel”) over the international gateway in the telecommunications industry.<sup>1</sup> An international gateway has been defined as “any facility that provides an interface to send and receive electronic communication (i.e. voice, data and multimedia images/video) traffic between one country’s domestic network facilities and those in another country”.<sup>2</sup>

This research, therefore, aims to establish whether Zamtel does have dominance and monopoly over this facility that is responsible for distributing incoming and outgoing international voice and data traffic. However, this is not an economic research paper; therefore the focus is on the law, and how Zamtel’s purported dominance relates to law on competition in Zambia. In order to understand the position of Zamtel in the industry, a background of the telecommunications industry is essential.

#### **Background of the telecommunications industry in Zambia**

To understand the issue at hand effectively, it is imperative to have an overview of the telecommunications industry in Zambia. The telecommunications industry in Zambia has come a long way; dating back to a state owned era in the pre-independence days up to 1998, when a private mobile service provider was permitted

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<sup>1</sup> The *Zambian Economist Newspaper*, 22 July, 2007.

<sup>2</sup> John Alden, *International sharing: international gateway liberalization*, 2002.

to enter the industry.<sup>3</sup> The process of change in the telecommunications industry began with the change of government in 1991. The new government adopted market liberalisation ideologies in which the State wanted to take a facilitator's role as opposed to being the main actor.<sup>4</sup> The liberalisation move adopted by government facilitated the administration of the Structural Adjustment Programmes (SAP) as prescribed by the World Bank and IMF. It was under the auspices of these bodies that the enactment of the Telecommunications Act (Telecom Act) was done in 1994.<sup>5</sup> In the same year, the Competition and Fair Trading Act (Competition Act) was also enacted. The Telecommunications Act ushered in the Communications Authority of Zambia (CAZ). CAZ effectively has jurisdiction of all regulation in the telecommunications industry in Zambia.<sup>6</sup> In December 2009, the Information and Communication Technologies Act ("the "ICT Act") was enacted. This Act repealed the Telecommunications Act. The name of the regulator, CAZ, has also been changed to Zambia Information and Communication Technologies Authority (ZICTA).

In the late 90's, Zambia, like many countries in the region saw a rise of mobile cellular telephones with the penetration of Celtel (now Zain) and Telecel (now MTN) into the telecommunications industry.<sup>7</sup> It is stated that the country has moved from a position where less than 5% of the population would be likely to use a phone in their lifetime, to one where almost 50% of the adult population owns a phone.

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<sup>3</sup> T. Kaira, *Understanding the dynamics of competition in the telecommunications services in Zambia*, p.2.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Annual General Connecting Rural Communities Forum, 2009.

The telecommunications market in Zambia has three principal product markets, namely: internet, mobile telephone and fixed landline.<sup>8</sup> A gateway is the medium used to facilitate communication in all these product markets. As such, whichever body has access to this gateway, will effectively be in a position to dominate the telecommunications market in Zambia.

In 1994, the Post and Telecommunications Authority (PTC) was split with the formation of Zamtel and Zampost, both entities remaining in State hands.<sup>9</sup> Zamtel, as the entity responsible for transmitting outgoing and incoming international data traffic was also left in control of the international gateway. The international gateway, which is at the core of this research, is the Mwembeshi Earth Station. Zamtel has exclusive rights to the Mwembeshi Station and charges usage fees.<sup>10</sup> The Mwembeshi Earth Station has been Zambia's international telecommunications traffic gateway for both incoming and outgoing traffic. When the station begun operating, all the traffic to and from the station was sent through the international satellite organisation.<sup>11</sup> It is stated that later in 1989, a second antenna code named Mwb-O2A was commissioned. This was Mwembeshi II. Mwembeshi II is digital and is able to have direct communication in all types of services, with the whole of Africa, Europe and South-America. Mwembeshi I is able to have direct communication with the whole of Africa, Europe, Asia and the Far East.<sup>12</sup> Mwembeshi I and II therefore process, and carry telecommunication signals to and from the satellites. The satellites are said to be

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<sup>8</sup> Ibid at page 4.

<sup>9</sup> Ibid.

<sup>10</sup> People's Daily Newspaper, 23 July, 2007.

<sup>11</sup> Zamtel website, *Mwembeshi Earth Station*.

<sup>12</sup> Ibid.

located high up in space at a distance of 36,000km from the earth.<sup>13</sup> The station is specifically meant to transmit telecommunications signals from Zambia to overseas regions, and at the same time receives telecommunication signals from overseas, which it passes on to the Zambian public network. In a nutshell, therefore, the telecommunication signals or traffic that are interchanged, and exchanged at Mwembeshi Earth Stations include the following:

- ❖ telephone conversations;
- ❖ internet traffic;
- ❖ fax and telex messages;
- ❖ other data traffic; and
- ❖ occasional television and voice broadcast, to and from overseas.<sup>14</sup>

### **Statement of the problem**

Zamtel's monopoly of the international gateway is said to affect the level of competition in the fixed line, cellular and internet segments.<sup>15</sup> What follows is an elaboration of how this dominance affects the different segments of the telecommunications industry:

#### **(i) Fixed-line segment**

It is stated that all international traffic has to be routed through Zamtel's gateway.<sup>16</sup> Interconnection fees paid by mobile providers are set at 80% of Zamtel's retail price, which has left no room for competition on prices.<sup>17</sup> This

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> The Zambian Economist, supra.

<sup>16</sup> Ibid.

essentially means that Zamtel is the sole supplier/provider of this type of service in the country, and the following result has been observed:

“with supply constraints, the result is high prices, and low quality of service because of congestion. Hence, with a de-facto monopoly on international traffic, Zamtel as a fixed line incumbent operator effectively operates a high-margin, low volume, low-quality business”.<sup>18</sup>

**(ii) Cellular segment**

MTN and Zain have to route their international traffic through Zamtel's gateway.<sup>19</sup> On all outgoing international calls, Zain and MTN are charged 80% of Zamtel's retail price as interconnection fees for the delivery of the call. MTN has been cited as a mobile provider that passes on 10% discount of Zamtel's international rates to its customers, and has claimed that it makes massive losses by providing international calls.<sup>20</sup> It is argued that their losses are depriving MTN and Zain from investing in the expansion of their networks at a faster pace.<sup>21</sup> Further, Zamtel also owns a mobile operator in the form of Cell-Z. This means that Zamtel is distorting competition by operating both a fixed network, as well as a mobile operator. Zamtel is able to operate Cell-Z because of its strategic and advantageous position of being sole owner of the international gateway.

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<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

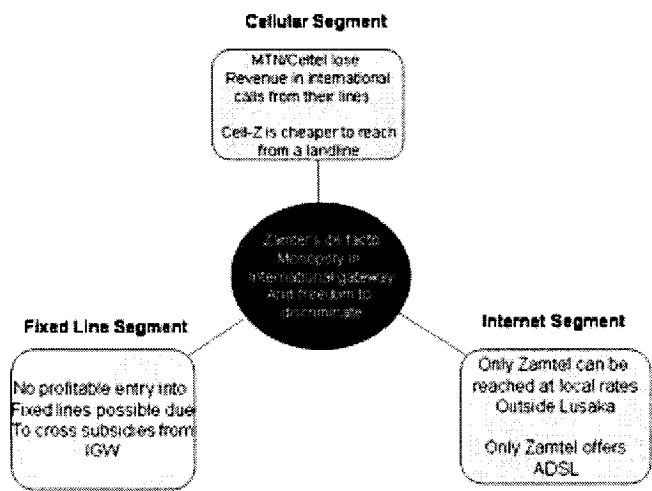
<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

(iii) Internet segment

Internet access is said to be generally open to competition, but it has been suggested that Zamtel's dominance as a fixed line operator eliminates the playing field.<sup>22</sup> This is because in Zambia, most of the internet is through dial-up connections, using the fixed line telephone network controlled by Zamtel. By controlling the landline infrastructure, Zamtel is able to offer better services to its subscribers.

Below is a summary in chart form, of Zamtel's dominance in the different segments.<sup>23</sup>



It is evident from the discussion above that Zamtel has undisturbed control over the international gateway. It is this control that caused the Zambia Competition Commission

<sup>22</sup> Ibid.

<sup>23</sup> *Zambian Economist Newspaper*, 22 February, 2007.

(ZCC) to state in 2003, in its submission to the Select Committee on Transport and Communication to comment as follows:

“The position of Zamtel means that it has the power to prevent, restrict or distort competition access to this essential infrastructure which was built with public funds”.

As stated earlier, Zambia has a liberalised economy and as such, Zamtel is not the only undertaking that operates in the telecommunications industry. The industry contains other players such as Zain, and MTN and indeed, potential entrants to the industry. What is the implication of Zamtel's dominance of the international gateway for other undertakings in the industry? This question can best be answered through the eyes of our competition legal framework. The next chapter comprises a discussion of the competition legal framework.

### **Significance of the research**

This research aims to highlight the dominance, and monopolisation of the international gateway by Zamtel and how this position restrains competition in the telecommunications industry. The research is significant in demonstrating the impact of such a position on the economy. The research will illustrate how increased competition in the telecommunications industry in Kenya, and Nigeria has led to a significant reduction in prices for consumers, as well as increased investment in the industry. This research is, therefore, important in illustrating how the same approach could be used in the Zambian context to the benefit of Zambian consumers, and the economy in general.



## **Objectives of the research**

The objectives of the proposed research paper will therefore, be the following:

- ❖ to have an overview of Zamtel, and how it is regulated. The objective here will be to establish that Zamtel is the sole operator of the International gateway;
- ❖ to establish how Zamtel's ownership of the international gateway affects other stakeholders in the industry;
- ❖ to critically analyse the Competition and Fair Trading Act, and ascertain whether Zamtel's sole operation of the international gateway is permissible under the Act.
- ❖ to critically analyse, and have a sound understanding of the concept of monopolisation and abuse of dominance, and relate the concepts to Zamtel's monopoly of the international gateway;
- ❖ to draw examples from other jurisdictions on whether these jurisdictions have liberalised their international gateways; and
- ❖ to provide solutions to an acceptable telecommunications framework that operates within the realms of free and fair competition.

## **Research questions**

In order to establish the purported dominance of Zamtel of the international gateway, the following questions will be pertinent to the research:

- (1) Would the alleged conduct of Zamtel be covered under section 7(2) of the Competition Act?;
- (2) Is Zamtel a dominant undertaking in the market?;
- (3) Is there abuse of dominance by Zamtel?; and

(4) Is there an adverse effect on competition in terms of section 7 (1) of the Competition and Fair Trading Act?.

### **Research methodology**

The major method of data collection to be deployed will be desk research. This will be supplemented by interviews with personnel from the Zambia Competition Commission. The data for this research will be sourced from books, statutes, case law, journal articles, paper presentations, student obligatory essays, reports, journals and newspaper articles.

### **Chapter outline**

#### **Chapter one**

This chapter will be the introductory chapter and will contain, inter alia, a statement of the problem, the objectives of the research, the research methodology as well as the outline of the chapters.

#### **Chapter two**

This chapter will focus on the competition legal framework in Zambia. It will specifically look at the Competition and Fair Trading Act, and critically analyse the provisions of this Act in relation to issues of abuse of dominance and monopolisation. Further, the paper will also have a look at regulator of competition law in Zambia, the Zambia Competition Commission, and how it ensures compliance with dictates of the Competition and Fair Trading Act.

### **Chapter three**

This chapter will be a critical analysis of the principles of dominance and monopolisation exclusively. I will tie these principles to the problem of Zamtel so as to arrive at a finding as to whether the position of Zamtel is outside the ambits of the law. This chapter will also draw on examples of how the ZCC as the regulator of competition, has handled similar issues.

### **Chapter four**

This chapter will contain comparative analysis. Kenya, and Nigeria will be cited as examples of jurisdictions within Africa that have liberalised their international gateway.

### **Chapter five**

This chapter will contain conclusions and recommendation.

## CHAPTER TWO

### THE LEGAL FRAMEWORK OF COMPETITION LAW IN ZAMBIA

#### The theory of competition

Competition means a struggle or contention for superiority.<sup>24</sup> In the commercial world, competition entails striving for the custom and business of people in the market place.<sup>25</sup> Capitalism and communism were the two main competing ideologies in the 20<sup>th</sup> century, suffice to say many countries were very suspicious of competitive markets of capitalist societies, and instead saw benefits in the state planning and managing the economy. However, many changes took place as the new millennium approached, and brought about phenomena such as demonopolisation, liberalisation and privatisation.<sup>26</sup> As aptly elaborated by Whish:<sup>27</sup>

“These phenomena coupled with rapid technological changes and the opening of international trade, have unleashed unprecedentedly powerful economic forces. The consequences of these changes impact upon individuals, and societies in different ways, and sometimes the effects can be uncomfortable, underlying them, however, is a growing consensus that, on the whole markets deliver better outcomes than state planning, and central to the idea of a market is the process of competition”.

Nnamdi Dimgba<sup>28</sup> aptly describes competition law as follows:

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<sup>24</sup> Whish. R. Competition Law, 2001 at p.2.

<sup>25</sup> *ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Introduction to Competition Law: a sine qua non to a liberalized economy, presented at Rules Watch on Competition legislation and the new world order 24-26 May 2006, p.4

“Competition law is a set of rules, disciplines and judicial decisions maintained by governments relating to either agreements between firms that restrict competition, or to the concentration of or abuse of market power on the part of the private firms”

A similar view is echoed by Justice Thurgood Marshall in *United States v. Topco Associates Inc*<sup>29</sup> when he stated:

“Anti-trust laws in general, and the Sherman Act in particular, are the magna carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is freedom to compete-to assert with vigor, imagination, devotion, and integrity whatever economic muscle it can muster”

Therefore, competition law enforces justice, and equality in trade. Its goal is to ensure that markets for producing and selling goods are effectively contestable.<sup>30</sup>

The statute which regulates competition in Zambia is the Competition and Fair Trading Act.<sup>31</sup> The Act came into force in 1995, largely as a result of the conditions imposed by the International Monetary Fund (IMF), and World Bank in the form of Structural Adjustment Programmes (SAP).<sup>32</sup>

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<sup>29</sup> 405 U.S. 596.

<sup>30</sup> Dimgba, supra note 28 p. 16.

<sup>31</sup> CAP 417 of the Laws of Zambia.

<sup>32</sup> UNCTAD Competition Policy, 1999.

## **Objectives of the Competition and Fair Trading Act**

The preamble of the Act provides the objectives and the scope of the Act as follows:

- ❖ encouraging competition in the country by prohibiting anti-competitive trade practices;
- ❖ regulating monopolies and concentrations of economic power so as to protect consumer welfare;
- ❖ strengthening the efficiency of production and distribution of goods and services; and
- ❖ securing the best possible conditions for the freedom and expansion of entrepreneurship base.<sup>33</sup>

It is clear from the preamble that the Act aims to create an environment that favours fair competition, and aims to curb and control anti-competitive practices.

That Act applies to all economic entities, and agents in relation to supply and demand in respect of all goods and services. It is stated that there are, however, certain exceptions to this general provision. The Act will, therefore, not apply to the following:

- ❖ activities of employees for their own reasonable protection as employees;
- ❖ arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
- ❖ activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;

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<sup>33</sup> Preamble to the Competition and Fair Trading Act.

- ❖ the entering into an agreement in so as it contains a provision relating to the use, licence or assignment of rights under, or existing by virtue of any copyright, patent or trade mark;
- ❖ activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party;
- ❖ activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public; and
- ❖ such business or activity as the Minister may, by statutory instrument, specify.<sup>34</sup>

Zamtel does not fall under any of the exceptions as elaborated above, and as such the provisions of the Act will apply to the entity.

### **The Zambia Competition Commission (ZCC)**

Section 4 of the Act establishes the Zambia Competition Commission (“ZCC”) as the body responsible for regulating competition in the Republic. The ZCC came into being in 1997, and is the body responsible for the enforcing competition law. It consists of 14 members (who are known as commissioners). The Ministries of Finance and Economic Development as well as the Commerce, Trade and Industry are represented by one commissioner each. There is also a representative from the Zambia Bureau of Standards. The rest of the commissioners represent Non Governmental Organizations (NGOs) in the following manner:

- ❖ Zambia Chamber of Commerce and Industry (2 commissioners);
- ❖ Law Association of Zambia with one commissioner;

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<sup>34</sup> As provided in section 3 of the Competition and Fair Trading Act.

- ❖ Zambia Federation of Employers with one commissioner;
- ❖ Zambia Congress of Trade Unions has one representative;
- ❖ Consumer Interest Representative has one representative; and
- ❖ Economics Association of Zambia also has one representative.<sup>35</sup>

The Board of ZCC consists of all the 13 Commissioners, and two ex-officio members, the Executive Director and the Secretary. The Commissioners appoint their own chairperson and vice-chairpersons among the 10 members representing NGOs. The Executive Director is assisted by a total of 25 members of staff.<sup>36</sup>

Section 6 (1) of the Act explicitly bestows the functions of the ZCC as follows:

*“it shall be the function of the Council to monitor, control and prohibit acts or behavior likely to adversely affect competition and fair trading in Zambia”.*<sup>37</sup>

The functions of the ZCC are further elaborated under section 6 (2) of the Act as being the following:

- ❖ to carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business, including the abuse of dominant position, so as to determine whether any enterprise is carrying on anti-competitive trade practices;
- ❖ carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;

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<sup>35</sup> Competition Policy in Zambia prepared under the auspices of consumer Unity Trust Society (CUTS), 2001 p.2

<sup>36</sup> Zambia Competition Commission, 2009.

<sup>37</sup> Section 6 (1) of the Competition and Fair Trading Act.



- ❖ to take such action as it considers necessary or expedient to prevent or redress the creation or a merger or the abuse of a dominant position by any enterprise;
- ❖ to provide persons engaged in the business with the information regarding their rights and duties under the Act;
- ❖ to provide information for the guidance of consumers regarding their rights and duties under the Act;
- ❖ to undertake studies and make available to the public reports regarding the operation of the Act;
- ❖ to co-operate with and assist any association or body of persons to develop and promote the observance of standards for conduct for the purpose of ensuring compliance with the provisions of the Act; and
- ❖ to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under the Act;

It is clear from the functions of the ZCC outlined above that it was established as a market regulator to ensure that there is free and fair competition in all market segments of the economy in Zambia, and also to protect consumers in their dealing with traders and manufactures in the economy.

### **Prohibitions**

Anti-competitive practices that are prohibited in Zambia include any agreements, decisions or concerted practices that have as their object the prevention, restriction or distortion of competition. These prohibitions can be summarized as follows:

- ❖ Section 7-Anti Competitive Practices;

- ❖ Section 8-Mergers and Takeovers;
- ❖ Section 9-Trade agreements;
- ❖ Section 10-Anti-competitive trade practices by associations;
- ❖ Section 11-criteria for controlling monopolies and concentrations of economic power; and
- ❖ Section 12-unfair trading/consumer welfare protection.

These practices are considered below.

### **Anti-competitive Trade Practices**

Section 2 prohibits agreements between enterprises that have the object of preventing, restricting or distorting competition to any appreciable extent in Zambia. It is stated that an agreement between entities itself is not prohibited, it is only prohibited when the purpose of such an agreement is to prevent or distort competition in a geographic market. In other words, such an agreement has to affect the free flow of competition as felt by affected parties or as seen by ZCC.<sup>38</sup>

Section 7 (2) prohibits what are known as vertical restraints on competition. Vertical restraints are arrangements or agreements between companies at different stages of the production and marketing chain.<sup>39</sup> These agreements can therefore, be regarded as possible instances of abuse of dominant position. Vertical restraints and the abuse of dominance are closely linked under Zambian Law. Examples of such restrictions have been cited under section 7 as follows:

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<sup>38</sup> M. Hantuba, Up Country Paper on Competition Regime in Zambia, 2002 p. 4

<sup>39</sup> Ibid.

- ❖ Exclusive dealing arrangements that restrict a firm's choice of buyers or suppliers;
- ❖ Exclusive territory allocations that restrict a firm's choice of location;
- ❖ Tying arrangements that restrict the source of supplies for particular inputs used by firms; and
- ❖ Resale price maintenance that restricts the price to be charged by down stream firms.

A number of examples have been cited which the ZCC has dealt with in the past. A good example has been cited as being that of exclusive dealing agreement between Hybrid Poultry Farm (HPF) and Galaunia farms Limited (GH), which was reported to ZCC and investigated.<sup>40</sup> HPF agreed to sell a Mariandale farm and the poultry processing plant to Galaunia Holdings (GH). The agreement had exclusive dealing clauses conditions in that GH would only purchase day old chicks from HPF. The ZCC noted that both parties to this transaction were leading parties in the poultry sector, and stated that the entities had taken advantage of their dominant position in the market and were “foreclosing competition in day-old chicks. These acts were, therefore, in direct contravention of section 7 of the Act”.<sup>41</sup> ZCC nullified the agreement.

The Act in section 7(2) also prohibits abuse of dominant positions of market power. Therefore, this provision requires the satisfaction of the requirement that the firm or entity in question is “dominant”.

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

## **Mergers and acquisitions**

Section 8 of the Act deals with mergers and acquisitions. The section prohibits any merger or take-over without prior authority from the ZCC. Such action relate to:

- ❖ a merger between two or more independent enterprises engaged in the manufacture or distribution of substantially similar goods or providing substantially similar services; and
- ❖ a take-over of one or more such enterprises by another who controls such enterprise.

The essence of regulating mergers/take-overs is to ensure efficiency and fairness in the business environment.

## **Horizontal agreements**

Section 9 of the Act deals with what are known as ‘horizontal agreements’. These have been defined as implicit and explicit arrangements between rival or potentially rival firms with identical or similar products.<sup>42</sup> The Act thus prohibits the following trade agreements:

- ❖ price fixing;
- ❖ collusive tendering;
- ❖ market or customer allocation;
- ❖ sales or product quotas;
- ❖ refusal to supply; and

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<sup>42</sup> M. Hantuba, *supra* note 32.

- ❖ collective denials of access to an arrangement or association which is crucial to competition.<sup>43</sup>

## **Controlling monopolies and concentrations of power**

Section 11 of the Act provides for control of monopolies and concentrations of economic power.<sup>44</sup> This issue will be discussed exhaustively in the succeeding chapter.

## **Powers of enforcement of the Competition Commission**

The effectiveness of competition law largely depends on its enforceability. Therefore, curbing anti-competitive practices depends on the actual degree of enforcement action by the Commission, as well as the role played by the Courts.<sup>45</sup> The Act bestows certain powers on the Executive Director of the Commission. The Director has been given the powers, after obtaining a warrant from a Court, to enter any premises, access to or production of any documents relating to trade or business of any person.<sup>46</sup> The Executive Director may also call upon the assistance of any police officials in carrying out his duties.

It is important to state that the Commission on its own, without recourse to the Courts, has no legal binding powers to issue orders to parties prohibiting conduct

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<sup>43</sup> Section 9(3) (a) to (g) of the Competition Act.

<sup>44</sup> Section 11 of the Competition Act.

<sup>45</sup> Zambia Competition Commission, Competition Rules in Zambia, 2002.

<sup>46</sup> Section 14 of the Competition Act.

found to have violated the law.<sup>47</sup> The Commission is required to take all of its matters to Court. This route is at times protracted, and can amount to a denial of justice where an instant remedy is required. The powers of the Commission are not extensive and, therefore, ineffectual.

Further, the Commission is said to face challenges as noted by the United Nations:<sup>48</sup> “the Commission suffers from acute financial and human resources which have severely limited the scale of its operations and advocacy efforts. The level of understanding and awareness on competition law, procedure and remedial action among the consumers and business concerns is quite low”.

This is an assertion that one is inclined to agree with, and largely contributes to the lack of effective enforcement mechanisms by the Commission.

The discussion above is a clear indication of the fact that our laws protect and uphold principles of fair competition. The next chapter is a discussion of the central concepts of monopolisation, as well as dominance, and whether these principles can be applied to the position of Zamtel as the sole operator of the international gateway in a justifiable fashion.

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<sup>47</sup> Zambia Competition Commission, *supra*.

<sup>48</sup> UNCTAD, *supra* note 32 p.44.

## CHAPTER THREE

### MONOPOLISATION AND DOMINANCE IN COMPETITION LAW

In order to fully comprehend the issue of Zamtel's monopoly, and dominance of the international gateway, it is imperative to analyse and understand the principles, and concepts of monopolisation and dominance in competition law. Thereafter, the principles will be applied to the position of Zamtel, in the telecommunications industry.

#### Concept of monopolisation and dominance

The competition laws of many jurisdictions contain a concept or principle which deters single firms from exploitation of market power.<sup>49</sup> A monopoly has been defined as:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers”.<sup>50</sup>

The exact definition of a monopoly was expressed in the cases of *United Brands Company v Commission*<sup>51</sup>, and *Hoffman La Roche and Co. v Commission*<sup>52</sup>. Therefore, an undertaking that is a monopoly, involves:

(1) an ability to prevent effective competition; and

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<sup>49</sup> B. Ralf, *Competitive Advantage: Superior offer or unfair advantage*, California Management Reviews, Volume 37, 1994, p. 132.

<sup>50</sup> OECD Policy, 1996, p.7

<sup>51</sup> Case 22/76 1978 ECR at 65.

<sup>52</sup> Case 85/76 1979 ECR at 38.

(2) an ability to act independently of the competitors, customers, and consumers

In our jurisdiction, section 2 of the Competition Act provides a definition of a monopoly as follows:

“a monopoly undertaking means a dominant undertaking or an undertaking which together with or not more than two independent undertakings:

- (a) Produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed throughout Zambia or any substantial part of Zambia; or
- (b) Provides or otherwise controls not less than one-half of the services that are rendered in Zambia or any substantial part thereof”.

It is clear, therefore, that in Zambian competition law, a monopoly is an undertaking that has more than 50% dominance in a market place. Further, it is noted that the words “monopoly”, and dominance are used interchangeably under the definition of monopoly, and are taken to have the same meaning.

The question that must be addressed is whether such dominance, and monopolisation by an undertaking is prohibited under the Competition Act. Section 7 (2) of the Competition Act prohibits as follows:

“enterprises should refrain from following acts or behavior if, through abuse or acquisition of a dominant position of market power they limit access to markets, or otherwise unduly restrain competition, or have or are likely to have adverse effects on trade or the economy in general:



- (a) Predatory behaviour towards competition including the use of cost pricing to eliminate competitors;
- (b) Discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods and services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undertake for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprise;
- (c) Making the supply of goods or services on the distribution or manufacture;
- (d) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier to the consignee;
- (e) Imposing restrictions where or to whom or in what form or other goods may be sold or exposed;
- (f) Mergers, takeovers, joint ventures or other acquisitions of control, whether horizontal, vertical or conglomerate nature; or
- (g) Colluding in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors or suppliers of services, in setting a uniform price in order to eliminate competition”.

From the provisions of section 7(2) of the Act, it is evident that the Act in section 7 (2) (g) targets monopolies by two or more undertakings, and as such does not directly address the position where there is only one undertaking controlling the market share.

However, section 7 (1) of the Act appears somewhat all encompassing and provides as follows;

“any category of agreements, decisions and concerted practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or in any substantial part of it are declared anti-competitive trade practices and are hereby prohibited”

Therefore, it would appear that conduct by a dominant or a monopoly which has an impact on competition in a negative manner is prohibited. This would appear to include the conduct of a single undertaking, which is a monopoly or is dominant in a particular industry.

Further, it is clear that the Act does not prohibit an undertaking from having a monopoly or being dominant in the market, but it is forbidden to misuse such position of dominance to the detriment of other firms as well as customers.<sup>53</sup> In determining dominance, the Act provides a market share threshold of 50% and above<sup>54</sup>. It is, therefore, explicit that the key concept of determination of a dominant position is market power.<sup>55</sup>

Therefore, it is important to establish how to determine abuse of dominance of market power? Or put differently, what are the characteristics that indicate that an undertaking is misusing its dominance in such a way that it becomes detrimental to other undertakings in its industry? This is paramount as it has earlier been indicated that dominance itself without misuse, is not prohibited per se. What is prohibited is for an

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<sup>53</sup> Zambia Competition Commission, 2001.

<sup>54</sup> Section 2 of the Competition Act.

<sup>55</sup> Hoekman, Bernard and Holmes, “Competition policy, Developing countries and the World Trade Organization” World Bank research working paper, 1999 p. 63.

undertaking to abuse its dominance in the industry. This inquiry of abuse of dominance is, therefore, vital when determining whether an undertaking has acted anti-competitively.

George Limipile<sup>56</sup> suggests that the determination of abuse of dominance follows a two-stage test:

(1) Whether the undertaking is dominant within its particular (relevant) market?

An undertaking is said to be dominant where it has a level of market power that allows it to behave independently of competitive pressures.<sup>57</sup> These competitive pressures may include factors such as pricing, and distribution strategies.<sup>58</sup> A very important factor in determining dominant position is the market share, that is to say, the share of the market in the particular relevant industry that the undertaking has.<sup>59</sup> In Zambia, as pointed out earlier, an undertaking cannot be said to be dominant if its market share is less than 40%. Another factor that assists in determining dominance is what level of competition the undertaking faces from new entrants to the market.<sup>60</sup> This factor will require the ZCC to analyse whether any barriers to entry to the market exists that would give businesses already existing into the market an advantage over the potential entrants.

(2) Whether it is abusing that dominant position?

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<sup>56</sup> OECD Global Forum on Competition "Competition Law and Policy in Zambia" 2001 p. 14.

<sup>57</sup> World Bank Report No. 15477-2A.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

The abuse of a dominant position is one of the key elements of the Competition Act. As aptly explained in the ZCC report: <sup>61</sup>

“for the provision to apply, one or more persons must substantially control a class of business through Zambia or a substantial part of it, and have engaged in or currently be engaging in a practice of anti-competitive nature that have the effect of preventing or lessening competition substantially.”

Therefore, an undertaking which is dominant will be taken to be abusing its dominance where its conduct in the industry has the effect of preventing or lessening competition. What, therefore, amounts to “*preventing or lessening competition substantially*.”? Dr David Cousins and Sitesh Bhojani,<sup>62</sup> provide an elaborate explanation by providing that *preventing or lessening competition substantially* means limiting access to the market or unduly restraining activity in the market. If a firm acquires market power, the competitive process will be weakened. However, if a weak firm becomes a stronger competitor against other stronger competitors, the competitive process is said to be strengthened.<sup>63</sup> Therefore, in order to assess whether there is a substantial lessening of competition as a result of certain conduct, it is necessary to consider what the future would be like with the conduct and compare this with what the future would be like without the conduct.<sup>64</sup>

Further, the *substantial lessening of competition* must be “*substantial*”. This means that the likely effect of the conduct of the dominant firm must be meaningful or relevant to

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<sup>61</sup> ZCC Competition Rules in Zambia, p. 192.

<sup>62</sup> Zambia Competition Commission (ZCC)/Law Association of Zambia (LAZ) Workshop on Competition Law for Legal Practitioners “The concept of substantial lessening of competition test”, 2009.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

the market process.<sup>65</sup> The ZCC has adopted the test used in the case of *Volk v Vervaeke*,<sup>66</sup> where the Court established the “de minimus rule” or the “de minimus doctrine”, in determining whether the conduct is *substantial*. This case established that some conduct has minimal effect on competition, and therefore, not substantial. In the *Volk* case, a German producer of washing machines granted an exclusive distributorship to Vervaeke in Belgium, and Luxembourg and guaranteed it absolute territorial protection against parallel imports. Volk lodged a complaint against this arrangement. Volk’s market share was only 0.5% in 1966 in Germany whilst Vervaeke had a market share of 5%. The Court held that a firm with a market share of less than 10% was not likely to harm competition in a significant manner.<sup>67</sup>

It is evident, therefore, that the law requires undertakings that are dominant not to be allowed to use their dominance to prevent or block challenges from existing or potential competitors.<sup>68</sup> The abuse of dominant position is vital especially in the context of a capitalist market, which is deregulated where many competitors are allowed to undertake business activities in any industry of their choice.<sup>69</sup> Further, the concept of abuse of dominance prohibition helps to ensure that dominant firms do not prevent or deter the discipline advocated by the removal of trade barriers and increased foreign competition.<sup>70</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> 1969 ECR 295.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> OECD, Trade and Competition policies OECD/GD (94), 1994 p.66.

<sup>70</sup> Ibid.

In order to appreciate the concepts of monopolisation and dominance, it is necessary to consider some matters that have been investigated by ZCC.

### **Zambia Breweries Plc (ZBL) exclusive distributorship and cooler usage Agreements**

Zambia Breweries notified ZCC of their exclusive distributorship and cooler usage arrangement.<sup>71</sup> ZCC had to make a determination on the arrangement and determined that ZBL was, in fact, a monopoly undertaking which controlled 95% of the clear beer market in Zambia, and that the object of the exclusive distributorship arrangement were actually anti-competitive by way of foreclosing market access of competing products.<sup>72</sup> ZBL forbade distributors from carrying competing brands in coolers supplied by the company.<sup>73</sup> As a result, ZCC nullified the agreements and declared the exclusive distributorships anti-competitive. This cease, and desist order of the ZCC is said to have preserved the competition process in the market, and the freedom of traders to make independent decisions was thus protected. It is also important to tie this case to the subject-matter of this research. It is evident that ZBL as result of their dominance, (95%), was abusing the dominance to restrict access to the market, and such a practice is clearly and bluntly anti-competitive

In another matter, Parmalat Zambia Limited's exclusive dealing arrangement in the dairy sector, was investigated. Parmalat (Z) Limited notified ZCC of its exclusive dealing arrangements.<sup>74</sup> It was established that Parmalat had instituted an exclusive

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<sup>71</sup> ZCC Annual report, 1999 p.18.

<sup>72</sup> Ibid.

<sup>73</sup> World Bank report, 2000 p.28.

<sup>74</sup> ZCC Annual Report, 2001 p.44.

distributorship along with the supply of refrigerated containers/cold rooms on loan basis for its products. It was discovered that Parmalat was a monopoly undertaking as regards milk producers with 60% market share, and only 20% in fruit juices. However, the Board authorized the exclusive dealing arrangement because the arrangement did not disadvantage competitors.

It becomes clear from the examples cited that ZCC approaches each case on a case-by-case basis. As explained by Thulasoni Kaira in his Obligatory essay,<sup>75</sup> anti-competitive trade practices are determined in a variety of ways. Indeed, some conduct may be perceived as rule of reason, while some may be viewed as a per se prohibition.<sup>76</sup> A rule of reason approach requires the case to be perceived on its own facts. Therefore, for instance the wording of our section 7 (2) of the Competition Act refers to “*if*” meaning that the conduct is only prohibited, and as such ultra vires “*if*” there is some actual adverse outcome on the markets, competition, trade or the economy.<sup>77</sup> However, a per se prohibition will prohibit the conduct outright, such as our section 9 and 10 which expressly states “the following are prohibited”.<sup>78</sup>

It therefore, becomes evident that the determination of abuse of dominance or monopoly requires a rule of reason criteria as evidenced by the cited case studies where each case was determined on its own merits and demerits by ZCC. As such, using a rule of reason approach, John Vivkers, who is the Chairman of the office of Fair

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

Trading in the United Kingdom in his paper entitled “Abuse of market”, <sup>79</sup> put it succinctly in his observation of abusive undertakings:

- “(i) that a dominant firm has a special responsibility not to allow its conduct to impair genuine undistorted competition;
- (ii) that a dominant firm may not eliminate a competitor or strengthen its position by recourse to means other than those based on competition and its merits;
- (iii) that abuse involves “recourse to methods different from those which condition normal competition; and
- (iv) that the concept of abuse is objective; so does not require anti-competitive intent.

In our Zambian context, the ZCC has developed a “four-step” assessment criterion in the determination of an abusive undertaking which has a dominant position in the market:<sup>80</sup>

- (a) is the alleged conduct captured under section 7 (2);
- (b) is the conduct engaged in by a dominant position of market power;
- (c) is there abuse of dominant position of market power; and
- (d) is there an adverse effect on competition in terms of section 7(1) of the Act.

It, therefore, becomes imperative to apply the above principles and provisions to the position of Zamtel in the telecommunications industry.

**(1) What is the conduct of Zamtel and would such conduct be covered under section 7(2) of the Act?**

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<sup>79</sup> Speech to the 31<sup>st</sup> conference of European Association for research in industrial economics, 2004 p.48.

<sup>80</sup> ZCC Guide on price discrimination, 2005 p. 19.



As explained earlier in the research, Zamtel provides international gateway services, as a result of being the only undertaking in the telecommunications industry with access to the device at Mwembeshi station. The position of Zamtel as the incumbent sole operator of the international gateway ushers in issues of restrictive practices as no other undertaking competes with Zamtel on the provision of international gateway services. Such conduct is therefore, undoubtedly an issue that has an effect on competition in the telecommunications industry. However, section 7 (2) of the Act appears to cover monopolies by more than one undertaking. The scrutiny should thus fall under section 7 (1), which is a more general provision as to whether a practice by any undertaking adversely affects competition.

**(2) Is the conduct engaged in by a dominant market power?**

One factor used in determining dominance as explained in the research, is the market share that an undertaking has. Under the Competition Act, the threshold is 50%. Zamtel is the only undertaking that operates the Mwembeshi international gateway, and other undertakings such as Zain and MTN have to go through Zamtel in order to transit their international gateway services. This means that Zamtel effectively has a 100% market share in this specific sphere of international gateway services. It has an absolute dominance. Therefore, the question as whether the undertaking is a dominant market power can be answered in the affirmative.

**(3) Is there abuse of dominant position of market power?**

Zamtel provides fixed and mobile-phone services. It has exclusive rights to the Mwembeshi Earth Station, and collects revenue from private operators using the satellite's facilities, including international gateways. It is through this position that Zamtel is able to effectively subjugate its competitors in the telecommunications industry thereby grossly restricting competition. This position amounts to an abusive control of market power as it vigorously limits access to the infrastructure used to provide international gateway services.

The position of Zamtel is further abusive in that it acts a barrier to entry. This is largely due to the fee of US\$12 million imposed by government,<sup>81</sup> charged to licensees who wish to operate international gateway services. This means new entrants cannot penetrate the market as the fee is prohibitive. This position was described as follows:

"the high licence fees would be seen to be prohibitive and in turn deter some operators from setting up their own international gateway, especially if the volumes of international traffic did not justify paying a huge licence fee. This had been cited as the reason why no new entrants had set up international Gateways, leaving only Zamtel as a monopoly".<sup>82</sup>

It is evident that this bureaucratic mechanism acts as a barrier to entry, and as such amounts to an abusive and autocratic process of competition in the telecommunications industry.

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<sup>81</sup> Statutory Instrument number 87 of 2001 Schedule 1 Part 1.

<sup>82</sup> Report of the Committee on Communications, Transport, Works and Supply, 2008 p.8.

It is evident therefore, that the exclusion of other undertakings from effectively competing with Zamtel, the hindrance of new entrants from penetrating the market as well as the charging of interconnection fees, and tariffs to user undertakings are all factors that amount to Zamtel's misuse and abuse of its dominance in the telecommunications industry.

**(4) is there an adverse effect on competition in terms of section 7(1) of the Act?**

An adverse effect in terms of section 7 (1) of the Act entails the application of the *substantial lessening of competition* test. Therefore, is the conduct of Zamtel substantially lessening competition? This requires the application of the explanation provided earlier on what the future would look with the conduct, and compare this with what the future would be like without the conduct. The position of Zamtel, as the sole provider of gateway services, weakens competition as there is little or no activity in this market. However, the full liberalisation of the gateway, and the active participation of other undertakings would increase activity in the industry, and therefore, strengthen competition. Therefore, if the conduct of Zamtel was to be corrected and increased participation took place, competition would strengthen in the telecommunications industry than if the present position of Zamtel were to continue to flourish. It is, therefore, evident that the current position of Zamtel has adverse effects on competition as it weakens the process of competition in the telecommunications industry regarding the provision of gateway services.

This research would be incomplete without obtaining the views of the officials at ZCC. I, therefore, conducted an interview with Mr. C. Sampa, the director of Mergers and Monopolies at ZCC.<sup>83</sup> I presented him with four specific questions in relation to the position of Zamtel. Namely:

- (1) would the conduct of Zamtel be covered under section 7(2) of the Competition Act?;
- (2) Is Zamtel a dominant undertaking in the market power?;
- (3) Is there abuse of dominance by Zamtel?; and
- (4) Is there an adverse effect on competition in terms of section 7(1) of the Competition Act?

In relation to the first inquiry, Mr. Sampa explained that ZCC uses the rule of reason to investigate the prohibitions under section 7 (2) of the Act. These prohibitions, he stated, are not prohibited per se. He explained that ZCC needs to see that the conduct of the dominant firm has actually affected competition through investigations that ZCC carries out with the prohibitions under section 7(2). In other words, a dominant firm can engage in the business involving the prohibitions, as long as ZCC is informed about the business, and the undertaking justifies the conduct to the satisfaction of ZCC. ZCC will conduct an investigation, and then advise the undertaking whether to engage in the conduct or not. Mr. Sampa advised that the position of Zamtel, however, does not seem to fall under the prohibitions of section 7 (2). He advised that the conduct by Zamtel in relation to the international gateway is centered mainly on being a barrier to entry, and

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<sup>83</sup> Interview conducted on 11<sup>th</sup> March 2010 at 15:30 hrs at the ZCC Offices.

the conduct of excessive pricing, which are covered more adequately under section 7 (1) of the Act.

In relation to the second inquiry as to whether Zamtel is dominant in the market. Mr. Sampa advised that section 2 of the Competition Act defines dominance as conduct by an undertaking providing services with a market share of 50% or above. He stated that the concepts of market power, and dominance go hand in hand. He further advised that the Competition Act adopts a quantitative approach to dominance, being 50% threshold. However, in determining dominance, the approach adopted in the *United Brands*<sup>84</sup> case, ought to be considered as well. In that case, a qualitative approach was adopted by looking at all relevant factors because even a firm which holds 30% may still have market power. In relation to Zamtel, he advised that the undertaking does have dominance because in the provision of international gateway services, the undertaking has 50% or more of traffic. He advised that previously, there was a perception that section 3 (h) of the Competition Act applied to Zamtel, where the Minister may approve certain business or activity, and as such was exempt from the provisions of the Competition Act. However, ZCC applied to the High Court for legal interpretation, and Justice Musonda declared that the provisions of the Competition Act will be equally applicable to government institutions which engage in commercial business. Mr. Sampa advised that the conduct of Zamtel is that of excessive pricing because of the institutional, and structural barriers imposed by government, and Zamtel itself. He cited the high tariff of US\$12 million to operate an international gateway, which acts as a barrier to entry. He advised that this conduct is certainly anti-competitive and as such,

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<sup>84</sup> Supra, note 51.

amounts to an abuse of its market power in the international gateway services market. He further added that the monopoly by Zamtel in this sector is aided by other statutes such as the Zamtel Act, which provides that only Zamtel may provide land line services. He advised that ZCC will need to apply, and ensure that this law is changed to be compliant with the dictates of free and fair competition.

It becomes important to reconcile the findings from the interview to the assertions expressed earlier regarding the position of Zamtel. The expression made in relation to the first inquiry was that Zamtel's conduct was that of providing international gateway services, and specifically having a monopoly over the Mwembeshi Earth Station. However, it was expressed that such conduct envisaged under section 7(2) seemed to apply to two or more undertakings, and in this scenario, it is conduct by one undertaking, and would more appropriately fall under section 7(1). Mr. Sampa, confirmed this position by stating that Zamtel's conduct of having exclusivity of the international gateway fell more appropriately under section 7(1), which provision is more generic, and covers anti-competitive practices generally. In relation to the assertion that Zamtel was a dominant undertaking by virtue of having more than 50% threshold, Mr. Sampa confirmed this position by repeating the position that the law provides a threshold of 50% for an undertaking to be dominant, and that Zamtel was as such, a dominant undertaking as it provides more than 50% or more of traffic. In relation as to whether Zamtel's conduct amounts to abuse of its dominant position, it was expressed that the undertaking's conduct was an abuse of its dominance by acting as a barrier to entry. In this regard, the fee of US\$12 million was cited as the fee charged by

undertakings that wish to provide international gateway services. Mr. Sampa expressed similar sentiments by stating that the fee of US12 million is a barrier to entry, which is an institutional, and structural barrier strategically imposed by government and Zamtel themselves. This position confirms the assertion that Zamtel's dominance amounts to abuse, and effectively has a negative impact on competition, and as such weakens it.

It is evident from the discussion above that the principles of monopolisation, and dominance by themselves do not attract prohibition. However, where such dominance is misused or abused, then our competition laws prohibit such conduct. This is the position of Zamtel as shown in the discussion above.

The next chapter will consider the jurisdictions of other countries in order to draw examples of how these jurisdictions have liberalised their gateways for the benefit of their consumers.

## CHAPTER FOUR

### ***COMPARATIVE ANALYSIS: THE CASES KENYA AND NIGERIA***

It becomes imperative to draw on the examples of other countries and understand the manner in which they have liberalised their telecommunications industry, and as such enhanced competition. Kenya and Nigeria have been selected as country case studies to show how the full liberalization of their international gateways have fostered healthy competition, and effectively been beneficial to the consumers in telecommunication industries in these two countries.

#### **Kenya**

##### **Overview of country**

Kenya is a large country with a population of around 34 million, and said to have a gross domestic product (GDP) per capita of around US\$1,144.<sup>85</sup> In 1998, the Kenyan telecommunications regulator, the Communications Commission of Kenya (CCK), was formed after the enactment of the Kenya Communications Act 1998.<sup>86</sup>

Kenya has recently liberalized its international gateway services. A limited number of international gateway licences initially provided for international data services in 2004, and then fuller liberalization is said to have been achieved when the Kenyan mobile operators received their own international gateway licences in June, 2006.<sup>87</sup>

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<sup>85</sup> OECD, Kenya, 2005.

<sup>86</sup> Ibid.

<sup>87</sup> GSM Report, Benefits of Gateway liberalisation: Stimulating Economic growth, 2009.



**Current Market**

**Fixed Sector**

Like Zambia, Kenya’s incumbent operator, Telecom Kenya is state owned, and had a statutory monopoly on fixed line services until about 2004.<sup>88</sup> The CCK is said to have subsequently licenced 19 operators in the fixed sector to provide services, and is said to be in the process of licencing a second national operator.<sup>89</sup> However, the use of fixed lines is said to be in the decline in Kenya, with 1 fixed line per 100 inhabitants in 2003, 0.9 in 2004, and 0.82 in 2005.<sup>90</sup>

**Mobile sector**

The mobile service sector in Kenya is dominated by Safaricom and Celtel. This sector has grown strongly with every 13.46 per 100 inhabitants.<sup>91</sup> Pre-paid services account for almost the entire mobile market (98.1%).<sup>92</sup> Safaricom has 65.9% of the market, and Celtel has 34.5%.

**Liberalisation of international gateways**

The monopolisation of the international gateway ended in June, 2004, following an offer by the regulator to provide licences only for internet backbone gateway operators with 6 licenses being issued between 2004-2005.<sup>93</sup> Following the issuance of the licences, and effectively the liberalization of the internet gateway, internet bandwidth charges fell by almost 50% during 2004-2005.<sup>94</sup> Kenya Data Networks is an open company that entered the market during the course for these reforms and is said to carry up to 70% of

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<sup>88</sup> Ibid.  
<sup>89</sup> Ibid.  
<sup>90</sup> OECD, Kenya, 2005.  
<sup>91</sup> ITU Report, 2005.  
<sup>92</sup> Ibid.  
<sup>93</sup> Global insight Newspaper, 28 September, 2005.  
<sup>94</sup> Ibid.

Kenya's outbound international traffic.<sup>95</sup> The sector is said to have further liberalised in June 2006 when the Communications Commissions of Kenya awarded international gateway licences to Kenya's two main operators, Celtel and Safaricom.<sup>96</sup>

### **Effects of liberalisation**

The liberalisation of gateways for international traffic led to the growth of VoIP calls over 2004, and 2005.<sup>97</sup> The result was also an increase in competing undertakings to such an extent that even the incumbent operator opened its own VoIP service in September, 2005, which offered calls to the UK and the USA for just US\$0.20 per minute, which was substantially below standard call rates.<sup>98</sup>

The liberalisation of the gateways also led to mobile operators reducing their own international call prices substantially.<sup>99</sup> Safaricom reduced its price in 2005, by about 46% calls to South Africa and Europe, and is said to have recently made another reduction of about 70%.<sup>100</sup> This latest reduction was as a result of Safaricom having been issued with its own licence to own an international gateway in June, 2006, and its use of satellite earth station for routing its own international traffic.<sup>101</sup> Kenya's other major mobile operator, Celtel has likewise introduced new pricing. Celtel launched its One Network price plan in September, 2006. The plan is said to have abolished

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<sup>95</sup> CCK Annual Report, 2004-2005 p.130.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

roaming charges and charging for receiving incoming calls for its customers when they travel between Kenya, Tanzania, and Uganda.<sup>102</sup>

It has been noted that liberalisation of the telecommunications sector, including international gateway services, has resulted in rapid and significant growth of the Kenyan telecommunications sector.<sup>103</sup>

**NIGERIA**

Nigeria is an important case study as it illustrates how liberalisation can be done gradually. Liberalisation of the gateway was partially done in 2001, and then fully liberalized in 2006.<sup>104</sup>

Nigeria has a population of about 130 million people, and as such has the largest population of any country in Africa.<sup>105</sup> The country went through a prolonged period of military rule, up to about 1999, when a new constitution was adopted establishing a civilian government. The civilian government begun to pursue reform, including the liberalisation of the telecommunications sector. As such, the telecommunications sector recorded a double-digit growth rate in 2005, and is said to be an important contributor to the overall economic growth rate of about 7 % in 2005.<sup>106</sup>

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<sup>102</sup> Ibid.

<sup>103</sup> The East and Central Africa Competitiveness Trade Hub “Implications for Kenya of accession to the World Trade Organization’s Information Technology Agreement” 2004 p.13.

<sup>104</sup> IMF Country Report No. 6/180-Nigeria, 2006.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid

Nigeria Telecommunications (NITEL) is Nigeria’s incumbent operator, which state is owned. The teledensity rate for fixed lines in Nigeria is said to be relatively low at 0.93 fixed lines per 100 inhabitants.<sup>107</sup> The number of subscriptions has been growing steadily following liberalization. Before liberalization in 2001, fixed line use was 0.49 lines per 100 inhabitants.<sup>108</sup>

In 2001, following government’s National Policy on Telecommunications, 3 GSM licences were auctioned in January, 2001.<sup>109</sup> The mobile sector is said to have subsequently grown from around 30,000 subscribers in 2000 to over 9 million in 2004. The leading mobile operator is MTN Nigeria with 45% of the market, followed by Globacom at 26.3%, Celtel Nigeria at 22% and M-Tel at 5.4%.<sup>110</sup>

The incumbent, NITEL, remained a monopoly over the international gateway until the licencing of GSM operators in January, 2001. The new GSM operators were given the right to supply international services in to their own customers using their own International Gateways.<sup>111</sup> The new operators were given exclusivity in the provision of mobile services for five years.<sup>112</sup> It is stated that following licencing, there was a period of over a year before operators were able to launch their gateway services. Celtel (then Econet) launched its International Gateway services in October 2002.<sup>113</sup>

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<sup>107</sup> Ibid.  
<sup>108</sup> Ibid.  
<sup>109</sup> Ibid.  
<sup>110</sup> Ibid.  
<sup>111</sup> Ibid.  
<sup>112</sup> Ibid.  
<sup>113</sup> Ibid.

International gateway services were fully liberalized in February, 2006. This is because holders of a unified licence were able to offer a variety of both fixed and mobile services including telephony, digital mobile services, internet services, value added services and international gateway services.<sup>114</sup> In May 2006, the Nigerian Communications Commission (NCC) issued four unified telecommunication licences with the operators each paying US\$2.11 million for the ten year licences. The licences are said to have been awarded to Multilink's, Starcomms, InterCellular, Prest Cable, and Satellite Communications, and additional gateway licences have also been created for international data access.<sup>115</sup>

### **Effects of liberalization**

It is stated that an analysis of international voice traffic suggests that partial liberalization in 2001 led to a substantial increase in traffic.<sup>116</sup> Average annual traffic in the five years after liberalisation was 65% higher than traffic in the five years prior to liberalisation. It is further stated that rapid traffic growth has been supported by large reductions in prices for both incoming and outgoing international calls. The price of an international call in 2005, was 10% of the price in 2002.<sup>117</sup> Further, MTN Nigeria's pre-paid tariffs; the price for international calling was reduced in 2006, by more than half from N90 per minute to N42 per minute following the full liberalisation of the international gateway.<sup>118</sup>

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<sup>114</sup> GSM Report, supra note 87 p. 88.

<sup>115</sup> Ibid.

<sup>116</sup> NCC Trends in the Telecommunications Market in Nigeria, 2003/2004 p. 47.

<sup>117</sup> GSM Report, supra note 87 p. 89.

<sup>118</sup> Ibid.

The liberalisation has also led to the overall health of the economy. Private sector investment into the Nigerian telecommunications sector has grown to over US\$6 billion in 2004 from US\$50 million in 2001.<sup>119</sup> The cited investment includes a €675 million project by Globalcom to install 1 million mobile lines, 100,000 fixed lines, three international gateways and a national fibre-optic backbone.<sup>120</sup> Globalcom is also building its own fibre optic submarine cable linking Nigeria to the United Kingdom, which will compete with the cable that NITEL has exclusive rights to use.<sup>121</sup> Further, about 4,500 Nigerians have been directly employed by the GSM operators.<sup>122</sup> The impact of Globalcom's investment in international gateway services has been summarized as follows:

“the major benefits of this development for Nigerian telephone users is substantial saving on international calls, improved voice clarity, a significant reduction in call delays, and the elimination of distortions. The dedicated circuits provided and managed by Globalcom will also ensure higher call completion rates”.<sup>123</sup>

It is evident, therefore, that the full liberalisation of the international gateway has benefits not only for the consumers, but for the economy in general.

It is important to note that the liberalisation of the international gateway in both Kenya and Nigeria, by issuing licences, led to heightened competition in the telecommunication. It is this heightened competition that in turn brought forth reduced prices for the benefit of

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

consumers. Therefore, monopolisation and abusive dominance stifle competition, and the economy in general.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

Zambia has undergone significant change in the telecommunications industry, mainly brought about by the advent of the change of governance from one a party state to multi-party governance. This change saw the enactment of the Telecommunications Act in 1994, followed by the Competition and Fair Trading Act in 1995. It is clear from the discussion, that the new dispensation also saw the disbanding of Posts and Telecommunications Authority (PTC), and the creation of Zamtel, as a company owned by government. Zamtel was given control of the Mwembeshi Earth Station, which is Zambia's only international gateway. Zamtel, however, was not the only company in the telecommunications industry, as the 90's also saw the advent of other communications providers. Zamtel, however, continued to enjoy exclusive use of the international gateway. This study was, therefore, aimed at analysing the purported dominance and monopolisation of Zamtel of the international gateway. After conducting research, I have come to the following conclusions:

- (1) Zamtel has dominance of the international gateway. This dominance is characterised by practices that are abusive in nature, such as excessive pricing. This conduct, in relation to the international gateway services, is anti-competitive in nature, as it weakens competition in the telecommunications industry;
- (2) Zamtel's dominance of the international gateway is aided by barriers to entry. The exorbitant fee of USD12 million to provide an international gateway service



prevents other entities from competing with Zamtel, leaving Zamtel in exclusive control of the gateway.

- (3) The telecommunications industry in relation to the provision of international gateway services is severely protected. It is this aspect of protectionism on the part of government that has led to the exclusive dominance by Zamtel of the international gateway in the provision of international gateway services. This act of protectionism amounts, not only to conduct that is anti-competitive, but it is also a blatant disregard of the principles of neo-liberalism, a philosophy adopted by countries with capitalist ideologies, such as Zambia. This philosophy is centered around the opening up or freeing of a country's markets to investors of other nations, and so forth.
- (4) The Competition and Fair Trading Act does not appear to recognize single-firm monopoly conduct under the prohibitions contained under section 7 (2). This means that the monopoly and dominance by Zamtel, as a single firm is not provided for under the prohibitions. This lacuna in the Competition and Fair Trading Act is serious in nature, as an undertaking can easily argue that its conduct does not fall under the prohibited practices.
- (5) The ZCC lacks enforcement powers. This lack of enforcement powers exacerbates Zamtel's dominance, as the Commission can make a declaration that Zamtel is monopoly in the international gateway market, but it cannot issue any effective orders to combat the conduct of Zamtel, other than by going to Court, like every other litigant. This weakens the power of the Commission in regulating competition issues.

- (6) The dominance, and monopoly of the international gateway is aided by the fact that Zamtel is majority-owned by the government. This position puts the undertaking on a higher footing than its competitors in the industry, as it has exclusive control of the international gateway.

The following recommendations are, therefore, made:

- (1) Zamtel's dominance should be investigated by ZCC, as the body tasked with regulating competition issues. Specifically, the conduct of abusive dominance ought to be investigated. This investigation would require ZCC to call on Zamtel to justify its practices. This is in accordance with the rule reason approach used by ZCC in approaching, and investigating cases where anti-competitive practices are alleged. If the reasons provided Zamtel are not justifiable or found to be unacceptable by the Commission, the Commission ought to make a declaration to the effect that Zamtel's position in the industry is detrimental to other undertakings in the industry, and stifles the economic growth of the industry.
- (2) The exorbitant licence fee of USD12 million, which acts as a barrier to entry, must be reduced to a fee that is reasonable. It is recommended that a survey ought to be done in this regard, especially with the affected undertakings in the industry, such as MTN and ZAIN, so as to get an understanding as to what an acceptable fee would be. In this respect, it is further recommended that ZICTA, as the regulator of the telecommunications industry, must step in, and determine a fair licence fee, after consultation with the other undertakings

affected. This recommended approach of conducting consultations with other stakeholders, will not only foster fair competition, but is also in line with principles of any democratic nation. It is further recommended that in determining a reasonable licence fee, ZICTA could also draw examples from jurisdictions, such as Kenya and Nigeria, whose fees are way below the unreasonable USD12 million fee operational in the Zambian market. A reduced fee will remove the barrier to entry, and attract more competitors in the industry in as far the provision of international gateway services is concerned.

- (3) There be full liberalization of the international gateway by way of issuance of licences to interested undertakings. It is recommended that ZICTA, must issue international gateway licences to those firms wishing to provide such services. This will remove the element of extreme protectionism of the gateway. It is recommended that undertakings, such as ZAIN and MTN must be proactive, and apply for the licences from ZICTA, as there is nothing in the repealed Telecommunications Act, or in the new ICT Act which prohibits an undertaking from being issued with a licence to operate an international gateway. It is the stringent hold by Zamtel, of the international gateway, as well as the institutional and structural barriers that create the perception that Zamtel is the only undertaking permitted to operate an international gateway. To remove this perception, it is recommended that both ZICTA, and ZCC must conduct educational programmes aimed at educating the stakeholders in the telecommunications industry.

- (4) The Competition and Fair Trading Act must undergo a process of amendment. ZCC, as the regulator, must couch provisions that are all-encompassing, which will cure the lacuna under section 7(2) of the Competition and Fair Trading Act. This amendment should be couched in such a manner that it provides for single-firm monopoly to be accountable under the prohibitions in section 7(2). In this respect, ZCC has already drafted a bill to amend the current Competition Act. It is my expectation that the amendment will be couched in a more all-encompassing fashion.
- (5) ZCC must be bestowed with extensive enforcement powers. This will render the Commission more autonomous, and therefore, more effective in combating issues of competition. The amendment of the Competition and Fair Trading Act to increase the powers of enforcement, must be done in such a manner that it enables the Commission to issue orders, and not simply declarations as is the case now. I have been informed that the new Competition and Fair Trading Bill will address this aspect of the problem.
- (6) The international gateway should be privatised as an asset of Zamtel, along with the privatisation of Zamtel. This will remove the gateway from the grasp of government, and put the gateway in private domain. This will strip the undertaking of its anti-competitive advantages. In this respect, it is recommended that it would be of assistance if the company that purchases Zamtel should insist on acquiring the Mwembeshi Earth Station, as an asset of Zamtel. Private ownership of the gateway will also encourage other competitors to set up their own gateways so as to compete effectively with the

company that will own the gateway. This will, therefore, lead to increased competition. Heightened competition will gradually lead to a drop in tariffs, for the benefit of consumers, as was the case in Kenya and Nigeria.

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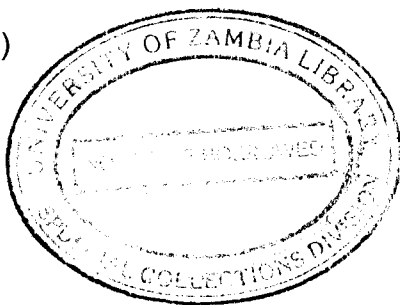
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