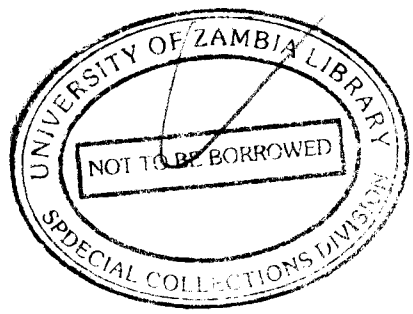
A REVIEW OF THE COMPETITION LAW OF ZAMBIA



by

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AN OBLIGTATORY ESSAY SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF ZAMBIA IN SUBSTANTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE BACHELOR OF LAWS DEGREE (LLB)

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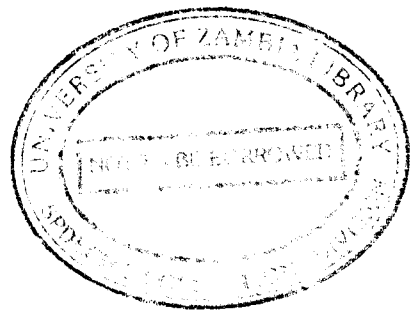

DECLARATION

I, **Thulasoni Gilbert Kaira**, Student No. **22097554**, hereby declare that I am the author of this Directed Research paper titled "**A Review of the Competition Law of Zambia**".

Due acknowledgment has been given where other scholars' work has been used or copied. I truly believe that this paper has not been previously presented to the Faculty of Law at the University of Zambia for academic work.

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

Date: 08/02/08

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ABSTRACT

The Competition and Fair Trading Act, 1994, (the Act) CAP 417 of the Laws of Zambia, was enacted in 1994 to address the rules of competition in commerce and trade in the domestic economy following market economic reforms that were ushered in after 1991. The enactment of a competition law in Zambia was first of its kind and so has been the implementation since 1997 when the Zambia Competition Commission was established. This law has been in force for 10 years now, a long period that invariably necessitates some form of "stock taking". This dissertation highlights the major provisions of the competition law of Zambia and analyses their application. These are exemptions to the law, anti-competitive trade practices, and mergers and acquisitions. Through this, it is hoped that academic interest would be developed in the subject matter at the University of Zambia, noting that the School of Law has introduced a combined "Intellectual Property and Competition Law" course. The dissertation largely benefited from secondary data available with the Zambia Competition Commission, vast array of literature available on the subject matter and discussions with key staff at the Commission. While the findings show that the law is complex and somehow ambiguous, and that some provisions would need revision, the process would greatly benefit from the presence of some higher level of knowledge in the rationale of this law and the mischief it is legislated to arrest.

(Key words: competition, anti-competitive, vertical arrangements, horizontal arrangements, mergers & acquisitions)

DEDICATION

I thank the Lord for seeing me through all these very hard 4 years, and I am grateful that in this time, He afforded me good health, a sustainable financial base to afford the K1.2 million per course fee, desirable logistical capacity, and easy access to research and printing facilities that eased my way through to this point. And thus, to Christ alone be all the glory, honour and praise and to his cause of justice, even for the poor, I dedicate this work.

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Lastly, I wish to pay glowing tribute to these colleagues, who assisted always to unblock my mind that was often stuck in the mud - Evans Sodala, Amb. Japhet Chulu, Gabriel Lesa and Magistrate Chrisantos Chandi. I am confident that with you, our class has really offloaded great legal minds who will change the legal profession in Zambia. God bless.

Thula. 8 February 2008.

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TABLE OF ACRONYMS

ACC	-	Anti-Corruption Commission
ACCC	-	Australian Competition and Consumer Commission
BFSA	-	Banking and Financials Services Act
BOZ	-	Bank of Zambia
CAT	-	Competition Appeals Tribunal
CAZ	-	Communications Authority of Zambia
EC	-	European Commission
ECJ	-	European Court of Justice
ERB	-	Energy Regulation Board
EU	-	European Union.
DGFT	-	Director-General of Fair Trading
IP	-	Intellectual Property
IPR	-	Intellectual Property Rights
MMC	-	Mergers & Monopolies Commission
OFT	-	Office of Fair Trading
RPC	-	Restrictive Practices Court
UNCTAD	-	United Nations Conference on Trade and Development
WTO	-	World Trade Organisation
ZCC	-	Zambia Competition Commission

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CHAPTER ONE

1.0 INTRODUCTION AND RELEVANT BACKGROUND TO COMPETITION LAW

Competition Law, or "anti-trust" law as it is reverently referred to in the United States (and "anti-monopoly" law in Germany), is a law that principally addresses anti-competitive business or trade practices in an economy. The first such law was enacted in Canada in 1889, and the second and perhaps renowned one was the Sherman Act of 1890 of the United States. Before 1890 the only "antitrust" law was the common law. Contracts that were allegedly restrained trade (price-fixing agreements, for example) were not often legally enforceable, but such contracts did not subject the parties to any legal sanctions.

The introduction of competition law in Zambia in 1994 by way of the enactment of the *Competition and Fair Trading Act*[1] was the first time Zambia introduced such a law. The law was part of the measures put in place to ensure a gainful liberalisation of the economy by the then new Government that had come into power in 1991 based on undertakings of market reform. A major component of the undertakings was the delinkage of the State[2] from being an active market participant, to being a "facilitator" of business. Prior to 1991, the State played all the roles of being a policy formulator, market player, as well as that of a self-regulator. Self-regulation was seen in areas such as price controls through Cabinet, Government departments and special committees. The Government grip on the economic activity was perhaps more exemplified by the fact that the President of the Republic of Zambia was actually the Chairman of the Zambia Industrial and Mining Corporation (ZIMCO), which oversaw the operations of all State Owned Enterprises (SOEs).

The shift from 1991 saw the dissolution of ZIMCO and the establishment, under statute, of various regulatory agencies such as the Zambia Privatisation Agency, the Zambia Investment Centre, the Securities and Exchange Commission, the Energy Regulation Board, the Communications Authority, the National Water Supply and Sanitation Council (NWASCO) and the Zambia Competition Commission. Unfortunately, most of the statutes establishing

[1] CAP 417 of the Laws of Zambia

[2] Which was done through the enactment of the Privatisation Act that was passed in May 1992. This law was used to sale off previously major State Owned Enterprises such as Zambia Breweries, Chilanga Cement, Zambia Sugar, InterContinental Hotel, etc

these institutions were not backed by distinct and comprehensive policy documents but relied on Cabinet decisions and consultancy reports. For instance, there was, and there still is no elaborate national competition policy. The enactment of the Competition and Fair Trading Act (supra) was based on a Cabinet decision, after which a consultant was engaged. The consultant's report of June 1993 titled "Implementation of a Competition Policy in Zambia" (Banda, et.alia)[3] contained a draft legislation, which draft was then progressed through the public service system and passed into law in May 1994.

According to the report's findings, there was need (in a liberalised economy) "for a regulatory mechanism for controlling powers of the market. The major concern of competition policy is the accumulation of economic power by firms through acquisitions, mergers, price fixing, collusion and other unfair business practices which result into undercutting other competitors. The assumption being that the free trade provides a wider choice of goods. In reality, this is not necessarily the case as reflected by history of American anti-trust laws and economic activities."

This was, *inter alia,* the mischief that the law was aimed at arresting and appeared to have been recast into objectives in CAP 417, as follows:

An Act to:

(i) encourage competition in the economy by prohibiting Anti-competitive trade practices;

(ii) regulate monopolies and concentrations of economic power;

(iii) protect consumer welfare;

(iv) strengthen the efficiency of production and distribution of services;

(v) secure the best possible conditions for the freedom of trade,

(vi) expand the base of entrepreneurship; and

(vii) provide for matters connected with or incidental to the foregoing.

The Act[4] thus set out mechanisms to deal with matters that would be inimical to the foregoing. The word "competition" itself is not defined in the Act.

[3] Banda, et.al, Implementation of a Competition Law and Policy in Zambia, a consultancy report to the Ministry of Commerce, Trade and Industry.

[4] Supra Note 2

1.1 Statement of the Problem

Competition Law is a relatively new field of study and interest in Zambia. While the law has been in existence since 1994, few legal practitioners and academics do not appear to have developed a sufficient degree of interest to explore this growing sphere of law. This is despite that this law has a great impact on other spheres of law such as intellectual property law, investment law and industry specific regulatory laws such as those in energy and telecommunications. Under the *Telecommunications Act*[5], its Section 5 addresses competition in the telecommunications sector. This also extends to the energy sector, where under the *Energy Regulation Act*[6], Section 6(1) states that: (The Board Shall) "in conjunction with the Zambia Competition Commission established by the Competition and Fair Trading Act, monitor the levels and structures of competition within the energy sector with a view to promoting competition and accessibility to any company or individual who meets the basic requirements for operating as a business in Zambia". Further, there are elaborate competition provisions in Sections 40-42 of the *Banking and Financial Services Act,* CAP 387 of the Laws of Zambia.

While the law was arguably enacted at the behest of the World Bank as part of a conditionality under the Structural Adjustment Programme of the early 1990s, some of the content and scope of the current competition law would appear to require reviewing after a 10 year implementation period. Any law has to be dynamic and should be well drafted in such a way as to address contemporary issues[7].

1.2 Rationale of the Study

Despite the competition legislation being enacted in 1994 and enforced since 1997 in Zambia, there is very little indepth knowledge about this law. The rationale is to bring to the academic

[5] 1994, CAP 469 of the Laws of Zambia

[6] 1994, CAP 436 of the Laws of Zambia

[7] There are uncertainties about the likely impact of competition policy upon the practice of business that arise from the fact that its operation requires the exercise of a considerable degree of expert judgement. Its legislative framework normally provides no more than a broad indication of the intentions of the policy makers who devised it, and it delegates to the authorities which it appoints, a wide range of discretion in their performance of the task of giving practical effect to those intentions. Also, its rationale is in some respects incomplete, leaving scope for a range of interpretations – The Citizen's Compedium, http://en.citizendium.org/wiki/Competition_policy

fore the presence and relevance of this law to academicians and practitioners in the legal and economic sectors.

1.3 General Objectives

The objective of the study is to understand the provisions of the *Competition & Fair Trading Act*, CAP 417 of the Laws of Zambia. It is hoped that the review would provide a better understanding of this important law and also provide an overview of its inadequacies, if any, in fully meeting its intended objectives. It is also hoped that the study will stimulate academic, practitioner, and student interest in this law in Zambia.

1.4 Specific Objectives

(i) To explain what competition law is and its rationale
(ii) To review scope and necessity of exemptions to the application of the Act
(iii) To review the anti-competitive provisions in the Act
(iv) To review the merger and takeover provisions in the Act
(v) To consider possibilities of improving future developments of the competition law.

1.5 Research Questions

(i) What is competition law?
(ii) What is the scope and necessity of exemptions in the competition law?
(iii) How does the Act address anti-competitive trade practices?
(iv) What are the merger and takeover provisions in the Act and their scope?
(v) In what ways can the competition law be improved upon?

1.6 Hypotheses

(i) It is impossible to appreciate competition law in Zambia without understanding its background, the rationale and objectives of its existence
(ii) Some of the exemptions to the application of the competition law are not necessary and should be limited in their scope.

(iii) Anti-competitive trade practices in the Act are not exhaustive enough and appear to be ambiguous

(iv) Merger and acquisition provisions in the Act are not adequately framed

(v) The current competition law needs to be reviewed and repositioned to the general public

1.7 Scope of the Study

The study is confined to a review and understanding of the Zambian *Competition and Fair Trading Act*, CAP 417 of the Laws of Zambia and the provisions therein.

1.8 Definition of key terms

Anti-competitive trade practice	Anything done in the market place by any person that has the effect of preventing, restricting or distorting competition
Competition	Rivalry between two or more independent persons supplying substantially similar products or providing substantially similar services in the same market.
Competition Law	A specific legal framework or branch of law that regulates the behaviour of persons in a market place in relation to competition
Horizontal arrangement	Any implemented decision involving competitors
Merger or acquisition	Combination of two or more entities under common control, also includes joint venture and takeover
Person	Any natural or artificial persons engaged in commercial activity

Vertical arrangement	Any decision involving persons in the production and marketing chain (i.e. from the supplier/producer to the consumer)

1.9 Methodology and limitations of the study

The study relies primarily on secondary data available at the Zambia Competition Commission as well as discussions held with the senior staff at the Commission. A review of literature on the subject of competition has also been carried out. A questionnaire was designed (ANNEXURE 1) for primary data collection but the response was poor thus the information could not be used as it was not representative.

1.10 Literature Review

Article 46(1) of the *Havana Charter*[8] prescribed that "Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives...". Competition law thus does only have a national but also a very pertinent international character in the form of trade amongst the international community of nations.

The United Nations Set of Principles and Rules on Competition ("The UN Set")[9], are an international appeal to all members of the UN to implement principles and rules for the control of restrictive business practices in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting

[8] FINAL ACT OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, The Economic and Social Council of the United Nations, by a resolution dated February 18, 1946, resolved to call an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods. The Conference, which met at Havana on November 21, 1947, and ended on March 24, 1948, drew up the Havana Charter for an International Trade Organization to be submitted to the Governments represented.

[9] *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UNCTAD/RBP/CONF/10/Rev.2, 2002, United Nations, Geneva

world trade, particularly those affecting the trade and development of developing countries;

2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:

   (*a*) The creation, encouragement and protection of competition;
   (*b*) Control of the concentration of capital and/or economic power;
   (*c*) Encouragement of innovation;

3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;

4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;

5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

Restrictive Business Practices (RBPs) have been domesticated in the Zambian competition legislation, principally enumerated as "anti-competitive trade practices under Section 7 of the Act[10]. The competition law in Zambia also deals with mergers and takeovers[11]; trade agreements (or cartels)[12], anti-competitive trade practices by trade associations[13]; control of concentrations of monopolies and concentrations of economic power[14]; and unfair trading[15] provisions.

[10] Supra Note 1
[11] ibid., Section 8
[12] ibid., Section 9
[13] ibid., Section 10
[14] ibid., Section 11
[15] ibid., Section 12. Which have principally been considered to be aimed at protecting consumers against traders

Behind all these provisions is a policy desire to have mechanisms to deal with bottle-necks in the effective functioning of markets. Frederic Jenny (2001)[16] has posited that despite competition, there must be a mechanism to prevent firms from the natural inclination to eliminate each other. In the absence of such a mechanism, the expected overall benefits of decentralised decision making (post liberalisation period), will be partly lost and transformed into rents by monopolistic firms. He submitted that the major goal of competition law is thus to allow firms to take advantage of business opportunities and to make sure that through the competitive process, the actual working of decentralised markets will foster static and dynamic economic efficiency to the fullest possible extent given the regulatory environment of such markets.

Thus policy (pronounced or not) begets the legal framework for dealing with market failures. According to the World Bank[17], an appropriate competition policy includes both:

(a) policies that enhance competition in local and national markets, such as liberalized trade policy, relaxed foreign investment and ownership requirements, and economic de-regulation, and
(b) competition law, also referred to as antitrust or antimonopoly law, designed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace.

Adam Smith[18] was also a keen advocate of the free market enterprise, and in *Wealth of Nations* indicated that: "Competition, unrestricted by the State or any other agency, was the first condition of economic expansion and, therefore, ultimately of an increase in the satisfaction of the wants of all members of the community." However, Smith was himself under no illusion about the desire of individuals, including business men, to create privileged positions for themselves (Roll, 1992). Without the intervention of Government to help them and given an active policy to preserve competition, those in search of monopoly were powerless. Therefore, while Adam Smith advocated for a lasseiz-faire approach to running the economy, he however was receptive to the idea of regulating harmful desires of the business person. No wonder Adam Smith said that:

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[16] *Globalisation, Competition and Trade Policy: Convergence, Divergence and Cooperation,* International and Comparative Competition Law and Policies, edited by Yang-Ching Chao, Gee San, Changfa Lo and Jiming Lo, 2001, Vol. 3, Kluwer Law International, The Hague

[17] The World Bank: http://www.worldbank.org/privatesector/ic/ic_faq.htm#Competition%20Policy/Reducing%20Barriers%20to%20Entry%A0

[18] Adam Smith, Wealth of Nations, Vol ii p177

People of the same trade seldom gather together, whether for merriment or diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices.

Various authorities such as Porter (1985: 1) states in his book *Competitive Advantage* that "Competition is at the core of the success or failure of firms. Competition determines the appropriateness of a firm's activities that can contribute to its performance, such as innovations." Porter continues that "Competitive Strategy is the search for a favourable competitive position in an industry, the fundamental arena in which competition occurs". The search or rivalry, as Porter puts it, for a so-called "favourable" competitive market position is not without bullies, predators, opportunists, and ultimately, casualties. Thus the law on competition strives to control the adverse effects of the exercise of market power[19].

The foregoing development has thus necessitated the enactment of a legal framework to monitor, control and prohibit any acts or behaviours that distort, prevent or restrict competition[20].

1.11 Thesis outline

Generally, competition experts classify the foregoing into 4 major elements being vertical restraints or arrangements; horizontal restraints or arrangements; abuse of dominant position of market power; and mergers and acquisitions (UNCTAD Model Law on Competition). RBPs, which are discussed in detail in Chapter 3 of this paper, can be vertical or horizontal in effect. Vertical arrangements concern the production and marketing chain; while horizontal arrangements concern agreements between competitors. Abuse of dominant position of market power has increasingly become a focal point in contemporary competition law and addresses RBPs engaged in by firms that have or exercise sustainable market power – usually large, dominant or monopoly firms. As regards mergers and acquisitions, these can equally be vertical, horizontal or conglomerate in nature (i.e. between firms in unrelated industries). All these are discussed in detail in Chapter 3 and Chapter 4.

[19] CAP 417
[20] ibid., Section 7

To an increasing extent, consumer welfare and protection has become an integral part of competition laws in countries such as Zambia[21] and Australia[22]. Some countries such as India have separate laws dealing with consumer welfare and protection.

While introducing the subject matter, this chapter has highlighted the background to the competition law in Zambia, its rationale and objectives. The chapter has further highlighted the major components of competition law generally and those in the Zambian legislation in particular. The chapter has also laid a foundation for the problem statement, rationale of the study, the objectives, research questions and the hypotheses thereof.

The next chapter shall deal with the exemptions to the application of the competition law in Zambia.

[21] Section 12 of the Competition & Fair Trading Act, CAP 417 of the Laws of Zambia
[22] ref. *Trade Practices Act, 1974.*

CHAPTER 2

2.0 THE SCOPE & NECESSITY OF THE EXISTING EXEMPTIONS TO THE APPLICATION OF THE COMPETITION LAW

While the objectives of the competition law are quite wide in the economic context, there are legal limitations to the enforcement of this law. Prof. Frederic Jenny has observed that in most countries, the coverage of competition law is limited through exemptions and exceptions which are not necessarily economically justified[23]. In Zambia, these limitations are contained under Section 3 of CAP 417. Khemani[24] has posited that "Best practice" advice recommends that competition (antitrust or antimonopoly) law should be a *general law of general application;* that is, the law should apply to *all sectors* and to *all economic agents* in an economy engaged in the *commercial* production and supply of goods and services. In this regard, both private and public (i.e. State) owned and operated enterprises should be subject to the same treatment. This is because all economic activity is interdependent.

This chapter attempts to consider the scope and necessity of the current exemptions to the application of the competition law. The exemptions would appear to have the effect of affecting the extent to which the Zambia Competition Commission can exert its legal influence on competition matters.

2.1 Functions of the Commission

The Commission is given a broader than fictitious mandate in Section 6(1) of CAP 417, which gives it power to "monitor, control and prohibit acts or behaviour that are likely to

[23] Frederic Jenny, Vice Chairman, Competition Council, France, Environment and Competition, INWENT, www.inwent.org/ef-texte/wto/jenny-e.htm

[24] R.Shyam Khemani, APPLICATION OF COMPETITION LAW: EXEMPTIONS AND EXCEPTIONS, (LECG, Europe), published by UNCTAD, UNCTAD/DITC/CLP/Misc.25

adversely affect competition and fair trading in Zambia"[25]. Notwithstanding Section 6(1), Section 6(2) of the Act appears to be relatively extensive as follows:

"Without limiting the generality of sub-section 6(1), the functions of the Council shall be:

(a) 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;
(b) carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;
(c) to take such actions 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;
(d) to provide persons engaged in business with information regarding their rights and duties under this Act.
(e) to provide information for the guidance of consumers regarding their rights under this Act;
(f) to undertake studies and make available to the public reports regarding the operation of the Act;
(g) 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
(h) to do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act."

However, these functions have limitations placed by virtue of Section 3 of the Act. These are discussed in detail in the next section.

2.2 Limitations to the scope of the law

Section 3 of the Act states that : "Nothing in this Act shall apply to –

(a) activities of employees for their own reasonable protection as employees;
(b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;

[25] Section 6(1) of CAP 417

(c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;

(d) the entering into an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade mark;

(e) any act done to give effect to a provision of an agreement referred to in paragraph (d);

(f) activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party;

(g) activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public; and

(h) such business or activity as the Minister may, by statutory instrument, specify."

The rationale of the exemptions does not appear to have been addressed in the consultant's report[26] that proposed the enactment of the competition law in Zambia. Salient exemptions in the Zambian legislation pertain to trade union activity, intellectual property, activities of the State, and of professional associations. These are discussed below.

2.2.1 *Exemption of Trade Unions*

The underlying policy objective for exempting trade union activity could be that there is an overriding public benefit to have such an exemption. Perhaps it would also be because trade union activity is not per se of a commercial nature. Allowing for competing trade unions within a homogenous workforce may likely work against the greater benefit of achieving the "greatest good for the greatest number" (As advanced by Jeremy Bentham in the "Utility Theory").

2.2.2 *Exemption of Intellectual Property*

Intellectual Property is exempted from the application of the competition law in so far as it related to the "*use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade mark*". This exemption may have been necessitated by the primary goal of ensuring that there was no excessive regulatory interference in the development of intellectual property. Khemani[27] has recognised the exemption accorded to intellectual property rights (IPRs) as one of the more complex areas of competition law and policy.

[26] Supra Note 3
[27] Supra Note 22

Protecting and conferring statutory monopoly rights in respect of patented, trademark and copyright products is aimed at creating incentives not only for inventive activity but also for the early disclosure of inventions, and the diffusion of new ideas, products and production methods. Through such incentives, technological change and progress can be fostered and result in dynamic economic efficiencies. In this regard, he cautions that there is need to have a careful balance struck. Since exemptions in this area grant statutory monopoly rights to firms in respect of the IPR protected product(s) and exclude coverage of such matters as the prices that can be charged, the licensing of the product, geographical markets, and exclusive dealing, the firms can potentially abuse their dominant market position. In such cases, provisions need to be in place for withdrawing or limiting the exemptions.

The UNCTAD[28] has also observed that competition policies in major developed countries or regions generally take a favourable attitude towards possession of intellectual property rights (IPRs), but take issue with the exercise that may have the effect of abuse of market power derived from the possession of IPRs. Thus, intervention may be undertaken where a pragmatic case-by-case analysis indicates IPR-based market power is unreasonably restraining competition in relevant markets. There is concern about some firms using IP to create barriers to entry, refusal to deal with distributors who do not abide to exclusive contracts, refusals to license IPRs or to sell IPR-protected products. Accordingly, despite the general consensus to the exclusion of the possession and/or licensing aspect of IP to the application of competition law, the extent of the exemption in so far as the exercise of IP generated market power remains as grey zone that the court have been willing and able to challenge. This is more so in the wake of such provisions as Section 7(1) of our CAP 417.

UNCTAD have recognized the complexities that arise when there is a clash between IP and competition laws. Taking into account the competition policy issues likely to arise as the[29]. Major competition law jurisdictions such as the United States and European Union appear to correlate the exercise, as opposed to the possession, of IPRs to whether there is an element of abuse of dominant power acquired through the possession of such IPRs. The European Court of Justice (ECJ) case law has also held that "so far as a dominant position is concerned ...

[28] COMPETITION POLICY AND THE EXERCISE OF INTELLECTUAL PROPERTY RIGHTS, Revised report by the UNCTAD secretariat, reference TD/B/COM.2/CLP/22/Rev.1, 19 April 2002

[29] ibid.

mere ownership of an intellectual property right cannot confer such a position"[30]. Whether a firm possessing IPRs is dominant and also abusive thereof appears to have been the gist behind the Federal Trade Commission[31] in the USA to take Microsoft to court.

In the famous *United States of America v Microsoft* ("the Microsoft Case")[32], the plaintiffs charged, in essence, that Microsoft has waged an unlawful campaign in defense of its monopoly position in the market for operating systems designed to run on Intel-compatible personal computers ("PCs"). Specifically, the plaintiffs contended that Microsoft violated Section 2 of the Sherman Act by engaging in a series of exclusionary, anticompetitive, and predatory acts to maintain its monopoly power. They also asserted that Microsoft attempted, albeit unsuccessfully, to monopolize the Web browser market, likewise in violation of the said Section 2. Finally, they contended that certain steps taken by Microsoft as part of its campaign to protect its monopoly power, namely tying its browser to its operating system and entering into exclusive dealing arrangements, violated Section 1 of the same Act.

The Court affirmed that Section 2 of the Sherman Act[33] declares that it is unlawful for a person or firm to "monopolize . . . any part of the trade or commerce among the several States, or with foreign nations..." The offence of monopoly power under Section 2 of the Sherman Act was identified to have two elements. The first was the possession of monopoly power in the relevant market and the second being the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The Courts in Zambia or the Competition Commission have not yet had occasion to adjudicate over this provision and the extent to which it can be allowed to exist where the exercise of IPRs adversely affects competition and fair trading conditions. This may be because there have not been cases that the Commission has handled that have traversed the two laws to point of litigation. Further, it would appear that IP/competition law cases are complicated and would require relatively costly expertise as well as finance.

[30] ECJ, 6.4.1995, *RTE and ITP/Commission*, C-241/91 P, ECR 1995, I-743, I-822, point 46.
[31] The US equivalent of the Zambia Competition Commission
[32] Civil Action No. 98-1232 (TPJ); and No. 98-1233 in the District Court for the District of Columbia
[33] the principle competition legislation in the USA.

2.2.3 *Exemption on activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party*

Section 3(f) would appear to give Statutory Immunity to the application of CAP 417, but also to extent has defined the limitations of the Sovereign acts to which such immunity can be extended i.e. to "activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party". The Courts in Zambia have not had occasion to interpret Section 3(f). This is because the Commission has not ventured to have a head-to-head court battle with the State. Where the State is a party, the Commission has tended to rely on "Advisory Opinions" or what is referred to as "Competition Advocacy". The Section 3(f) provision would appear to be conditional and not absolute. Until such a time that the Court has occasion to interpret this provision, the question would still remain: How do we define "activities expressly approved or required under a treaty or agreement" to which the Republic of Zambia is a party? An attempt in made below.

(i) Who or what is the Republic of Zambia?

Section 2 of the Interpretation Act[34] states that "the Republic" means the sovereign Republic of Zambia; "Government" means the Government of Zambia. In the State Proceedings Act[35], the "State" also means the sovereign Republic of Zambia. This is to be construed to be all the three organs of the State and the departments or offices falling under their direct control. These are further the ones which can sue or be sued in the name of the Attorney-General[36]. In this context, this should exclude independent statutory bodies and/or those that are corporate sole and are able to sue and be sued in their own name, because they have a distinct legal personality from that of the "Republic", "Government" or "State". However such independent bodies can only be deemed to be exempt from the provisions of the Act if the conduct they are engaged in has an "express approval" of "the Republic" through its various offices.

(ii) What are the "activities" ?

Where there is a Sovereign prerogative, e.g in issuance of policy guidelines and other constitutional functions of Government, these are clearly matters with "express approval" and Section 3(f) properly applies. The actitivites may also be what the Minister may by SI provide - as provided for under Section 3(h) of CAP 417. The UNCTAD Model Law on Competition

[34] CAP 2 of the Laws of Zambia
[35] CAP 71 of the Laws of Zambia
[36] Supra Note 2

(Article 2(II)(c) in the 2002 edition has acknowledged that the scope of application of competition law does not apply to the sovereign acts of the State itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power In the case of *Civil Service Unions v. Minister for the Civil Service*[37] it was held that "*...all powers exercised directly under the prerogative are immune from challenge in the courts.*"

(iii) *What is Express Approval?*

Unfortunately, the *Interpretation Act*[38] does not offer guidance on what "express approval" means. Under the literal rule of statutory interpretation, it may be that "express approval" has to largely be in written form, although express verbal directives from the State can also be captured. Both of these forms could be through an SI (as provided for under Section 3(h) of CAP 417), policy documents or a speech of a notable public officer such as the President and his Ministers. The Interpretation Act defines "writing" as "words in visible form". Where words in visible form are mandatory in order to impute legal effect, nothing would legally be binding until such writing has been done in the manner prescribed. Therefore, in the context of Section 3(f) of the Act, it would appear that for an exemption to take effect even against the Government, such exemption has to be "expressly approved" in one form or the other. Where there is no such express writing or other express pronouncement to convey any "express approval", exemption is not to be construed as applicable automatically.

(iv) *Consideration of Sovereign Immunity*

The online Encyclopaedia, Wikipedia[39], defines Sovereign immunity or crown immunity as a type of immunity that, in common law jurisdictions traces its origins from early English law. Generally speaking it is the doctrine that the sovereign or government cannot commit a legal wrong and is immune from civil suit or criminal prosecution. In many cases, the government has waived this immunity to allow for suits; in some cases, an individual, such as an Attorney-General, may technically appear as defendant on the government's behalf.

[37] [1984] 3 All ER 96
[38] Supra Note 9
[39] http://en.wikipedia.org/wiki/Sovereign_immunity

According to the authors of a paper titled *The King Can Do No Wrong*[40], under the Common Law, the Crown was entitled to a wide range of privileges and immunities. One of the most famous immunities of the Crown was the immunity from being sued for the tortuous acts of its agents or servants. The Crown also benefits from another important traditional immunity: a statute will not be applicable to the Crown unless there is a clear statement to that effect in said statute. Crown immunity, where available, can be removed through legislation.

Records from the *Hansard Reports*[41] of the Parliament of the United Kingdom, indicate that Crown immunity was discussed during a question and answer session in the House of Commons on 15th June 1995. A Mr Folkes asked the Secretary of State for the Environment if he would list all areas within (a) his Department, (b) agencies under his Department's control and (c) organisations for which he had ministerial responsibility to which Crown immunity applied; what consideration he had given to removing this; and if he would make a statement. In response, Sir Paul Beresford answered thus:

"An Act of Parliament is presumed not to bind the Crown unless the contrary intention is clearly stated, or there is a necessary implication that the Crown is to be bound. Ministers and civil servants will not necessarily share the Crown's immunity from criminal prosecution. The Government's policy on Crown immunity as set out in Cm 1599--"The Citizen's Charter--Raising the Standard" is that Crown immunity is being progressively reduced, as legislative opportunities arise. In the meantime, Crown bodies are expected to behave as though they were bound by regulations. In accordance with this policy, we have announced our intention to introduce legislation to place on a statutory footing the requirement for the Crown to observe town and country planning controls."

From the foregoing, it follows that the Republic of Zambia, departments under it, independent statutory bodies and parastatals are all expected to abide by the provisions of CAP 417, unless in a situation where there is an "express approval" as implied in Section 3(f) of the Act.

[40] THE KING CAN DO NO WRONG by François M. Grenier * LEGER ROBIC RICHARD, Lawyers, ROBIC, Patent & Trademark Agents Centre CDP Capital 1001 Square-Victoria- Bloc E – 8 th Floor Montreal, Quebec, Canada H2Z 2B7 Tel. (514) 987 6242 - Fax (514) 845 7874 www.robic.ca - info@robic.com

[41] Source: http://www.parliament.the-stationery-office.co.uk/pa/cm199495/cmhansrd/1995-06-19/Writtens-15.html

2.2.4 Exemption to activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public

There has been great debate as to what extent "activities" of professional associations "designed to develop or enforce professional standards" are actually "reasonably necessary for the protection of the public". For instance, the fixing of legal fees under the Legal Practitioners Act[42], can be considered to be "price fixing" within the meaning of a cartel in Section 9(3)(a) of CAP 417. To what extent the fixing of seemingly high legal fees which a large segment of society cannot afford is actually within the meaning of ""reasonably necessary for the protection of the public" is a very debatable matter. Most likely, competition would open up for affordable legal fees.

2.2.5 *Exemption to such business or activity as the Minister may, by statutory instrument, specify*

Clearly, the last proviso appears to state that the enshrined exemptions are not exhaustive. By implication, it also entails that the Minister[43] can amend the competition law by adding an exemption through a Statutory Instrument? Can a Statutory Instrument amend a substantive legislation? While this exemption has not yet been utilised by the Minister, it would be interesting how the law would be interpreted by the Courts where such an amendment was effected through an SI. It should also be noted that perhaps the inclusion pf Section 3(h) above was to limit abuse by the Minister where a directive would be made to the Commission to stop investigating a situation.

2.3 Conclusion

In concluding this chapter, it would appear that there is a lot that could be discussed regarding the exemptions under CAP 417. The underlying policies pertaining to the exemptions are not clear. Clearly, the exemptions and/or exceptions under this law are debatable, both in terms of their scope and application. There has been no judicial interpretation of any of the exemptions because no cases have been brought before the courts. It may be prudent for the Commission to have the law tested, particularly the one relating to the State and professional associations.

[42] CAP 30 of the Laws of Zambia
[43] The Minister here being the one responsible for Commerce, Trade and Industry

CHAPTER THREE

3.0 ANTI-COMPETITIVE PROVISIONS UNDER THE ACT

The term anti-competitive trade practice is as wide and perhaps confusing in more than one way. This chapter attempts to address this and consider how the anti-competitive provisions in CAP 417 are addressed. The concept introduced in Chapter One as "restraint of trade" is synonymous with anti-competitive trade practice. In referring to contracts "in restraint of trade," or to arrangements whose effects "may be substantially to lessen competition or to tend to create a monopoly," it is acknowledged that most competition statutes are relatively vague. It has been argued (by lawyers in Zambia as well) that very little statutory guidance is provided for distinguishing benign from malign practices. Thus, competition authorities and judges have been left to decide for themselves which practices would be deemed as "likely to" or "actually" infringe competition laws and qualify as "anti-competitive". An important judicial question has been whether a practice should be treated as "per se illegal" (that is, devoid of redeeming justification and so automatically outlawed) or whether it should be judged by a "rule of reason" (its legality to depend on how it is used and on its effects in particular situations)[44]. The Competition and Fair Trading Act does not use the words "per se" and "rule of reason" rather these would be deciphered from the wording of the specific provisions themselves.

As a result of the foregoing, the enforcement of competition law appears to ignite controversy and in many ways seen as an unnecessary interference with what on the face of it would appear to be legitimate business interests or goals. Competition law generally appears to foster a "neighbour principle" and extends this to one's rivals[45]. It is critical therefore to have a reasonable knowledge and understanding of anti-competitive trade practices or restrictive business practices (RBPs), as this would appear to be the key to understanding the whole of what competition law is all about[46].

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[44] "Antitrust", an article by Fred S. McChesney in *The Concise Encyclopaedia of Economics*. He is the Class of 1967 James B. Haddad Professor of Law at Northwestern University School of Law, and a professor in the Kellogg Graduate School of Business. Source: http://www.econlib.org/library/Enc/Antitrust.html

[45] It is likely that the "neighbour principle" ably espoused by Lord Atkins in *Donoghue v Stephenson,* may as well apply to the relationship between competitors or potential competitors.

[46] Ref. also to Chapter 5 of the Havana Charter

3.1 What is an anti-competitive trade practice?

PART III of CAP 417[47] addresses what are referred to as anti-competitive trade practices, etc. Anticompetitive trade practices have generally come to be considered to be in the form of horizontal arrangements (i.e. between competitors); vertical arrangements (i.e. in production & marketing chain); or conglomerate arrangements (i.e. in unrelated product markets). Section 2 of the Act, which contains definitions, defines the terminology "anti-competitive trade practices" to be the trade practices enumerated in Sections 7-10[48]. The word "competition" is not defined. However, Section 2 does define the term of "trade practice" as:

"Any practice related to the carrying on of any trade and includes anything done or proposed be done by any person which affects or is likely to affect the method of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service."

From the foregoing, a trade practice appears to have been extensively defined to be "anything" "done" or "proposed" to be done "by any person", which actually or is likely to affect "any traders" in the production, supply or pricing of any good or service. This definition would appear to cover the activities of the Government and professional associations whose debatable exemption scope under Section 3 of the Act has already been addressed in Chapter 2.

While the "trade practice" definition appears to be endless, the definition of "anti-competitive trade practice" to be a "trade practice as enumerated in Sections 7-10" of the Act does appear to limit what would be captured as a "trade practice" for purposes of determining what is "anti-competitive" trade practice or not for enforcement of the Competition and Fair Trading Act. The reference to Sections 7-10 thus appears to provide us with the nature of these seemingly limitless trade practices. The question that appears illusive from the Act is this: When does a "trade practice" become an "anti-competitive" trade practice? While the Act does not expressly define an "anti-competitive trade practice" in Section 2 except with reference to "trade practices enumerated in Sections 7-10", Section 7(1) does appear to open with another wide proposition that:

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[47] Supra Note 1

[48] Because of their special and/or extensive nature, mergers and acquisitions that are described under Section 8 of the Act shall be discussed under a separate chapter – Chapter 4.

"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 a substantial part of it are declared anti-competitive trade practices and are hereby prohibited."

It appears this provision was adopted from the competition provisions in the Treaty of Rome that established the European Union, where under its Article 85 (now article 81), a similar provision was enacted. Article 81(1) reads as follows:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market..."

While the word "decision" is perhaps easier to understand, the word "agreement" as used in the context of Section 7(1) has been a subject of judicial interpretation in foreign jurisdictions (but not in Zambia). The agreement can be express or implied – thus formal or informal, written or unwritten. Further, the agreement or "concerted practice" has to be between two independent entities but does not apply to entities that fall under a common ownership e.g. a holding company. In the case *Viho v Commission*[49], the ECJ held thus:

"All parties directly or indirectly involved in an agreement are considered to be parties to the agreement. Agreement does not apply to those "between undertakings which form a single economic unit."

Competition adjudicators appear to have considered the word "object" to also equally connote "result" or "effect" – thus taking a more pragmatic approach in application. Under European Community Competition Law, the European Court of Justice has held that:

"..... When considering whether an agreement might have anti-competitive effects, it is irrelevant that it might also have or even that it was entered into with the purpose of having quite different differential consequences..."[50]

[49] Case C-73/95P (1996) ECR I-5457
[50] Cases 96/82 etc IAZ International Belgium NV v Commission [1983]

On the matter whether an act or a conduct does have an appreciable effect on competition the European Court of Justice has laid a firm foundation that appears to have been adopted by other leading competition authorities. A trade practice that has anti-competitive effects on competition is only that which is done by a firm that has some influence on the market process on a sustainable scale. Thus in the case of *Volk v Vervaeke*[51], the ECJ established the "de minimis rule" or the "de minimis doctrine". This rule established that some conduct has little if minimal consequences on competition. In this case, a German producer of washing machines granted an exclusive distributorship to Vervaeke in Belgium and Luxembourg and guarantied it absolute territorial protection against parallel imports. Volk complained against this arrangement. Volk's market share was minute (0.5% in 1966 in Germany) while Vervaeke had a market share of 5%. The Court thus held that a firm with a market share of less that 10% was not likely to engage in a trade practice that could harm competition. The ECJ put it thus:

"An agreement falls outside the prohibition in Article 85(1) where it has only an insignificant effect on the market, taking into account the weak position the concerned have on the market for the production question."

Determining any effect on competition has inevitably meant identifying a relevant product market in which the infringement has occurred. Such determination has not been without controversy. Again, Zambia does not have any judicial interpretation to this. On the matter of "...in Zambia or a substantial part of it", the UK case *of R v. Monopolies and Mergers Commission ex parte South Yorkshire*[52] Transport, provides some insights. This case concerned a merger situation in which there was a discussion of what was meant by "substantial area of the UK". South Yorkshire Transport (SYT) was a bus company formed by the merger of five (5) bus companies. The Monopolies and Mergers Commission (MMC) decided that the merger was against the public interest. The Court of Appeal upheld an appeal from SYT. MMC appealed to the House of Lords. Their Lordships held that what amounted to "substantial" could not be subject to a hard rule and was not solely dependent upon geography or arithmetic, and thus the MMC should not be limited by the phrase. The House of Lords held that "an area was considered to be substantial if its size, character and importance made it worth considering under the Fair Trading Act 1973". Thus they held that

[51] (case 5/69) (1969) ECR 1869)
[52] (1993) 1 AllER 289

the decision of the MMC was not irrational and upheld it. A similar decision was held in the case of *Stagecoach Holdings PLC v Secretary of State for Trade and Industry*[53].

With the foregoing, Section 7(1) of CAP 417 does not appear to be as simple as it has been drafted. It appears to capture all matters that may be determined under competition law i.e. vertical arrangements, horizontal arrangements, and conglomerate arrangements. Of more concern are vertical and horizontal arrangements, which are analysed below.

3.2 Vertical Arrangements/Restraints

Vertical agreement has been defined as an "Agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services."[54] These arrangements do not appear to be explicitly covered under the competition law of Zambia but would be captured under the generic provision on Section 7(1) in the context of "any category of decisions, agreements and concerted practices". Further, to a large extent, these would appear to be closely linked, although technically different, to the instances of abuse of market power under Section 7(2). These include, discriminatory pricing, exclusive dealing, territorial restraint, resale price maintenance[55].

There is a leading case on exclusive dealing from the European Union, *Consten & Grundig v Commission*[56]. Grundig appointed Consten as its exclusive distributor in France. It also assigned to Consten the rights to a French trademark, GINT (Grundig International). The combination of exclusivity and the trademark assignment not only prevented other distributors from being appointed but also prevented parallel imports from other Member States. On appeal from a decision of the European Commission, the ECJ addressed the question whether EC competition rules could apply to vertical agreements. The ECJ held that:

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[53] 1991 Trading Law Reports, 97

[54] European Commission, Glossary of terms used in EU competition policy - Antitrust and control of concentrations, Directorate-General for Competition Brussels, July 2002

[55] For explanation and definitions of these terms and others used in Competition Law, refer to "Glossary of terms used in EU Competition Policy – Anti-trust and control of concentrations" on the competition site of EU website, www.europa.eu.

[56] Cases 56 and 58/64 (1966) ECR 299

"Article (81) refers in a general way to all agreements which distort competition within the Common Market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels".

On the other hand, the ECJ's position on Franchise Agreements appeared to be totally different to the foregoing. In *Prouptia de Paris v Schillgallis*[57], the ECJ was asked by a German court whether a franchise system fell within Article 81. The ECJ pointed out that franchise agreements for the distribution of goods differed from dealerships and selective distribution systems for three reasons. The first was because of use of a single business name; the second was the application of uniform business methods; and the third being the payment of royalties in return for benefits granted. The ECJ opined that the positive benefits to competition from franchise agreements meant that Article 81 did not catch provisions in a franchise agreement which were intended to avoid the risk that know-how and assistance provided by the franchisor might benefit competitors or which were measures necessary for maintaining the identity and reputation of the network bearing the franchisor's business name or symbol. However, the ECJ also noted that any provisions in a franchise agreement that restricted the possibility of parallel imports, which encouraged price control or which granted absolute territorial protection could be prohibited.

The ECJ did lay down core principles that appear to have been adopted by the Zambia Competition Commission in determining whether a particular vertical arrangement has had the effect of "preventing, restricting, or distorting competition to an appreciable extent in Zambia or a substantial part of it". This is more in line with the ECJ ruling in *Stergios Delimitis v Henninger Brau*[58] regarding an exclusive purchase agreement, where a two-stage test was proposed to be applied. The first was that the relevant market should be analysed to see whether it was difficult for competitors to enter the market. The second stage of the test required an analysis of the impact on the market access of the agreements entered into by the supplier in question. This appeared to be a determination of the market power that the supplier could independently exert in the market place arising out of the agreement. In other words, it is not sufficient for a competition authority to merely determine, arbitrarily or otherwise, that a vertical arrangement is anti-competitive, but there must be a process that should be followed to show that a particular conduct has had an adverse effect on competition. This also goes in

[57]

[58] Case C-234/89 (1991) ECR I-977

situations were the decision is assumptive and based on projected "likely" effects, as opposed to "actual" effects[59].

The other important element of competition law are horizontal arrangements, which are discussed below.

3.3 Horizontal Restraints/Arrangements

Horizontal or trade restraints, arrangements, agreements are conduct occurring amongst entities that are rivals or potential rivals. These are cartel-like or conduct of a collusive nature i.e. a "conspiracy" against the market forces. However, conduct occurring between or amongst firms failing within the same ownership structure, is not considered as an anti-competitive horizontal restraint *per se* - even where the entities are separate legal persons.. In so far as competition is concerned, firms operating under a common ownership will inherently have joint operational and marketing strategies and would not likely engage in cut-throat winner-takes-all competition. This is captured in the formulation of Section 9 of the Act, which reads as follows:

> "(1) It shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in practices appearing in sub-section (2) where such practices limit access to markets or otherwise unduly restrict competition. Provided that this subsection shall not apply where enterprises are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.
> (2) This section applies to formal, informal, written and unwritten agreements and arrangements".

The formulation of Section 9 appears to provide a *per se* prohibition to the following conduct, i.e. firms cannot and must not engage in them[60]:

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[59] Further reading on vertical arrangements in the EU can be sought from European Commission Green Paper on Vertical Restraints – COM (96) 721, Commission Regulation 2790/1999 and maybe downloaded from www.europa.eu.int/comm/competition/antitrust/others/. *Other details benefited from University of London,* Kings College "Module Two Unit 9 – A Distribution System" for their Postgraduate Diploma/Masters in EC Competition Law 2007 - 2008

[60] A number of these provisions appear to have their inspiration from the Havana Charter – Chapter 5 where under Article 46(3) similar conduct is listed.

"(3) For the purposes of subsection (1), the following are prohibited:

(a) Trade agreements fixing prices between persons engaged in the business of selling goods or services, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services.

(b) Collusive tendering;

(c) Market or customer allocation agreements;

(d) Subject to the Coffee Act, 1989, allocation by quota as to sales and production;

(e) Collective action to enforce arrangements;

(f) Concerted refusals to supply goods and services to potential purchasers; or

(g) Collective denials of access to an arrangement or association which is crucial to competition."

Horizontal arrangements extend to agreements by trade associations (which usually comprise competitors e.g. the Millers Association of Zambia; Poultry Association of Zambia and the once notorious United Taxis and Transport Association (UTTA). Section 10 of the CAP 417 is principally targeted at such:

"The following practices conducted by or on behalf of a trade association are declared to be anti-competitive trade practices:

(a) 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

(b) making of recommendations, directly or indirectly, by a trade association, to its members or to any class of its members which relate to:-

(i) the prices charged or to be charged by such members or any such class of members or to the margins included or to be included in the prices or the pricing formula used or to be used in the calculation of those prices; or

(ii) 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."

It is unfortunate that there has been no case law that has addressed any of these matters in Zambia. The Zambia Competition Commission has continued to make administrative decisions that have hitherto not been subjected to judicial interpretation. Cartel activity is secretive in nature and requires reasonably higher resources to successfully litigate i.e. "beyond reasonable doubt". Some of the horizontal arrangements, e.g involving small and micro enterprises, would not ordinarily be a subject of investigation as there is considered to be a greater public interest in allowing such conduct to prevail. The concept of public interest is debatable as discussed in the section below.

3.4 Considering the net public benefits when dealing with anti-competitive trade practices

Some horizontal as well as vertical arrangements may be authorised in the public interest. While this is not a norm but exceptional for horizontal arrangements, it is the general norm for vertical arrangements. In Australia, both horizontal and vertical arrangements may be determined under a "public interest doctrine"[61]. This appears to be so in the United Kingdom as well, where the criterion under the *Fair Trading Act 1973* for determination of anti-competitive trade practices is whether or not the conduct is contrary to the "public interest". Thus, the Competition Commission of the UK may take into account all matters which appear in the particular circumstances to be relevant, and, among other things, shall have regard to the desirability of maintaining and promoting the balanced distribution of industry and employment in the UK[62]:

The Zambia Competition Commission has by and large adopted this approach. Under Section 14 of the Act, the Commission may authorize 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 the Act.

[61] ACCC Guide to Authorizations and Notifications, 1998

[62] Dean Michael and David McGowan, Dealing with Dominance – The Experience of National Competition Authorities, pp 193-225, Kluwer Law International: London

Public interest determination is prone to abuse by the competition authority due to its open-endedness. Dean and McGowan (2004)[63] have noted that such public interest considerations are wide, vague and varied criteria which carry no presumption in favour of competition. Where they are contained in guidelines and not the statute, they would appear to even be more prone to arbitral use by a competition authority the limits to which would only be able to be set by vigilant courts.

This was perhaps exemplified in the *Premier League Case*[64]. In this case, the English football Premier League sold the licence to broadcast football collectively on behalf of its member clubs. Live transmission rights for 60 matches per season were sold to BSkyB (pay satellite TV) and the exclusive right to broadcast recorded highlights was sold to the BBC (free terrestrial TV). The DGFT had these arrangements referred to a special court, the Restrictive Practices Court (RPC)[65], before which he argued that the arrangements were contrary to the public interest. The essence of the DGFT's argument was that markets operate most efficiently when fragmented with many competing sellers. The RPC decided that the DGFT had failed to demonstrate the sale of matches by the individual clubs would operate effectively. Evidence provided to the RPC suggested that changing the status quo would result in the larger, more successful clubs enjoying the lion's share of the revenue, which was thus impractical and undesirable (for smaller or struggling clubs).

The DGFT further argued that the collective monopoly selling could lead to the raising of prices and restriction of output in the number of televised matches. This was also rejected by the RPC as the exclusive rights were being sold as a bundle of 60 games. The Premier League had an incentive to sell additional games as this would go beyond the bundle of 60 and thus bring in further revenue[66].

3.5 Anti-competitive trade practices by Dominant Firms

Section 7(2) addresses conduct that would distort competition if it was (1) done by a dominant enterprise. Dominance is synonymous with market power as these cannot be mutually exclusive i.e. neither exists without the other. Further, dominance and monopoly have generally come to be construed as referring to one and the same thing. Thus rules

[63] ibid.
[64] (1999) UKCLR 258
[65] the fore runner to the current Competition Appeals Tribunal under the Competition Act 1998
[66] Dean and McGowan (2004), supra, have compiled and analysed a number of other British competition cases.

applying to regulation and/or control of monopolies refer not only to a "single producer" or a "single supplier" in the literal sense but equally to any market player that is classified as "Dominant".

The competition legislation in Zambia does not appear to prohibit the existence of a monopoly or a dominant firm rather calls on such firms to refrain from certain acts or behaviour that would adversely affect competition or the economy in general. Under CAP 417, the word "monopoly" is defined in the context of "dominance". The definition of a monopoly undertaking is defined as[67]:

"A dominant undertaking or an undertaking which together with not more than two independent undertakings-

(a) produces, supplies, distributes or otherwise controls not less than one half of the total goods of any description that are produced, supplied or distributed throughout Zambia or any substantial part of Zambia; or

(b) provides or otherwise controls not less than one-half of the services that are rendered in Zambia or any substantial part thereof."

Dominance or monopoly power may be exercised by a single firm (unilaterally)[68] or two or more independent firms acting in concert (multilaterally). The exercise of multilateral market power is referred to as "cartel", "horizontal restraints" or "horizontal arrangements". These appear to be prohibited *per se* under Section 9 of CAP 417 (as already explained in Chapter Three of this thesis).. . The Fair Trading Act 1973 of the United Kingdom defined dominance to be a market share of at least 25% in a specific product.[69]

The Competition Act 1998 of the United Kingdom defines, and vaguely so, a dominant position as "a dominant position within the United Kindgdom". Thus the determination of such is left to the competition authority and a dissatisfied person may appeal to the courts. The Office of Fair Trading has issued guidelines on this matter.[70]

[67] under Section 2 of CAP 417
[68] Any firm acting singularly with at least 50% market share is deemed to be a dominant firm as was held in the case of AKZO Chemie BV v Commission (1993) 5 CMLR 215
[69] Section 6(2) and Section 7(2)
[70] The Chapter II Prohibition, OFT 402, March 1999.

Without defining what dominance is, Article 81 of the EU Treaty specifically forbids "abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it... in so far as it may affect trade between Member States." Determination has been left to the courts. There would appear to be two tests in determination of Dominance. The first is a quantitative test, which is a per se determination based on the market share of a firm e.g 50% as in Section 2 of CAP 417. The other determination from case law appears to be a rule of reason approach. This is because the conduct of the firm may indicate that it does actually exercise tenets of a dominant firm regardless of its market share. The rule of reason thus allows the determination by a competition authority to go a step further and consider each case on its own merits. In the *United Brands Company v Commission*[71] and *Hoffman La Roche and Co. v Commission*[72], the ECJ held that a dominant position was:

"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave independently of its competitors, customers and ultimately of consumers."

Where the competition authority has identified that a particular enterprise is dominant, the evidential burden appears to lie with that party to prove that they are not dominant, and where they are dominant, to prove that they have not taken advantage of the dominance (i.e. abuse), which is discussed below.

3.6 What is abuse of Dominant Position of Market Power?

It is noteworthy that competition law is not against dominance or monopoly power per se but the manner of the exercise of what is referred to as the Dominant Position of Market Power. Thus the competition issue is not so much about the size of a firm as firms naturally or generically grow when they have a distinctive competence or competitive advantage vis-à-vis its existing and potential rivals. Competition law would not appear to be aimed at punishing success rather at ensuring that any success does not impinge on the right of other firms to also or equally be successful through the fairness of a liberal market economy. The competition issue is the manner in which the dominant firms exercises its power. Competition Law uses

[71] Case 22/76, 1978 ECR 207,65
[72] Case 85/76, 1979 ECR 461,38

the term "abuse" or "misuse" as issues to be monitored, controlled and/or prohibited. Determination of abuse is only possible after determining dominance.

Section 7(2) of the Competition and Fair Trading Act states that[73] :

"...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:

(a) predatory behaviour towards competition including the use of cost pricing to eliminate competitors;
(b) discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods or services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
(c) making the supply of goods or services dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
(d) making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee;
(e) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;
(f) mergers, takeovers, joint ventures or other acquisitions of control whether of horizontal, vertical or conglomerate nature; or
(g) colluding, in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors, or suppliers of services, in setting a uniform price in order to eliminate competition."

Rationally, paragraphs (a) to (g) would appear to provide a guide as to the elements that would constitute abuse of a dominant firm. The Commission's approach to this has been that these provisions are not *per se* illegal but follows a rule of reason approach where each case is

[73] All the terms used in this section except for "dominance" are not defined in the Act. A useful guide for definitions is the "Glossary of terms used in EU Competition Policy – Antitrust and control of concentrations".

determined on its own merits i.e., there would be a requirement to prove the following in each case:

(i) Whether the enterprise is dominant in the relevant product market

(ii) Whether the identified dominant enterprise is abusing its market power in the relevant product market

(iii)Where such abuse has had the effect of:

(a) limiting access to markets or

(b) otherwise has unduly restrained competition, or

(c) have or is likely to have adverse effects on trade or the economy in general.

It would appear to be a tall legal order to prove an abuse. For instance, a claim of predatory pricing[74] in the poultry industry was established by the Commission but the case failed to stand because the culprit who was engaged in the conduct was not considered to be a dominant firm[75]. In the case *Aberdeen Journals*[76], a competitor complained to the Director-General of the Office of Fair Trading (DGFT), who eventually found that Aberdeen Journals had abused a dominant position in the market for the supply of advertising space in local papers in the Aberdeen area by pricing its advertising space at below average variable cost, that is predatory pricing. Aberdeen appealed to the Competition Appeals Tribunal (CAT) on the basis that DGFT had defined the market incorrectly. CAT concluded that the market assessment had been insufficiently thorough and lacked elements such as demand substitutability[77]. CAT thus set the decision aside but remitted the matter back to the DGTF for further consideration. After a further assessment, DGTF still arrived at the same result and Aberdeen appealed[78].

John Vickers, Chairman of the Office of Fair Trading[79], in his paper titled "Abuse of Market Power" explained that in terms of general principles, case law has established criteria for determining abuse, *inter alia,* that a dominant firm may not eliminate a competitor or

[74] Predatory Pricing is defined as: "Suppliers sell at very low price (or supply intermediate input to competitors at excessive prices) in order to drive competitors out of business" at page 4 in a booklet "Zambia Competition Commission – its functions and objectives", 1998 publication

[75] Eureka Chickens Limited – allegations of predatory pricing, ZCC 2005 Annual Report

[76] Case No. 1009/1/1/02.

[77] Simply put, demand side substitutability is an economics concept that tries to find out whether the buyers (customers or consumers) of a particular product or service would have an alternative supplier 'B' to turn to if Supplier A's price, quality or other variable was not competitive or favourable

[78] At the time of finalising this paper, the final decision was unknown to the author

[79] Office of Fair Trading is the UK equivalent of the Zambia Competition Commission

strengthen its position by recourse to methods different from those which condition normal competition.[80]

3.7 Conclusion

Anti-competitive trade practices are determined in a variety of ways by various competition authorities. Some conduct may be considered as a rule of reason, while others are considered as *per se* prohibitions. The wording of the law would appear to provide guidance as to whether conduct is *per se* prohibited. For instance, use of "if" in Section 7(2) implies that the conduct is prohibited only "if" there is some actual or likely adverse outcome on markets, competition, trade or the economy in general. In Sections 9 and 10 the wording "the following are prohibited" and "the following practices... are declared to be anti-competitive trade practices" respectively appear to provide express prohibition of the conduct whether there are adverse effects or not, intention or not.

Competition authorities usually publish guidelines to explain the process and assessment criteria for dealing with matters such as vertical arrangements, while in many ways cartels are per se prohibited and thus as a result would not ordinarily have elaborate guidelines. Useful guides appears to be the European Commission's Commission Notice – Guidelines on Vertical Restraints (2000/C 291/01)

All these anti-competitive trade practices, or restrictive business practices (RBPs), would appear to find their extensive application in the determination of mergers and acquisitions. The determination of a merger or acquisition as being "anti-competitive" or "pro-competition" appears to take into account various vertical, horizontal and conglomerate competition issues. In this regard, merger assessment even in a small economy such as Zambia would appear to be marred with controversy. The next chapter, Chapter 4 deals with this pertinent topic.

[80] Speech to the 31st Conference of the European Association for Research in Industrial Economics, Berlin, 3 September 2004

CHAPTER FOUR

4.0 MERGERS & ACQUISITIONS UNDER THE ACT

Mergers and acquisitions cut across all the other elements of competition law that have so far been discussed. A merger or acquisition may be vertical, horizontal or conglomerate. In many cases, mergers and acquisitions may create a dominant position of market power, with actual or likely abuse of market power as the worst case scenario. However, mergers and acquisitions, or other forms of amalgamation such as joint ventures do have many positive effects when they bring two distinctive competencies whereby these take advantage of the combined strengths to offer better products and services, or enter markets that, acting separately, they would not have entered in a cost effective manner. As has been noted previously, competition or "anti-trust" law exists primarily to provide a legal regulatory mechanism to "monitor, control and prohibit" acts, behaviour, decisions, practices, arrangements or agreements by enterprises (i.e. commercial entities) that are deemed as actually or likely to 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[81].

Mergers and acquisitions are part of these competition affected "acts" or "behaviours" that a competition law addresses. The underlying policy behind merger control would appear to be that when two businesses merge, or when they create a joint venture, it may reduce competition. Mergers that substantially lessen competition can be prohibited or have certain conditions imposed. This has been a matter of debate and criticism by some scholars. For instance in an article titled "Anti-trust is Anti-competitive", Malek[82], lamented thus:

"People engage in fierce competition everyday. Entrepreneurs strive to create the next... We can all appreciate the drive and spirit behind the competitive impulse, and we recognize that it yields productive gains for everyone. The primary motivation for businesses is profit, and if they are successful, they have not only served themselves but also society. Yet, businesses sometimes urge the government to intervene when their competitors with the same goal pose a threat to them. This is the driving force behind antitrust legislation. The supposed purpose of antitrust is to ensure the competition necessary for a thriving market economy. In reality, it

[81] Sections 6 and 7 of the *Competition & Fair Trading Act*, CAP 417 of the Laws of Zambia.

[82] Malek, Ninos P, Ph.D student in the Economics Department at George Mason University in Fairfax, Virginia – article appeared on the Ludwig von Mises Institute website, www.mises.org/story/1555 13 July 2004

is a bludgeon used by businesses against their better-performing competitors. This is the essence of all attempts to invoke an antitrust rationale to stop mergers."

This chapter reviews how mergers and acquisitions are handled in CAP 417 and there is an attempt to make a comparable analysis with other foreign provisions. It is hoped that the chapter shall also highlight any deficiencies in the provisions as they are now.

4.1 Definition of merger, acquisition or takeover in CAP 417

The determination of whether a transaction is a merger, an acquisition or a takeover does pose practical difficulties in the absence of express definitions within the law itself. Case law abounds from the Commonwealth and elsewhere as to what is a merger, an acquisition or a takeover. For instance, in the Australian case of *Trade Practices Commission (TPC) v Australian Iron & Steel Pty Limited*[83], it was held that the word "acquire"... refers to acquisition in the sense of "obtaining ownership of any legal or equitable interest in". And prior to this, in the case *Australia Meat Holdings Pty Ltd v Trade Practices Commission (TPC)*[84], Davies J expressed the view that the words "acquire directly or indirectly"...encompass all forms of acquisition including situations where assets are acquired in an indirect way...

In its *Manual on the Formulation and Application of Competition Law*[85], the United Nations UNCTAD under the subheading "What is a merger" have posited that given that the central concern is with the effects of the merger on competition, it is important to have a broad definition of a merger encompassing all those forms of "merger-like" transactions, which could impact on competition. Accordingly, such transactions include:

(i) the acquisition of a majority shareholding in a target business;
(ii) the acquisition of a minority shareholding which gives effective control of the target business;
(iii) the acquisition of the assets of a target business, which then ceases to operate;

[83] (1990) 22 FCR 305; 92 ALR 395; ATPR 41-001
[84] (1989) ATPR 40-932
[85] English Edition, 2004, page 26, United Nations, Geneva

(i) the establishment of a joint venture by two or more firms with products which overlap; and

(ii) the appointment of interlocking directors to the boards of two businesses which were previously independent of one another.

The UNCTAD Model Law on Competition refers "Mergers and acquisitions" to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.

In the face of such foregoing illustrations, it would appear that it does not matter whether a transaction is a merger, a takeover or an acquisition. The effect of any of these would, should and is the concern of the competition authority. For instance, a merger, takeover or acquisition may all alter the market structure (i.e. reduce the number of competitors or the level of competition), may lead to dominance, monopolization, bring in distinctive competencies, lead to entry into new markets, bring in additional capital, etc. Thus the terms may be used interchangeably or synonymously to address the same thing, with the word "merger" being used in many jurisdictions to refer to all forms of amalgamations and concentrations of independent persons.

4.2 Merger and Acquisition provisions in CAP 417

Under Section 6(2)(b) and (c) of CAP 417, the Commission appears to be empowered as follows (in respect of mergers and acquisitions):

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(b) carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;

(c) to take such actions 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."

The foregoing appear to give the Commission the functional powers to enquire into mergers[86] and what are also referred to as takeovers and/or acquisitions. Other specific provisions

[86] The word "merger" appears to be interchanged or as a generic term and appears to be used as a synonym for takeovers and acquisitions. I

relating to mergers are Section 7(2)(f), which states 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 ... mergers, takeovers, joint ventures or other acquisitions of control whether of horizontal, vertical or conglomerate nature."

Section 8 of CAP 417[87] appear more explicit as follows:

"(1) 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) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;

(b) a takeover 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.

(2) No merger or takeover 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 takeover shall be legally enforceable."

It is noteworthy that the wording of section 8(1) includes agents and perhaps advisors as well. The notable exception from other legislations such as the Competition Act 1998 of England, the Trade Practices Act 1973 of Australia and the Competition Law of South Africa is that Zambia's merger control provisions are the only ones that contain criminal sanctions by providing a jail sentence of 5 years if breached. The underlying policy objectives of criminalising a breach are unclear as there would appear.

On the face of it, Section 8 appears to provide that a merger or a takeover between and/or affecting a competitor has to be notified for authorisation before it can be effected i.e. pre-

[87] The same provisions are contained in the *Restrictive Trade Practices, Monopolies and Price Control Act*, CAP 504 of the Laws of Kenya, and the Malawian *Competition and Fair Trading Act 1998*. However, unlike the Zambian merger provisions, the Malawian and Kenyan provisions appear to be more detailed and provide for authorisation process, investigation and evaluating procedure. Perhaps the Zambian provisions may also benefit through future inclusion of more elaborate provisions.

merger notification – otherwise it is a criminal offence and the transaction itself is null and void.

4.3 Mergers and Acquisitions on a Public Stock Exchange

Section 7(1) may be used in the context of a merger being an agreement between two or more parties; then in the form of a decision e.g. to purchase shares on a stock market – which is common for "hostile" mergers; or it can be a concerted practice where by implied or explicit conduct two or more parties act in concert to effect such a transaction. Thus, where a party refuses to notify under Section 7(2)(f) or Section 8, or where the Court may determine that a transaction is not a merger or a takeover, it would appear that the Commission may still intervene by using the ambiguous and almost open ended Section 7(1) of CAP 417.

In face of pre-merger notification, transactions on a stock exchange would appear to provide an enforcement conundrum. This appears to have been so in the case of *Cavmont Capital Holdings Zambia PLC takeover of 24.9% shares by Bank Windhoek Beherend*[88], in which Cavmont Capital Holdings (Cavmont) refused to notify the takeover because it had occurred through share purchase on a public Stock Exchange, to which Cavmont had no control over, did not require notification and authorisation to the Zambia Competition Commission. The Commission on the other hand contended that Sections 3 and 8(1) of CAP 417 did not exempt such stock market purchases from authorisation and Section 8(2) was clear that no merger or takeover that was effected in the absence of authorisation from the Commission had any legal validity in Zambia. Evidently, there is a clear notification problem in the law as a party or parties to a takeover transaction on the stock exchange would not ordinarily first have to practically seek authorisation before they deal in share sales and purchases. Records at the Commission show that Cavmont however later filed in a notification to seek authorisation, which was subsequently granted by the Commission, post-merger.

4.4 Mergers and Acquisitions leading to sole control

Generally, as detailed already under Chapter 4, the effect of a conduct is an issue in competition law, more so conduct executed by a dominant firm. Thus mergers leading to sole control and actual or likely dominance of a product market would appear to intrinsically raise the competition authority's eye-brows. In the case of *BP Zambia PLC and Mobil Oil Zambia*

[88] Zambia Competition Commission, Staff Paper No. 277, March 2007

Limited - The proposed acquisition of 50% shareholding from Mobil Oil Zambia Limited by BP Zambia PLC in the Joint Jet-fuel Storage Facility at the Lusaka International Airport[89], BP Zambia, through their lawyers, contended largely that the proposed acquisition was not a "merger" or a "takeover" requiring the jurisdiction or authorization of the Zambia Competition Commission. They contended that the proposed acquisition was part of pre-emptive rights in the shareholders agreement between themselves and Mobil Zambia. The Commission on the other hand contended that the exercise of such pre-emptive rights could not be done in the presence of a statutory requirement for merger or takeover authorization before such could be effected. BP Zambia however formally notified and sought authorization from the Commission for the transaction to be effected.

The Board of Commissioners of the Zambia Competition Commission at their sitting of 13th September 2007 determined not to authorize the transaction as it appeared to them that the acquisition of Mobil Zambia's 50% shares by BP Zambia in the Joint Jet Fuel storage facility at the Lusaka International Airport (LIA) was likely to substantially prevent, restrict or distort competition in the relevant product market for jet fuel at the LIA. The Board further directed that Mobil Zambia's shares be sold by public tender to interested third party Oil Marketing Companies which should exclude Total or any of its affiliates. The new parties would be required to come up with an agreement that would ensure equitable access to and from the storage facility. This sale should be completed within three (3) months after the Commission's decision is communicated to the parties. The Board further directed that Mobil or its affiliates should continue to utilise the jet fuel facility under existing arrangements until when the 50% are accordingly disposed off to other OMCs.

The two cases above illustrate the seemingly ambiguous nature of a merger, a takeover or an acquisition, more so in the context of lack of definitions in our own law. As analysed by the Commission in *BP Zambia PLC and Mobil Oil Zambia Limited*[90], there would appear to be an indication, although not conclusive, as to the extent of mergers and acquisitions that the Commission may intervene in under Section 7(2)(f) of the Act, where the wording "other acquisitions of control whether of horizontal, vertical or conglomerate nature..." is used. It is accepted practice in Zambia that where there is a lacuna, other specified legislations and/or case law, notably from the Commonwealth, can be used to assist in better understanding our

[89] Zambia Competition Commission, Staff paper No. 293, September 2007
[90] Zambia Competition Commission, Staff paper No. 293, September 2007

own legal situation or circumstance. This practice extends to the Zambian competition legislation as well.

Arguments have been advanced by BP's lawyers that the proposed acquisition of the additional 50% shares in the jet-fuel terminal is not a merger or takeover, or even if it is, it is not subject to the Commission's authorization. It would appear to be the Commission's understanding from Sections 6(1), 6(2)(a) to (c), 7(2(f) and 8 of CAP 417 that the Commission has the legal mandate to inquire, on its own initiative, or at the prompting of a complaint, into what the Commission considers to be a merger, acquisition or takeover. At the time of finalizing this report, the BP lawyers had sought judicial review in the High Court.

4.5 Conglomerate Mergers and Acquisitions

Conglomerate mergers and acquisitions occur where the parties involved are operating in the same product market. For instance in the case of Zambeef Products PLC takeover of Amanita Milling Limited and Amanita Premier Oils[91], ("Zambeef-Amanita case"), the Commission authorised the transaction to proceed after determining that the two companies were not competitors i.e. there were no horizontal overlaps that would unduly alter the product markets in which Zambeef and Amanita operated. Further, in its determination, the Commission took cognisance of the fact that Amanita was a failing firm that was not likely to continue to meet its debt obligations (the Failing Firm Defence).

There have been criticisms levelled against the authorisation by the Commission granted in the *Zambeef-Amanita* case. Some observers have contended that the merger was likely to make an already larger Zambeef to dominate to dominate the agriculture production and marketing sector, which would likely have adverse impacts on small to medium size players in all the sectors where Zambeef operates. These sectors include beef, broiler chickens, layers, stock feed, and crops production. The Commission's analysis of these contentions were that there were no insurmountable barriers to entry in these sectors for any would be investor, more so in view of falling interest rates.

4.6 Conclusion

This chapter has attempted to analyse the core merger provisions in CAP 417 of the Laws of Zambia and in the process showed how the Zambia Competition Commission has dealt with

[91] Staff Paper No. 291, September 2007

cases falling under this category. The need for merger control is to ensure that mergers that take effect in an economy are those that add to "efficiencies" in production and distribution of goods and services. The determination of what is an allowable merger and what is not lies with a competition authority. Where there are no notification thresholds, it would entail that all mergers have to be notified and it is up to a competition authority to determine whether to assess a transaction for anti-competitive effects or not. Clearly, mergers involving competitors require careful attention before an authorisation is granted.

Mergers and acquisitions appear to be the most that are shrouded with controversy given the immediate impact that they have on markets. It appears to be a much wider topic, the details of which are clearly beyond the limited parameters of this paper Details on merger assessment process are attached as ANNEXTURE 2.

CHAPTER FIVE

5.0 SUMMARY OF FINDINGS, CONCLUSIONS & RECOMMENDATIONS

The enactment of the competition legislation in Zambia, the establishment of the Zambia Competition Commission and the subsequent enforcement and development of the law in the country was and is a major milestone in a liberalized or market economy. The law provided an instrument to deal with anti-competitive elements in vertical arrangements between firms; horizontal arrangements amongst competitors (i.e. cartels); abuse of Dominant position of market power, mergers and acquisitions and also incorporated unfair trading practices which addressed consumer protection issues.

In this paper, the key elements of the competition law in Zambia and how they have been enforced have been highlighted. Despite the elaborate provisions on the functions of the Zambia Competition Commission, the Act, like other Acts of Parliament, has expressly or implicitly limited the scope of enforcement of the anti-competition provisions. Enforcement appears to be limited by the scope of application contained in Section 3 of the Act, of which the extent of the exemption appears to be dependant on the interpretation of a specific provision. A cardinal finding has been that the scope of the exemptions does not appear to be exempt but is conditional as provided for in the wording of the exemption provisions.

It is evident that the Commission itself does appear to have been "litigation" shy as they have not stretched the law in the seemingly ambiguous exemption clauses. Among the contentious exemptions are those pertaining to professional associations, the Government and the blank cheque given to the Minister under Section 3(h) where, by statutory instrument, he can declare the Act as inapplicable to any activity as he may specify. It is not yet clear under what ordinary circumstances that the Minister may, through an SI, limit the application of the competition law in view of the exemption to the State already contained under Section 3(f). Depending on a resolve on the part of the Commission or other interested third party, it is possible that even an SI that may have the resultant "adverse effects on trade or the economy in general" can actually be challenged in the courts of law.

As regards the matter of anti-competitive trade practices under Section 7, they appear to be equally ambiguous and have not been tested in the courts – whether by the Commission or the

corporate or private persons. Section 7(1) is clearly a generic provision that appears to consider "all categories of agreements, decisions and concerted practices that has as their object the prevention, restriction and distortion of competition to an appreciable extent" to be "anti-competitive trade practices". Such anti-competitive trade practices are not listed per se but one could decipher them under Section 7(2), Section 9 and Section 11. Despite, this, the wording of Section 7(1) appears to be broader than would be expected and not ordinarily limited to the anti-competitive trade practices enumerated under Section 7(2), Section 9 or Section 10.

The general consideration of anti-competitive trade practices has been understood to fall into two categories: namely those that are prohibited outright (i.e. *per se*) and those that are prohibited under a rule of reason (i.e. can be allowed to stand if proven not to have had adverse effects on competition, trade or the economy in general). The general understanding at the Commission (and perhaps from the wording of the law itself) is that the provisions under Section 7 fall under the "Rule of reason" category, while those under Section 9, Section 10 and Section 12 fall under "*per se*" prohibitions. While the Act may not have defined most of these concepts, a vast amount of case law does actually exist to define all these concepts.

In the matter of mergers and acquisitions, decisions on these transactions appear to be controversial not only in Zambia but also in other countries. Mergers and acquisitions are a topical issue in any competition enforcement regime as they appear to provide an opportunity for a competition authority to effect a direct and immediate impact on either breaking the market concentration and allowing other parties to enter it, or actually raising the market concentration and increasing barriers to entry. The latter appears to be a subject of relentless criticism in Zambia as this is what has actually occurred in the carbonated soft drinks and clear beer industries. The Zambia Competition Commission has assisted the creation of a giant monopoly under the Zambian Breweries Group of Companies.

Mergers and acquisitions tend to follow the rule of reason determination, although jurisprudence from the European Court of Justice appears to be averse towards creation of dominant or monopoly undertakings In Zambia, it would appear that all mergers and acquisitions have to be authorized by the Commission before they can have any legal effect. Criminal sanctions also uniquely exist against those who effect a merger or an acquisition in the absence of the Commission's authorization. To this effect, there are no merger notification thresholds in Zambia as is the case in most other similar legislations in countries such as

Namibia, Zimbabwe, Malawi and South Africa. Mergers and acquisitions can actually be authorised based on factors outside the anti-competitive ethic, i.e. in the public interest. This is not defined in CAP 417 and thus would appear to give the Commission some discretionary leeway.

In conclusion, this paper has tried to highlight the major elements of the competition law of Zambia and attempted within the confines of the objectives of the paper, to highlight some observed weaknesses of the law. In its current form, the law is still usable and appears to be used at sufficient levels by the Commission. There however appears to be little public knowledge of the law and even where there is such knowledge, there is no usable facts about the purpose and contents of the law – even amongst lawyers and economists alike. It behoves the Commission to promulgate the law as widely as they can possibly do. Again, ignorance of the law remains no defence.

By way of recommendations, it is important that under Section 2 on definitions, there is need to separate the definition of "Dominance" from "Monopoly" as the law appears to equate these. Definitions or indicators of some instances of "abuse" and "merger" or "takeover" or "acquisition" should also be included. As regards the Section 3 exemptions, particularly Section 3(d), (e), (f), (g) and (h), these must be made more specific and where possible, the Commission should take a step further and test the law with the court in order to have some case law.

While matters under Section 9 and 10 are deemed by the Commission to be *per se* prohibitions, there may be need to review the extent to which such conduct would be applicable in the *per se* sense towards small or micro businesses that desire to cooperate in order to offer effectual competition to a dominant or monopoly firm.

There is need to have clear notification thresholds for acts or conduct under Section 7 and Section 8 that address mergers and acquisitions. The presence of notifiable transactions would also appear to likely give business certainty in how they approach merger control issues in Zambia.

The University of Zambia has introduced competition law through a combined course referred to as "Intellectual Property and Competition Law". This combination does not appear to have worked well as the IP syllabus in its current form is already quite loaded and there would

appear to be no time to deal informatively and educatively the elements of competition law. Perhaps consideration for splitting the course into two separate and comprehensive courses may be useful. IP may be the first part, and Competition Law the second part (as the case is for Business Associations and Company Law).

It is hoped that this paper shall be a first step towards the development of literature for competition law as a reckonable academic discipline at the University of Zambia.

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ANNEXURE 1

QUESTIONNAIRE FOR COMPETITION LAW THESIS

Dear Respondent ☐

This questionnaire should take utmost 20 minutes to fill in. *I am a final year law student at the University of Zambia and in the process of finalizing my obligatory essay (thesis) on competition law in Zambia. In order to make the thesis more informative, it is imperative to obtain first hand views from practitioners in the field of competition law. For this purpose, a questionnaire has been designed to assist in addressing the following specific objectives:*

(i) To highlight the background, rationale and objectives to the enactment of the competition law in Zambia

(ii) To review the necessity of exemptions to the application of the Act

(iii) To review the anti-competitive provisions in the Act

(iv) To review the merger and takeover provisions in the Act

(v) To consider possibilities of improving future developments of the competition law.

I wish to assure you that the answers you shall provide shall be used for the purpose of this research only. In case of further details and/or clarifications, you may get in touch with my supervisor, Mrs Chanda Nkoloma Tembo , School of Law, Tel: 290733.

Thank you for your assistance.

Thula Kaira – Cell 097-775-6147; Tel 236770

PROFESSION OF RESPONDENT .....

NOTE: You may return the filled questionnaire via email or to fax 222789

You may tick your boxes electronically by putting * next to the box, as shown below:

☐ ☐* ☐ ☐

OBJECTIVES AND RATIONALE OF THE LAW

1. The objectives of the Competition and Fair Trading Act, CAP 417 of the Laws of Zambia are listed in its preamble and are reproduced below. Please tick as appropriate whether you consider the objectives to be not clear (1), somehow clear (2), Clear (3), or Very Clear (4)

		NotClear 1	**SomehowClear** 2	**Clear** 3	**VeryClear** 4
(i)	To encourage competition in the economy by prohibiting Anti-competitive trade practices;	☐	☐	☐	☐

(ii) To regulate monopolies and concentrations of economic power ☐ ☐ ☐ ☐

(iii) To protect consumer welfare ☐ ☐ ☐ ☐

(iv) To strengthen the efficiency of production and distribution of services; ☐ ☐ ☐ ☐

(v) To secure the best possible conditions for the freedom of trade ☐ ☐ ☐ ☐

(vi) expand the base of entrepreneurship ☐ ☐ ☐ ☐

(vii) provide for matters connected with or incidental to the foregoing. ☐ ☐ ☐ ☐

2. Any other comments on the objectives of the Act

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3. The objectives of the law as captured are

Too broad	*Too Crowded*	*Adequate*	*Inadequate*
☐	☐	☐	☐

Other: _____

4. The objectives of the Act do address the rationale of the competition law:

No	Yes	Not Sure
☐	☐	☐

Other: _____

EXEMPTIONS TO THE APPLICATION OF THE ACT

5. Section 3 contains exemptions to the application of the Act. In view of the objectives of the Act, please tick accordingly whether the exemptions would appear to be unfair, fair, and in this regard whether they should be reviewed or maintained in the law:

	Unfair	***Fair***	***Should be Reviewed***	***Should be Maintained***
	1	2	3	4
(a) activities of employees for their own reasonable protection as employees	☐	☐	☐	☐
(b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment	☐	☐	☐	☐
(c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members	☐	☐	☐	☐
(d) the entering into an agreement in so far as it contains a provision relating to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade mark	☐	☐	☐	☐
(e) any act done to give effect to a provision of an agreement referred to in paragraph (d)	☐	☐	☐	☐
(f) activities expressly approved or required under a treaty or agreement to which the Republic of Zambia is a party	☐	☐	☐	☐

(g) activities of professional associations designed to develop or enforce professional standards reasonably necessary for the protection of the public and	☐	☐	☐	☐
(h) such business or activity as the Minister may, by statutory instrument, specify.	☐	☐	☐	☐

6. Any other comments on exemptions.

ANTICOMPETITIVE TRADE PRACTICES

7. Section 7(1) of the Act appears to contain a description of what would be considered to be "anti-competitive", as: *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.* Tick accordingly:

	Not Clear	***Clear***	***Should be Reviewed***	***Should be Maintained***
	1	2	3	4
(i) Any category of agreements	☐	☐	☐	☐
(ii) Any category of...decisions	☐	☐	☐	☐
(iii) Any category of... concerted practices	☐	☐	☐	☐

(iv) ...which have as their object	☐	☐	☐	☐
(v) ...the prevention, restriction or distortion of competition	☐	☐	☐	☐
(vi) ....to an appreciable extent	☐	☐	☐	☐
(vii)...in Zambia	☐	☐	☐	☐

8. Any other comments:

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9. Tick Accordingly. Section 7(2) of the Act requires that 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:

	Not Clear	***Clear***	***Should be Reviewed***	***Should be Maintained***
	1	2	3	4
(a) predatory behaviour towards competition including the use of cost pricing to eliminate competitors	☐	☐	☐	☐
(b) discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods or services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied	☐	☐	☐	☐

	as compared with prices for similar or comparable transactions outside the affiliated enterprises				
(c)	making the supply of goods or services dependant upon the acceptance of restrictions on the distribution or manufacture of competing or other goods	☐	☐	☐	☐
(d)	making the supply of particular goods or services dependant upon the purchase of other goods or services from the supplier to the consignee	☐	☐	☐	☐
(e)	imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported	☐	☐	☐	☐
(f)	mergers, takeovers, joint ventures or other acquisitions of control whether of horizontal, vertical or conglomerate nature	☐	☐	☐	☐
(g)	colluding, in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors, or suppliers of services, in setting a uniform price in order to eliminate competition.	☐	☐	☐	☐

10. Any Other Comments:

CARTELS

11. Section 9 contains "trade agreements", which appear to be a reference to cartel-like behaviour. Please tick accordingly:

	Not Clear	*Clear*	*Should be Reviewed*	*Should be Maintained*
	1	2	3	4
(1)It shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in practices appearing in sub-section (2) where such practices limit access to markets or otherwise unduly restrict competition. Provided that this subsection shall not apply where enterprises are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other	☐	☐	☐	☐
(2)This section applies to formal, informal, written and unwritten agreements and arrangements.	☐	☐	☐	☐
(3)For the purposes of subsection (1), the following are prohibited	☐	☐	☐	☐

(a) Trade agreements fixing prices between persons engaged in the business of selling goods or services, which agreements hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services.	☐	☐	☐	☐
(b) Collusive tendering;	☐	☐	☐	☐
(c) Market or customer allocation agreements	☐	☐	☐	☐
(d) Subject to the Coffee Act, 1989, allocation by quota as to sales and production	☐	☐	☐	☐
(e) Collective action to enforce arrangements	☐	☐	☐	☐
(f) Concerted refusals to supply goods and services to potential purchasers	☐	☐	☐	☐
(g) Collective denials of access to an arrangement or association which is crucial to competition.	☐	☐	☐	☐

12. Any Other Comments on trade agreements/cartels:

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13. Section 10 contains "anti-competitive trade practices by trade associations" and states that the following practices conducted by or on behalf of a trade association are declared to be anti-competitive trade practices and the legal provisions are quoted below for your appropriate tick:

	Not Clear	*Clear*	*Should be Reviewed*	*Should be Maintained*
	1	2	3	4
(a) 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	☐	☐	☐	☐
(b) making of recommendations, directly or indirectly, by a trade association, to its members or to any class of its members which relate to:-	☐	☐	☐	☐
(i) the prices charged or to be charged by such members or any such class of members or to the margins included or to be included in the prices or the pricing formula used or to be used in the calculation of those prices;	☐	☐	☐	☐
(ii) 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.	☐	☐	☐	☐

14. Any Other Comments on anti-competitive trade practices by trade associations:

MERGERS AND ACQUISITIONS

15. The Commission's functions in Section 6 also contain merger/takeover provisions [Section 6(2)(a) and (c)]. Section 8 appears to substantively make merger notification and authorization mandatory. The following are excepts from Section 8. Please tick accordingly:

	Not Clear	*Clear*	*Should be Reviewed*	*Should be Maintained*
	1	2	3	4
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 takeover 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.	☐	☐	☐	☐
No merger or takeover 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 takeover shall be legally enforceable

		Not Clear	*Clear*	*Should be Reviewed*	*Should be Maintained*
16.	The assessment process of mergers & acquisitions by Commission are	☐	☐	☐	☐

17. Are you aware of any international best practices or methods for assessment or evaluation of mergers & acquisitions? If YES, indicate which ones.

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18. Is it necessary to have merger & acquisition control in Zambia? Explain Answer.

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19. Any other comments on mergers & acquisitions provisions in the Act?

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20. Any other comments on how the general competition law should be framed?

- THE END -

THANK YOU VERY MUCH

ANNEXURE 2

ASSESSMENT OF MERGERS AND ACQUISITIONS

How does a competition authority exercising its jurisdiction over a merger or takeover determine whether to authorize or not to authorize a merger? The Act does not specify the criteria which the Commission would determine before concluding under Section 7 whether a merger is or is likely to be "anti-competitive". Under Section 17 of the Act, the Commission is authorized to issue regulations while Section 6(2)(h) of the Act appears to give the Commission a wider jurisdiction (which is yet to be tested in the Courts.

In the United Kingdom, the Office of Fair Trading (OFT)[1] is responsible for investigating mergers in the first instance, referring cases to the Competition Commission for an in-depth inquiry if they believe the merger may be expected to result in a substantial lessening of competition[2].

The OFT only has jurisdiction over mergers that meet all three of the following criteria to qualify for investigation:

(i) two or more enterprises must cease to be distinct.

(ii) The merger must not have taken place already, or must have taken place not more than four months ago.

(iii) **Either** of the following must be true:

- The business being taken over has a turnover in the UK of at least £70 million.
- The combined businesses have significant market presence. This applies if together they supply (or acquire) at least 25 per cent of a particular product or service in the UK (or in a substantial part of the UK), and the merger results in an increase in the share of supply or consumption.

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[1] UK equivalent of the Zambia Competition Commission

[2] Business Link, an advisory agency of the UK government, Source: http://www.businesslink.gov.uk/bdotg/action/detail?type=RESOURCES&itemId=1073792282

Because of these last two tests, many mergers between smaller businesses do not qualify for investigation. There are no such notification thresholds in the Zambian competition legislation meaning that in effect, any merger or takeover, not matter how small, would have to be notified for authorization by the Commission.

Major competition authorities have derived "Merger Guidelines"[3], from which the Zambia Competition Commission has adopted its procedure. The different approaches in the assessment of mergers and acquisitions is one of the unresolved controversial issues in contemporary competition law enforcement. There are largely two competing approaches to merger assessment. There is the Substantial Lessening of Competition (SLC) approach which is popular in American and Australian enforcement, then there is the Dominance approach favoured by the Europeans. Both may also consider efficiency test to supplement their findings. The efficiency tests pertains to technical and economic progress as generated or likely to be generated by the merger and possible enhancement of the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have. The approach by the Zambia Competition Commission has been to take a multiple assessment approach that considers both approaches.

Substantial Lessening of Competition or "Effect" test

To assess a transaction under the SLC approach, a number of tests are done that involve established market variables. These tests are largely variables that affect the performance of markets as drawn from economic theory, industrial organisation in particular. Case law has used such extensively to qualify a conduct as a SLC or not. The key variables are as follows:

Market Definition

(i) Both product market and geographic market have to be identified and restricted to their narrowest levels and/or definitions. Generally, these are standard practices by competition authorities where the product market is reduced to the most peculiar

[3] notably the US "Horizontal Merger Guidelines" and the Australian Competition & Consumer Commission's "Merger Guidelines", European Commission Merger Guide of 2004

functional characteristics of the product. A detailed publication from the Office of Fair Trading (OFT) titled *The Role of Market Definition in Monopoly and Dominance Inquiries*} appears useful in this regard.

(ii) During the merger transaction involving the Coca-Cola Company and Cadbury Schweppes in 1998 in Zambia, the parties contended that their product market was the 'beverage market' and contended that anything that went down the throat, including tap water, was a competitor to Coca-Cola products. The Commission disagreed with the position and considered the relevant market, with its unique characteristics, as the carbonated soft drinks product market.

The Market Concentration ratio

(iii) This is usually the sum of the market shares of the top 4 players in the relevant product market to arrive at a market concentration ratio (CR4) that demonstrates whether the market is open or closed to competition. It is increasingly common to use the so-called Herfindhal-Hirschman Index (HHI) – which adds together the square of market shares of all undertakings operating in the market. Where there are market shares less than 25%, positive presumption is that merger is legal). Where the post merger HHI is less than 1000 or if the HHI is between 1000-1800 but the increase in the index post-merger is less than 50, no competitive concerns. If HHI is between 1000-1800 (market is moderately concentrated) and increase is more than 100 or if HHI is above 1800 and the increase is between 50-100, merger potentially raises significant competitive concerns. If HHI is above 1800 and increase is more than 100, the merger is presumed to be illegal and may not be authorized, depending.

Barriers to Entry

(iv) This is a significant cause of foreclosure in the industry as a result of a market conduct. Barriers to entry were looked into through cost of entry, easy access of distribution channel and market promotion activities. If it was easy enter the market in view of the conduct, then there would still be effective competition in the

market. Barriers to entry can be structural or behavioural. Structural barriers may include limited or no access to raw materials; natural monopoly existence, while behavioural would include close retail access due to exclusive dealing practices; and other entrenched anti-competitive trade practices that "scare" away potential investors as the market looks very "unattractive".

Import Competition

(v) If significant imports were available, then they would restrain the merged entity from increasing prices indiscriminately because buyers would go for imports as substitutes. As a result, effective competition would still prevail in a market where there are significant and cheaper import sources e.g for textiles. In food related sectors, imports may be prevented through high import duties to protect a local market; implementation of sanitary and phytosanitary (SPS) measures such as protection of local market from animal diseases or for other political economy considerations. Then there could also be "standards" aimed at ensuring that "low standard products" do not come into the country.

Countervailing Power

(vi) The degree of countervailing power is the power that the customers e.g. distributors and the retail trade to fight off any anti-competitive distribution strategies and/or conditions from the suppliers, producers, manufacturers, especially if these have dominant position of market power. This is critical in a market with strong distributional system of using middle-men.

Availability of Substitutes

(vii) If a product had substitutes i.e. bread/rolls; butter/margarine, buyers would easily switch to either as long as the switching costs are low if there was an increase in price above Small but Significant Non-transitory Increase in Price (SSNIP – explained above under market concentration) since there would be effective competition. If quantity demanded of rolls went up when the price of bread was

increased, it meant that the rolls and bread were in the same relevant market and they were substitutes.

Removal of a Vigorous Competitor

(viii) If the transaction resulted in removal of a competitor this would mean that the number of competitors would be reduced and such resulted in alteration of the market structure and likely increase in concentration and market power. This scenario is likely to substantially lessen competition in the relevant market.

Effective Remaining Competition

(ix) If the transaction resulted in effective competition in terms of efficiencies or viability then there would be effective competition in the relevant market especially where the conduct is a common/peculiar market practice that other players can efficiently duplicate. Where the conduct reduces competition, regardless of market peculiarities, it is likely anti-competitive.

The list is not exhaustive and extends to all variables that influence competition in a defined product market such as branding, differentiation, history of the merger parties in relation to the principles of competition, etc.

Determination of Dominance and Abuse of Market Power

The Dominance test on the other hand deals with the matters of whether the firm is actually or likely to be dominant or attain a monopoly position then tackles the issue of actual or likely abuse of market power. Having considered whatever a relevant product and geographic market is, the question still begs the competition analyst: Is an accused firm dominant? What exactly is a dominant firm? Dominance is synonymous with market power as these cannot be mutually exclusive i.e. neither exists without the other. Further, dominance and monopoly have generally come to be construed as referring to one and the same thing. Thus rules applying to regulation and/or control of monopolies refer not only

to a "single producer" or a "single supplier" in the literal sense but equally to any market player that is classified as "Dominant".

Efficiency and Public Interest Tests

Other tests are also employed by the Commission such as the 'Efficiency Test' and the 'Public Interest Test' under Section 14 of the Act. The determination of efficiencies and public interest have raised great debate in various jurisdictions. In 2001, the Zambia Competition Commission authorised under 'efficiencies' and 'public interest' the takeover of Zambia Bottlers – the Coca-Cola franchisee, to be takeover over by South African Breweries, who owned the monopoly clear beer enterprise, Zambian Breweries PLC. Efficiencies largely pertain to cost reduction and improvement in doing business.

In consideration of public interest, the Commission has adopted a trade-off strategy of striking out the actual or likely anti-competitive effects against the actual and likely benefits to the public. In this process, the Commission generally applies three tests, as follows:

(i) The Commission must be satisfied that in all circumstances that the conduct would, or would likely to, result in a benefit to the public and that the benefit would outweigh the detriment to the public;

(ii) The Commission must be satisfied that there is a benefit to the public that the conduct should be allowed; and

(iii) The Commission must be satisfied that the conduct is not inimical to the objectives of the Act generally, and in particular the strengthening of the efficiency of production and distribution of goods and services in Zambia.