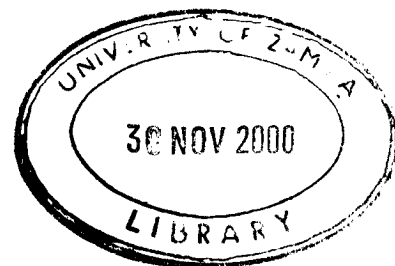


UNIVERSITY OF ZAMBIA



THE ZAMBIA COMPETITION COMMISSION N (ZCC) ITS ROLE, IMPACT AND
CHALLENGES IN A LIBERALISED ECONOMY

BY

AUSTIN CHINYAMA KAYANDA

Being a paper submitted in partial fulfillment of the examination requirements for the
degree Bachelor of Laws (LLB) of the University of Zambia.

Faculty of Law
University of Zambia
P.O.Box 32379
Lusaka.

MAY 2000

THE UNIVERSITY OF ZAMBIA SCHOOL OF LAW

I recommend that the Directed Research Paper prepared by AUSTIN CHINYAMA KAYANDA, under my supervision.

Entitled:

The Zambia Competition (ZCC) its role, impact and challenges in a liberalised economy.

Be accepted for examination, I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations for the governance of obligatory essays.



.....
PATRICK MATIBINI LLM, LLB AHZ
SUPERVISOR

10th MAY 2020

.....
DATE

TABLE OF CONTENTS

		Page
	Preface.....	(i)
	Acknowledgements.....	(ii)
	Dedication.....	(iii)
	Abbreviations.....	(iv)
	INTRODUCTION.....	1
	1. The Centralised model.....	1
	2. Laissez Faire Model.....	4
I	CHAPTER 1	
	Zambia's Economic History.....	7
	Reasons for the creation of public corporation.....	8
	Zambian Parastatal Sector.....	12
	The Performance of parastatals in Zambia	15
II	CHAPTER II	
	Privatisation as a policy option.....	19
	Procedure for Privatisation and Commercialisation.....	22
	Privatisation of State owned Enterprises.....	23
	Eligibility of buyers.....	27
	Commercialisation of Government departments.....	27
	Extent of Privatisation.....	28
	Foreign Vs Local Investors.....	29
	A comparative Evaluation of Trade Regulation.....	29
	PERU.....	30
	NORWAY.....	31
	The need for Enforcement decision.....	32
III	CHAPTER III	
	Competition and Fair Trading Act Cap 417 of the laws of Zambia.....	
	A brief background to the Act.....	36
	Functions of the council.....	37
	Anti-Competitive Trade Practice.....	38
	Control of Mergers and Take-overs.....	39
	Trade Agreements.....	40
	Anti-Competitive Trade Practices by Associations.....	41
	Criteria for Controlling Monopolies.....	42
	Unfair Trading.....	42
	Authorisation of Allowable Acts.....	43
	The Commission.....	44
	Restrictive Business practices.....	45
	Authorisation and Notification.....	48

IV CHAPTER IV

Merger and Acquisition Control Regulation.....	53
CASE STUDIES	
Vitrex Paints Ltd.....	54
Zambia Breweries PLC and National Breweries Co. Ltd.....	55
BOC Gases PLC.....	57
Anderson Security and Mayvan Enterprises.....	58
Midlands Security Ltd. and Tri-Star Security Ltd.....	58
Price Waterhouse and Coppers and Lybrand.....	59
Disposal of National Air Charters.....	59
BP and Amoco Merger.....	60
Coca-Cola acquisition of Cadbury Schweppes.....	60
Anti-Competitive Practice	
United Bus Company of Zambia.....	62
Flash Commuter Bus Services.....	63
Abuse of Dominant Position	
Various case studies.....	65
Consumer Welfare Matters.....	66
Unfair Trade Practices (Trade agreements).....	68

V CHAPTER V

Conclusion, Suggestions and Recommendations.....	70
Foot Notes.....	76
Statutes.....	77
Bibliography.....	78

PREFACE

1.1 STATEMENT OF THE PROBLEM

The proposed study is intended to be a contribution to the discussion of regulating competition in Zambia under a liberalised economy through the creation of the Zambia Competition Commission.(ZCC) There has been a major shift in the Zambian economy from a centrally planned economy to a free market economy. Most of the state owned enterprises have been privatised. Privatisation is aimed at promoting wide share ownership, promoting a better allocation of resources and encouraging competition. Such a move will enable the economy to be run by private entrepreneurs who are more concerned with the success of their businesses. It is an acceptable fact that a private sector is more efficient than a public one. Private ownership tends to be more conducive to competition and financial discipline, both leading to economic efficiency. However, this competition is very unlikely to be perfect in that there would be private monopolies created if not properly handled. The degree of this type of market failure depends on a number of factors including the nature of the sector and government regulation. In Zambia, the government has put in place measures to discourage private monopolies by creating the Zambia Competition Commission (ZCC). The discussion of this paper will be centred on the challenges ZCC is facing now as to whether it has sufficient legal powers to regulate competition.

1.2 HISTORICAL BACKGROUND

For many years, Zambia exhibited in the main, a centrally planned economy. This economic structure has been typified by a web of government involvement and intervention at almost all levels of economic activity. But the economic experience of the past has clearly and forcefully indicated the necessity for Zambia to review her economic order.

This has called for a movement from a controlled economy to a free market economy. The main under-lying reason for this shift being that, for a long time, economic distortions which have sprung from controlled economy have made it increasingly difficult for an efficient economic order in the country.

The shift to a free market economy is what has come to be termed as Liberalisation of the economy. Privatisation is understood to mean the transferring to the private sector, the equity held by government in the public sector. Privatisation is aimed at promoting wide share ownership, promoting a better allocation of resources and encouraging competition. Such a move will enable the economy to be run by private entrepreneur who are more concerned with the success of their businesses. Given this situation, it is an acceptable fact that a private sector is more efficient than a public one.

We now turn to discuss the merits of a private sector. First and foremost, privatisation promotes competition in the business world as enterprises are subjected to cope with the prevailing market forces. These enterprises will no longer be insulated from competition nor will they obtain direct support from government. The spur of competition pushes such enterprises to develop their market skills thus paying close attention to services provided. This in itself entails that an enterprise responds favourably to competitive forces. Competitive forces we are referring to include raw materials, technology, quality goods and services, prices as well as customers. Faced with such a situation, an enterprise will become more conscious and always cautious with its operations.

Experience has shown that only a private enterprise can survive in this kind of environment while state enterprises, in Zambia as well as else where, being products of nationalisation have proved to be unable to cope with any kind of competition pressures because their management is bureaucratic rather than business like.

In this premise, we can rightly state that privatising state owned enterprises is a rapid way of improving their capacity to compete because privatisation addresses many issues of competition and vulnerability simultaneously.

Private ownership tends to be more conducive to competition and financial discipline, both leading to economic efficiency.

However, this competition is very unlikely to be perfect in that there would be private monopolies created if not properly handled. The degree of this type of market failure depends on a number of factors including the nature of the sector and government regulations. We will not go into discussing these factors as it is not the subject of this paper. In Zambia, government has intimated that in order to discourage private monopolies being created, competition laws will be enacted. The Law will ensure fair trading. Hence the creation of the Zambia Competition Commission.

Secondly, the transfer of ownership from the state to private hands will provide the incentives for the enterprise to seek out opportunity to increase both productive and allocative efficiency. Privatisation will therefore lead to improved efficiency in terms of operations as the political influence on the parastatal will be reduced or completely done away with.

More often than not, state owned enterprises are made to meet demands of political expediency at the expense of commercial objective. The situation is compounded by political appointees who manage public enterprises even though they are not qualified for the posts. Furthermore financial mismanagement in public enterprises leads to inefficiency when it comes to operations. Shareholders in private enterprises are more demanding with regards to finances than government as these share directly from the benefits and costs of the company. Consequently, finances are used for their

intended goals which in turn leads to efficiency. The operational efficiency will be utilised to allocate resources rationally and to maximise the benefits therefrom.

Thirdly, through increased competition and loss of government protection by way of removal of special privileges, privatisation encourages entrepreneurial capabilities. Entrepreneurs seek a stable environment before they can invest or increase their production. Therefore the involvement of Representatives Associations, for example the Zambia congress of Trade Union (ZCTU), in the policy making process is the first step towards reducing entrepreneurial uncertainty. Because this confirms the stability of regulatory and institutional reforms. For their part, entrepreneurs will learn to operate on a level with ability to compete and produce efficiency.

It can be argued at this point that depending on the manner in which public enterprises will be privatised, local entrepreneurs might not participate effectively due to capital constraints as already discussed in the preceding chapter. This can result in a situation where foreign investors dominate the economy, thereby defeating the whole objective of wide share ownership. To avoid such an occurrence, one feasible option for indigenous entrepreneurship development is to use the state machinery itself. The state can improve the business environment by removing undue regulatory constraints protecting property rights and improving the public sectors image to would be entrepreneurs.

Notwithstanding the aforesaid, it must be appreciated that most of the public enterprises require the infusion of foreign capital for their much needed rehabilitation. The exchange can only be acquired through foreign investor participation.

Fourthly, the greatest merit of the privatisation programme if executed well, is the opportunity it gives for broader participation in share ownership. Ownership by the state is not the same as one by the private individual. Therefore Privatisation should be viewed as the only means by which wider share ownership will be promoted in

Zambia. Wider share ownership especially among the locals will in effect lead to income distribution. However, wider participation may not be realised in time due to lack of Stock Market in Zambia. Perhaps the various Financial Institutions, entrusted with the task of stock brokers will facilitate participation of a considerable number of Zambians.

Additionally, privatisation will lead to the promotion and creation of a wide capital market. Here, we have in mind the stock market and the proposed mutual funds as examples. These will widen capital market in Zambia from which we will all benefit.

Finally, but by no means the least, privatisation will create conditions for better governance because the Government will no longer be engrossed with the operations of the state enterprises, more time will be devoted to its primary functions. One of its indispensable role being the creation of a favourable economic environment. It is important that Government establishes a predictable and honest administration of the regulatory framework.

A simple and transparent legal framework which is easily enforceable is also indispensable for the long term success. As all enterprises can benefit from a legal framework that defines contract and property rights clearly. Therefore, Government will be required to provide such a legal system to regulate competition, reliable and efficient infrastructure and also social services.

Overall, Government will be expected to leave commerce to businessmen and take up its functions of providing a welfare state, but we have to regulate competition.

Against this theoretical framework of privatisation, this paper will proceed to look at the creation of the Zambia Competition Commission (ZCC) in order to discourage private monopolies being created, and enforce competition laws. It's claimed the law will ensure fair trading.

FOOTNOTES

1. Kydd J "**For Tearing African Enterprises" Sub Sahara African: From crisis to Sustainable Growth.** (The world Bank, Washington DC October 1989 p.142
2. Kydd J Op Cit P.143
3. Kydd J Ibid P.147
4. Ministry of Commerce, Trade and Industry Technical Committee on Privatisation in Zambia. **Privatisation in Zambia Strategy and Design,** May 1992 (unpublished document)
5. Kaunga E C "**Selling the family Silverware; The Parastatal reform programme, aims process, prospects in Zambia**". Seminar presentation 21st March 1992 Edinburgh Hotel Kitwe (Unpublished).

"ACKNOWLEDGEMENT"

Throughout my academic life, a number of people have particularly encouraged me both academically and spiritually I now take this opportunity to express my indebtedness to those people.

I would like to express, my profound gratefulness to my Supervisor, Mr Patrick Matibini for the amount of patience, inconvenience (accepting appointments at very short notice despite his busy schedule), keen interest and valuable time he spent going through my work as well as whose comments had greatly broadened my scope of understanding the subject. To him I am greatly indebted.

To my wife Dama, a very special thank for her constant encouragement and the moral and material support which she generously gave and without which I would not have completed my work in time.

Appreciation goes to my children Fred (JR) Malambo, Mayaba and Twaambo for enduring uncomplainingly less attention during the period of my studies.

My gratitude is also extended to my academic friends like, Abel, Richard, Kaswanta, Chituwa, Philimon, Collins, and all my other colleagues.

Lastly, I would express my gratitude to all the people who helped in one way or, another in making the realisation of this paper a reality.

AUSTIN C. KAYANDA

DEDICATION

To my wife DAMARIS and my children, FRED (JR), MALAMBO, MAYABA and TWAAMBO, for the love, support and encouragement given to me during my academic life.

To my late father FRED (SR) and Mum JANE "To whom I owed so much."

ABBREVIATIONS

1. INDECO - Industrial Development Corporation
2. INDOCOPI - Competition regulatory authority in Peru
3. MBO - Management Buyout
4. MMD - Movement for Multi-party Democracy
5. UBZ - United Bus Company of Zambia
6. UNIP - United National Independence Party
7. UTTA - United Taxis and Transport Association
8. ZAMTEL - Zambia Telecommunications Company Ltd
9. ZCC - Zambia Competition Commission
10. ZCTU - Zambia Congress of Trade Union.

INTRODUCTION

1. THE CENTRALISED MODEL

For a number of years, the application of Marxist economic thought to actual political needs was either through a peculiar interpretation of the Marxists writing or by simply removing names and works which were regarded as politically compromising from the history of science. As a result, Marxist political economy, especially the political economy of socialism, was viewed rather like a hero.

The discussion of the model of the functioning of a socialist economy evolves about two problems; plan and market - centralisation and decentralisation of economic decision-making. Schematically, economic decisions in a socialist system can be divided into three groups: First, basic macro-economic decisions as a rule taken directly by central authorities; second, decisions on personal consumption given consumer incomes and the free choice of profession and place of work; third, residual decisions which are the most difficult to categorise although they are often called 'current economic decisions'. (These are decisions concerning the size and structure of output in individual enterprises and branches, the size and the structure of output, the areas of marketing and of supply procurements, smaller investments, detailed forms of rewarding workers etc.) *The real area for studying the model for the purpose of this paper is basically limited to this last group: models of the functioning of the socialist economy, if they are truly to correspond to the foundations of system, can only differ from each other by the centralisation or decentralisation of the decisions in this third group.*

The basic feature of a centralised model is:

1. The concentration of practically all decisions on the central level (except for individual choice in the field of consumption and employment). The chief factor is that the final decision, along with the organisation and control of the execution of the plan, are left to the central administrative organs of the state, perhaps subject to sanctioning by the representative body. The basic feature is thus the concentration of decisions at one level.

the portions of investment funds allotted to particular sectors, which not only shapes the economic structure in the current planning period, but also the future growth rate. The current investment structure largely determines the future structure of production and hence the real base of the future rate of accumulation. (The adjustment of the real structure to the proposed distribution of national income takes place partially through foreign trade)

(c) Division of the consumption fund into collective and individual consumption. (d) Determination of the main proportion of current output in accordance with the adopted structure of income distribution.

2. The hierarchical nature of plans and the vertical links between different parts of the economic apparatus. A plan based on central decision is directed to a particular unit at a lower level. The function of each successive level in the hierarchy is analogous in relation to the next lower level down to the individual enterprise; but at the same time the ministries and central boards frequently have very limited rights even to allot and specify centrally determined global tasks, since central decisions refer directly to enterprises.

3. The imperative form of transmitting decisions downwards. The plan tasks are sent down to the successively lower levels in an administrative way, as so called imperative plan orders. This means that the tasks embodied in the plan must be treated by lower levels as imperative regardless of their own preferences resulting from the current economic situation.

4. The predominance of economic calculation and planning in terms of physical units. In a centralised model there is a need in macro-economic decision to consider not only proportions in terms of value but also in terms of use-value. The consideration is the root of the whole system of orders dealing with the detailed structure of production and outlays in physical units.

5. The passive role of money within the state sector (i.e. in relation to the economic administrative organs and enterprises and between enterprises themselves) To understand clearly the passive role of money in state sector, it is easier to analyse two areas of economic activity in which money is not prevented from playing an active role in the centralised model i.e. labour market and consumer goods market.

The chief feature of the socialist economy is its planned distribution of labour on a social scale; an incalculably valuable factor in eliminating the competition between enterprises and branches of production which is typical of capitalism. At the same time, however, the elimination of competition gives rise to adverse conditions in the structure of incentives to improve production and all kinds of innovation especially in matters of quality. General market equilibrium is closely bottlenecked up of both sides of the balance-supply of goods and purchasing power under socialism. It provides everything necessary to satisfy the needs of a centralised, planned management of the economy.

A system of management which corresponded especially to the centralised model was established in the United Socialist Soviet Republic (USSR) in a period when conditions provided several objectives pre-conditions for centralistic tendencies. The initial stage of industrialisation was marked by a sudden acceleration of growth rate with major and rapid structural transformation in an enormous country possessing vast unused reserves. The connection between centralisation and specific problems of an abrupt and violent acceleration of economic growth was recognised at the inception of the centralised system of management. From the end of 1920s until Stalin's unexpected pronouncement in "*Economic problems of socialism in the USSR*" the centralised system was viewed as a hero. Stalin the man who brought the system to perfection was the first one to identify that the system was not perfect as it had made too many assumptions. It assumed that by eliminating competition at all levels, growth will automatically come to the country. But the rate of growth depend generally on three factors;

- (a) on the magnitude of the means which an economy is able to devote to extended reproduction.
- (b) The efficiency with which these means and the whole of productive resources are employed.
- (c) availability of resources to invest and management of these resources.

What happened to the eastern block is public knowledge. The system just crumbled in the late eighties and even the communist China has to make major reforms to encompass market forces to survive up to this time.

2. LAISSEZ FAIRE MODEL

For the purpose of this paper, a history of free market vis-a-vis competition began with Adam Smith's enquiry into the nature and causes of 'The Wealth of nations' (1776). Adam Smith like other physiocrats held a common view, of the goodness and bounty of nature and of the goodness of man as he came from the bosom of nature. Adam Smith is viewed as the Father of modern Capitalism.

The aim of government, therefore should be to conform to nature; and so long men do not interfere with each other's liberty and do not combine among themselves, government should leave them free to find their salvation. Otherwise the duty of government is *laissez-faire, laissez passer*.¹ The principle underlying the laissez faire model is that the government should not interfere in the running of business in the country, instead the government should provide environment conducive for the running of business. "The government which govern least is the best government"². State authorities do not interfere with market processes; prices develop freely on market according to actual demand and supply relationship.

From this, follows of necessity the doctrine of free trade between nations on ground of both justice and of economy. For the greater the competition, the more will each one strive to economise the cost of his labour and capital to the general advantage. Man is a rational being, for in the economic sphere, he seeks the attainment of profit and so much produce what others require; and the better he does this the greater will his profit be. "Man's selfishness" and thus in god's benevolent government of the world, the "beneficent order of National liberty" best serves the interest of all.³

For Smith, the supreme subject of economics was the consumer: man laboured and produced in order to consume. Any anything that could increase consumption, or the "Sum of enjoyment" ought to be viewed with favour.⁴ Adam Smith saw clearly that a country gain by trading. The tailor does not make his own shoes; he exchanges a suit for shoes. Thereby both the shoe-maker and the tailor gain. In this same manner, Smith argued, a whole country can gain by trading with other countries. This is a simple and

powerful illustration of the benefits of trade, and on it Adam Smith rested his plea for non-interference - free trade as the best policy for trade between nations.

Laissez-faire was a dogma rather than a fact. Smith's argument seems convincing but not very deep because there is a danger of creating monopolies if trade is not regulated. (unfair competition). State never yielded entirely to the general bias against intervention in industry. In particular, it showed more reluctance to leave domestic trade uncontrolled than to adopt free trade in international economic relations. However, we must appreciate the danger that large enterprises may exploit their monopoly position in the market. There has been intervention against abuse of monopoly power and in sectors of the economy of critical importance to policy. There has been intervention also because the market ignored fundamental wants or was incapable of bringing them satisfaction. Prevention of such tendencies provides the chief justification for instituting the regulated market mechanism where the compliance with the law of fair-trading is consistent with social optimum. This phenomenon, at the first glance, looks like a paradox; the activities of state authorities are directed not against the market, but in defence of its "perfection". Apart from preventing monopoly, the regulated market mechanism is also helpful in making prices resistant to the temporary business fluctuations which sometimes mislead the producers and exporters.

Footnotes

1. Jaffe William **Elements of Pure Economics** 1965 Jarrold & sons ltd, London Page 55
2. Smith **An inquiry into the nature and causes of The Wealth of Nations** 1910
page 12
3. Ibid p 109
4. Bo Sodersten **International Economics** St Martin's press New York Page 12

CHAPTER ONE

ZAMBIA'S ECONOMIC HISTORY

As mentioned in the introduction, this chapter intends to outline the background of the Zambian economic situation. This will enable us understand the historical trade regulation in Zambia. The Zambian economy has always been centred on and controlled by parastatals. To appreciate the topic of competition it shall be necessary to start by defining what the parastatal sector is, its scope and state what objectives have been held to lie behind its creation. It's not however a paper on the parastatals, the emphasis is still predominantly on the question of regulating competition in the liberalised economy hence the creation of Zambia Competition Commission (ZCC).

It must be stated from the outset that the term Parastatal has many definitions and can be understood to mean different things by various people. However in the Zambian context, we shall understand parastatal to mean any organisation or corporation in which the state owns a considerable measure of its operations.¹ This definition is a rather restrictive as it confines itself to the inherent government control of public corporations. Perhaps a more elaborate definition was that given by the Mwanakatwe Commission that a public corporation is "an organisation which is not an integral part of government but an institution or agency which is wholly or mainly financed or owned or controlled by the state"² in other words, these are commercial, semi-commercial or service enterprises to which governments delegate some of their authority.

To fully understand the present economics of state intervention, it is necessary to delve into the history of public corporations generally, then specifically address the issue of parastatals in Zambia. This is useful to the extent that it gives an insight into the structure of ownership and control of the economy which the post - independence government sought to change. Economic history is also useful to the extent that it traces the origins of state intervention and the then objectives for the introduction of state corporations.

2. REASONS FOR THE CREATION OF PUBLIC CORPORATIONS:

2. (a) Assertion of economic independence

The reason behind government resorting to parastatals are extensive. One of the main reason, is that in the newly independent states, there existed the inherited colonial economic structures whose basis was the laissez-faire model. Consequently, the creation of public corporations represented a defence against the perceived dangers of foreign economic domination.

For reasons derived from their former conditions of dependence, and also in view of their specific cultural characteristics, these countries had reached a stage of economic development which they hardly controlled.

The dependence syndrome in the newly independent states was so much that colonial policies were seen to have continued to perpetrate in the economies. Each sector of the economy was seen to have a strong tie to a metropolitan economy. The dependence was such that it was easier for foreign economies to maintain the international division of labour which consigned Africa to primary production and retarded her industrialisation. Suddenly, the post independence regimes found themselves obliged to initiate rapid economic and social change and to undergo a process of economic development, which was to be integrated locally; one which would not be obeying forces of attraction rather than an internal order. This situation explains the magnitude of the nationalist reaction. The governments took to the parastatal sector as one way of asserting firm economic arms of the state. This explains also why political independence once acquired, many an African government's emphasis was laid on the conquest of economic independence, without which, as one socialist observes, "political sovereignty would be empty of all content."³ It will thus be appreciated that one of the goals for the newly independent states was to assert their economic independence. The assertion of economic independence implied that independent states had to create economic structures that could inhibit the infiltration of external economic forces which robbed the local infant industries of the much converted local market, more so, the new governments thought they were deprived of their

administrative powers. To reverse this situation, states adopted policies which could see to it that almost all the cardinal limbs of the economy were under the direct control of the indigenous ruling governments. This was achieved through the creation of the parastatal sector either by nationalising the existing private corporations or creating new ones which adopted a monopolistic way of conducting business. With this scenario of government protectionism, it was idealised that a government could have a say or a hand in the supervision of the country's economic life. To illustrate this, president of Senegal Mamadoo Dia writes that " Whether camouflaged imperialism accepts it or not, the era of resignation is ended for the people and nations of the third world. They no longer consent to others thinking and deciding for them. They wished henceforth to think for themselves and decide on their own account."⁴

The apprehension shown by the newly independent states is that as long as they remained passive observers in the economic lives of their states, the development they so much "prophesied" control. So vesting of the most strategic enterprises in the hands of the state or its citizens who would not externalise the proceeds of their businesses but cultivate it in the economic development of the state.

It was also felt that external economic forces would be kept-at bay by the nationalisation process and the pegging of prohibitive tariffs on imports which would keep foreign businesses comparatively at a disadvantage to that of the locals. With this it was hoped that economic independence would be achieved.

2 (b) UNSUITABILITY OF FREE TRADE FOR DEVELOPING COUNTRIES

The other reason for the creation of public sector apart from that of asserting economic independence, was that the doctrine of Laissez faire were said to be best for countries that had already created a steady economic base that is, those that had reached a stage where they could, with the resources available produce goods and services at a minimum cost.

It is with this stage of development, that a state can effectively be expected to participate in multi-national trade. This line of thought was echoed by a Germany socialist, Friedrich List, who concedes that "Free trade was best from a cosmopolitan

standpoint, but argued that a nation could not afford to head to allocative argument until it had developed its national industries.

2. (C) THE THEORY OF PROTECTIONISM

The other reason is that most developed countries started their economic life on a protective note. The theory of protectionism in essence implies that almost all states started their economic development on a protective note. Therefore, before a country could take itself to be at par with other countries to compete on international trade, it should first build a protective economic structure to protect the indigenous industries from foreign competition. How this is done is a matter of great subjective government policy. However, the most opted for protective mechanisms are the creation of the parastatal sector (to help regulate the economic life of a state) or the enhancement to trade barriers i.e. adoption of high tariff rates on goods imported into the country.

This contention of a state having to start development on a protective note, though not accepted as the right development strategy, the Germany socialist views it as a practical solution though it is not overtly appreciated.

To illustrate the point of economic development behind a closed economy, Socialist have argued that even the ardently held capitalist states started on a protective note for example, the United States of America, Germany and Britain. From the examples of American, German and English economic histories, we may safely conclude that even the avowed developed countries had adopted protective economic strategies in their early stages of development, and the most resorted to mechanisms were the adoption of prohibitive tariffs on imports and the creation of public bodies. The prohibitive strategies stood as some of the reasons for the adoption of prohibitive tariffs on imports and the creation of public corporation by third world countries for a simple reason that, the countries that had colonised them, or at least those they considered developed had started their economic development on a protective model. It was not until they had attained such stage of economic development, where they were able to be self reliant in most of the demands of local market and when they produced more than the local market could demand, that is when they thought of opening up to the competitive international market.

Therefore, it was to be expected that the third world countries had to trace the economic trends used by the countries they viewed as developed which were the high tariffs in the parastatals sectors.

2. (d) OTHER REASONS FOR THE CREATION OF PARASTATALS

2.d(i) to reduce direct political control

The other reason for the creation of public corporations is to entrust an activity to an autonomous body thereby reducing the scope for direct political control.⁵ Where a commercial institution is left to be run by politicians, the most likely qualification for top management level would be allegiance to the government in power and not merit. There would also be rampant transfer from the civil service to posts in the parastatal bodies if management powers of corporations were to be left in the hands of the government officials. The obvious implications of appointments on the basis of allegiance and transfers from the civil service to public corporation may be that the personnel that may be appointed may lack the technical know-how of running business ventures, thereby, making the running of public institutions more susceptible to failure than success. These problems are not to be expected where there is a body entrusted with the running of the affairs of the corporation which is independent in the formulation of policies for the corporation. Thus, the creation of parastatal bodies is important; so as to separate them from government day-to-day supervision.

2.d(ii) The other reason for the introduction of the parastatal sector was what was termed as import substitution. This was a popular approach to development.⁶ This was due perhaps to the decline in demand and earnings for primary products which led to a fall in foreign exchange earnings. Import substitution came first, as it was argued in the process of foreign trade, the underdevelopment countries had already established markets and so by import substitution, the country could be supplying the local market with local products, save foreign exchange and promote local industrialisation. With this reasoning it was to follow that the only institution that could effectively implement the programme of import substitution were government department, or the parastatal sector which could be

created with a specific programme of action, but would execute the duties with minimal government control.

It was argued that import substitution would help industrialisation and diversification of the economy. It was also contended that import substitution under public corporations would make more goods available than would allow imports constrained by foreign exchange.

In sum, the objective behind the institution of parastatals are mainly; to represent a defence against foreign domination; promotion of self-reliance in the strategic sectors of the economy; reducing regional disparities in development; preventing the concentration of the economic powers in the hands of few individuals; parastatals may be adopted as a result of trying to emulate the way developed countries positively employed them to achieve social and economic development; and may be used to reinforce social control on trade and industry in order to ensure equitable distribution of goods and service between urban and rural areas.

On the basis of the foregoing, we may safely conclude that parastatal were and are justifiable to some extent.

3. THE ZAMBIAN PARASTATAL SECTOR

Having established in general the rationale for the creation of public corporations, we may now turn to look at how the system was institutionalised in Zambia.

The nature of the post colonial state in Zambia can only be best understood in relation to its colonial history. Although colonialism was of relatively short duration, its effect on the economy was overwhelming. The dominance of foreign capital and the settlers who followed came to set the terms on which the country's resources would be used.

The period prior independence was marked by substantial inequalities of income and political power between whites and Africans. The Northern Rhodesia state apparatus were concerned not with development but with maintaining law and order for the better exploitation of mineral resources.

The challenge to all this came with independence on the 24th of October, 1964. The United National Independence Party (UNIP) was popular despite being devoid of a clearly defined economic policy. The priority of the new government was to rapidly Zambianize all the top positions. The government had also acquired the mass media institution.⁷ All in all there was a surge of economic activity after independence which was targeted at narrowing the gaps in the infrastructure through local efforts and the new manufacturing industries that were established. The government shortly after independence allowed new parastatals to emerge. Andrew Sardanis, a Zambian businessman was appointed to head the development corporation. His task was to initiate such development strategies as would stimulate rapid economic growth, thereby furthering a central aspect of the official policy,⁸ namely, that it would be government rather than private business which would mobilise the development effort by providing massive investment capital.

The policies of maintaining the colonial institutions were intended to calm settler and multinational corporations' anxieties in order to prevent a flight of capital and the disruption of economic life, while the policies of establishing new economic structures were intended to initiate a new enabling environment for economic growth. Industrial Development Corporation (INDECO) rapidly established itself as a strong force in the economy taking over responsibility for the management of its minority interest in associate companies and those enterprise and corporation in which it held a majority or total share.

The government had seized the opportunity to take hold of the economic infrastructure and reshape the parastatal to reflect the government's desire for greater control over the economy. It was also helpful in providing the institutions through which the government could begin to increase the scope of social welfare provision; increase employment and re-orient economic activity in various ways.⁹ Indeed, the then president, Kenneth Kaunda had summed it up as follows "We must experiment with the best methods we can think of spreading wealth to all our people in as short a time as possible".¹⁰ This statement of president Kaunda was to be construed as being the probable (and not certain) means of achieving the goals of the government. In other words, the experimental policies could or could not bear the expected results depending on the interplay of such factors; as the means of production, the efficiency with which the technology employed yields produce,

social needs of the people and above all, the administrative instruments involved in the organisation of the means of production.

The then increasing state intervention seem not to have caused any alarm in its early stages possibly because it was widely accepted that, much needed to be done to make up for the gross colonial neglect and partly because state intervention was an accepted phenomena at the time.

It has been contended that the private sector was in any case too small to provide the funding needed for the kind of proposed economic growth. The other factor behind government intervention was the evident incompatibility of interest between the balanced development it envisaged and the sectoral structure of private industry.¹¹ The multinationals had showed little interest in diversifying into other industries apart from copper mining.

The then, republican president, Dr Kaunda had on many occasion stressed that the state was to play a key role in the progress of the economic and social life of a humanist society. This was done through economic reforms as a remedial instruments . (The Mulungushi reforms, The Matero reforms and the 1970 Economic reforms). The effect of the three economic reforms extending from 1968 to 1970 was to give the state a participating and controlling share in most foreign owned businesses and industries, leaving economic space for Zambian entrepreneurs in small and medium sized undertakings. The government's objective as represented in the take over of these companies was that, with the instrument of public bodies, the state could easily influence the economic life of the state, thus improving the standards of living of the people through financing economic ventures which could create employment and reduce regional disparities in development

The legal nature and effect of nationalisation policies have been a crucial subject in Zambia's bid to attract investors. Nationalisation has been defined as the "act by which one state forces certain categories of individuals or corporate bodies to suffer their rights in all or certain categories of their property, movable or immovable, tangible or intangible, which property is submitted to its sovereignty, being vested in that state or in state controlled bodies for further exploitation.¹² Though it may appear to be unjust and an

infringement of personal or corporate liberties, international organisations have recognised nationalisation as a valid and legal practice.

The United Nations recognises the right of a state to nationalise property within its jurisdiction as valid. This is according to the 1962 United Nations resolutions relating to permanent sovereignty over nation resources. The resolution however, limits nationalisation to be based on grounds of public utility, security on national interest.¹³

This resolution was reaffirmed by another United Nations resolution which confirmed the unalienable right of all countries to exercise permanent sovereignty over their natural resources.”¹⁴ From these U.N resolutions therefore, we can conclude with certainty that nationalisation as a policy is legal. (Its not within the ambit of this paper to discuss the legality of nationalisation)

Having looked at the policies of take-over in their legal sense , we may now turn briefly see the performance of these parastatals.

4. THE PERFORMANCE OF PARASTATALS IN ZAMBIA

As parastatal comprised a major section of the economy, there was no clear distinction between the social and economic policies in the country. Projects involving social as well as economic considerations that were not viable in purely commercial terms were undertaken. “For instance, a manager in Indeco prepared in 1970 a five year plan based on commercial viability of projects. That plan did not only disregard the element of social responsibility but it was also not in accord with the country’s published Development plan. As soon as it became known, there was a controversy between the government and INDECO management which ended in its withdrawal.”¹⁵

Public revenue was spent on sustaining non - viable commercial projects “for the development of the nation.” Projects were undertaken more for their social implications rather than for their commercial potential. Public funds were injected into loss-making ventures regardless of their impact on the economy. Government subsidies were an essential part of the economic policy.

Parastatals became mere manifestations of government's bureaucratic system and performed regardless of efficiency, viability or any other commercial trait.(Politics prevailed, not economics.)

The Zambian economy began to suffer. Inflation and devaluation became the order of the day. Government had to resort to foreign borrowing and the national debt grew astronomically. Most industries relied on government subsidies and had no means of self-development. Entrepreneurship, invention and innovation were stifled. State owned enterprises exploited their monopolistic position without regard to efficiency or fair pricing.

It has been rightly pointed out that "As long as a state owned enterprise could generate cash flow, they could either make profits, or could borrow money, the state owned enterprise was a useful agent for any political party in any country because the generation of money meant, in effect that wages could be raised, prices could be held down, small political favours, and sometimes large political favours, could be granted to the political party all out of the state owned enterprise's cash flow. When these cash - flows turned negative instead of positive, the state owned enterprises became an enormous embarrassment to the politicians.¹⁶

In his zest for power Dr Kenneth Kaunda, however, seemed oblivious to the deterioration of the Zambian economy. On the 25th of February 1972, he announced that United National Independence Party (UNIP) had taken a decision that Zambia would become a one party state. There was from 1972, only one political party - UNIP and no opposition was allowed.

Government now began to rule arbitrarily and the country was plunged into an economic as well as a political crisis. Parastatals and the civil service became bureaucratic giants requiring huge amounts of capital input and the country existed on foreign borrowing.

Government needed a scapegoat to divert the rising hostility of the people. In 1988, Government took-over several shops belonging to Indian traders asserting that they were causing the rampant black-market. The whole exercise was a disaster and most of the

shops had to be given back to their previous owners. This only succeeded in intimidating foreign investors and alienating the donor countries.

The international community began to restrict aid to Zambia. The government, therefore, introduced an auction system for the allocation of its meagre foreign exchange. The economy was plunging and devaluation and inflation were on the rise.

Government found it increasingly difficult to justify state enterprises that generated losses year after year.

The citizens began to express their disenchantment with the Kaunda regime and began advocating for multi-party elections. The international community also began to pressurise the government to hold democratic elections. President Kenneth Kaunda was finally forced to assent to multi-party elections in 1991.

On the 2nd of November, 1991, The movement for multi-party democracy won the election and Mr Frederick J T Chiluba was inaugurated as the new president of the republic of Zambia.

This ended the reign of both Dr Kenneth Kaunda and Humanism and brought with it the hope of democracy and a free market system.

FOOT NOTES

1. J.M Chileshe, Third World Countries and Development Zambia 1987 p 125
2. Mwanakatwe, J , 1975 Summary of the main recommendations of the comm. Of inquiry into salaries , public service and the parastatal sector - Government printers.
3. S.A De Smith, Foundations of Constitutional and Administrative Law 4th ed 1973 p 228
4. Mamadou Dia, African nations and world solidarity
5. Peter B.K ed International economics 3rd ed , prentice Hall incorp 1971 P 36
6. Ake C A political economy of Africa 1981, Long Man P145
7. Tordoff W , Politics of Zambia, Manchester University Press (1974) P20
8. Johns S Parastatal Bodies in Zambia, Problems and Prospects 1971 Welt forum munich P1
9. John S , State Capitalism in Zambia, the evolution of the parastatal sector 1975 P1
10. Kaunda D K , Zambia's guideline for the next decade. UNIP 1968 Mulungushi Z.I.S P25
11. Simwinga G K , Corporate autonomy and Government control Indeco Ph D thesis 1977
12. Report of the conference of international law association (1958) pp 2-3
13. The UN General assembly resolution, Dec 1962 G.A res 1803
14. The UN General assembly resolution, 25 Nov 1966 Res 2158
15. Zambia, This completes economic reforms, "Now Zambia is ours" Address by president Kaunda, 10th November, 1970.
16. Vernon Raymond in Harvard business Review - "Can the world survive the Triumph of Capitalism"(a look at free markets. The global economy is spinning out of control.) V.75(July-August)1990 local publications

CHAPTER TWO

PRIVATISATION AS A POLICY OPTION

This chapter will comprise an account of the privatisation programme implemented by the Movement for Multiparty Democracy (MMD) government and will also be used to evaluate how the issue of competition has been addressed in the programme. Lastly, we will look at a comparative evaluation of trade regulation in other countries.

Up until the year 1990, there appeared to be no serious reference to privatisation as a policy option after the failure of commercialisation of parastatals and government departments. It was only when the fifth United National Independence Party (UNIP) (Ruling party at that time) National Convention (Convened to discuss national issues of interest) was held from the 14th to the 17th of March, 1990, that the idea of privatisation was articulated.¹ The then President of Zambia Dr Kenneth Kaunda had the following to say; “ the answer at least for us , does not lie in privatisation but in establishing competition against parastatals and exposing their inefficiency through better results.”²

The main thrust of the president’s speech was on promotion of local and foreign private entrepreneurship to increase competition and spur the parastatals to higher levels of performance. The convention accepted the idea of privatisation except that the view taken was that this should be directed into new investment as against the transfer of existing activities.³ It was further felt at the convention that no public interests would be threatened if parastatals were opened up to direct individual private ownership. The concept of individual participation in ownership of commercial activities was welcome on account of promoting competition and efficiency, among others.

The landmark pronouncement on privatisation was when Dr Kenneth Kaunda in his address to the fifth extra - ordinary session of the UNIP National Council, announced government’s decision to “ devolve more economic power to Zambian people through a

scheme by which the state will sell part of its capital in state enterprise to the general public.”⁴

For purposes of this pronouncement, the parastatals were classified into two groups, namely; public utilities and mining, Industrial and commercial enterprises. The state was to offer to the public part of its shareholding in these enterprises. The basic objective of the privatisation policy was to give power, that is economic power, to the people, in order to realise the benefits of broad share ownership.

Considering the entrenched state participation in commercial life, the pronounced state participation in commercial life, the pronouncements of May 28, 1990, represented a major shift in policy. As expected from the business community, although many felt that the pronouncements did not go far enough.

The 1990 budget speech, by the then minister of Finance, late Mr Gibson.G Chigaga, expanded the scope of the government’s policy on privatisation:

“ In addition, the party and its government has decided, in principle, to sell off some parastatal companies. The modalities for sale are being studied, including the possibility of selling some of the shares to workers and members of the public.”⁵

While the full details and scope of the programme still remained to be unveiled, it was clear from the minister’s statement that the government had in mind a more comprehensive programme of divestiture than had been outlined in the initial announcement of May 28, 1990.

With the coming into power of the movement for Multi-party Democracy (MMD) the policy on privatisation received even a greater impetus. The party manifesto clearly states its intention to promote privatisation in Zambia as follows

“The MMD is committed to privatisation in order to optimise resource utilisation, enhance the productivity and profitability of the public sector and assist in the reduction of the government deficit. To facilitate privatisation, MMD will as a matter of urgency establish a stock market. The current economic role of government as a major participant in business undertakings shall cease. Free market and not nationalisation will become the foundation stone upon which the economy under an MMD government shall operate.”⁶

In December, 1991, President Fredrick Chiluba in his address to the donor community confirmed the new government's policy by categorically stating that in executing the privatisation programme in Zambia, there would be "No sacred lamb". In other words government is committed to total privatisation of the parastatal sector..... commerce, industry, mining and agriculture should be left to the private sector." 7

In addition to the above broad statements of policy, the President went further to vest responsibility for overseeing the programme with the ministry of commerce, trade and Industry.

The MMD government's resolve to pursue the policy of privatisation was further emphasised by the minister of Finance, Emmanuel Kasonde in his budget address when he stated that :

".....the MMD government has made clear its intention to promote the private sector and divest itself of investment in parastatals."

"..... in this regard privatisation will proceed expeditiously and the revenues generated by the sale of companies will be placed in a special fund to supplement the government capital budget."8

It is of some significance that the Minister of Finance put great emphasis on the promotion of the private sector with divestment coming as a logical consequence. Often in the current debate on the subject of privatisation, the mere transfer of ownership from the public to private hands is mistakenly taken to be a goal in itself as against the broader objective of promoting new initiatives in the commercial sector by individual entrepreneurs.

At this stage, it is important to state government's objective behind privatisation as a policy option. In march, 1992, cabinet approved the privatisation programme in Zambia and the following objectives were adopted:

- To scale down the government's direct initiative in economic activities and correspondingly its administrative load
- To reduce government budgetary costs arising from subsidies and capital expenditure
- To promote competition and improve the efficiency of enterprise operation
- To encourage wide ownership of shares

- To promote the growth of capital market
- To minimise the involvement of government bureaucracy in enterprise operations
- To promote new capital investment
- To derive capital incomes for the treasury. 9

The foregoing have been identified as the objectives behind the privatisation programme in Zambia.

The MMD's economic thrust is moulded around private initiative, promoting market forces to allocate resources efficiently and minimising government exposure in the economy. The role of government is being redefined as one of creating an enabling environment in which private enterprises can flourish. Emphasis is placed on reduction of perpetual dependence on the state. 10

That the MMD government's fundamental intention is to minimise state intervention and promote private and individual enterprises cannot be disputed. This is to be done through privatisation of state owned parastatals. However, it is the economic policies and measures which will determine the success or failure of the programme..

The privatisation Act was enacted on the 4th. of July 1992, vide Act number 21 of 1992 and the Zambia privatisation agency was established by the Act as the principal implementing agency.

The Act has three main objectives, namely establishment of the privatisation agency, laying out the procedure for privatisation, and regulating finances generated from sales. For the purpose of this paper, we will only look at the procedure for privatisation..

PROCEDURE FOR PRIVATISATION AND COMMERCIALISATION

This is covered under part three of the Privatisation Act No 21 of 1992, and now Chapter 386 of the laws of Zambia

It is government's intention to effect the privatisation programme in two forms. Namely, privatisation of state owned enterprises and commercialisation of government departments. We shall only discuss privatisation of state owned enterprises because its the one which affects our topic of discussion directly.

PRIVATISATION OF STATE OWNED ENTERPRISES.

In seeking to fully achieve its intended objectives vis-à-vis privatisation of parastatals, government is employing the following procedures as provided under the privatisation Act.

(a) PUBLIC OFFERING OF SHARES

Viewed within the ambit of company law, public offering of shares is a process where a public company issues its shares to the public with the intention of seeking finances from the investing public. However, by the very distinction between a private company and a public one, the former is forbidden from issuing its shares to the public.¹¹ Therefore, in order not to contravene this statutory provision, before a private company is privatised, it will be converted into a public company in accordance with the provisions of the companies Act.¹²

Public offering of shares can be done in either of the three ways:

First, a company may itself make a direct offer to the public by way of issuing a prospectus. A prospectus has been defined as “ Any notice circular, advertisement or other invitation offering to the public for subscription or purchase of any share or debentures of the company.”¹³ From this definition a prospectus is therefore an invitation to the public to subscribe to the shares of a company.

Secondly, a company may sell the whole of its shares to an issuing house, for instance a department of a merchant bank, which in turn invites the public to purchase from it at a higher price. This method is usually referred to as “Offer for sale.”¹⁴

Where difficulty arises regarding fixing of the issue price of the shares due to uncertainties as to public response to the offer, an offer for sale by tender may be employed. The rationale behind this is to ensure that the company receives what the shares are worth to the public. In addition, “Stags”(people who speculate on stock markets) are defeated.

Finally, the method called “placing” may be employed by the company. Here the issued shares of a company may be placed in two of the following ways;

(a) a company may arrange with the issuing house whereby the latter agrees to purchase shares and then invite its client to purchase from it at a higher price.

(b) an issuing house may act as a stock broker for the company and invite clients to take up shares from the company. In this way, the agent will be paid a commission called brokerage for services rendered only.

This method of “placings” is cheaper than either of preceding alternatives. Normally, placings require the obtaining of a stock exchange quotation as a necessary condition of the placing. In other words, placings are coupled with a stock exchange introduction.

From the foregoing, it can be argued that public offering of shares will only be possible where there is a issuing house. Therefore, for Zambia to ensure that privatisation is a success, it established a stock market, thereby bringing into operation the Zambia stock Exchange Act number 43 of 1990 now chapter 354.

**(b)PRIVATE SALE OF SHARES THROUGH NEGOTIATED OR
COMPETITIVE BIDS.**

This mode of privatisation imports what goes on at a stock market. A stock exchange market by simple definition is a place where stocks and shares are publicly bought and sold by a group of professional dealers engaged in such business.¹⁶

The advantage of a stock market is that shares are freely marketed which in turn enhances their initial value to an outside investment.¹⁷ Selling shares in state enterprises may also be by way of promoting stock markets and bringing in new savers. But unless the sophistication of the market information is analysed, the risk to the investor will be great.

**(c) SALE OF THE ADDITIONAL SHARES IN A STATE ENTERPRISE TO
REDUCE GOVERNMENT SHARE HOLDING**

Where it will be found that government has majority shareholding in a particular parastatal, a proportion of such shares will be withdrawn and offered to the public. This process is intended at regulating the control of the affected company. This analogy is drawn from the British system of privatisation where, for instance, Cable and Wireless limited which was wholly government owned was privatised by government by putting a proportion of its shares on the market from 1981 to 1985. 19

It must be appreciated at this stage that, all transfers of shares is done in accordance with the provisions of the companies act, cap. 686 of the laws of Zambia. And allotment of shares will be carried out by the agency, though government intends to fully divest of its shareholding in all parastatals, there is an exception to this. Government will be allowed to retain a special share known as the “Golden Share” which will give it a paramount right in the control of the enterprises operation after privatisation.²⁰ Government will have voting rights in the general meetings of these parastatals. Only parastatals of strategic and defence purposes will be affected by this provision. Such parastatals will include Indeni Petroleum Refinery Company Ltd., Tazama pipelines, Zambia Postal Services Corporation, Zambia Telecommunication Company limited.²¹ Apart from these, all other parastatals will be privatised in accordance with the divestiture sequence plan. A divestiture sequence plan is a table by which state enterprise which have already been placed into groups will be privatised. Every six months, companies from each group will be sold to the public. The investor demand will determine the success of the process.²²

**(d) SALE OF THE ASSETS AND BUSINESS OF THE STATE OWNED
ENTERPRISE.**

Enterprises to be privatised by this method will have their assets valued by independent valuers who will then prepare a certificate of valuation. Then, they will be sold at their true market value. This approach is aimed at avoiding the likelihood of selling enterprises at a give- away price or exorbitantly. For instance, in Hungary, premature decision on the price at which state enterprises were to be offered led to a public outcry which obliged

government to revoke its earlier decision.²³ A similar situation can arise in Zambia if pricing of the parastatal is not properly done. Therefore, objectivity in pricing is imperative.

(e) **REORGANISATION OF THE STATE ENTERPRISE BEFORE SALE OF THE WHOLE OR ANY PART THEREOF**

The above mode of privatisation is self-explanatory and hence needs no elaborate discussion. However, it should be pointed out that studies of the affected enterprises will be carried out with a view to identifying those parts which form the core of the business which will then be sold piece-meal or contracted out.

(f) **BY MANAGEMENT OR EMPLOYEE BUY- OUT IN THE STATE OWNED ENTERPRISES.**

Management buyout (MBO) is a method of acquisition of interest in a company by a small group of managers or/and employees. ²⁴ The term applies to a transaction where employees and management acquire interest in a company.

Within the privatisation process, MBO's are seen as a way of securing Zambian equity in the process and of capitalising on the expertise, experience and talents of local managers and employees. Successful MBO's will increase Zambian participation in the programme.

Management buy-out in Zambia will not be easy as some managers or employees would only wish to effect an MBO where the potential to generate profit exists, while leasing the rest of shares to government. Nevertheless, the success of it all will depend heavily on the managers and employees' own willingness to adopt rational thinking of meeting the new demands of a developing economy. ²⁵

(g) **LEASE AND MANAGEMENT CONTRACTS**

Briefly, this will entail government and the new owners of the enterprise entering into a written agreement, in accordance with the law, by which the premises will be used for a certain period of time in return for rent. In this way, government will be able to generate funds.

3.3 ELIGIBILITY OF BUYERS

Wider share ownership is main the political motive of privatisation programme in Zambia. In this respect to ensure property owning - democracy in Zambia every one whether Zambian or not will be eligible to buy shares in the parastatals.²⁶ But members of the agency, their employees and consultants including their immediate families will only be allowed to buy shares by way of a public share offer.²⁷

In view of the fact that the present economic environment does not allow for the Zambian public to participate in the programme, government will create the following funds,

(a) an investment fund that will purchase shares on behalf of the contributors in any privatised enterprise. This type of fund will be contributory and purchase of shares will be subject to the consent of the contributors.

(b) a privatisation trust fund which will hold shares in trust for the citizens of Zambia. Here citizens include every Zambian regardless of origin. The shares in this fund held in such a manner will be sold to the citizens at a later stage. The shares will be sold in small affordable shares either at a discount or by paying for them in instalments.²⁸

3.4 COMMERCIALISATION OF GOVERNMENT DEPARTMENTS

Although, not our area of concern, it is worth mentioning. The method employed by government when carrying out the commercialisation process has not been provided for in the Act. It appears the minister in consultation with the ministry responsible for the department scheduled for commercialisation, will be required to specify the department by gazette notice.

A specified department will then be incorporated under the companies Act, and will be empowered to fix its own commercial rates, prices and charge for goods and services provided to the public. From these commercial ventures funds will be generated to assist the department instead of relying on the government totally. Also, the department will be allowed to capitalise on its assets to borrow debenture stocks.²⁹

By incorporating commercial ventures, its intended to free the government departments from governmental control, as it will be regarded as a legal entity, for commercial purposes, and has independent autonomy.

3.5 EXTENT OF PRIVATISATION

Government has indicated its intention to fully divest of its share holding in the state owned enterprises except in those which are in the negative list. That is to say, those which won't be privatised for strategic or defence reasons. Is it therefore the government's intention to retain control over these enterprises?

It could be argued that government need not retain ownership to maintain control of the operation of the key companies. The move to allow government retain a "Golden Share" with special power to be invoked is a necessary way of protecting interest of government. But should it decide to privatise the strategic companies, in the long run, caution should be taken as to the number of shares any one shareholder should be allowed to take, because we cannot afford our strategic enterprises to be wholly held by foreigners.

3.6 THE ISSUE OF COMPETITION

The question is how will government ensure that the privatisation process does not create monopolies thus negating the objective of greater competition. The reality of the Zambian society is that, if the process is left uncontrolled, trade sales of the parastatals could result in the creation of monopolies and the formation of cartels. The privatisation Act has not addressed itself to this issue though the Competition and Fair Trading Act 21, Chapter 417 of the laws of Zambia does so. Appropriate screening measures for the trade sales would have to be put in place. Equally, some limit on the share to any one individual or group of companies will need to be employed. For example in Czechoslovakia to prevent privatisation replacing state monopolies by private ones, individual investors were not allowed to hold more than a ten percent (10%) stake in any one company and were only allowed to invest in at least ten Companies.³⁰

In Zambia we can employ a similar method and where monopolies are unavoidable the competition law should be enacted.

The stock market has been created to cater for the floatation of shares

3.7 FOREIGN Vs LOCAL INVESTORS

There appears to be no specific guidelines with regards to the extent of foreign ownership. This is why concern has been raised in the debate on the programme currently in the country that the economy will be swamped by foreign investors. As the government has maintained an open door policy to foreign investors.

The above problem was quickly foreseen in Czechoslovakia where privatisation was implemented into stages, vis a vis., "Small" and "Big" privatisation. The "Small" privatisation concerned small shops and restaurants to be auctioned only to Czechs and Slovaks. While in the "big" ones involving large industries, foreigners were allowed to participate.³¹

A similar approach was adopted in Hungary where large industries were exclusively offered to foreigners.

The government, therefore, should remove the apprehension Zambians have with regards to foreign investors by setting up proper guidelines as to foreign ownership. Before investors actually come to Zambia, a number of issues in the country's investment climate need immediate attention.

3.8 A COMPARATIVE EVALUATION OF TRADE REGULATION

This section will comprise a comparison between Competition regulatory authority in Zambia (Zambia Competition Commission) (ZCC) with Competition regulatory authorities in other countries particularly Peru, and Norway Vis-a-vis. privatisation

Today, all over the world, most governments are withdrawing from commercial enterprise. Brazil, for example, has raised half a billion dollars from the sale of bonds, the government in Chile has sold numerous banks and pension funds. Japan has plans to sell Nippon phones, Nippon Telegraph, and National Airline and the National railways, all of which are state owned.

Privatisation is seen as a progressive step towards reduction of imbalances and restoration of positive rates of growth. Poor performance by the state owned enterprises has resulted in this growing trend towards privatisation. This has forced governments in

developed and developing countries to re-asses the desirability of state participation in commercial activity.

Throughout the world, hundreds of companies are up for sale, including banks, telecommunications, railways, energy industries and even airlines. These sales indicate a global shift towards privatisation. Most governments are now getting out of the business.

Privatisation is adopted in countries to achieve different goals. Mexico adopted her programme so as to increase efficiency in her economy. Italy adopted privatisation to accelerate growth. Great Britain's privatisation programme was geared towards reduction of the size of the state. Whilst Singapore adopted privatisation to encourage private investment.

It should be emphasised that the whole question of competition has both social and political implications. It has to be carried out in conformity with the evolving social and political concepts and policies and not only on the basis of economic and financial arguments. Consequently, different countries have adopted different techniques to suit their individual positions. Although an analysis of all these techniques is beyond the scope of this research, we will discuss trade regulation in Peru, and Norway in relation to Trade regulation in Zambia

PERU

Problems common to under developed countries affected Peru as well. Namely, unemployment, Inflation, high rate of population growth and other social problems such as congested cities and housing shortages. Also as in other third world countries, these problems were a result of two main reasons, deficits in both the budget and balance of payments and bad government policy.

In 1978, the president of Peru admitted that the parastatal sector in the country was not competitive. The government had no resources to capitalise, modernise or bail them out. Hence the government's strategy for privatisation. Privatisation in Peru has been a success story. Currently, 95% of all parastatals have been privatised.

The trade liberalisation and competition policy can be compared to Zambia's Fair Trading and Competition Act . It establishes the trade regulating body called Indecopi

which is equivalent to the Zambia Competition Commission and gives it the responsibility of regulating trade in the country.

However, unlike the Zambian system, Peru's Indecopi has more powers, roles and impact on trade regulation. Its overarching objective is to improve the welfare of all Peruvians. It was created to ensure that there was free trade accompanied by sound comprehensive and systematic competition policy and ensure free market vision of the promotional role of government.

Indecopi recognises that trade liberalisation is a vital component of Peru's economic development and welcomes foreign direct investment. Peru, like Zambia, has opened itself to free trade. It also recognises that trade liberalisation does not guarantee corporate competitiveness. So there is need for competition policy (INDECOPI)

Contributions made by indecopi to the development of Peru, include;

- Reform of the administration of Justice
- Creation of value through formalised innovation
- Facilitation of increased business competitiveness; and
- Modernisation of the state

Indecopi has a tribunal with powers equivalent to a court of law (e.g. the industrial relations court in Zambia). Between 1993-1997 it handled 154,000 cases of which it settled 95% of the cases and 5% appealed to the judicial system of which 2% of Indecopi's decision was overturned by the court of appeal.³²

Unlike the Zambia Competition Commission, Indecopi is decentralised with offices in every major town and manned by specialised officials. 64% of the cases are delt within the same day, while 10% within the same week and cases which require prosecution take slightly longer.³³

NORWAY

One of the oldest controversies in competition analysis concerns the relationship between market structure and innovation. The question usually posed is whether or not monopoly is more conducive to innovation than competition.

Perfectly competitive markets are like UNICORNS (Beautiful mythical animal resembling a horse with a single straight horn) - perfect beauties and never seen. Businessmen and competition officials alike have to muddle through in a world of market imperfections, respectively trying to make money and repair market failures

The Norwegian competition act was enacted by the Norwegian parliament on 11th. June 1993, and came into force on January, 1, 1994.

The statutory purpose of the competition Act is stipulated in section 11 as to ensure efficient use of society's resources by promoting workable competition.

Over the last ten years, Sweden, Finland and Denmark have enacted similar statutory enactments. This focus on efficiency means that the intention as well as the effect of this new generation of Nordic competition laws can be measured through economic analysis. The Norwegian Swedish and Finish competition laws are all based on prohibition principle, under which price cartels, market sharing cartels, retail price maintenance, and bid rigging are flatly outlawed in the statutes themselves. In addition, various provisions exist to deter other forms of anti- competition conduct and other forms of anti-competition conduct and in Sweden and Norway also anti- competitive mergers.

Other European countries have adopted similar national competition laws. Broadly speaking two trends are quite noticeable. First, the emergence of efficiency as a statutory purpose or at least an important policy consideration. Secondly, the introduction of the prohibition principle as the preferred design.

3.9 THE NEED FOR ENFORCEMENT DECISION

However, in the real world, neither markets nor legal systems are perfect, nor are they self-enforcing. And for the purpose of this paper, it is important to stress that all laws, regardless of their basic design, require decisions by the competition authorities to be consistently applied. These agencies, sometimes in co-operation with ministries and courts, possess important enforcement powers, and the discretionary use of this power determines the fate of the regulated firms. Under the Norwegian law, Several important distortionary decisions are, for example, left with the competition authority:

- The detection of illegal cartels requires a decision to investigate and report the alleged illegal activity to the criminal prosecution authorities;
- It is possible to apply for a dispensation from the general cartel bans, provided that certain statutory requirements are met; and
- Anti- competitive conduct not outlawed in the law itself, as well as anti-competitive mergers, can still be deemed illegal if the competition authority makes a decision to intervene against them.

While the first decision is principally an enforcement decision that could theoretically be left to the police, the second and third forms of decisions are policy decisions that require professional analysis to determine whether a possible policy action promotes the statutory purpose of economic efficiency. In turn, this means that decisions by competition authorities can be analysed and criticised by economists on purely professional grounds. Such professional critique operates in addition to formal judicial review of decision by administrative agencies.

FOOTNOTES

1. Times of Zambia, 16th March 1990
2. Ibid
3. Kaunga E C "**Selling the family silverware: the parastatal reform programme, aims, process and prospectus in Zambia.**" Seminar presentation, held at Hotel Edinburgh, Kitwe 21-22 March, 1992 (Unpublished paper)
4. Zambia Daily Mail, 29th May 1990
5. Chongo R (Minister of finance) Budget address November 1990 p. 15 para 90
Government printers Lusaka Zambia
6. Movement for Multi-Party Democracy (MMD) Manifesto p5 (unpublished).
7. Ministry of Commerce, Trade and Industry, Privatisation programme in Zambia,
Report to the consultative group meeting, Paris, March 1992 (unpublished)
8. Kasonde E (Minister of Finance) Budget address 31st January, 1992, para 117 and 118
Government printers Lusaka Zambia
9. Source Ministry of commerce, trade and Industry, technical committee on privatisation
in Zambia **PRIVATISATION PROGRAMME IN ZAMBIA STRATEGY AND DESIGN** May 1992 (Unpublished)
10. MMD manifesto op cit
11. S. 5(1) (c) of the companies Act Cap 388
12. S. 33 of the privatisation Act ; CAP 386
13. S. 2 of the companies Act, Cap 388
14. Gower L.C.B **The principles of modern company Law** 4 Th. Ed (London, Stevens & Sons Ltd 1979) p 271
15. Investment Act: CAP 385 of the laws of Zambia.
16. Horn-by A.S **Oxford Advanced learner's dictionary of current English**, 4th Ed
(Oxford university press,) Oxford, 1989 p 1264
17. Loire J H & Hamkton M J **The stock Market Theories and Evidence** (Irwin-

dorsey ltd Ontario, 1973) p.5

18. S.36, Privatisation Act; CAP 386 of the laws of Zambia.
19. Wade H.W.R Administrative Law, 6th Ed (Oxford University press 1988) P162
20. S.18 of Privatisation Act; CAP 386 of the Laws of Zambia.
21. 'Strategy and Design' , May 1992 (unpublished)
22. Note : The criteria used for categorising enterprises not discussed
23. Herman A H The socio - Economic scene - Economic legal problems of transition to market economy (University of London,) 1990 p 24
24. Jones c "An overview of the key issues for managers considering a management buy-out in Zambia," Management buy-out dated 2nd June 1992 PP 5-6
25. Ibid p 10
26. S.24, Ibid
27. S.25, Ibid
28. S. 29, Ibid
29. S.37, Ibid
30. WhiteHouse I 'Privatisation strive to stay on track Euromoney (a sponsored supplement from Euromoney magazine for April, 1992 p 21
31. white House I op. cit, p. 22

CHAPTER THREE

COMPETITION AND FAIR TRADING ACT: CAP 417 OF THE LAWS OF ZAMBIA - A CRITICAL ANALYSIS.

A BRIEF BACKGROUND TO THE ACT.

The competition and fair trading act is an act to encourage competition in the economy by preventing anti-competitive trade practices;

- 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 foregoing..

For many years, Zambia exhibited in the main, a centrally planned economy. This economic structure has been typified by a web of government involvement and intervention at almost all levels of economic activity. But the economic experience of the past has clearly and forcefully indicated the necessity for Zambia to review her economic order. The advent of economic and political liberalisation in Zambia dating from 1991, has witnessed the adoption of a new industrial policy being formulated on laws of three inter-related policies; deregulation, commercialisation and privatisation. There has been a major shift in the Zambian economy from a centrally planned economy to a free market economy. Most of the state enterprises have been privatised. Privatisation is aimed at promoting wide share ownership, promoting a better allocation of resources and encouraging competition. Such a move will enable the economy to be run by private entrepreneurs who are more concerned with the success of their businesses. It is an acceptable fact that a private sector is more efficient than a public one. Private ownership tends to be more conducive to competition and financial discipline both leading to economic efficiency. However, this competition is very unlikely to be perfect in that there could be private monopolies and cartels created if not properly handled. The degree of

this type of market failure can depend on a number of factors including the nature of the sector and government regulation.

The government thought of legal mechanisms by which it could address the issue of competition and fair trading. One of the economic policies adopted by government was that of "deregulation of the market through the enactment of the Competition and Fair Trading Act that came into force on 10th February, 1995. The government has put in place measures to discourage private monopolies by creating the Zambia Competition Commission. (ZCC). Part II of the Competition and Fair Trading Act no 18 of 1994 section 4(I) provides for the creation of a commission. S4(I) provides that "There is hereby established the Zambia Competition Commission which shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of this Act, to do all such acts and things as body corporate may by law do or perform. 1

The competition commission was established on April 14th, 1997.² The establishment of a new national competition authority was one of several important steps taken towards the economic and political liberalisation in Zambia. 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.

The Competition and Fair Trading Act establishes the Competition and Fair Trading Council (herein after refereed to as 'the council') consisting of the chairman, vice chairman, secretary and ministers from Finance, Commerce, Trade and Industry. The Functions of the council are generally to supervise the implementation of the Act and to do all such acts and things as are necessary to develop and foster trade in Zambia

FUNCTIONS OF THE COUNCIL

S 6. (1) It shall be the function of the Council to monitor, control and prohibit acts or behaviour which are likely to adversely affect competition and fair trading in Zambia.

(2) Without limiting the generality of subsection (1), the functions of the Council shall be-

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

ANTI-COMPETITIVE TRADE PRACTICES, ETC.

S.7(1) of the Competition and Fair Trading Act 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.

S.7(2) of the Competition and Fair trading Act provides that Subject to the provisions of subsection (1), enterprises shall refrain from the following acts or behaviour if, through

abuse or acquisition of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effect on trade or the economy in general.

- predatory behaviour towards competition including the use of cost pricing to eliminate competitors;
- discriminatory pricing and discrimination, in terms of and conditions, in the supply or purchase of goods or services, including by means of 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;
- making the supply of goods or services dependant upon the acceptance of restrictions on the distribution or manufacture of competing goods;
- making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee;
- imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;
- mergers, take-overs, joint ventures or other acquisitions of control whether of horizontal, vertical or conglomerate nature: or
- colluding, in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors or suppliers of services, in setting a uniform price in order to eliminate competition.

CONTROL OF MERGERS AND TAKE-OVERS

S. 8.(1) of the Competition and Fair Trading Act provides that any persons who, in the absence of authority from the Commission, whether as a principal or agent and whether by himself or his agent, participates in effecting-

- a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;
- a take-over of one or more such enterprises by another enterprise, or by a person who controls another such enterprise; shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten million kwacha or imprisonment not exceeding five years or to both.

S.8(2)of the Competition and Fair Trading Act provides that no merger or take-over made in contravention of subsection(1) shall have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or take-over shall be legally enforceable.

TRADE AGREEMENTS

S.9.(1) of the Competition and Fair Trading Act provides that it shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in the practices appearing in subsection

S.9.(2)of the Competition and Fair Trading Act provides that where such practices limit access to markets or otherwise unduly restrain competition:

Provided that this subsection shall not apply where enterprises are dealing with cash as a common entity wherein; they are under common control or where they are otherwise not able to act independently of each other.

S.9(3) of the Competition and Fair Trading Act provides that this section applies to formal, informal, written and unwritten agreements and arrangements.

S.9(4) of the Competition and Fair Trading Act provides that for the purpose of subsection (1), the following are prohibited:

- i trade agreements, fixing prices between persons engaged in the business of
- ii selling goods or services, whose agreements hinder or prevent the sale or
- iii supply or purchase of goods or services between persons, or limit or restrict
- iv the terms and conditions of sale or supply or purchase between persons
- v engaged in the sale of purchased goods or services.
- vi Collusive tendering;
- vii market or customer allocation agreements;
- viii subject to the world Coffee agreement, allocation by quota as to sales and
- ix production;
- x collective action to enforce arrangements;
- xi concerted refusals to supply goods and services to potential purchasers; or
- xii collective denials of access to an arrangement or association which is crucial
- xiii to competition.

ANTI-COMPETITIVE TRADE PRACTICES BY ASSOCIATIONS

S.10. of the Competition and Fair Trading Act provides that the following practices conducted by or on behalf of a trade association are declared to be anti- competitive trade practices:

- i unjustifiable exclusion from a trade association of any person carrying on or intending to carry on in good faith the trade in relation to which the association is formed; or
- ii making of recommendations, directly or indirectly, by a trade association, to its members or to any class of its members which relate to-(a)the prices charged or to be charged by such members or any such class members or to the margins included or to be included in the prices or to the pricing formula used or to be used in the calculation of those prices; or (b)the terms of sale (including discount, credit, delivery and product and service guarantee terms) of such member or any class of

members and which directly affects prices or profit margins included in the pricing formula.

CRITERIA FOR CONTROLLING MONOPOLIES AND CONCENTRATIONS OF ECONOMIC POWER

S10.(1) of the Competition and Fair Trading Act provides that the Commission shall keep the structure of production of goods and services in Zambia under review to determine where concentration of economic power exists whose detrimental impact on the economy outweighs the efficiency advantages, if any.

(2) For the purposes of subsection (1) but without limiting the generality thereof, the Commission shall consider whether-

- a person controls a chain of distributing units the value of whose sales accounts for a significant portion of the relevant market;
- 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; or
- 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.

UNFAIR TRADING

S.11 of the Competition and Fair Trading act provides that a person shall not-

- withhold or destroy producer or consumer goods, or render unserviceable or destroy the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing a price increase;
- exclude liability for defective goods;
- in connection with the supply of goods or services, make any warranty-
 - (I) limited to a particular geographical area or sales point;
 - (ii) falsely represent that products are of a particular style, model or origin;
 - (iii) falsely represent that the goods are new or of specified age; or
 - (iv) represent that products or services have any sponsorship, approval, performance and quality characteristics, components, materials, accessories, uses or benefits which they do not have;
- engage 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; or
- supply any product which is likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any law.

AUTHORISATION OF ALLOWABLE ACTS

- (1) 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.
- (2) The Minister may, on the recommendation of the Commission, by statutory instrument, make regulations prescribing the particulars to be furnished to the Commission for the purposes of subsection (1).

Part II of the Competition and Fair Trading Act no 18 of 1994 provides for the creation of the Commission. S.4 (10) of the Competition and Fair Trading Act states that "there is hereby established the Zambia Competition Commission which shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of this act, to do all such acts and things as a body corporate may by law do or perform.

The commission shall consist of ;

- (a) a representative from each of the ministries responsible for Finance, and Commerce, Trade and Industry
- (b) a representative of the Zambia Bureau of Standards
- (c) Two representative from the Zambia Chamber of Commerce and industry, each representing different sections of that body
- (d) A representative of the law association of Zambia
- (e) A representative from the Zambia Federation of Employers
- (f) A representative of the Zambia congress of Trade Unions
- (g) Two persons representing consumer interest and appointed by the minister
- (h) A representative of the engineering institution of Zambia
- (i) A representative of the accounting profession and
- (j) The Economics Association of Zambia

THE COMMISSION:

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. The competition rules set down minimum standards and allow enterprises to penetrate markets and establish themselves without barriers or restrictions thereby facilitating intra-market trade and co-operation. The competition law operates to protect the competitive process in the market rather than competitors

MAIN TASKS:

The objectives of the Commission are to promote effective competition in the private and the public sector for the benefit of consumers. Its main tasks are:

- i Applying and enforcing competition legislation. This includes the handling of applications for negative clearance and notifications for exemptions, as well as control of notified mergers. The Commission shall also take action against infringements of the prohibitions in the Act.
- ii Proposing changes in administrative regulations restricting competition. When required, assist other authorities in monitoring adherence to other rules where infringements may have harmful effects on market and competition conditions.
- iii Enhancing competition within the public sector. Call attention to the restraining effects on competition of public measures, where appropriate by submitting proposals aimed at increasing competition and facilitating entry for new competitors.
- iv Information - Issue appropriate information concerning competition policy and the application of competition rules. Promote a "culture of competition" in the market.
- v Stimulating research - Initiate and support relevant research within the field of competition.

RESTRICTIVE BUSINESS PRACTICES

There are four main types of business practices that can have anti-competitive effects: practices undertaken by a single firm (when a firm enjoys a dominant position); anti-competitive mergers and acquisitions; horizontal restraints (i.e. arrangements between

competitors to restrain competition) and vertical restraints (anti-competitive arrangements between firms along the production - supply - distribution chain). Horizontal and vertical restraints include the following arrangements, which can be undertaken individually or in combination:

HORIZONTAL RESTRAINTS

Price Fixing: Competing suppliers enter into comparative agreements regarding prices and sales conditions.

Restraint of output: Competing suppliers enter into agreements regarding output and product quality.

Market allocation: Competing suppliers allocate customers amongst themselves, who therefore cannot benefit from competition by other suppliers.

Exclusionary practices: Competing suppliers employ practices that inhibit or preclude the ability of other actual or potential suppliers to compete in the market for a product.

Collusive tendering: Competing suppliers exchange commercially sensitive information on bids and agree to take turns as to who will make the most competitive offer.

Conscious parallelism: Competing suppliers generally set the same prices, but without an explicit agreement.

VERTICAL RESTRAINTS

- Exclusive dealing:** A producer supplies distributors and guarantees not to supply other distributors in a given region.
- Reciprocal exclusivity:** A producer supplies on the condition that the distributor does not carry anybody else's products.
- Refusal to deal:** A supplier refuses to sell to parties wishing to buy.
- Resale price Maintenance:** A producer supplies distributors only on the condition that the distributor sells at a minimum price set by the supplier.
- Territorial restraint:** A supplier sells to distributors only on the condition that the distributor does not market the product outside a specified territory.
- Discriminatory pricing:** A supplier charges different parties different prices under similar circumstances.
- Predatory pricing:** Suppliers sell at very low price (or supply intermediate inputs to competitors at excessive prices) in order to drive competitor out of business.
- Tied selling:** Producers force purchasers to buy goods they do not want as a condition to sell them those they do want, or force resellers or wholesalers to hold more goods than they wish or need.
- Full-line forcing:** A supplier requires distributors, for access to any product, to carry all of the supplier's products.
- Transfer pricing:** Involves over-invoicing or under invoicing of intermediate inputs between Foreign affiliates. Under invoicing can be used as a

method of predatory pricing.

Premium offers or loyalty

Rebates: A dominant supplier offers discounts or other inducements only to Certain Parties on the condition they do not sell someone's products.

AUTHORISATION AND NOTIFICATION

The Act, however, recognises that some objectives of the Act may not reconcile with the reality of our society or may not always be met by the operations of competitive markets. To secure such objectives, exemptions from the applications of the Act are available. The adjudication (authorisation and notification) procedures under section 13 of the Act provide the exemptions. The adjudication procedures apply only to specific parts of the restrictive trade practices provisions of the Act. For example, they do not apply to section 12 of the Act which deals with consumer protection provisions.

Parties considering lodging applications for authorisation and/or notifications under section 7 and 9 of the Act are encouraged to have prior discussions with the Commission after first giving consideration to the following issues:

- . Is the conduct at issue likely to be in breach of the Act authorisation or notification should be sought only where there is a prospect of contravention of the Act.

- . Are there demonstrable benefits to the general economy which result or are likely to result from the conduct at issue?

- . What is the magnitude of any detriments to the economy, including lessening of competitions, arising from the conduct?

COMPULSORY REQUIREMENT TO NOTIFY TRADE AND SERVICE AGREEMENTS:

A goods or service agreement must be notified if two or more persons party to it carry on business in Zambia supplying goods, services or applying a manufacturing process to goods, and two or more parties to the agreement accept restrictions on:

- Prices or charges; or
- The terms or conditions on which people are to do business; or
- The quantities or descriptions of goods to be produced, supplied or acquired; or
- The manufacturing process to be used or the quantities or description of goods to which such process is to be applied; or
- The persons with whom business is to be done; or
- The areas or places of the business;
- The extent (if any) to which, or the scale (if any) on which, services are to be made available, supplied or obtained.

UNFAIR TRADING:

The Act contains a range of provisions aimed at protecting consumers:

- Misleading or deceptive conduct: prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive.
- False or Misleading representations: Prohibits false claims about:
The standard, quality, value, grade composition, style, model or origin of goods or services: Whether goods are new.
- Misleading the public as to the nature or characteristics of goods and services:
Prohibits a person from engaging in conduct which is liable to mislead the public as to the nature manufacturing process, the characteristics, the purpose or the quality of any service.

- Exclude liability for defective goods.

- Withholding the production of goods and services on the market or production and distribution of such goods, with the aim of bringing about a price increase.

FOOTNOTES

1. Competition and Fair Trading Act no 18 of 1994 -pg 2
2. Times of Zambia 15th April 1997

CHAPTER FOUR

The aim of this chapter is to look at case studies of trade regulation in Zambia by giving documentary data to help us understand the challenges the Zambia competition Commission (ZCC) faces in a liberalised economy.

The Zambia Competition Commission has been in existence and operational for just over one year six months. Since its establishment, the Commission has continued with its mandate in the economy as follows ;

- (i) to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service, and ;
- (ii) to ensure that the interests and welfare of consumers are adequately protected in their dealings with producers and sellers.

The Zambia Competition Commission as the central administrative authority for competition issues exists to promote the interests of consumers, who ultimately are the beneficiaries of competition in the national economy. The demands on the institution have increased and the effects can be assessed from the discussion of its work outlined below . On the whole, the problem of funding continues to hinder the operations of the commission. One can cite shortages of staff and weaknesses in programme implementation, as some of the operational impediments.

The status and/or issues dealt with over the last one and half years of operation are outlined as follows:-

2.1 Merger and Acquisition Control Regulation

2.2 2.1.1. The merger control regulation under the act applies to all mergers in the economy that involve the acquisition or the establishment of control over a significant interest in the whole or a part of a business of a competitor, suppliers, customer or other person. The Commission normally evaluates proposed mergers, take-overs and acquisitions in two circumstances, namely:

- where it is believed the object of the merger or acquisition is to prevent, restrict or distort competition; or
- where the merger or take-over could, through the abuse of market power, be likely to result in undue restriction of competition or have an adverse effect on trade in the economy.

2.1.2. There are two institutional features of competition policy that are considered to be important when evaluating a competition case. The first is that competition law generally is indifferent to the nationality of firms operating in a market, focus instead on their contribution in ensuring a high level of inter-firm rivalry. The second is that competition law is concerned with protecting competition as a process, rather than with advancing the interests of individual firms in a market.

2.1.3. However, take-overs may be a means of achieving efficiencies, particularly where increased exposure to global markets is putting pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive in those markets. Efficiency issues are relevant both for assessing the impact of a take-over on competition and for assessing the overall public benefit that would flow from a take-over.

- 2.1.4. On the other hand, the terms of an acquisition that is to say a merger or take-over have been modified in a number of cases. As a result, the acquisition could be in accordance with the intentions of the legislation.
- 2.1.5. The mergers and acquisition notifications were received from the brewery industry, industrial gases, beverages industry, freight and clearing industry, petroleum, security industries and others.
- 2.1.6. When it concerns proposals for changes to the rules and other measures to eliminate obstacles to effective competition. However, the Commission does work to promote well functioning competition by its analysis and through its proposals for changes to regulations, which if implemented it considers would lead to more effective competition in different sectors of the economy.
- 2.1.7. The Commission has received a number of merger/take-over applications under Section 8 of the Act. Such applications include the following ;

3.1 **VitreteX Paints Take-over by Turpeth Incorporated, a subsidiary of Investment Holdings Ltd.**

The facts of this case were as follows;

Turpeth corporation is one of the world major paint company registered in Panama. It is also a minority share holder in Investment Holding Ltd (a wholly registered company in Zambia). Investment Holding Ltd has interest in a company called Titanium paints Ltd, - a company which among other things manufactures paints in Zambia. An independent research has shown that Turpeth corporation has always used its dominant position in which ever country it went to, to distort prices.

There were two major areas of concern, when the Commission received the application of take over VitreteX paints Ltd in Zambia ;

- (a) The Paint manufacturing industry in Zambia is not well developed and Turpeth corporation might use its huge financial muscle to dominate the paint industry in Zambia.
- (b).Turpeth corporation is a minority share holder in Investment Holding Ltd which owns

Titanium paints Ltd, a major competitor to Vetretex paints Ltd. This will effectively thwart Competition.

(b) Turpeth Corporation is a registered company in Panama, a country known to be a major supplier of illegal drugs in the world. They could use Zambia as a major transit points for drugs and money laundering (Unregistered concern)

The Commission is still analysing the case and a decision hasn't been made yet.

Thus applying the competition law to the facts in the case above, it is observed that the take-over will have the effect of preventing, restricting or indeed distorting competition, which factor clearly goes against S. 8 of the Competition and Fair Trading Act. This will stifle competition as prices for the products from both Turpeth Corporation and Vitretex paints Ltd will inevitably be centrally controlled . This clearly is the proper case for the commission to refuse a take-over, since the aim of competition as a process rather than with advancing the interest of individual firms. This latter statement brings to the fore the inappropriateness of the commission's action in certain cases when it has held as overriding, the interest and welfare of workers in companies on the verge of collapse which have been taken-over. The case in point is the take-over of Northern Breweries Ltd by Zambia Breweries PLC

3.2 . **Zambian Breweries Plc take-over of Northern Breweries Plc** . **South African Breweries take-over of National Breweries Plc.**

The facts of this case are as follows;

Since independence, Zambia Breweries PLC has been running two plants in Zambia. Namely, Lusaka plant and the Ndola Plant. When the government decided to privatise the brewery industry, it decided to create two separate brewery companies in order to foster competition. Namely Zambia Breweries PLC and Northern Breweries limited. Zambia breweries PLC was bought by South African breweries limited (The fourth largest brewery in the world). South African Breweries limited bought 70% shares and 30% was floated to the public. Northern Breweries Ltd was bought by Nile Breweries limited of Uganda (Madvani group of companies). Kindly note that Anglo American Corporation, a

holding company owns 40% share in South African Breweries limited and 30% Shares in (Central African Holdings)(CAH) the owners of Nile Breweries Ltd.

In 1994/95 the Anglo American Corporation changed the strategy completely from Agriculture related activities to Mining activities. They sold off their shares in Nile Breweries limited through its holding company CAH. Without major a financial partner, Nile Breweries had problem running Northern Breweries limited. It faced a lot of financial problems. It reached a stage we may call in Economics **FINANCIAL FAILURE DEFENCE** (A situation where the company fails to pay its employees, suppliers and fulfil its tax obligations) and was about to be declared bankrupt. One of the reasons why it could not make a grade, was that it could not penetrate the Zambian markets with its low quality products and could not withstand competition from Zambia Breweries limited.

Nile Breweries limited approached South African Breweries limited to buy the plant, because it could not run it any more. South African Breweries limited refused and told them to approach Zambia Breweries PLC if they would be interested to buy. Zambia Breweries PLC agreed to buy Northern Breweries limited and applied to the Zambia Competition Commission (ZCC) for permission to purchase Northern Breweries limited. The question the commission had to consider was, if they allowed the take over, would it mean that Zambia Breweries would control 90% of the lager beer in Zambia (10% coming from imports) but at the same time it had to look at the welfare of over five hundred employees who were going to lose employment. Eventually, the Zambia Competition Commission gave a go-ahead for Zambia Breweries PLC to buy Northern Breweries limited.

The second part of the equation was when South African Breweries limited applied to the Zambia Competition Commission to purchase National Breweries limited - the opaque beer producing company. South African Breweries limited argued that, it was a different entity completely distinct from Zambia Breweries PLC and only owned shares in Zambia Breweries limited. They claimed that South African Breweries limited will own the National Breweries limited and not Zambia Breweries PLC. The points which were considered were that the National Breweries limited had reached a point of near collapse and if it was not sold immediately, it was going to collapse. At the same time the issue of

monopoly was considered. If they were allowed to buy the company, they would control 90% of the beer market in Zambia. The Zambia Competition Commission did not have much choice but to allow the sale. They only gave them one condition that they should allow small brewers in the industry to develop and out of the plants National Breweries limited has. They should allow Zambians to buy four to foster competition. But South African breweries have chosen four loss making breweries plants and nobody is willing to buy them.

The fact that the commission sanctioned the take-over, it is submitted that it is wrong in so far as the enabling statute is concerned. ZCC's mandate is very clear. It is a notorious fact that Northern Breweries limited was the only other competitor in the clear beer industry quite apart from Zambian Breweries PLC. It is good to note that consumers had a choice between products manufactured by one enterprise as opposed to products from another enterprise differing as it were in price, quality and service. Therefore, for whatever reasons that made the commission to act as it did, it went contrary to the ideals for which it was created or set up. In summary, by allowing the take-over, the Commission approved anti-competitive conduct and took up the role of government in up holding the welfare of workers against the interest and welfare of consumers whose interest in any event the Commission is mandated to protect. It is felt that there are adequate legal mechanisms put in place for the protection of former workers of defunct companies. So it is not the concern of the competition commission to do so. Thus, the purported justification was misplaced and was against the objectives and policy of competition law. The resultant effect is that Zambian Breweries PLC has no competitors in the economy and thus the consumer is at its whims and has no choice as to the quality, price and service offered. It is very doubtful that the commission can effectively ensure that the interests and welfare of consumers are protected in their dealings with producers and sellers, in such a situation.

This lack of seriousness exhibited by the Commission depicted its weakness.

3.3 **BOC Gases Plc's bid to acquire Industrial Gases Limited**

The Facts of this case were as follows;

This is a case where BOC Gases limited, a British registered company is interested in buying Industrial Gases limited. However, Industrial Gases limited does not want to sell its holdings in the company. (BOC Gases limited bought 100% shares in the former Zambia Oxygen company LTD.)

In Zambia, BOC Gases limited is the major supplier of both domestic and industrial gases. It holds 80% of the shares while industrial gases hold 19% of the shares. The other one percent is shared among other producers like Zambia Consolidated Copper Mines limited, Nitrogen Chemicals of Zambia limited. When BOC Gases limited applied to ZCC to purchase Industrial Gases Ltd, it was felt that this market should be protected since it is a special type of market with very few players. The request was rejected.

The Commission acted within the law by not allowing the take over of Industrial Gases Ltd by BOC gases Ltd according to part 111 S.8 of the competition and fair trading Act. This would have created a monopoly in the industry which is against the Act.

3.4 **Merger of Anderson Security Midlands and Mayvan Enterprises**

The facts of this case are as follows;

Anderson security Ltd is a security company providing security services in the country through the provision of security guards services and security dogs services. Mayvan alarms enterprises is a company providing security devices like alarms and rapid response services. Both companies are 100% owned by Mr Anderson. He applied to ZCC to have the companies merged. The ZCC felt that the market share of both Anderson security ltd and Mayvan alarms is so small that its merger will have minimal effect on the security services market. Moreover, this was a misconceived merger according to the Competition and Fair Trading Act since both companies were owned by one person and have always provided complimentary services to each other. (Such mergers are not provided for in the Act)

3.5 **Midlands and Tri-Star to form Group 3 Security Company.**

The facts of this case are as follows;

Midlands, Tri-Star and Cono limited are security companies providing security services to the country. With the coming of Coin Zambia security Ltd (a large South African security Company) to Zambia , they feared that business will slump and planned to merge. The unfortunate thing about this merger is that, they registered the Group 3 company before the merger was approved by ZCC. Todate, the decision hasn't been made whether to allow the merger to go ahead or not.

The Commission should move in very fast and prosecute the G 3 Security Company Ltd for merging without authority from the Commission. S.8 of the Competition and Fair Trading Act provides that (1) Any persons, in the absence of authority from the Commission, whether as a principal or agent and whether by himself or his agent, participates in effecting;

- (a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services
- (b) a take-over of one or more such enterprises by another enterprise, or a person who controls another enterprise or by a person who controls another such enterprise.

Shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding ten million Kwacha or imprisonment not exceeding five years or to both.

3.6. **Price Waterhouse and Coopers and Lybrand merger.**

The facts of this case are as follows;

Price Waterhouse and Coopers and Lybrand are two major accounting firms providing audit and consultancy services. This was an international merger world wide. Since both companies had offices in Zambia they had to apply for merger in Zambia as well. The merger did not take place in Zambia, so the case was not considered.

3.7. **Disposal of National Air Charters**

The facts of this case are as follows

National Air Charters Ltd was a subsidiary of Zambia Airways Corporation limited which was liquidated in 1994. The National Air Charter Ltd remained operational until some three years ago when it became very viable. Zambia Growers Association (ZEGA), a company which handles 90% of the Zambian exports and 60% of the cargo at the International airport was interested in buying it. It was felt that this market also needs protection and if ZEGA bought it, it will control 100% of this market. A decision has not been made.

This is another case which the Commission is failing to decide when the act is so clear. The control of mergers according to part III of the act, S.8. of the Competition and Fair Trading Act and provides that the Commission should not allow the merger.

3.8. **Merger of BP and Amoco/ARCO**

The facts of this case are as follows;

BP and Amoco/Arco are world major fuel and lubricants producers . They are intending to merge although the negotiations are still going on at international level. They have since applied for a merger in Zambia should the negotiations go through. The decision has not yet been made since the negotiations are not yet concluded and ZCC feel this will have no effect on the Zambian Market since Amoco/Arco has no offices in Zambia.

3.9. **Coca-Cola acquisition of Cadbury Schweppes .**

This is equally an international merger and since both companies are operating in Zambia, the merger will affect competition. Both companies are the largest producers of fizzy drinks in Zambia. They have since applied for merger in Zambia. A decision has not been made but it will be a very interesting case since some continents for example, Europe, has not sanctioned the merger, while United Kingdom sanctioned the merger. South Africa has sanctioned the merger. While in the far East and Middle East have sanctioned the merger. A decision is still awaited from the ZCC.

The proposed merger poses a serious threat to competition vis -a - vis fizzy drinks. The two companies have for a long time been trade rivals and this has to some extent off-loaded some benefits to the consumer. The competing firms have competed in quality, service and price. But should the merger be approved, then the aims of competition law will be contravened for the object of the acquisition is impliedly to restrict and/or distort competition. The prices of the products will be centrally determined thus putting the consumer at the whims of the Coca Cola Company. Just like in other countries, it is submitted that the commission should not allow the proposed acquisition.

3.10 Anti-Competitive Practices

- (i) In general terms, an "anti-competitive practice" can be defined as a course of conduct which has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods or services in Zambia or any substantial part of it. It is a business practice which frustrates or inhibits the effective working of the competitive process in some way.
- ii (ii) Another goal of a ZCC activities has been that the general perception should be that the Commission has actively counteracted harmful restrictions on competition in a competent and legally correct manner

(iii)The Commission has intervened in the cotton industry, beverages industry, milling industry, beef industry and recently called on all Oil Marketing Companies to notify their exclusive distribution agreements to assess their effect on competition. The Commission has removed measures or agreements between companies at different stages of the distribution chain in various sectors of the economy aimed at monopolisation of the various markets.

BACKGROUND TO TRANSPORT SECTOR

As earlier stated Zambia has exhibited in the main, a centrally planned economy. This economic structure has been typified by a web of government involvement and intervention at almost all levels, of economic activity. As earlier mentioned, the government controlled 90% of economy through parastatals. Just as shareholders registered companies have residual powers of management thus can appoint company directors, the Zambian government by virtue of being the principal share holders have derived powers of appointing and setting of rules for the appointment of company executives. These management posts were given to people who were usually lacking in technical know how of the institutions they were given to administer. Among the parastatals which were mismanaged was the United Bus Company of Zambia.

The United Bus Company of Zambia. (UBZ)

The UBZ was created with the prime object of providing transport service to rural areas, Intercity and international routes. The government's objective in setting up the company was to ensure the company make profit but at the same time provide services to the rural areas. While profit making remained the main objective of the company, in time political considerations prevailed. This state of affairs made the company a loss making operation.

To grasp how the company performed, we may look at the profit and loss chart below;

U.B.Z Annual profits and losses (in thousand Kwachas)

YEAR	1977	1978	1981	1982	1983	1984	1985	1986	1989	1991	1992
PROFIT	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL	Nil	NIL
LOSS	3,961	5,991	4,754	6,207	6,953	13,559	22,550	80,096	120,891	471,923	
ASSETS	15,121	20,976	23,881	28,884	23,374	24,050	48,603	96,000	164,764		

(Source; annual Reports, Various years)

From the chart one notices that the company had never made profits for close to two decades inspite of huge assets owned. On the basis of this we can comfortably conclude that the company had failed to achieve its goals both in social and economic terms in that the profits that were to enable the efficient provision of transport services were not made.

It is against such back ground that the Movement for Multi-Part Democracy government moved from a controlled economy to a free market economy because the economic distortions which have sprung from a controlled economy had made it increasing difficult for an efficient economic order in the country.

UBZ was liquidated in 1994 and the sector was liberalised to promote a better allocation of resources and encouraging competition

Many businessmen took advantage of the vacuum created by the liquidated UBZ and entered the transport sector. Many buses were bought to cover the gap. With the collapse of UBZ, the transport sector was being managed by a private organisation called United Taxis and Transport Association of Zambia. (UTTA). UTTA has grown so big that it has become difficult to manage. With the growing unemployment in the country, unemployed youths have taken advantage of the situation and are controlling the stations and harrasing travellers. Situations in UTTA bus-stops are uncontrollable to the extent that bus drivers were forced to pay before they can load their buses and commuters are forced to board run down buses. The situation had reached the mafia type of situation where it is the survival of the fittest.

FLASH COMMUTER BUS SERVICES

Among people who entered this sector is Mr Ishimael Kharadi, trading as Flash Commuter Buses ltd. He runs over 120 mini-busses and his drivers were finding it difficult to load the buses. In 1997, he decided to open his own bus stop where he could operate from in the middle of town. He applied to the Lusaka city council to occupy the empty space along Katondo street. But before the licence could be approved, he started to operate from there. The Lusaka City Council Issued a directive to have the station closed because it was operating illegally. There was a public uproar from the general public

because the place was very convenient and it was free from harassment from Street/Mafia type of boys from UTTA stations. The following day the Minister of Transport and Communication issued a directive that they be allowed to continue operating from the Station.

The issues considered by the ZCC were (a) The anti- competitive environment to be created by one monopoly considering the captive market due to its location (b) The consumer welfare - whether it will be in the interest of the consumer - considering that they were being harassed by call boys at the UTTA bus stop.

The Capital commuter buses have been allowed to operate, but to date, ZCC have not made their decision.

This is a clear case of political interference in the commission's work. It is submitted that the commission is still reluctant to make a decision because of political pressure. The act on this issue is very clear. Any activity that will create anti-competitive environment should not be allowed. As earlier submitted, it is not the duty of the commission to look at the consumer welfare but regulate competition. By allowing capital commuter buses to continue operating, the commission is approving anti-competitive conduct and takes over the role of government in upholding the welfare of consumers in disregard of the provision of the Competition and Fair Trading Act.

4.0 Abuse of Dominant Position

When it comes to abuse of a dominant position, the Commission by exercising its power to issue a directive, has in a number of cases been able to bring such abuse to an end. The Commission has for example varied the distributorship Agreement of Zambian Breweries PLC. The distributors are now authorised to deal in competing products and sell at their own prices. The commission has removed price, geographical and product restrictions from the said exclusive agreements.

It is important to note that the lawful acquisition of a dominant position is not within the prohibition of the law on competition. The holding of a dominant position is not prohibited, but the abuse is. The Competition and Fair Trading Act under Section

7(2) gives examples of practices employed by dominant firms to maintain, enhance or exploit a dominant position in a market. The practices that can be dealt with under this rubric include exclusive dealing, market foreclosure through vertical integration, tied selling, the control of scarce facilities and vital inputs or distribution channel, price and non-price predation and price discrimination .

Some of the cases the Commission has handled include:

- .(I) Zambia Bottlers exclusive dealing (Zambia bottlers agents and dealers were not allowed to deal with any other soft drinks on the market

- .(ii) Exclusive dealing arrangements of oils marketing companies in Zambia such as British Petroleum (BP) Ltd, Caltex Zambia Ltd, Total Zambia Ltd, Agip Ltd and Mobil Zambia Ltd.(individual filling stations were not allowed to deal with any other fuels or lubricants apart from the landlord's)

- .(iii) Parmalat (Z) Limited exclusive dealing.(Dealers and agents of Parmalat (Z) ltd were only allowed to deal with its dairy products only)

- . (iv) Lever Brothers of predatory pricing allegations which has since been cleared.

- . (v) Nulaid Farms predatory pricing was also cleared but is under continuous surveillance.
This is a South African Company dealing in farm products including day old Chicks. They are selling day old chicks at half the price which Hybrid poultry farms and Tamba farms are selling. Although they are justified the low prices, it is suspected, they are only trying to enter the market and thwart competition.

- .(vi)Price Fixing by various companies including Zambia Telecommunication company Ltd (Zamtel Ltd), Chinika Beer Ltd, Invesco/Goldspot Bottling Ltd,

Zambia Bottling Company Ltd, Central Breweries Ltd.(ie advertising the recommended selling price for their products) These practices have been discontinued but the Commission shall continue to monitor such anti-competitive practices.

4.1 Consumer Welfare Matters

(i) In general , these are trade practices of traders that violate the rights of the consumer as provided for under Section 12 of the Competition and Fair Trading Act. The Commission has observed that traders still practice old fashioned trade conditions of no refund, no exchange no guarantee in their business transactions. These are matters where the trader refuses to accept liability for defective goods they sell . This violates Section 12(b) of the Competition and Fair Trading Act.

(ii) The Commission has received many complaints in this regard. Cases handled by the Commission include complaints against:

. Telecel Zambia Ltd (this is a new communication company involved in cellular phones.) Since they did not have adequate infrastructure they got permission to use transmitters for Zambia Telecommunications company limited (Zamtel). They used to pay monthly rental for the use of this equipment. But when Zamtel gave them concessions and cash discounts, they decided to pass these discounts to their customers making their services cheaper than those of Zamtel. Zamtel complained to the commission for this anti- business practice and ended up terminating the contract with Telecel Zambia Ltd.

. Automotive Equipment Ltd. This company is involved in selling agriculture equipment. In their contract of sale, there was a clause

which states that no return or exchange or guarantee of goods once bought even though the customer has not been given chance to test or examine the goods before buying them. Consumers complained of buying defective goods. It was felt that this violates the consumers rights according to section 12(b) of the Competition and Fair Trading Act.

. Suppliers of Toy drinks (Brand name for small 250 millilitre orange drink) and PVC bottles (There was anonymous publication that the PVC bottles which some companies were using to sell toy drinks contained toxic substance harmful to persons.) The commission took the bottles to the Bureau of Standards for examination, but it was found that the bottles are safe.

(iii). Misleading advertisements or claims by traders or suppliers has been an area of concern and the Commission has intervened. Some of the cases handled include.

. Speciality Foods Ltd advertisement of custard porridge dessert making unfair remarks against Kandolo (sweet potato).(This advertisement was running on national television showing that children in a certain family did not like Kandolo and preferred custard for breakfast)

. Reckitt and Colman company Ltd polish advertisement (In this advert, were two men using two different types of polish- one using nugget polish the other one using polish B. The one using nugget polish had his shoes glittering and won the favours of girls while, the other one using polish B, the shoes never shined . Kiwi Brands company limited complained to the commission that since there were only two companies manufacturing polish in Zambia, it implied that polish B was its product.

.Telecel Zambia Ltd advertisement of international call rates.
(Telecel Zambia Ltd a local communication company, was running an advertisement in the news media, showing a lady making an international call on one of their hand-sets, while in actual fact the company does not have an international direct dialling facility. (The advertisement was misleading)

4.2 Unfair Trade Practices (trade agreements)

- i (I) Unfair trade practices may arise through agreements between companies at two levels of the distribution chain. The dominant player in the arrangement sets conditions which are difficult to fulfil. The Commission has requested the Companies involved to notify such agreements for authorisation. In most cases, the affected parties have withdrawn them from the markets.

(iii) Matters that have been brought to the attention of the Commission and have since been nullified include complaints lodged against.

. Insurance companies. The insurance companies constitute some form of a cartel and decide on what premiums to charge the customer and other conditions pertaining to insurance policies.

. Dallas International limited. (This is an international transport company which was trying to bring different companies together so that they could harmonise charges on international routes)

. BOC Gases (Zamox Plc) (This company was also trying to dictate prices to be charged on industrial and domestic gases to other companies)

REFERENCES AND FOOTNOTES

Personal Interviews with officials from:

1. Zambia Competition Commission - Director General Mr. George Lipimile.
2. Zambia Chamber of Commerce and Industry - The Chairman Dr. G.G. Chabwera.
3. Economics of Zambia - The Secretary - Mr. David Musona.
4. The Chartered Institute of Marketing (Zambia Chapter) - President Mr. Kabeta.
5. Officials from affected companies (Some did not want to be quoted and identified).
6. Personal Interview, The Chairman - Economics Association of Zambia 20.08.99
Dr. Moses Banda.
7. Chikwanda A.B. New Economic Recovery Measures a paper presented to ZINCOM Economic Symposium on the analysis of the New Economic recovery measures, Mulungushi Hall, Lusaka 1 2 October 1987.
8. Bos, H.C. Saunders M and Secchi C Private Foreign Investment in Developing countries, D. Reidel Publishing Company, Dordrecht - Holland/Boston - USA 1974.
9. Chileshe J H Third World Countries and Development Options in Zambia Vikas Publishing House Pvt Ltd. 1986.
10. Times of Zambia, July 30 1999
11. Times of Zambia, September 27, 1999

CHAPTER FIVE

CONCLUSIONS, SUGGESTIONS AND RECOMMENDATIONS

At the end of an exercise of this kind, it is desirable that the issues brought out be generally discussed with a view to attempting some suggestions as to the best way possible of addressing them.

All things said, it is submitted, that the investment climate in Zambia is generally not attractive or conducive to investors, whether local or foreign.⁶ The reasons for this rather dismal conclusion is a result of the lack of comprehensive and attractive investment code and the absence of a sound and straight forward investment policy. This makes competition very uneven and only big players in the market can compete favourably with big economies of scale. In order to improve the investment climate so as to make investing in Zambia attractive, there are a number of measures which the government can undertake. It must be noted that, its not within the ambit of this paper to discuss investment opportunities but it is worth mentioning since investment is a function of trade and trade is a function of competition.

There is no denying of the fact that a country like Zambia can derive great benefits from institution like the Zambia Competition Commission which is capable of playing an important catalytic role in fostering the process of economic development. Indeed, the importance of institutions like the Zambia Competition Commission can be discerned from the fact that a lot of countries world over and indeed in Africa, in particular, are establishing trade regulating boards or institutions. Zambia is at a disadvantage because she did not develop her industries fully, to the extent that most of the goods are imported and this leaves the country at the mercy of the exporting countries. It is also at a disadvantage considering that the Zambian government in the first and second republic pursued socialist policies and sudden change of policies does not gurantee investments. This gives all, the more reason for a need of a concerted effort to woo investors with special incentives by making competition more conducive and guaranteed return. Even, in as far as private foreign investment is concerned, a lot of other countries, developing and

developed, are searching for it and in the final analysis, the highest rewards go to those who make the most effort to woo it and guaranteed return.

The Competition and Fair Trading Act chapter 417 of the laws of Zambia, provides a framework for channelling and controlling competition in Zambia in accordance with the national objectives while at the same time providing a structure within which companies can operate. With such attributes, it is important that, amendments are made to the Act to give the Zambia Competition commission for instance, more powers to prosecute companies flouting the competition rules and change the structure to provide an organ for appeal if the company is dissatisfied with the decision of the Zambia Competition Commission. With the present arrangement, the commission can not do much. If someone is flouting the competition rules apart from recommending to the Director of Public Prosecution (DPP) to take action, there is nothing more ZCC can do. The Act itself makes it an offence for anyone breaking competition laws - and may be liable, upon conviction to a fine of ten million kwacha or imprisonment not exceeding five years or to both. Other Competition Commissions else, have powers to prosecute for example INDOCOPI in Peru. The Director of Public Prosecution is already over burdened with other criminal cases. . Even if prosecutions were conducted efficiently, our courts of law take long to resolve cases. Some cases taking as long as five years. It is doubtful, if a private investor with a profit motive in mind would wait for five years to have his/her case resolved.

As we observed earlier in the paper, Institutions like INDOCOPI (a competition commission in Peru) has the powers to act and prosecute companies flouting trade regulations.

Most importantly, the government must come up with a comprehensive policy on trade regulation in Zambia and must therefore desist from changes in policy directions and stances which impairs its credibility.⁷ The problem which has been apparent in Zambia in this regard has been that whereas policy statements have been made known by the government, these have been subjected to changes which has brought about inconsistencies in policies. An example in this regard has been the granting of South African Supermarkets Ltd a tax rebate which puts other players in the market at a disadvantage.

Another example in this regard has been the uncertain price control policy and the frequent devaluation and over-valuation of the Kwacha. Indeed as the chairman of the Export and Import bank of the United States of America, Mr John Bohn said to foreign reporters and businessmen in Jakarta and Hong Kong during a telepress interview from Washington, the best investment climate is created by clear and precise rules in which the investors can have the greatest confidence. "It's clarity and consistency of the rules, " said Mr Bohn, " which is far more important than any short- term incentives, that will govern the investment decision." 8

Once the Government has clarified its policies on investment and trade regulation in Zambia, the next step it should take is to redefine the investment Act and the Competition and Fair Trading Act. Zambia as one Italian legislator Senator Mario Pedini put it while on a fact- finding mission to Zambia, "has an unlimited potential for growth". A good number of Italian businessmen have indicated their desire to invest in Agriculture provided the country's legislation regarding private foreign investment and trade regulation is made attractive.9

The redefining or review of the investment Act and the Competition and Fair Trading Act can commence by making the Act applicable to both local and foreign investors and specifying the area where foreign entrepreneurs can invest and areas for the exclusive jurisdiction of local entrepreneurs. In the recent past the Zambian government has allowed China Hainan Corporation to import raw materials and machinery duty free to construct roads in Zambia 10 . This foreign company competes unfavourably with local contractors who have to pay duty on all raw material and machinery. Similarly, government has allowed SUN Hotels International to import their raw materials duty free for the construction of a hotel in Livingstone, yet they are competing with local hotels who are not enjoying such facilities.11

As a follow-up to the specification of the areas for both local and foreign investors, the investment Act should be made equally attractive to both local and foreign investors, and this calls for attractive incentives for both categories of investors. No sacred cows should be allowed. By being given appropriate incentives, local businessmen would be given an opportunity to participate fully and effectively in the development of the country's

natural resources and industries while at the same time benefiting from the resources and know-how of foreign investors.

Admittedly, company tax constitutes one of the basic source of revenue for the government but if it is excessive, it may prove a repelling force to foreign and local investors. It is no secret that income tax on companies in Zambia is very high (35 percent of income tax on manufacturing and trading companies.) One cause for high tax levels in Zambia is that the government has never come around to sufficiently broaden the tax base to extend to the informal sector which is for ever expanding and profitable. The majority of persons in the informal sector, do not pay tax. The government concentrates on the formal businesses which are already over taxed. The formal businesses end up using anti-competitive methods and other underhand methods in order to compete favourably with this informal sector and make up for the tax provision.

The Zambia Competition and Commission has been in existence and operational for over one and half years. Since its establishment, the commission has tried to implement its mandate that is to say, regulating any activity which prevent, restrict, or indeed distort competition or any factor clearly which goes against section 8 of the Competition and Fair Trading Act. From its inception, the Zambia Competition Commission has recorded some success, but hasn't fared as expected due to the following reasons;

The Commission has acted inappropriately in some cases, where it has held as overriding, the interest and welfare of workers in companies on the verge of collapse, which have been taken over. The case in point is the take over of Northern Breweries Company Ltd by Zambia Breweries PLC. The fact that the Commission sanctioned the take-over is wrong in so far as the enabling statute is concerned. Its mandate is very clear. The commission approved anti-competitive conduct and assumed the role of government in upholding the welfare of workers in disregard of the interest and welfare of consumers whose interest in any event the commission is mandated to protect. It is submitted that there is adequate legal mechanisms put in place for the protection of former workers of defunct companies.

Although the Commission has been in existence for one and half years, it has not sold itself to the public, and very few people know about it and its activities. It is the duty of the commission to sell itself to the public so that the people can know where to channel their complaints. By so doing, the commission will be able to know some of the cases which have never come to their attention. Currently they rely on press reports and few complains from customers who know their existence.

The commission has no powers to prosecute anyone violating competition rules. It can only recommend to the Director of Public Prosecution to take action. While the Act provides for an offence for anyone, violating competition law (S.8 of the Competition and Fair Trading Act), the act does not provide for the powers to the Commission to prosecute the offenders.

ii

The Zambia Competition Commission operates like a government department, with a lot of political interference from politicians. The case in point is the Flash Commuter Buses where the Commission cannot make a decision because of political pressure. The mandate of the Commission is very clear as stated in the Competition and Fair Trading Act. The Act creates a commission which is very autonomous and independent of government interference - S.4 of the Competition and Fair Trading Act.

Funding is one of the problems the commission is facing. It has to wait for government funding every year through the Ministry of Commerce, Trade and Industry. While the Competition and fair Trading Act (S.4 (11) provides that the funds of the commission will be appropriated by parliament, it's still continuing receiving funds through the Ministry. This does not auger well, because the Commission has to continue competing for allocations from the said Ministry with other departments in the same ministry.

The Commission is understaffed. There are very few professional in certain specialised

fields. The Competition and Fair Trading Act (S.4(7)) only provides for employment of the Executive Director and the secretary. It's silent on other supporting staff. The secretary to the commission has not been employed to date and few professionals have been employed to date. It is submitted that the Commission should employ adequate and qualified staff to enable the commission carry out its mandate properly.

Cases take unnecessarily long to be resolved. Unlike other Commissions, like INDOCOPI (Peru) which has branches in every major town and resolves cases within three months, some of the cases in Zambia have already taken more than one year, and yet the decisions have not been made. Cases in point include, Virtrex paints Ltd, Group 3 security Company Ltd and the Coca-Cola case to mention but three.

Inconsistent government policies, which puts the Commission in a very awkward position to operate in. The case in point is the Flash Commuter Buses.

The Current Chief Executive officer of the Commission was appointed by the Minister of Commerce, Trade and Industry. The Competition and Fair Trading Act provides that the chief executive officer and the secretary to the commission be appointed by the Commission. This causes the chief executive to pay allegiance to the Minister and other government officials instead of the Commission. It is submitted that for the commission to be independent, it should be detached from all government activities

Despite ZCC being in operation for one and half year, the members of the council have not been appointed in accordance with S.6(1) of the Competition and Fair Trading Act. It is suggested that, the members of the council should be appointed immediately by the minister in terms of section 4(1) of the Act..

Footnotes

1. Personal Interview, **The Chairman - Economics Association of Zambia**, 20/08/99
(Dr Mosses Banda)
2. A.B Chikwanda, '**New Economic Recovery Measures**' paper presented to ZINCOM Economic Symposium on the analysis of the New Economic Recovery Measures, Mulungushi Hall, Lusaka 1-2 October, 1987
- 2.** Bos, H.C Sanders M and Secchi c **Private Foreign investment in Developing Countries**. D . Reidel Publishing Company, Dordrecht - Holland/ Boston - U.S.A
1974
4. Chileshe J H **Third world countries and Development Options Zambia**. Vikas Publishing House Pvt Limited !986
5. Times of Zambia, July 30th 1999
6. Times of Zambia, September 27,1999

STATUTES

1. Companies Act : CAP 388 of the laws of Zambia
2. Privatisation Act : CAP 386 of the laws of Zambia
3. Competition and fair Trading Act: CAP 417 of the laws of Zambia
4. Investment Act : CAP 385 of the laws of Zambia
5. Stock Exchange Act: CAP 354 of the laws of Zambia

BIBIOGRAPHY

BOOKS AND JOURNALS

1. ANDY P.H. (ED) **PRIVATE FOREIGN INVESTED AND THE DEVELOPING WORLD**. NEW YORK PRAEGER PUBLISHERS 1970.
2. AKE C. **POLITICAL ECONOMY OF AFRICA** LONGMAN NIGERIA LTD 1981.
3. BALDWIN R. **ECONOMIC DEVELOPMENT AND EXPORT GROWTH: A STUDY OF NORTHERN RHODESIA 1920 - 1960**. UNIVERSITY OF CALIFORNIA PRESS, BERKELEY AND LOS ANGELES 1966.
4. **BUDGET ADDRESS** (VARIOUS YEARS 1990 - 1999)
5. Bo Soderstern **INTERNATIONAL ECONOMICS** 1982 ST MARTIN PRESS NEWYORK
6. CHILESHE J.H. **THIRD WORLD COUNTRIES AND DEVELOPMENT OPTIONS**. ZAMBIA VIKAS PUBLISHING HON. C. PVT LTD 1986.
7. CLIVE S (ED) **SOURCE OF THE LAW OF INTERNATIONAL TRADE** HEINMANN PUBLISHERS LONDON(1964)
8. ELLIOT C. **CONSTRAINTS OR THE ECONOMIC DEVELOPMENT OF ZAMBIA**. OXFORD UNIVERSITY PRESS 1970.
9. GOWER LCB **THE PRINCIPLES OF MODERN COMPANY LAW** 4TH ED (LONDON STEVEN AND SONS LTD).
10. ROBERTS A: **A HISORY OF ZAMBIA**. OXFORD UNIVERSITY PRESS 1971
11. HOLIS BC **POVERTY AND PROGRESS CHOICES FOR DEVELOPING WORLD** 1978.
12. TUROK B (ED) **DEVELOPMENT IN ZAMBIA**.AFRCAN PUBLISHING HOUSE, NAIROBI, KENYA 1984

13. MARSHAL ALFRED **PRINCIPLES OF ECONOMICS** 1964 MC MILLAN & CO Ltd LONDON
14. MARX K. **CAPITAL** (MOSCOW 1954) ED FA VON HAYEK - LONDON
15. MARTINA. **MINDING YOUR OWN BUSINESS** LONDON HUTCHINSON 1972.
16. MINISTRY OF COMMERCE, TRADE AND INDUSTRY, **PRIVATISATION PROGRAMME IN ZAMBIA REPPORT TO THE CONSULTATIVE GROUP MEETING**, PARIS, MARCH 1992 (UNPUBLISHED)
17. **MOVEMENT FOR MULTI-PARTY DEMOCRACY (MMD) MANIFESTTO.**
18. MULWILA J.M. **PARASTATALS COMPANIES AND THE LAW IN ZAMBIA** (PHD) THESIS LONDON UNIVERSITY 1980.
19. NDULO M. **LAW IN ZAMBIA** GOVERNMENT PRINTERS LUSAKA 1984.
20. NWOGUGU E. **THE LEGAL PROBLEMS OF THE FOREIGN INVESTMENTS IN DEVELPING COUNTRIES.** MANCHESTER UNIVERSITY PRESS USA 1965.
21. ORGANISATION FOR THE ECONOMIC CORPORATION AND DEVELOPMENT (OCED): **INVESTING IN DEVELOPING COUNTRIES: FACILITIES FOR THE PROMOTION OF FOREIGN PRIVATE INVESTMENT DEVELOPING COUNTRIES** PARIS 1970.
22. PETER B (ED) **INTERNATIONAL ECONOMICS** 3rd ed ZED PRSS LONDON 1971
23. SMITH A **THE WELTH OF NATIONS** VOL 1 1910 ST MARTINS PRESS NEWYORK
24. SMITH de SA **FOUNDATIONS OF CONSTITUTIONAL AND ADMINISTRATIVE LAW** 4th ed 1973 PENGUIN EDUCATION LONDON
25. SEIDMAN A. **THE NEED FOR INDUSTRIAL STRATEGY IN ZAMBIA**, 1973 UNZA MEMO. (unpublished)
26. SHAFTO T **ECONOMICS IN THE MODERN WORLD** 1969 PITMAN PRESS LONDON
27. SHIRLEY M. NELLIS I **PUBLIC ENTERPRISES REFORM. THE LESSON OF EXPERIENCE** (WORLD BANK) DEVELOPMENT REPORT WASHINGTON DC WORLD BANK 1989.

28. SIMWINGA A. K. **CORPORATE AUTONOMY AND CONTROL OF STATE ENTERPRISES** PHD THESIS.
29. TUROK B **CONTROL IN THE PARASTATAL SECTOR IN ZAMBIA "LAW IN ZAMBIA"** (EAST AFRICA PUBLISHING HOUSE LTD NAIROBI, KENYA 1984.
30. YOUNG A: **INDUSTRIAL DIVERSIFICATION IN ZAMBIA**. NEW YORK: PRAEGER PUBLISHERS 1973.
31. WADE. HWR **ADMINISTRATIVE LAW** 6TH ED OXFORD 1988.
32. WLODZIMIEZ Brus: **THE MARKET IN A SOCIALIST ECONOMY** 1972 ROUTLE AND KEGAN PAUL LONDON
33. ZAMBIA COMPETITION COMMISSION (ZCC) **ITS FUNCTIONS AND OBJECTIVES** - GOVERNMENT PRINTERS 1997
34. **ZAMBIA TOWARDS ECONOMIC INDEPENDENCE** an address by President Kaunda to UNIP National Council 19th April 1968 Lusaka.