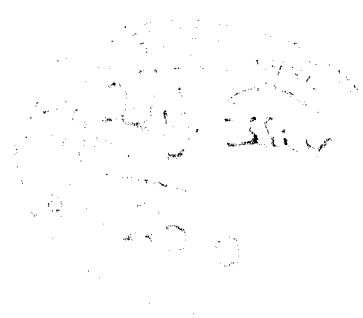


**COMPETITION LAW IN ZAMBIA: THE RELEVANCE AND ADEQUACY OF
SUCH LAWS IN CONSUMER PROTECTION IN ZAMBIA**

By



MUSEBA BWEMBYA MUTULE

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**A dissertation submitted to the University of Zambia in partial fulfilment of the
requirements for the award of Bachelors of Laws Degree (LLB)**

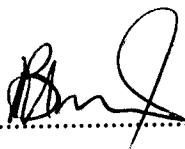
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I, **MUSEBA BWEMBYA MUTULE** (Computer Number: 26131307), DO HEREBY declare that the contents of this directed research paper are entirely based on my findings and ingenuity and I have endeavoured to acknowledge where the work herein is not mine. I further depose to the best of my knowledge that this work has never been presented in any university for academic purposes.

I THEREFORE take full responsibility for the contents, errors, defects and omissions that may appear herein.

09th APRIL 2010

Date



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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

L410-DIRECTED RESEARCH

I recommend that the Obligatory Essay prepared under my supervision,

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Entitled:

**COMPETITION LAW IN ZAMBIA: THE RELEVANCE AND ADEQUACY OF SUCH
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ABSTRACT

The Competition and Fair Trading Act, CAP 417 of the laws of Zambia, was enacted at the transition of Zambia from a state controlled economy to a decentralised free market economy. This meant that there was need to regulate the economy from anti-competitive vices which result in consequences, such as price control and depreciation of quality, which are ultimately detrimental to consumers.

The Competition and Fair Trading Act, defines a consumer as any person-

(a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;

(b) to whom a service is rendered; ;

From the above definition, it is clear that the competition and Fair Trading Act contemplates a wide scope of persons that are affected by the anti-competitive trade practices it prohibits for the advancement of a competitive free market economy.

This research shall therefore consider the relevance and adequacy of competition law in the promotion and protection of consumer interests in Zambia. This shall be done by looking into the substantive provisions and the enforcement mechanisms under the Competition and Fair Trading Act in light of consumer protection.

DEDICATION

This Obligatory Essay is dedicated to the memory of my late mother, **ANNE SIPHO SINGO** and my late grandmother, **BETTY NCUBE SINGO**, the biggest and most important influences in my life.

This Obligatory Essay is the culmination of the effort you tirelessly put in to help me achieve my dream of becoming a lawyer. It was never easy for you but you always persevered and strived for the best for me. It upsets me that you will not be able to see the fruits of your labour, but your efforts will continue to be appreciated through all my endeavours, present and future. May your soul rest in eternal peace.

I also dedicate this work to my siblings, **KABANDA MUSEBA** and **SITHABILE MUSEBA**, to whom I hope this work serves as motivation to work even harder than I have.

This is a yardstick set for you to exceed.

ACKNOWLEDGEMENTS

In my endeavour to produce this Obligatory Essay, I received an enormous amount of assistance and would therefore reserve this space to thank all those of you who have been of assistance. First and foremost, I would like to thank God for all the blessings that I have been privileged to receive in all aspects of my life. I would also like to thank my family, my father, **Colonel Museba, Mr. and Mrs. Ziba, Mr. and Mrs. Makala**, for all the support rendered during the course of my studies. I would also especially thank **Mr. A. Alaba**, without whose guidance and support I would not be where I am today.

To my friends, you have been there for me in good times and bad. **Natasha Banda**, you have been my pillar throughout the course of my studies and I reserve a special place in my heart for you. **Nsama Chisanga, Milimo Moonga, Noel Siamoondo, Soi Kaingu, Sasha Daka** and **Yosa G. Yosa**, you have been indispensable friends to whom I owe a large debt of gratitude.

I would also like to thank my supervisor, **Dr. Ngosa Simbyakula** for guiding me through endeavour in a way that encouraged me to work harder and yet enjoy this exercise.

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CHAPTER ONE

An Introduction to Competition Law in Zambia

1.0 Introduction

Since the transition of Zambian economic policy from a national control economic model or centrally planned economy to a free market economy, there was a need for the enactment of legislation that would regulate the business practices so as to achieve and ensure competitive market structures obtained in the newly liberalised economy.

In June 1994, the Zambian government endorsed the need for national legislation to create and safeguard market structures and encourage behaviour which prevents anti-competitive practices, to ensure markets operated efficiently and protect the welfare and interests of the consumer.¹ This culminated in the enactment of the Competition and Fair Trading Act, Chapter 417 of the laws of Zambia, largely a consequence of conditions set on Zambia by the International Monetary Fund (IMF) and the World Bank.²

In an effort to determine the nexus between consumer protection, which in the interests of this discussion is considered to represent the same ideal as consumer welfare, and competition laws currently obtaining in Zambia, the aims of the Competition and Fair Trading Act are indicative of the importance of consumer protection under the competition laws.

The Competition and Fair Trading Act has two principal aims. Firstly, the Act is aimed at preventing anti-competitive conduct thereby ensuring competition and efficiency in

¹ www.zcc.com.zm

² G. K Lipimile. *Addressing Anti-Competitive Practices of Enterprises in a Developing*

Country Setting: The Case of Zambia - Symposium on Competition Policy and the Multilateral Trade System, (WTO: Geneva) 1998, p 4

business.³ The assumption lies in the fact that free trade results in greater choice for consumers in price quality and service.⁴The second aim of the Act is to ensure the interests and welfare of consumers is adequately protected in their dealings with producers and sellers.⁵

With consideration of the aims of the Competition and Fair Trading Act forming the background, it is clear that consumer protection forms a cardinal aspect in the enactment of this piece of legislation. The fact that there still has not been any official policy on Competition law in Zambia makes it a considerably tedious task to determine the precise intention of the enactment of such a law.

However, from the Act itself, it can be reasonably construed that as well as regulating market structures, the basic or fundamental aim would seem to be to ensure the welfare of consumers.

In order to clearly understand the concept of consumer welfare, in the context of this discussion, it is important that this concept is considered in the light of the competition and Fair Trading Act. This is because there are various regulatory bodies such as the Energy Regulation Board (ERB), Communications Authority (CA) and the Securities and Exchange Commission (SEC) that act as watchdogs for consumer welfare and thus the nexus between consumer welfare and Competition law should therefore be succinctly distinguished.

In order to achieve the task of elucidating the nexus between the Competition and Fair Trading Act and consumer welfare, it is imperative that the workings of the Act are understood so as to in turn understand the role of the Act in protecting consumers.

³ www.zcc.com.zm

⁴ M. Banda et al *Implementation of Government Policy in Zambia*, a Consultancy Report for the Ministry of Commerce Trade and Industry 1993

⁵ www.zcc.com.zm

The objectives of the competition laws would include encouraging competition in the economy by prohibiting anti-competition trade practices, regulating monopolies and concentration 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 of trade and expansion of entrepreneurship base.⁶ From the above objectives, it is clear that the laws are invariably aimed at market advancement and consumer welfare. In terms of the latter, a well regulated competitive market would protect the consumer from the threats of over-pricing and also assists in quality control.

The Competition and Fair Trading Act also established the Zambia Competition Commission (ZCC) which came into being in 1997 as the agency responsible for enforcing the competition laws in Zambia. Under the Competition and Fair Trading Act, the ZCC is empowered to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair trading. Therefore, the ZCC plays the role of the 'watchdog' in ensuring consumer protection as provided for under the Competition and Fair Trading Act.

Therefore, the introduction of the Competition and Fair Trading Act stemmed from the recognition that as Zambia had undertaken economic liberalisation measures, it was imperative that it takes interest in ensuring that the welfare and efficiency benefits arising from such measures were not lost due to anti competitive practices by firms.⁷ Consequently, proviso protecting welfare of consumers from unfair trading practices was enshrined in section 12 of the Act which was put in the Act principally to protect the interests and welfare of consumers from unfair trading. According to section 12 of the Act, certain trade practices

⁶ T. Kaira. *A Review of Competition Law of Zambia*. Obligatory Essay submitted to the School of Law in partial fulfilment of the award of Bachelor of Laws Degree 2003.

⁷ Zambia Competition Commission. *The Promotion and Protection of Consumer Welfare and Interests in Zambia*.

by firms are regarded as illegal and would affect consumers negatively if they were not prohibited.

This research is therefore intended to provide an analysis of the relevance of the competition law regime in Zambia with specific regard to consumer protection. This analysis shall focus on the efficacy of the consumer protection provisions under the Competition and Fair Trading Act and whether these provisions are adequate enough to ensure consumer protection with regard to issues relating to competition.

1.1 STATEMENT OF PROBLEM

As has been mentioned above, the introduction of competition laws in Zambia was part of conditions set by the IMF and the World Bank as part of the Structural Adjustment Programs which were being implemented at the transition of Zambia from a centrally planned economy to a free market economy after the change of government in 1991. As a result of this imposition, Zambia has never had in place a comprehensive policy to guide the implementation of competition laws. The question to be determined is whether the policy introduced in Zambia is a responsive one designed to meet the requirements of consumer welfare.

The factors accounting for the enactment of the competition policy in Zambia can be considered as being vague when compared to the factors that led to the introduction of such laws in jurisdiction like the US and the European Union. In the former, the introduction of the Sherman Act of 1890 and the Clayton Act of 1914 were in response to the large American corporations that used trusts to conceal the nature of their business arrangements⁸, while in

⁸ R. Wilberforce, Alan Campbell and N. Elles *The Law of Restrictive Practices and Monopolies*, 2nd edition, (London: Sweet and Maxwell) 1966, p.42

the latter jurisdiction, the introduction law was so that there could be regulation of competition in an integrated market environment.⁹ Therefore, it is of cardinal importance that it is established in the Zambian context, the relevance of such laws as either responding to a mischief or as being part of the mechanism necessary for the transition to a free market economy.

From the above, it is clear that there was inadequate experience with issues concerning competition in Zambia as all industries were regulated and administered by the government and therefore the factors that led to the enactment of the Competition and Fair Trading Act will serve as an important factor in determining the importance attached to consumer welfare in competition laws. Thus the question to be determined is whether the competition laws adequately and effectively protect the consumer, with close regard to the issues relating to competition.

1.2 PURPOSE OF THE STUDY

Discussing the relevance of competition law to consumer protection in Zambia is of great importance in the sense that it is a branch of law that has not been thoroughly dealt with due to its novelty to the Zambian context. This branch of law has a growing influence on the development of the economy as its development is directly linked to the growth of a free market economy. The growth of the private sector may give rise to anti competitive behaviour that is intended to disturb the equilibrium in the competitive market structures that form an important component of the free market economy and therefore the need for regulation of such behaviour cannot be understated. An economy without such regulations or

⁹ ibid

competition laws will inadvertently be inimical to the consumer whose protection the enactment of such laws is directed at.

Having stressed the importance of having in place laws and mechanisms for the promotion of a competitive market, it is important to note that such measures should be able to respond to the needs of the market in which they are introduced, failure of which would result in such measures proving irrelevant as they do not adequately respond to their intended purpose. Therefore, a number of questions may arise. Firstly, is the law governing competitive practices in Zambia practicable enough to meet its objectives, as regards consumer protection, as set out in the Competition and Fair Trading Act? What are the shortfalls, if any, of the current competition laws? What inroads have been made in relation to the advancement of consumer protection by virtue of the application of such regulations?

The main objective of this research is to conduct an analysis of the adequacy and relevance of the prevailing competition laws in governing the protection and promotion of consumer welfare. Therefore the specific objectives of this study will be to:

- (a) Explain consumer protection with specific reference to the history and nature of competition law.
- (b) Analyse the practicality of provisions relating to consumer protection in the Competition and Fair Trading Act.
- (c) Analyse the impact of competition law, both negative and positive, on consumer protection in Zambia by analysing cases and policy considerations.
- (d) Provide an overview on the relevance and import of the Competition and Fair Trading Act and analyse any proposed changes to provisions relating to consumer protection.

1.3 SIGNIFICANCE OF THE STUDY

1.3.1 Theoretical Importance of this Study

The importance of looking into the relevance of competition law in Zambia is that the promotion of a competitive free market economy has limitless benefits on the growth of the economy and protects the consumer from being at the mercy of monopolies who would be in a position to manipulate prices of products and services at their will. A free market economy with competition law regulating it promotes and maintains an effective competition so as to achieve a more efficient allocation of resources.¹⁰ This research is also of importance in that amendments to provisions relating to consumer protection have been intimated by the Ministry of Commerce and Industry to review the current competition law following a draft of a comprehensive national competition policy and come up with a comprehensive competition and consumer protection act.¹¹

Therefore, it is of cardinal importance that for the competition laws to be relevant in any given country, especially one like Zambia where such a law was not based on a comprehensive policy, it has to be able to achieve its objectives for its relevance to be appreciated. Therefore, this research intends to ascertain the relevance of such laws in the attainment of adequate consumer protection.

1.3.2 Practical Importance of this Study

The practical importance of this study lies in the identification of the inadequacies of the current competition law provisions relating to consumer protection. This shall be looked at in the light of the proposed changes to the provisions relating to consumer protection in the

¹⁰ F. Jenny. *Globalisation, Competition and Trade Policy: International Comparative Competition Law and Policies* Vol. 3 (Hague: Kluwer Law International) 2001, p.12

¹¹ www.daily-mail.co.zm/media/news/

Competition and Fair Trading Act. It is important that laws such as the Competition and Fair Trading Act are of immense efficacy as anything short of that would be greatly prejudicial to its objectives and therefore greatly undermine welfare of the consumer.

1.4 Research Questions

This research was conducted so as to provide answers to some questions pertaining to the relevance and adequacy of competition law in the protection and promotion of consumer rights. The following thus are the questions;

- What role does competition law, and specifically the Competition and Fair Trading Act, play in the promotion and protection of consumer rights?
- Are the provisions of the Competition and Fair Trading Act practical enough to provide comprehensive protection for consumers?
- Has the current competition law regime in Zambia had the requisite impact on the promotion and protection of consumer rights?
- What improvements can be made to competition law that can enhance its function of promoting and protecting consumer rights?

1.5 Methodology

The data for this research was sourced from books, statutes, case law, journal articles, paper presentations student obligatory essays, Hansards, reports and journals from relevant institutions, newspaper articles and internet sources. Interviews carried out at the Zambia Competition Commission and research at the National Assembly also provided data for this research.

1.6 Review Of Related Literature

A search of the special collection in the University of Zambia library revealed that two previous dissertations have been written on the topic relating to competition law. The relevant dissertations are below:

- Kaira, T. "A Review of the Competition Law of Zambia" (2008)
- Pumulo, A. "Anti-Competition Laws in Zambia: Its Relevance and Applicability" (2005)

The dissertation of Kaira highlights the major provisions of the Competition and Fair Trading Act and analyses its application. Kaira focuses on the exemptions to anti competitive trading practices, the prohibited anti trading practices and mergers and acquisitions. Kaira sets out the objective of the dissertation as aimed at bringing to the fore the relevance of the Competition and Fair Trading Act.

Pumulo, in his dissertation, focuses on the relevance of competition laws in Zambia by looking at the socio-economic and political aspects and legal framework necessitating the development of competition laws in Zambia. This was done by looking at the necessity and relevance of such laws with reference to other jurisdictions.

The Havana Charter also provides also presents literature concerning Competition Law that forms an important aspect in the understanding of this branch of law as an internationally accepted practice. The Havana Charter was the final act of the United Nations conference on Trade and Employment from which the Economic and Social Council of the United Nations, by a resolution dated 18th February 1946, called for conference for purpose the of promoting expansion of production, exchange and consumption of goods.

Under the resulting Havana Charter, it was agreed that 'each member shall take appropriate measures and shall co-operate with the organisation to prevent, on the part of private or public commercial enterprise, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control whenever such practices have harmful effects on the expansion of production or trade or interfere with the achievement of any other objectives'.¹²The Havana Charter reveals the international recognition of the principles of competition law and provided a basis for the development of competition policy in United Nations member states.

A more comprehensive international set of guidelines has since been agreed upon and this is contained in the United Nations Set of Principles and Rules on Competition¹³ which sets out a set of multilaterally agreed equitable principles and rules for the control of restrictive practices.

The nature of competition law and its objectives is also discussed by Frederick Jenny in the publication, *Globalisation, Competition and Trade Policy: Convergence, Divergence and Cooperation of Internal and Comparative Competition Law and Policies*, where he states that 'despite competition there must be a mechanism to prevent firms from the natural inclination to eliminate each other. In the absence of such a mechanism, the expected overall benefits of decentralised decision making will be partly lost and transformed into the rents of monopolistic firms. The major goal of competition law is thus to allow firms to take advantage of business opportunity and to make sure that through the competitive process,

¹² Preamble of the Havana Charter, United Nations Economic and Social Council, 1946

¹³ UNCTAD/RBP/CONF/10/REV.2 UN, Geneva

actual market working of decentralised market will foster dynamic economic efficiency to the fullest possible extent given the regulatory environment of such markets'.¹⁴

The emphasis, by Jenny, on the decentralisation of markets is especially important to the Zambian situation as the introduction of competition law in Zambia was a response to the transition from a centralised economic system in which the government regulated and controlled all aspects of the economy to a decentralised free market and thus illustrates the importance of competition in the current status quo of the Zambian economy.

¹⁴ F. Jenny. *Globalisation, Competition and Trade Policy: International Comparative Competition Law and Policies* Vol. 3 Hague: Kluwer Law International (2001), p. 14

CHAPTER TWO

The Role of Consumer Protection in the Development of Competition Law

2.1 Introduction

The recognition of interests of consumers and their protection can be said to be a somewhat recent movement as compared to other movements such as those for the promotion of human rights. The consumer promotion and protection movement can be traced to the American congress of the 1960s. International recognition of the movement for the protection of consumer interests came in 1982 when General Assembly Resolution 39/ 248 was adopted by the United Nations General Assembly to provide for guidelines on consumer protection.

These guidelines were intended to provide a general framework for consumer protection and each member country has the responsibility of developing its own consumer protection legal framework.

The guidelines consist of eight basic rights of the consumer that every state has to endeavour to achieve. These rights comprise of the “right to the satisfaction of basic needs, right to physical safety, right to be informed, the right to choice, right to be heard, right to redress, the right to promotion and protection of consumers’ economic interests and the right to a healthy environment”.¹⁵ It is these rights that states should endeavour to achieve by creating an environment, by way of statutory intervention, in which the consumer can enjoy them.

Under Zambian law, section 2 of the Competition and Fair Trading Act¹⁶ defines a consumer as including any person;

¹⁵ United Nations Conference on Trade and Development *United Nations Guidelines for Consumer Protection* (New York: United Nations) 1999, p. 3

¹⁶ CAP 417 of the Laws of Zambia

(a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;

(b) to whom a service is rendered;

Consumer protection can be seen to be a form of government regulation of the interests of the mass of society described in the above definition. The class of persons regarded as consumers is very broad and the protection of their rights is normally not restricted to a single piece of legislation, let alone institution.

Therefore, consumer protection shall be considered in the context of the laws regulating competition, with specific regard to the Competition and Fair Trading Act, CAP 417 of the laws of Zambia. To aid this discussion, a look at the role of consumer protection in the development of laws relating to competition shall proceed by looking at the history of the development of laws relating to the regulation of anti competitive trade practices.

2 History of Competition Law

In discussing the historical development of competition law, the importance of consumer interests shall be highlighted by looking at the policy basis of many laws that were intended to bring about regulation of anti-competitive practices. The history of the development of competition shall be partitioned into two eras, the pre-Sherman Act era and the post Sherman Act era. This is because the Sherman Act gave birth to the codification of competition law as we know it today.

Competition law refers to the economic regulation that affects both the structure of markets and the conduct of the market participants with the essential mischief being the use, by single

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exclude competition.¹⁷ Therefore, when looking at the development of competition law and laws relating to it, the impact on consumer interests is one of the foremost considerations.¹⁸ This forms the backdrop to the intricate relationship that exists between consumer protection and competition and shall form the context within which the historical development of competition law shall be viewed *vis-a-vis* consumer protection.

2.2.1 Pre-Sherman Act Era

Laws relating to the regulation of anti competitive practices are known to have existed as early as around 50 BC when the Roman Republic enacted the *Lex Julia de Annona* which was aimed at protecting grain trade by imposing heavy fines on anyone directly, deliberately and insidiously stopping supply ships.¹⁹ Another such law was enacted under the rule of Diocletian in 301AD which imposed the death penalty on those that violated a tariff system by buying up, concealing or contriving the scarcity of everyday goods.²⁰

In England, legislation to regulate monopolies and restrictive practices was introduced before the Norman Conquest when concern for fair prices led to attempts to regulate the market.²¹ Forestallers were regarded as oppressors of the poor and the community at large and enemies of the whole country²² and this attitude culminated in the enactment of the statute of labourers in 1349 during the reign of King Edward III which decreed that foodstuffs be sold at reasonable prices and also outlawed trade combination.²³

¹⁷ I. McEwin. *Competition Law in a Small Open Economy*. New South Wales Law Journal, 2003, p 246

¹⁸ *ibid*

¹⁹ R. Wilberforce, A. Campbell and N. Elles *The Law of Restrictive Practices and Monopolies*, 2nd edition, (London: Sweet and Maxwell) 1966, p. 23

²⁰ *Ibid*

²¹ *Ibid*, p. 18

²² Forestallers were those individuals that were in the practice of buying goods before they reach the market and then inflating the prices.

²³ R. Wilberforce, A. Campbell and N. Elles *The Law of Restrictive Practices and Monopolies*, 2nd edition, (London: Sweet and Maxwell) 1966, p.23

Up to this stage of the development of regulations relating to anti-competitive and trade restrictive practices, it is clear that public interest seemed to be the fulcrum of the policy basis. These regulations were put in place to secure the basic necessities of the societies where they were introduced and thus the nexus between the development of such regulations and consumer protection is clear. Therefore, from the onset, consumer protection ideals formed the policy basis for the introduction of competition laws.

The inception of the industrial revolution in England led to the introduction of the Industrial Monopoly Licenses, similar to modern patents, but an abuse of this privilege led to the landmark Case of Monopolies- *Darcy v Allin*²⁴ where the grant of sole trading rights was held to be void by the court on the grounds that monopolies led to the undesirable consequences of price increases, quality decrease and the tendency to reduce smaller groups to idleness and beggary.

At this stage of the evolution of competition law, the parameters of restrictive trade practices were expanded from merely restricting activities relating to basic needs of the people like food prices to an approach restricting trade practices that were resulting in the breach of now recognised consumer rights such as the right to consumer protection and the right to choice. Price increases and quality depreciation negatively affected consumers and the leading to obscurity of lesser traders led to a gradual negation of the right to choice.

The next stage in the development of competition law was the development of the English law of Restraint of Trade which was a direct predecessor to the modern form of competition law. This was a two tiered concept which prohibited agreements that ran counter to public

²⁴ [1602] 11 Co. Rep. 84b

policy, i.e. an agreement restraining another's trade, unless the reasonableness of such an agreement could be shown.²⁵

The issue of public policy is again the basis for the limitation placed on the law of restraint of trade and thus imports the consideration of the interests of the consumer. Cases involving the interpretation of the restraint of trade law suggest that such trade restraints would be authorised in instance when their reasonableness could be determined by the likely impact on trade and the weighing up of the interests of the consumer. This consideration of consumer interests is not a conspicuous one but can be inferred from the fact that restraint of trade agreements are not restricted on the basis of the restriction of another party from trading but rather that of the unreasonable constraint on the other party not to compete.

This rule was enunciated in the case of *Nordenfelt v Maxim, Nordenfelt Gun Co.*²⁶ where a Swedish gun maker made a promise on sale of his business to an American gun maker that he 'would not make guns or ammunition anywhere in the world and would not compete with Maxim in any way'. Lord McNaughton ruled in this case that while one could validly promise not to make guns or ammunition anywhere in the world, it was an unreasonable restraint 'not to compete with Maxim in any way'. This decision draws an inference that the exclusion of competition, the collateral effect being the compromise of consumer interests, forms the essence of the declaring a restraint of trade agreement unreasonable. Therefore, the intrinsic connection between competition and consumer interests can reasonably be seen as a cardinal consideration in the determination of the reasonableness of a restraint of trade agreement which incidentally forms an important part of the development of competition law.

²⁵ R. Wilberforce, A. Campbell and N. Elles *The Law of Restrictive Practices and Monopolies*, 2nd edition, (London: Sweet and Maxwell) 1966, p.28

²⁶ [1894] AC535

2.2.2 Post Sherman Act Era

The Sherman Act was enacted in the United States in 1890 and is seen as the beginning of the modern form of legislation regulating competition. This Act was supplemented by the Clayton Act that was passed in 1914 to respond to the inadequacies of the Sherman Act. The Sherman Act was enacted to respond to the mischief of large American corporations using trusts to conceal the nature of their business arrangements. These business arrangements included the anti-competitive practices that these big monopolies engaged in under the auspices of trusts. These monopolies were perceived to be threats to democracy and the free market structure in the United States.

The Sherman Act provided for the restriction of all contracts or trusts or conspiracy in restraint of trade among several states or foreign nations.²⁷ The Act additionally provided for the modern competition law restrictions on monopolies and mergers in section 2 which provided that;

Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several states...shall be deemed guilty of a felony.

The Clayton Act on the other hand supplemented the Sherman Act by providing for specific categories of abusive conduct such as price discrimination, exclusive dealings and mergers which substantially lessen competition. From the additional categories provided in Clayton Act, it is clear that the consideration of competition and its effects played a major role in providing an extension to the provisions contained in Sherman Act. It is thus clear that consumer interests were, even if inadvertent, a concern to the enactment of these Acts.

²⁷ Sherman Act, Title 15 of the United States Code s. 1

Following the Sherman Act and the Clayton Act, the European Community signed the Treaty of the European Economic Community in 1957,²⁸ and competition law was a part of the European Union law that was encapsulated in it. A healthy competition environment was seen as an important element of the creation of a common market created by this treaty that was free from restraints on trade.

The treaty of the European Economic Community contained a provision which meant to prevent the restriction or distortion of competition within the common market.²⁹ Though the goals of the inclusion of competition law in the treaty are arguable, the predominant school of thought is that consumer protection considerations were the most relevant, with public policy considerations such as health and environment being the alternative view.³⁰ It is therefore clear that the importance of consumer interests in the development of competition law cannot be understated as it forms one of the most important considerations in the enactment of any law regulating competition.

The importance of consumer interests as a consideration in the development of consumer protection can also be seen in the theories that have been developed to explain the basis of competition law. Early theorists of the classical perspective of the competition law theory held the view that ‘...monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above their natural price, and raise their emoluments...greatly above their natural rate’.³¹ This perspective consolidates the importance of consideration of the interests of the consumer in an environment where

²⁸ This treaty is otherwise known as the Treaty of Rome

²⁹ Treaty of the European Community, Article 81 (1)

³⁰ O. Odudu. *The Boundaries of EC Competition Law: Scope of Article 81* (Oxford: Oxford University Press) 2006, p. 8

³¹ C. McConnell, S. Brue. *Economics: Principles, Problems and Policies*. (London: McGraw Hill) 2005, p. 601

high prices are artificially created by monopolies and hence the importance these interests serve in the development of competition law.

Another theorist, John Stuart Mills consolidates this position when he states that;

both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, then under the sole check of equal freedom to the buyers for supplying themselves...this is the so-called doctrine of free trade, which rests on grounds different from, though equally solid with, the principle of individual liberty...restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraints, qua restraint, are evil.³²

The above statement equates the importance of free trade and competition to the enjoyment of principles of individual fundamental freedoms and this would import the same level of reverence for the effect and intention of a competitive market, protection of consumer interests. Therefore, the importance of consumer interests is once again emphasised.

In Zambia, the introduction of competition laws was by way of the enactment of the Competition and Fair Trading Act, CAP 417 of the Laws of Zambia, which was a response to the liberalisation of the Zambian economy. Prior to 1991, the economy was run by the government and thus there was no free market to be regulated as regards issues relating to competition. Under this regime, there was the system of price controls in force and prices were thus controlled by the state as this formed part of the national control economic model.³³ This led to increased importance of consumer welfare as the shift from a command economy to a liberal one resulted in free flow of goods and services without government intervention and this would lead to increased likelihood of compromise.

³² Ibid, 602

³³ CIA World Factbook Zambia, www.cia.gov/cia/publications/geos

Under the Competition and Fair Trading Act, the objectives include, firstly, preventing anti-competitive behaviour by encouraging competition and efficiency in order to provide for greater choice of consumers in terms of distribution of goods and services.³⁴ The Act also aims at strengthening the efficiency of production and distribution of goods and services and also to ensure that the interests and welfare of consumers are adequately protected in their dealings with producers and sellers.³⁵

From the objectives of the Act, it is clear that the interests of consumers form the core of the policy basis of the Competition and Fair Trading Act as the three objectives of the Act highlighted above would suggest. Therefore, consumer protection can be reasonably inferred to be basis of the development of competition law in Zambia.

2.3 Overview of the Development of Competition Law

From the above discussion, it is clear that from the onset of enactment of laws regulating competition, consumer interests have formed the most important consideration. From the early times of protecting society from traders conspiring to raise the prices of commodities, to the restriction of restraint of trade agreements and onto the inclusion of trusts designed to conceal agreements that are anti competition in nature, the interests of the consumer have been the ultimate end of all laws relating to competition.

³⁴ Preamble of the Competition and Fair Trading Act Cap417 of the Laws of Zambia

³⁵ *ibid*

CHAPTER THREE

Analysis of the Practicality of Provisions Relating to Consumer Protection under the Competition and Fair Trading Act

3.0 Introduction

This chapter shall focus on the practicality and efficiency of the provisions relating to consumer protection by considering the substantive clauses of the Act which prescribe the types of business practices that are deemed anti-competitive. The chapter shall also consider whether the provisions relating to consumer protection are practical enough to be efficiently enforced given the mechanisms provided under the Act.

In considering the substantive provisions relating to restrictive business practices, sections 7, 8, 9 and 10 of the Competition and Fair Trading Act shall be closely considered as they set the restricted business practices and these shall be looked at in detail. Section 11 of the Act shall also be considered as it provides for the control of monopolies and concentration of economic power.

With regard to the provisions relating to consumer protection, section 12 of the Act provides for the protection of consumers which out rightly prohibit certain types of business conduct in order to protect the consumer. It is these prohibitions that shall be considered in light of whether they are practical enough to protect consumer interests in a free market. The practicality of these provisions shall be measured in the context of the enforcement mechanisms provided under the Act.

3.1 Restrictive Business Practices

Under the Competition and Fair Trading Act, trade practices are defined as ‘any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service’.³⁶ Such trade practices, as contemplated in the above definition, will assume a restrictive nature when their object is to restrict competition.

The measure for what shall be deemed to be anti-competitive is spelt out in section 7 of the Competition and Fair Trading Act which provides that “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”. This provision sets the context within which the nature of the main types of business practices that can have anti-competitive effects such as vertical restraints, horizontal restraints, anti-competitive mergers and acquisitions and practices undertaken by a single firm enjoying a dominant position.

Section 7 of the Act therefore sets out the relevant intention that has to be present in order to deem trade practices as restrictive and therefore prohibited. This section further provides a list of anti-competitive trade practices which are considered vertical anti competitive trade practices.³⁷ These trade practices are considered vertical as they relate to anti-competitive agreements between firms along the production-supply-distribution chain which have the objective of preventing, restricting or distorting competition to an appreciable extent of it.³⁸

³⁶ Section 2

³⁷ Section 2 (2)

³⁸ Zambia Competition Commission. *Market Interventions* (Lusaka: Zambia Competition Commission)2008

3.1.1 Vertical Anti-Competitive Trade Practices

Under section 7(2)(a), the Competition and Fair Trading Act prohibits predatory behaviour towards competition including the use of cost pricing to eliminate competitors. This provision relates to the prohibition of behaviour such as suppliers selling at a very low price, or in the alternative providing intermediate inputs to competitors at excessive prices, in order to drive competitors out of business.

Another element of vertical restraints that relates to pricing is that of discrimination. The Competition and Fair Trading Act prohibits the “discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods or services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises”.³⁹In simple terms, this provision prohibits the charge of different prices to different parties under the similar circumstances.

The Competition and Fair Trading Act also prohibits the practice of making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods.⁴⁰This provision encapsulates trade practices such as the refusal to deal with willing parties if they do not fulfil certain conditions which in effect results in reciprocal exclusivity, a restrictive trade practice. The practice of exclusive reciprocity imports the condition that a distributor does not carry the products of any other supplier.

Tied selling is another element of the vertical anti-competitive trade practices that is restricted under the Competition and Fair Trading Act. This practice relates to forcing

³⁹ Section 7(2) (b)

⁴⁰ Section 7(2) (c)

Tied selling is another element of the vertical anti-competitive trade practices that is restricted under the Competition and Fair Trading Act. This practice relates to forcing purchasers to buy goods they do not wish to purchase as a condition to sell them the goods they wish to purchase. The Competition and Fair Trading Act provides for this prohibition in section 7(2) (d) where it states that making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier to the consignee shall be prohibited.

Collusions, 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 is another business practice that forms part of the vertical anti-competitive practices that are prohibited under the Competition and Fair Trading Act.⁴¹

Therefore, the Competition and Fair Trading Act provides a comprehensive, yet not exclusive, set of prohibitions of practices that lead to what can amount to vertical restraints on competition.

3.1.2 Horizontal Anti-Competition Trade Practices

Horizontal restraints to trading consist of agreements or arrangements between competitors to limit competition. Section 9(1) of the Competition and Fair Trading Act makes it an offence for enterprises engaged on the market in rival or potentially rival activities to engage in practices whose object is to limit access to markets or otherwise unduly restrain competition.

The first such restraint to be discussed is that of price fixing which involves competing suppliers entering into comparative agreements regarding prices and sales conditions.⁴²This

⁴¹ Section 7(2)(g)
⁴² ZCC Competition Commission. *Merger Control Regulation Zambia* (Lusaka: Zambia Competition Commission) 2008, p. 2

goods or services between persons, or limit or restrict the terms and conditions of sale...”. This prohibition is in effect a fetter on the ability of competing firms to destabilise the competition in a market structure.

Horizontal restraints also include practices such as market allocation which involves competing suppliers allocating customers amongst themselves⁴³ thus precluding the customers from enjoying the benefits of competition by other suppliers. This in effect leads to the practice of another prohibited trade practice that is classed as exclusionary. This relates to the employment of practices that preclude the ability of other or potential suppliers to compete in the market for a product.⁴⁴

Collusive tendering, also referred to as bid-rigging, is another aspect of horizontal restraints to competition that is prohibited under the Competition and Fair Trading Act⁴⁵. These practices involve the exchange of commercially sensitive information between suppliers on bids and agreement to take turns as to who will make the most competitive offer. This practice inhibits the ability of suppliers not party to the agreement to effectively participate in the market hence the practice being an anti-competitive one.

3.1.3 Merger Control Regulation

This aspect of regulation of anti competitive trade practices is concerned with mergers and takeover notification. Under section 8 of the Competition and Fair Trading Act, no merger or takeover between competitors and potential competitors can take effect without the prior approval of the Zambia Competition Commission. A merger that is effected without the prior authorisation by the Zambia Competition Commission shall not have any legal effect and no

⁴³ Competition and Fair Trading Act, section 9(3)(c)

⁴⁴ Zambia Competition Commission. *Zambia Competition Commission: Its Functions and Objectives* (Lusaka: Zambia Competition Commission)1998, p.4

⁴⁵ Competition and Fair Trading Act, section 9(3)(b)

approval of the Zambia Competition Commission. A merger that is effected without the prior authorisation by the Zambia Competition Commission shall not have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable.⁴⁶

The mergers contemplated in section 8 include a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services.⁴⁷ Takeovers on the other hand refer to the takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise.⁴⁸

Mergers are classed into three different categories; vertical, horizontal and conglomerate mergers. With regard to vertical mergers, these are concerned with the regulation of mergers between firms in the same production and marketing chain while horizontal mergers refer to those involving competitors. Conglomerate mergers on the other hand refer to those between firms in unrelated businesses.

The focus on mergers under competition law stems from the recognition of the relationship between conduct in a market and the structure of the market.⁴⁹ Mergers can lead to high levels of market concentration which can result in the loss of innovation that can be generated in a competitive market. Therefore, the role of competition law in regulating mergers is to ensure that mergers and takeovers that take place do not lead to innovation and competition in Zambia hence the regulatory nature, as opposed to prohibitory, of section 8 of the Competition and Fair Trading Act.

⁴⁶ Competition and Fair Trading Act, section 8(2)

⁴⁷ Section 8(1)(a)

⁴⁸ Section 8(1)(b)

⁴⁹ ZCC Competition Commission. *Merger Control Regulation Zambia* (Lusaka: Zambia Competition Commission) 2008, p. 2

Therefore, the provisions of section 8 do not prohibit mergers or takeovers but merely regulate them such that prohibition occurs only where there is a likelihood of abuse of market power. Mergers shall also be measured in accordance with the captive clause of all anti-competitive conduct set out in section 7(1) of the Competition and Fair Trading Act to determine whether they are anti-competitive or not.

3.1.4 Control of Monopolies and Concentrations of Economic Power

The Competition and Fair Trading Act mandates the Zambia Competition Commission with the authority to keep the structure of production of goods and services in Zambia under review to determine where concentration of economic power exist whose detrimental impact on the economy outweigh the efficiency advantages.⁵⁰The various transactions that are in contemplation of this provision are those practices that could potentially lead to concentrations of economic power such as mergers, joint ventures and strategic alliances.⁵¹The object of this provision is to avoid unchecked anti-competitive behaviour which inadvertently leads to monopolies and abuse of market power.

The Competition and Fair Trading Act narrowly defines the criteria which the Zambia Competition Commission shall use when determining the concentrations of power for purposes of regulating the same in a market structure. The first such criterion is that of whether a person controls a chain of distributing units the value of whose sales accounts for a significant portion of the relevant market.⁵²Therefore, the extent of control of a market provides an important indicator as to whether the concentration of market is detrimental to the economy with regard to the effects of anti-competitive practices on the market structure.

⁵⁰ Section 11(1)

⁵¹ Zambia Competition Commission. *Market Interventions* (Lusaka: Zambia Competition Commission) 2008,

p.3

⁵² Section 11(2)(a)

The second consideration provided for in the Competition and Fair Trading Act is whether a person, by virtue of controlling two or more physically distinct enterprises which manufacture substantially similar goods, supplies a significant portion of the domestic market at unreasonably low prices.⁵³ This provision is intended to preclude the business entities that hold significant market power from using this power to distort the competition in the market structure by using unreasonably low prices to disable other firms' ability to compete.

The third criterion provided for under section 11(1)(c) of the Competition and Fair Trading Act is consideration of whether a person has substantial shares in a manufacturing enterprise and whether he simultaneously has a beneficial interest, however small, of outstanding shares in one or two wholesale or retail enterprises which distribute products of the manufacturing enterprise. This provision precludes such persons from enjoying a position in the market where they can easily engage into agreements amounting to vertical restraints on competition.

3.1.5 Unfair Trading

The provisions of section 13 of the Competition and Fair Trading Act prohibit practices which amount restrictive trade practices and is aimed at the consumer welfare and protection. These provisions are premised on the fact that consumers will benefit if the economy is not burdened by unreasonable and unfair restrictive agreements or practices.⁵⁴ This rationale stems from the fact that a competitive market structure will generally ensure that consumers obtain a wider range of goods and services at better prices.

The importance of the provisions relating to consumer protection under the Competition and Fair Trading Act lies in the fact that there is no comprehensive consumer protection policy in Zambia. Therefore, the provisions of the Competition and Fair Trading Act greatly enhance

⁵³ Section 11(2)(b)

⁵⁴ Zambia Competition Commission. *Market Interventions* (Lusaka: Zambia Competition Commission)2008, p.

the protection of consumer interests as it recognises consumers as an integral part of the market economy and considers consumer protection as a tool to address issues of market failure.⁵⁵

Under section 12(a) of the Competition and Fair Trading Act, a person is precluded from withholding or destroying producer or consumer goods, or rendering unserviceable or destroying the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing about a price increase. Consumers are therefore protected from enduring high prices brought about by the artificial machinations designed to distort the competitive market structures.

Section 12(b) of the Competition and Fair Trading Act provides for prohibition of the exclusion of liability for defective goods. This provision is in line with article 21 of the United Nations Guidelines on Consumer Protection which provides that 'Consumers should be protected from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts and unconscionable conditions of credit by sellers'.

The Competition and Fair Trading Act also precludes persons from engaging in conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any products or services.⁵⁶ This is again in line with the 'international best practice' standard⁵⁷ which requires that Governments should encourage all concerned to participate in the free flow of accurate information on all aspects of consumer products. This forms another illustration of the recognition of consumer interests as

⁵⁵ *ibid*

⁵⁶ Section 12(d)

⁵⁷ United Nations Guidelines on Consumer Protection, Article 23

light of the functions of the Zambia Competition Commission in an attempt to determine the practicality of the consumer protection provisions.

3.2.1 Functions of the Zambia Competition Commission

The Zambia Competition Commission ('the Commission') is established under section 4(1) of the Competition and Fair Trading Act and its mandate is set out under the provisions of section 6. The commission is primarily concerned with the establishment of conditions that enhance free and effective competition in the economy to ensure that the anti-competitive practices do not create new barriers to trade or other forms of protectionism.⁶⁰

The objective of the Commission is to promote effective competition in the private and public sector for the benefit of the consumers.⁶¹ It follows that in the performance of its functions, the Commission should aim at ensuring that unfair trade practices, as provided in section 12 of the Competition and Fair Trading Act, and their consequences are averted. Whether or not this is practical shall be determined by considering the main functions of the Commission that have a bearing on consumer protection and how these functions contribute to the protection of consumers.

3.2.2 Applying and Enforcing Competition Legislation

This function of the Commission includes the implementation of the operative provisions of the Competition and Fair Trading Act, most of which have been discussed above. This function includes the handling of applications of negative clearance and notifications for

⁶⁰ Zambia Competition Commission, *Zambia Competition Commission: Its Functions and Objectives*. (Lusaka: Zambia Competition Commission) 1998, p. 1

⁶¹ *ibid*

exemptions, as well as control of notified mergers. The Commission is also mandated to take action against infringements of prohibited acts under the Competition and Fair Trading Act.

In this vein, the Commission is mandated 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 a dominant position, so as to determine whether any enterprise is carrying on anti-competitive trade practices and the extent of such practices.⁶² The Commission also has the function to carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger.⁶³

This function of the Commission is indicative of the importance of the role it plays in protection of consumer interests because it provides for the enforcement of the prohibitions contained in the Competition and Fair Trading Act. The fact that the Commission can carry out investigations into the nature of trade practices on its own initiative is illustrative of the practicality of consumer protection provisions as these will be enforced even in the absence of a complaint. Pre-emptive investigations by the Commission also import the relevance of prevention in the protection of consumers as would be the case in proposed mergers that adversely affect any person.

Additionally, the enforcement of consumer protection provisions is not subject to factors such as lack of awareness on competition policy by the consumers or the fear to challenge more illustrious market players and thus consumer protection remains a practical objective under the Competition and Fair Trading Act.

⁶² Competition and Fair Trading Act, Section 6(2)(a)

⁶³ Ibid Section 6(2)(b)

The prohibition of anti-competitive practices, in the absence of any enforcement mechanism, would make the consumer protection provisions futile and consequently reduce the importance of competition law in the protection of consumer interests a 'passing fancy'. Since competition law operates to protect the competitive process in the market rather than competitors,⁶⁴ the enforcement of the consumer protective provisions plays a cardinal role in the protection of the competitive process as breach of unfair trading provisions is synonymous with the distortion of the competitive process. Therefore, the implementation function of the Commission is indicative of the practicality of the consumer protection provisions under the Competition and Fair Trading Act.

3.2.3 Information Dissemination

Under section 6(2) (d) of the Competition and Fair Trading Act, the Commission is mandated to provide persons engaged in business with information regarding their rights and duties under this Act. This function of the Commission is concerned with the issuance of appropriate information relating to competition policy and the application of competition rules which is intended to promote a culture of competition in the market.⁶⁵

This function of the Commission aids the enhancement of the practicality of the consumer protection provisions by way of increasing awareness of the competition policy and rules amongst consumers. An aware consumer populace is necessary for the promotion of a culture of competition as they will be conversant with their rights and duties in the market. This will translate into increased protection for consumers as they will be able to recognise anti-

⁶⁴ Zambia Competition Commission, *Zambia Competition Commission: Its Functions and Objectives*. (Lusaka: Zambia Competition Commission) 1998, p. 1

⁶⁵ Ibid, p.2

competitive practices that detrimentally affect them. Increased awareness will also shed the burden of the cost to the Commission in the investigation of anti-competitive practices as consumers will bring complaints to the Commission if they are adequately informed on the policy and procedure relating to competition.

3.2.4 Enhancing Competition within the Public Sector

The enforcement of competition law is directed at the protection of the competition process in a decentralised free market economy.⁶⁶ However, the scope of the provisions of the Competition and Fair Trading Act are not limited to the acts of private individuals. The government, being the policy maker in Zambia, may introduce public measures that may have a restraining effect on competition and in order to avoid such a situation, the Commission is mandated to call attention to these restraining effects.

This can be done by the Commission submitting proposals aimed at increasing competition and facilitating entry for new competitors. This keeps the competitive market process free of distortion from public measures and thus maintains the environment in which consumer protection remains a viable objective.

The Commission also has the function of proposing changes in the administrative regulations restricting competition.⁶⁷ The Commission may, when required, assist other authorities in monitoring adherence to other rules where infringements may have harmful effects on the market and competition condition. An example of this function would be to assist the Energy

⁶⁶ Supra note 14

⁶⁷ Zambia Competition Commission, *Zambia Competition Commission: Its Functions and Objectives*. (Lusaka: Zambia Competition Commission) 1998, p. 2

Regulation Board when infringements of the Energy Regulation Act⁶⁸ may have harmful effects on market and competition conditions.

3.3 Conclusion

This chapter has considered the Competition and Fair Trading Act with regard to what types of conduct are deemed to be anti-competitive and also discussed the provisions relating to consumer protection. The functions of the Commission have also been considered in light of whether the consumer protection provisions in the Competition and Fair Trading Act are viable given the enforcement mechanisms provided under the Act.

Having considered the mandate and functions of the Commission, a number of factors have been identified as contributing to the viability of the consumer protection provisions of the Competition and Fair Trading Act. Firstly, the Commission has the authority to carry out investigations into anti-competitive trade practices on its own initiative hence protecting even the unsuspecting consumer. Secondly, the fact that investigations into anti-competitive practices can be pre-emptive, as is in the case of mergers, and this results in the prevention of violations of consumer rights.

Thirdly, the ability of the Commission to initiate investigations on its own initiative enables the protection of consumers even in instances where no complaint has been made will protect even those consumers that may not know how to make complaints. This is coupled with the Commission's function to inform consumers on their rights and the prevailing competition policy. As a result, consumers will have protection even in instances where they can have difficulty in getting access to the enforcement mechanism. This is because resource

⁶⁸ CAP 436 of the Laws of Zambia

constraints do not allow the Commission to operate from all corners of the country⁶⁹ and thus increased initiative by the Commission may accommodate those that do not have access to it.

Additionally, the Commission's guidance of public measures provides protection of the consumer even from actions of policy makers. Therefore, the protection of consumers under the Competition and Fair Trading Act can, on the basis of the above discussion, be deemed to be viable.

⁶⁹ George K. Lipimile, *Competition Regimes in the World- A Civil Report* (Lusaka: CUTS International) 2006, p.305

Chapter Four: Impact of Competition Law on Consumer Protection in Zambia

4.0 Introduction

Having considered the viability of the consumer protection provisions contained in the Competition and Fair Trading Act in the previous chapter, this chapter shall focus on the impact that competition law has had on the protection of consumer interests in Zambia. In so doing, the operations of the Commission in relation to the enforcement of competition law shall be discussed by considering policy developments which have been implemented to improve consumer protection and also consider the response of the Commission in cases relating to consumer protection. This discussion shall also determine whether the authorisation of allowable acts under section 13 of the Competition and Fair Trading Act has any impact on the consumer protection.

4.1 Impact of the Establishment of the Consumer Directorate

The Commission's responsibilities towards the consumer, as set out in section 12 of the Competition and Fair Trading Act, are discharged by the Consumer Directorate which has been given powers to promote and safeguard the economic interests of consumers in Zambia. The Consumer directorate is concerned with prohibitions of practices such as hoarding goods with a view to increase prices, exclude liability for defective goods, conduct that mislead the public, and supply of a product that is likely to cause injury to health and physical harm to consumers, when properly used.

In carrying out its functions, the Consumer Directorate carries out the Commissions various statutory powers, including regulatory action against individual traders and firms, and advises

the government on fair trading issues generally.⁷⁰ This function of the Consumer Directorate is aimed at ensuring the application and enforcement of competition law and consumer protection.

The Consumer Directorate is also tasked with keeping the Zambian market for goods and services under review in order to identify and investigate trading practices that appear to affect the economic interests of consumers adversely.⁷¹ This function is concerned with ensuring that constant review detects potentially detrimental practices and also detect practices already in effect that may not have had complaints raised about them but nonetheless affect the economic interests of consumers.

The Commission, through the Consumer Directorate has dealt with cases that illustrate how practices that adversely affect the consumer are dealt with. Examples of such cases include;

- i) **Allegations of Misleading Advert of Custard Porridge Dessert against Speciality Foods⁷²**: This case was based on a complaint against Speciality Foods for a misleading advert against Kandolo traditional food. The advert suggested that kandolo cannot be consumed as a dessert. The advert was terminated in compliance with the directive of the Commission. The Board closed the case.
- ii) **Complaint of Unfair Trade Practice against BMK (Z) Ltd.⁷³** This case was a complaint against BMK (Z) Limited of unfair trade practice. The complainant bought a liner kit to restore an engine which had a knock in his motor vehicle from BMK Limited. BMK sales personnel had recommended to him a Sub-Assembly Engine (SAE). After buying the SAE the complainant discovered that the cylinder head in his

⁷⁰ Zambia Competition Commission, *Annual Report 1999* (Lusaka: Zambia Competition Commission) 2000,

p.21

⁷¹ *ibid*

⁷² *ibid*, p. 22

⁷³ *ibid*

engine was not compatible with the SAE. He decided to return it for possible replacement or refund. BMK refused to replace it or refund the money. After the Commission's intervention, BMK agreed to refund. The Board decided to close the case since BMK had agreed to refund the money.

The Consumer Directorate also keeps in close touch with consumer associations generally and with the concerns of business about consumer issues, and seeks to ensure that government policy takes them properly into account.⁷⁴ This is done with the aim of having consumer affairs work, both by this Commission and others consumer associations such as the Zambia Bureau of Standards (ZABS), maximising consumer welfare in the longer term, subject to protecting vulnerable consumers' interests.

Such alliance with other associations may be illustrated in the Commission's act of entering into a pilot, service level arrangement with all district authorities. The objective is to establish clear operational targets for tasks in which the Commission and local authorities depend upon one another for their effectiveness and to monitor compliance.⁷⁵ This is an illustration of the impact that competition law has had on consumer protection in that such arrangements would enable national application of competition law and consumer protection.

The Consumer Directorate is also mandated to refer cases it cannot deal with given its jurisdiction. The Consumer Directorate shall refer when the alleged malpractice complained of arose from government policy decisions or that other regulatory bodies were better equipped to deal with them.⁷⁶ The rationale behind referrals emanates from the universal

⁷⁴ Ibid, p. 21

⁷⁵ Ibid, p. 15

⁷⁶ Ibid, 31

difficulty in many countries on whether the Competition Authority is responsible enough for cases which concern specific regulated sectors of the market.⁷⁷ The common approaches have been to either let the Competition Authorities come in when asked or to let the regulatory bodies or regulator handle only the technical aspects of the sectors, i.e. leaving out all the matters to do with markets and marketing with the Competition Authorities.⁷⁸

This referral system ensures that consumers are protected even when the complaint raised by consumers is beyond their mandate. This underlines the impact that competition law and its mechanisms play in the advancement and protection of consumer rights. Some cases that have come before the Commission reflect this important aspect of the protection of consumer rights under competition law.

- i) **Consumer Complaint on "Toy Drinks" and PVC Bottles:** This was a consumer complaint over the influx of unbranded and poor quality beverages sold by street vendors and the potential harmful effects of beverages bottled in PVC bottles. The Board observed that the matter was beyond the mandate of the Commission and decided to refer the matter to the Zambia Bureau of Standards.
- ii) **Allegations of Unfair Trading Practices in Advertising of Safe Plan - A Prescription Medicine:** A complaint was received against Society for Family Health of unethical trading practices for publicly advertising Safe Plan, a prescription medicine. Prescription medicine requires a physician to prescribe before use. Advertising Safe Plan created undue pressure on the consumer to use Safe Plan. The advertising of Safe Plan violated Section 12(b) and 12(c) of the Competition and Fair Trading Act and Ministry of Health Statutory Instrument No. 47 of 1993. The

⁷⁷ ibid

⁷⁸ ibid

Board decided to refer the matter to Pharmacy, Medicines and Poisons Board, the sector regulator. The Board in referring the case observed that the government, while supporting reproductive health matters, should be mindful of its responsibilities in protecting the welfare of consumers in case of complaints.

In light of the above cases, it is clear that competition law provides an avenue for the protection of consumer rights. The enforcement of consumer protection provisions by the Consumer Directorate of the Commission illustrates the positive impact that competition law, as provided for under the Competition and Fair Trading Act, has had on the rights of consumers. As there is no comprehensive consumer protection policy, the importance of the provisions of competition law to the promotion and protection of these rights cannot be overstated. Competition rules provide a wider spectrum of protection of consumer interests than other statutory law provisions and bodies that advance the interests of consumers.

This is so because most statutory bodies that are relevant to consumer protection have a narrow scope within which they protect consumer interests. The Food and Drugs Act⁷⁹, for instance, provides in its preamble that it is “an Act to protect the public against health hazards and fraud in the sale and use of food, drugs, cosmetics and medical devices, and to provide for matters incidental thereto or connected therewith”. It should be noted that the consumer, under the Food and Drugs Act is seen as being a person to whom foodstuffs have been sold. This can be inferred from the fact that the offence under this Act should involve the act selling. Therefore, the scope of the Food and Drugs Act in the protection of consumer interests is limited to the person that purchases articles contemplated under the Act and is thus narrow.

⁷⁹ CAP 303 of the Laws of Zambia

Another example of a narrow scope of consumer protection is that of the Standards Act.⁸⁰ This Act is aimed at providing for standards of quality control of certain commodities both for local and export purposes. The Standards Act, under section 4, establishes the Zambia Bureau of Standards (ZABS) which is a body corporate and provides for its powers and functions. The Bureau has its functions spelt out under section 5 of the Standards Act and these include providing facilities for examination and testing of commodities for quality control and facilitating the education and dissemination of information on quality and standards control among others.

This Act is another example of statutory bodies that are relevant to consumer protection but whose scope is nonetheless limited to consumers of commodities. Under section 2(1) of the Standards Act, 'commodity' is defined any article or goods, whether manufactured or not. The substantive provision relating to prohibited behaviour is section 10 which provides that;

A person shall not-

- (a) supply to another person any commodity to which a compulsory standard applies; or
- (b) export any commodity to which an export standard applies;

unless the commodity concerned complies with the standard.

The above provision can reasonably justify the inference that the scope of the Standards Act, and in effect the Zambia Bureau of Standards, is limited to the protection of consumers in relation to the standard of commodities.

With the context of the Food and Drugs Act and the Standards Act in mind, the scope of the Competition and Fair Trading Act in relation to protection is fairly broad and thus has greater

⁸⁰ CAP 416 of the Laws of Zambia

impact on consumer protection. This is because under the Competition and Fair Trading Act, the scope of application of restrictive practices includes both goods and services.

This is buttressed by the definition of a 'consumer' under section 2 of Competition and Fair Trading Act which provides that a "consumer" includes any person-

(a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;

(b) to whom a service is rendered;

It is thus clear that the scope of application of the Competition and Fair Trading Act in relation to consumer protection is broader than the other Acts relating to consumer protection. Therefore, this broad scope of application that the Competition and Fair Trading Act provides in the promotion and protection of consumer interests is illustrative of its impact on consumer protection.

4.2 The Effect of Authorisation of Allowable Acts

The question that arises with regard to authorisation of allowable acts, as provided for under section 13, is that of whether such acts can circumvent the consumer protection provisions. Section 13(1) of the Competition and Fair Trading Act provides that;

The Commission may authorise any act which is not prohibited outright by this Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of this Act.

On consideration of this provision, acts not expressly prohibited under the Competition and Fair Trading Act can still be held to be anti-competitive or in breach of consumer protection

provisions provided the act is illegal or legal but abused and results in the act being inconsistent with the objectives of the Competition and Fair Trading Act.

Therefore, the Competition and Fair Trading Act provides a wide enough 'safety net' that precludes unfair trade practices that may not expressly be prohibited so as to adequately protect the consumer from such trade practices. The impact of competition law on consumer protection is thus not fettered by the provision allowing for authorised allowable acts.

4.3 Conclusion

This chapter has considered the impact of competition law on consumer protection. In consideration of this impact, the policies and mechanisms of enforcement of competition law rules and the effect this has on consumer protection has been considered. The wide scope of consumers that is contemplated in competition further illustrates the wide impact it has in relation to consumer protection. The allowance of authorised allowable acts does not mitigate the impact that competition law has on consumer protection as these acts are narrowly construed so as not to circumvent the prohibitions under the Competition and Fair Trading Act even though not expressly prohibited.

Chapter Five

Recommendations and Conclusions

5.0 Introduction

This chapter serves to provide recommendations and a conclusion on the issue of relevance and adequacy of competition law provisions in the protection of consumer interests in Zambia. The recommendations shall focus on any proposals that may improve competition law in Zambia as a tool of consumer protection and following this a general conclusion shall be arrived at.

5.1 Recommendations

i) Introduction of a Comprehensive Consumer Protection Policy: The introduction of competition law in Zambia was not based on a comprehensive policy but rather on a consultative report and thus the objectives and desired results of competition law are not concisely codified. Consumer protection in Zambia is also not provided for under any comprehensive policy but rather under different statutes and associations that regulate consumer protection.

The absence of such policies, as regards competition law and consumer protection, considerably affects the efficiency and adequacy of consumer protection in Zambia, especially under the Competition and Fair Trading Act. This is so because consumer protection remains a speculative objective of competition law and thus the paradigms of consumer protection are not clearly defined.

Therefore, the introduction and implementation of a comprehensive consumer protection policy would adequately define the role and scope of competition law in consumer protection.

A comprehensive policy would therefore provide for increased responsibility of the Commission to deal with issues relating to consumer protection as well as provide for more consumer protection provisions under the Competition and Fair Trading Act. This would form a seamless incorporation as competition law provides the widest range of consumers as including consumers of both goods and services.

ii) **Establishment of a Separate Consumer Protection Authority:** In addition to the above discussed recommendation of the introduction of a comprehensive consumer protection policy, the establishment of a separate consumer protection authority would enhance the adequacy of competition law in consumer protection. This would provide a more focused approach to consumer protection and also provide a more specialised tool to deal with unfair trading practices.

The introduction of a separate consumer protection authority would absolve the Commission's function of addressing issues of consumer protection and thus enhance its efficiency in resolving matters involving competition in the market structure. This separate authority would have the functions such as carrying out investigation on its own initiative or at the instigation of a person regarding matters relating to consumer issues, monitor the frequency and magnitude of price increases, co-ordinate and network consumer activities and liaise with consumer associations, both nationally and internationally, to protect consumer interests.

Therefore, the establishment of a separate consumer protection authority would enhance the efficiency of consumer protection under the Competition and Fair Trading Act as it would provide specialised consumer protection enforcement.

iii) **Strengthening Consumer Awareness:** One of the most important aspects of implementing a consumer protection regime is the awareness of the consumers on their rights. Without such awareness, the implementation of consumer protection provisions under the Competition and Fair Trading Act may face serious obstacles as the burden of investigating unfair trade practices shall fall squarely on the Commission.

The Commission should engage in activities that improve awareness on competition issues and the rights that consumers hold under such issues. This empowers the consumers with knowledge on what their rights are and also how the implementation mechanism of these rights operates. This will further relieve the Commission of some of its duty to initiate investigations, which demands resources, as some of these investigations shall result from complaints of well informed consumers.

iv) **Improving Relations between Consumer Protection Bodies:** In line with the recommendation of introducing a comprehensive consumer protection policy, the interface between consumer protection bodies should be improved so as to provide better co-ordinated relationship. This can be done by clearly spelling out the roles of consumer protection bodies at both policy and operational levels.

The Commission should work in tandem with institutions such as the *Zambian Bureau of Standards* to ensure that the interests of consumers are wholly covered under the relevant bodies. Without such co-ordination, the risk of not adequately covering all aspects of consumer protection suffices as well as the possibility of an overlap of mandates of such bodies. To achieve such co-ordination, ventures such as conferences and seminars involving the relevant consumer protection bodies should be instituted.

v) **Increased Funding:** One of the main factors affecting the adequacy of consumer protection under the Competition and Fair Trading Act stems from lack of resources. The lack of resources affects issues like implementation of wide civic education and the availability of manpower. Another factor relating to lack of resources is that most of the institutions that are established for consumer welfare matters are only located in Lusaka. This invariably excludes consumers from districts in Zambia from enjoying the protection afforded to them under the Competition and Fair Trading Act.

Therefore, the government should ensure that the institutions in place for the promotion and protection of consumer rights, such as the Commission should be allocated with enough resources to ensure the effective implementation of consumer protection policy.

5.2 Conclusion

The previous chapters have considered the relevance and adequacy of competition law in consumer protection in Zambia. From the historical development of competition law, it is clear that consumer protection has played an important role in the evolution of this branch of law. In Zambia, the introduction of competition law coincided with the reversion to the free trade policy from the state control model. It was important to introduce competition law at that stage as a free market structure could leave consumers at the mercy of the avarice of the dominant players in the market structure.

The viability of the consumer protection provisions under the Competition and Fair Trading Act was also considered. This was done by looking at the efficacy of the substantive provisions of the Competition and Fair Trading Act in light of the implementation mechanisms under the Act. It is clear that the Competition and Fair Trading Act has provided for the relevant mechanisms that hold for the adequate enforcement of consumer protection

provisions. The impact of competition law on consumer protection in Zambia was also considered by way of considering cases that have come before the Commission and also considering the impact that some of the provisions of the Competition And Fair Trading Act have had on consumer protection.

Therefore, it is clear that the relevance of competition law to consumer protection cannot be overstated as can be seen by the role of consumer interests in the development of competition law. The fact that competition law provides the widest range scope of protection of consumers is indicative of the relevance that competition law holds in the promotion and protection of consumer interests. The adequacy of competition law in protecting consumers has been considered and it is trite to state that the provisions of the Competition and Fair Trading Act adequately provide for enforcement mechanisms of the consumer protection provisions under the Act. Competition law therefore plays an important role in the protection of consumer interests in Zambia.

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