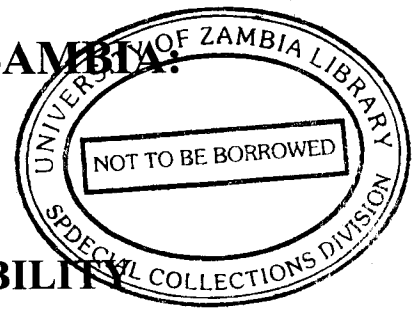


ANTI-COMPETITION LAW IN ZAMBIA:



ITS RELEVANCE AND APPLICABILITY

BY

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UNIVERSITY OF ZAMBIA

2005

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

**ANTI-COMPETITION LAW IN ZAMBIA:
ITS RELEVANCE AND APPLICABILITY**

BY

PUMULO AKAPELWA

Being a final year essay submitted to the University of Zambia, School of Law, in partial fulfilment of the conditions for the award of the Degree of Bachelor of Laws (LLB).

UNIVERSITY OF ZAMBIA

DECEMBER 2005.

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that this Directed Research prepared under my supervision

By

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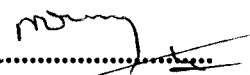
Entitled

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ITS RELEVANCE AND APPLICABILITY

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

Date.....5/02/06.....

Supervisor..........

Mr Mumba Malila

DECLARATION

To the best of my knowledge, and according to the regulations of the University, the essay on '**ANTI-COMPETITION LAW IN ZAMBIA: ITS RELEVANCE AND APPLICABILITY**' is my own work and consists of fifty pages in the main text.

DEDICATION

This dissertation is dedicated to my wife Mulima, and children, Mwinsi, Buitumelo and Musa and all the other members of my family.

To my wife, words cannot express my gratitude for being very supportive and encouraging during this period of my studies. Your support was unwavering and spurred me on even in times of despair.

To my children, you were the driving force behind all my effort for I had to live up to your expectations and to provide a foundation from which to draw your inspiration.

To my other family members, I thank you all for being understanding and supportive during the times that I was never available for you. May the almighty God bless you all.

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Finally to all my other classmates and friends from inception of my law studies to its end who made my stay and learning enjoyable. My failure to name them is purely due to limited space.

However, for any shortcoming that may arise out of this dissertation, I take full responsibility.

STATUTES

- 1) Competition and Fair Trading Act, Chapter 417 of the Laws of Zambia
- 2) Banking and Financial Services Act, Chapter 387 of the Laws of Zambia
- 3) Investment Act, Chapter 385 of the Laws of Zambia
- 4) Lands Act (1995), Chapter 184 of the Laws of Zambia
- 5) Privatisation Act, Chapter 386 of the Laws of Zambia
- 6) Securities Act, Chapter 354 of the Laws of Zambia
- 7) Telecommunications Act, Chapter 469 of the Laws of Zambia

ABSTRACT

Anti-competition law has been in existence in Zambia for nearly ten years now. Although significant work has been done by the Zambia Competition Commission (ZCC) in enforcing the anti-competition law, little work has been done to establish the relevance and applicability of these laws on account of various reasons such as lack of adequate financial, human resources and institutional capability, largely monopolistic-dominated economy especially in areas such as utilities, and uniform pricing of petroleum products among others. Lack of enforcement and enforcement capability renders the effect of the law moribund. The relevance of the competition law as it was enacted in fulfilment of conditionalities set by multilateral agencies such as the International Monetary Fund (IMF) and the World Bank pursuant to meet the western donors expectations.

Competition policy has a significant role to play in promoting competitiveness and growth. It has been observed that competition policy helps create an enabling environment for entrepreneurial development, ensures efficient allocation of resources in an economy and that privatisation without anti-competition legal framework policy will mean transfer of monopoly power from the public sector to the private sector.

An inappropriate competition regime does not add to the development of the economy but acts as a disincentive in promoting competition and growth in the economy. It is important that competition policy is relevant and applicable so as to promote competition and growth in the economy.

It is for this reason that an informative and educative study is undertaken on this subject so as to bring awareness and stimulate debate among policy makers and other

stakeholders on the need to have an effective competition legal framework. The legal regime must be relevant and applicable to the Zambian scenario.

This area of law has not seen a lot of work done in relation to this subject in Zambia. Given the background of Zambia's privatisation programme ownership of businesses has largely moved from public ownership to private ownership creating virtual monopolies. This is contrary to the spirit of the competition policy.

Due regard must be had to the relevance, and more importantly, the setting and implementation of such legal framework must be applicable in the Zambian context.

In Chapter One, the essay gives a historical aspect of the Zambian socio-political economy and the legal framework and the development of anti-competition law in Zambia.

Chapter Two examines the necessity and relevance of competition law in a developing economy such as Zambia.

Chapter Three looks at the implementation and effectiveness of Zambia's competition policy and law and the challenges of the competition agency.

Chapter Four looks at the appropriateness and relevance of competition law with lessons drawn from other jurisdictions.

Finally conclusions and recommendations are made in Chapter Five.

Historical Aspects of Zambia's Socio-political Economy - Legal Framework and Development of Anti-competition Law.

Introduction

Competition policy has a significant role to play in promoting competitiveness and growth.¹ It has been observed that competition policy helps create an enabling environment for entrepreneurial development, ensures efficient allocation of resources in an economy and that privatisation without anti-competition legal framework policy will mean transfer of monopoly power from the public sector to the private sector.²

An inappropriate competition regime does not add to the development of the economy but acts as a disincentive in promoting competition and growth in the economy. Competition policy is an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare.³ Competition policy is defined as *“those Government measures that directly affect the behaviour of enterprises and the structure of industry”*.⁴ It is important that competition policy is relevant and applicable so as to promote competition and growth in the economy. Competition is broadly defined as *“a situation in a market in which firms*

¹ Mehta P.S. and Nanda N, *Competition Policy, Growth and Poverty Reduction in Developing Countries*, CUTS Centre for Competition, Investment & Economic Regulation, Jaipur, India, a paper delivered at the “Regional Conference on Competition, Competitiveness and Investment in Global Economy”, Dar es Salaam, Tanzania, May 2004, at p.3.

² Ibid at p.3

³ Committee on the Review of the Proposed Competition Policy – India Volume I, Chapter 1, at p.3, www.dca.nic.in/comp/mainfile.htm

⁴ Ibid at p.2

*or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share"*⁵.

It is for this reason that an informative and educative study is undertaken on this subject so as to bring awareness and stimulate debate among policy makers and other stakeholders on the need to have an effective competition legal framework. The legal regime must be relevant and applicable to the Zambian scenario.

This area of law has not seen a lot of work done in relation to this subject in Zambia as Lipimile G.K⁶ states,

"The level of understanding and awareness on competition law, procedure and remedial action among the consumers and business concerns is quite low." Given the background of Zambia's privatisation programme ownership of businesses has largely moved from public ownership to private ownership creating virtual monopolies. This is contrary to the spirit of the competition policy.

It is important that the competition regime is reviewed by the government so as to meet the needs of the country as opposed to merely fulfilling conditionalities set by multilateral partners such as the IMF. Due regard must be had to the relevance, and more importantly, the implementation of such legal framework must be applicable in the Zambian context.

Historical aspects of Zambia's Socio-political Economy

At independence in 1964, one of the government's key objectives was to empower the Zambians with economic freedom. The government adopted a free market economy,

⁵ Ibid at p.2

⁶ Executive Director, Zambia Competition Commission, *Competition Policy in Zambia*, Consumer Unity Trust Society, October 2001 Publications at p. 4.

which reigned from 1960 to 1969.⁷ This era coincided with multiparty democracy⁸. The government's objectives were the maintenance of state stability; development of human and material resources; and improvement of the standard of living of its citizens, attract private business enterprise and encourage trade.⁹ During this period the economy was relatively buoyant with growth in per capita real GDP growing from 0.8 per cent over the 1960-1964 to 1.0 percent in the period 1965 –1969.¹⁰ The economic policy focused, among others, on -

- development, mainly through the private enterprises, of individual cultivator or businessman or corporation,
- government responsibility was limited to the maintenance of stable government and provision of necessary infrastructure, including research and extension services and
- assisting private enterprises in early stages of establishment, and expansion of economic activity in rural areas and undertaking important activities of economic development which private enterprise was likely to be willing to undertake as direct government investment.¹¹
- To achieve the maximum possible increase in the prosperity and general well being of its citizenry.

However, due to the need to empower its citizenry, the impatience with both private foreign and Zambian investors on the other hand government in April 1968 made a series

⁷ Mwanawina I and Mulungushi J, Explaining African Economic Growth Performance: The Case Study for Zambia, (Draft) March 2002, Executive summary, p.i, www.gdnet.org/pdf/draft_Country_studies/Zambia-Mwanawina.RIR.pdf.

⁸ Ibid

⁹ Ibid

¹⁰ Ibid at p. ii

¹¹ Ibid at p. 10

of economic changes.¹² The changes transformed the economic policy from a semi-liberal to economic nationalisation (that is, state control and management of most aspects of economic activity).¹³ The government introduced restrictive fiscal and monetary policy instruments aimed at regulating most economic activities like price controls of essential commodities, interest rates, exchange rate and wage rate controls, regulations governing the borrowing of financial resources and remittance of profits.¹⁴ Furthermore the government took over private enterprises, some wholly and others partially.¹⁵

The period 1970 to 1984 signalled the start of sluggish economic performance, which apparently was the period of the birth of the second Republic.¹⁶

The nationalisation policy created a number of monopolies in the production, utilities and services sectors.¹⁷ The monopoly entities were wholly owned by the state¹⁸ and this led to numerous problems such as political interference, inefficiency, capacity under-utilisation and lack of accountability¹⁹. Poor management and low levels of investment also contributed to the poor performance of the parastatal sector. Zambia's past economic policies created a huge parastatal sector based on monopolistic principles²⁰.

The state controlled sector dominated the economy to such levels that jurisprudentially anti-competition and unfair trade practices were rife. No regulatory framework was in

¹² Ibid at p. ii

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Ibid

¹⁹ Ibid at p.iii

²⁰ Patel D, Minister of Commerce, Trade and Industry, Parliamentary Debates of the Third Session of the Seventh National Assembly of Zambia No.97, 21ST January –17th March 1994, at P. 1523.

place to encourage private sector and free competition in the market. It is quite obvious that nobody could feel the need for a competition law in such a scenario.²¹

Economic performance continued to be dependent on foreign aid.²² There was a contradiction between the state ideology of humanism-socialism that aimed at attaining real political and economic independence from western countries and heavy dependence on foreign technical skills and financial assistance from the same countries on the other hand.²³ Donor interests dictated both aid and capital from industrial countries.²⁴ As a consequence of this the relationship between the Government and the donors deteriorated.

The Zambian government, in collaboration with the International Monetary Fund, introduced policies aimed at resuscitating the economy towards the end of 1985.²⁵ The policy measures focused on partial freeing of interest rates, thereby allowing the rates to respond to market conditions, reductions of subsidies and removal of price controls on most commodities and the auctioning of foreign exchange for general imports.²⁶ However, the economy failed to respond.²⁷ There were fiscal slippages and money supply growth went out of control and with it, inflation increased.²⁸ The demand for imports remained high while living standards deteriorated. The government abandoned the

²¹ Supra note 2

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid at p.27

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

liberalisation policies and reverted back to the controls.²⁹ This led to a break down of ties with the International Monetary Fund (IMF) and the World Bank.³⁰

Eventually Zambia was declared ineligible to use the International Monetary Fund (IMF) resources in September 1987 following the accumulation of overdue financial obligations to the IMF³¹. As a consequence of this suspension Zambia had to endure difficult economic hardships leading to dissatisfaction in the general populace.

Third Republic Era

With the advent of the winds of change that blew from the eastern bloc (the collapse of the Soviet Union and the fall of the Berlin Wall in 1989) the Zambian people called for the re-introduction of multiparty democracy. In 1991 the multiparty democracy was re-introduced and the Movement for Multiparty Democracy (MMD) succeeded the United National Independence Party (UNIP).

The new government introduced new economic policies, which sought to do away with the mixed economy, which had as its main objective the provision of social welfare.³²

It undertook a fully-fledged Structural Adjustment Programme (SAP) in line with the IMF conditionalities³³. The liberalisation of the economy was set in motion and the Government stated that it was pulling out of business, as it had “no business in being in business”. With this change in policy it was imperative to realign the legal framework so as to support the changed circumstances and hence a significant work on legal reforms was embarked on. One of the laws proposed for enactment was the competition law.

²⁹ Ibid

³⁰ Ibid

³¹ IMF Press Release No. 95/62, 6th December 1995, Washington.

³² Consumer Unity Society (CUTS) India, *Competition Policy In Zambia*, Publications, October 2001, www.globalcompetitionforum.org/regions/Africa/Zambia/Competition.

³³ Ibid.

Development of Competition Law

Since the beginning of the 1990s, competition policy has been increasingly recognised as a key component in the ongoing reforms of most developing countries.³⁴ The role of competition law has arisen in response to the privatisation and liberalization movements that have swept many developing economies in the past two decades, which have been spawned by technological, economic, political and ideological forces.³⁵

Anti-competition laws are designed to promote competition and free enterprise. The concept behind these laws is that competition in any industry or business will lead to maximum efficiency and the lowest possible prices for consumers.³⁶ Under the one party state the government's direct involvement or intervention in economic activity stifled economic freedom, entrepreneurial activity, business efficiency productive investment and economic growth as well as consumer welfare by administrative decisions and not market decisions.³⁷

Mr. Dipak Patel, the then Minister of Commerce, Trade and Industry on 10th March 1994 in introducing for second reading the Competition and Fair Trading Bill in the National Assembly stated as follows,³⁸

"...The private sector was marginalized and pitied against heavily protected monopolistic State-owned enterprises. Because of such heavy protection, these State enterprises grew complacent, inefficient, and quality standards of their products fell to shameful levels. To finance these deficiencies and over-employment overheads, these

³⁴ CUTS, 2002, Promoting Competitiveness and Efficiency in Kenya - The Role of Competition & Law, at p. (iii).

³⁵ Gal M, The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries, UNCTAD Publications, 2004, at p.23

³⁶ DIMON, Anti-Competition & Trade Regulation Compliance Manual, at p.1, www.dimon.com/cg/files/anticompetition.pdf

³⁷ Kwendakwema N.J., Chairman's Report, Zambia Competition Commission Annual Report 1999.

³⁸ Supra note 3.

enterprises resorted, more often than not, to hiking prices. They could not price themselves out of competition because they were protected monopolies.

Mr. Speaker, as the MMD Government continues in its irreversible march to building a free market economy through the privatisation and free market programme, there is need to build safeguards against creating private monopolies from State monopolies. Monopolies, whether they are State or privately owned are enemies of the free market and breed anti-competitive trade practices.”

In seeking to achieve this objective various other statutes were introduced in line with the liberalisation and privatisation programmes. These included provisions to counter anti-competitive practices or conduct in the economy. Other statutes, in which have anti-competitive provisions are the Banking and Financial Services Act³⁹, Privatisation Act⁴⁰, Telecommunications Act⁴¹ and the Securities Act⁴².

Why have a Competition Policy and Law

The reasons for the need for competition laws has increased due to globalisation and the changes it has brought at international level.⁴³ By and large developing countries have adopted competition policies mainly due to conditionalities imposed upon them by the Breton Woods Institutions.⁴⁴

Following the return to a free market economy in 1991 under the support of the IMF and World Bank institutions the benchmarks and conditionalities set by these institutions constituted the policy package for the stabilisation and structural adjustment programme

³⁹ Chapter 387 of the Laws of Zambia.

⁴⁰ Chapter 386 of the Laws of Zambia

⁴¹ Chapter 469 of the Laws of Zambia

⁴² Chapter 354 of the Laws of Zambia

⁴³ Ibid

⁴⁴ Adhikari R, Prerequisite for Development-oriented Competition Policy Implementation: A Case Study of Nepal, UNCTAD – Publications, at p. 55.

(SAP).⁴⁵ The thrust of these reforms was to liberalise the economy by divestiture from state enterprises, removal of subsidies and removal of price controls among others.

The Minister of Commerce, Trade and Industry, Mr Dipak Patel, when introducing the Competition and Fair Trading bill 1994 stated the objectives of the bill as –

- to encourage competition in the economy by prohibiting anti-competitive trade practices, to regulate monopolies and concentrations of economic power,
- to protect consumer welfare,
- to strengthen the efficiency of production and distribution of goods and services,
- to secure the best possible conditions for the freedom of trade, and
- to expand the base of the entrepreneurship.

This was subsequently enacted into law in 1995 as the Competition and Fair Trading Act 1994, and these intentions have also been enshrined in other statutes to provide a comprehensive framework of competition law.

The Banking and Financial Services Act provides under Chapter IV, anti-competition provisions in sections 40, 41 and 42. Section 42 extends the promotion of competition and free trade provisions existing in other statutes that deal specifically with competition matters. The Privatisation Act provides in section 8(2)(j) that the Agency must ensure that no monopolies are created in the process of privatisation.

The Securities Act⁴⁶, Part VI, section 39 also prohibits take-overs or substantial acquisitions of securities in any company, which may lead to substantial lessening of competition.

⁴⁵ Mwanawina and Mulungushi supra at p.28.

⁴⁶ Chapter 354 of the Laws of Zambia

The Telecommunications Act⁴⁷ in section 5(2)(b) and (c) provides for the protection of customer welfare and promotion of competition amongst telecommunication service suppliers respectively.

The Competition Commission

The Competition and Fair Trading Act 1994 created the regulatory agency known as the Zambia Competition Commission under Part II section 4. The functions of the agency are to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair-trading in Zambia.

This agency secretariat came into existence in May 1997 and is responsible for enforcing the competition law in the country.⁴⁸

Major Provisions

Any categories of agreements, decisions and concerted practices whose objectives is to prevent, restrict or distort competition in the country or any substantial part of it are declared anti-competitive trade practices and are prohibited by the Act.⁴⁹ The main elements of the competition law relate to⁵⁰ -

- Restrictive Trade Practices
- Abuse of dominant position
- Mergers and Acquisitions

⁴⁷ Chapter 469 of the Laws of Zambia

⁴⁸ Consumer Unity Society (CUTS) India, Competition Policy in Zambia, October 2001, www.globalcompetitionforum.org/regions/africa/zambia/competition.

⁴⁹ Ibid

⁵⁰ Ibid

The Challenges

Competition policy and competition law are still in their infancy in Zambia. The level of understanding and awareness on competition law, procedure and remedial action among the consumers and business concerns is quite low. Hence the benefits of the competition policy are yet to be seen. So far what has been observed under the privatisation process is the transfer of state monopoly to private monopoly as seen in the case of the clear beer and carbonated drinks industry.⁵¹

The success of any competition policy depends to a large extent on the existence of a competition culture and a supportive policy environment.⁵² Competition advocacy is a necessary pre-requisite in the environment. The question that begs an answer is whether these conditions exist in Zambia.

Further is the law realistic and implementable in the Zambian context? An unenforceable law on paper is as good a dead law so goes the juristic saying. Every country needs to tailor its competition law to meet its own specific set of needs and circumstances. Is the stage of development that Zambia has attained congruent with the need for a competition law? If the enforcing agency is not well funded to enforce the law how can the law be effective nor be considered to be relevant to the needs of the state?

As to whether these circumstances exist is a matter that this paper seeks to establish.

⁵¹ Zambia Competition Commission, Press Releases, 14/04/2005.

⁵² Mehta PS & Nanda N, Competition Policy, Growth and Poverty Reduction in Developing Countries, CUTS, www.fias.net/ifcext/fias.nsf/attachmentsByTitle/Conferences_Competition_Nitya+Nand, at p.13

Chapter Two

Necessity and relevance of competition law; Objectives, Scope and Coverage of Zambia's Competition Law

Necessity for Competition Policy and Competition Law.

The Objective of competition policy⁵³ is to promote efficiency and maximize welfare.⁵⁴ It is well known that in the presence of competition, welfare maximisation is synonymous with allocative efficiency.⁵⁵ There are two elements of such a policy.⁵⁶ The first involves putting in place a set of policies that enhance competition in local and national markets – these include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation.⁵⁷ The second is legislation designed to prevent anti-competitive business practices and unnecessary Government intervention – competition law.⁵⁸

Liberalised Trade Policy

The adoption of liberalisation policies, the rise in privatisation, and the fact that most privatised entities monopolies underscore the importance of a solid competition regime to elicit the most favourable efficiency and welfare effects of liberalisation and privatisation.⁵⁹ Zambia undertook liberalisation policies by enacting various pieces of legislation to provide for an enabling free market environment such as the Privatisation

⁵³ This is known as antitrust law in the United States.

⁵⁴ Volume I, Chapter 1, at p.4, www.dca.nic.in/comp/mainfile.htm

⁵⁵ Ibid at p.5

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Adhikari R, Prerequisite for Development-Oriented Competition Policy Implementation: A Case study of Nepal, UNCTAD Publications – 2004, Competition, Competitiveness and Development: Lessons from the Developing Countries, at p.53.

Act, Banking and Financial Services Act, Investment Act, Pensions Act, Insurance Act, Zambia Revenue Authority Act and others. In turn the government also amended or repealed certain statutes so as to avoid the impediment of its liberalisation policies such as the Control of Goods Act, Exchange Control Act, Lands Act, Companies Act, Employment Act, National Parks and Wildlife Act and other acts.

Investment Environment

The Zambian government adopted relaxed foreign investment policies and by creating an enabling legal framework. The Investment Act was enacted which provided under Part VII investment guarantees. These guarantees guaranteed the protection from acquisition of a foreign entity's property in the Republic and the repatriation of an investor's funds in foreign currencies from the Republic.

Property Ownership

The Lands (Conversion of Titles) Act was repealed and replaced by the Lands Act (1995), which provided for the recognition of value in land and also provided for transfer of land for a valuable consideration. The Act also provides for the alienation of land to non-Zambian persons who may have acquired an investment licence from the Zambia Investment Centre, or are a company registered under the Companies Act or a commercial bank registered under the Banking and Financial Services Act and companies.

Economic Deregulation

The deregulation of the economy was a policy move from state controlled economy to a free economy. The government set out to free the market by privatising most parastatal entities and this was done by way of the Privatisation Act, enacted to facilitate the

process. Since then two hundred and sixty-two (262) companies have been privatised as at July 2005.⁶⁰

The Chairman of the Zambia Competition Commission reiterated the foregoing in his Annual Report statement for the year ending 1999 as follows –

“Since the advent of economic and political liberalisation in Zambia dating from 1991, there have been considerable policy changes in the Zambian economy with increased reliance being placed on market forces. A common aspiration underlying these reforms has been that the reduction of government’s direct involvement or intervention in economic activity would be providing enterprises with more freedom and stronger incentives, stimulate entrepreneurial activity, business efficiency, productive investment and economic growth, as well as enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than administrative decision.

It was further anticipated that the free play of supply and demand would, in the long run, determine market prices throughout the economy, allowing productive resources to be allocated in an efficient manner.

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

⁶⁰ Privatisation Status Report 2005, Zambia Privatisation Agency.

A well functioning market mechanism is essential in this respect, for example, price liberalisation in the market dominated by monopolies (former parastatal companies now privatised), unless specific efforts are made to ensure the existence of competition, will end up in monopolistic price rises without corresponding competitive price equilibrium. In recognition of the major role of competition law and policy for the success of the policy reforms, the Zambian government enacted the Competition and Fair Trading Act of 1995”.

Relevance of Competition Law

The Supreme Court of the United States once characterised competition (antitrust) law as the ‘*Magna Carta*’⁶¹ of free enterprise.⁶²

In the US where competition law is most developed the law has firstly sought to protect customers, both individuals and businesses, against the creation and exercise of undue market power; secondly it has served to protect small, inefficient firms from competition; thirdly competition law is an aspect of competition policy which refers to broader public policies that seek to promote private competitive markets as alternatives to state-owned, private monopoly, or regulated monopoly, supply sectors.⁶³

⁶¹ Magna Carta, also known as Magna Carta Libertatum, is an English 1215 charter which limited the power of English Monarchs, specifically King John, from absolute rule. Magna Carta was the result of disagreements between the Pope and King John and his barons over the rights of the king: Magna Carta required the king to renounce certain rights and respect certain legal procedures, and to accept that will of the king could be bound by law. Magna Carta is widely considered to be the first step in a long historical process leading to the rule of constitutional law.

⁶² Owen B, Sun S, and Zheng W, *Antitrust in China: The Problem of Incentive Comparability*, Journal of Competition Law and Economics 1(1), (2005), at p. 124, Oxford University Press.

⁶³ Ibid.

Given Zambia's historical background to date, the liberalisation programme that has been undertaken by the government since 1991, it is imperative that competition policy and competition law are relevant and adequate to support the development of a free economy.

Objectives of Competition Policy and Law

The objective of any competition policy must be supported by legal framework. The Competition law in force in Zambia is "The Competition and Fair Trading Act" which came into force on 10th February 1995 by Statutory Instrument Number 26 of 1995. This Act had as its objects the following –

- to encourage competition in the economy by prohibiting anti-competitive trade practices; to regulate monopolies and concentrations of economic power;
- to protect consumer welfare;
- to strengthen the efficiency of production and distribution of goods and services;
- to secure the best possible conditions for the freedom of trade;
- to expand the base of entrepreneurship; and to provide for matters connected with or incidental to the above.

Scope of the Law⁶⁴

The Act applies to all economic agents in relation to the supply and demand of all goods and services. However, there are a number of exceptions:

- Treaty or agreements to which the state is a party
- Activities of employees or associations for their own protection

⁶⁴ Consumer Unity Trust Society (CUTS), Competition Policy in Zambia, www.globalcompetitionforum.org/regions/africa/zambia/competition, October 2001, Publications.

- Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment
- Agreements relating to the use of intellectual property rights
- Such business or activities as the Minister of Commerce and Industry may, by statutory instrument, specify.

Any category of agreements, decisions and concerted practices whose objective is to prevent, restrict or distort competition in the country or any substantial part of it are *declared anti-competitive trade practices and are prohibited by the Act*. The main elements of the Act cover three main areas in Part III, sections 7 to 13 inclusive namely –

- Restrictive Trade Practices
- Abuse of dominant position
- Mergers and Acquisitions

Dealing with Restrictive Trade Practices

Restrictive trade practices can be of two types; horizontal restraints and vertical restraints to competition. Horizontal arrangements are agreements between firms competing with identical/similar commodities in a common market.⁶⁵ Such arrangements manifest themselves in price fixing, collusive tendering, market or customer allocation, sales/production, refusal to supply and collective denials of access to an arrangement.

Vertical arrangement refers to a situation where a firm buys or sells another firm's product.⁶⁶ Such firms are said to have a vertical relationship. This arrangement is manifested in discriminatory pricing maintenance, exclusive dealing, bundling and tying

⁶⁵ Ibid

⁶⁶ Ibid

arrangements and resale price maintenance.⁶⁷ However, some of these practices are common commercial undertakings.⁶⁸ The ZCC can allow them provided the parties concerned submit the necessary application and in the Commission's view; their use won't restrict competition.⁶⁹

The Act also restrains entities from undertaking acts or behaviour that limit access to the market or otherwise inhibit competition, and which are likely to adversely affect trading of the economy in general.

Dealing with Dominant Market Position

Restraining the abuse of dominant market position is one of the most important elements of the Act. A firm is said to have a dominant position if it substantially controls business throughout the country or a substantial part of it. The position is abused if such a firm is engaged in limiting access to markets by other entities or unduly restrain competition or involved in any other act that could adversely affect trade of the economy in general.

Dealing with Mergers and Acquisition

The law 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 or person who controls another such enterprise. The essence of regulating mergers/take-overs or indeed of prohibition of

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

anti-competition practices is to ensure efficiency and fairness in the business environment. The Act sets a threshold of 50 per cent for unilateral and concentrated market share. The following aspects are taken into consideration in arriving at a decision:

- What is being acquired?
- The relevant markets that may be affected by the acquisition
- Any barriers to entry that may be created
- Motives and objectives of the concerned parties and
- The expected effect of the proposed acquisition on competition in each relevant market.

Approach to Cross-border Abuses

An entity that enters into agreement as a consequence of provisions in respect to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade is protected by the Act⁷⁰.

On a wider regional basis, the Common Market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community, to both of which Zambia is a founder member, recognise the need for the protection and promotion of fair competition in its area.⁷¹

Means of Enforcement

Section 4 and the Schedule of the Competition and Fair Trading Act provides for the establishment of the Zambia Competition Commission and its composition. The Commission's functions are outlined in section 6 of the Act. Section 6(1) provides that

⁷⁰ Section 3(d) Competition and Fair Trading Act.

⁷¹ Competition Policy in Zambia, supra note 11.

functions of the Commission is “*to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair trading in Zambia*”.

The Act provides the Executive Director of the Zambia Competition Commission with authority where he has reasonable belief that an offence has been or is being committed to seek a court warrant to -

- Enter any premises and he may be accompanied by or assisted by any such police officers as he thinks necessary.
- Grant access to or production of, any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any books, accounts or other documents.

Competition Rules in Zambia

According to the Competition rules currently in force in Zambia, the Zambia Competition Commission will enforce the following prohibitions as provided in the Competition and Fair Trading Act -

- Anti-Competitive Practices – section 7
- Mergers and Take-overs – section 8
- Trade Agreements – section 9
- Anti-competitive Trade Practices by Associations – section 10
- Criteria for Controlling Monopolies and Concentrations of Economic Power – section 11
- Unfair Trading or Consumer Welfare and Protection – section 12

Anti-Competitive Practices

The guidance notes published by the ZCC state that section 7(1) prohibits agreements or concerted practices between enterprises which have the object of preventing, restricting or distorting competition to an appreciable extent in Zambia or any substantial part of it. It further states that ‘a concerted practice in and of itself may not necessarily be anti-competitive’. The guide, however, qualifies what will amount to be an anti-competitive agreement or a concerted practice, only if –

- The agreement or concerted practice is made between independent enterprises. The ZCC states that there can never be a concerted practice between a company and its subsidiary or between divisions of the same company.
- The objective, purpose, aim or driving force behind such a practice. However, the ZCC does not envisage that associated companies may actually enter into anti-competitive practices such as highlighted above with a view to maximise their profitability but invariably perpetuating anti-competition practices.
- The approachable extent in Zambia of the practice to prevent, restrict or distort competition e.g. in a relevant product or geographic market.

Mergers and Takeovers

Section 8 of the Act provides for prohibition of mergers and takeovers that involve the acquisition or establishment of control over a significant interest in the whole or part of a competitor, supplier, customer or other person.⁷² Firms are required to fulfil mandatory pre-notification requirements to ZCC. The Commission focuses on whether the proposed transaction is likely to prevent, distort or lessen competition.

⁷² ZCC Guidance Publication – Competition Rules

It is an offence to effect a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods and in providing substantially similar services (horizontal mergers)⁷³.

Trade Agreements

The Act prohibits in section 9 enterprises engaged on the market in rival or potentially rival activities to engage in practices, which in effect limit access to markets or unduly restrain competition.

The Act prohibits specifically the following agreements –

- Price fixing
- Collusive tendering
- Market or customer allocation agreements
- Sales or production quotas
- Concerted refusal to supply goods and services to potential purchasers
- Collective denials of access to an arrangement or association, which is crucial to competition.

Anti-Competitive Trade Practices by Associations

Section 10 of the Act prohibits anti-competitive practices perpetrated by trade associations. A trade association is defined in section 2 as *“a body of persons, which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members”*.

⁷³ Section 8(1) (a), Competition and Fair Trading Act

The prohibited practices are such practices as -

- Unjustified exclusion from a trade association, and
- Recommending directly or indirectly to the trade association members on prices to be charged or terms of sale, which directly affects prices.

Controlling Monopolies and Concentrations of Economic Power

The Act provides in section 11 for the control of monopolies and concentrations of economic power. The Act in section 2 defines a monopoly undertaking as “*a dominant undertaking or an undertaking which together with not more than two independent undertakings –*

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

Unfair Trading/Consumer Welfare and Protection

The Act protects consumers by prohibiting certain practices of unfair trading such as –

- Misleading or deceptive conduct,
- False or misleading representations
- Misleading the public as to the nature or characteristics of goods and services
- Exclusion of liabilities for defective goods

Chapter Three

Competition Law in Zambia - Implementation and Effectiveness

It is imperative to analyse how the competition law, in its current form, has been effective to support the need and relevance of the competition law in Zambia. In seeking to achieve this a look at some decisions of the ZCC, its operational constraints and drawbacks of the legal provisions regarding enforcement such as fines and penalties will be done.

The basis of the competition policy that Zambia has adopted is similar to that adopted by the United Kingdom and Western Europe.⁷⁴

‘Competition policy in the United Kingdom and in Western Europe has traditionally been based on a rather different philosophy. It does not regard competition as an end in itself but as a means to an end. This leads to a trade-off approach: encroachments on competition are acceptable if they are adequately counter-balanced by benefits to the community. This means a case-by-case approach to mergers rather the promulgation of per se structural rules as in the US.’⁷⁵

Some types of anti-competitive behaviour may be permissible if the public benefit exceeds the detriment to competition.⁷⁶

As explained in the guidance notes published by the ZCC⁷⁷, Part III of the Zambian competition law is based on the fundamental principle that any conduct which has the purpose of substantially lessening competition in the market should be prohibited, while recognising that, in certain circumstances, full competition may not deliver the most

⁷⁴ See note 8 above.

⁷⁵ Ibid

⁷⁶ Section 13 of the Competition and Fair Trading Act, provides for authorisation of certain acts which may not be prohibited outright by the said Act. Such an act may only be outlawed if it is an abuse of the law.

⁷⁷ Competition Rules in Zambia, ZCC Publications, Item 11.

desirable outcome. The Act, however, recognises that some objectives of our society may not always be met by the operation of the competitive markets.⁷⁸ To secure such objectives, exemptions from the application of the Act are available.⁷⁹ The adjudication procedures under the Act provide the exemptions. However, it is important to note that adjudication procedures only apply to certain parts of the Act and these do not apply to any of the consumer protection provisions of the Act.⁸⁰

‘The law also provides a mechanism for authorisation by which the Commission may grant immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act.’⁸¹

‘Authorisation by the Commission of some types of anti-competitive behaviour is possible if the public benefit exceeds the detriment to competition. The Commission may grant immunity on the public benefit grounds from legal proceedings for some arrangements or conduct that might otherwise breach the restrictive trade practices provisions of the Act. To grant authorisation, the Commission must be satisfied that the public benefit stemming from the arrangements outweigh the anti-competitive effect.’⁸²

This was demonstrated in the case of the approval of the market dominance of the *Zambian Breweries*.

Effectiveness of the Competition Law

A myriad of perceptions of competitors, potential entrants in specific market, consumers, enforcement agency and other stakeholders would indicate how effective the competition law is. The effectiveness of the law or inadequacies of its implementation are raised by

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Competition Rules in Zambia, ZCC Publications, Item 11

⁸² Ibid.

various stakeholders. Press reports such as illustrated below are indicators of the likelihood of breach of the competition law and draw the attention of the regulators of to counter check the issues raised -

*"The Institute of Southern African Development (ISAD) president Lewis Mosho has reiterated his call that the Zambia Competition Commission (ZCC) and the Bank of Zambia (BoZ) should investigate the possibility of collusion in the banking sector. Mr Mosho said that from commercial bank actions on the market there was likelihood of collusion and it was the duty of the ZCC and the BoZ to regulate the sector and ensure that anti-competitive practices do not exist. He said that the Competition and Fair Trading Act and the Banking and Financial Services Act give the ZCC and the BoZ, respectively, authority to ensure that anti-competitive practices are not present in the sector. "The Bank of Zambia should regulate this sector to ensure that commercial banks are not colluding," he said. "Nowadays the commercial banks seem to be taking certain actions together. For example, when one bank increases or reduces its interest rate base rate, others follow suit even when their respective overheads are different," said Mr Mosho. The interest rate is a price for capital and is determined by various factors, including overheads and, as such, it is not possible that small and big banks can have the same base rates because their overheads are different."*⁸³

Such concerns are an indication of the inadequacies of and the perceived ineffectiveness of the competition law. This is despite the existence of more specialised laws such as the

⁸³ BoZ urged to check anti-competitive practices in banking: Lewis Mosho, Business News, Times of Zambia, archive series 6-17th September 2001, www.times.co.zm;

Banking and Financial Services Act. Part IV of the Act provides for the prohibition of anti-competitive conduct.

Growth of Monopolies in Zambia

The clear beer, carbonated drinks, cement, electricity and landline telephone sectors has entities that occupy monopoly positions. These sectors, among others, were state monopolies and have continued to be monopolies even after privatisation, except for electricity and landline telephone sectors - which are still state enterprises. For example, Zambian Breweries controls more than 98 per cent of the carbonated soft drinks market and 98 per cent of the clear beers market in Zambia.⁸⁴ Another entity, which has a monopoly in the cement sector, is Chilanga Cement, which holds 95-98% of the market share.⁸⁵

This is against the policy intention of the government as stated by the Minister of Commerce and Industry, when presenting the proposed Competition and Fair Trading bill in the National Assembly⁸⁶. An illustration of the transfer of monopolies from the public to private sectors is shown in the Zambian Breweries case below.

The Case of Zambian Breweries

The Zambia Competition Commission granted authorisation of the take-over of Zambia Bottlers by Zambian Breweries despite the creation of a super and concentrated monopoly in the beverage sectors of the economy.

⁸⁴ ZCC, Press Release – Take-over of Zambia Bottler's Limited by Zambian Breweries Plc, 14 April 2005, http://www.zcc.com.zm/fullpress_release.php; (visited 5 November 2005)

⁸⁵ ZCC Director of Mergers and Acquisitions, "Chilanga Cement still has grip on local market", Times of Zambia, 13-28 July 2005, www.times.co.zm;

⁸⁶ Supra note 20

The Zambia Breweries group comprises Zambia Breweries Plc, Northern Breweries Plc, Zambia Bottlers and Copperbelt Bottling Company Limited.⁸⁷

At the time of privatisation there was some recognition that privatisation should not merely transfer a state monopoly to a private monopoly but seek to avoid the creation of monopolies. Zambia Breweries was a state owned company, which operated two plants at Lusaka and Ndola.⁸⁸ On the other hand Zambia Bottlers based in Lusaka and Copperbelt Bottling Company based in Ndola were privately run.⁸⁹

The Zambia Competition Commission justified its decision on the basis that⁹⁰ -

- (a) The transaction was not a horizontal acquisition because the parties were not direct competitors in the market they operated in, that is clear beer and carbonated soft drinks sector.
- (b) The acquisition was of a conglomerate nature and sought to achieve synergies in production, distribution with high potential to enhance consumer choice given a wider product portfolio of the amalgamated producer.
- (c) Globalisation was impacting heavily on the competitiveness of industrial activity in Zambia and Zambia Breweries was likely to withstand this by achieving better economies of scale from the synergies with the carbonated soft drinks operation.
- (d) That at the time of the transaction both Zambia Bottlers and Zambia Breweries were, at the time of the transaction, implementing Compliance Programmes on the undertakings made with the ZCC. Compliance Programmes are a framework

⁸⁷ Augustine Seyuba, Corporate Affairs Director, Zambia Breweries, *Enforcement of Competition Law after Privatisation*, Private Sector Perspective, Paper presented at the Regional Conference on Competition, Competitiveness and Investment in Global Economy, (May 10-12, 2004) Dar-es-salaam, Tanzania.

⁸⁸ Ibid.

⁸⁹ Ibid

⁹⁰ ZCC Press Release, The Takeover of Zambia Bottlers Limited by Zambia Breweries Plc, 14th April 2005, www.zcc.com/fullpress_release.php?press_id=16,

of competition concerns that a company undertakes to implement in its business systems to ensure that the provisions of the Competition and Fair Trading Act are known by top management, disseminated to all relevant staff, with a view to preventing possible breaches of the Act. The monitoring of the compliance Programmes was to continue even after the two companies merged.

ZCC also took note of the parties' claims of some benefits associated with the consummation of this transaction as follows –

- (a) That a Zambian firm would now own Zambia Bottlers as the two foreign owners are to divest their interests
- (b) That Zambian Breweries undertook to sell 37 per cent of Zambian Breweries Limited shares to the Zambian public through a rights issue and ultimately Zambian Breweries would be 25 per cent owned by local persons and institutions. At the time of notification the public owned 10 per cent of shares of Zambian Breweries.

That on the whole the benefits of the transaction indicated that they outweighed the anti-competitive effects. The anti-competitive effects of the transaction could adequately be dealt with through the existing compliance programmes the parties were implementing and monitored by the ZCC.

Emergence of Uncompetitive Practices

The Executive Director of ZCC stated that reduced government borrowing had created and increased possibilities of business houses borrowing from commercial banks to salvage their operations as opposed to the option of being taken over merging with other

entities when faced with insolvency.⁹¹ However, the less stringent borrowing conditions and lower rates in 2004, led to some businesses showing uncompetitive behaviour in order to maintain, gain and sustain market share.⁹²

The Executive Director stated that anti-competitive practices increased by 33 per cent and the highest anti-competitive practices were recorded in the timber and wood, insurance, clear beer, carbonated soft drinks, and livestock sectors.⁹³

Infringement of Customer Welfare - the growth of monopolies in the market has led to the infringement of consumer welfare. As a consequence of the dominant monopoly position that the *Zambian Breweries* occupies in the market it has been observed that the customer welfare has gone down as evidenced by the increase in consumer complaints by twenty-five per cent in 2004, with the beverage sector recording the highest.⁹⁴ Mr *Muyunda Ililonga*, Executive Secretary of *Zambia Consumer Association (ZACA)* reported this. He stated that beverages had recorded the most complaints, which were usually of foreign matter being spotted in drinks.⁹⁵ It is clear that customer welfare considerations must be addressed prior to approval of the creation of monopolies such as the *Zambian Breweries*. The competition law has in the case of the *Zambian Breweries* case created a monopoly contrary to what it is framed to combat.

In a press report "*Chilanga Cement chief marketing manager Faisal Nanavat said in an interview at the seventh national marketing conference at Pamodzi Hotel in Lusaka that*

⁹¹ ZCC records 32 per cent decline in number of mergers, *Times of Zambia*, 17 -25th February 2005, www.times.co.zm; archives.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ *Times of Zambia*, 14th - 24th December 2004 series, www.times.co.zm, archives.

⁹⁵ Ibid.

his company had been working out permutations on how they could satisfy the local market and at the same time maintain steady exports.

“Demand for cement has been increasing, especially on the local market. The demand has been higher than our supply on the market. The shortage has not been artificially created,” *said* *Mr* *Nanavat.*

Mr Nanavat also denied speculations that the shortage was a ploy to increase cement prices saying Chilanga Cement has no intentions of increasing the commodity price: “We have maintained cement prices at K27, 000 since June, and at least for now we do not intend to make changes to the prices.” He said the firm could not deliberately starve the local market saying the company had maintained 20 per cent exports with the remaining 80 per cent catering for the local market. He also intimated that the company had experienced a break down on one of the machines that played a major role in production, creating more pressure on the market.

“We have been working tirelessly to get the machine running again, and we are getting it working. We should resume full production in the next two weeks, everything should normalise after this,” Mr Nanavat said.

Chilanga Cement has been under fire from local authorities, especially the Zambia Competition Commission (ZCC), who have demanded to know the cause of the shortages. A fortnight ago, the ZCC and Chilanga Cement held talks concerning the shortages and tried to put immediate solutions in place”.⁹⁶

⁹⁶ Chilanga Cement still has grip on local market, Times of Zambia, 13-28 July 2005, www.times.co.zm;archive.

Curbing Anti-competitive Practices

The ZCC combats anti-competitive conduct, which is likely to be harmful to consumers and destructive to economic efficiency. The ZCC investigates these acts following complaints received from any source of the various stakeholders or after carrying out its own investigations. The Director of Mergers and Acquisitions was reported as having stated that there was the existence of hardcore cartels in Zambia.⁹⁷ He stated the dangers of the existence of anti-competitive practices as follows –

*“harm of hardcore cartels was evident as could be seen when they raised prices above competitive levels and reduced output as witnessed in the oil marketing sector in Zambia”.*⁹⁸

He said that the ZCC would prevent anti-competitive conduct to encourage efficiency in business, which would result in wider choice for consumers in price, quality and service.⁹⁹ However, the regularising of the dominance of Chilanga cement in the market has not been tackled by the ZCC. This has led to the dissatisfaction of the customers due to irregular supply of the product on the market.¹⁰⁰

The Communications Authority is reported as having said that it will start regulating mobile phone tariff charges to prevent service providers from exploiting consumers and to promote competition among them.¹⁰¹

The new entrant in the mobile phones sector MTN Zambia Limited has also affirmed the foregoing. The mobile phone sector is said to have been offering a raw deal to its

⁹⁷ “ZCC roasts cartels”, Times of Zambia, archives series - 23rd September to 6th October 2004; www.times.co.zm;

⁹⁸ Mr Thula Kaira, Ibid.

⁹⁹ Ibid.

¹⁰⁰ Supra note 28.

¹⁰¹ Katambwa Mwansa, Consumer Services Director, Communications Authority, reported in the Times of Zambia, Business News, series 7th -15th October 2004, www.times.co.zm, archives.

customers in Zambia. The Group Sales and Marketing Executive Freddie Mokoena of MTN Zambia Limited said, *"Since we entered this market, we have been learning, trying to find out what the Zambian market wants. We have gotten the impression that customers have received a raw deal. For example, many clients have complained that the tariff structures are prohibitive"*.¹⁰²

This is an indication of the ineffectiveness and failure to regulate unfair trading practices in Zambia. There is no corrective action that has been taken apart from a mere expression of concern by the ZCC.

Removing Barriers to Entry

He further stated that the ZCC was involved in lessening and removing barriers to entry and expansion in the telecommunication sector.¹⁰³ The telecommunications sector was reported as having barriers to entry in the fixed telephone lines sector, as the private sector participation was not allowed.¹⁰⁴ The failure by Vodacom of South Africa into the Zambian mobile phone market in 2001/2002 was an indication of the restrictive barriers to entry to the sector.

Capacity And Needs Of The ZCC

The Zambia Competition Commission is a body corporate capable of being suing and being sued. It is a grant-aided organisation funded by way of appropriations from the Government revenues. A board made up of thirteen (13) Commissioners and two ex-officio members, the Executive Director and the Secretary, governs the ZCC¹⁰⁵. The ZCC

¹⁰² Post Newspapers, The Business Post, Issue No. 3323-27, Tuesday 22nd November 2005, Page I - IV.

¹⁰³ Ibid

¹⁰⁴ Ibid.

¹⁰⁵ CUTS, Competition Policy in Zambia, 2001.

has a structure with a staff compliment of twenty-six officers.¹⁰⁶ However, it has not been able to recruit and fill the vacancies due to poor funding.¹⁰⁷ According to the World Development Report 2000 of the World Bank, eighty-one per cent of the ZCC budget is expended on salaries and honoraria.¹⁰⁸ This situation invariably deprived other critical areas such as research and investigations and publications. Other countries' expenditure on the same items for the same period were, Tanzania – eighteen per cent, Kenya – fifty-four per cent, South Africa – forty-one per cent, Sri Lanka – forty-three per cent, which is quite off the norm. For example in 2003 the Executive Director reported in his annual report that the Commission had constraints regarding the lack of adequate office accommodation, reference materials and sustainable training for the professional staff.¹⁰⁹ Muyunda Ililonga, Executive Secretary of the Zambia Consumers Association (ZACA), in his reaction to the announcement made by the ZCC that it was scaling down its operations urged the government to adequately fund the ZCC to enable it execute its mandate.¹¹⁰ This trend of inadequate and erratic funding from government continued and constrained various activities of the Commission as reported in the years 2003 and 2004.¹¹¹

One of the responsibilities of the ZCC is to disseminate information to the consumers. It has not performed very well in this regard due to the small budget.¹¹² This has been one

¹⁰⁶ *ibid*

¹⁰⁷ Chairman's Report, ZCC Annual Report 1999, March 2000 at p.11.

¹⁰⁸ As reported in the article, Promoting Competitiveness and Efficiency in Kenya: The Role of Competition Policy and Law, at p.53, Institute of Economic Affairs Publication, 2002.

¹⁰⁹ ZCC Annual Report 2003 item 1.1 at p. 13.

¹¹⁰ Times of Zambia, Business News, 18th - 31st January 2002.

¹¹¹ Executive Director's Report, ZCC Annual Report 2003 item 1.1 at p. 13 and Annual Report 2004, item 1.9.

¹¹² *Supra* note 138.

of the challenges of the ZCC. The ZCC has been considering how to access assistance without compromising its independence.¹¹³ The ZCC is based only in Lusaka. This restricts its outreach and enforcement capabilities. Decentralisation would enhance its performance in view of the constrained funding.

Commission Activities 1998 - 2004

The ZCC received a total of six hundred and ninety-five period 1998 to 2004.¹¹⁴ Of these forty-nine were under section 6 dealing with functions of the ZCC, one hundred and seventy-two cases under section 7- dealing with restrictive business practices, one-hundred and sixty under section 8 – dealing with mergers and acquisitions, fifty under section 9 – dealing with trade agreements, nine under section 9 – dealing with trade associations, six under section 11 – dealing with control of monopolies and dominant positions and two hundred and forty-nine under section 12 – dealing with unfair trading or consumer welfare.

For example in 1999, the Commission rejected an application to acquire Industrial Gases Limited by BOC Gases Limited as BOC Gases controlled eighty per cent share of the industrial gases. An acquisition of Industrial Gases Limited would have eliminated a competitor and create a market concentration of ninety-nine per cent of the market where the customer choice would be eliminated.¹¹⁵ However, the same basis reasoning was not applied in the case of the Zambian Breweries as regards the takeover of Northern Breweries and Zambia Bottlers. This was a reflection of inconsistency on the part of the Commission.

¹¹³ Ibid.

¹¹⁴ ZCC Annual Report 2004.

¹¹⁵ ZCC Annual Report 1999.

Offences and Penalties

The Competition and Fair Trading Act provides for a penalty of up to a maximum of 1000 penalty units, which is an equivalent of K1, 800,000 or five years imprisonment if a person is found guilty of committing an offence against the provisions of the Act.¹¹⁶ The monetary penalty is too low to act as a deterrent. A comparison of this with what obtains in, for example, Europe is a trifle too little. Recently the European Union Commissioner found Microsoft, the world's largest software company, guilty of abusing its dominant position in the market and was fined a penalty amounting to four hundred and ninety-seven million Euro (equivalent to US\$ 612 million at the time).¹¹⁷ This shortcoming has been realised by the ZCC and has since submitted a draft amendment memorandum of the Act to the Government.¹¹⁸

From the foregoing it is shown that the lack of appropriate legal provisions, lack of enforcement of the law according to its spirit and the lack of enforcement capability of the ZCC renders the effect of the competition law moribund. It has been acknowledged that the success of the implementation of competition law lies in the awareness of the competition law by the business community and consumers. The ZCC has faced constraints to carry out awareness programmes adequately and due to its restricted office location and inadequate funding. The contrary implementation of the law such as illustrated in the *Zambian Breweries* case shows that the implementation of the competition law is compromised rendering the intention of the law-makers unrealisable.

¹¹⁶ Section 16(1)

¹¹⁷ BBC News, www.newsvote.bbc.co.uk, 13th July 2005.

¹¹⁸ ZCC Annual Report 2004, item 1.1.7 9(a)

Chapter Four

An Evaluation of the Competition Policy and Law in Zambia - Its Appropriateness and Suitability

Competition policy has a significant role to play in promoting competitiveness and growth.¹¹⁹ It has been observed that competition policy helps create an enabling environment for entrepreneurial development, ensures efficient allocation of resources in an economy and that privatisation without an appropriate anti-competition legal framework in place will mean transfer of monopoly power from the public sector to the private sector.¹²⁰

An inappropriate competition regime does not add to the development of the economy but acts as a disincentive in promoting competition and growth in the economy.

It is important that competition policy is relevant and applicable so as to promote competition and growth in the economy.

¹¹⁹ Mehta P.S. and Nanda N, *Competition Policy, Growth and Poverty Reduction in Developing Countries*, CUTS Centre for Competition, Investment & Economic Regulation, Jaipur, India, a paper delivered at the “Regional Conference on Competition, Competitiveness and Investment in Global Economy”, Dar Es Salaam, Tanzania, May 2004, at p.3.

¹²⁰ Ibid. at p.3

Relevance of Traditional Competition Policies

Competition policies will have major differences in terms of the underlying philosophies, legislative practices and their modes of implementation from one jurisdiction to another. This is evident even amongst the Organisation for Economic Cooperation and Development (OECD) member countries.¹²¹

The early US legislation passed nearly a hundred years ago took a so-called structural approach to competition policy.¹²² It viewed competition as a good thing in itself and anti-trust laws attempted to discourage anti-competitive practices.¹²³ The spirit of this view was that the purpose of competition is to advance the competitive process rather than to protect the competitors.¹²⁴

A World Trade Organisation (WTO) report noted that,

*“A guiding principle that is often referred to by competition agencies and tribunals or courts is that competition law protects competition, not competitors”.*¹²⁵

‘Competition policy in the United Kingdom and in Western Europe has traditionally been based on a rather different philosophy. It does not regard competition as an end in itself but as a means to an end. This leads to a trade-off approach: encroachments on competition are acceptable if they are adequately counter-balanced by benefits to the community. This is similar to the how Zambia’s competition law has been designed, to permit encroachment on competition law subject to benefits accruing to the economy. The ZCC is permitted in section 13(1) to approve any act, which is prohibited by the Act

¹²¹ Institute of Economic Affairs, Promoting Competitiveness and Efficiency in Kenya, The Role of Competition Policy and Law, p.3, CUTS, (2002), <http://www.cuts-international.org/kenya-report.pdf>; (visited 6 September 2005)

¹²² Ibid. at p.31

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Ibid

as long as it is not illegal unless abused. This means a case-by-case approach to mergers rather than the promulgation of per se structural rules as in the US.¹²⁶ The structural approach to competition policy would be the appropriate approach to competition policy in Zambia. This is because the current competition law is being abused by certain businesses. Under section 7 of the Act, the ZCC is permitted to approve applications for a merger even when the merger results in a dominant position of market power i.e. engage in business practices, which substantially lessen or prevent competition. An example of this is the case of the *Zambian Breweries*, which dominates the clear beer and carbonated drinks sectors. It occupies about ninety-eight per cent of the market share. The *Zambian Breweries* was granted approval of the mergers and takeovers of the other entities in the market place due to the purported economic efficiency, which would result from the transaction. Further the *Zambian Breweries* made undertakings to comply with the *provisions of the competition law and also to implement a compliance programme and an officer at operating board level to avoid the likelihood of abuse of market dominance*. However, it has since transpired that the *Zambian Breweries* has abused its market dominance as reported in the ZCC Annual Report for the year ending 2004. The ZCC had to intervene in the market to caution the *Zambian Breweries* for abuse of its market power in relation to pricing and distribution of its alcoholic and non-alcoholic beverages products vis-à-vis the transporters, distributors and retailers. It also abused its dominant market position by predatory pricing in the wholesale of clear beer products on the Copperbelt market. Predatory pricing is the setting of prices of products below cost, which results in adverse effect on competition. The only action taken by the ZCC against

¹²⁶ Ibid

the *Zambian Breweries* for both breaches of the law was a mere caution.¹²⁷ Such treatment of a dominant market player is not in accord with the competition law. In any case the penalty for such breach is only a paltry one million eight hundred thousand kwacha only, which is not capable of acting as a deterrent to such a large conglomerate. The approval of such a monopoly would not have been permissible under a structured approach form of competition law, which seeks to promote competition per se without taking other considerations such as promotion of market efficiency and maximisation of consumer welfare, which in practice may be flouted as seen in the case of the *Zambian Breweries*. This is contrary to the spirit of competition law in general.

Regulators in the UK, on the other hand, have started giving much greater weight to the effects of mergers or of other kinds of corporate behaviour on competition per se than to other considerations (such as regional impact) in the calculation of net social gain.¹²⁸ From the foregoing it would have been beneficial for the *Zambian competition law* to have been drafted on such a basis so as to counteract any abuse by big corporate entities that dominate the market especially in the face of the predominance of multinational corporations in *Zambia*. In countries such as the *US*.

Economic theory and *Zambia's* Competition Policy Needs

Among industrial countries, *Japan* has its own approach to competition questions.¹²⁹ Although *US* type anti-trust laws were enacted after World War II, competition in *Japan* was made subservient to the country's vigorous industrial development policy.¹³⁰ Competition theory and practice of competition policy during the *Japanese catch-up*

¹²⁷ ZCC Annual Report 2004, item 1.1.8, at p. 7

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid

process in the 1950s and late 1960s was aimed at addressing the challenges of low levels of industrialisation and economic development.¹³¹

During the late 1980 at the height of Zambia's economic doldrums, (the IMF and World Bank and Donors had suspended economic aid), there was a proliferation of a variety of carbonated drinks namely Kwench, Tarino and so forth. It is undoubted that such products would have provided alternative choices for the consumers as opposed to dependence on internationally trademarked products such as Coca-cola, Schweppes, Pepsi-cola, etc, developed by multinational corporations. Inventiveness and innovation (technical progress) would have taken foothold in the Zambian economy with consequent multiplier effects in the economy such as job creation and development of other related support industries. This anti-competitive state of affairs would largely be attributable to the absence of a competition law at the time and due to state controlled enterprises.

According to Trudi Hartzenberg, Research Fellow of Cape Town University, competition policies and a free market alone will not guarantee economic gains for developing countries without additional provisions to ensure checks and balances in the global economy.¹³² Ms Hartzenberg said developing economies especially those in the sub-Saharan region need to look at the broader areas of industrial policy and entrepreneur capacity development.

Speaking in an interview, Ms Hartzenberg who was in Zambia to attend a competition regional seminar observed that under free trade, the large multinational corporations were the ones gaining more because of their strengths.

'Competition policy alone cannot effectively offer small businesses the means to compete

¹³¹ Ibid

¹³² Times Of Zambia, Business News, 9th - 17th December 2002, www.times.co.zm, archives.

with large multinational corporations.' She said. The large multinationals were still calling the shots in the economies of developing countries even under adherence to the demands of competition because they had several advantages including capacities, economies of scale and technological edge. Industrial policies and entrepreneurial capacity building programmes should see to the affordability of interest rates for small business entrepreneurs so that they are able to borrow to meet their capital financing requirements. She also said there was need for incentives like guarantee schemes to assure the small-scale entrepreneurs whenever they wished to access loans. The challenges of Zambia regarding the implementation of competition laws is to look at an analysis of the different approaches to competition in the US, UK and Japan suggests that the most appropriate model, which might have useful elements for a country like Zambia from the perspective of economic growth and development, may be that of Japan in the 1950 –1973 period.¹³³ This is because the Zambian economic sector has a significant presence of multinational corporations. Recent advances in economic theory suggest that regulated rather than unregulated competition may be a superior strategy.¹³⁴ Modern economic theory suggests that dynamic efficiency is best promoted by a combination of co-operation and competition between firms, rather than by maximum or unfettered competition.¹³⁵

¹³³ Comparison made from an analysis of Kenya's competition policy, whose economic and socio development stage and needs are similar to that of Zambia. This was reported in a paper titled, "Promoting Competitiveness and Efficiency in Kenya, The Role of Competition Policy and Law", prepared by Institute of Economic Affairs, CUTS, (2002), p. 31-32; <http://www.cuts-international.org/kenya-report.pdf>; (visited 6 September 2005)

¹³⁴ Ibid

¹³⁵ Ibid

Of particular interest in this regard is the Japanese economy in the period 1950-1973, which achieved historically unprecedented growth. Manufacturing production grew by 13 per cent annually, and the share in world exports of manufacture rose by 10 per cent.¹³⁶ A central role in this spectacular economic advance was played by the very high rates of savings and investment in the Japanese economy.¹³⁷ Industrial policy was concerned with maintaining the private sector's high propensity to invest.¹³⁸ The Japanese government's Ministry of International Trade and Industry frequently regulated competition and encouraged mergers between leading firms in key industries.¹³⁹ In the 1990s Korean giant conglomerates competed with each other fiercely for government support based on performance targets for exports, new product development, and technological change.¹⁴⁰ The policies adopted by these East Asian countries find endorsement in new developments in economic theory.¹⁴¹ The essential focus of competition policy in advanced countries such as the US is the promotion of allocative efficiency and the reduction of prices for consumers.¹⁴²

However, from the perspective of Zambia's economic development this approach may be too narrow and static. In Zambia for example one of the government's key objective is to raise its people's living standard. One of the key objectives of Zambia Poverty Reduction

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Ibid

¹⁴² Ibid

Strategy Paper (PRSP) is to promote economic growth through economic stabilisation and diversification.¹⁴³

The pursuit of this objective of dynamic rather than static efficiency requires, among things, high rates of investment, diversification and competition. In line with this objective it is prudent for the Zambian competition policy and law to encourage and permit the entry into the market of small producers in dominated sectors.

Dealing with Cross-border and Extra Territorial Jurisdiction Issues

The Competition and Fair Trading Act has no provisions for addressing cross-border abuses and extraterritorial jurisdiction. This is despite the growing influence of multinationals and globalisation in general. This aspect has been addressed by countries like the US, Japan and European Union.

In Zambia the anti-competition law does not provide for dealing with cross-border and extraterritorial jurisdiction issues but only if the merger effected abroad has an effect in the Zambian market. However, this is far short of what is expected in the present era of globalisation.¹⁴⁴ The South African Breweries, which holds the major stake in the Zambian Breweries has embarked on investing in the sub-region taking-over most national breweries. Such acts may negatively impact the local market in an imperceptible manner due to its monopolistic dominance of the region.

¹⁴³ Second Review of Zambia's Poverty Reduction Strategy Paper (PRSP) for the period July 2003 – December 2004, IMF Publications, 2005, www.imf.org/external/pubs/ft/scr/2005; (visited on 5 November 2005)

¹⁴⁴ Consumer Unity Trust Society (CUTS), Competition Policy in Zambia, October 2001, www.globalcompetitionforum.org/regions/Africa/zambia/competition

Chapter Five

Conclusion

In addressing monopolies issues it is acknowledged that monopolies whether state or private are enemies of a free market and breed anti-competitive practices. This problem has continued to exist despite the Minister of Commerce and Trade highlighting its bad effect when he introduced the proposed law in the National Assembly. The situation regarding the existence of monopolies is still prevalent in the electricity, landline telephone services and even in entities in which the state has divested such as the cement, beverages and carbonated drinks sectors. The case of *Zambian Breweries* is an example of the failure of the competition law to deal with issues for which it was designed to curtail by promoting the existence of such dominant monopolies at the expense of the welfare of consumers.

Further competition law is an instrument to achieve technical progress. The attaining of such a goal is severely restricted if dominant monopolies are allowed to exist in a market as this limits the development and entry of small and medium enterprises. Competition law can mitigate market failures, as what obtained during the Second Republic, often more effectively than direct regulation of economic activity. Monopolies, cartels and practices associated with them are a source of market failure; their reduction improves economic efficiency. The perpetuity of monopolies in total disregard of the intention of the law has denigrated from the relevance and applicability of the competition law.

The lack of adequate financing of the Zambia Competition Commission by the Government is an indication of the lack of appreciation of the importance of competition

law in the promotion of competitiveness and growth in an economy. The lack of adequate funding has compromised the effectiveness of the implementation of the law. Due to lack of funding the Commission has continued to suffer poor staffing levels, lack of sustainable training of professional staff, lack of research materials and lack of office space. The failure to carry out awareness programmes by disseminating information to the stakeholders has negatively impacted on the development of an appropriate competition culture. This has had a compounding effect of negating the relevance of competition law. The low staff levels and lack of presence in key areas of the country are limitations to the realisation of the competition law due to lack of outreach programmes which seek to build the awareness of the law in the business community and the consumers in general. This has constrained the implementation of the competition law and hence compromised its applicability.

The poor funding of the Commission by the Government affirms the underlying belief that the enactment of the law was not as a result of Government's initiative but a condition precedent to qualification for donor aid and support by the International monetary Fund and World Bank.

Recommendations

Institutional Capacities - the challenges of the ZCC regarding institutional capacity are a disservice to the promotion and growth of a competition law and culture. It is imperative to build the capacities of the competition authority and also other sectoral regulators such as the Communication Authority, Bank of Zambia, Energy Regulation Board, Investment Centre and the Securities and Exchange Commission, and the

courts.¹⁴⁵ This can be attained by deepening skills such as communication and advocacy of the competition authority, development of manuals, guidelines and revisions to the competition law, improve on case screening criteria, improve investigative techniques of the competition authority, analysis of case studies and seminars for judges who deal with competition cases.¹⁴⁶ It is proposed that this recommendation be adopted.

Funding -The funding constraints experienced by the Commission have a severe negative impact on the applicability and relevance of competition law. It is recommended that the Government increase the funding levels of the ZCC.

Decentralisation of ZCC - there is need to decentralise the operations of the ZCC to facilitate the dissemination of information and receive complaints from the members of the public especially in provincial headquarters.

Further funding problems have constrained the capacity of the ZCC to disseminate information on competition law to key stakeholders. The lack of awareness of competition law by consumers as well as competitors is a problem that needs to be given the utmost attention in order to enhance compliance of competition law. This aspect of the competition law needs to be addressed.

Legal Reform

The Zambian competition law section 9(1) does not consider group companies as being capable of perpetuating anti-competitive trade practices amongst themselves. This practice is likely to cause the abuse of the competition law by multinational corporations.

¹⁴⁵ Lipimile G K, AD-HOC EXPERT MEETING ON COMPETITION LAW AND POLICY: Peer Review As A Tool For Cooperation, Exchange Of Expertise And Best Practices, 15TH –16TH JULY 2004, UNCTAD, GENEVA.

¹⁴⁶ Ibid.

This aspect of the law must be revisited and amend the law so as to cover the likelihood of trade agreements being perpetuated amongst related entities.

The penalty for infringing the competition is too low to serve as a deterrent. As it has been shown in other jurisdictions such as Europe the penalty for infringing the competition law are prohibitive and act as a deterrent.

The other statutory provisions available in specialised sectors such as the banking and finance sector, communications sector and so forth need to be harmonised in their implementation. It is recommended that the ZCC should deal with all such cases on referral basis from the respective regulators. This would be in keeping with the spirit of the law as what is obtaining in Europe, where the European Court of Justice has shown willingness to lift the veil of incorporation within groups of companies for purposes of applying Community rules on competition between member states.¹⁴⁷

Cross-border and Extraterrestrial Issues

‘The need to have provisions to deal with cross-border issues are becoming increasingly important in all countries. Zambia is no exception. Moreover, the current trend shows that the trans-national corporations are restructuring and integrating at regional level, which is aimed at controlling the region rather than any particular country. This may lead to monopolisation of the regional market and foreclosing other potential investment inflows into the region. Zambia alone cannot tackle the challenge. Without a strong and coordinated regional competition policy, it will be difficult to maintain competition in the entire region including Zambia.’¹⁴⁸ It is therefore imperative that at regional level the

¹⁴⁷ Abbott K, et al, BUSINESS LAW, at p.368.

¹⁴⁸ Ibid note 137.

proposed SADC protocol on competition policy be finalised and ratified by member states to forestall the risk of monopolisation of the region.

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