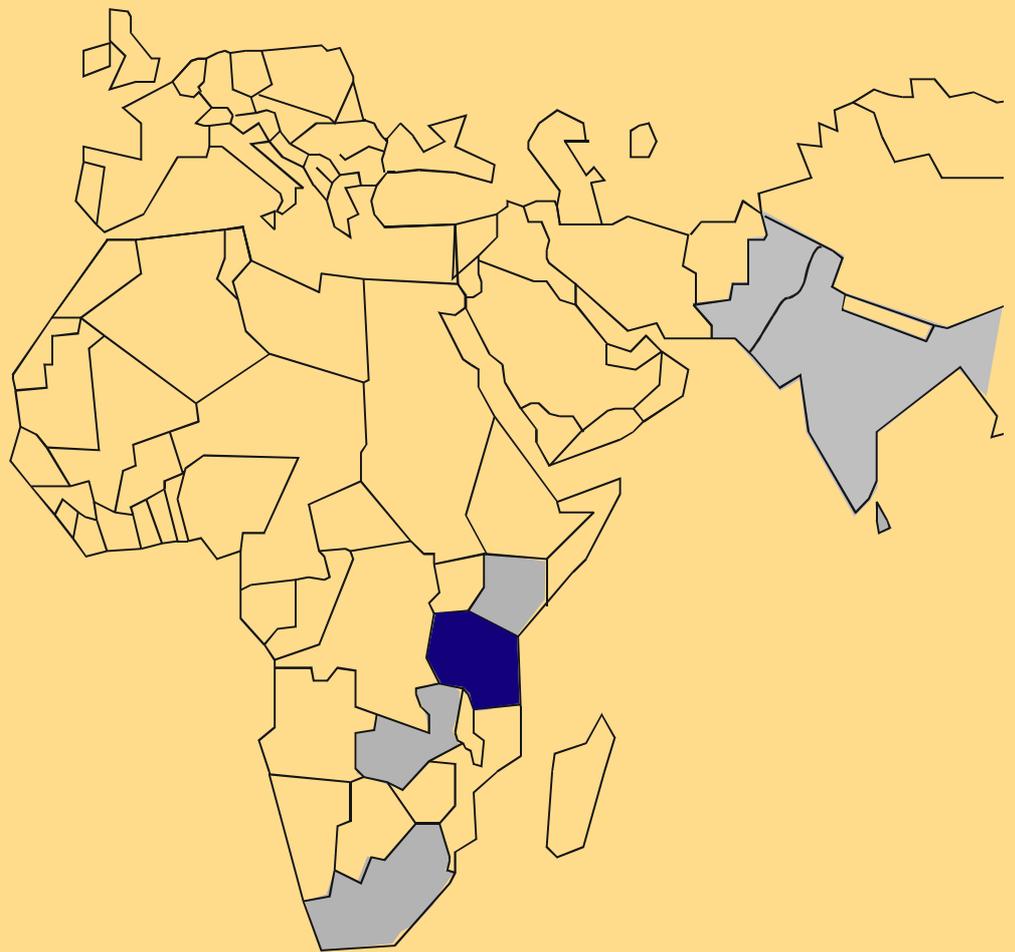


# COMPETITION LAW & POLICY

- A TOOL FOR DEVELOPMENT IN TANZANIA



Economic and Social  
Research Foundation

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## LIST OF ABBREVIATIONS

ATC	Air Tanzania Corporation
CA	Competition Authority
CR	Concentration Ratio
CUTS	Consumer Unity & Trust Society
DFID	Department for International Development
EAC	East African Community
ESRF	Economic and Social Research Foundation
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
FTPA	Fair Trade Practices Act
GNP	Gross National Product
GTZ	Gesellschaft für Technische Zusammenarbeit, Germany
IMF	International Monetary Fund
NBC	National Bank of Commerce
NGOs	Non Governmental Organisations
NPC	National Price Commission
PSRC	Parastatal Sector Reform Commission
RBPs	Restrictive Business Practices
SIDA	Swedish International Development Cooperation Agency
TANESCO	Tanzania Electric Supply Company Limited
TAZARA	Tanzania Zambia Railway Authority
TBL	Tanzania Breweries Limited
TCC	Tanzania Communication Commission
TIC	Tanzania Investment Centre
TRC	Tanzania Railways Corporation
TSH	Tanzanian Shillings
TTCL	Tanzania Telecommunications Company Limited
UK	United Kingdom
WB	World Bank

## FOREWORD

Since the 1980s, many developing countries have begun introducing market-based economic policies. Like several of these countries, Tanzania recently introduced competition legislation, with the enactment of the Fair Trade Practices Act in 1994. Competition policies set the framework for free and fair competition, and form one of the basic foundations of the new institutional framework.

While it represents a significant development, the Act itself has a number of weaknesses; some features of the price-control regime were maintained, and its reach went beyond anti-competitive activities. Additionally, a single individual was appointed as Commissioner, instead of a board of several individuals. These weaknesses have been recognised, and modifications to the legislative framework commenced in 2000. However, the agency has not been made independent of the ministerial bureaucracy and does not receive adequate funding. As a result, by 2001 the agency had failed to develop into a fully-fledged and operational competition authority.

Developing countries like Tanzania must address the question of whether competition agencies based on US or European models are relevant for their immature markets. Like many other African countries Tanzania has virtually no culture of consumer advocacy and its small markets can only accommodate a few suppliers.

This study of the Tanzanian competition regime highlights these points very clearly, and challenges the 7-Up group to find appropriate solutions for emerging markets. The study reflects the importance of institutional economics in providing a deeper foundation for policymaking.

**Cezley Sampson**  
**Lead Advisor**  
**Presidential Parastatal Sector Reform Commission**

## PREFACE

This report was prepared as part of efforts needed to respond to the challenges posed by the trend of liberalisation, de-regulation of markets in the world. The issue of competition law and policy has gained increased importance and urgency, particularly in developing countries. In addition, the quest to increase foreign direct investment in many developing countries adds another complication to competition law and policy.

The Report on the Competition Regime in Tanzania makes a critical assessment and review of the competition regime in Tanzania based on the Fair Trade Practices Act of 1994 and the subsequently created institutions. In this report, economic and law-based researchers carefully explore the competition regime in Tanzania, bringing to fore the different facets of competition policy in Tanzania, including the socio-economic and public policy context. These sections explain concentration issues, direct investment, trade orientation, financial sector reforms, and various policies important for competition law and policy to work.

The report urges that competition policy and law should be part and parcel of the trade liberalisation, privatisation and de-regulation process in Tanzania. The enactment of the Fair Trade Practices Act in 1994 provided the basic foundation for the establishment of competition policy and law in Tanzania. The Act encourages competition by prohibiting practices that hamper fair competition, and protects consumer welfare in the market-based economy. However, while Tanzania has a good Competition Act, not much has been done so far in terms of its implementation. The report however, goes further to bring out the changes that have been made by the country to improve the law itself and the capacity of the Authority.

The report is based on solid research conducted at the ESRF for one year under the coordination of the Consumer Unity & Trust Society (CUTS) of India. In the course of the research and various drafts, two National Reference Group meetings were held and the ideas and views emanating from these meetings have been incorporated into the report. From the report it has become obvious that more studies of competition policies and law are needed in Tanzania, including the important area of consumer protection and advocacy. It is also important to strengthen the institutions dealing with competition issues and sensitise many people on the need for competition regulators, especially at this critical point of increased de-regulation and liberalisation of various markets.

The ESRF acknowledges the important initiative taken by CUTS of India in initiating and coordinating this research, and the financial assistance of DFID. The ESRF is grateful to the country researchers, Dr Flora Musonda, Mr Wilfred Mbowe and Ms Faye Sampson for their hard work in preparing this report. We would also like to thank Mr Godfrey Mkocho, Commissioner of the Competition Authority of Tanzania, for his cooperation.

**Prof. H.K.R. Amani**  
**Executive Director**  
**Economic and Social Research Foundation**

## EXECUTIVE SUMMARY

### Introduction

*While Tanzania has a good Competition Act, not much has been done so far in terms of its implementation.*

The Report on the *Competition Regime in Tanzania* makes a critical assessment and review of the competition regime in Tanzania. The report urges that competition policy and law should be part and parcel of the trade liberalisation, privatisation and de-regulation process in Tanzania. The enactment of the Fair Trade Practices Act in 1994 provided the basic foundation for the establishment of competition policy and law in Tanzania. The Act encourages competition by prohibiting practices that tend to hamper fair competition, and protects consumer welfare in the market-based economy. However, while Tanzania has a good Competition Act, not much has been done so far in terms of its implementation.

It should be noted that when this paper was prepared, the bill to remove the Competition Authority away from the auspices of the government, and change the Fair Trade Practice Act into the Fair Competition Act had not yet been passed. Furthermore, additional amendments to the Fair Competition Act of 1994 were tabled during the October/November 2001 Parliamentary session. Currently the proposed Fair Competition Act is still not in force and might be tabled again in the next session of Parliament. Therefore, this report still refers to the Fair Trade Practice Act and to the Competition Authority before it is detached from the ministry.

### Socio-economic /Development Context

*The relevance of Competition Policy in Tanzania is increasing as the country moves away from being a centrally planned economy.*

The relevance of Competition Policy in Tanzania is increasing as the country moves away from being a centrally planned economy. Since 1967, the economy has been characterised by public ownership, price control and very limited private sector development initiatives. In the mid-eighties, due to the new global perspective in economic management, which emphasised reliance on the free market, the government of Tanzania deliberately pursued policies and legislation directed towards reducing government involvement in production and commercial services. This resulted in the liberalisation, privatisation and deregulation of the economy, and competition in different spheres of production and service provision was improved.

*The private sector seems to be moving toward dominating the supply of social services at the secondary and tertiary levels, while the public sector still plays an overwhelmingly dominant role in the provision of these services at the primary level.*

Since the government withdrew itself from total control of the economy, the private sector has played a leading role. However, there are still a few sectors that have not been completely let open to free competition by the private sector. The sectors in which the government is still participating include the provision of social services, education and health. The private sector seems to be moving toward dominating the supply of social services at the secondary and tertiary levels, while the public sector still plays an overwhelmingly dominant role in the provision of these services at the primary level. Similarly, private dispensaries and hospitals have recently mushroomed in urban centres, while public services still dominate in rural districts and villages. Some sectors are more regulated than others. For example, sectors like health, education, natural resources, agriculture, water and energy, and communications are regulated. The management

and control of foreign exchange is carried out by the Central Bank of Tanzania.

***Privatisation has greatly reduced the number of public monopolies in sectors such as transportation (air transport); media (newspapers, radio); communication (postal and telecommunication services); and agriculture (especially in crop buying etc). There has, however, been an emergence of private monopolies and oligopolies.***

With regard to the structure and concentration of the market, the abolition of confinement policy has reduced the number of monopolies. Privatisation has greatly reduced the number of public monopolies in sectors such as transportation (air transport); media (newspapers, radio); communication (postal and telecommunication services); and agriculture (especially in crop buying etc). There has, however, been an emergence of private monopolies and oligopolies.

No detailed analysis has recently been carried out into the pricing behaviour of firms, but casual observation suggests that the pricing behaviour of large firms, especially those that are highly protected, is monopolistic. These firms enjoy more market power than smaller firms do. In some lines of production, such as the beer industry and cigarette manufacturing, monopoly power is very significant due to limited competition.

***The manufacturing sector is small and is dominated by a few well performing industries, namely beer and tobacco.***

In terms of sector-wise concentration, Tanzania's economy is still heavily dominated by the agricultural sector, with many people living in rural areas. The same trend is repeated in the export sector where export crops are mainly concentrated into six traditional exports, coffee, cotton, sisal, cashew-nuts, tea and tobacco. The level of export diversification has remained low although the country has a large potential in this area. The manufacturing sector is small and is dominated by a few well performing industries, namely beer and tobacco. The textile sector has suffered quite a lot due to competition from cheaper imports. The tourism and mining sectors are becoming quite important in the economy.

As regards the competitiveness of local firms and potential entry barriers, effective participation by any producer in the market is determined by the degree of accessibility of the market. Production costs are among the factors that determine this. Others include storage and transport costs, the level of taxation, utility costs (e.g. water and electricity), labour costs, accessibility to and cost of financial capital, interest rates charged and access to land. These cost factors have not worked in favour of Tanzanian producers, and have therefore adversely impacted on the competitiveness of the manufacturing sector (which is still in its infant stage) in local and world markets.

***Although its development policy was inward looking for a long period of time, Tanzania now has a high degree of openness.***

Although its development policy was inward looking for a long period of time, Tanzania now has a high degree of openness. However, the levels of imports over the years have been much higher than the levels of exports, and therefore the country has persistently registered a negative trade balance. The Export/GDP ratio has shown a declining trend over the 1995-99 period. The reasons for this declining trend may have been a fall in export capacity, falling prices of the primary goods which are exported, or the closure of manufacturing firms due to rising costs of production and stiff competition with firms from outside. The Import/GDP ratio has also been falling over the period under review. This may be attributed to a number of factors including illegal and unrecorded imports of goods, and an improvement in domestic production whereby goods that were imported in the past are now being produced domestically.

### **Public Policy Context**

To build a private sector led, and outward looking economy, the government intends to continue with the stabilisation effort, reducing inflation to minimal

levels, and increasing foreign exchange reserves to a level sufficient to provide good protection against external shocks.

Strong macroeconomic policies and structural reforms will be crucial in the attainment of stability and higher growth rates. The government will continue to centre macroeconomic policies on rigorous fiscal management and prudent monetary policy. There will be a continuing shift of functions from central government and the parastatal sector to local administration and the private sector.

Financial sector reform has been undertaken and continues, with the aims of fostering competition and efficiency in the supply of financial services, narrowing the spread between lending and deposit interest rates, and strengthening the mobilisation and allocation of financial resources. Allowing new banks in and privatising the 'giant' National Bank of Commerce (NBC) have lessened monopoly-power in the financial sector.

***Despite all the government's efforts to build strong macroeconomic policies and carry out structural reforms, there are a number of constraints which hinder the government's policy implementation.***

Despite all the government's efforts to build strong macroeconomic policies and carry out structural reforms, there are a number of constraints which hinder the government's policy implementation. The first is inadequate funds. The government's financial capacity has been low, making it impossible to finance all its planned activities. This problem has also hindered projects that are jointly financed with donors. Some of these projects have either been postponed or not implemented at all due to the government delaying or not releasing counterpart funds. Secondly, most funds for development projects to meet specific policy targets are donor oriented and beyond the government's control. Thirdly, there is a lack of adequate human capacity to plan, execute or facilitate, and monitor different government policies and strategies. This has not only delayed or completely obstructed government policies, but also increases the need for external technical assistance. Another constraint lies with the ambitious number and nature of policies and targets.

### **Assessing the need for competition policy and law**

The theoretical underpinning of the need for competition policy and law stems from the inherent nature of market failure. Market failure comes about as a result of the divergence between the ideal or textbook conditions of perfect competition on the one hand, and the actual economic conditions on the other. This divergence is caused mainly by information asymmetries, natural monopolies, natural growth of firms, and mergers and acquisitions. Theoretical and practical problems of the market have led the prevailing wisdom to advocate the design and establishment of institutions that ensure that clandestine market power is not achieved and that those with market power do not abuse it.

***Theoretical and practical problems of the market have led the prevailing wisdom to advocate the design and establishment of institutions that ensure that clandestine market power is not achieved and that those with market power do not abuse it.***

The United Nations Conference on Restrictive Business Practices adopted a set of Principles and rules in Competition Policy and Laws on April 22<sup>nd</sup> 1980, and charged UNCTAD with the duty of implementing them.

According to UNCTAD, the general objectives of Competition Policy and Law are: -

- i. To enforce and safeguard consumer welfare;
- ii. To enforce the provision of quality goods and services at competitive prices to consumers;
- iii. To prohibit restrictive business practices in the economy.
- iv. To regulate monopoly or abuse of power and unwarranted concentration of economic power.

- v. To promote regional and international trade through harmonisation of competition practices.
- vi. To sensitise consumers to their rights.

***The current trade liberalisation, privatisation and deregulation process going on in developing countries like Tanzania, requires the establishment of a competition policy for the process to be conducted properly.***

Many practitioners are of the opinion that the current trade liberalisation, privatisation and deregulation process going on in developing countries like Tanzania, and in transitional economies, requires the establishment of a competition policy for the process to be conducted properly.

If the privatisation process is not conducted properly, that is without transparency, accountability, due process before the law and without contestability, it is quite possible that the process would simply remove monopolies from state control and convert them to private monopolies. Such a process could cause chaos and may not serve the public interest, without institutional mechanisms in place to redress the situation. Competition policy aims to achieve efficiency through competition, and equity in the economy.

### **Competition Law in Tanzania**

Under the Fair Trade Practice Act, which is to be changed to the Fair Competition Act, anti-competitive activities and behaviour must be justified if they significantly affect competition in a market. The act was revised this year and is awaiting the president's approval. It cannot be quoted until it has been approved by the government.

***Tanzania has little experience or jurisprudence in the regulation and arbitration of competition matters and would need to take advantage of precedents and procedures developed in other jurisdictions.***

Tanzania has little experience or jurisprudence in the regulation and arbitration of competition matters and would need to take advantage of precedents and procedures developed in other jurisdictions. The scope and application of the Fair Trade Practices Act extends to all enterprises engaged in business, whether private or public, and covers transactions in the production and distribution of goods and services. As with most competition laws its powers are limited to the national territory, and it does not have any extra-territorial application.

Exemptions are limited to the areas of sovereign acts of the state and the labour market, in particular trade union collective bargaining rights. As with most competition regimes the Act prohibits three main types of business conduct:

- i. Restrictive business practices (RBPs) -horizontal and vertical practices.
- ii. Misuse of market power.
- iii. Control of Monopolies and Concentration of Economic Power through Mergers and Acquisitions.

Firms with substantial market power may be in a position to misuse that power to the detriment of competitors and hence ultimately to the detriment of consumers.

***Prohibited conduct includes price-fixing, collusion, bid-rigging and cartelisation. The Fair Trade Practices Act (1994) exhaustively prescribes rules for the protection of consumer interests.***

Specifically, prohibited conduct includes price-fixing, collusion, bid-rigging and cartelisation. The Fair Trade Practices Act (1994) exhaustively prescribes rules for the protection of consumer interests. The law prohibits misleading or deceptive conduct. It requires that in determining whether a person has broken the law, the Commissioner considers the strength of the bargaining positions of the parties, the validity of conditions, the consumer's understanding of documents, and the circumstances (e.g. use of force or unfair tactics).

In addition to other unfair practices, the Fair Trade Practices Act prohibits misrepresentations, misleading advertising and conduct, bait-supply, harassment, and coercion. It imposes the obligation to label prices in shops to increase transparency and hence competition. It also requires the statement of and conformity with safety standards and warning requirements, product information, and product recall requirements, and imposes standards as to the quality or fitness of the product for the purpose of obtaining basic warranties and indemnities and the like, to prevent unfair trade practices.

The requirement for compliance with prescribed consumer product safety standards and the requirements of the Act relating to consumer protection are obligatory on penalty of prescribed and revisable fines and/or imprisonment.

### **Design and Implementation of Competition Law**

*The institutional framework of the Fair Trade Practices Act in Tanzania consists of two levels of implementation, the Fair Trade Practices Commission and the Appeals Tribunal.*

The institutional framework of the Fair Trade Practices Act in Tanzania consists of two levels of implementation, the Fair Trade Practices Commission and the Appeals Tribunal. The Commissioner for Trade Practices has overall administrative responsibility for the implementation and monitoring of the Act. The Trade Practices Tribunal has been established as the appellate body by the decisions of the Minister and the Commissioner. The Tribunal has jurisdiction to hear and determine any complaint relating to trade practices, to inquire into any matter referred to it, and to issue orders. It is to be guided by the rules of natural justice.

Both of the competition institutions mentioned i.e. the Commissioner's office and the Trade Practice Tribunal, are at an early formative stage. When the study started, the office of the Commissioner had a nucleus staff of five people and was located in, and was a department of the Ministry of Industry and Trade. However, it has now been removed from the ministry and has become a body corporate i.e. it stands on its own.

### **Capabilities of the Competition Authority as of April 2001**

According to the field survey in April 2001, there was no governing committee for the Competition Authority. In fact, procedures for the appointment and dismissal of staff and other members were even not in place. Staff turnover over the last five years has been negligible, with 1999 having highest number of staff entering (three). In 1996 and 2000 there was only one new member of staff and in 1997 there were no recruitment of new staff.

*The budget for the commission is inadequate and not essentially used to pay for salaries and honorarium etc.*

The interview with the competition authority in Tanzania indicates that the competition commission's budget is still tied to and managed by the Ministry of Industry and Trade's budget, which is then submitted to the parliament. The budget for the commission is inadequate and not forthcoming. For example, in the year 2000 it was 0.01 percent of the budget of the federal government. It is essentially used to pay for salaries and honorarium etc. Due to the limited resources, the training of staff and publicity about the competition law has been delayed.

The existing situation indicates that competition authority staff salaries are comparable to other government departments'. Since the salaries and benefits in government are low and inadequate for a worker's daily needs, applying the same rates to competition law executors and monitors is likely to motivate corruption practices, and will not attract a high calibre of staff to the authority.

## The Next Steps

The Fair Trade Practices Act had inherent weaknesses even as it was being enacted in 1994. Some of the weaknesses have been addressed recently through the presentation in Parliament of two Acts: the Surface and Maritime Transport Regulatory Authority Act (SUMATRA) of 2001, and the Energy and Water Regulatory Authority (EWURA) Act of 2001. In order for these Authorities' powers not to conflict with the powers in the Fair Trade Practices Act, concurrent amendments had to be introduced in the FTPA. These amendments are contained in schedule No.4 of the EWURA Act of 2001. The main changes are as follows:

- The schedule changes the name of the Fair Trade Practices Act (No.4) of 1994 to the Fair Competition Act of 1994.
- The top decision-maker in the Fair Trade Practices Act of 1994 was the Trade Practices Commissioner. In the new Act it is the Fair Competition Commission of 5 members headed by an Executive Chairperson and a Secretary.
- The Commission becomes a Body corporate i.e. it stands on its own and not as a department of the Ministry responsible for Competition Policy and Law as was the case for the Trade Practices Commissioner's Office.

*On the capacity building initiatives for the competition authority, the authority has received support worth US\$918,000 from SIDA and the World Bank, and UK£90,000 from DFID/UK.*

On the capacity building initiatives for the competition authority, the authority has received support worth US\$918,000 from SIDA and the World Bank, and UK£90,000 from DFID/UK.

The funds are to be used to provide expatriate help on competition law and information technology. The funds are also to be used for the education of various stakeholders, the training of Competition Authority and Tribunal Staff, and for buying information related equipment.

Further changes to the Fair Competition Act of 1994 were tabled during the October/November 2001 Parliamentary Session. The objective of the changes is to update the Act in line with the recent Multi-Sector Regulatory Authorities Act, SUMATRA and EWURA, and also to bring the Fair Competition Act of 1994 up to date with international best practices.

## Conclusion

*Competition policy and law in Tanzania are very important tools to further and monitor the liberalisation and de-regulation process in Tanzania, while focusing on the private sector to champion the development of the country.*

Competition policy and law in Tanzania are very important tools to further and monitor the liberalisation and de-regulation process in Tanzania, while focusing on the private sector to champion the development of the country. The enactment of the Fair Trade Practices Act in 1994 provided the basic foundation for the establishment of competition policy and law in Tanzania to encourage competition (by prohibiting practices in business or trade which hamper fair and free competition), and to protect consumer welfare in the free market economy.

But having a good act and implementing it are two different issues. So far not much has been done in terms of implementation of the act, however recent changes in the Fair Trade Practices Act (No.4) of 1994 and the capacity building initiatives of the Competition Authority mentioned in the next chapter seem to be a good starting point for the effective implementation of competition law and policy in Tanzania.

## CHAPTER-I

### Introduction

The United Republic of Tanzania lies between latitudes one and 11 degrees south of the equator. In addition to the mainland, it includes the Indian Ocean islands of Pemba and Zanzibar. It is located on the east coast of Africa between the Great Lakes of the rift valley system in the central part of the continent, and the Indian Ocean. To the North-west the country stretches to Lake Victoria and to the West lie Lake Tanganyika and Lake Nyasa. Tanzania has common borders with Kenya and Uganda to the North; Rwanda, Burundi and the Democratic Republic of Congo to the West and Zambia, Malawi and Mozambique to the South. It covers an area of 945,000 square kilometres.

*The economy is largely agriculture based and it is estimated that 90 percent of the population is occupied in this sector. The manufacturing sector is both small and weak.*

The current population of Tanzania is estimated to be over 30 million people. Of the total labour force, estimated at 15.6 million persons at the time of writing, 10.8 million are employed. The remaining 4.8 million are unemployed or inactive, amounting to an unemployment rate of 30 percent. This rate may have increased over recent years. About 49 percent of the labour force is male and 51 percent is female. An estimated 2.3 million people are employed in the informal sector. The economy is largely agriculture based and it is estimated that 90 percent of the population is occupied in this sector. The manufacturing sector is both small and weak.

The country's GDP has experienced an average growth rate of about 3 percent over the past few years and is forecast to grow at an even higher rate in 2001. Gross Domestic Product (GDP) increased by 3.9 percent in 1995 and growth for 1999 was 4.8 per cent. Per capita GNP is still around US\$210. Life expectancy at birth is 47.9 years (1997), the under five mortality rate is 592/100,000 (1997), access to safe water is 51 percent (1993), and access to health services 76 percent (1991).<sup>1</sup>

Tanzania's main trading partners are the European Union, Japan, India, and Kenya. Its exports are primarily agricultural commodities, with coffee, cashew nuts, tobacco and cotton constituting the largest shares. Machinery, transportation equipment, industrial raw materials, and consumer goods constitute the majority of imported products. Because of the decrease in agricultural production during the past few years, attributable to climatic conditions, food and foodstuffs imports have increased sharply. Tanzania is a net importer of services.

For about two decades (1967 to 1986) Tanzania's economy was run on a central planning model. Since 1986, there has been a deliberate reversal of the economic model to a market-based one. However this reversal did not signal that any of the main players in the economy, that is the government, parastatals, private firms and even consumers, knew how a market economy was supposed to be run. Therefore between 1986 and 1993 there was some confusion as to how a liberalised trade regime, or a privatised and a heavily de-regulated economy could be supervised. Was the wisdom of the 'invisible hand' enough to ensure a level playing field in the economy? This was one of the many questions posed, in

particular in 1993 when the Minister of State for Planning presented the resolution for repealing the Price Control Act of 1973 to Parliament. Later the reform architects (WB/IMF) came to realise that trade liberalisation, privatisation and deregulation should go hand in hand with competition protection and economic regulation.

***This report presents a critical assessment and review of the competition regime in Tanzania. The report urges that competition policy and law should be part and parcel of the trade liberalisation, privatisation and de-regulation process in Tanzania.***

***While Tanzania has a good Competition Act, not much has been done so far in terms of its implementation.***

This report presents a critical assessment and review of the competition regime in Tanzania. The report urges that competition policy and law should be part and parcel of the trade liberalisation, privatisation and de-regulation process in Tanzania. The enactment of the Fair Trade Practices Act in 1994 provided the basic foundation for the establishment of competition policy and law in Tanzania. The Act encourages competition by prohibiting practices in the economy that tend to hamper fair competition, and protects consumer welfare in the market-based economy. However, while Tanzania has a good Competition Act, not much has been done so far in terms of its implementation. The main reason for the delay has been a lack of commitment on the part of the bureaucracy to the concept, to the design of the implementing institutions and to the benefits to the economy of a properly constituted economic regulatory framework. The attitude now seems to be changing towards serious implementation of competition policy and an industry-specific regulatory framework.

This report is organised into nine chapters. Chapter two of the report surveys the socio-economic/development context of Tanzania, whereas chapter three presents a review of the public policies. Chapter four assesses the need for competition policy and law. In chapters five and six, descriptions of the types of anti-competitive practices that are covered by Tanzania's competition law, and the design and implementation of the law are given respectively. The capability of the competition authority is discussed in chapter seven, while chapter eight presents the next steps in competition law and policy. Chapter nine concludes the report.

## Socio-Economic/Development Context

Tanzania's economy has passed through a number of socio-economic stages, the most important milestone being the Arusha declaration in 1967, which led to the nationalisation of all major means of production and exchange. With the Arusha declaration, and government control of the major means of production and consumption, the manipulation of prices was common. One of the most frequently quoted reasons for having price control was to keep a check on monopolies. The government's price-control system was introduced by the Regulation of Prices Act, 1973, which was administered by the National Price Commission (NPC).<sup>2</sup>

In the mid-eighties, due to the new global perspective on economic management, which emphasised reliance on a market-run economy, the government of Tanzania undertook deliberate policy and legislation changes directed towards reducing government involvement in production and commercial services. This later culminated in the liberalisation, privatisation and deregulation of the economy, by which processes competition in different spheres of production and service provision were improved.

*The Tanzanian economy has long been characterised by public monopolies, but has recently witnessed significant reforms.*

As mentioned elsewhere in this report, the Tanzanian economy has long been characterised by public monopolies, but has recently witnessed significant reforms. Since the government withdrew itself from total control of the economy, the private sector has played a leading role. More recently, the private sector has dominated the rehabilitation of the ailing industrial sector, mainly through the privatisation program; expansion of the export base; and investment in mining and tourism, which are currently the most dynamic sectors.

With the liberalisation of trade and the rolling back of the public sector's involvement in commerce, the private sector also consolidated its dominant role in commerce.<sup>3</sup> In Tanzania now, unlike in the past, there are no reserved sectors. However, there are still a few sectors that have not been left completely free for competition by the private sector. The government still participates in the provision of social services, education and health.

*Although the private sector seems to be moving toward domination of the supply of social services at the secondary and tertiary levels, the public sector still plays an overwhelmingly dominant role in the provision of these services at the primary level.*

Although the private sector seems to be moving towards domination of the supply of social services at the secondary and tertiary levels, the public sector still plays an overwhelmingly dominant role in the provision of these services at the primary level. Similarly, private dispensaries and hospitals have recently mushroomed in urban centres, while public services are still dominant in rural districts and villages.

At the same time, some sectors are more regulated than others. For example the health, education, natural resources, agriculture, water and energy, and communications sectors, and management and control of foreign exchange by the Central Bank of Tanzania, are all heavily regulated. There are also particular export commodities that cannot be exported

without a permit or license. While most sectors are free for competition, some still suffer from relics of the past control era. In the agricultural sector for example, one meets a lot of controls and behaviour that are not conducive to competition.<sup>4</sup>

## 2.1 Marketing Interventions through Marketing Boards

Despite the fact that Tanzania has liberalised its foreign trade, industrial sectors and the economy as a whole, there are still several marketing boards (for instance for coffee, cotton, sisal, cashew nuts, pyrethrum and tobacco) that regulate the buying and selling of certain products, especially those that are exportable. In the 1970's and 1980's, the marketing boards played the role of price setter for many export crops. This price-setting role has now been abolished.

The marketing boards are now entrusted with quality-control and inspection before commodities are marketed or exported. They provide extension officers, finance research, and issue licenses and permits for the purchase and marketing of local and export commodities.

## 2.2 Structure and Market Concentration

No formal analysis has recently been published of Tanzania's market concentration in terms of, for example, four firm concentration ratios, CR4 (which is the proportion of output originating from the four largest enterprises). Nor has there been an analysis using the Herfindahl-Hirschman index<sup>5</sup>. The last census of industries was produced in 1992 for the year 1989. No comprehensive study on market structure and concentration has recently been made, especially in terms of sales.

It is clear, however, that the number of monopolies has fallen with the abolition of confinement policy. Public monopolies have been very much reduced in sectors like transportation (air transport); media (newspapers, radio); communication (postal and telecommunication services) and agriculture (especially in crop buying etc.) by the process of privatisation, although there has been an emergence of private monopolies and oligopolies. Two years ago, only one firm was responsible for all of the imports of petroleum, but now the system has been liberalised and many firms import it. The banking system is still not very liberalised and a few multinational firms control Tanzania's banking and other credit institutions.

*There has been no recent in-depth analysis into the pricing behaviour of firms, but casual observation suggests that the pricing behaviour of large firms, especially those that are highly protected, is monopolistic.*

There has been no recent in-depth analysis into the pricing behaviour of firms, but casual observation suggests that the pricing behaviour of large firms, especially those that are highly protected, is monopolistic. These firms enjoy more market power than smaller firms do. In some lines of production such as the beer industry and cigarette manufacturing, monopoly power is very significant due to limited competition. This may be caused by entry barriers to these markets. These are not the result of deliberate actions, but result, among other reasons, from high set-up costs.

*The structure of Tanzania's economy is still heavily dominated by the agricultural sector, with many people living in rural areas.*

### 2.2.1 Sector-wise Concentration

The structure of Tanzania's economy is still heavily dominated by the agricultural sector, with many people living in rural areas. The same trend is repeated in the export sector with the concentration of export crops mainly into six traditional exports, coffee, cotton, sisal, cashew-nuts, tea and tobacco. The level of export diversification has remained low although the country has a large potential in sectors such as food-

processing, tourism, and mineral and mineral based products. The manufacturing sector is small and is dominated by a few well performing industries, namely beer and tobacco. The textiles sector has suffered quite a lot due to competition from cheaper imports. The tourism and mining sectors are becoming quite important in the economy.

### 2.2.2 Industry-wise Structure

Casual observation would suggest a concentration of a few industries in certain sectors, which contribute a large fraction to total industrial GDP. Although there has been a slight increase in foreign investment, there is still dominance by a few relatively large producers, especially in the beverage industry. This market concentration is not so much caused by unfair behaviour, but rather by the inadequacy of investment in the area; lack of a sufficient market to sustain many producers; and also investors who are not yet sure of the sustainability of macro economic policies. These policies include fiscal policies that impact on the levels and patterns of taxation and public expenditure; monetary policies, which have a bearing on the level of monetary expansion such as credit and the level of inflation; and exchange rate policies.

**Table 1: Industrial Licenses Issued**

Industry	1993	1994	1995	1996	1997	1998	1999
Food Processing	3	5	18	11	23	21	17
Beverages	2	-	4	3	9	6	9
Textile manufacturing and garments	-	-	4	7	-	-	1
Leather and manufacture of leather goods	-	1	2	-	1	-	1
Timber, and manufacture of paper products	1	2	5	-	6	2	4
Pharmaceuticals and industrial chemicals	12	6	14	2	9	7	5
Tobacco and cigarettes	-	-	1	-	1	-	-
Wire and electrical goods	1	1	2	-	-	-	1
Mattresses	1	-	2	-	2	3	2
Building hardware	2	1	2	6	7	9	4
Manufacture and repair of machinery	-	-	5	3	7	3	5
Automobile tyres	1	-	2	2	-	1	-
Cosmetics	1	-	1	11	3	2	-

*Source: Economic Survey (several issues).*

The import sector has been greatly liberalised, so competition is not hindered there, but other forms of misconduct, such as dumping, have arisen and require competition law and policy. At the same time there are still some imports that are designated to specific importers such as cereals, petroleum in the case of Zanzibar, and those imports that require licenses for various reasons.

### 2.3 Competitiveness of Local Firms and Potential Entry Barriers

Effective participation by any producer in the market is determined by the degree of accessibility of the market. Production costs are among the factors that determine the accessibility of the market. Others include storage and transport costs, the level of taxation, the cost of utilities e.g. water and electricity, the cost of labour, accessibility of and the cost of

*The manufacturing sector in Tanzania is still underdeveloped and the competitiveness of local firms is still low, except for a few beverage, beer and cigarette firms, which have been able to compete with imported products.*

financial capital, interest rates charged and accessibility of land. The manufacturing sector in Tanzania is still underdeveloped (dominated by food processing, beverages, agri-business, light manufacturing, and some textiles and footwear) and the competitiveness of local firms is still low, except for a few beverage, beer and cigarette firms, which have been able to compete with imported products.

Tanzania currently has very high production costs, making her products less competitive in the international market.<sup>6</sup> In Tanzania for instance, electricity costs US\$1.11/kwh. The same unit of power costs US\$0.075 in Uganda and US\$0.035 in Kenya. Telephone charges per minute and connection costs are also comparatively high. Whereas in Kenya a telephone connection costs only US\$99.70, Tanzanian users pay US\$123.68.

*In Tanzania, there is a high concentration of ownership and of control.*

In Tanzania, large industries are few and medium sized ones are linked through cross directorship or equity holding. This means there is a high concentration of ownership and of control. In the past there were significant barriers to market entry caused by long establishment and licensing procedures, but these barriers have now been eased somewhat. Nevertheless other obstacles to entry are still prevalent, such as difficult business licensing procedures, the legal framework, a lack of credit, high taxes that limit imports of raw materials and machinery, small local markets, protection, and a lack of export markets.

### 2.3.1 Foreign Direct Investment (FDI)

In Tanzania there has been a steady increase of Foreign Direct Investment (FDI) inflows into the economy. Investment by foreign investors grew from US\$50.2 million in 1994 to US\$183.8 million in 1999. The increase in foreign investment has been encouraged by the country's investment environment, which has improved and become more predictable. The great mass of FDI is accounted for by projects involving mining and tourism.

<b>Year</b>	<b>Amount (US \$million)</b>
1994	50.2
1995	150.86
1996	148.64
1997	154.63
1998	172.22
1999	183.83
<i>Source: Bank of Tanzania.</i>	

### 2.3.2 Export Orientation

*The levels of imports over the years have been much higher than those for exports and therefore the country has persistently registered a negative trade balance.*

Tanzania has a high degree of openness although for a long period of time its development policy was more inward looking. However, the levels of imports over the years have been much higher than those for exports and therefore the country has persistently registered a negative trade balance.

Table 3 shows the percentage contribution of total exports to the total gross domestic product. Thus Export Orientation is given by the formula: Export Orientation = Total Exports/Gross Domestic Product.

	1995	1996	1997	1998	1999
EXPORTS TSH (millions)	394,944	443,374	459,549	391,805	412,262
GDP TSH (millions)	2,796,642	3,452,558	4,281,600	5,125,311	5,986,085
EXPORTS/GDP	0.141	0.128	0.107	0.076	0.069
<i>Source: Data from Bank of Tanzania.</i>					

The Export/GDP ratio has shown a declining trend over the 1995-99 period. The reasons for this declining trend might be a fall in the export capacity, falling prices of the primary goods which are being exported, and the closure of manufacturing firms due to rising costs of production and stiff competition with firms from outside.

Tanzanian exports are primarily agricultural commodities with coffee, cashew nuts, tobacco and cotton constituting the largest sectors.

### 2.3.3 Import Penetration

Import Penetration = Total Imports/Gross Domestic Product.

The Import/GDP ratio has been falling over the period under review. This may be attributed to a number of factors including an increase in GDP, thus increased domestic production and, given the decrease in exports, increased domestic demand. With regard to imports, large increases have not been registered due to illegal and unrecorded imports of goods.

Tanzania mainly imports machinery, transportation equipment, industrial raw materials, and consumer goods. It is also reported that because of the decrease in agricultural production during the past few years, attributable to adverse climatic conditions, food and foodstuffs imports have increased sharply.

	1995	1996	1997	1998	1999
IMPORTS TSH (millions)	775,246	703,952	703,106	907,495	1,025,863
GDP TSH (millions)	2,796,642	3,452,558	4,281,600	5,125,311	5,986,085
IMPORTS/GDP	0.277	0.204	0.164	0.177	0.171
<i>Source: Data from Bank of Tanzania.</i>					

### 2.3.4 Financial Sector Reforms with Credit Accessibility & Capital Market

*The Banking and Financial Institutions Act of 1991 ushered in a new era in Tanzania by liberalising the banking sector.*

The government enacted the Banking and Financial Institutions Act of 1991 to replace the Banking Ordinance. The Act ushered in a new era in Tanzania by liberalising the banking sector. The objective was to introduce competition and thereby improve the quality of services offered to clients through the participation of private banks and other financial institutions. Moreover, the role and autonomy of the Bank of Tanzania (BoT) was reviewed to enable the BoT to carry out supervisory functions. Furthermore,

the 1991 Act led to the establishment of the Capital Market and Securities Authority (CMSA) in 1995, and the formation of the Dar Es Salaam Stock Exchange (DSE) in 1998, with the objective of establishing secondary markets for securities and for the exchange of stock.

The liberalisation of the banking sector removed the monopoly of the state-owned banks and financial institutions by allowing participation of the private sector through privatisation and/or new establishments, thus creating competitiveness and hence efficiency in banking activities. More banks have entered the economy and by the end of 1999 17 banks and 11 non-bank financial institutions were licensed and operational.

However, the spread of interest rates has been quite high (for example in 1999 the savings deposit rate was 12 percent, while the lending rate was 30 percent for short term and 22 percent for long term borrowing). This has meant that many individuals and small producers have limited access to finance. In addition, many individuals lack the collateral necessary to obtain credit.

Sector-wise, the amount of commercial bank credit directed to sectors other than the government increased between 1998 and 1999. The transport sector was the leading sector in terms of credit, followed by the mining and industry sectors.

*The CMSA Act has paved the way for an increased role for the private sector in the production as well as the mobilisation and utilisation of domestic resources.*

The CMSA Act has paved the way for an increased role for the private sector in the production as well as the mobilisation and utilisation of domestic resources. However, since the capital/financial account of the balance of payments has yet to be fully liberalised, participation of foreign investors in the DSE is still limited.

**Table 5: Credit Accessibility by Sectors**

Sectors	End of June		1997		1998				1999		June 1998-June 1999	
	1998	1999	Q3	Q4	Q1	Q2	Q3	Q4	Q1	Q2	Amount	%
Public administration	3741	43351	31	-2183	-267	2846	-2135	-519	4810	-1546	610	16
Agricultural production	2478	28828	7510	-4628	-3946	2244	9338	-2730	-2313	155	4450	18
Mining & manufacturing	52617	79575	5128	5613	6007	4371	8338	-4505	14935	8190	26958	51
Building & construction	11419	12942	665	-939	99	744	-1160	1749	183	750	1523	13
Transportation	26770	46820	3022	2693	3627	1130	6970	23070	12248	4798	20050	75
Tourism	4279	5014	201	626	-434	-21	-295	457	180	393	735	17
Markt' of Agri. Produce	17286	19271	535	-3092	2348	-1505	14778	1423	-994	78	1985	12
Exp. of Agri. Produce	7693	6608	12460	-11621	-7	-149	3426	-4433	3	-81	-1085	-14
Trade	70752	90767	13118	6648	3757	1401	991	15262	3084	678	200150	28
Specified financial Inst.	386	1339	-1495	4030	171	916	1054	-9	-375	283	953	247
Others	-20642	-16017	8779	9500	-6374	-1257	19514	-651	-7261	-6978	4625	-22
Total	198678	279496	49955	3020	4980	10721	41245	8353	24500	6720	80818	41

Source: Data from Bank of Tanzania.

## Public Policy Context

*Tanzania intends to continue with the stabilisation effort, reducing inflation to minimal levels, and increasing foreign exchange reserves to a level sufficient to provide good protection against external shocks.*

Tanzania intends to continue with the stabilisation effort, reducing inflation to minimal levels, and increasing foreign exchange reserves to a level sufficient to provide good protection against external shocks. Attaining these objectives will facilitate the maintenance of a growth-oriented economic environment, and continuing structural reforms and infrastructure development are expected to sustain high growth rates. The human aspect of development will also be addressed through policies aimed at eradicating poverty and enhancing access to social services.

Strong macroeconomic policies and structural reforms will be crucial in the attainment of stability and higher growth rates. The government will continue to centre macroeconomic policies on rigorous fiscal management and a prudent monetary policy. There will be a continuing shift of functions from central government and the parastatal sector to local administration and the private sector.

Financial sector reform has been undertaken and continues, with the aim of fostering competition and efficiency in the supply of financial services, narrowing the spread between lending and deposit interest rates, and strengthening the mobilisation and allocation of financial resources. Allowing new banks in and the privatisation of the 'giant' National Bank of Commerce (NBC) have lessened the monopoly in the financial sector.

### 3.1 Sectoral Policies

#### 3.1.1 Parastatal Policy

*Tanzania has been pursuing an aggressive policy of privatisation in conjunction with the support it receives from international financial institutions.*

Reform of the parastatal sector has been a key element of the government's economic reform program. Tanzania has also been pursuing an aggressive policy of privatisation in conjunction with the support it receives from international financial institutions. The intention of the Government is for all parastatal entities to be either privatised or liquidated. Major privatisation is currently underway in the utility, transport, and financial services sectors. The government has also put in place legislation on competition policy.

*By ensuring inter-ministerial and inter-agency co-ordination, the government seeks to facilitate the kind of co-operation that will be critical to implementing the policy changes and regulatory reforms needed to attract private participation to these sectors.*

The government is instituting a framework for each sector that will allow for a coherent and organised approach to privatising key infrastructure sectors and utilities. By ensuring inter-ministerial and inter-agency co-ordination, the government seeks to facilitate the kind of co-operation that will be critical to implementing the policy changes and regulatory reforms needed to attract private participation to these sectors. Another area of interest is the government's plan to pay special attention to stimulating private commercial farming and dismantle the remaining agricultural parastatals.

*The government is committed to making major improvements in the business environment for private investment, so as to stimulate a more rapid expansion in local and foreign private investment and, hence, growth.*

### 3.1.2 Investment Policy and Private Sector Development

The government is committed to making major improvements in the business environment for private investment, so as to stimulate a more rapid expansion in local and foreign private investment and, hence, growth. Investment policy has underlined the need for maximum mobilisation and utilisation of domestic capacity, and the promotion of exports of goods and services.

Policy recognises the need to encourage inflows of external resources to complement national efforts; to encourage the adoption of new technologies to increase productivity, quality and competitiveness; and to create a transparent legal framework that facilitates the promotion and protection of all investments.<sup>7</sup>

To ensure smooth economic reforms in Tanzania, the Parliament of the United Republic of Tanzania has passed the following Acts:

- **The Loans and Advances Realisation Trust Act 1991**; an Act to establish a Loans and Advances Realisation Trust and an expeditious machinery for the recovery of overdue debts of banks and financial institutions.
- **The Banking and Financial Institutions Act 1991**; an Act to consolidate the laws relating to the business of banking; to harmonise the operations of all financial institutions in Tanzania; to foster sound banking activities; to regulate credit operations; and to provide for other matters incidental to or connected with those purposes.
- **The Foreign Exchange Act 1992**; an Act to make better provisions for the more efficient administration and management of dealings and other Acts in relation to gold, foreign currency, securities, payments, debts, imports, exports, transfer or settlement of property and for purposes incidental to and connected to those.
- **The Public Corporations Act 1992**; an Act to make better provisions for the establishment, management and streamlining of public corporations and to provide for other matters incidental to or connected with those purposes.
- **The Public Corporations (Amendment) Act 1993**; an Act to amend the Public Corporations Act, 1992. The amendments made are generally in the areas of definitions and provide for the establishment of some specific commissions such as the Presidential Parastatal Sector Reform Commission.
- **The Crop Boards (Miscellaneous Amendments) Act 1993**; an Act to amend certain written laws pertaining to Crop Marketing Boards.

### 3.1.3 Trade Policies

Tanzania's trade policies have traditionally been protectionist, though this stance has undergone constant re-evaluation since the mid-1980s. Starting with the first Economic Recovery Program in 1986, active trade policy has increasingly relied on market incentives and less on controls. Trade and exchange rate liberalisation and macroeconomic reforms are among the more significant hallmarks of policy in the move towards opening up the economy. The 1990s have seen a reorientation of trade policies away from import substitution towards outward orientation, albeit with a focus now on export promotion. Tanzania's emphasis on export promotion has led it to offer a variety of incentives to local producers, including tariff concessions. However, in practice these promotional measures have been difficult to implement. A formal trade policy paper is being prepared.

*Tanzania's emphasis on export promotion has led it to offer a variety of incentives to local producers, including tariff concessions.*

### 3.1.4 Agriculture

The government's policy towards the state-owned and regulated agricultural marketing sector has also been one of privatisation and liberalisation. The policy calls for the privatisation of the major agricultural parastatals in tea, coffee, cashew nuts, sugarcane, and sisal production, among others. These enterprises are to be sold to private investors and at the same time the role of the Export Marketing Boards will be restricted to quality control. The agricultural sector, like most of the other sectors, falls under the Fair Trade Practices Act.

### 3.1.5 Industry and Mining

The general policy towards the manufacturing and industrial sectors has been one of liberalisation of imports, removal of quantitative restrictions and reduction of import duties. The mining parastatals have also been privatised and the sector opened up to private investors. This sector has attracted a significant amount of foreign investment. The government's preferred role is to provide the initiative and the environment to ensure the rapid expansion of this sector. Particular attention is also being given to the development of micro-enterprises and small-scale operations in rural areas. To this end a restructured micro-enterprise bank is in the process of development.

### 3.1.6 Regulated Utilities and Infrastructure

*At present electricity, ports, railways, airlines, airports, telecommunications, water supply and sewerage disposal are franchised monopolies.*

At present electricity, ports, railways, airlines, airports, telecommunications, water supply and sewerage disposal are franchised monopolies. In 1996 the government took the decision to privatise all of the parastatal utilities including regional transport and urban bus companies. Part of the port (the container terminal) and one of the international airports has also been privatised. However, the electricity generation sector and the Telecommunications Company are still in the process of being privatised.

The mobile telephones market has since been opened up to competition. The electricity industry is to be vertically unbundled into generation, transmission and distribution companies so as to allow for competition upon privatisation. The level of access to these essential services is low, with electricity being available to only six percent of households and telephone connections to 0.5 percent of the population.

*As part of its privatisation policy, the government has also taken the decision to establish two multi-sector regulatory agencies.*

As part of its privatisation policy, the government has also taken the decision to establish two multi-sector regulatory agencies. One agency will regulate electricity, telecom, electronic broadcasting, natural gas transmission and distribution, and postal services. The other will regulate the transport sector, covering airports, air transport, ports and maritime transport, rail, and public passenger and road freight transport. The new enabling legislation was tabled in parliament in April 2001.

The legislation will provide clear rules with respect to the distribution of responsibilities between the competition authority and the industry specific regulators. It is expected that the Competition Tribunal will act as the final appellate body for the multi-sector regulatory agencies.

### 3.1.7 Principal Factors Influencing Policy Setting and Priorities

There are a number of factors that influence the government's policy setting and priorities. These include:

- The need to sustain macroeconomic stability and sound macroeconomic management.
- The need to generate high and widely shared growth so as to reduce poverty.
- The need to promote private sector development. Emphasis is placed on promoting public-private sector interactions and improving the business environment.
- The need to ensure that people are empowered with the capacity to make their leaders and public servants accountable. Good governance and rule of law are important to the process of creating wealth and sharing its benefits in society.
- Promotion of self-reliance, utilisation of domestic resources, capacity building and enhancing ownership of the development agenda.
- The need to reduce the debt burden.

### 3.2 Major Constraints to the Implementation of Government Policies

There are a number of constraints hindering the government's policy implementation. The first one is inadequate funds. The government's financial ability has been low, making it impossible to finance all of its planned activities. This problem has also arisen in projects that are jointly financed with donors. Some of these projects have either been delayed or obstructed due to the government delaying or not releasing counterpart funds.

Secondly, most of the funds for development projects to meet specific policy targets are donor-oriented and beyond the government's control. Thirdly, there is a lack of adequate human capacity to plan, execute or facilitate and monitor different government policies and strategies. This has not only delayed or caused government policies to fail completely, but has also increased the need for external technical assistance. Another constraint lies in the ambitious number and nature of policies and targets.

*The government's financial ability has been low, making it impossible to finance all of its planned activities.*

## Assessing the Need for Competition Policy and Law

### 4.1 History of Competition Policy and Law

The history of competition policy and law spans many years. The first competition law, or anti-trust law as it is known in the USA, was the Sherman Act, introduced in 1890.

The theoretical underpinning of the need for competition policy and law stems from the inherent nature of market failure. Market failure comes about as a result of the divergence between the ideal or textbook conditions of perfect competition on the one hand, and the actual economic conditions on the other.

This divergence is caused mainly by information asymmetries; natural monopolies; the natural growth of firms; and mergers and acquisitions. Theoretical and practical problems of the market have led the prevailing wisdom to advocate the design and establishment of institutions that can ensure that clandestine market power is not achieved and that those with market power do not abuse it.

### 4.2 The Recently Rekindled Interest in Competition Policy and Law

While competition institutions in most developed market economies are strong and respected, developing countries and transition economies are only just waking up to the need for such institutions. The recently collapsed centrally-planned economic model did not need competition policy and law because the market economy was not operational.

Countries making the transition from such a system have had considerable difficulties in the design and implementation of competition policy, laws and institutions. This is because they have no past experience and, even though it is in the public interest, there is no political pressure or public support for establishing and implementing a competition regime. Therefore many responsible developed nations are now encouraging developing countries to establish competition policies, laws and institutions.

### 4.3 Multilateral Institutions' Interest in Competition Policy

The United Nations Conference on Restrictive Business Practices adopted a Set of Principles and Rules in Competition Policy and Laws on April 22<sup>nd</sup> 1980, and charged UNCTAD with the duty of carrying out their implementation.

According to UNCTAD, the general objectives of Competition Policy Law are:

- i. To enforce and safeguard consumer welfare;
- ii. To enforce provision of quality goods and services at competitive prices to consumers;
- iii. To prohibit restrictive business practices in the economy.
- iv. To regulate monopoly or abuse of power and unwarranted concentration of economic power.

*While competition institutions in most developed market economies are strong and respected, developing countries and transition economies are only just waking up to the need for such institutions.*

- v. To promote regional and international trade through harmonisation of competition practices.
- vi. To sensitise consumers on their rights.

Specifically, the Set of Multilaterally Agreed Equitable Principles and Rules were framed by the United Nations to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.
2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
  - (a) The creation, encouragement and protection of competition;
  - (b) Control of the concentration of capital and/or economic power;
  - (c) Encouragement of innovation;
3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;
4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of trans-national corporations or other enterprises, and thus help to maximise benefits to international trade and particularly the trade and development of developing countries;
5. To provide a Set of Multilaterally Agreed Equitable principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

#### **4.4 The Need for Competition Policy and Law in Developing Countries:**

There is a debate about whether developing countries should have institutions to help the market work better or whether the situation should be left to the market itself to correct.

*There is a debate about whether developing countries should have institutions to help the market work better or whether the situation should be left to the market itself to correct.*

Many practitioners are of the opinion that the current trade liberalisation, privatisation and deregulation process going on in developing and transitional economies is precisely the reasons for instituting competition policy. However, others argue that given that developing countries have been operating for years in highly controlled regimes, liberalisation should not be hampered by regulations, and market forces should be left to function unimpeded.

In addition, it is argued that due to the limited amount of foreign inflows, it would be inappropriate to have policies that could and would reduce the ease of the inflow of resources. It has been argued that the limited number of companies and firms in a given sector may be caused by the lack of foreign capital rather than the lack of competition.

*If the privatisation process is not conducted properly, it is quite possible that the process would simply remove monopolies from state control and convert them to private monopolies.*

If the privatisation process is not conducted properly, that is without transparency, accountability, due process before the law and contestability, it is quite possible that the process would simply remove monopolies from state control and convert them to private monopolies. Such a process could cause chaos and would not serve the public interest unless institutional mechanisms were in place to redress the situation. Competition Policy aims to achieve efficiency through competition, and equity in the economy.

## Competition Law in Tanzania

### 5.1 The Competition Rules Laid Down in the FTPA

Under the Act, anti-competitive activities and behaviour must be justified if they significantly “affect competition in a market.”

*Tanzania has little experience or jurisprudence in the regulation and arbitration of competition matters and would need to take advantage of the precedents and procedures developed in other jurisdictions.*

Tanzania has little experience or jurisprudence in the regulation and arbitration of competition matters and would need to take advantage of the precedents and procedures developed in other jurisdictions. The scope and application of the Act extends to all enterprises engaged in business, whether private or public, and covers transactions in the production and distribution of goods and services. As with most competition laws, its application is limited to the national territory and therefore it does not have extra-territorial application.

Exemptions are limited to the areas of sovereign acts of the state and the labour market, in particular trade union collective bargaining rights. As with most competition regimes, the Act covers three main areas:

- i. Restrictive business practices (RBPs) -horizontal and vertical practices.
- ii. Misuse of market power.
- iii. Control of monopolies and concentration of economic power through mergers and acquisitions.

Firms with substantial market power may be in a position to misuse that power to the detriment of competitors and hence ultimately to the detriment of consumers. Specifically, prohibited conduct includes price-fixing, collusion, bid-rigging and cartelisation.

#### 5.1.1 Anti-Competitive Agreements - Restrictive Trade Practices

Agreements between rival firms (horizontal agreements) and even between buyers and sellers (vertical agreements) have the potential to restrict competition. The rules provide for the treatment of such agreement in two ways:

*Per se* Prohibition:

Some kinds of anti-competitive agreements are considered so detrimental to the public interest that they are prohibited without the need to prove the anti-competitive purpose or effect. Horizontal price-fixing usually falls within this category, as does resale price maintenance.

The primary challenge is to uncover the existence of such an agreement, and if the conduct is proven, penalties are automatically imposed.

*Prima facie* Anti-Competitive:

There are other agreements, which may be *prima facie* anti-competitive in effect, but require further evaluation to determine whether the restriction of competition is outweighed by some other

*Agreements between rival firms and even between buyers and sellers have the potential to restrict competition. The rules provide for the treatment of such agreement in two ways.*

public benefit (rule of reason). Vertical agreements tend to fall in this category, as well as horizontal agreements relating to matters such as industry-wide standards.

Under the Act, restrictive trade practices refer to:

- Any act performed by one or more persons engaged in production or distribution of goods or services which prevents others from effective participation in the distribution of goods or services and reduces or eliminates their opportunities so to participate; or
- In other respects reduces or eliminates the opportunities of other persons able and willing to pay fair market prices for goods or services, either for production, for resale or final consumption, to acquire those goods or services.

Among the categories of agreements that are designated restrictive trade practices are:<sup>8</sup>

- Discriminatory agreements or arrangements between sellers or between sellers and buyers to grant rebates to buyers of goods calculated with reference to the quantity or value of the total purchases by those buyers from those sellers.
- Arrangements or agreements between sellers (resellers) not to sell (buy) goods in any particular form or of any particular kind to buyers or to any class of buyers (from sellers or any class of sellers);
- Arrangements or agreements between persons whether as producers, wholesalers, retailers or buyers to: limit or restrict the output or supply of any goods, or withhold or destroy supplies of goods; or allocate territories or markets for the disposal of goods.

Similar provisions apply to Trade Associations as follows:

Unjustifiable exclusion from a trade association of any person carrying on or intending to carry on in good faith, the trade in relation to which the association is formed. Making direct recommendation to its members in relation to the prices charged or to be charged by such members, or any such class of members; or to the margins included in the prices; or to the pricing formula used in the calculation of those prices; or the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

These practices, however, are not prohibited *per se* under Tanzanian Law. They are just not enforceable in legal proceedings, nor can a suit be brought against those who fail to observe or adhere to such an agreement or arrangement or to recover damages arising from such failure.<sup>9</sup> Any person who considers himself to be aggrieved as a result of a restrictive trade practice may submit a complaint to the Commissioner. If he determines that a restrictive trade practice has indeed been committed, he can require the person involved to negotiate a satisfactory consent agreement. This consent agreement must stipulate that the offending party ceases the RTP and specify measures to compensate for past effects. If the steps taken are not satisfactory to the Commissioner, he can issue an order to regulate the RTP. Any person who fails to comply with such an order, without lodging a complaint against it with the Tribunal, is committing an offence.<sup>10</sup>

The following restrictive trade practices are prohibited *per se*.

### **5.1.2 Refusal or Discrimination in Supply as a Restrictive Trade Practice**

The act of a person in selling or supplying or offering to sell or supply, goods or services to another person, whether for use in production, for resale or final consumption, under conditions less favourable to that person than those on which he sells or supplies or offers to sell or supply substantially similar goods or services to third persons.<sup>11</sup>

### **5.1.3 Predatory Trade Practices that Repress Competition**

An action intended to drive a competitor out of the business or deter a person from establishing a competitive business in the country, or in any specific area of location within the country; or to induce a competitor to sell assets to, or merge with another party, whether that party is the offender himself or a third person; or to induce a competitor to shut down, whether temporarily or permanently an existing manufacturing facility or wholesale or retail outlet for the sale of services.

Predatory trade practices also cover those which deter a person from establishing any such facility in any one or more locations in the country; or induce the competitor to desist from producing or trading in any goods or services; or deter a person from producing or trading in any goods or services.

### **5.1.4 Collective Tendering and Bidding**

Collusive tendering or trading, by two or more persons, whether retailers, manufacturers, wholesalers or contractors, is prohibited under the Act, and is an offence in the following circumstances:

- Two or more persons tender for the supply or purchase of any good or service at prices or on terms of agreement between them;
- Two or more persons strike a deal for all or any of them to abstain from tendering for the supply or purchase of any good or service; or
- Two or more persons tender for the purchase of a good or service for which the tender has not been invited.
- Two or more persons (i.e. wholesalers, manufacturers, retailers or contractors) at an auction sale agree or arrange the price or prices for which all or any of them will bid during the auction sale, or all or any of them agree to abstain from bidding during the auction sale of a good or service.

### **5.1.5 Merger Control**

Mergers are dealt with as agreements that are *prima facie* anti-competitive thus imposing a requirement for evaluation to determine the existence of merit "...advantageous to the country..." synonymous to the net public benefit or public interest criterion of the UK Act.

*Mergers are dealt with as agreements that are prima facie anti-competitive thus imposing a requirement for evaluation to determine the existence of merit synonymous to the net public benefit or public interest criterion of the UK Act.*

Prior approval of the proposed merger transaction by the relevant minister is required before consummation. The Minister carries the overall decision-making responsibility for regulation of this area, irrespective of provisions in the Companies Ordinance and the Securities Act.

The Act provides for an application to the Commissioner in the first instance. The Commissioner has extensive powers of investigation, as well as powers to compel the attendance of witnesses and to subpoena information and documents. He is required to carry out a thorough investigation of the situation under review and following this process he makes his recommendation to the relevant Minister.

*The Act provides a set of criteria which the Commissioner must have due regard for in the processes of evaluation and formulation of his recommendation to the Minister.*

The Act provides a set of criteria which the Commissioner must have due regard for in the processes of evaluation and formulation of his recommendation to the Minister:

- A merger or take-over will be advantageous to the country to the extent that the participants produce goods and services to enter into international trade and the merger or take-over will yield a substantially more efficient unit with lower production costs and greater marketing thrust, thus enabling it to compete more effectively with imports, expand country exports and thereby increase employment;
- A merger or take-over will be disadvantageous to the extent that it reduces competition in the domestic market and increases the ability of the producers of the goods and services in question to manipulate domestic prices in accordance with the principles of oligopolistic interdependence;
- A merger or take-over will not merely be disadvantageous for the only reason that it encourages capital-intensive production technology in lieu of labour intensive technology.<sup>12</sup>

The Minister would normally be expected to accept the Commissioner's recommendation but is not obliged to do so. The Act, however, provides the right of appeal from the Minister's decision to the Competition Tribunal for any aggrieved person.

#### **5.1.6 Control of Monopolies and Concentration of Economic Power**

The control of monopolies and concentration of economic power are deemed prima facie anti-competitive, imposing a requirement for evaluation to determine the existence of a net public benefit. This is similar to the criterion used in the UK Act. The Act does not prevent or prohibit monopolies or enterprises seeking to be monopolies "*per se*". It seeks to impose restrictions where monopolies are not in the public interest and are "Prejudicial to the public interest." In this respect the "detrimental effect on the economy must outweigh the efficiency advantages..." of economies of scale.

*The Act does not prevent or prohibit monopolies or enterprises seeking to be monopolies "per se". It seeks to impose restrictions where monopolies are not in the public interest and are "Prejudicial to the public interest."*

The Minister may direct the Commissioner to investigate any economic sector that he has reason to believe may feature areas of unwarranted concentration of economic power.

An unwarranted concentration of economic power shall be deemed to be prejudicial to the public interest if, having regard to the economic conditions prevailing in the country and to other factors which are relevant in the particular circumstances, the effect thereof is or would be to:

- (a) Increase the costs of production or distribution of goods and services.
- (b) Increase the price at which goods and services are sold and increase the profits derived there from.
- (c) Reduce or limit competition.
- (d) Result in a deterioration in the quality of any good or in the performance of any service.

The Commissioner can also independently initiate his own investigation under the same defined criteria required of the Minister. He may conclude that there is a dominant position or market strength in a given market. In his assessment and determination the Commissioner is required to look at the percentage market-share held by the enterprise, and to a lesser extent at the behaviour of the enterprise in the product market.

If the concentration is deemed prejudicial to the public interest, in that it has a detrimental effect on the economy which outweighs any economy of scale benefits, remedial action can be imposed to overcome the effects and this could involve structural remedies.

Based upon the Commissioner's report the Minister makes a formal order requesting the disposal, whether by sale of all or part of the beneficial interest in the enterprise or units in the group, representing such a portion of the economic concentration as is deemed necessary to remove the unwarranted concentration.

The exercise of this power to break up or sell off the enterprise is qualified and may not be exercised if such structural change results in reduced efficiency or an increase in the cost of production. The Act also provides the right of appeal in this area, by decision of the Minister, to the Competition Tribunal. Where an enterprise fails to respond to an order of the Minister, the Commission may apply to the court for a pecuniary penalty to enforce the order.

### **5.1.7 Regulation and Display of Prices**

*The Fair Trade Practices Act gives the responsible Minister the power to exercise limited price regulation such as fixing a maximum price, especially for goods and services produced by monopoly undertakings.*

The Fair Trade Practices Act gives the responsible Minister the power to exercise limited price regulation such as fixing a maximum price, especially for goods and services produced by monopoly undertakings. This is notwithstanding the fact that price-fixing or resale price maintenance as RBPs are prohibited and economic reforms in place encourage price liberalisation through competition. The Minister may from time to time, by an order published in the gazette, fix maximum prices for which goods or services may be sold or charged, including charges for packing and delivery of a good or service; or prevent any person engaged in gainful business or occupation from increasing the price of any good sold or service charged above the price or charge which is ordinarily charged by him for similar or same goods or services.

The Minister also prescribes the type of packing, weight, size, quality, marking and the processing and ingredients of any goods manufactured in the country and the amount of deposit and refund on price controlled goods which are returnable e.g. bottles containers etc.

### **5.2 Consumer Protection**

*The competition law of Tanzania contains specific provisions that are usually found in separate consumer protection legislation. The implementation of these provisions is entrusted to the Commissioner of Fair Trade Practices.*

The competition law of Tanzania contains specific provisions that are usually found in separate consumer protection legislation. The implementation of these provisions is entrusted to the Commissioner of Fair Trade Practices.

The Fair Trade Practices Act (1994) exhaustively prescribes rules for the protection of the interests of consumers. The law prohibits misleading or deceptive conduct. It requires that in determining whether a person has contravened the law the Commissioner may have regard to the strength of the bargaining positions of the parties, the validity of conditions, the consumer's understanding of documents and the circumstances (e.g. use of force or unfair tactics).

In addition to other unfair practices, the Fair Trade Practices Act prohibits misrepresentations, misleading advertising and conduct, bait-supply, harassment and coercion. It imposes the obligation to label prices in shops to increase transparency and hence competition.

It also requires the statement of and conformity with safety standards and warning requirements, product information, product recall requirements and imposes standards as to the quality or fitness of a product for the purpose of obtaining basic warranties and indemnities and the like, to prevent unfair trade practices. The principal assumption is one of information asymmetry hence the plethora of provisions to protect the safety, health and economic interests of the consumer which also promote competition.

*In the interests of product safety standards, the law gives the Minister discretion to publish a notice in writing indicating that goods of a kind specified in the notice are under investigation and to impose a temporary ban.*

In the interests of product safety standards, the law gives the Minister discretion to publish a notice in writing indicating that goods of a kind specified in the notice are under investigation and to impose a temporary ban.

The requirement to comply with prescribed consumer product safety standards and the requirements of the Act relating to consumer protection are obligatory on penalty of prescribed fines and/or imprisonment. Fines imposed are stated in the Act. Over time these will become ineffective due to inflation, and they will need updating periodically. Therefore the amount of the fines should be removed from the Act and provided for in regulations.

### **5.3 Sanctions**

Fines and/or imprisonment for breaching statutory provisions are to be imposed by a court with jurisdiction in competition cases.

### **5.4 Cases dealt with by the Trade Practices Commissioner**

In table 6, cases dealt with by the Competition commission, despite the office not being fully operational, are given. The cases are diverse and affect different important stakeholders in the country's economy.

**Table 6: Cases dealt with by the Trade Practices Commissioner**

DATE	PARTIES INVOLVED	BONE OF CONTENTION	ACTION/DECISION
8/6/1998	Coopers and Lybrand and Price Waterhouse	Request for merger approval of two multi-nationals; accounting and business-consulting firms.	Request granted on 27/6/1998.
13/8/1998	Trade Practices Commissioner vs. Tanzania Communication Commission	Query on allowing Mobile and Tritel (cell phone companies) dominance in the economy. Letter MITC/E.10/45 of 13/8/1998.	Detailed explanations given by letter Ref. No. TCC/c.7/75 of 10/9/1998 and subsequent registering of other cell phone providers e.g. Vodafone in 2000.
August 1998	Permanent Secretary Ministry of Industry and Trade vs. Associated Breweries (Tanzania) Ltd. NOTE: Permanent Secretary was also a member of the Board of Directors of TBL, a monopoly beer producer with an 80 percent share of the Tanzanian market	False advertisement and unfair representation complaint that the Associated Breweries advertisement of "Guaranteeing no hangover" from their alcoholic beer and "no sugar added" were false and misleading, especially the latter to diabetics.	The Trade Practices Commissioner barred the use of such advertisement and the order was complied with.
22/9/1998	Kibo Breweries vs Tanzania Breweries Limited	Tanzania Breweries with a monopolistic market share in Tanzania of over 80 percent was barring independent agents and mini-wholesalers from stocking competitors' beer brands and threatening to punish them by not selling beers to those who did not obey on the same terms as to those who obeyed.	The Commissioner for Trade Practices forbade Tanzania Breweries (TBL) from these actions and declared them to be illegal. TBL replied that even though the actions were by law illegal, they were justified because regulations on how to carry out the Act were not in place, and therefore the Commissioner had no mandate. The Permanent Secretary of the Ministry of Industry and Trade who happened to be a Board Member of TBL supported TBL. Key respondents were MIT Ref. No. MIT-C/E.10/45 for Feb. 5, 1999, and Law Associates (Advocates) for TBL Ref. TBL.753PT.TRM of 19.2.99, MIT-C/E.10/45 of 22/2/99.
5/5/1999	Urafiki Textile Mills Vs Karibu Textile Mills	Urafiki Textile Mills complained that Karibu Textile Mills had fast-copying machines that copied popular Urafiki design prints onto cloths, and was selling them at lower prices than the original prints by Urafiki Textile Mills.	This appeared to be an unfair trade practice but it was deemed to be a copyright issue, which should be dealt with by the Commercial Court in the High Court. Therefore Urafiki Textiles was advised to follow the matter up there.
5/6/1999	United Lumber and Forest Products Co. Ltd. Vs Sao Hill Timber Ltd.	The Government of Tanzania had leased a former parastatal to a Norwegian firm at terms below normal commercial rates. It also appeared that the Norwegian Company was subsidising the operations of this firm. These dispensations enabled Sao Hill Timber Ltd. to outbid all competitors on tenders and price offers.	The Commissioner's verdict was that the Government should have sold the former parastatal outright, instead of leasing it. The ESRF advised the government to sell it by open tender. The tender is out but this took a long time.
1/6/1999	Ministry of Industry and Trade Vs Bonite Bottlers Ltd.	Bonite Bottler bottles drinking water under the Kilimanjaro Brand Name. In their advertisements they claimed that the water is bottled from a "Natural Spring" when actually the water is from a deep well, and is purified then bottled.	A letter was written to Bonite Bottlers by the Trade Practices Commissioner's Office and the advertisement was changed to "Pure Drinking Water" with neither argument nor notification of compliance.



## CHAPTER-VI

# Design and Implementation of Competition Law

*The institutional framework of the Fair Trade Practices Act consists of two levels of implementation, the Fair Trade Practices Commission, and the Appeals Tribunal.*

The institutional framework of the Fair Trade Practices Act consists of two levels of implementation, the Fair Trade Practices Commission, and the Appeals Tribunal. The Commissioner for Trade Practices has overall administrative responsibility for the implementation and monitoring of the Act. His area of responsibility is the control, management and efficient accomplishment of the objectives of the Act, which are to encourage competition in the economy by prohibiting restrictive trade practices; to regulate monopolies, concentrations of economic power and prices; and to protect the consumer.

Generally the Commissioner will be responsible for monitoring, investigating, evaluating, prosecuting, issuing orders, imposing penalties or otherwise resolving alleged contraventions. Additionally, he will be responsible for implementing measures to develop public awareness of the provisions of the Act; conferring with other regulatory bodies; and receiving and giving advice to other regulatory bodies with respect to competition matters.

The Commission is headed by the Commissioner of Trade Practices (supported by a deputy and two directors responsible for research and legal affairs) and consists of a dichotomy of administrative departments. These are the Restrictive Trade Practices and Monopoly Control Department and the Consumer Protection and Price Monitoring Department; both located in the Ministry of Industry and Trade as a unit thereof.

All members of staff are classified as civil servants. The intention on establishment was that the Commission should be independent of the political system in order to ensure that its decisions were not distorted by considerations other than competition. Costs, as well as institutional and logistical constraints, seem to have impeded this objective.

### 6.1 Functions of Competition Authorities

*The role of a Competition Authority is to protect competition by advocating against measures in the economy which impede the market from operating, and by prosecuting those who either deliberately or clandestinely abuse their market power or connive to gain market power by interfering with competition in the market.*

The role of a Competition Authority is to protect competition by advocating against measures in the economy which impede the market from operating, and by prosecuting those who either deliberately or clandestinely abuse their market power or connive to gain market power by interfering with competition in the market.

The role of an industry or sector regulator is to ensure that the relevant public utility supplier, (a monopoly by statute) provides its services at a price and quality, and with after-sales service, as though it is in competition. Both Competition Authority and regulator aim to achieve efficiency gains in the economy, but the Competition Authority makes the suppliers of goods and services compete, while the regulator sets price, quality and service terms which are fair from both the supplier and the consumer's point of view.

The design and implementation of both sets of organisations usually follow the same principles. They have to be independent from government and political influences; accountable to the public; follow due process of the law; and have provisions to allow aggrieved parties to appeal to a higher organ against the Authorities' decisions.

Other functions of the authority have been stipulated, but not yet approved by the government. These proposed functions may change and cannot be made available for reference before their approval.

The Competition Authority is still at a primitive stage, with only three officers at present. Thus its activities have not yet been undertaken fully. In order to discharge its duties fully, it will need a transport facility (motor vehicle), workers, and other facilities.

## 6.2 Trade Practices Tribunal

The Fair Trade Practices Tribunal has been established as the appellate body for decisions of the Minister and the Commissioner. The Tribunal is composed of a chairperson with judicial experience commensurate with the qualification of a High Court or Court of Appeal judge, assisted by a maximum of four other members (all appointed by the President), and a registrar. They have minimum tenure of three years with restrictions on removal except for specified causes.

## 6.3 Trade Dispute Settlement

*The Tribunal has jurisdiction to hear and determine any complaint relating to trade practices, to inquire into any matter referred to it, and to issue orders. It is to be guided by the rules of natural justice.*

The Tribunal has jurisdiction to hear and determine any complaint relating to trade practices, to inquire into any matter referred to it, and to issue orders. It is to be guided by the rules of natural justice. Appeals on decisions of the Tribunal are limited to judicial review.

The idea of the use of the rule of natural justice is that the decisions of the Tribunal should be based on fairness, however in practice it may introduce some vagueness into proceedings. The problem is that it is not specific, and the rules on evidence and procedure are not clearly stipulated. If the competition law is comprehensive and does not result in problems in interpretation and procedure, and the competition authority functions well, then there might be no problems. However, if the laws are not very clear and the Tribunal is very busy, then the rule of natural justice might not be sufficient, and specific rules might be necessary.

## 6.4 Basic Procedure for Investigating Restrictive Business Practices (RBPs)

Whilst the system of investigation leading to a decision and sanctions may vary from country to country, the basic technicalities of the method of investigation are similar. The Tanzanian Act follows this practice and the procedures of investigation pursuant to section 25 are as follows:

- *Initiation of Investigation* - Investigations may be initiated as a result of a complaint from a consumer, a private individual, a government authority, the minister, consumer councils or bodies, or initiated by the competition authority itself.
- *Preliminary Investigations*- to facilitate an assessment of the case to decide whether to pursue or discontinue the case according to the results of the Commissioner's own research. Parties are informed and comments invited about the allegation of the breach of RBPs.
- *An Interim Order* - if the findings of the investigation are indicative of an RBP, and the defendant fails to justify the practice, the

Commissioner may issue a stop order. He may then negotiate and extract a consent agreement, which is published in the Gazette. This consent agreement should at least stipulate that the defendant will desist from the specified practices and will take specified measures to compensate for the past effects of the practices.

- *Further Analysis* - a more rigorous analysis might take place (if a consent agreement is not obtained or adhered to), involving the search of premises and the issue of questionnaires and official requests to firms for information. The Commissioner has extensive powers of search, and can issue warrants to that effect including subpoenas for the production of documents and witnesses.
- *The Commissioner Conducts an Inquiry* - formal hearings involving firms and their legal representatives prior to the issue of a formal order.
- *Decision and Remedy* - After the matter is fully investigated and heard before defendants, the Commissioner may make a final determination. He has the legal power to make an order regulating the practice in question; to issue stop-orders to cease and desist the practice forthwith; and to impose compensatory relief in favour of the plaintiff to redress the past effects of the restrictive practice.
- *Sanctions/Penalties* - In respect of breaches of certain RBPs the Act provides for the imposition via the courts of further compensatory relief to the plaintiff and punishment of the defendant by means of fines and/or imprisonment. Certain breaches are treated as criminal offences. Serious RBPs such as predatory trade practices and collusive tendering fall into this category. Individuals can have jail sentences and fines imposed upon them by the courts.

*There is always a right of appeal against decisions of the Commissioner to the Trade Practices Tribunal whose procedures and practices are similar to those of a high court.*

There is always a right of appeal against decisions of the Commissioner to the Trade Practices Tribunal whose procedures and practices are similar to those of a high court.

The Commissioner is also conferred investigative functions with respect to the control of monopolies and the concentration of economic power (mergers and take-overs). Investigations into the concentration of economic power can be initiated on the instructions of the relevant Minister or on the commissioner's own initiative. However, the final decision and resulting action is in the hands of the Minister, who usually acts upon the recommendations of the Commissioner.

*The Commissioner is also conferred investigative functions with respect to the control of monopolies and the concentration of economic power (mergers and take-overs).*

Similarly, mergers or take-overs that have the potential to create concentrations of economic power and monopoly situations in the manufacture and distribution of substantially similar commodities or services require prior authorisation by the relevant Minister.

Application may be made to the Commissioner for clearance, who investigates and evaluates the merits of the application in the context of certain prescribed criteria. The Minister makes an order approving or rejecting the application after considering the Commissioner's recommendation. There is a right of appeal to the Appeal Tribunal against such orders.

### **6.5 Status of Competition Institutions**

Both of the competition institutions (the Commissioner's office and the Trade Practices Tribunal) are at an early formative stage. The office of the Commissioner has a nucleus staff of five people who are located in and are a department of the Ministry of Industry and Trade. However, as a

result of a recent study, proposals for a new organisational structure are being developed to enable the Commission to operate efficiently and effectively in the delivery of its functions and the objectives of the Act. This will include amongst other things, recommendations with respect to organisational structure and management; staffing; training; and funding of the Commission. The intention is to improve and expand the administrative capacity of the Commission to meet the necessary objectives.

## CHAPTER-VII

### Capabilities of the Competition Authority

*Competition policy implementation in Tanzania is still in its initial stages. The supporting infrastructure and staffing are still limited.*

Competition policy implementation in Tanzania is still in its initial stages. The supporting infrastructure and staffing are still limited. According to interviews carried out with the competition authority, the Commission has only one computer and one printer. Staffing for the Commission is inadequate given the importance of its task; in fact the staff and organisational structure have not yet been approved.

**Table 7: Staffing Strength**

	1996		1997		1998		1999		2000	
	Sanc.	Exist.								
<b>Full-time member</b>		1		1		1		4		5
<b>Part-time member</b>										
<b>Professionals</b>										
<b>Support staff</b>										
<b>Total</b>		1		1		1		4		5

*NB:* The chairperson of the commission is included among the members as part-time or full-time as the case may be.

*Source:* ESRF competition policy field survey, 2001

**Table 8: Professional/Technical Background of Members and Other Staff as at Present**

	Economics/ Commerce/Finance	Law	General Admn.	MIS/ Systems	Others
<b>Full-time member</b>	3				
<b>Part-time member</b>					
<b>Professionals</b>					
<b>Support staff</b>					
<b>Total</b>		3			

*Source:* ESRF competition policy field survey, 2001

The field survey drew attention to the fact that there is currently no governing committee. There are also no procedures for the appointment and dismissal of staff and other members. Staff turnover (i.e. entry and exit of staff) has been negligible over the last five years, with 1999 having the highest figure for staff entry.

Table 9: Staff Turnover										
	1996		1997		1998		1999		2000	
	Entry	Exit								
Full-time member	1	0	0	0	0	0	3	0	1	0
Part-time member										
Professionals										
Support staff										
<b>Total</b>	1						3		1	

Source: ESRF Competition Policy field survey, 2001

*Capacity building forms an important and integral part of the overall strategy for the effective and efficient delivery of service by the Competition Authority and the Tribunal.*

### 7.1 Capacity Building

Capacity building forms an important and integral part of the overall strategy for the effective and efficient delivery of service by the Competition Authority and the Tribunal. In addition to improvements to the organisational structure mentioned above, realistic efforts to further ensure capacity building of the institution will be needed for the successful implementation of an effective competition regime.

The ultimate test of a competition law is whether it is effectively implemented, and how effective the Authority is in carrying out its mandate. The need to garner support and confidence for both the policy and the law from the general public as well as the business community is critical to the further success of the Fair Trade Practices Act. A public awareness programme is necessary, which should seek to educate the public and build up a constituency for the speedy implementation of competition policy and law.

### 7.2 Budget and Costs

*The Fair Trade Practices Commission's budget is still tied to and managed by the Ministry of Industry and Trade budget, which is later submitted to the parliament.*

The interview of the competition authority in Tanzania revealed that the Fair Trade Practices Commission's budget is still tied to and managed by the Ministry of Industry and Trade budget, which is later submitted to the parliament. The budget for the commission is inadequate and not forthcoming. For example in the year 2000 it was 0.01 percent of the budget of the federal government (see table 10). In most cases it is extended to pay for salaries and honorarium etc. Due to the limited resources, the training of staff and publicity about competition law has been delayed.

*The existing situation indicates that the competition authority staff salaries are comparable to other government departments'.*

The level of salaries and benefits could be an important factor in the effective and efficient implementation of competition law in the country. The existing situation indicates that the competition authority staff salaries are comparable to other government departments'. Since salary and benefit rates for government are already low and inadequate to cater for a worker's daily needs, applying the same rates to competition law executors and monitors is likely to motivate corruption. Higher salaries will be needed to attract a high class of employee.

If the Competition Authority and Tribunal are to be independent, they will require committed and dedicated sources of funds for their annual operations. This will require a commitment from government to allocate a realistic level of funds to the two agencies as part of the annual national budget. Additionally, the Competition Authority should be able to charge

Year	Budget of the CA in Million TShs	Budget of the Federal Gov. in Millions TShs.	(2) as % of (3)	GDP in Millions TShs.	(2) as % of (5)
(1)	(2)	(3)	(4)	(5)	(6)
1996					
1997					
1998					
1999	49.631	1,136,526	0.004	5,986,085	0.00083
2000	129.71	1,051,089	0.01	6,663,687	0.00195

Source: ESRF, Competition Policy field survey, 2001

*If the Competition Authority and Tribunal are to be independent, they will require committed and dedicated sources of funds for their annual operations.*

for services where appropriate. Referral and appeals from the industry regulators to the Tribunal should be paid for by the two regulatory agencies. Some regimes have allowed the competition regulator to benefit from 50 percent of the penalties imposed.

However this method of financing has not readily found favour with the World Bank, since an incentive is provided to the agency to impose high penalties in order to meet its operating costs. Support will therefore be necessary from donor agencies to provide for capital items, capacity building and specialist consultancy services in the initial years.

### **7.3 Extent of Autonomy**

The field survey revealed that the Competition Authority is a quasi-judicative body and it is accountable to both parliament and specific legislation. It was shown that the authority has the power to investigate, prosecute, adjudicate and carry out an advocacy role. However, the competition authority is not required by law to keep track of trade agreements made in the country, nor is it mandatory for parties to register trade agreements with the authority.

*Competition Authority is a quasi-judicative body and it is accountable to both parliament and specific legislation.*

The decisions of the Competition Authority are binding, except for those on mergers and acquisitions where the relevant Minister makes the final decision. Because the structure is not yet out, the adjudicative, prosecutorial and investigative functions are not yet clearly defined.

### **7.4 Cases, Exceptions and Exemptions**

From the interview it was shown that different people or groups can lodge complaints. These groups include private individuals, the public sector, private companies, consumer organisations/NGOs, government departments and the competition authority itself.

A distinction is made between information and a complaint, and investigations are carried on the basis of both. According to the competition authority, information on the behaviour of firms has to be analysed to see whether it can be the basis for a complaint.

Areas or sectors that do not fall under the jurisdiction of the CA include those not covered by the Act and those where there is another legal body dealing with the issues. Areas/sectors to be dealt by separate regulatory

***The co-ordination and arrangements between the competition authority and different regulatory bodies have not been worked out.***

agencies are still in formulation and will include utilities and transport. Therefore even the co-ordination and arrangements between the competition authority and different regulatory bodies have not been worked out. Despite the fact that there is the possibility of multiple regulatory bodies, the Tribunal will be the only appellate body.

With respect to price control/surveillance, the interview with the CA indicated that the Act allows it but that it has to be temporary, and the CA must seek the endorsement of parliament.

When asked whether any complaint or information had been rejected outright without any investigation being carried out, the CA revealed that in one case piracy in television broadcasting was brought to the authority but rejected and directed to the institution dealing with the Copyright Act. In another case a company by the name of Bonite Bottlers, which advertised that it was bottling 'natural spring water', was said to be deceiving people. When the CA investigated this, it was found to be true and the company voluntarily changed its advertisement to 'pure drinking water'.

***According to the CA, a complaint or information is rejected only if it does not fall under competition law.***

According to the CA, a complaint or information is rejected only if it does not fall under competition law. There is no provision under which a complaint/information can be sent directly for adjudication without any investigation. However, since the Trade Practices Commission is not fully operational, the CA tries to intervene administratively.

## CHAPTER-VIII

### The Next Steps

While the research took place, other activities have been taking place concerning the policy and law of the country.

#### 8.1 Changes to the Fair Trade Practices Act (No.4) of 1994:

The Fair Trade Practices Act appeared to have inherent weaknesses, even as it was enacted in 1994. Some of the weaknesses have been addressed recently through the presentation to Parliament of two Acts; the Surface and Maritime Transport Regulatory Authority Act (SUMATRA) of 2001 and the Energy and Water Regulatory Authority (EWURA) Act of 2001. In order for these authorities' powers not to conflict with the powers in the Fair Trade Practices Act, concurrent amendments have had to be introduced. These amendments are contained in schedule No.4 of the EWURA Act of 2001. The main changes are as follows:

- The schedule changes the name of the Fair Trade Practices Act (No.4) of 1994 to the Fair Competition Act of 1994.
- The top decision-maker in the Fair Trade Practices Act of 1994 was the Trade Practices Commissioner. In the new Act it is the Fair Competition Commission of 5 members headed by an Executive Chairperson and a Secretary.
- The Commission becomes a body corporate i.e. it will stand on its own and not as a department of the Ministry responsible for competition policy and law as was the case for the Trade Practices Commissioner's Office.

#### 8.2 Capacity Building Initiatives for the Competition Authority:

The Authority has received support from SIDA, the World Bank and DFID (UK). The table below shows the funds indicated for assistance to the Commission:

<b>Table 11: Commission Funds</b>		
	<b>US\$</b>	<b>UK£</b>
SIDA Project to the Ministry of Trade and Industry	307,000	
Modernisation of substantive aspects of the Fair Competition Act, DFID/PSRC		80,000
Component in PPSDP to facilitate the re-organisation of the Fair Competition Agency/Competition Tribunal \$432,000+46,200	478,200	
DFID, London, 8 Country Study of the application of Competition Policy & Law		10,000
Possible further support from the World Bank Competition Division – FIAS	133,000	
<b>Total</b>	<b>918,200</b>	<b>90,000</b>

The funds are to be used to provide expatriate assistance on competition law and information technology. Also the funds are to be used for the education of various stakeholders, the training of Competition Authority and Tribunal staff and for buying information related equipment.

### **8.3 Further Changes to the Fair Competition Act of 1994.**

Further changes to the Fair Competition Act of 1994 are expected to be tabled during the October/November 2001 Parliamentary session. The objective of the changes is to up-date the Act in-line with the recent Multi-sector Regulatory Authorities Act, SUMATRA and EWURA, and also to bring the Fair Competition Act of 1994 up to date with international best practices.

## Conclusions and Recommendations

*Competition policy and law in Tanzania are very important tools for furthering and monitoring the liberalisation and de-regulation process in Tanzania while focusing on the private sector as the champion of the country's development.*

Competition policy and law in Tanzania are very important tools for furthering and monitoring the liberalisation and de-regulation process in Tanzania while focusing on the private sector as the champion of the country's development. The enactment of the Fair Trade Practices Act in 1994 provided the basic foundation for the establishment of competition policy and law in Tanzania. The major roles of the Act are to encourage competition by prohibiting practices that hamper fair and free competition in business or trade, and to protect consumer welfare in the free market economy.

Having a good Act and effective implementation are two different issues. So far, not much has been done in terms of the implementation of the Act. Several reasons can be found for this. The country is in transition from a centrally controlled economic system and therefore there is neither internal pressure nor experience on competition issues. The move towards liberalisation has not been as smooth and as accepted, as it might seem on the surface.

On the one hand, the remnant of the old school still focuses on control. On the other hand the country has rapidly moved towards liberalisation, especially in certain areas, such as trade. Advocates of the free market do not see the need for regulation of the system, as they believe that the "invisible hand" will be enough to govern the market. Neither of these two opposing groups sees the need for competition policy and laws. Nevertheless there is willingness to change, and the outlook, vision and policies of the government are conducive to the process of further evolving competition policy and justifying its existence.

The recent changes in the Fair Trade Practices Act (No.4) of 1994 and the capacity building initiatives of the Competition Authority mentioned in chapter eight seem to be good starting points for the effective implementation of competition law and policy in Tanzania.

*Although the country's competition policy is thorough and comprehensive and takes into account changes in the international trading arena, the institutions necessary for the policy to work are not yet operational.*

Although the country's competition policy is thorough and comprehensive and takes into account changes in the international trading arena, the institutions necessary for the policy to work are not yet operational. For example the structure of the Commission is not yet widely accepted and fully supported. This implies that competition policy has not been given the weight it deserves. Also, the general public has little knowledge or is not aware of what is taking place in the Commission.

*The competition regime needs to be supported by strong laws and regulations and headed by a person of great integrity who can make rational decisions with confidence.*

Lack of adequate funding and remuneration of authority staff reduces their work efficiency. The competition regime needs to be supported by strong laws and regulations and headed by a person of great integrity who can make rational decisions with confidence.

There is a need to advocate and sensitise on issues in the Act. This should be done by spreading awareness of the Act to stakeholders and the public. For this purpose, the dissemination of information to different stakeholders in the economy (including professionals, the business community, consumer associations and the public in general) through media, conferences, workshops and seminars is important.

Competition policy and law has to be sold and emphasised in the same way as political pluralism and proper ethics during elections have been, to remove uncertainties in the economy. Competition policy and law basically deal with conflicts of interest between producers of goods and services, consumers and government institutions in the economy. Therefore the formulation of laws, rules and institutions has to be carried out with the interests of those groups in mind. The consultation of competition law officials must be a part of this process.

***The public must be sensitised and even educated about the importance of competition policy, laws and regulations.***

The public must be sensitised and even educated about the importance of competition policy, laws and regulations. Strong institutions need to be created to move policies forward and to ensure that stakeholders uphold the law.

## NRG MEETING SUMMARY

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

### First NRG Meeting:

The first National Reference Group (NRG) Meeting was conducted to deliberate on the Tanzania draft report on the competition regime and to carry out the advocacy part of the project.

### Second NRG Meeting:

#### First Presentation – the Case of Mainland Tanzania

Below are the highlights of the presentation:

- a) The report looks critically at trade liberalisation and competition policy;
  - i) The country is moving from an economy that is centrally controlled to a situation where the government is withdrawing from the control of economic activities.
- b) Some of the major problems in the deregulating process are:
  - i) Foreign buyers determine prices;
  - ii) Confidence-building of foreign investors has failed and therefore fair trade practices should be put in place as a confidence-building strategy;
  - iii) Local consumers are unaware of what is happening; sometimes the information they get is piecemeal. There is a need to start raising awareness at the grassroots level to encourage consumers to get organised.
- c) Local firms face other barriers to entering markets and competing because:
  - i) To do business one must have sufficient capital, and borrowing involves interest payment;
  - ii) The degree of accessibility to markets is constrained due to transportation costs, lack of storage facilities, multiplicity of taxes, high water and electricity costs, etc;
  - iii) Imports are higher than exports.
- d) To effect financial sector reforms there is a need to assess competition policy and law.

- e) In order for the sensitisation programme at the grassroots to succeed, there is a need to use simple language so that it is possible to reach a wider audience.
- f) There is a need to establish proper sources of financing since donor-funding is limited.

### **Second Presentation: the case of Zanzibar**

The key points of the presentation were that:

- a) Zanzibar has a centralised economy.
- b) Zanzibar Fair Trading and Consumer Protection is run by a Bureau that is an autonomous organ of the government and is headed by a director appointed by the President.
- c) The function of the Bureau is to approve agreements and advise the government on matters of fair competition, consumer protection and related issues.
- d) The Bureau has powers to manage information related to its area of jurisdiction, to initiate proceedings, and appoint prosecutors to conduct all cases that contravene the Act.
- e) The achievements of the Bureau are:
  - ii) Progress on importing quality goods;
  - iii) General awareness in the public and the business community;
  - iv) Increased awareness within formal institutions;
  - v) Cooperation and active participation of public and non-public organisations.
- f) The Bureau has faced short- and long-term constraints as follows:
  - (i) Short-term constraints include financial resources, motor vehicles, office equipment and understaffing.
  - (ii) Long-term constraints are: laboratory facilities, non-compliance of traders, and political interference.

### **Comments on the presentations**

The participants had the following comments and reactions:

- a) In what ways is the consumer protection effected in Tanzania? There is need to discredit false advertisements.
- b) The wrongdoer, i.e. the one who makes false advertisements should bear the cost of corrective advertising. This would serve as a deterrent.
- c) One of the problems encountered, which is common to African countries, is the lack of consumer power to protect their own interests.
- d) It is the statutory responsibility of consumer associations to give support to efforts made towards the protection of consumers. Although the Act has been passed, not enough work has been done.
- e) Since the establishment of PSRC, some money has been set aside for sensitisation purposes; for example PSRC has US\$500,000 and SIDA has US\$350,000 set aside for establishing an agency for raising awareness.
- f) It is important to put in place a mechanism for independent funding since funding through the government budget is likely to be restrictive.
- g) The relationship between competition and agency is complex. Initially, these agencies were monopolies and there was no one to merge with, for example TANESCO and TTCL. Monopolies are now being broken to ensure competition. TTCL have mobile telephones as competitors. The next thing is to unbundle electricity into four or five competing agencies of production, distribution and sales.
- h) Why are there two separate regulatory bodies for Zanzibar and the Mainland?

### **Responses from the Presenters**

- a) Consumers are not well organised on the Tanzanian Mainland. If the Competition Authority (CA) intends to succeed pressure groups or activists will be needed to sensitise the general public;
- b) Putting in place groups to effect corrective advertisements would require budgeting for additional expenditure.
- c) Having one control agency for the whole country should be enough. The Act talks of the United Republic of Tanzania; however, trade is not a Union issue.

### **Comments from the Fair Competition Commissioner**

The commissioner said that the report was the first of its kind in Tanzania. The highlights of the rest of his comments were:

- a) The Competition Authority in Tanzania is not yet operational. To make it operational, a format with legal, research and consumer departments has been prepared and submitted to the government for approval;
- b) Now that the Act has been passed it has been realised that it is important for the CA to be independent.
- c) Advocacy is needed to explain to stakeholders what the competition regime can offer, and that when competition is good the customer benefits. The case studies need to be sold where they can attract the most publicity.
- d) There is a need for patience on the part of the general public while the structure, personnel, office space, etc. are being set up.

### **Comments from the Participants**

- a) In Tanzania competition is something new, other countries like South Africa, Kenya, and Zambia were quite advanced, how can Tanzania cope?
- b) In cross-border trade the customs union should not start without a common competition policy. The GTZ is one of the bodies trying to propose the structure for an EAC customs union to follow that of the European Union (EU). Once there is a common market, there should be common rules.
- c) The terminology is confusing. What is the difference between 'unfair trade practices', 'anti-competitive trade practices', 'restrictive business practices' and 'unfair competition'?
- d) The word 'trade' is misleading, that is why the original name of the Act, 'Fair Trade Practices Act' has been changed to 'Fair Competition Act'. The basic idea is that if a practice is curtailing competition it is unfair business.
- e) The services of professionals such as lawyers, engineers, doctors and others should also be exposed to competition, claiming not to do so because of customer interests is price-fixing.
- f) When other countries started moving towards a market economy they had a Ministry of Restructuring. Tanzania had the Planning Commission; therefore the lines of responsibilities are not very clear.
- g) A steering committee should be educated to run the CA. It should go out to see how the CA's work is done.

### **Country case studies for Phase II**

After some suggestions areas of focus were identified as:

- Pricewaterhouse and Coopers;
- Leasing of the container terminal;
- Banks – the death of Greenbank;
- Railways – TRC and TAZARA;
- Air transport – ATC and Kenya Airways merger;

It was agreed that this list would be refined and two specific case studies would be selected such as Pricewaterhouse for companies that achieved a merger, and Railways and Air transport for cross-border companies.

## 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.**

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.

***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.***

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.

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

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.***

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
<b>Population<sup>1</sup></b> Millions (1999)	998	29	135	42	19	33	10
<b>GDP</b> Millions US\$ (1999)	459,765	10,603	59,880	131,127	15,707	8,777	3,325
<b>GNP/Capita</b> US\$PPP (1999)	2,149	975	1,757	8,318	3,056	478	686
<b>Adult Illiteracy (1998):</b>							
% Male (>15)	33	12	42	15	6	17	16
% Female (>15)	57	27	71	16	12	36	31
<b>Poverty<sup>2</sup></b>							
% <National poverty line	40.9	42.0	34.0	-	40.6	51.1	68.0
% <\$1/day	44.2	26.5	31.0	11.5	6.6	19.9	72.6
<b>Exports % GDP</b>							
1990	7	26	16	24	30	12	36
1999	11	25	15	25	36	20	29
<b>Imports % GDP</b>							
1990	10	32	23	19	37	35	58
1998	13	35	21	25	42	27	34
<b>Currency</b>	Indian Rupee	Kenyan Shilling	Pakistani Rupee	South African Rand	Sri Lankan Rupee	Tanzanian Shilling	Zambian Kwacha
<b>Exchange Rate</b> Currency / US\$ (2000)	43.3 <sup>3</sup>	76.2	51.7	6.9	75.1	800.4	3,110.80
<b>Annual budget of CA</b> US\$ (2000)	406,582	235,892	325,919	7,742,678	97,870	162,056	193,005
<b>Annual Govt Budget</b> Millions US\$ (2000)	68,840	3,230	13,560	23,270	3,395	1,010	340
<b>% Government Budget</b>	0.00059	0.00731	0.00240	0.03327	0.00288	0.01604	0.05619
<b>Pattern of expenditure -% share (2000)</b>							
Salaries & honoraria	66	54	33 <sup>4</sup>	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					
<b>Staff (2000/2001)</b>							
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
<b>Total</b>	<b>96</b>	<b>31</b>	<b>33</b>	<b>78</b>	<b>20</b>	<b>5</b>	<b>23</b>

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**

	<b>1980</b>	<b>1990</b>	<b>1999</b>	<b>2000</b>
<b>TSH/US\$</b>	8.2	195.1	744.8	800.4
<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-Saalam 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, UNDP, (1998).Development Co-operation Report for 1998 (p.1) for Tanzania.
- 2 Musonda, (1992).
- 3 World Bank, (2001).
- 4 Musonda, (2000a).
- 5 The index calculates the sum of the squares of the market shares of the firms in a market. A Hirschmann-Herfindahl Index value of 0 denotes perfect competition, and a value of 10,000 denotes pure monopoly. In a market where five companies each have a 20 percent market share, the Hirschmann-Herfindahl Index would be  $(20^2+20^2+20^2+20^2+20^2)$  4000. For comparison, the US merger guidelines consider a value above 1800 as highly concentrated, and below 1000 as weakly concentrated.
- 6 Musonda, (2000b).
- 7 Tanzania Investment Centre, 1998.
- 8 For an exhaustive list see section 16 of the Act.
- 9 Sections 16(2) and 17 of the FTPA.
- 10 Sections 25, 26 and 28 of the FTPA.
- 11 A condition may be less favourable if the goods or services delivered or made available after a significantly longer period of time following receipt of an order, provided that such treatment shall not be deemed to constitute discrimination if more rapid delivery is openly offered to each purchaser on condition of payment of a uniform; or goods or services sold or supplied at higher prices, provided that the provisions of quantity discounts which are normal for the trade in question shall not be considered to constitute discrimination.
- 12 See section 38 of the Act.

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