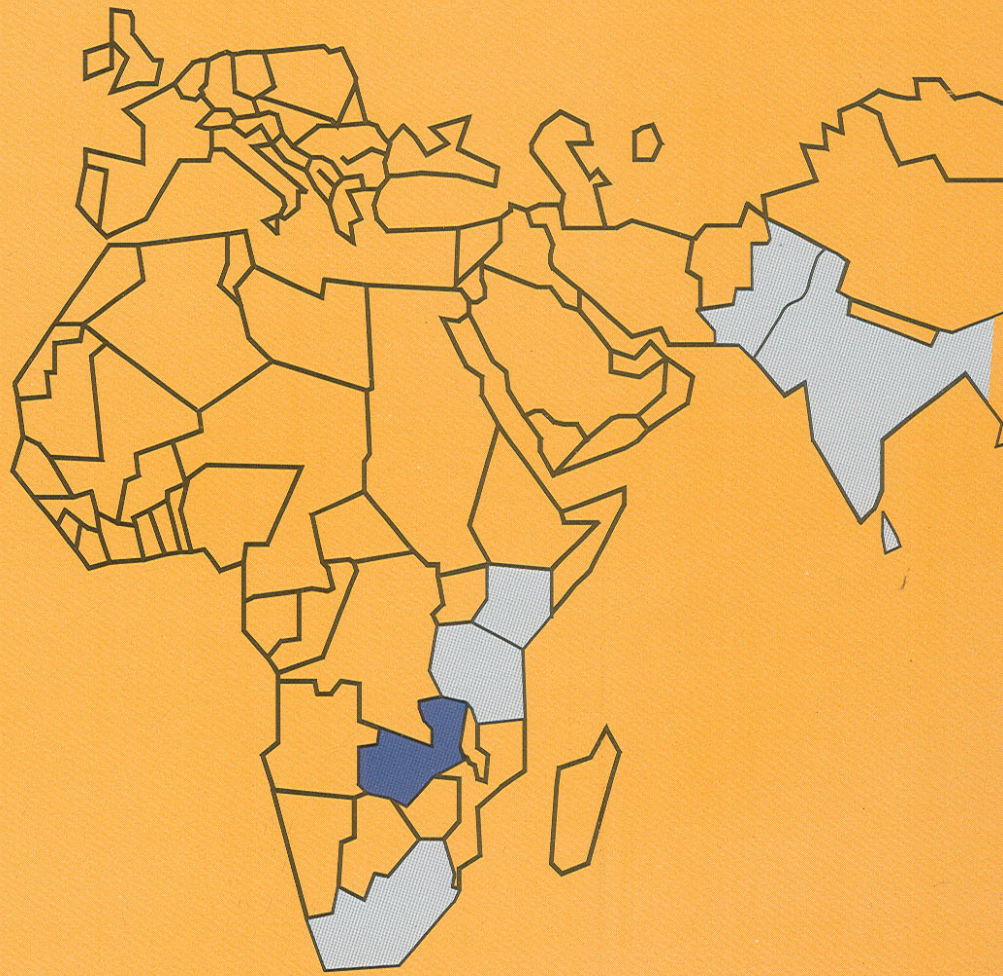


ENFORCING COMPETITION LAW IN ZAMBIA



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LIST OF ABBREVIATIONS

ACP	African-Caribbean and Pacific Pact
AMOCO	American Oil Company
BP	British Petroleum
CDC	Commonwealth Development Corporation
COMESA	Common Market for Eastern and Southern Africa
GDP	Gross Domestic Product
GH	Galaunia Holdings
GRZ	Government of the Republic of Zambia
HPF	Hybrid Poultry Farm
K	Zambian Kwacha
PAC	Pan African Cement
SADC	Southern African Development Community
UNCTAD	United Nations Conference on Trade and Development
UNIP	United National Independence Party
UTTA	United Transport and Taxis Association
VAT	Value Added Tax
ZAMTEL	Zambia Telecommunications Company
ZANACO	Zambia National Commercial Bank
ZCC	Zambia Competition Commission
ZESCO	Zambia Electricity Supply Corporation
ZIMCO	Zambia Industrial and Mining Corporation
ZRA	Zambia Revenue Authority

FOREWORD

The need to have a regulatory body to preside over trade/business practices is in response to the intensification of competition arising from the process of globalisation. This has introduced new market players and with it increases in cross border trade, financial flows and foreign direct investment.

This study marks the first step to address the status, role, and the evolution of the Zambia Competition Commission (ZCC) in regulating the Zambian market. This is one of the many regulators that have been introduced over the past decade. Primarily, the imperative was to build up business confidence, and harmonise trade/business practices in the wake of rapid economic liberalisation, privatisation of public enterprises and globalisation.

Competition policy is a facilitator of economic restructuring and a tool for capital redistribution. It has also been identified as a tool for the promotion of harmony and growth of the private sector through application of corporate governance practices. Its achievement is a function of the success of government programmes and the commitment government has to ensure level playing field.

However, selective application of concessions arising from negotiated deals does injure the core objective of setting up of the ZCC. Such incidences demonstrate that the setting up of the ZCC is not a panacea. It will not sort out all the problems of trade/business practices in the face of opening of markets through the Common Market for Eastern and Southern Africa (COMESA) and various other protocols for promoting competition in the market place.

Regulation of the trade/business environment is a necessary, but not a sufficient condition for growth and economic development as this also depends on various other factors, especially the macro economic stability. Globalisation itself may render the government's position weak in the face of strong lobby and bargaining power of multi national corporations, especially those of a monopolistic disposition.

In view of this, Zambia has to anchor its development through the enhancement of human capital, physical infrastructure, and by creating strong institutions, such as the ZCC. They must foster good corporate governance and stress on accountability and transparency.

This study has revealed that the Zambian Competition Act may have come into effect at the right time and may be adequate, but the operations of the ZCC have had hitches. These are primarily due to funding difficulties and uncoordinated regulatory environment. The possible influence of multi national corporations may not be ignored either.

Ironically, if regulation of competition is to provide scope for providing local participation in trade/business activity, the ZCC framework exhibits ideological, structural and therefore real implementation shortcomings. This is not to understate the ZCC's authoritative influence in tackling strategic alliances such as mergers and takeovers, especially for listed companies. Furthermore, corroborative efforts of other regulatory institutions do help create an environment for checking trade/business conduct and promote competition. It is also good to understand that occasional interventions of the ZCC help in protecting consumers' interests.

With this as backdrop, this study has provided necessary details for all relevant stakeholders to debate the effectiveness of the ZCC. It will help readers understand how far the concept of regulating capitals for the good of trade/business efficiency has performed in Zambia. It also brings out the argument that as long as the government maintains monopoly position in industry where it deemed competition is necessary there may be difficulties for the ZCC to carry out its functions.

I do not pretend to share every view that has been expressed here. However, I hope that this study will be received and viewed as a serious attempt to relate the principles of competition and the stressful experience and harsh ground realities, as in the case of Zambia. With this impressive beginning, we can now face the hurdles of harmonising overall industry regulation and spend energies in resolving the shortcomings and controversies regarding fair trade and business practices.

Munakupya Hantuba

President

Economics Association of Zambia

PREFACE

This publication forms part of the output of the two-year Comparative Study of Competition Regimes in Selected Countries of the Commonwealth in Africa and South Asia. The report is a forerunner in its field, offering a first insight into the Zambian competition regime by analysing the state of competition policy and law in the country.

Although competition policy and law is one of the current hot topics in international forums, this study is the first attempt to address the issue in a Zambian context. The need to understand competition issues in a country like Zambia is critical given the rapid liberalisation which has taken place. Alongside the restructuring of the economy through market liberalisation and privatisation, the government must institute and enact laws to regulate privatised public monopolies. Without these, there is a risk of the abuse of monopoly power. It can therefore be said that regulatory reforms in Zambia are a critical element of domestic restructuring.

In recent years, efforts have been made to strengthen competition policy and law at the multilateral level through International Treaties and Regional Integration Agreements. These efforts have had the backing of the WTO and UNCTAD. One of the motivations behind this phenomenon has been the emerging awareness that with the globalisation of markets, anti-competitive practices are likely to have more international effects. Multilateral efforts might be effective in countering these cross-border implications where individual governments would fail.

The paper examines the adequacy of the Competition and Fair Trading Act of 1995 as applied in Zambia. In addition, an attempt has been made to relate competition law to economic development policy in general and, more specifically, to market liberalisation policies, policies on foreign direct investment, consumer protection, and other sector-specific regulations.

Since competition law in Zambia seeks to protect consumers by encouraging competition and fair-trading, this project also addresses the effectiveness of the regulatory authorities in prohibiting/regulating the monopolies that operate in the economy. In assessing the effectiveness of the Zambia Competition Commission (ZCC), procedural issues regarding the powers and responsibilities of the Commission, and its functions, coverage, constraints and prospects are also examined.

The study looks at the adequacy of existing budgetary allocations with respect to manpower and motivation; operations and infrastructure; and finance and logistics. The independence of the Commission and its ability to take decisions without external interference are also examined. The interaction between the Commission and other sector regulatory authorities is assessed in terms of their formal relationship and the manner in which they handle common cases.

Competition law and policy has an integral role to play in the promotion of healthy competition in the economy, thereby advancing economic

efficiency and consumer welfare. This will not be achieved without sustained public awareness programmes. In this regard, the report also examines the attempts which have so far been made to disseminate information on the rights of consumers.

We would like to express our sincere gratitude to Mr. Gideon Choolwe Mudenda, the researcher for this project for undertaking this task and preparing the report.

We are also grateful to all the National Reference Group members of this study, for their participation in meetings and for providing valuable suggestions and guidelines. Our gratitude would not be complete without mentioning the support we have received from the staff of the Zambia Competition Commission, particularly the Executive Director Mr. George K. Lipimile, who provided valuable inputs and access to relevant information.

Mwamba Makasa
Coordinator CUTS-ARC
Lusaka

CHAPTER-I

Introduction

1.1 Context of Competition Policy in Zambia

Competition policy refers to measures and instruments used by government to determine the conditions of competition prevailing in the markets¹. The colonial government used discriminatory measures by offering African farmers prices lower than those enjoyed by European settlers. For ten years after independence, the government unified markets, abolished racial segregation and encouraged free markets. In 1974 the government replaced free prices with price controls, ostensibly to encourage equity. Since this proved to result in the promotion of production activities that did not improve the country's comparative advantage, the government decided to return to a price system that was determined by free market forces. Market liberalisation, privatisation and public sector restructuring became the hallmarks of the national context of competition policy in Zambia.

The law on competition in Zambia seeks to protect consumers by encouraging competition and fair-trading by prohibiting/regulating monopolies and concentrations of economic power.

1.2 The Perceived Role of Competition Policy in the Country

The law on competition in Zambia seeks to protect consumers by encouraging competition and fair-trading by prohibiting/regulating monopolies and concentrations of economic power. Other aspects of economic law that fall within legal protection are consumer welfare, freedom of trade, and expanding the base of entrepreneurship. In addition, the law seeks to strengthen the efficiency of production, and of the distribution of goods and services. All these matters are provided for in the Competition and Fair Trading Act of 1995, chapter 417 of the laws of Zambia.

In the context of this country, competition policy augments economic restructuring through privatisation, market liberalisation and consumer protection policies.

1.3 Summary of the Major Arguments of the Paper

Competition policy is all those measures and policies used to regulate enterprise behaviour and industry structure². In the context of this country, competition policy augments economic restructuring through privatisation, market liberalisation and consumer protection policies. Competition law is a regulatory mechanism for the realisation of market liberalisation, where the market is regulated by freely determined prices rather than by commands, as it was in the centralised and planned economy that was attempted in the second republic.

Competition law sets the rules for fair trade, enterprise development and promotion and improvement of efficiency of production. It is for this reason that competition policy and law was established. It aimed to provide an enabling framework for private sector development by seeking to increase productivity and growth of the industrial and commercial sectors by implementing decisions that help to level the market and encourage entrepreneurship. Competition law helps to reduce corruption, bribery and rent-seeking behaviour of economic agents. Competition policy and law contribute to the structural diversification of the economy, employment growth and a more equitable distribution of income and other economic

opportunities. In short, competition law and policy are tools for meeting broad social and economic objectives by acting to improve management accountability, encourage efficient deployment of assets and improve corporate governance.

Considerable achievements have been made towards improving macroeconomic management, the opening up of the economy to international competition and the establishment of a regulatory regime through legal reform.

The Economic Reform Programme, which the government began in 1991, will remain unfulfilled without strengthening the regulatory environment. Considerable achievements have been made towards improving macroeconomic management, the opening up of the economy to international competition and the establishment of a regulatory regime through legal reform. However, these measures are yet to result in tangible economic progress. Further efforts are required to strengthen the functioning of regulatory institutions, the Zambia Competition Commission (ZCC) itself, the Communications Authority, the Energy Regulatory Board, the Pensions and Insurance Authority, the Road Traffic Commission, the Bank of Zambia, the Pharmacy and Poisons Board and the Radiation Protection Board. It is argued that support for the ZCC will contribute to the enforcement of competition in general.

1.4 Outline of the Rest of the Report

This report is expository. It will therefore describe the framework of competition policy and law in Zambia. Following this section, which is the introduction, the paper will present the socio-economic context of development of Zambia by explaining the nature of the economy, its structure and its sectoral profile. The purpose of this section will be to present the context of development in which competition policy and laws are geared. While this section is general, the next section, chapter three, will concentrate on revealing the nature of the policy environment. Policy by its nature is a set of informed decisions based on given social values for the purpose of resolving social problems. This section will therefore explain the nature of Zambian government trade and investment policies, among others, including the nature of the monetary and fiscal policy environment as regards their impact on innovation and market structures.

Chapter four will examine the scope of the competition law and its provisions regarding monopolies, price controls, trans-boundary or cross-border issues and available remedies. This section will inform of the completeness and adequacy of the law as seen by key sector players. Chapter five will extend the analysis of the competition law in relation to development needs and policies. This chapter is analytical as it weighs the competition law face to face with relevant policies introduced in chapter three. This will relate the competition law to economic development policy in general and specifically to the market liberalisation policies, the policy on foreign direct investments, consumer protection law and other sector specific regulation laws – communications and energy.

Chapters six and seven will discuss the administrative machinery of the competition law and policy. While chapter six will discuss purely procedural issues, the powers and responsibilities of the Competition Commission, its functions and coverage, constraints and prospects, chapter seven is a capacity assessment of the ZCC. The conclusion is chapter eight and will summarise the competition regime of Zambia as it stands at the turn of the century and the dawn of the third millennium.

Socio-Economic/Development Context

2.1 Geography

Zambia is a land locked country in Southern Africa that is surrounded by eight other countries. These are Angola, Botswana, Congo DR, Malawi, Mozambique, Namibia, Tanzania, and Zimbabwe. Zambia is a medium sized African country that spans 752,610 square kilometres - a little less than Kenya and Uganda combined. The administrative capital is Lusaka. The country was until very recently, a major world producer of copper and cobalt, which accounted for more than 90% of total exports. Increasing costs of production and transportation to world markets have made the copper industry in Zambia less and less competitive.

Zambia is a typical case of small economy with a very small market. Some analysts believe that Zambia's land locked status and numerous neighbours make her a strategic place for a regional trade centre.

Zambia is therefore a typical case of small economy with a very small market. Some analysts believe that Zambia's land locked status and numerous neighbours make her a strategic place for a regional trade centre. A persistently poor copper export performance over a long period of time has caused recurrent balance of payments problems, encouraging trade rather than production. However prevailing conditions and ineffective business and economic managerial expertise have hindered her from achieving that role. In recent years Zambia has suffered extensively from brain drain with a progressive deterioration of her social and economic welfare and employment opportunities.

2.2 People

The population was estimated to be 10.2 million people in 1999. Average male literacy is higher (84.6 percent) than the average female literacy rate (70.2 percent). The average total literacy rate is 77.2 percent of the population.³ English is the official language, though Tonga, Bemba, Lozi, and Nyanja are the spoken languages in most places. Altogether there are 73 different Bantu language dialects spoken in Zambia including other African languages such as Ndebele, Shona and Swahili. Hindi and Arabic are also common among the expanding Asian immigrant community that dominates local manufacturing and trade.

Most people practice indigenous beliefs. Christianity, Islam and Hindu, introduced by missionaries and other immigrants are also becoming popular. The National Anthem proclaims Zambia as a land of joy in unity, dignity and peace, strong and free.

2.3 Vital Statistics

Human welfare improved drastically following independence from the United Kingdom in 1964, but the rate of progress slowed in the 1980s and began to reverse in the 1990s. For instance, the national under five-mortality rate fell to a low of 150 deaths per 1000 in 1980 but has since crept upwards to 202 in 1992 and is believed to exceed 250 deaths per 1000 today. This means that one child in every four is likely to die before

the age of five. Data on maternal mortality rates is not reliable, but the authorities have reason to believe that this too is rising. Life expectancy for both males (41.4) and females (40.6) was similar in 1999. Life expectancy at birth for the total population was 41 years. This reflects a very high infant mortality rate of 112 per 1000 live births. Fertility rates have remained stable at around 6 children per woman.⁴

2.4 Government

Zambia has a republican government and was established as an independent country on October 24th 1964 within the Commonwealth of Nations mostly comprising of former colonies of the United Kingdom. Until very recently, Zambia was a strong proponent of the Pan African Movement and a staunch supporter of African liberation and the non-aligned movement. Virtually, all the anti-colonial liberation movements of Southern African countries, and therefore the freedoms of the peoples of Angola, Mozambique, Namibia, South Africa and Zimbabwe were fought from the Zambian soil. Zambia has a very special place in the political history of the region.

Zambia is a member of several important political and economic groupings: the Non-Aligned Countries; the African-Caribbean and Pacific Pact (ACP); the United Nations Organisation and the Organisation of African Unity. It has also played a leading role in the formation of the regional economic blocs including the Common Market for Eastern and Southern Africa (COMESA), which is based in Lusaka. The Gaborone based Southern African Development Community (SADC) and the African Union were also launched from Lusaka.

2.5 Socio-Economic Context

By all indicators, Zambia is a very poor country. In 1999 Gross Domestic Product (GDP) was estimated to be US\$3.1 billion.⁵ Inflation is a persistent problem. Since 1995, inflation has fluctuated around 34 percent per annum.

By all indicators, Zambia is a very poor country. It is a heavily indebted country and is prone to balance of payments difficulties. The external sector balance closely reflects the internal fiscal position of the economy.

Zambia is a heavily indebted country. The external debt is US\$5.6 billion, almost twice the level of GDP.⁶ The debt service burden exceeds a quarter of annual foreign exchange receipts. This is a major drain on scarce foreign resources that the country needs to finance imports and development. Zambia is highly dependent on imports, particularly on imports of petroleum oils, transport and other equipment. This country is prone to balance of payments difficulties. Zambia's foreign reserves expressed as months of import cover have not exceeded two months for many years now.

The external sector balance closely reflects the internal fiscal position of the economy. The revenues - expenditure gap is also very small. Domestic expenditures are 94 percent of revenues. The government therefore has a difficult debt service burden at home, similar to that abroad. Several structural reform programmes supported by the International Monetary Fund, the World Bank and bilateral donors to relieve the fiscal burden through privatisation, cost sharing, reduction of civil service emoluments and market liberalisation have been tried. But the structural adjustment programme, which started in earnest in 1989, is yet to be followed by growth of production.

Agriculture output, which accounts for the livelihood of most of the population, continues to be dependent on rainfall, rather than improvements in productivity. Production of major products, grains and

pulses, livestock and livestock's products, oils, tobacco and cotton has declined. Base metal mining production has also declined by more than half. Lead and zinc operations at Kabwe have ceased and production of industrial minerals, fertiliser, chemicals and textiles have either stalled or drastically fallen. Unemployment has risen dramatically making the official estimate of 24 percent current unemployment a gross understatement. Annual growth of the labour force is 2.8 percent.⁷

By any measure, Zambia is a very poor country. It needs to reverse the economic stagnation and declining drift of the past twenty years or more. All forms of external development assistance will be required to accelerate the pace of development.

2.6 Market Structure and the Nature of Concentration

Data for the formal analysis of market concentration and performance are not available. The last census of establishments was undertaken in 1980. Anecdotal information shows that the market structure has somewhat changed over the period since then, because a number of establishments have closed down. On the other hand a few sectors that were dominated by a monopoly now enjoy a reasonable degree of competition because of privatisation and market liberalisation.

For instance, the mining industry was previously dominated by a state owned monopoly, the Zambia Consolidated Copper Mines Limited. Since the copper industry is critical for the supply of foreign exchange, it became necessary to diversify the ownership of mines to reduce the monopoly power of the state owned mining corporation in the determination of foreign exchange rates.

Table 1: Indicative Market Structure for Zambia - 1991 and 2000			
Item	Service	Nature of Market	
		1991	2001
Petroleum	Imports/ Wholesale	Monopoly	Oligopoly
Fertiliser	Imports/ Wholesale	Monopoly	Competition
Copper	Export Marketing	Monopoly	Competition
Production activities	Maize milling	Monopoly	Competition
	Vegetable oil	Monopoly	Competition
	Cement	Monopoly	Monopoly
	Textile	Oligopoly	Oligopoly
Services	Banking	Oligopoly	Oligopoly
	Broadcasting	Monopoly	Oligopoly
	Insurance	Monopoly	Oligopoly
	Telecommunications	Monopoly	Oligopoly
Source: 7-Up Country Researchers' Assessment			

There are several reasons for the high level of market concentration in the Zambian economy. First of all, this is because the economy is very small. Secondly, the history of state ownership and controlled markets means that one or two large foreign owned enterprises dominate some sub-sectors. Third, the small sized nature of the manufacturing sector makes it highly amenable to inter-locking directorship and domination by a single

multinational company for example Lonhro, or the Commonwealth Development Corporation.

There has been very little movement towards competition in the so-called public service sectors. The major reasons for this could be the lack of substantial sub-sectoral restructuring before privatisation.

Table 1 shows the results of market policies adopted in the post 1991 era. On balance, there has been substantial competition in import trade, the food and beverages industry, garments and non-metallic mineral products, particularly asbestos products. There has been very little movement towards competition in the so-called public service sectors. The major reasons for this could be the lack of substantial sub-sectoral restructuring before privatisation.

2.7 The Public Sector

At independence in 1964, the public sector accounted for 14 percent of the economy. By 1972, the public sector was 80 percent of the economy. The government had moved to Soviet style policies, which played the conflicting roles of policy formulation, regulation and enterprise management. Thus, it became a player and an umpire at the same time. Consequently, loose fiscal policies were inevitable. The results were huge public expenditure deficits, a huge external debt and runaway inflation. Tens of thousands of jobs were lost and economic performance became tenuous.

To correct the declining economic performance, the government adopted an economic reform programme aimed at the reduction of the government's direct involvement in the economy by providing enterprises with greater freedom and stronger incentives, and stimulating entrepreneurial activity by promoting business efficiency.

To correct the declining economic performance, the government adopted an economic reform programme aimed at the reduction of the government's direct involvement in the economy by providing enterprises with greater freedom and stronger incentives, and stimulating entrepreneurial activity by promoting business efficiency. The government sought to open the economy to allow domestic firms to compete internationally and adopted an improved and more modern regulatory framework by passing new laws on trade and investment, liberalisation, privatisation and deregulation. As a result of these measures, new institutions such as the Privatisation Agency, the ZCC and other regulatory bodies were established, and existing ones, such as the Investment Centre and the Bank of Zambia were reformed. Overall, these measures resulted in a reduction of red tape and bureaucracy, by removing all foreign licensing requirements; privatisation; adopting anti-inflation measures such as reduction of the money supply; removing exchange rate restrictions, and removing subsidies.

The government adopted a policy of decentralisation by shifting services to sub-national levels of government, and sought greater involvement of communities in public service delivery.

The public sector reform programme recast the role of the government administration to one that is conducive to private sector development by seeking to end duplication and competition with private sector. Towards this end, the government adopted a policy of decentralisation by shifting services to sub-national levels of government, and sought greater involvement of communities in public service delivery. The programme has three components:

1. Restructuring Ministries and Provinces to streamline the structure and make them more consistent with current policy priorities;
2. Improving human resource management by developing and instituting performance management systems and individual performance appraisals, training and building a culture of accountability and instituting measures to motivate workers;
3. Decentralising and strengthening local government, addressing the performance management systems and financing functions of provincial and local government, and supporting participatory governance.

The implementation of these measures has been slow. In 1997, the government identified 31 departments for commercialisation. By the end of 2001, none were commercialised. Similarly, the district focus and orientation of government expenditure towards sub-national administration has yet to gain significant ground. More energy went into programme preparation than implementation. Enthusiasm has yet to be demonstrated towards implementing the public sector reform programme as it was towards privatisation. Some ministries have been restructured, ostensibly to make them more consistent with current policies. The results show haphazard retrenchment and brain drain.

2.8 The Role of Foreign Investment

During the copper boom period, a significant proportion of the mining surplus was invested locally in import substitution industries. Much of the foreign investment during this period was destined towards the creation of state enterprises as minority interests. With hindsight, it can now be said that the choice of investments did not favour the long-term comparative advantage of Zambia. When copper revenues burst, both private and public investment fell drastically. However, recurrent expenditure did not decline. Instead, it rose dramatically, as seen above. Gross Domestic Investments fell from 30 percent of GDP during 1964-74 to 11 percent in 1991 and have since begun to rise as, shown in table 2 below.

Table 2 shows that reported direct investment inflows have tended to increase since 1995. What is not clear is the quality of these investments. It would seem that these inflows were destined for privatisation rather than the creation of new production premises. It is probably still too early to conclude that they have had little effect on employment and growth.

Table 2: Foreign Direct Investments in Millions of US\$							
Country Average	1988-1993	1994	1995	1996	1997	1998	1999
Uganda	9	88	125	120	175	210	180
Tanzania	7	50	150	149	158	172	183
Zambia	99	40	97	117	207	198	163
Zimbabwe	3	41	118	81	135	444	59
<i>Source: World Investment Report 2000 Annex table B.3</i>							

On balance, we can say that as a foreign direct investment destination, Zambia has consistently performed worse than her northern neighbour Tanzania, and than Uganda, except for 1997 when Zambia's foreign investment inflows were higher. However, Zambia has a smaller population than all the countries indicated in table 2, therefore, per capita foreign direct inflows to Zambia were relatively higher. In terms of accumulated foreign direct inflows, Zambia's gross investment is highly dominated by foreigners, at 52 percent of gross domestic product.⁸

2.9 Export Orientation

Zambia is an open economy. With a Gross National Product of US\$3,158 million in 1998, total foreign trade accounted for US\$2,854 million or 90 percent of gross national product. Data on export orientation of individual sectors is not available. Over 50 percent of exports are of copper.⁹

Analysis of the external sector 1975-98 shows that average annual exports have gradually declined over the years, but imports have consistently recorded positive annual growth rates. As a result, terms of trade have gradually deteriorated. Export unit values declined by 33 percent between 1995 and 1998¹⁰. Import growth has been accompanied by declining manufacturing. The quality of imports has changed substantially from capital and intermediate goods to capital and final goods.

2.10 Import Penetration

Zambia is an oil importing country and foreign exchange supplies are essential to economic growth to finance oil, capital, intermediate goods and food imports. Imports are crucial to the development of the economy. Import penetration, the proportion of imports in domestic output, remains high, at about 33 percent per annum. Zambia imports virtually all of its mining and transport equipment and oil, and a substantial proportion of its raw materials and final goods.

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External trade liberalisation has induced an import competition driven process of 'creative destruction' of domestic manufacturing. This is characteristic of private sector driven markets. However, the boom and bust of Zambian manufacturing cannot be solely explained by import competition. It must be realised that the declining copper industry has also contributed to the high mortality of manufacturing enterprises. In general, declining domestic demand has helped to kill off a number of firms that were unable to redirect their operations towards export markets. It should be pointed out that paper, chemicals and garments have received a direct hit from import competition (partly from smuggling).

The next chapter deals with public policies and will show that some of the causes of the poor export performance of Zambian industry are structural and policy induced. In a study carried out in 1994 to evaluate the performance of private enterprises in Zambia, the World Bank observed that competition from imports was the third most important business constraint faced by Zambian industry. Industries have great difficulty in competing in the export as well as import sectors.

Public Policy Context

3.1 Background

At independence, the government inherited a dual economy composed of a large traditional sector and a small but powerful modern export enclave. The traditional sector was largely involved in subsistence agriculture. This provided cheap labour for the dominant modern sector; predominantly copper mining for export and a small import substitution manufacturing industry. The new government led by the United National Independence Party (UNIP) adopted a policy of transforming the traditional subsistence agriculture into commercial small holders and attaining commanding heights of economic development.

In 1968 the government nationalised the trading sector and restricted non-Zambians from trading in rural areas. In what were later to be known as the Mulungushi Economic Reforms of 1972, the government nationalised the remaining manufacturing and mining sectors.

In 1968 the government nationalised the trading sector and restricted non-Zambians from trading in rural areas. These reforms were known as the Matero Economic Reforms. In what were later to be known as the Mulungushi Economic Reforms of 1972, the government nationalised the remaining manufacturing and mining sectors. All establishments with a turnover exceeding K500,000 were invited to accept state participation. These measures and additional state directed investments resulted in the creation of the state owned Zambia Industrial and Mining Corporation (ZIMCO) that dominated 80 percent of the economy. ZIMCO had a number of subsidiaries, the largest of which were the Zambia Consolidated Mining Corporation and the Industrial Development Corporation that held manufacturing interests and the National Import and Export Corporation, which was involved in the trading sector.

In addition, the crop marketing functions were carried out by the state owned National Agricultural Marketing Board. This was later to be unbundled into several crop-marketing companies. The Lint Company of Zambia was involved in the marketing of exportable crops, cotton, soya beans and sunflowers. The National Tobacco Corporation was responsible for the marketing of tobacco. Virtually every sector of the economy was dominated by a state owned company. A number of these companies were monopolies. The Zambia Sugar Company was established to produce cane sugar through the Nakambala Sugar Plantations and also operated the processing operations.

In addition, the state owned a number of large farms such as tea and coffee plantations, beef and pork production farms and processing plants under the Agricultural Development Corporation. The Zambia Forest Industries Corporation was involved in the management of plantations for the production of timber, and wood processing activities. There were similar arrangements for metal fabrication, roads and rail transport.

The public economic policy of Zambia evolved on a path of import substitution industrialisation, pervasive trade controls, expansion of the state sector and neglect of agriculture from 1965 to 1980.

Thus, the public economic policy of Zambia evolved on a path of import substitution industrialisation, pervasive trade controls, expansion of the state sector and neglect of agriculture from 1965 to 1980. By 1980, it was clear that these policies had failed. It was realised that inward looking

policies gave stimulus to activities that were not consistent with the country's comparative advantage. In 1987, the government tried a home-grown economic reform programme, which was called 'growth from own resources'. This programme also failed to last. In 1989 the government gradually moved to policies that stimulate competition. In 1990 a new era based on plural party government was established and elections were held in 1991, which resulted in the establishment of a government committed to economic reforms.

The new economic reform programme was based on the implementation of three macroeconomic objectives:

1. Restoration of macroeconomic stability through monetary and fiscal reforms;
2. Facilitation of private sector growth by freeing price and exchange rate regulations and import and export regulations;
3. Shifting agriculture and industry from public monopolies to private and decentralised institutions.

The thrust of the macroeconomic stabilisation strategy was an attack on inflation by reducing fiscal deficits and the money supply. This was to be achieved through the elimination of subsidies and the adoption of a cash budget – so that expenditure increases would only be met from revenue increases or savings. The government also reformed the tax machinery by setting up the Zambia Revenue Authority (ZRA) in 1994. It followed measures to raise the tax base by introducing Value Added Tax (VAT), which replaced sales tax.

Concentration and public sector dominance of agricultural business through nationalised companies encouraged price fixing and allocation of materials only to state owned enterprises.

Thus stabilisation, liberalisation and privatisation became the watchwords of the new government economic policies. These objectives had deep-seated implications for the country's industry, investment and trade policies that necessitated a competition policy and law to facilitate import and export competition.

3.2 Trade Policy and Agricultural Reforms

Trade policy was dominated by official price controls and the determination of pan-territorial agricultural prices on a pan-seasonal basis. The government not only controlled crop prices, but into mill prices were controlled as well as final product prices. Concentration and public sector dominance of agricultural business through nationalised companies encouraged price fixing and allocation of materials only to state owned enterprises. Imports and market entry were restricted through licensing regulations. The result was that the processing and distribution of food and other agricultural commodities became dominated by a limited number of large-scale, state owned companies located in a few large urban areas. The net effect was the crowding out of private sector participation and the obliteration of opportunities for rural based industries.

In order to maintain officially determined prices and at the same time keep consumer prices down, a number of subsidies had to be applied. Prices became the subject of public protests and trade union lobbying. In rural areas, this policy created a 'public sector peasantry'. Agricultural small holders became government contract farmers through the provision of subsidised farm credit. When crops failed, farmers would not repay and loans were even written off. By the 1980s, the agricultural system had become unsustainable. Urban consumer markets were hit by consumer goods shortages, food production lagged behind, population increases and food imports became regular.

Table 3: Agriculture Reforms		
Reform Measure	Year	Comments
Privatise maize and fertiliser trade	1990	No significant activity until 1992
Eliminate fertiliser subsidies	1992	Indirect fertiliser subsidy maintained
Eliminate mealie meal subsidies	1992	Hammermill growth
Decontrol of maize producer price	1993	Consumer price increase
Elimination of maize transport subsidy	1993	Consumer price increase
Lift sugar price controls	1993	Reduced local consumption
Privatise milling industry	1994-95	Some milling companies close down
Privatise cotton ginning	1995	Gins acquired by Lonrho and Clark
Privatise Zamseed	1996	New entrants in crop seed marketing
Privatise Fertiliser trading	1996	New entrants

The agricultural market liberalisation process was chaotic to say the least. The state agricultural marketing companies were privatised, but the private sector was unable to finance crop marketing. This forced the government to re-enter the market. But it would not defend the market due to the cash budget being squeezed. Instead, it issued promissory notes, which were discounted at discount. The liberalisation of crop marketing was a complete disaster.

Table 3 shows that market liberalisation increased competition but also had mixed results. On the positive side, liberalisation opened the sectors to new participants. The elimination of maize subsidies encouraged investment in the food and beverages market. The removal of import restrictions encouraged import competition and product diversification. For example the liberalisation of the crop seed market led to the entry of a number of new players and ended the near monopoly of the state sector. On the negative side, those enterprises that could not operate without state subsidies collapsed and workers lost their employment.

The liberalisation of markets, trade and exchange rates was undertaken rapidly in the post 1991 economic era. The country clearly moved to an outward trade regime.

The liberalisation of markets, trade and exchange rates was undertaken rapidly in the post 1991 economic era. Prices were freed and exchange rate regulations eliminated with repeal of the exchange control act in 1994. Both product and factor markets (excluding land) were liberalised as price controls were dismantled. The Kwacha became fully convertible. Restrictions on bank lending were also lifted. Interest rates were freed and a weekly auction of treasury bills was introduced. All import and export restrictions were also removed. Tariff bands were compressed and simplified. Customs duty rates, which had ranged from 0 to 100 percent with 11 tariff bands, were reduced to from 0 to 25 percent with 4 tariff bands. The country had clearly moved to an outward trade regime.

The elimination of trade protection is usually associated with a surge in exports. This has yet to happen in Zambia. In part this could be due to the absence of real exchange rate depreciation and the remnants of negative protection arising from insufficient duty drawback provisions, which hinder exporters from accessing materials and intermediate inputs at world prices.¹¹ The growth of non-traditional exports, though impressive, from 10 percent in late 1980s to 15 percent in the 1990s, has been too small to contribute meaningfully to overall export performance. Table 4 shows some of these non-traditional exports being encouraged. The greatest growth has come from the export of cut flowers and fresh vegetables.

Table 4: Shares of Non-Traditional Exports (NTE's) in 2000		
Product	Earnings	
	(thousands of US\$)	Percent of Total
Fresh Flowers	30,780.7	14.6
Cotton Yarn	22,447.7	10.6
Sugar	20,831.2	9.9
Fresh Vegetables	16,056.0	7.6
Copper Rods	12,081.8	5.7
Gemstones	11,983.0	5.7
Tobacco	8,333.0	4.0
Coffee	7,376.4	3.5
Subtotal	129,889.8	61.6
Total NTE's	210,835.5	100.0
Source: Bank of Zambia		

A study commissioned by the World Bank and the Ministry of Commerce and Industry revealed that there was a good measure of import protection despite the removal of quantitative import controls and tariff reforms.

A study commissioned by the World Bank and the Ministry of Commerce and Industry revealed that there was a good measure of import protection despite the removal of quantitative import controls and tariff reforms⁵. The study showed that enterprises selling in the domestic market and facing competition from outside the COMESA area had effective rates of protection ranging from 40 to 70 percent. This means that enterprises that faced competition from duty paying imports received more than enough protection to run efficiently, provided they were reasonably well suited to Zambia's comparative advantage.

However, the study found a number of import competing activities facing difficulties:

- Activities that faced competition from COMESA imports but got their material inputs from outside the COMESA area;
- Activities whose output was exempt from customs duty, e.g. education goods, health materials and government purchases; and
- Activities competing against smuggled imports.

In sum, the liberalisation policies of the government have had a number of effects on the competitiveness of production in the Zambia. Some of these are:

- The removal of transport and other subsidies and services to agriculture has adversely affected small-scale producers and increased urban food prices.
- Increased competition and more open trade regimes have suppressed price increases, but also caused difficulties for some companies.
- The decrease in controls has created opportunities for new producers and consumers.

Lack of access to credit due to high interest rates and insufficient demand are the most important causes of poor business performance. Those enterprises involved in less competitive activities have to shake up, while others still need to get used to operating in an uncontrolled market environment and learn to fend off import competition. Outside the copper

industry, there are very few activities in which Zambian firms are able to penetrate foreign markets. Potential for this is limited to copper fabrication, yarn, sugar and cement. It will be seen later that market liberalisation proceeded against the backdrop of an escalating financial crisis. This coincided with the lifting of controls on interest rates and measures to tighten the money supply. Farm loan interest rates went up from 50 percent to 120 percent and many farmers went under.

3.3 Investment Policies

Part of the explanation for stagnation of the economy is the low levels and poor quality of past investments.

Part of the explanation for stagnation of the economy are the low levels and poor quality of past investments. It has been said that state directed investments did not always go to areas that built upon Zambia's comparative advantages. First of all, many of these investments were geared towards import substitution under import protection and therefore were not situated for international competition in a liberalised market.

The low levels of savings in the economy, about 12-15 percent of annual gross domestic product, cannot provide the basis for sound investment growth. Foreign investment inflows are therefore critical for Zambia to achieve accelerated growth of capital formation, income and employment.

The government has so far not shown sufficient political will towards investment promotion. For instance, despite the enactment of the Small Enterprise Development Promotion Act of 1997 for the renewal of small scale industrial development, the law has yet to be implemented due to lack of political will. There have been a number of initiatives to encourage the growth of investments in agro-processing and other manufacturing areas such as the Ministry of Commerce and Industry's externally funded *Matching Grant Scheme*. These measures have favoured existing enterprises and have also been characterised by little use.

In 2001, the government amended (Amendment No. 2 Act of 2001) the Customs and Excise Act, Cap 322 of the Laws of Zambia and passed a new law enabling the establishment of *Export Processing Zones*. The law provides for duty exemptions and other tax reductions to investors operating in declared tax free zones for a period of ten years. The competition benefits of this scheme remain dubious at this stage and are likely to remain limited to the promotion of resource based industries, which seem to be doing well even without special export protection.

The government's industrial policy seems to be confined to privatisation activities. As regards deliberate industrial promotion, or giving support to the growth of industries, the government has had a hands off attitude despite making political statements to the contrary.

The government's industrial policy seems to be confined to privatisation activities. As regards deliberate industrial promotion, or giving support to the growth of industries, the government has had a hands off attitude despite making political statements to the contrary. The government of Zambia has clearly shown a lack of political will towards industrial development. Poor governance performance records such as the erosion of transparency and accountability and delays in the privatisation of the mines may also have contributed to investor wait and see attitudes.

3.4 Privatisation

The government set about the dismantling of the state owned sector, which accounted for 80 percent of GDP, with the enactment of the Zambia Privatisation Act and the establishment of the Zambia Privatisation Agency in 1992. Beginning with smaller companies, privatisation went into full swing in 1996/97. By the year 2000, 248 out of 280 companies had been sold. The privatisation of the mines was delayed amidst allegations of incompetence and corruption. At any rate, a veil of secrecy, and behind

the scenes manoeuvres shrouded the whole process. Delays in the privatisation of the mines added to investor uncertainty. A number of other factors could have contributed to the investor wait and see attitude. Persistent uncertainty made investors hesitant about any significant commitment. The effects of market liberalisation, price decontrol, removal of subsidies, and reduced government participation decreased protection. Nevertheless uncertainty about whether these policies would continue increased.

Table 5: Privatisation Programme Status - 1994 to 2000

	1994	1995	1996	1997	1998	1999	2000
Completed privatisation deals (cumulative)	15	60	189	213	224	234	245
Negotiations completed		12	4	8	6	2	3
Heads of Agreement Signed		30	5	2	6	2	0
Companies/units privatised (cumulative)	15	102	194	223	236	238	248
Companies under negotiation	4	24	6	33	20	16	6
Companies under preparation	32	12	53	25	16	26	26
Commercialisation of Govt. Departments*				31	31	31	31
Total Working Portfolio	52	210	253	312	303	311	311
Source: Zambia Privatisation Agency (2000)							
*Total number of Government departments identified for commercialisation							

Despite the tremendous progress achieved in the privatisation of industry and the trading sector, there has been some delay in the privatisation of the telecommunications, media, railways and banking sectors.

Despite committing itself to complete privatisation, the government has reneged on privatisation of the so-called public utilities, broadcasting, communications and power.

3.5 Communications

Despite committing itself to complete privatisation, the government has reneged on privatisation of the so-called public utilities, broadcasting, communications and power. It has not even embarked on the commercialisation of some government departments. In broadcasting and communications, the government has allowed the entry of new players subject to stringent licensing regulations. For instance, private broadcasts are allowed only three minutes of news time. The growth of the free press has been subjected to a pattern of harassment, and public media performance has been reduced to sycophancy. Despite these drawbacks, there is considerable growth of competition in print-media. Restrictions continue in electronic broadcasting and competition in television is restricted to cable networks.

The telephone communication market has yet to be completely privatised. Even though the sector has been opened to hyper-market mobile phones, the main carrier, the state owned Zambia Telecommunications Company (ZAMTEL) has yet to be privatised. Despite the available infrastructure, indicators of telephone connections show a relative decline. ZAMTEL marketing is clearly not devoted to seeing market expansion. Telephone lines per 1000 persons were 9.4 in 1999 and 9.0 in 2000. The small but significant increase in internet hosts of 0.1 per 1000 persons in 1999 to 0.5 per 1000 persons in 2000 indicates a growing demand for communications services.

Clearly, a high degree of market concentration exists in this state dominated public utility. Competitive behaviour has yet to be seen. For

example, a considerable backlog of internet service providers was allowed to wait for more than 18 months pending the appointment of the Communications Authority Board. But the communications authority allowed ZAMTEL to participate in internet service provision in competition with its subscribers. The playing field has yet to be levelled.

3.6 Electricity

Similarly, the state has delayed privatisation of the power sector. Zambia is well endowed with electricity potential. Power generation, transmission and distribution are undertaken by ZESCO through its subsidiaries operating at divisional levels. The total installed capacity of the interconnected system is 1,623 MW but the available capacity is about 1,608 MW. Diesel stations are used for small township power supply but are now old and unreliable. Thermal and gas turbine power stations have an installed capacity of 138 MW and are only used to supply the mines in case of shortages. All together, ZESCO has at least three large hydro-generations plants and a number of small hydropower stations around the country. The main power stations are shown in table 6.

Table 6: Market Shares of Existing Power Generation Stations		
Name of Station	Installed Capacity	Percentage Market Share
Kariba North	598 MW	41.1
Kafue Gorge	730 MW	50.1
Victoria Falls	105 MW	7.2
Small Power Stations	138 MW	2.0
<i>Source: ZESCO Annual Report March 31st 1993</i>		

There is the potential for multiple players in this sector, a potential for diversification of ownership throughout the generation, transmission and distribution structure. Generation potential is estimated at 6000 MW with a firm energy output of 33,500 GWh. So far only 28 percent of this potential has been utilised. The state owned ZESCO seems ill placed to promote large-scale projects for the export of electric power, stabilisation of power supply and improvement of rural electrification. Privatisation of this sector at this stage seems appropriate. But, competition pressures will remain unrealised if the sector is not disbanded into various units.

3.7 Water and Sanitation

In 2000, the population that had access to safe water was estimated at 58 percent¹². Access to safe water and sanitation services was greater in urban areas, at 93 percent, than in rural areas, which had only 38 percent of safe water coverage. To increase the service delivery in this sector, the government established the Water and Sanitation Council to regulate the commercialisation of the water supply and to promote private sector participation in this sector. To this end, seven water companies were established between 1999 and 2000 and an Asset Holding Company was established to provide water and sewerage services to mining townships in the Copperbelt province of Zambia. It is too early to judge the growth of competition in this sector or the performance of the new regulatory body. What is clear is that the Water Supply and Sanitation Council will have exert competitive pressures on the utilities and municipal companies through more appropriate pricing than it has to date.

The overall goal of government fiscal and monetary policies is to attain economic growth, decrease inflation and restrain budget deficits.

3.8 Fiscal and Monetary Policies

The overall goal of government fiscal and monetary policies is to attain economic growth, decrease inflation and restrain budget deficits. The government has sought to achieve these goals by widening the tax base through the reform of trade taxes and the replacement of sales tax by Value Added Tax in 1995; improvement of tax enforcement strategies and simplification of tariffs in 1996; and enhancing compliance.

Zambia has improved fiscal and monetary policies. However, fiscal and monetary conditions remain linked to the fortunes of the mining industry. When the Zambian mining industry sneezes, the rest of the economy catches a cold. The role of the mining industry in Zambia can be understood in terms of Dutch Disease effects on the rest economy¹³. Accordingly, a decline in rents from copper have led to a sharp fall in fiscal revenue.

Fiscal revenue fell from 30 percent of GDP in 1970-74 to 19 percent in 1980-90 and revenue from mining declined from 10.8 percent of GDP or 36 percent of total fiscal revenue to 1.6 percent of GDP or 8.4 percent of revenue¹⁴. Expenditure decline has been delayed because of consumer and producer subsidy policies. The effect of falling revenues was increasing interest rates, reduced capital expenditure and an increase in domestic credit. These factors contributed to a poor investment climate.

On the other hand increasing imports induced general price increases and production shortfalls. The state initially responded with measures that increased domestic credit and inflation, which reduced the country's competitiveness. In short, Zambia found herself with persistent balance of payments deficits, recession and inflation. To correct the problem, the government adopted a 'shock therapy' approach primarily intended to eliminate the balance of payments deficits and inflation.

Sound macroeconomic management is crucial to attaining sustained economic growth. Price stability should be regained and interest rates should come down for investment to occur and employment to increase. Zambia also needs an exchange rate regime that provides an incentive for export expansion.

Deregulation of the exchange and interest rates helped to stabilise the Kwacha and wade-off the threat of hyperinflation. However, trade liberalisation measures were not accompanied by real exchange depreciation.

Deregulation of the exchange and interest rates helped to stabilise the Kwacha and wade-off the threat of hyperinflation. However, trade liberalisation measures were not accompanied by real exchange depreciation. Consequently, some manufacturing activities experienced a sharp increase in import competition. A sluggish economy and tight monetary policies offset the positive effects of trade liberalisation policies.

Occasionally, net foreign exchange supplies have exceeded demand. The commitment to holding down inflation could be one motive for meeting government cash needs through sales of foreign exchange, but this may also be due to domestic price increases relative to foreign prices. In some cases, it may have been driven by political expediencies to slow down exchange rate depreciations. The effects have been bursts of foreign exchange appreciation. For example, the real exchange rate went up by 4.6 percent in 1999 and 2.6 percent in the first half of 2000¹⁵. Exchange rate appreciation has also contributed to the erosion of trade liberalisation gains.

There have been no winners from the structural adjustment programme. Observers have blamed poor programme design and badly thought out sequencing of reform phases. There is now some agreement that the

removal of foreign exchange restrictions prior to stabilisation contributed to inflation and a credit crunch on the private sector. The high cost of borrowing delayed the emergence of rural crop marketing and reduced the private sector investments that were required for structural adjustment. Clearly, agriculture and copper mining should have received attention earlier. Delays in the privatisation of the mines and the restructuring of agricultural marketing caused investor uncertainty, delayed investment and sacrificed potential economic growth.

It can be said therefore that Zambia is a case of elusive stabilisation. Government borrowing did not ease upon the withdrawal of subsidies. Even the introduction of the Treasury Bill Auction did not really bring down government borrowing. The net reduction of international reserves created a regular need for government borrowing. In 1993, government borrowing exceeded 100 percent of asset creation of the central bank. Continued monetary creation through government borrowing has contributed to the persistence of inflationary pressures.

3.9 Banking and Financial Services

There are 16 commercial banks in Zambia. A few of these are local, but the sector is dominated by a handful of multinational banking institutions: Barclays; Standard Chartered; and Stanbic Bank. The Zambia National Commercial Bank (ZANACO) is a state owned conglomerate that enjoyed state support during the era of nationalised companies and is the only bank with branches in many rural areas. Rumours of its privatisation have persisted through out the period up to 2001. Delays may indicate government procrastination on some privatisation commitments.

Improvements in the bank and non-bank financial regulatory framework have not changed the nature of competition which still favours high levels of vertical concentration and oligopoly markets. The ZCC has yet to have a significant effect on the market behaviour of dominant banks.

During the early 1990s, a number of small-scale commercial banks emerged and set up branches in Lusaka and the Copperbelt. The proliferation of small-scale nationally owned commercial banks demonstrated how easy it had become to establish a commercial bank. It would seem that many of these banks were set up to provide cheap capital sources to their owners. Many of them could not survive competition and collapsed due to their own inadequacies. Their collapse revealed weaknesses in the regulatory frameworks, inadequate supervision called for strengthening of banking laws, under-capitalisation, insider borrowing and unqualified banking practices were common among these banks. These factors contributed to a series of bank failures¹⁶.

As a result, Zambia has now made considerable improvements in enhancing the supervision and regulation of commercial banks by the Bank of Zambia (the country's central bank). The Banking and Financial Services Act of 1996 has regularly been amended to bring it into line with best practice and internationally accepted standards for licensing, prudential regulation and supervision. These measures have raised standards of fiduciary responsibility, accountability, and professional competence and integrity among directors and senior bank personnel. In 2001, the Banking Act was amended to accommodate for the regulation of micro-finance institutions and the money-laundering bill became law.

Improvements in the bank and non-bank financial regulatory framework have not changed the nature of competition which still favours high levels of vertical concentration and oligopoly markets. Anti-competitive behaviour is common and abuses of dominant behaviour are implied in many of the services provided. The ZCC has yet to have a significant effect on the market behaviour of dominant banks.

In 2001, the banking Act was amended to accommodate for the regulation of micro-finance institutions. During the same year, the money-laundering bill also became law.

CHAPTER-IV

Scope of Competition Law

The law on competition in Zambia seeks to encourage competition and fair-trading by prohibiting anti-competitive practices. The law also regulates monopolies and concentrations of economic power. Other aspects of the law that fall within its legal protection are consumer welfare, freedom of trade and expanding the base of entrepreneurship. In addition, the law seeks to improve the efficiency of production and distribution of goods and services. All these matters are provided for in the Competition and Fair Trading Act, chapter 417 of the Laws of Zambia. This law came into force in February 1995 with the appointment of the ZCC, which in turn became operational in March 1997. The ZCC is therefore an authority in its youth.

The law on competition in Zambia seeks to encourage competition and fair-trading by prohibiting anti-competitive practices. The law also regulates monopolies and concentrations of economic power.

4.1 Aims and Objectives of the Competition Law

The preamble to the Competition and Fair Trading Act – hereafter the Act, clearly states the aim is to:

- Encourage competition in the economy;
- Regulate competition in the economy by prohibiting anti-competitive trade practices;
- Regulate monopolies and concentrations of economic power;
- Protect consumer welfare;
- Strengthen the efficiency of production and distribution of goods and services;
- Secure the best possible conditions for freedom of trade;
- Expand the base of entrepreneurship.

In addition, the Act has a number of definitions. Part Section (2) defines a consumer as any person who purchases or offers to purchase goods otherwise than for the purpose of resale, but excludes a person who purchases any goods for the purpose of using them in production and manufacture of any other goods or articles for sale. The definition seems to suggest that a customer is a consumer of final goods. Intermediate goods are excluded.

It is interesting that the definition of manufacturing – ‘transforming, on a commercial scale raw materials into finished or semi-finished products’ - including – ‘assembling of inputs into finished products’ – excluding mining. It is not immediately obvious why the legislators excluded mining from the scope of the Act. If anything, given the importance of mining industry to the Zambian economy, concentration of ownership in this sector should be avoided. If the mining industry was allowed to fall under the control of one or so individuals, that person would have overwhelming influence on any government of the day.

The Act defines a monopoly undertaking as a ‘dominant undertaking or undertaking which together with not more than two independent undertakings – produces, supplies, distributes or otherwise controls not

less than one half of total goods of any description that are produced, supplied or distributed through out Zambia or any substantial part of Zambia; or provides or otherwise controls not less than one half of the services that are rendered in Zambia or any substantial part thereof. The scope of the definition is limited to supply considerations and does not include demand side considerations. Availability of substitutes are not considered nor are choices available to consumers in general included in the definition.

The Act does not distinguish between natural or corporate persons as a 'person' refers to an individual, a company, a partnership, an association and any group of persons acting in concert, whether or not incorporated'. This definition catches all. It was probably made in this way to make individuals, such as corporate leaders for example, personally liable for their decisions.¹⁷.

The scope of application of the Competition Act in Zambia is limited by a number of exemptions.

However, the scope of application of the Competition Act in Zambia is limited by a number of exemptions. There are two classes of exemptions, *explicit* and *implicit* exceptions to the law. The first includes 'activities of employees for their reasonable protection as employees'; such as collective bargaining for the purpose of fixing terms and conditions of employment; activities of trade unions, provisions relating the use of license, copyright, patent or trademark and activities arising from this; activities arising from provisions of an agreement to which the Republic of Zambia is a party; activities of professional associations designed to develop or enforce professional standards meant for the protection of the public and any business or activity as the Minister may, by statutory instrument, specify.

Implicit exemptions refer to issues when the application of the Act is displaced by industry – specific regulatory regimes – or other manifestations of state ownership or direction. Thus, banking, transport and communications and energy sector, electricity petroleum, gas, and water are excluded from competition law because they have specific regulatory framework. This situation raises regulatory uncertainty to be discussed later. Suffice to say that the law requires amendment to include sectors previously exempted. Notable here is the exemption of activities from regulation where the state is a party. Thus, enterprises where the state has shares, whether controlling or otherwise, should no longer be exempted.

The scope of the competition law in Zambia is limited by these exemptions and exceptions. Thus, the prohibitions are not absolute and exclude agreements that promote technical or economic progress or economic development and market efficiency. For example, a number of agreements can escape competition law exemptions, such as, patent licensing agreements, technology transfer agreements, motor industry distribution and servicing agreements.

4.2 Prohibitions

Under Zambian law some anti-competitive practises are out rightly (*per se*) prohibited, while others are not. Anti-competitive practices that are prohibited in Zambian law include, among others, any agreements, decisions or concerted practices that have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or any substantial part of it. Prohibitions under the Act relate to¹⁸:

- Section 7 – Anti Competitive Practices
- Section 8 – Mergers and Takeovers
- Section 9 - Trade Agreements
- Section 10 – Anti-Competitive Trade Practices by Associations
- Section 11 – Criteria for Controlling Monopolies and Concentrations of Economic Power
- Section 12 - Unfair Trading/Consumer Welfare Protection.

However, Section 13 (1) empowers the Commission to authorise some actions as long as they are consistent with the objectives of the Act. The onus is upon the commission to decide which anti-competitive practices are allowable and which ones are not.

4.3 Anti-Competitive Trade Practices

Section 7 prohibits agreements or concerted practices between enterprises, which have the object of limiting access to markets or otherwise unduly restrain competition, or are likely to have adverse effect on the economy in general.

Section 7 prohibits agreements or concerted practices between enterprises, which have the object of limiting access to markets or otherwise unduly restrain competition, or are likely to have adverse effect on the economy in general. The Act defines such acts as predatory behaviour towards competition including use of price to eliminate or discriminate against competitors, whether through distribution, tied purchases, quotas or through mergers, takeovers, joint ventures or other acquisitions of control.

A concerted practice in and of itself is not necessarily anti-competitive. For a 'concerted practice' to be anti-competitive, it should be an agreement between enterprises whose purpose is to prevent, restrict, or distort competition in a relevant product or geographic market. Such an agreement should affect the free flow of the process of competition as felt by affected parties or as seen by the ZCC itself¹⁹.

Such agreements only apply to independent enterprises, and therefore the ZCC will first look at the nature of the enterprises involved. There can never be a concerted practice between a company and its subsidiary or between divisions of the same company. The enterprises must be entities that are independent of each other.

4.4 Vertical Restraints and Abuse of Dominant Position

Vertical Restraints

Under Zambian law, vertical restraints and the abuse of dominance are not prohibited per se, but are approached under a 'rule of reason' or case-by-case analysis.

Vertical restraints on competition are arrangements or agreements between companies at different stages of the production and marketing chain. These arrangements are dealt with in Section 7(2) of the Act as possible instances of the abuse of a dominant position. Under Zambian law, vertical restraints and the abuse of dominance are therefore closely linked. These arrangement are not prohibited *per se*, but are approached under a 'rule of reason' or case-by-case analysis. The view is that such restraints are not necessarily harmful and may be efficiency enhancing, even though they may put restrictions on a firm's ability to compete freely.

Examples of these kind of restraints include exclusive dealing arrangements that restrict a firm's choice of buyers or suppliers; exclusive territory allocations that restrict a firm's choice of location; tying arrangements that restrict the source of supplies for particular inputs used by firms; and resale price maintenance that restricts the price to be charged by downstream firms.

There are a number of examples from the brief history of the ZCC that can be used to demonstrate the application of this part of the Act. A good example is the exclusive dealing agreement between Hybrid Poultry Farm (HPF) and Galaunia Farms Limited, which was notified to the ZCC and investigated in 2000²⁰. HPF agreed to sell Mariandale Farm and the poultry processing plant to Galaunia Holdings (GH).

However, the sale agreement had exclusive dealing clauses and conditions. According to the agreement, Galaunia Holdings would only purchase day old chicks from Hybrid Poultry Farm, and HPF were granted right of first refusal should GH resell the farm. Furthermore, GH would not raise any other poultry apart from broiler chickens, and could not go into business hatching chickens. In addition, the parties also agreed that GH would have the right of first refusal should HPF sell any shares, and that HPF should also have the first right to participate in an out-grower scheme should GH come up with one.

One of the major objects of the Act is to prohibit the abuse of dominant positions of market power. This requires the satisfaction of the requirement that the firm is 'dominant'.

The ZCC noted that the parties to this transaction were two leading players in the poultry sector – with HPF dominating the upstream market (60%) while GH dominating the downstream sub-sector. With its uptake of 48,000 day old chicks per week at its Mariandale and Diamondale Farms, GH was clearly the largest buyer in the poultry market. The ZCC found that the parties had taken advantage of their dominant positions in the market. By motive and concerted practice, the parties were foreclosing competition in day old chicks, table broiler birds and frozen chicken. These acts were therefore in direct contravention of section 7 of the Act. The Board of Commissioners accordingly nullified the agreement.

Abuse of Dominant Position of Market Power

One of the major objects of the Act is to prohibit the abuse of dominant positions of market power. This requires the satisfaction of the requirement that the firm is 'dominant'. Accordingly, it is stipulated that the firm is unlikely to be dominant if it controls less than 40 percent of the market. The main test seems to be whether such a firm or group behaves in a manner that excludes others from fair participation in the market.

It seems that the definition of a dominant position of market power is restrictive and requires broadening to include other factors such as turnover, the degree of economic concentration, the absence of substitutes and/or the ability of the firm to raise or lower prices.

It seems that the definition of a dominant position of market power is restrictive and requires broadening to include other factors such as turnover, the degree of economic concentration, the absence of substitutes and/or the ability of the firm to raise or lower prices. For example, an enterprise may control 25 percent of the market, but if the rest of the market is dominated by an assortment of dissimilar units, it may well have dominant power. For this reason, in the United Kingdom, a monopoly is presumed to exist if a company supplies 25 percent or more of the goods or services of a particular type²¹.

The intervention by the ZCC to remove vertical restrictions in cotton out-grower schemes encouraged new developments favourable to the growth of the industry. In this arrangement, the suppliers of the capital in the contract were also involved in seed multiplication, research, marketing, ginning and selling cotton and its by-products. The ZCC recommended the establishment of the Cotton Development Trust which would be supported by all players in the industry, but operate autonomously in seed multiplication, research and the financing of cotton production. As a result, the government established a Cotton Development Trust and the action helped to remove vertical restrictions in the industry that could have been abused by the dominant player to the detriment of the farmers, weaker competitors and local customers of cotton by-products.

4.5 Mergers and Takeovers

Under the Act, firms are required to fulfil mandatory pre-notification requirements to the ZCC in order to identify and resolve problems before the restructuring is undertaken.

Section 8 of the Act deals with mergers and takeovers. Under the Act, firms are required to fulfil mandatory pre-notification requirements to the ZCC in order to identify and resolve problems before the restructuring is undertaken. This is a crucial aspect of the competition law in Zambia because it gives the country leverage to challenge foreign mergers and acquisitions that may have influence within its territory. Again, the Commission assesses whether the proposed merger or acquisition is likely to prevent, distort or lessen competition.

The Commission rightly put greater emphasis on horizontal mergers than vertical ones – unless the latter are employed to foreclose distribution channels to competitors. Analysis of merger control in Zambia seems to follow determination of relevant market in geographical and product aspects, characterisation of inter-firm and product competition, determination of relative and the likelihood of new entry and the existence of effective barriers to entry.

The assessment of mergers or takeovers by the commission focuses on the question of whether a proposed transaction is likely to prevent, distort or lessen competition. Some mergers and takeovers are prohibited outright. Others must be authorised, while others do not need to be authorised. It is an offence under the act to effect a merger between two or more independent enterprises engaged in the manufacture or distribution of similar goods or services without authorisation. But if a merger involves firms which are engaged in the production or distribution of dissimilar goods or services, an application for authorisation is not needed. Thus many vertical and conglomerate mergers or acquisitions are legal in Zambia, unless it can be shown that they intend to restrict or distort competition.

Many vertical and conglomerate mergers or acquisitions are legal in Zambia, unless it can be shown that they intend to restrict or distort competition.

The Act has set two thresholds for the assessment of mergers and takeovers. One is to deal with situations of unilateral market power or single firm dominance. This threshold is set at where the merged firm has more than 50 percent of the market. The other is to deal with the situation of concentrated markets, such as an oligopoly. This threshold is set at where not more than two undertakings share in excess of 50 percent of the market. Although thresholds are set for the purpose of screening market concentrations, there are people in Zambia who want them lowered²².

In the case where a take-over is completed abroad, the law in Zambia considers it to have taken place in the country, as long as there are domestic subsidiaries in operation in the country. Such a merger is said to have domestic effects if the merger affects the structural conditions of the enterprise concerned. This is more likely if both enterprises were operating in Zambia prior to the merger, whether directly or through subsidiaries or affiliates, but there may also be domestic effects, even if only one company previously operated in Zambia.

The ZCC has already considered a large number of takeovers. Many of these, such as that of the Coca Cola takeover of Cadbury Schweppes, or the takeover of Tate and Lyle in Zambia Sugar Plc by Illovo Sugar Limited, were allowed to proceed because they did not have appreciable domestic effects, in the sense of prevention, distortion or restriction of competition in Zambia.

4.6 Horizontal Agreements

Section 9 deals with horizontal agreements – implicit or explicit arrangements between rival or potentially rival firms with identical or similar products. These arrangements are expressly prohibited as they encourage rent-seeking behaviour and unwarranted producer surpluses. The Act prohibits the following trade agreements:

- Price fixing
- Collusive tendering
- Market or customer allocation
- Sales or product quotas
- Refusal to supply
- Collective denials of access to an arrangement or association which is crucial to competition.

These arrangements, whether formal or informal, verbal or written, are forbidden outright. Numerous examples of such practices have come before the ZCC. For example, the ZCC intervened in the price fixing arrangements of insurance companies in the Insurance Brokers' Association of Zambia. The insurance companies were alleged to have agreed to standardise commission rates payable to insurance brokers for all types of risk. They also standardised the maximum free cover limit at K 65 million for group life assurance and had engaged in the unethical practice of by-passing brokers and dealing directly with brokers' clients at significant discounts. The insurance companies discontinued these practices at the intervention of ZCC. Standardising commission rates and setting a maximum free cover limit would have led to reduced competition²³.

4.7 Anti-Competitive Trade Practices by Associations

It is an offence under Section 10 to exclude any person from a trade association from carrying out the trade in relation to which the association is formed or making recommendations, directly or indirectly, by trade association to its members or any class of its members regarding the prices to be charged by members or to the margins included in the prices or pricing formula or to be used in the calculation of these prices or to the terms of sale of such member or any class of members

Section 10 guarantees the right to association, but prohibits anti-competitive trade practices by such associations.

Section 10 guarantees the right to association, but prohibits anti-competitive trade practices by such associations. No-one shall be unjustifiably excluded from participating in a trade association, but such an association cannot recommend prices or terms of sale to its members. The Commission intervened in the passenger transport sector in this regard, and investigated the alleged anti-competitive practices of the United Transport and Taxis Association (UTTA), which appeared to be in violation of the Competition Act. In consultation with other stakeholders, the Commission addressed the cartel behaviour of the UTTA in pricing, approval of fares by the Road Traffic Commission, and use of callboys at bus stops. These practices clearly restricted the free flow of competition in the market. Though cartel behaviour in this sector has not been completely eliminated, there are signs that bus operators are beginning to set fares independently for different services, in defiance of the UTTA recommended fares.

Section 13 provides for additional limitations to the implementation of provisions for anti-competitive practices. Subsection (2) allows the Minister upon recommendation of the Commission, by statutory instrument, to make regulations prescribing the particulars to be furnished to the Commission for the purpose of authorising any act which is not prohibited out rightly by the Act – unless there is evidence of abuse.

4.8 Controlling Monopolies and Concentrations of Economic Power

The control of monopolies and concentration of economic power is provided for under section 11 notwithstanding the provisions of section 7 already described above. In this respect, the Commission may make an exception and, in some circumstances, authorise a dominant undertaking to acquire a failing competitor in order to meet public policy objectives. Such cases may assure the efficient use of resources, provided that the impact and practices are assessed for possible infringements of section 7(2).

One example where the ZCC allowed the emergence of a monopoly, in the public interest, is in the clear beer sector. The Commission allowed a conditional takeover of Northern Breweries by Zambian Breweries Plc to prevent the latter from closing down in the face of competition with a dominant player. At the time of take-over, Zambian Breweries had an 85 percent market share in the sector, and there was no other willing buyer. Northern Breweries had accumulated at least US\$8 million in debt, and was on the verge of liquidation. To save jobs and the Rhino lager brand, and in the absence of other willing buyers, the Commission authorised the takeover.

On the other hand, the Commission has rejected some notifications for takeovers because of the potential damage to the competitive environment from the increase in market concentration. One such case was the takeover bid of BOC Gases for Industrial Gases Limited. BOC Gases had an 80 percent market share, and Industrial Gases had 19 percent. Given the fact that sales in this line of business are of a long-term nature and conducted on business-to-business lines, the Commission felt that such a takeover would lead to market concentration under one supplier who would have considerable power over consumers.

A major objective of this Act is the efficient allocation of resources, and the maximisation of national welfare by ensuring that competition is not distorted or hampered through the abuse of dominant positions.

4.9 The Role of the *per se* Rule and the Rule of Reason

We have already noted that the objectives of the competition Act is to define a set of rules regarding agreements between firms that restrict competition or abuse a dominant position, including attempts to create dominant positions. A major objective of this Act is the efficient allocation of resources, and the maximisation of national welfare by ensuring that competition is not distorted or hampered through the abuse of dominant positions²⁴. It follows that the aim of the Act is not to restrict monopolies *per se*. Indeed, monopolies are not inherently bad. The Commission may therefore allow a merger to take place even though such an action results in the creation of a monopoly its prohibition would cause the failure of other social objectives. This is what is known as the *rule of reason*.

4.10 Unfair Trading/Consumer Welfare and Protection

Section 12 contains provisions aimed at protecting consumers. This is because competition rules are closely related to consumer interests. This section caters for the protection of consumers' economic interests and standards for the safety and quality of consumer goods. In this regard, the Zambian law prohibits misleading and deceptive conduct, false and misleading representations, excludes liability for defective goods or any act that may be aimed at bringing about a price increase.

Many of the cases received pertain to consumer welfare protection. The Commission refers these to other organs of government or civil society. The rationale for such referrals is either that they fall under other regulatory bodies, or that the malpractice is a result of government policy.

The Commission has powers of entry to make inquiries and investigations, including as a result of complaints. The decisions of the Commission are legally binding on parties.

4.11 Powers of Enforcement

The Commission has powers of entry to make inquiries and investigations, including as a result of complaints. Upon ascertaining the validity of the complaint, i.e. the substance of the complaint, evidence of its legitimacy, and the remedies involved, the Commission may demand the inspection of financial, sales and production records, or any other documents that the Director of the Competition Commission sees fit.

The decisions of the Commission are legally binding on parties. The Act makes it an offence to disobey orders by the Commission. Any dispute arising from the Commission's decision can only be appealed against in the High Court of Zambia.

Even though the Act has both criminal and fine sentences, fine sentences are not indexed to inflation. Today the K 10 million (US\$2,500) fine can not be seen as sufficient deterrence to those that may have profited from anti-competitive practice.

The exercise of powers under Part III of the Act continues to be difficult. When traders persistently ignore civil and criminal law, the Commission is obliged to seek assurances about their future conduct. If they refuse to give assurances, the Commission can initiate proceedings against them, but resource constraints make it difficult to monitor compliance agreements or institute litigation. There are many ways that a competition authority can exercise its powers. The ZCC has yet to exercise the full range of legal options available to it. For instance, they may make interim measures to prohibit or discontinue illegal conduct if prompt action is required without resorting to costly litigation.

CHAPTER-V

Assessing Competition Law: Development Needs and Public Policies

The re-emergence of market economies following the break up of the Soviet Union has brought about sweeping changes in the economies of countries around the world. The democratisation of society calls for the application of far-reaching liberal ethics in society and the economy. Liberalisation, deregulation, privatisation and commercialisation of public services and restructuring sectors of society and the economy characterise the content and extent of national reform policies in developing countries. There is renewed interest in the benefits of promoting buyers' patronage through competition. It is believed that competition policy should encourage decentralised decision-making in business and encourage efficiency, productivity and growth. Political processes have also influenced the prominence of competition policy as a relevant aspect of the new form of governance in a new democratic dispensation.

Competition policy is a very broad area and competition law is not completely new. Competition policy comprises measures and instruments used by government to influence the "conditions of competition" that reign in the markets²⁵. Competition law, or anti-trust law as it is sometimes referred to, is only one of the components of competition policy. Other components of policy include actions to privatise state-owned companies, deregulate activities, cut subsidies and reduce discrimination against foreign products or producers.

Initially, competition policy was restricted to private actions. In recent years however, governments around the world have become party to competition policy through International Treaties and Regional Integration Agreements and the influence of the World Trade Organisation and the United Nations Conference on Trade and Development. Today, competition policy applies to both governments and private actions, while competition law exclusively applies to the behaviour of private entities.

The need to restructure the economy through market liberalisation and privatisation required the Zambian government to institute a law to regulate privatised entities.

The need to restructure the economy through market liberalisation and privatisation required the Zambian government to institute a law to regulate privatised entities. It was evident that the removal of subsidies and price controls would put consumers at the mercy of the monopolies that dominate the market. In order to achieve price stability, the government needs measures to moderate inflation by checking the power of monopolies to apply higher prices and reduce output by virtue of their dominant position in the market. The law is therefore aimed at domestic firms that may block the trade reform process through unfair business practices.

This chapter is an assessment of competition policy in Zambia. It is argued that regulatory reform in Zambia is a crucial element of domestic restructuring. Zambia's liberal economic policies show a good example of a country that is committed to enhancing a competition regime in

order to reduce import prices, expand exports and reduce the country's vulnerability to cross border anti-competitive behaviour. In this context, competition law enhances the benefits of other public policies. Therefore, the full benefits of competition policy in the presence of a political will to open markets are more easily realised when the competition authority is well supported.

5.1 Competition Policy and the Size of the Economy

Zambia is a very small economy and can be compared to that of a medium sized American city. The number of economic sectors and establishments are limited. It is therefore possible for one entity, through an array of interlocking directorships and other relationships, to dominate one or more sectors. The history of state owned companies and controlled prices have created a habit of determining industry prices. Competition policies are aimed at removing such behaviour.

In addition, Zambia is a small economy dependent on imports. She is a price taker in international trade and has no market power to set import or export prices. Therefore open trade policy is the easiest of all competition instruments available to the government. The removal of trade barriers helps to reduce prices thereby contributing to price stability. A lower import price also lowers plant sizes and that eases barriers to entry. Improving access to international markets immediately improves the availability of affordable intermediate and capital goods to domestic final goods producers. Open trade policies promote import competition, an incentive for market discipline among firms.

Zambia's economy is characterised by a lopsided industrial structure dominated by the mining industry. The industrial structure plays an import replacement function by processing imported intermediate and capital goods.

5.2 Competition Policy and Industrial Structure

Zambia's economy is characterised by a lopsided industrial structure dominated by the mining industry. The industrial structure plays an import replacement function by processing imported intermediate and capital goods. Indeed Zambia's import schedule is largely oil, equipment and intermediate inputs. Until 2001, the oil market was dominated by an import monopoly. This has since been replaced by a cartel. There are a number of situations in which importers enjoy a monopoly and the country suffers from un-competitive supply practices as a result. Trade policy has a limited regulatory role in such cases. There is need for a competition law and an authority to regulate such instances.

We have shown from the discussion on the role of foreign direct investment that accumulated foreign direct investment inflows accounted for 52 percent of Gross Domestic Product in the year 2000. This shows the significance of foreign investment in the Zambian economy. It is well known that importing countries have usually paid artificially high prices for such investment. At the same time, powerful trade cartels are able to charge systematic predatory pricing or import dumped goods. Clearly, the landscape invites a trade policy that can correct such practices and enhance competition.

5.3 Competition Law and Foreign Direct Investment

It is difficult to regulate international companies in a national regime without collaboration with other competition bodies. The issue becomes more pertinent where trading partners do not have similar laws to regulate the behaviour of international monopolies. This is the case for Zambia and the example of Zambia's cement industry illustrates this concern.

The takeover of Pan African Cement (PAC) by Lafarge SA of France shows the difficulties of regulating multinationals in the absence of a regional competition authority to check cross border effects. The issue of concern was that Chilanga Cement Ltd, in which PAC had a 51 percent stake, controls over 50 percent of the Zambian market and had been abusing its dominant position in the market through over-pricing and market sharing with other subsidiaries of PAC in Malawi and Tanzania. The effect of the market sharing was to prevent Zambian Cement from being sold to Burundi. This was now supplied by Tanzania.

Zambian competition law only considers the domestic effects of trans-boundary abuses.

Lafarge already owned plants in South Africa, Zimbabwe, Uganda and Kenya, and with the acquisition of PAC, it was possible for Lafarge to supply most areas in Zambia from its plants in neighbouring countries. This raised public interest issues, including the possible adverse effects on employees, ancillary enterprises and national trade. A major concern of the ZCC was to maintain domestic pressures on Chilanga Cement. The ZCC was also influenced by the view that even if import competition were desirable, this should not be achieved at the expense of domestic production.

On the other hand, Burundi, Malawi and Zambia were all members of the Common Market for East and Southern Africa (COMESA). Tanzania was not. Furthermore, while Zambia had a competition law to regulate the behaviour of multinational corporations, Malawi and Tanzania did not have competition legislation. It therefore became difficult to effectively regulate the behaviour of Lafarge SA and PAC in the absence of a regional competition authority.

Zambian competition law only considers the domestic effects of trans-boundary abuses. The board of the competition Commission has granted unconditional authorisation for mergers between a foreign company and one operating through a subsidiary in Zambia as long as the merger would not affect the conditions for market competition within Zambia. For instance, the board authorised the merger of British Petroleum (BP) and the American Oil Company (AMOCO) because AMOCO was not operating in Zambia. Similar reasons were advanced in the authorisation of the international merger between Total and a Belgian oil company, Petrofina, because it would not affect the status of competition in the Zambian market²⁶.

There is no comprehensive consumer protection law in Zambia. Legal provisions for consumer protection are contained in various pieces of legislation relating to safety and standards. The competition Act, however, provides for the protection of consumer interests and welfare by ensuring that they have greater choice in terms of price, quality and service.

5.4 Competition Policy and Consumer Law

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In the words of the Competition and Fair Trade Act, Chapter 417 of the Laws of Zambia, sub-section (a) a consumer is defined as any person “who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purposes of using them in the production and manufacture of any other goods or articles for resale; (b) to whom a service is rendered.” In short, section 12 stipulates consumer protection by granting rights to safety, information, choice, hearing and a clean environment. In this regard, the ZCC has a Consumer Complaints Desk for the purpose of redressing consumer complaints.

Consumer protection should be seen in terms of the nature of the market. In a situation where there are many players in the market, it is assumed that the consumer is able to choose freely among competing products as opposed to where a single firm dominates the market. In the case of a market with many players and many products, consumer protection pertains to the instance of market failure, or where a firm may give misleading information. In that event, the competition authority would act against what it considers as an unsatisfactory practice. Such a practice would have led to unfair advantage on the part of the executor.

This is different from the case of the market where there is no competition. In the event that there is no competition, the intervention of a competent regulatory body would be required. But, if there was no competent regulator, it would still be up to the competition authority to apply measures that would compel such a firm to behave as if it were in a competitive market.

The existence of other sector regulatory bodies somewhat restricts the purview of the competition law in Zambia to sectors that do not have regulatory authorities or and state interests.

There is now a strong case for the establishment of a ministry for consumer protection in Zambia because the present situation clearly lacks focus, and inadequate funding to the ZCC constrains any meaningful efforts towards that end. It is paradoxical that issues affecting the common people have been the most difficult to regulate.

5.5 Sector Regulating Bodies

The existence of other sector regulatory bodies somewhat restricts the purview of the competition law in Zambia to sectors that do not have regulatory authorities or and state interests. There are a number of sector regulation bodies in Zambia. The Communications Authority provides for the regulation and licensing of broadcasting and communication activities.

The Energy Regulation Board regulates energy supplies and consumption and stipulates conditions for electricity generation, transmission, the distribution of commercial energy such as petroleum products and coal, and the establishment of solar energy utilities. The Road Traffic Commission regulates the transport sector while the Water and Sanitation Council regulates the activities of water utilities and rights to water use.

All the sector specific regulatory bodies deal with technical aspects of the industry but have considerable limitations regarding the competition issues in the industry concerned.

The Zambia Wildlife Authority is responsible for the regulation of Wild Life Estates, and the utilisation and trade in wildlife products. The Pharmaceuticals and Poisons Board is responsible for regulating the manufacture and trade of pharmaceutical products, and the administration and distribution of medicines and poisons. In addition, the Pensions and Insurance Authority, the Securities and Exchange Commission and the Bank of Zambia are involved in different aspects of the financial market.

All the sector specific regulatory bodies deal with technical aspects of the industry but have considerable limitations regarding the competition issues in the industry concerned. The regulatory bodies established after the ZCC do have explicit competition provisions, unlike the older ones such as the Road Traffic Commission, which entertains anti-competitive associations and practices within the sector. There is a case for regulatory uncertainty in Zambia. The requirement that enterprises where the government is party are outside the competition law raises the difficulty of intervention in privatisation by the competition commission. There are also instances of state inaction regarding the regulation of a sector regulator.

There is a strong case for harmonising the regulation of technical and market behaviour of economic agents between sector regulators and the competition commission.

What happens when the sector regulator acts outside the competition policy? There can be conflicts about what may advance economic development. Is the Energy Regulation Board (ERB) misguided when it acts to set prices for an oil cartel - the Consortium of Oil Marketing Companies - through determination of allowable trade margins? Should competition issues be included in sector specific regulatory bodies? There is need for boundary definitions between sector regulation and competition regulation. There is a strong case for harmonising the regulation of technical and market behaviour of economic agents between sector regulators and the competition commission. This is particularly striking the banking and non-banking financial services sector where anti-competitive market behaviour continues to be unchecked by the sector regulator.

However, the ZCC and other sector regulatory bodies are interlocked in their operations. For example, Section 6(d) of CAP 436 of the laws of Zambia provides for Energy Regulation and reads that “*The Board shall in conjunction with the Zambia Competition Commission established by the Competition and Fair Trade Act monitor the levels and structures of competition within the energy with a view to promoting and accessibility to any company or individual who meets the basic requirements for operating a business within Zambia.*”

Similarly the Communications Authority is linked to the ZCC at board level and is equally empowered to satisfy competition needs. It has therefore been acting together with the ZCC to restructure the Zambia Telephone Company in advance of privatisation by unbundling the internet, landline and mobile services into separate companies. The ZCC also sits on the Water and Sanitation Council.

The relationship between the ZCC and sector regulators requires strengthening at policy and operational levels.

Clearly, the relationship between the ZCC and sector regulators requires strengthening at policy and operational levels. At policy level, there seems to be a chasm in competition regulation for sectors that have a regulator. We have seen how some sectors have aligned technical and market related regulation and how others are still disjointed. The harmonisation of the legal framework is therefore an immediate requirement and the establishment of operational frameworks is yet another challenge for the medium term. It would probably help to give jurisdiction for all competition concerns to the competition commission so that competition issues are excluded from sector regulators.

CHAPTER-VI

Administrative Structure and Functions

This chapter deals with administrative aspects of the law and the framework for implementation. The chapter will demonstrate the powers of the competition authority, and present issues related to its independence and functions.

In Zambia, the Competition Commission is fairly large and the Act allows for the appointment of up to 14 members. The current board has a dozen members representing government, industry and civil society. The ZCC Board has two people representing consumer interests and others representatives are drawn from the following institutions:

- Law Association of Zambia;
- Zambia Federation of Employers;
- Economics Association of Zambia;
- Zambia Congress of Trade Unions;
- Institute of Certified Accountants;
- Engineering Association of Zambia;
- Zambia Bureau of Standards;
- Zambia Association of Commerce and Industry;
- Zambia Association of Manufacturers;
- Ministry of Commerce, Trade and Industry; and
- Ministry of Finance and Economic Development.

The advantages of a representational board are that it brings in influential and well respected persons to give the commission a level of credibility at the same time as providing key linkages with government, industry and civil society.

The representatives or commissioners are nominated by each of the relevant institutions for appointment by Minister of Commerce Trade and Industry. The tenure of office for Commissioners is three years and is renewable. There are no special qualifications required for appointment to Board of Commissioners. The Act provides for members to disclose their interests when they come into conflict with functions of the Commission. It is presumed that Commissioners would be persons of high standing in society.

The advantages of a representational board are that it brings in influential and well respected persons to give the commission a level of credibility at the same time as providing key linkages with government, industry and civil society. The weakness of this arrangement is that such a board relies heavily on the secretariat. Secondly, the board is too large and members may all not have sufficient time and therefore can only provide distant level oversight.

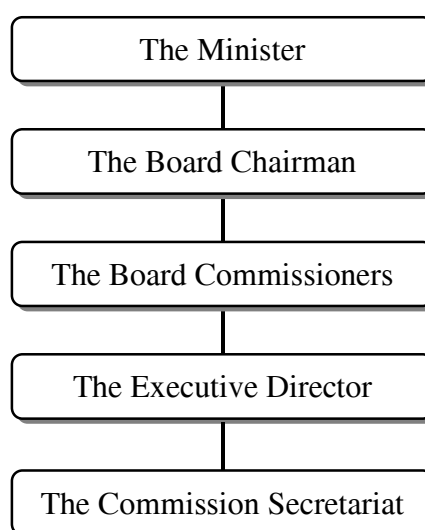
In short, the members of this type of board are likely to accomplish the following:

- Open doors for the institution which would otherwise have remained closed or hard to open thereby allowing it more easily achieve its mission;
- Increase the institution's access to information outside its direct area of operations and enhance its national and international exposure.

- Maintain the necessary oversight to ensure that their names and reputations remain above board and are not damaged by association with a poorly performing institution.

Analysis of the 1999 income and expenditure statement shows that salaries alone accounted for 60 percent of income. Other than salaries, the largest expenditure items, in order of importance, were depreciation, rent, telephones, entertainment, travel and subsistence allowance, fuel, motor vehicle expenses and board and committee expenses. Funding given to the secretariat is typically inadequate, and is essentially meant to cover personnel costs. As a result, staffing is a skeleton of key personnel.

Chart 1: Structure of the Zambia Competition Commission



One would have expected that in view of low staff levels, there would be significant funds available for contracting specialised services. There is no indication that consultancy services were being used at the commission. Indeed no funds were allocated for carrying out research activities and most probably none were carried out.

6.1 Functions

The functions of the commission relate to monitoring, controlling and prohibiting conduct likely to adversely affect competition and fair trading in Zambia.

Broadly, the functions of the commission relate to monitoring, regulation, information and public assistance. Specifically, the functions of the commission are spelt out in Section 6 of Part Two of the Competition Act. These refer to monitoring, controlling and prohibiting conduct likely to adversely affect competition and fair trading in Zambia. The Commission may therefore 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 out anti-competitive trade practices and the extent of such practices. Investigate on its own or at the request of any person who may be adversely affected a proposed merger and to take any actions that it considers as expedient to prevent or redress the creation of a merger or abuse of a dominant position of an enterprise.

In addition, the Commission serves to provide information to persons engaged in business and consumers about their rights and duties under

the Act. The commission is also bound to assist association or body of persons to develop and promote the observance of standards of conduct to ensure compliance with the provision of the law.

The role of the Commission is to receive complaints, investigate them and recommend to the board what action should be taken. Part IV of the Act empowers the Executive Director or any officer of the Commission to seek a court warrant to enter any premises, or access or order the presentation of any books, accounts or other documents relating to the trade or business concerned, if there is reason to believe that an offence has been committed.

Any person aggrieved by the decision is entitled to appeal to the high court within 30 days of the date on which notice of that decision was served. It is an offence to refuse to comply with the order, or knowingly furnish the commission with misleading information. Such an offence is punishable with a K10 million fine, and/or imprisonment not exceeding 5 years.

CHAPTER-VII

Capabilities of Zambia Competition Commission

7.1 Infrastructure Facilities

The ZCC is accommodated in 652 square metre rented offices. Space and facilities are fairly adequate. Officers are provided with computers and share a photocopier. The Commission does not have a library or documentation centre even though space for one is available. A registry is used as a repository of printed materials and receives 16 periodicals and four national newspapers. The Commission has minimal communication facilities. There are three telephone lines and one fax line. There is also internet connectivity and the Commission was developing a website at time of this study.

7.2 Financial Resources

The Commission receives insufficient budgetary allocation from the Government of the Republic of Zambia. In fact, grants received over 1998-99 declined in absolute terms. In such a situation, it is surprising that the Commission has been able to accomplish its record of achievements. Insufficient government subvention is responsible for under-staffing. The Commission cannot attract requisite staff with limited funding.

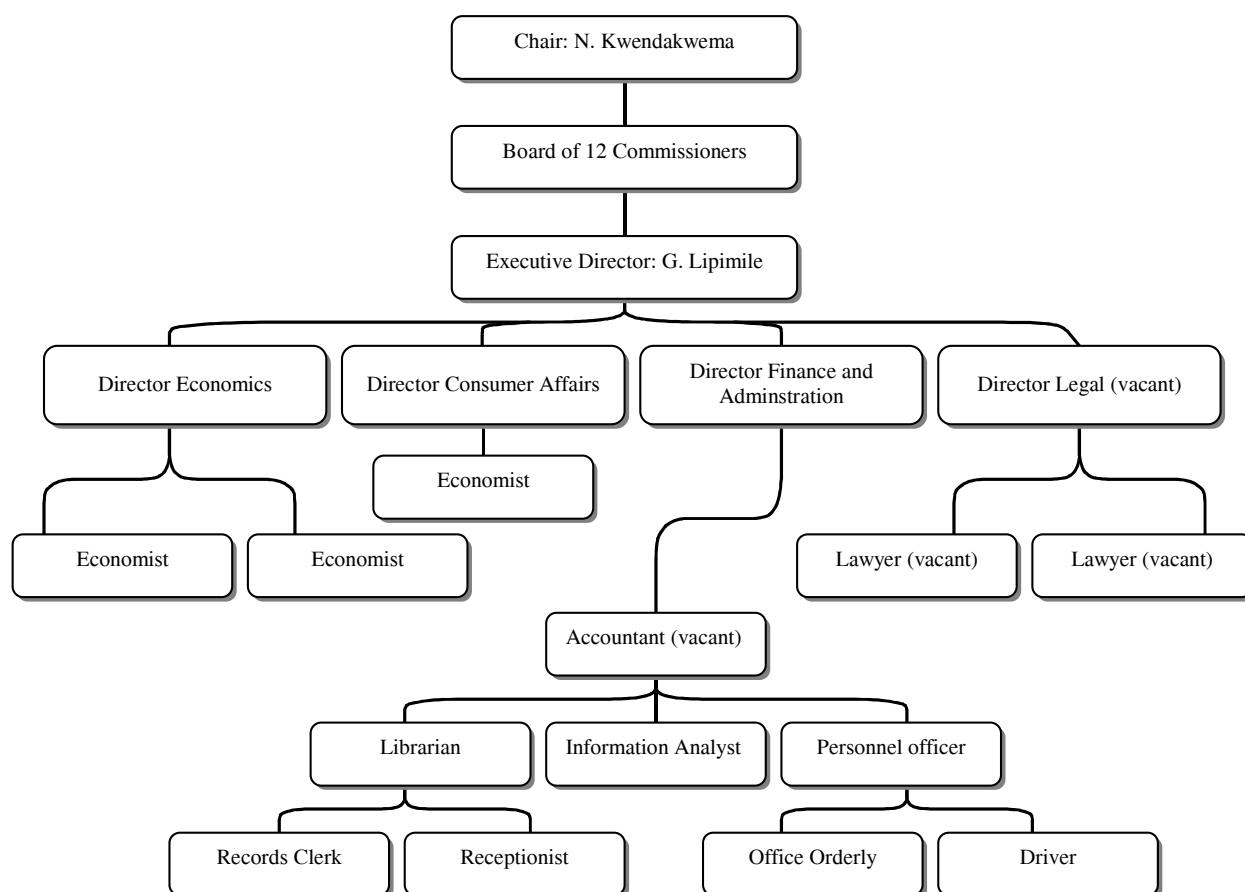
Table 7: The Pattern of ZCC Expenditure - 1997 to 2000 in Million Kwacha.

Description	1997	1998	1999	2000
Salaries & Honoraria	31.1	166.9	233.6	350.0
Establishment cost	101.4	-	-	-
Books, Periodicals and other materials	0.5	109	-	-
Research and Investigation	-	34.9	40.5	50.6
Printing and Publications	-	-	1.9	8.6
Meetings and Conferences	8.7	14.7	10.4	25.5
Total	140.7	219.4	286.4	434.7

7.3 Human Resources/Staff

In 2001, the Commission was staffed with five officers from an establishment of 14 officers and seven support staff. There are nine vacancies at the level of professional officers of which six are senior positions.

Chart 2: Detailed Structure of the Zambia Competition Commission



The problem with lean staffing is that professional officers do not always have sufficient time for research, education and training activities that are relevant to their duties. The table 8 below shows the staffing and establishment.

Year	1997		1998		1999		2000	
Description	Sanc	Exist	Sanc	Exist	Sanc	Exist	Sanc	Exist
Part-time	13	12	13	12	13	12	13	12
Professional	13	2	13	5	13	5	17	5
Support Staff	8	3	8	7	8	7	9	6
Total	34	17	34	24	34	24	39	23

It is evident from the above table that the need for personnel has increased over the period. However, staff availability has not changed. It seems to suggest that funding has continuously remained short. The hardest hit category is the professional category. For instance, there was no lawyer employed at the Commission to carry out prosecutorial functions. In this case, these services may be sourced from outside or rest on the current Executive Director who has both economics and law degrees.

Despite low staff levels, particularly among the professionals, the Commission has handled a total of 172 cases between 1998 and 2000. The most frequent cases related to complaints concerning restrictive business practices followed by notices of mergers and acquisitions and trade agreements. Table 9 summarises the record of complaints considered by the commission during the period 1998 and 2000.

It is clear that there is a backlog of cases to be considered by the Commission particularly under sections 7 and 8, which relate to restrictive business practices and mergers and acquisitions. According to the Executive Director, Mr George Lipimile, investigating a merger case sometimes takes three months or even more. The backlog of complaints and notices at the ZCC is purely due to limited funds and creates a case of delayed justice.

Table 9: Record of Cases Received by the ZCC between 1998 and 2000

Type of Contravention	1998	1999	2000	Total Cases Closed	Cases Carried Forward to 2001	Total 1998-2000
Section 7 (Restrictive Business Practices)	11	27	29	49	18	67
Section 8 (Mergers and Acquisitions)	13	21	31	48	17	65
Section 9 (Trade Agreements)	8	5	2	14	1	15
Section 10 (Trade Associations)	1	1	0	2	0	02
Section 12 (Unfair Trading)	5	10	3	17	1	18
Consumer Rights	1	0	4	5	0	05
Total	39	64	69	135	37	172
<i>Source: ZCC Annual Report 2000</i>						

7.4 Capacity Needs Assessment of the Zambia Competition Commission

It was stated earlier that the ZCC as an authority is still in its youth. Insufficient government funding is stifling its growth. Not only is there a critical shortage of staff, but the Commission has to complete a number of internal documents such as pamphlets about various aspects of the functions of the Commission and other relevant information such as an Annual of Case Records, newsletters and other such information materials. Not only does the Commission deserve a full complement of staff, but office equipment such as computer equipment and accessories are inadequate and sometimes archaic.

Not only does the Commission deserve a full complement of staff, but office equipment such as computer equipment and accessories are inadequate and sometimes archaic.

It is incredible that an important office such as the ZCC does not have a website or even an internet connection. These services are crucial for the preparation of public education materials and awareness raising activities. Further, for the Commission to be proactive, baseline market surveys should be undertaken in order to understand, for example, the nature of the economy and the levels of market concentration. Some of the capacity needs of the ZCC are discussed in the sections below.

7.5 Strategic Planning

In order to build upon the inception activities undertaken by the ZCC so far, there will be a need to develop a consensus on the application and implementation of competition law and policy. A strategic planning

process is one way that such a consensus can be achieved through a wide involvement of interest groups. Only then will it be easier to determine the internal capacity that the ZCC needs and the means to achieving its goals. It will be through this process that appropriate organisational rules and procedures will be prepared. This exercise would facilitate the process of consumer policy making and enforcement by enabling transparency and predictability of the Commission's work and decisions. Procedural guidelines would specify how the public could interface with the commission on each section of the Act.

In addition, they would also detail a requisite institutional liaison structure that the public can use to access the Commission's staff and or compliance agents depending on the relevant sections of the Act and the nature of the cases at hand. Needless to say, this exercise would assist in the identification of key areas of law, government, private and business practices that inhibit competition and hence consumer welfare.

7.6 Public Awareness

The competition Act is a new feature among the business community and the public alike. Successful implementation and the establishment of adequate machinery for policy and law would require a protracted campaign strategy. For this to happen, the public at large and the business community should be able to appreciate and support the provisions of the law. On its part, the Commission requires the capacity to engage in such a campaign through pamphlets, the publication of newsletters, occasional papers, and radio and television discussions targeting the population as a whole.

The Commission has since its inception produced seven different pamphlets and several posters as a means of public awareness. The Commission has considerably high media profile and is frequently quoted in the national press, particularly radio and newspapers.

However, the Commission has since its inception produced seven different pamphlets and several posters as a means of public awareness. The Commission has considerably high media profile and is frequently quoted in the national press, particularly radio and newspapers. From its inception the Commission undertook to introduce its work to the public and has addressed all the national business associations and universities. CUTS has assisted in producing pamphlets and posters popularising competition regulation in Zambia.

7.7 Baseline Market Studies

We have already seen that it is not easy to have a full understanding of the nature of concentration in the market without detailed investigations. At the same time, we have also seen that it takes a while to review complaints against restrictive business practices and mergers. All this requires an adequate understanding of the nature of the market and sectoral organisation. The last Census of Industrial Production and Establishments was undertaken in 1980 when the economy was still dominated by the state sector. It is also general knowledge among statisticians and economists that annual estimates of National Accounts in Zambia are seriously out of date and frame.

The Commission requires the undertaking of baseline market studies to reveal information on:

- Market concentration and possible areas for restrictive business practices;
- Ways in which competition and consumer laws can be harmonised;
- The liberalisation of the market in Zambia, with a view to enhancing domestic and foreign market contestability.

These things and many more would be required to improve the position of the ZCC in regard to the promotion of competition in Zambia.

Summary of Recommendations and Conclusions

8.1 The Economy and Public Policy

Zambia has moved towards a competitive regime by reducing the role of the government in the economy and removing high levels of ownership concentration through market liberalisation, privatisation and public participation.

Zambia has moved towards a competitive regime by reducing the role of the government in the economy and removing high levels of ownership concentration through market liberalisation, privatisation and public participation. This has certainly improved the framework for competition policy and the administration of competition law. However, there are some outstanding issues related to the harmonisation of various policies, particularly the sequencing of liberalisation and macroeconomic stabilisation policies.

As a small economy, the adoption of open trade policies has been well received because it eases the barriers to enterprise growth. However, taxation policies have been criticized for eroding the possible gains of liberal trade. The lack of government support for small-scale industrial development is a matter of serious concern. In some cases, government open market operations in the foreign exchange market have led to an increase in real exchange rates, thereby harming export competitiveness, contrary to trade policy objectives. In short, public policy has had contradictory effects on competition. There is therefore a need for the refinement of the public policy mix to enhance competitiveness and level the playing field for competition among economic agents.

The lack of concern for the market structure in the privatisation of the agriculture and manufacturing sectors has increased the role of the ZCC in redressing structural imbalances and possible abuses of dominance by privatised enterprises.

The lack of concern for the market structure in the privatisation of the agriculture and manufacturing sectors has increased the role of the ZCC in redressing structural imbalances and possible abuses of dominance by privatised enterprises. We have seen a good example of the benefits of ZCC intervention in the cotton sub-sector.

The foregoing discussion showed that competition policy is no longer a realm for private entities alone. Government is increasingly being drawn into it through international agreements under the World Trade Organization and UNCTAD and economic integration in the context of the Common Market for East and Southern Africa and the Southern African Development Community. The government will have to press for the harmonisation of regional competition regimes to improve regulatory actions of a cross border nature. Privatisation has increased brown field foreign direct investment with serious consequences for cross border competition issues.

8.2 Competition Law

Although competition law was recently introduced to Zambia, the establishment of the Zambia Competition Commission and other specific sector regulators represents tremendous progress. Legal draftspersons have taken note of the need for inter-relationships between the ZCC and sector regulators. In the near future, the ZCC may be overburdened by

multiple representations on various sectors. It is therefore necessary to prepare guidelines for institutional liaison among regulators. This is of immediate concern because some specific regulators do not seem to be concerned by competition issues. This seems to be the case in the banking industry, where improvements in prudential regulations have not had competition overtones.

Further, it has also been observed that the administration of the law has been hindered by inadequate information. It was pointed out for instance that the absence of baseline information hinders the expeditious disposal of complaints, particularly those relating to restrictive business practices, merges and acquisitions. It has therefore been suggested that the ZCC should commission baseline market studies in agriculture, manufacturing, and trade to decide on the nature of market concentration.

The ZCC should improve its financial base. Dependency on government funds leaves the office open to government interference through funding.

8.3 Capacity and Resources

The ZCC should improve its financial base. Government subventions are likely to remain low for a long time to come. Dependency on government funds leaves the office open to government interference through funding. Beyond making internal improvements, which in the short run will depend on government willingness to support the Commission, one way to raise resources is through alliances and collaboration with independent institutions. Notwithstanding its responsibility for various competition promotional activities, the ZCC could encourage the participation of academic and independent institutions in engaging in research and advocacy activities related to competition issues.

The government on its part should also be encouraged to fulfil its responsibilities, especially those related to the production of baseline information, by carrying out timely and periodic surveys. More specifically, the government should lead the process towards harmonised competition laws and regulatory policies, in addition to consumer protection concerns.

NRG MEETING SUMMARY

The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture.

One of the important components of the 7-Up project was the formation of a National Reference Group (NRG) in each of the project countries. The main objectives of forming NRGs were to deliberate on the inputs prepared in each country, and to create a base for launching advocacy for a healthy competition culture. The NRGs comprised of representatives of the following categories of organisations/persons:

- Consumer organisations and other civil society organisations with a demonstrated interest in economic issues
- Experts/interested persons from academia and the media
- Business and chambers of commerce
- Competition & regulatory authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or parliamentarians
- Trade union leaders

The report was generally well received and it generated a lot of discussion.

The meeting of the Zambian National Reference Group (NRG) was held on 22nd November 2001. The meeting discussed the revised Country Report for Zambia and agreed on the next course of action. It was explained to the NRG membership that the Phase I component of the 7-Up project was to deal with national competition issues as opposed to the second phase whose main focus was cross-border competition issues with the objective of determining important and relevant issues for the project countries that can be used both for cross-country learning experiences and to support regional cooperation in the development of competition policy and laws.

Comments on the Findings and the Paper

The report was generally well received and it generated a lot of discussion. This was as a result of the fact that NRG members had time to read through the paper before the meeting.

The following were the comments on the paper:

- It was observed that there is an apparent global problem faced by Competition Authorities (CAs) in terms of their practical inability to deal with the basic but important complaints of small consumers e.g. on tied purchases for sugar by shopkeepers during times of shortages.
- It was also observed that the ZCC receives a lot of cooperation from other government institutions during the course of its work and this sectoral regulatory authority statutory cooperation is complementarily unique to Zambia.
- On cross border competition issues the meeting wondered whether it is true that according to the law, a merger taking place outside has the same effect domestically when applicable to branches of the same merging companies.
- It was suggested that patent licensing should be discussed in the paper, particularly the ramifications of TRIPS and how issues of patent licensing are currently handled in Zambia. Secondly, the incorporation of micro-finance organisations into the banking system is commendable in Zambia and the way in which this will affect the supply of financial services to small-scale producers should be discussed in view of the oligopolistic banking sector.

It was observed that there is an apparent global problem faced by Competition Authorities in terms of their practical inability to deal with the basic but important complaints of small consumers.

It was noted that the socio-economic context of competition policy in Zambia has been well documented and this should be discussed in the paper, particularly in relation to the objectives of the ZCC and its performance.

- It was noted that the socio-economic context of competition policy in Zambia has been well documented and this should be discussed in the paper, particularly in relation to the objectives of the ZCC and its performance.
- Regarding funding, it was agreed that inadequate funding of the ZCC is a detriment to its work and could be seen as negative “interference” by government. The meeting agreed with the researcher on the need to find alternative sources of funding for the ZCC.
- It was suggested that anti-competitive practices should be highlighted in the paper e.g. exceptions given on government transactions. According to section 3 of the Act government parastatals are given exceptions. This may have an effect on the post privatisation competition situation of the privatised firms.
- It was observed that the paradox of small business not being covered by the ZCC is as a result of the Act, which restricts the observance to businesses that have a significant impact on the economy.
- The meeting noted with satisfaction that a pre-merger notification requirement is part of the legislation, which is important in dealing with MNCs in cases of cross-border mergers.

Other salient issues that generated discussions included the following:

- That consumer protection is one concern which has not been tackled by most recent projects and programmes;
- Political will is a key factor in tackling some of the issues concerning competition and consumer welfare;
- It is not the number of players in the market which will determine low prices;
- Given that it is not generally in the interest of donors to support strong competition authorities in LDCs it is the locals themselves who can put an effective consumer policy and law in place.

Political will is a key factor in tackling some the issues concerning competition and consumer welfare.

Suggested Additions to the Paper

- On cross border competition issues the paper should clarify the situation regarding the legal position of mergers which take place outside Zambia and the effect on local branches of the merging companies,
- Given the importance of patent licensing, the situation in Zambia should be discussed,
- Anti-competitive practices should be highlighted, particularly in relation to privatisation transactions, which may lead to post- privatisation anti-monopolistic situations,
- There should be a simplification of language and terminologies on page 19 (the section on fiscal and monetary policies),
- In the section on investment policies (page 16) “government paying only ‘lip service’” should be considered for substitution with “government not having political will”,
- The new law on Export Processing Zones legislation should be discussed in the section dealing with investments,
- The paper should give more information on the performance of the ZCC.

Suggested Additional Recommendations

Arising from floor discussions and comments, the following points emerged:

- Consumer protection is a concern which has not been tackled by most project activities and should be given priority,
- Political will is a key factor in tackling some of the issues concerning competition and consumer welfare,

- An effective consumer policy and law can only be put in place by the locals themselves,
- Funding and decentralisation of the ZCC is an important issue that should be pursued by the ZCC,
- The ZCC should address the concerns of the small-scale sector,
- Whistle-blowers provisions and legal protection of whistle-blowers as applied in the USA should be replicated in Zambia with the ultimate objective of taking legal action that protects consumers,
- The definition of a dominant position in the Act should be revisited to take care of the concerns of the small business sector,
- Consumer rights awareness should be enhanced from the point of view of the ZCC and the consumer movement,
- Consumer law and policy should be put in place,
- The ZCC has more board members than operational staff and this should be reversed,
- For consumer education to have an impact, media personnel should be involved so that they can become conversant with consumer concerns.

Awareness of Competition Concerns

Towards the end of the meeting the researcher presented the summary analysis of responses of the stakeholder questionnaire on awareness of competition concerns in the economy.

Most of the population agreed that competition law was useful and necessary. Those who thought that it was useless were also unaware of the existence of the law.

The analysis on awareness revealed the following:

- The majority of respondents (66 percent) were aware of the existence of competition law. However, of those who said they were aware, less than a quarter (22 percent) thought that the law was adequate. It can therefore be said that most people think that the law on competition is inadequate. The majority did not know that there was consumer protection law in Zambia. *It seems evident that the ZCC should mount or intensify awareness raising activities regarding the provisions of the law on competition so that everyone concerned should know about it and how its application protects the consumer.*
- Most of the population (92 percent) agreed that competition law was useful and necessary. Those who thought that it was useless were also unaware of the existence of the law. *There is cross-cutting agreement among businesses and consumers alike that Zambia needs a competition law.*
- The sample was almost split on the adequacy of the law in its present form (58 percent) to deal with nation competition concerns. More respondents (75 percent) thought that the law was much more inadequate for dealing with cross-border issues. *The respondents were unanimous that the law was not ably being enforced (92 percent).*
- Respondents' awareness of anti-competitive practices was much less than desired. It was either that they did not know or disagreed that there were anti-competitive practices in various sectors of the economy. The only sector that they believed to be riddled with unfair trade practices was due to a dominant position by a foreign bank, two-thirds majority did not know.
- However, respondents believed that dumping was a matter of concern – especially in the dairy sub-sector. However they did not know whether any action had been taken.

In Conclusion;

- a. The ZCC should carry out more awareness-raising activities.
- b. The ZCC should use alternative and varied ways of publicising their activities to improve public awareness of competition issues.
- c. Consumer protection interest is weak and civil society has done little to inform citizens about consumer rights and their threats. This is shown by the respondents' lack of knowledge about unfair trade practices in the Zambian economy.
- d. The government officer responsible for trade has not explained national measures to reduce dumping.
- e. The public should demonstrate a greater interest in competition matters.

Project Case Studies

Concerning case studies for the project, participants were informed that there were three case studies to be undertaken in the second phase. Two of the case studies were already selected on the basis of commonality to all project countries, whereas they were expected to only choose one case, which in their opinion had a greater social impact on their economy. They were informed that the two selected cases were: the Coca cola/ Cadbury Schweppes merger and the Cement case. After protracted debate, they chose the poultry industry for the final case study although others had earlier preferred the beer industry.

Synopsis of the Synthesis Report

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project. This synopsis provides a summary of the Synthesis Report.

The Synthesis Report is the culmination of the work undertaken in Phase I of the 7-Up project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. It brings together the results and findings from the individual country reports that provide details of the structure, functioning and efficiency of the institutional framework for enforcing competition law in the country.

The synthesis compares the experiences of the seven countries, providing a benchmark by which countries can evaluate their own progress and offering an opportunity for them to learn from developments elsewhere. This synopsis provides a summary of the Synthesis Report.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges.

The 7-Up countries differ in terms of their geographical locations, population sizes, and specific developmental challenges. They are also at different stages in terms of the development of their competition regimes. While India has had competition legislation in place since 1969, Tanzania and Zambia first enacted competition laws in 1994 and 1995 respectively. Accordingly, the countries have different levels of experience as regards the implementation of competition policy.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries. This process has involved liberalisation of the economy, including a reduction of barriers to international trade and reduced state involvement in commercial enterprises.

Every country in the study is undergoing a process of economic reform and market restructuring. In this sense, the project countries are not only developing, but also transition countries.

Large state-owned enterprises have been privatised and replaced by profit-driven bodies. In this context, competition policy is extremely important in order to ensure that a smooth transition towards a well-functioning market occurs, and to avoid the danger of transferring dominant market positions to private enterprises. This would ensure a broader choice of goods at cheaper prices for consumers, and an efficient allocation of the economy's resources.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws. As with other policy changes, this represents a shift in emphasis away from government control (e.g. price controls) towards the encouragement of market-driven efficiency, through competition.

As part of the more general programme of reforms many of the countries have recently changed, or are in the process of changing their competition laws.

However, some of the laws include objectives that are not directly related to the promotion of competition; for example one of the objectives of the South African Competition Act, 1998, is to "promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons", and the Sri Lankan Fair Trade Commission takes the control of inflation into consideration in its activities. In general, the key objectives are efficiency and consumer welfare, with a recognition that there may be a trade-off between static and dynamic efficiency.

Three main areas are generally considered to be the core concerns of competition policy in any country:

- i) Restrictive trade (or business) practices;
- ii) Control of monopoly power or a dominant position; and
- iii) Mergers and acquisitions.

While each of these is covered under all of the 7-Up country laws, the manner in which they are covered differs somewhat.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition.

Most countries identify specific actions that constitute an RTP; the others give a more general definition. In several of the 7-Up countries the definition of restrictive trade practices (RTPs) is related to the idea of a horizontal or vertical agreement between firms that restricts competition. In other countries RTPs also include restrictive actions by single enterprises.

No country prohibits all RTPs per se, but in some countries those practices that are regarded as particularly damaging are singled out for this type of prohibition. All countries include a 'rule of reason' provision whereby some practices can be justified either in the public interest, or on efficiency, technological progress or export grounds. The onus is usually on the offending party to make a case for itself, though in Sri Lanka the burden of proof is reversed. It is difficult to determine the precise criteria on which 'rule of reason' decisions will be based, but this process should develop over time to provide more predictable outcomes for enterprises, while allowing competition authorities the necessary flexibility to support developmental needs and other public policy aims.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions.

Most of the 7-Up countries adopt a two-step approach to determining the abuse of monopoly power and dominant market positions. Firstly, they must establish that a position of dominance exists, and secondly, they must establish that this position is being abused. A prerequisite for this process is identifying the relevant market, in terms of its 'geographical' and 'product' dimensions. Most of the laws do not provide a clear prescription for how this should be done. India's new Competition Bill, although not yet in force, will be the only competition law to specify which factors should be taken into consideration in this regard.

Once the relevant market has been determined, dominance is assessed. The major factor for determining this in all countries is market share. Although there is no one-to-one relationship between a high market share and market dominance, which makes it difficult to set a threshold, this method is used as an important indicator in jurisdictions all over the world. The levels above which dominance is presumed in the 7-Up countries fall between 30 and 50 percent. India's new Bill takes a more behavioural approach, taking into account other factors such as the size and importance of competitors, technical advantages and the overall structure of the market. It is not yet clear how much weight will be allocated to each factor.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused.

Once it has been established that a firm is in a dominant position, the second step is to determine whether this position is being abused. Dominant firms are subject to the same prohibitions as other firms, while in some cases behaviour that is legitimate for non-dominant firms is also not allowed.

The only country that does not follow the two-step approach is Pakistan. Here, once market dominance is determined it is up to the dominant enterprise to justify its position on the grounds that it contributes substantially to efficiency, technological progress or the growth of exports.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes. However, the division of authority between the competition agency and the sector-specific regulator is often unclear.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties.

In addition, the economic circumstances that prevailed in the country in 1970, when the MRTPO was enacted, led the law to prohibit excessive 'personal' market power per se. At that time there was a vast concentration of the country's wealth into the hands of 22 business families. The MRTPO set a threshold of 300 million Pakistani Rupees, above which an individual's assets are deemed to constitute an undue concentration of economic power. The remedy in these cases is divestiture of ownership.

All 7-Up countries have provisions to the effect that mergers and acquisitions likely to result in situations where competition will be limited are prohibited. Requirements on pre-notification, however, differ; Pakistan requires that all mergers are notified to the authority; Kenya, Tanzania and Zambia require that all horizontal combinations are notified and approved (this limits their scope to deal with cases of vertical mergers with anti-competitive implications); South Africa requires pre-notification above a certain threshold; and India requires no pre-notification in either the existing Act or the proposed Bill. In Sri Lanka all mergers are notified, though the law actually only requires this in cases where combinations result in either the acquisition of a dominant position, or the strengthening of an existing one. The policy towards pre-notification has significant implications for the workload of competition agencies. In South Africa, this was part of the motivation for the amendment that introduced the threshold below which notification is not required.

In addition to the three main areas, some of the laws include provisions on unfair trade practices or consumer protection. In other countries these are covered under separate consumer protection laws, although Kenya and South Africa do not have any legislation covering either area.

Certain activities are shielded from the purview of competition law in some countries. In some cases this is because they fall under sector-specific regulatory regimes (this applies to many utilities, which are regarded as natural monopolies), however, the division of authority between the competition agency and the sector-specific regulator is often unclear. Both the Kenyan and the Indian governments have wide powers to exempt any enterprise that performs a 'sovereign duty'. Pakistan's Monopolies and Restrictive Trade Practices Ordinance specifically exempts all state enterprises. In South Africa firms can apply to the Competition Commission for exemption for a specific practice on various grounds, including the maintenance or promotion of exports or preventing the decline of an industry.

Some of the laws make use of the 'effects' doctrine, whereby foreign firms can be prosecuted for violations of competition laws that have an adverse effect in the domestic jurisdiction. However, as in the rest of the world, even where specific provisions for extra-territorial abuses are included this is not a guarantee that they will be effective in dealing with them. The South African Competition Commission and Tribunal have both recognised that they are unlikely to oppose a large international merger that has already been approved in the US or the EU, given the relative size of the South African economy. The second phase of the 7-Up project will examine these issues in more detail.

Various types of sanctions and relief are provided for in the competition laws of the 7-Up nations. These include cease and desist orders, fines, imprisonment and compensation to injured parties. The fines are often very low; in Kenya the maximum fine is approximately US\$1,300 and in Tanzania it is approximately US\$3,750. Such fines will not deter large

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body.

The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff.

In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour.

enterprises from anti-competitive practices. The South African and the new Indian legislation may be more effective since they relate the maximum fine to the size of the enterprise involved.

The powers of the competition authorities can be separated into 'investigative' and 'adjudicative' powers. Whether or not these powers are separated varies across the project countries, but all countries allow for appeal and final adjudication by and independent judiciary body. The South African set-up with a 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model law. However, such a set-up might not be constitutional in countries that provide for final Supreme Court jurisdiction in all cases, as is the case in India.

After the introduction of the new law in Tanzania, the Kenyan authority will be the only one that is administratively part of a government department. However, this does not mean that the other authorities have sufficient autonomy from central government. In Pakistan for example, an attempt to curtail cartelisation and collusive pricing in the cement industry resulted in government intervention to fix prices at a 'mutually acceptable level'. Several factors influence the level of an authority's autonomy, including the method by which funds are allocated. In addition to funds from central government, Sri Lanka and South Africa receive some of their income from the filing fees that they receive. This increases their independence.

In most cases the authorities' budgets are extremely low. The lack of funds has generally resulted in competition authorities with inadequate facilities and resources to carry out their functions, and insufficiently attractive salaries to draw high-calibre staff. The largest portion of the budgets is usually spent on salaries, with very little on research and investigations, or meetings and conferences.

Many of the authorities are understaffed. There has been some difficulty in finding appropriate candidates to fill positions, and many research positions remain vacant. Though India has a large staff, this is dominated by support staff and there are few professionals. In most 7-Up countries there is also a shortcoming in the amount of on-the-job training for existing staff. In addition, authorities do not have access to adequate information on market structure; several of the countries have no industry database. In conjunction with the lack of experience and suitably qualified staff this will make complex tasks like assessing market dominance very difficult.

In many respects South Africa is better equipped than the other countries to carry out its functions. The office has a fully electronic information resource centre, and all reference material is available online. The Commission also uses a case management and tracking system, which allows users to keep track of the progress of cases. The Tribunal also has continuous training and development programmes and provides funding for staff to pursue higher study. However, even the South African authorities have difficulty in attracting high-calibre staff.

The introduction of a market economy has been relatively recent in the 7-Up economies, so there is a particular need to promote understanding in the general population on the benefits of competition and the costs of anti-competitive behaviour. Despite this need, the advocacy and outreach programmes of the competition authorities have been limited and most countries spend very little on publications and raising awareness.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture.

On the whole, the 7-Up countries now have laws that are comprehensive enough to deal with the variety of practices and activities that infringe on the level of competition in their markets. Certain improvements would be necessary to complete this picture. The main problems, however, are in the effective implementation of the laws. On the whole, the main barrier to this lies in the weakness in the capacities of the competition authorities, and their inexperience. Overcoming these difficulties will be much easier if governments and civil society are educated on competition issues.

7-UP COUNTRY PROFILES

	India	Kenya	Pakistan	South Africa	Sri Lanka	Tanzania	Zambia
Population¹ Millions (1999)	998	29	135	42	19	33	10
GDP Millions US\$ (1999)	459,765	10,603	59,880	131,127	15,707	8,777	3,325
GNP/Capita US\$PPP (1999)	2,149	975	1,757	8,318	3,056	478	686
Adult Illiteracy (1998): % Male (>15) % Female (>15)	33 57	12 27	42 71	15 16	6 12	17 36	16 31
Poverty² % <National poverty line % <\$1/day	40.9 44.2	42.0 26.5	34.0 31.0	- 11.5	40.6 6.6	51.1 19.9	68.0 72.6
Exports % GDP 1990 1999	7 11	26 25	16 15	24 25	30 36	12 20	36 29
Imports % GDP 1990 1998	10 13	32 35	23 21	19 25	37 42	35 27	58 34
Currency	Indian Rupee	Kenyan Shilling	Pakistani Rupee	South African Rand	Sri Lankan Rupee	Tanzanian Shilling	Zambian Kwacha
Exchange Rate Currency / US\$ (2000)	43.3 ³	76.2	51.7	6.9	75.1	800.4	3,110.80
Annual budget of CA US\$ (2000)	406,582	235,892	325,919	7,742,678	97,870	162,056	193,005
Annual Govt Budget Millions US\$ (2000)	68,840	3,230	13,560	23,270	3,395	1,010	340
% Government Budget	0.00059	0.00731	0.00240	0.03327	0.00288	0.01604	0.05619
Pattern of expenditure -% share (2000)							
Salaries & honoraria	66	54	33 ⁴	41	43	18	81
Establishment cost	31	36	16	21	53		0
Books, periodical etc	2.21	-	0.49		0.80		0
Research & investigation		-		7.1	0.39		11
Printing/publications		-			2.33		1.98
Meetings/conferences	0.66	0.33		3.6	0.18		5.87
Other		0.27					
Staff (2000/2001)							
Full time members	4	1	3	1	1	5	
Part time members	0	0	-	8	5	-	12
Professional	7	24	5		7	-	5
Support staff	85	6	25		7	-	6
Total	96	31	33	78	20	5	23

1 Data in the table comes from the World Development Report 2000, the World Bank, and the country reports.

2 Latest available year.

3 Budget and exchange rate figures for India are for 1999 (2000 not available).

4 Pattern of expenditure for Pakistan is for 1999.

ANNEXURE-1

Exchange Rates
Unit of National Currency/US Dollar

	1980	1990	1999	2000
K/US\$	0.8	30.3	2,388.0	3,110.8
<i>Source: World Bank, (2001).</i>				

ANNEXURE-2

ABOUT 7-Up

The 7-Up Project is a two- year research and advocacy programme being conducted by the Consumer Unity & Trust Society (CUTS) with the support of Department for International Development (DFID), UK for a comparative study of competition regimes in seven developing countries of the Commonwealth.

The countries selected for the Project are India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, which have similar legal systems, and are at similar levels of economic development.

Main Objectives

The project primarily aims to:

- Evaluate the existing competition law and its implementation on a few basic principles: budgets, autonomy, composition and structure of the competition regime and authority;
- Identify typical problems and suggest solutions, including on the basis of good practices elsewhere;
- Suggest ways forward to strengthen existing legislation and institutions dealing with competition and consumer protection issues;
- Assess capacity building needs of the government, its agencies and the civil society;
- Develop strategies for building expertise among the competition agency officials, practitioners and civil society to deal with anti-competitive practices, including cross-border abuses more effectively; and
- Help build constituencies for promoting competition culture by actively involving civil society and other influential entities during this exercise.

Project Implementation

The project is being implemented by CUTS Centre for International Trade, Economics & Environment (CITEE) under the close supervision of an international advisory committee who are experienced in competition and related issues. The research and advocacy work of the project at country level is being done by local partners/ research institutions in the relevant countries. The following institutions have been involved in the project as partners:

- *India*: National Council of Applied Economic Research, New Delhi and CUTS, Jaipur
- *Kenya*: Institute of Economic Affairs, Nairobi
- *Pakistan*: Sustainable Development Policy Institute, Islamabad and The Network for Consumer Protection, Islamabad
- *South Africa*: Institute for Global Dialogue, Johannesburg
- *Sri Lanka*: Law & Society Trust, Colombo and Institute of Policy Studies, Colombo
- *Tanzania*: Economic and Social Research Foundation, Dar-es-Salaam and Christian Council of Tanzania, Dodoma
- *Zambia*: CUTS Africa Resource Centre, Lusaka and Zambia Consumers Association, Kitwe

The Project comprises of two phases, where Phase-I studied the institutional framework for enforcing the competition law in the project countries and Phase-II deals primarily with cross border competition issues.

The project, implemented under the close supervision of an international advisory committee, has two components: research and advocacy.

The research output of the project is designed to be based on:

- Study of relevant existing literature
- Field study, and
- Consultation with local stakeholders

The advocacy component of the project includes raising awareness among the various groups of stakeholders through meetings and publications and building constituencies that would help shaping a healthy competition culture. In this regard a National Reference Group, involving various stakeholders, has been formed in all the project countries.

It is expected that the project will be extended to implement some of the results of the project including providing capacity building and technical assistance to governments and civil society, as well as advocating for a healthy competition culture at different levels.

ENDNOTES

- 1 See Richardson, J, (1998).
- 2 CUTS, (2001).
- 3 UNDP, (2001).
- 4 UNDP, (2001).
- 5 World Bank, (2001).
- 6 Ibid.
- 7 World Bank, (2001).
- 8 WIR (2000), table B4.
- 9 World Bank, (2001). The exact figure for 2000 was 56.4 percent.
- 10 World Bank, (2000).
- 11 World Bank, Report No 15477-ZA.
- 12 GRZ, *Economic Report 2000*.
- 13 It has been argued elsewhere that even though the copper industry has given the country a stronger purchasing power, it has largely disadvantaged other exporting sectors, which compete with it for capital and labour. In the absence of the copper industry, the exchange rate would have been lower and this would have benefited exporters and import-competing activities.
- 14 World Bank, (1995).
- 15 GRZ, (2000), p16.
- 16 Researcher's own observation.
- 17 UNCTAD (2000) Model Law on Competition TD/RBN/CONF.5/7 p.13
- 18 Zambia Competition Commission *Competition Rules in Zambia*, p2.
- 19 Zambia Competition Commission, *Competition Rules in Zambia*, p2.
- 20 Lipimile, G, (2001), p 3-5.
- 21 UNCTAD, (2000), p20.
- 22 Participants of the second national reference group meeting expressed this view
- 23 ZCC, (2001a), p9.
- 24 Hoekman, B, and Holmes, P, (1999).
- 25 Richardson, J. David (1998).
- 26 Zambia Competition Commission, (2001), p20.

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CUTS-AFRICA RESOURCE CENTRE

CUTS-Africa Resource Centre was established in February 2001 with the aim of promoting South-South civil society cooperation, especially between the Asian and African civil society groups. The Centre focuses on consumer protection, trade, investment and competition issues. The work in these areas involves:

- Strengthening capacity of policy makers for policy-making and implementation in the region.
- Sharing resources and information across and beyond the region.
- Global networking of civil society and governments of the South.
- Building consensus on the above-mentioned issues for developing countries at multilateral fora.

ZAMBIA CONSUMERS ASSOCIATION

Zambia Consumers Association (ZACA) is a non-partisan and non-governmental organisation, which was established in 1998 in Kitwe, Zambia. ZACA was affiliated to Consumer International Regional Office for Africa (CI-ROAF) in 2002.

The organisation has three full time and six part time staff with two thousand and thirty volunteers. The organisation's main area of work includes: consumer education, complaints handling, campaigning, lobbying and representation.

Major achievements of the organisation include: bringing consumer welfare to the fore in the country, lobbying for enactment of consumer protection law whose process has begun and successfully campaigning against Zambia Electricity Corporation's newly introduced 30% surcharge on delayed payment for electricity until the surcharge was withdrawn.

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