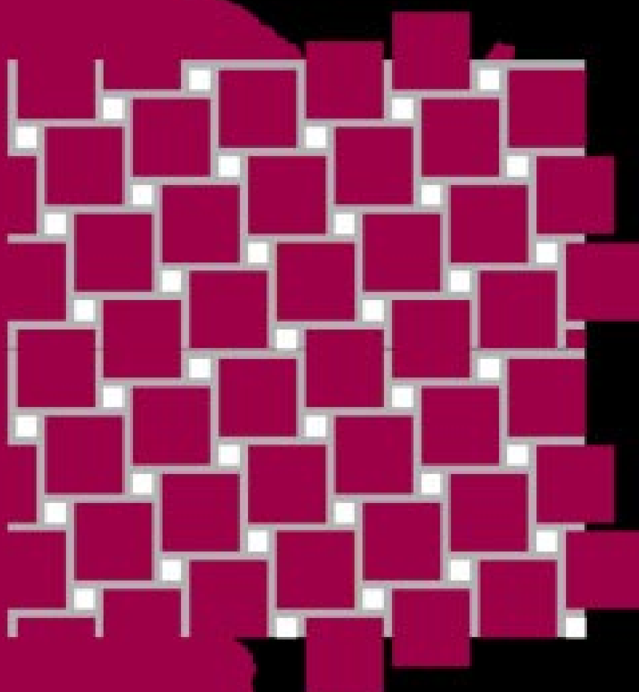
Competition Policy: Essential Element for Private Sector Development in Eastern and Southern Africa



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Competition Policy: Essential Element for Private Sector Development in Eastern and Southern Africa

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Abbreviations

BoB	Bank of Botswana
BTA	Botswana Telecommunications Authority
BMC	Botswana Meat Commission
COMESA	Common Market for Eastern and Southern Africa
CPL	Competition Policy & Law
CUTS	Consumer Unity & Trust Society
CFTA	Competition and Fair Trading Act
CCK	Communications Commission of Kenya
DFID	Department for International Development
ESA	Eastern and Southern African
ESRP	Economic and Social Rehabilitation Programme
EAC	East African Community
ETC	Ethiopian Telecommunication Corporation
EEPCO	Ethiopian Electric Power Corporation
EPZ	Export Processing Zone
EPAs	Economic Partnership Agreements
ERB	Electricity Regulatory Board
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
FCC	Fair Competition Commission
FIAS	Foreign Investment Advisory Service
GDP	Gross Domestic Product
IGOs	Inter-governmental Organisations
IMF	International Monetary Fund
LAM	Linhas Aereas de Mozambique
LDCs	Least Developed Countries
MPRS	Malawi Poverty Reduction Strategy
MSEDA	Micro and Small Enterprise Development Agency
NaCC	Namibian Competition Commission
NGOs	Non Governmental Organisations
OFT	Office of Fair Trading
OECD	Organisation for Economic Cooperation and Development
PPP	Purchasing Power Parity

PPDA	Public Procurement and Disposal of Assets Authority
PSD	Private Sector Development
RTPs	Restrictive Trade Practices
SADC	Southern African Development Community
SACU	Southern Africa Customs Union
SAP	Structural Adjustment Programme
SOEs	State Owned Enterprises
SMEs	Small and Medium Enterprises
SMIDO	Small and Medium Industries Development Organisation
STC	State Trading Corporation
TNCs	Transnational Corporations
TPIC	Trade Practice Investigation Commission
UTPs	Unfair Trade Practices
WTO	World Trade Organisation
ZCC	Zambia Competition Commission

Executive Summary

"Strong competition policy is not just a luxury to be enjoyed by the rich countries, but a real necessity for those striving to create democratic market economies", Joseph Stiglitz

Most African countries adopted market-oriented reforms as part of the globalisation and liberalisation process initiated in the early 1990s. But due to various reasons, distortions have arisen in the working of the market processes, which has restricted the emergence of a vibrant private sector in most countries and thereby creating speed breakers in their ability to contribute towards poverty alleviation.

A dynamic private sector requires the right enabling environment to thrive. An essential element of the enabling environment is a sound, fair and transparent regulatory environment, of which an effective competition regime is an imperative. The Eastern and Southern African (ESA) countries pose unique challenges for effective competition enforcement. Their low level of economic development, which is often accompanied with institutional design problems and complex government regulation and bureaucracy, creates real-world challenges that need to be recognised for successful implementation of competition and regulatory regimes. Further, the lack of wide understanding and support on these issues further retards the process. Institutional changes in the ESA countries in the wake of economic transition have significantly altered the prevailing conditions. Private businesses have begun to thrive and foreign interest in domestic markets has started to grow. While this has not only led to economic progress, but also increased the threat of anti-competitive business practices. Sadly, Government policies have taken more time to adjust to this changing environment, the effect of which has been reflected in the performance of competition regimes across the ESA region, of course with a few exceptions.

This monograph highlights impediments to the effective operationalisation of competition regimes in the region, which has been argued to be an imperative for private sector development therein. The observations made herein are

based on the research findings of two research based advocacy projects of CUTS on competition policy and law (CPL) issues in the region: *Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth (7Up1 project);* and *Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (7Up3 project)*. These projects have contributed towards providing information on the state of competition regimes in the ESA countries, highlighting the perceived weaknesses, thereby motivating national stakeholders and the regional and international community to assist these countries in taking the right steps forward in implementing their competition regimes.

CUTS experience of implementing CPL project from 11 countries in ESA countries over the last six years, have been distilled in providing inputs for this monograph. It is important for various stakeholders (governments and civil society), development partners and inter-governmental organisations (IGOs) to realise how the absence of operational competition regimes in these countries restricts private sector development and economic growth in the region.

1
Background

CUTS have been engaged with research, advocacy and capacity building projects on competition issues in 11 Eastern and Southern African (ESA) countries. The organisation has gained almost unparallel experience on competition policy in Africa having implemented a couple of multi-country projects in the continent: *Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth (7Up1)*[1] and *Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (7Up3)*[2] projects, namely. A third project has recently been launched in seven countries of West Africa, entitled, S*trengthening Constituencies for Effective Competition Regimes in Select West African Countries (7up4)*[3]. Outcomes from the research on competition has been instrumental in informing stakeholders (government, civil society and business community) about the state of competition in these countries; and helping them in assuming appropriate roles in contributing to the process of evolution and implementation of competitive environments.

Further, the research findings have also educated the regional authorities: Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), East African Community (EAC) and Southern African Customs Union (SACU) in ESA of the realities on national competition issues, such that these authorities are able to create synergies between the process of implementation of the regional competition legislations and the respective national competition laws. Moreover, this information has been used for sensitising the international community in promoting healthy competition culture in the region as a pre-requisite to achieving developmental objectives, an aspect that has also helped the development community in channelling its support better, for competition reforms in the continent.

This monograph collates knowledge and evidences from the countries to explore the contribution of a sound competition regime to private sector development in the region. It adds to the body of literature to motivate the business community in supporting competition reforms at the national and regional levels.

2
Introduction

Most of the ESA countries have undergone a transition from a command-control regime to a market-led economy. In some countries, the process of this transformation has progressed at a far greater speed than in most of the others. It is a difficult process for any country to negotiate, especially owing to structural refinements and new policy directions that accompany such transformation. Adoption of a competition regime is one such policy area that has accompanied economic transformations in the last decade, not only in Africa, but also in other parts of the developing world. Literature is replete with evidence of impediments associated with effectively implementing juvenile competition regimes.

There is a near universal consensus among economists and other experts that left to its own a market led economy without a proper regulatory oversight could give rise to the most undesirable outcomes, e.g. anti-competitive practices, like predatory pricing, cartelisation, abuse of dominance, etc. Economic theory provides eminently tenable arguments to curb such malpractices. Their effective regulation is a major challenge for any economy particularly those in the developed world. Most typically, the solution comes in the form of a formal competition regime with a competition law and a well functioning policy environment to support its enforcement.

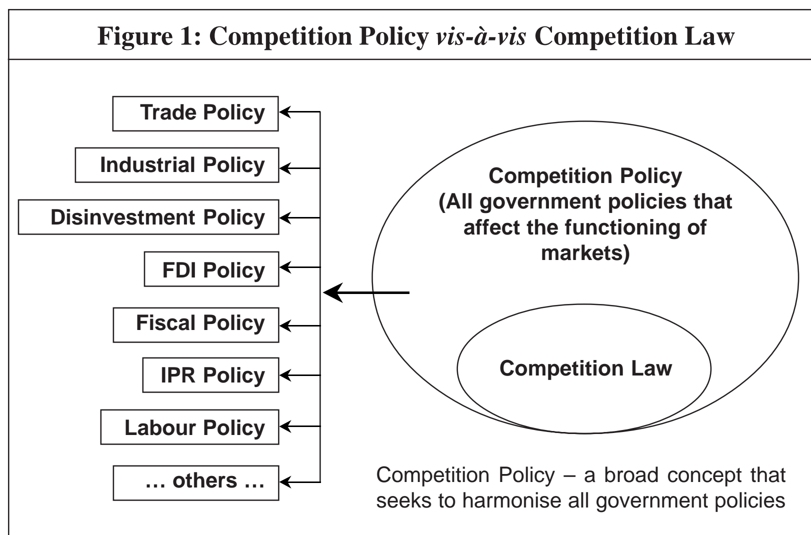
At this stage, it is pertinent to ask the question: Why has CPL suddenly become a subject of such overwhelming interest to one and all, given that anti-competitive practices have prevailed since as far back as living memory goes and there are countries that have handled competition without a formal regime? The answer becomes obvious the moment we take note of the increase in the number of countries having a competition regime; from 35 in 1995 to over 100 today, with another 30 odd countries in the process of adopting a competition law. This phenomenal rise could be ascribed to the recent trend,

gaining momentum in the 1990s, of a large number of developing economies adapting trade liberalisation, deregulation and privatisation.

The power of competitive markets to promote economic growth is now widely recognised among governments, international developmental partners and national stakeholders. There are strong links between the existence of competitive markets, and achieving economic growth and reducing poverty. An effective competition regime strongly encourages use of the most efficient methods of production, and channelling of firms' resources to production of such goods and services that society values the most. There are continuing incentives to firms to innovate and increase productivity. This ultimately benefits consumers from lower prices, better quality and a greater variety of goods and services.

Competition law, an important element of competition policy (refer to Fig.1 on page 5) seeks to promote efficiency and fairness in markets, and increase consumer welfare. Where it is properly administered, a competition law provides a mechanism for identifying and removing impediments to effective competition; and curbing anti-competitive conduct. In the recent years, concerns have been raised on certain elements of *investment climate* of developing countries. The annual 'Doing Business' rankings are religiously tracked by investment promotion authorities. Recent studies linked to the annual Foreign Investment Advisory Service (FIAS)/World Bank 'Doing Business' reports indicate that competitive pressures that thrive in regimes with working competition laws and policies are critical factors in the improving their domestic investment climate. They greatly influence the variations in firm-level productivity together with infrastructure and bureaucratic capability. This suggests that to improve productivity, increase output, and reduce poverty, policymakers should focus reforms on removing barriers to entry and in creating open and highly competitive markets[4] .

Figure 1: Competition Policy *vis-à-vis* Competition Law



Since the second half of the 1990s, the role of CPL, especially relevant for the developed world, has been debated in many fora throughout the world. Three major economic developments explain this debate:

- Failure of centrally planned economies in the former Communist bloc contributed to the realisation that market forces, if properly channeled, could play an essential role in economic growth;
- Deregulation movement and the opening up of new sectors to private sector participation have created a need for new forms of market governance to avoid widespread abuses of market power; and
- Internationalisation of the world economy has led to the recognition of an increasing discrepancy between the ever-expanding scope of economically relevant markets and the limited area of jurisdiction of national competition agencies. Evidence has shown that transnational anti-competitive transactions or practices are numerous and cause great harm to the developed and developing countries alike, the issues of cooperation between competition authorities and of convergence or harmonisation of national competition laws came to the fore.[5]

These elements have contributed to changing the nature of the competition law debate. Whereas until the late 1980s, competition law matters were mostly discussed from a narrow technical point of view by the competition enforcers or practitioners of a few select developed countries, the recent debate has involved officials of developed and developing countries alike and has focused

largely on the relationship between competition law, international trade and economic development.

New ideas, such as the fact that "there is no one size fits all competition law" or that "competition policy is not a stand alone policy" are now widely accepted by the international community. Rather than promoting the adoption of a competition law model which has succeeded elsewhere, competition experts now try to better understand the legal and economic specificities of the countries so as to determine if and how competition law enforcement could contribute to economic development.

Also, rather than trying to promote convergence of national laws, they seek to find ways to create an interface between countries having different laws and enforcement systems in order to tackle trans-national anti-competitive practices or transactions.[6]

Along with regime changes, several African economies adopted competition laws as a sequel to their market oriented economic reforms process (Structural Adjustment Programme, or SAP) and many times, after the liberalisation measure had already been embraced. Some of these countries also adopted sector-specific regulatory laws (in telecom, electricity, financial services, etc.) after these sectors had been opened up for private players. In many countries of ESA, it has been observed as a trend that establishment of sectoral regulators happened before that of the competition agency. This was done to oversee the behaviour of private firms, especially since these sectors had not witnessed private participation earlier and was exclusively reserved for the public sector. This upsurge in interest in competition and regulatory laws in African economies reflects the substantial changes that have been taking place in their economic governance system, as alluded to earlier.

To summarise, CPL are needed to address:

- Anti-competitive practices designed to restrict the free play of competition in the market;
- Unfair means adopted by firms against consumers in order to extract the maximum possible consumers' and/or producers' surplus;
- Maintenance and promotion of a competitive spirit in the market; and
- Government policies and regulations (including policies limiting access to particular markets, policies on the operation of parastatals, public procurement policies, policies on privatisation, etc).

3
Political Economy Context

Since CPL aims to create and protect a competitive environment in the market, they have to function within the political, economic and social framework of a particular country. Therefore, it is essential to trace synergies between competition law and other government policies as pre-requisite for meeting the objectives of competition. The manner, in which an optimal interface between competition law and other policies can be achieved, however, remains a debatable issue and varies from one case to the other.

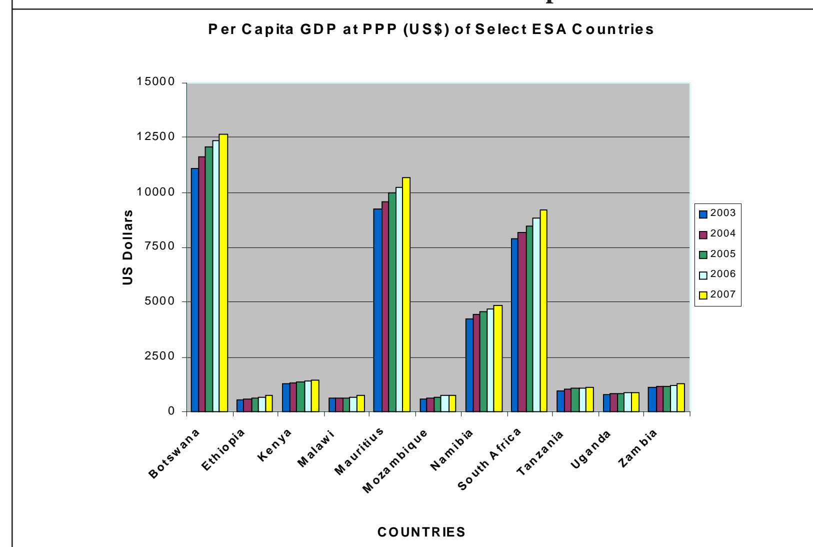
The ESA countries have a number of common features as well as dissimilarities, when compared from the perspective of their political economy and public policy contexts (refer Annexure I, for an overview of landmark changes in National Economic Policy of select countries). Among the 11 countries analysed in this paper, five are designated as least developed countries (LDCs), while six are developing countries. It includes the third largest country (by population) of Africa – Ethiopia; as well as one of the smallest – Mauritius. Moreover, while Ethiopia with a per capita gross domestic product (GDP) of about US$100 is one of the poorest countries of the world, Mauritius with a per capita GDP in excess of US$4000 is the richest country in Africa.

Three of the countries, Ethiopia, Malawi, and Uganda, have a history of command and control type one-party rule; while one country, Mozambique has a history of protracted civil war and large-scale destruction. Four of them, Botswana, Kenya, South Africa and Mauritius have shown vibrant democracy and are among the best governed countries in Africa. They also happen to be among the richest in the continent. Namibia is a young nation, having acquired freedom as late as in 1990s. Since then, however, the country has been governed with functional democracy, political stability and respect for civil rights. Five countries, Zambia, Botswana, Ethiopia, Malawi and Uganda are landlocked, while Mauritius is an island nation. Two of them, Ethiopia and Malawi are

largely hilly, while deserts cover Botswana and Namibia. Ethiopia also has its share of deserts.

Table 1: Per Capita GDP at PPP (in US$)						
S. No.	**Countries**	**2003**	**2004**	**2005**	**2006**	**2007**
1	Botswana	11105	11660	12088	12350	12664
2	Ethiopia	521	577	628	679	736
3	Kenya	1277	1308	1346	1391	1449
4	Malawi	630	650	648	681	713
5	Mauritius	9263	9616	9975	10244	10647
6	Mozambique	606	639	677	716	752
7	Namibia	4226	4450	4599	4671	4883
8	South Africa	7878	8161	8478	8807	9191
9	Tanzania	963	1002	1049	1092	1141
10	Uganda	803	819	846	861	886
11	Zambia	1107	1146	1183	1233	1283
Source: World Development Indicators, The World Bank						

Figure 2: Per Capita GDP at PPP (US$) of Select Eastern and Southern African countries over the period 2003-07



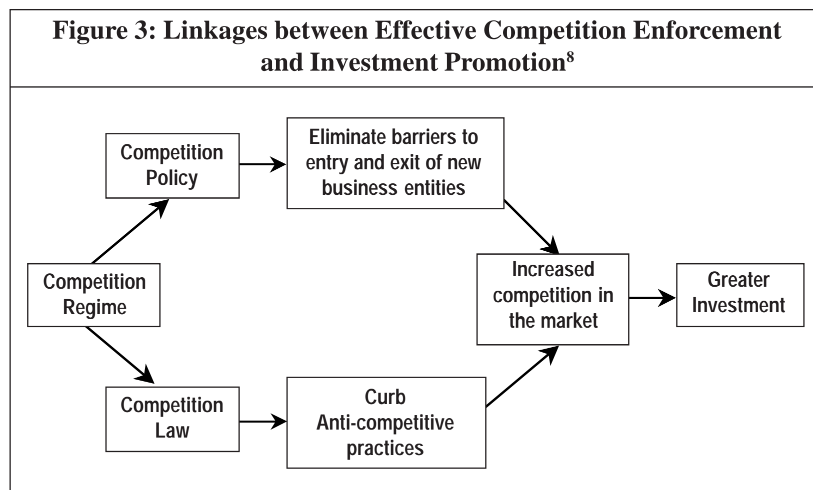
4
Rationale for a Competition Regime

Competitive firms find better ways to produce and distribute goods and services, innovate, and drive lower productivity activities out of markets so as to allocate resources to more productive uses. Competition benefits entrepreneurs, consumers, etc from rich to poor, through lower prices, better quality and improved choice of inputs and products, as well as more indirectly, through its impact on productivity, investment and living standards.

There are two components of a comprehensive competition regime (refer Fig. 3 on page 10): competition policy and a competition law. Competition policy refers to a set of government measures that enhance competition or competitive outcomes in the markets, such as relaxed industrial policies, liberalised trade policy, conducive entry and exit conditions, reduced controls in the economy and greater reliance on market forces. The other component – a competition law is necessary to curb anti-competitive behaviours of businesses, specifically to rule out abusive market conduct by dominant enterprise, regulate potentially anti-competitive mergers and minimise unwarranted government/regulatory controls[7]. It is well-established that competition law can regulate markets best, thereby acting as an incentive for attracting investments, if it is part of a comprehensive competition regime rather than when it has been enacted in isolation. It is the enactment of a competition law without a complementary adoption of most of the other elements of competition policy that has resulted in some operational shortcomings in many developing countries.

Many practitioners are of the opinion that the current trade liberalisation, privatisation and deregulation process witnessed in developing and transitional economies should act as 'the trigger' for instituting and operationalising competition regime, therein. However, others argue 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.

Figure 3: Linkages between Effective Competition Enforcement and Investment Promotion[8]



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. Such a process could cause chaos in the market and not serve public interest unless institutional mechanisms are put in place. CPL are such control mechanisms that could lead to favourable outcomes in a market-led economy.

Healthy private sector competition between firms among other requirements is necessary for poverty reduction. To enable consumers' access quality goods at lowest possible prices, there is need for competitive markets that allow the entry of new firms, allows firms to compete, and also that sub-standard firms fail and exit. Competition forces producers of goods and services to be efficient and to produce goods and services that consumers need, at the lowest possible prices. While competition can lead to innovation and more efficient use of resources, it can also lead to the emergence of anti-competitive practices if firms are not ready for competition. They can form cartels (for example, research reflects that 16 international cartels overcharged developing countries between US$16bn and US$32bn in 1997, and that price fell by 20 to 40 percent following the break up of the cartel[9]) or collude, for example the case of Cashew and Sugar industry in Mozambique (refer to Box 1 on page 11).

Box 1: Cashew and Sugar Concession: A Saga of Mozambique

In 1995, as part of the liberalisation drive by the World Bank and International Monetary Fund (IMF) compelled Mozambique to allow unrestricted export of unprocessed cashew nuts, whose main market was India. The World Bank argued that peasant producers would gain higher prices from the free market.

But it did not happen as monopoly buyers in India pushed down the price; transfer pricing also lowered the price paid to cashew producers. The domestic trading cartel in Mozambique also collected larger margins. As a result the peasant's producers lost out and nearly 8500 industrial workers in cashew processing units became unemployed. Liberalisation of the trade in cashews was one of the conditions imposed by the World Bank in 1995, in exchange for access to soft loans. The local cashew processing industry has been demanding a total ban on raw nut exports, arguing that the exporters compete unfairly with the industry, and deprive it of its raw materials. The export cartels had such as large influence in fixing the prices of the product.

In 1999, the Government imposed a surcharge of 14-18 percent on the export of raw nuts after a study by the Food and Agriculture Organisation (FAO). In the end of 2000, the International Financial Institutions allowed Mozambique to protect its two most important agro-industries: Cashew and Sugar as a result of intense pressure from the Mozambican Government, trade unions local business and civil society. In 2000, the IMF Executive Board agreed to a policy under which some cashew factories will be closed down, but the rest will be protected. The protection is two-fold, an 18 percent export duty on unprocessed cashew nuts, plus the local industry given the right of first refusal – to purchase nuts before they are exported. In 2001, Mozambique banned the export of unprocessed cashew nuts.

Source: Joseph Hanlon, Africa Policy E-journal, February 19, 2001, http://www.africaaction.org/

In some cases, firms form associations under the guise of developing the sector. These end up whittling down competition through market sharing or price-fixing. Effective competition can also be undermined by Government legislation, regulation, and administrative procedures or requirements. These can be used to limit competition by actually barring entry or raising the cost of market entry. In some cases, well meaning economic reforms in the form of trade liberalisation and privatisation can reduce competition, if not accompanied by appropriate competition and consumer protection policies

and legislation. Cartel-like behaviour amongst buyers of goods and services can also hurt poor producers. Employers in certain sectors can gang up and fix wages. Wage labour, in such cases, loses out as it pays below the market price of their services. Likewise, buyers of farm produce can collude and determine produce prices. Farmers are forced to accept low prices for their produce due to little or no bargaining power, given absent or limited markets for their produce.

Lack of competition generates direct and significant costs to the economy as a whole and to consumers, entrepreneurs, workers and recipients of government services. The poor are harmed the most, because of their constrained household options and budgets. In economies marked by lack of competition, be it due to the economic structure or poverty or both, an active promotion of competition and consumer protection is required. While trade and industry and other related policies address some aspects of the problem, explicit CPL are required to address the problem squarely. Explicit CPL preserve and promote competition for efficient allocation of resources, best possible choice of quality, lowest prices and adequate supplies to consumers. Consumer protection policy and law ensures that consumers have remedies against firms who misuse their dominant position, monopolies who skim the highest possible profits and suppliers who may be forced to cheat so as to beat competition. Private sector led poverty reduction requires, effective CPL.

5
Competition Legislations in the ESA

The Organisation for Economic Cooperation and Development (OECD) report, entitled, 'Promoting Pro Poor Growth, Private Sector Development'[10] lays down guidance for the donors on increasing the impact of private sector development on poverty reduction. One of the guidelines as mentioned includes the implementation of competition regime in developing countries. The importance of having a competition regime as reflected in the words of Sir John Vickers, the former Chairman of the Office of Fair Trading (OFT), UK, 'Competition is good for consumers for the simple reason that it compels producers to offer better deals – lower prices, better quality, new products, and more choice. Competition is not an end in itself but a process that advances goals of economic well being, ultimately for consumers'.

This need is also gradually being realised in the ESA countries, as is noted from the description provided in table 2.

Table 2: Overview of Competition Regimes in Select ESA Countries

S. No.	Countries	Countries having a competition policy and/or law	Countries developing their competition policy/law
1.	Botswana	The Botswana Parliament passed the National Competition Policy for Botswana in August 2005. The country has developed a draft law, and is expected to adopt it soon.	-

Contd...

S. No.	Countries	Countries having a competition policy and/or law	Countries developing their competition policy/law
2.	Burkina Faso	Burkina Faso has adopted a Competition Law, (No 15/84/ ADP of May 05, 1994) related to the organisation of competition in Burkina Faso.	-
3.	Ethiopia	The Ethiopian Government issued a Trade Practice Proclamation no. 329/2003 of April 17, 2003 to promote competition in the domestic markets, is the competition law of the country. The Ministry of Trade and Industry has recently developed a new (draft) law, which is being discussed internally.	-
4.	Ghana		The country is in the process of developing a competition law, and is expected to adopt the same soon.
5.	Kenya	The Monopolies and Price Control Act, 1998, is the Competition Law of the country. The Act had created the Monopolies and Prices Commission to carry out its objectives. The Government has been discussing certain amendments to this existing law.	-
6.	Malawi	The country adopted a Competition Policy in 1997 with a broad policy objective in	-

Contd...

S. No.	Countries	Countries having a competition policy and/or law	Countries developing their competition policy/law
		promoting economic efficiency and protecting consumer interest. The Competition and Fair Trading Act (CFTA) was adopted in 1998. The Malawi Competition and Fair Trading Commission has been operational since 2003.	-
7.	Mali	The Competition regime of Mali was established through a Government Ordinance in 1992. The main aim of this ordinance was to introduce free competition in the Mali markets. A subsequent Decree in the same year, set in motion the implementation of the ordinance.	-
8.	Mozambique	The country has adopted a Competition Policy in 2007; and has recently drafted a Competition Law, which is being discussed with various stakeholders.	-
9.	Mauritius	The National Assembly passed the Competition Act in 2007, with the objective to safeguard and promote competition in Mauritius.	-
10.	Namibia	Competition Policy was introduced in 2003 through Competition Act of 2003 (Act No. 2 of 2003).	-

Contd...

S. No.	Countries	Countries having a competition policy and/or law	Countries developing their competition policy/law
11.	Nigeria	-	Nigeria is yet to develop its competition policy and/or law. The process has been retarded a bit by internal turf issues among various Ministries/ Departments, which want to host the planned Competition Commission.
12.	Senegal	In 1994, Senegal adopted the Prices, Competition and Economic Disputes Act (No. 94-63) within the framework of SAP implementation.	-
13.	South Africa	A new Competition Law was enacted in South Africa, in October 1998, and came into force in 1999. It forms an important part of reforms: address the historical economic structure in South Africa; and encourage broad-based economic growth.	-
14.	Tanzania	The enactment of the 'Fair Competition Act, 2003' provided the basic foundation for the establishment of competition law in the country.	-
15.	Uganda	-	A competition bill was drafted in

Contd...

S. No.	Countries	Countries having a competition policy and/or law	Countries developing their competition policy/law
			2002, and amended in 2004, but has yet not been adopted. The Bill was scheduled to be tabled in the Parliament in 2005. However, there has been no movement forward, since.
16.	Zambia	The CFTA Chapter 417 was enacted on May 11, 1994, came into force on February 15, 1995 (but only became operational in April 1997). Currently, the government is considering bringing consumer protection provisions into the existing Competition Act, through an amendment. Consultations with various stakeholders are on at the moment.	-

6
Competition Policy and Private Sector Development

A growing private sector allows new investments that increase the flow of goods and services, creates employment and increases incomes. The flow of goods and services is important for improving the quality of life, while more employment and higher incomes reduce poverty. New investment also encourages people to inject capital in education and skills, so that they can take advantage of better jobs arising within the private sector. For the private sector to deliver growth, five interlinked and mutually reinforcing factors are required to be in place:

- providing incentives for entrepreneurship and investment;
- increasing productivity through competition and innovation;
- harnessing international economic linkages through trade and investment;
- improving market access and functioning; and
- reducing risk and vulnerability.

Openness to 'best practices', possession of entrepreneurship skills and markets embedded in decent governance systems are essential factors that link private sector development to poverty reduction. The effective and rapid adoption of best practice requires openness to new ideas and technology. Competition provides incentives to adopt them. Competition means free entry for new entrepreneurs. This creates opportunities for all sorts of firms, be they small, medium or large. New entrants try new ways of doing things and are crucial to the process of diffusing best practice. Competition also means choice for customers. This empowers consumers and makes firms responsive to them. Overall open and competitive markets, supported by facilitating public policies, have proven to be the best mechanism both to stimulate innovation and to spread best practice within countries and across borders. Growth, driven by such markets, is a powerful pre-requisite for poverty reduction. It is widely accepted that the private sector is needed and indeed better suited for sustaining

rapid growth. The Asian experience shows that growth is the most powerful weapon in the fight against poverty.

The same is also reflected in the core developmental agenda of some countries in ESA. For example in Botswana, the development policy emphasises enhancement of gender-equity-based economic empowerment of citizens and foster private-sector-led and diversified sustainable economic development. This is evidenced by the goals of its national development policies (National Development Plan 8, 1997; Vision 2016, 1997). The country's goal in 2016 is to reduce the current level of poverty and backwardness by half, by fostering gender-equity-based indigenous managerial and technical expertise, innovation capacity and entrepreneurial acumen (UNDP, 2000). The Government of Botswana (GoB) has attempted to strengthen its institutional capacity to facilitate conducive environment for private initiatives and innovations. Sectoral development policies and the national development plans of the country gave substantial attention to the promotion of small and medium-sized enterprises (SMEs) for innovation, entrepreneurship and business skills (National Development Plan 9, 2001; National Policy on the Promotion SMEs, 1999). About 10 percent of the development budget of the country has been consistently earmarked for this purpose every year (Budget Speech, 2003; National Economic Development Report, 2000).[11]

Growth creates jobs that use labour, the main source of income for the poor. As growth proceeds, private sector employment becomes the major source of economic support for a majority of workers and their families. Thus, improving labour market operations is an important element of strategies to promote pro-poor growth and reduce poverty. It also helps allocate a country's human capital resources to their most productive uses, enhancing general economic welfare, and encouraging further growth and development.

The key role played by the private sector in spurring economic development, often referred to as 'engine of growth', has since long been common knowledge. Private sector development has received increasing attention by policy-makers in the developing world and by the development community alike, in a country like Kenya (refer Box 2 on page 20).

The Government of Malawi is committed to putting the development of the private sector at the heart of Malawi's national development strategy. Malawi is fundamentally an open, liberal and lightly regulated economy, which is welcoming to investors. The Government's new medium-term development strategy adopted in the year 2006 is built around the Malawi Growth and

Development Strategy. This strategy fully recognises that creating a healthy enabling environment for private sector development is a pre-requisite for sustainable economic and social development.

Working closely with stakeholders in the private sector, the Ministry of Trade and Private Sector Development of Malawi is leading implementation of the National Export Strategy and a Private Sector Development (PSD) Strategy. The National Export Strategy aims at highlighting export issues as development issues, target improved export volumes and add value in six key sub-sectors: namely, cotton and textiles, food and agro-processing, handicrafts, tourism, (other) services and mining. In addition, the PSD Strategy aims at addressing the cross-cutting constraints to doing business in Malawi and will tackle thematic areas, such as credit and finance, skills and productivity, investment and technology, licensing and taxation, among others.

Box 2: Private Sector Development Strategy of Kenyan Government

The Government of Kenya (GoK) has developed this Strategy to address the constraints which restrict the growth and competitiveness of the Private Sector in the country. The two strategic objectives of the PSD Strategy are to:

- (i) create a conducive business environment for Private Sector growth by alleviating major constraints; and
- (ii) enhance the growth and competitiveness of the Private Sector, especially, the Micro, Small and Medium Enterprises (MSMEs).

The focus of the two strategic objectives is broad and therefore does not concentrate on any specific sectors. Moreover, certain aspects of implementation will target the growth and development of key areas of Kenya's comparative advantage. Implicit in the strategy is the recognition that significant activities are already ongoing. The aim of the PSD Strategy will be to catalyse and support these initiatives, as well as to develop new activities.

Furthermore, the PSD Strategy will be multi-sectoral and work through existing institutional mechanisms. The core mechanism will be through the Medium Term Expenditure Framework (MTEF) Sector Working Groups that re-linked to the budget process. A key principle underlying the Strategy is that the Government's role is essentially facilitative, i.e. to enable markets work better. Hence, unless there is a strong justification for it, direct intervention by the Government will be limited to the implementation stages of the Strategy.

Source: Ministry of Trade and Industry, Kenya, available at www.tradeandindustry.go.ke

Creation of an enabling business environment through business environment reforms, as evidenced in Tanzania, has been acknowledged as an important pre-requisite for unleashing a private sector response that leads to dynamic growth, and ultimately employment and income generation. The reform of the parastatals sector in Tanzania has been a key element of the Government's economic reform programme. 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 parastatals 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 a legislation on competition, and has actively pursued its effective implementation.

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 coordination, the Government seeks to facilitate co-operation that will be critical to implementing the policy changes and regulatory reforms needed to attract private participation in the relevant 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.

It is now widely accepted that private sector must be the engine of economic growth and as a result lead to reduction in poverty; and that governments must create environments that allow the private sector to flourish. It is well established that even if all other structures are in place to support a market-oriented system, it cannot be assumed that the private sector will operate independently of each other in the marketplace, or that the interaction of market forces will automatically maximise consumer welfare. Therefore, it is pertinent that the state intervenes to protect competition by prohibiting agreements and activities that undermine the same. This intervention takes the form of a competition regime. A key objective of competition policy is to promote the competitive process. Competition policy is thus increasingly seen as a complement to sector-specific regulation, trade, industrial and other policies to promote broad development objectives.

In Uganda, the need for such intervention has been met with considerable debate, and in some respect, resistance. On the other hand, in Zambia, the Government in order to attract private players provided incentives to foreign investors, through tax holidays and special conditions for import of inputs

(raw material as well as intermediate goods). While tax holidays have now been abolished, the special import conditions for foreign investors still continue. Moreover, since the privatisation trend in Zambia did not distinguish between foreign and domestic players, many erstwhile parastatals are now foreign-owned private sector monopolies or dominant firms. The example of Zambia reflects the need of applying competition rules to pursue long-term productivity growth. The pursuit of this objective requires dynamic rather than static efficiency and is dependent, among other things, on high rates of investment. This necessitates encouragement of entrepreneurs' propensity to invest, which in a way means creation of an environment conducive for such investments to be mobilised.

Competition is essential if markets are to work well for the poor. When firms have to compete vigorously, they must find better ways to produce and distribute goods and services. Competition benefits consumers both directly, through lower prices, better quality and an improved choice of products; and indirectly through its impact on economic growth.

The provision of services by central and local governments contributes significantly to the welfare of the poor. Competition is important for an oversight on government procurement, as anti-competitive practices by suppliers could reduce what governments can achieve with the limited funds at their disposal.

Competitive domestic markets benefit farmers. They will be in a more favourable position if the markets in which they buy their inputs, arrange transport of their crops to market and sell their outputs are competitive. An OECD's Task Team's analytical framework captured in the report, 'Accelerating Pro-Poor Growth through Support for Private Sector Development', reflects the importance of competition policy to the poor[12] . It discusses the effects of entry and exit barriers on entrepreneurship, and the contribution made by competition to innovation and productivity. Such views are complemented by a growing body of evidence on the link between growth and poverty reduction. The World Bank's *World Development Report 2005* emphasised the importance of competition for investment, and noted how competitive pressure leads to innovation, new products and new technology.

The existence of competition policy reduces uncertainty for business, and is an important element of a good regulatory package for mobilising private sector participation. There are also indications that, by reducing the scope for

arbitrary decisions by officials, competition law reduces possible corruption. Corruption hurts the poor. Competition policy, including competition law, is needed because markets do not always work well. As noted above, anti-competitive actions by firms are one cause, but inappropriate regulations by governments at all levels are also frequent causes of market failure.

The private sector needs a good overall investment climate to operate. If the investment climate is poor, as it still is in many ESA countries, the extra costs and risks to business are inevitably passed on to the consumers through high prices.

An effective CPL is a part of the economic governance rubric that enables consumers' involvement in the economy. For example, in a country such as Tanzania, CPL have proved to be important tools in monitoring the liberalisation and de-regulation process, while focusing on the private sector to champion the development of the economy. The enactment of the Fair Trade Practices Act in 1994 provided the basic foundation for the establishment of CPL 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.

Adam Smith emphasised the benefits of free entry to and exit from markets. According to the theory of 'contestable' markets, it has been established that benefits of competition are obtained when the conditions are right, for new entrants to enter the market, while the less efficient firms in the market are forced to innovate and upgrade or leave. Further, competition ensures that prices are kept low and that consumers get a better choice of products. Lower prices and better quality of products act as incentives for the consumers to continue buying such products, thereby increasing the demand in the market. This encourages private sector to produce more, resulting in higher growth, more employment opportunities and reduction in poverty.

The 2006, UK White Paper on development, entitled 'Eliminating World Poverty: Making Governance Work for Poor People', offers an analytical framework comprising of three inter-locking basic characteristics: "*Capability* – the extent to which government has the money, people, will, and legitimacy to get things done; *Responsiveness*- the degree to which government listens to what people want and acts on it; and *Accountability*- the process by which people are able to hold the government to account". These principles create a governance framework for competition policy to thrive and contribute to state

legitimacy, creating a sense of national purpose and market processes in the long-term interests of the whole population. Competition regimes have been evolved in the last decade in many countries keeping in view such outcomes[13]. This aspect is underscored in the Competition Law of South Africa, which aims 'to balance economic efficiency with socio-economic equity and development' in the country.

7
Concerns Relating to Private Sector Growth[14]

The biggest challenge in ESA countries is to alleviate abject poverty that deprives a large section of their population a dignified life. An essential element of a poverty reduction strategy is to empower the poor – provide them with productive employment and facilitate their access to land, capital and other resources. An approach that has recently been receiving a lot of attention of the international community as a mechanism for poverty reduction is to devise strategies to link the poor to the markets. Evolving markets that are responsive to the needs of the poor – in terms of providing opportunities, ensuring that products are available at lower prices, offering better prices for goods produced by the poor, providing easy and secure sources of finances/credit on fair terms, etc. A pre-requisite for evolving such a market is to create a governance framework that promotes rule-based private sector development.

CUTS experience has indicated that certain factors have prevented the evolution of a rule-based, enabling environment in many ESA countries and thus decelerated private sector growth in the region. It is important to identify such factors and highlight appropriate measures to effectively address them so that the private sector can flourish.

I. Competitive Neutrality

Competitive Neutrality is about adopting policies, which establish a 'level playing field' in areas where public sector competes with the private sector. In practice, it is difficult to ensure competitive neutrality in sectors where government or its agencies retain control or insist upon retaining control.

In Mauritius, the share of the public sector, i.e. state-owned enterprises (SOEs) in the GDP is around 24 percent. SOEs contribute almost 100 percent of the

water output, around 60 percent of the electricity production and about half of the total production in transport and communications. Several parastatals bodies purchase, import, and store 'strategic products', including commodities subject to price control and/or supply certain services. The State Trading Corporation (STC), with a turnover of around US$182mn, imports the bulk of the island's requirements for petroleum products, flour and ration rice (partially broken rice) and cement requirements. These products are considered as 'essential' goods for which regularity and reliability of supply must be assured.

The authorities also justify the STC's monopoly, citing the sustainable quantities of the goods it enables Mauritius to import and the resultant cheap prices (due to bulk purchases) that the STC obtains from foreign suppliers. STC sells the staple food e.g. flour, ration rice to private wholesalers and bakers, who then distribute the products to retailers. The retail prices of ration rice and flour are subsidised. Imports of 'luxury' (*Basmati*) rice were liberalised in 1997. Therefore, the monopoly formerly held by STC over the importation of this product has been abolished. Currently, the STC competes with private traders in the importation of *Basmati* rice. As for cement, the Mauritius Portland Cement Company (MPCC), and the *Ciments de l'Océan Indien Limitée* (since 2000) import 50 percent of Mauritius' requirements for cement; the STC's import price serves as the basis for the local price. Petroleum products are sold by STC to local distributors at a set price, with price controls maintained along the distribution chain.

In Ethiopia, the private sector along with foreign investors alike complains about the preference shown to party-owned businesses. From the private

Box 3: Existence of Party-statals in Ethiopia

Few enterprises owned by the Government and/or ruling party, usually known as *party-statals*, have been alleged by the private sector for controlling the supply of certain goods and services in the market. Ethiopian Telecommunication Cooperation (ETC), Ethiopian Electric Power Corporation (EEPCO), & Ethiopian Postal Service could be cited as examples, from para-statals, in this regard. These are the only producers and/or suppliers of the products and/or services in the respective sector (s). Although power generation & transmission up to 20 KMW in the energy sector has been allowed for local private investment very recently, not yet realised.

Source: http://www.cuts-ccier.org/7up3/pdf/PCP-Ethiopia.pdf

sector's point of view, although it is appreciable that Ethiopia at least recognised the importance of fair competition, yet the newly introduced proclamation is believed to be still very far from being a true competitive legislation.

To achieve the intended objectives of the proclamation, it has been argued that trade should be performed in accordance with the market principles (guided by demand and supply) and a system should be established introducing conducive environment to promote competition and competitiveness. Moreover, it has been said that in order to address the prevailing imbalance in and among the actors in the economy both the strength of "Hercules and wisdom and justice of Solomon [are required] to establish an enabling environment that could pass the simplest test of level playing field and fair competition".

Box 4: Monopoly in Ethiopian Telecom Sector

The Government-owned ETC is the country's only telecom company, with a monopoly power in providing a national landline and mobile phone network. EthioMobile, the mobile division of ETC, remains the country's only mobile operator. ETC has been repeatedly criticised for its poor performance in delivering telecom services. The company still has less than one percent coverage among Ethiopia's potential fixed line customers. Mobile coverage had mostly been limited to the Addis Ababa region, [only very recently being expanded to other regions, and the customer base is low, compared to other African nations.

The Ethiopian authorities started a slow and partial privatisation of ETC two years ago. Recently, ETC entered into a •40mn (US$54mn) deal with Nokia, to upgrade its poor GSM network. Under the deal, Nokia provides a full range of GSM and GPRS network infrastructure, including base stations and assists in network planning and implementation, and project management.

Source: http://www.cuts-ccier.org/7up3/pdf/PCP-Ethiopia.pdf

In Mozambique, state patronage and exclusive flying rights to operate most of the domestic destinations are granted to the state subsidiary Linhas Aereas de Mozambique (LAM), whereas the private airline Air Corridor has not been allowed to do so. This allows LAM to overprice domestic operations, as a mean to remain in the market despite being inefficient, all at the expense of consumer's interests.

Anti-competitive practices have been identified in sectors across the ESA region, such as construction, property, beef export and mining. According to the Botswana Meat Commission Act of 1996, the exportation of live animals or their edible products is solely reserved for the Botswana Meat Commission (BMC) unless the Minister of Agriculture permits otherwise in writing. This has resulted in some farmers raising concern on the BMC monopoly of the beef export market and has appealed to Government to liberalise the sale of live animals and their products outside the country to provide them favourable prices.

De Beers (through Debswana) continues to dominate mining in Botswana. The GoB needs to consider working with other players in the diamond industry to reduce dependence on De Beers. This will help achieve balance in information gathering and enhance rapid learning of the industry. It has also been recommended that the Government should consider transferring some of its shareholding in mining and processing companies to citizens.

A study undertaken by the South African Institute of International Affairs (SAIIA) on the experience of South African firms doing business in Botswana revealed that some companies complained that the playing field is tilted in favour of companies owned by locals, particularly in the construction and property development sectors. The Government plays a disproportionate role in the latter sector, and is the chief developer of office space (because of the inability of the local private sector to fill the gap). As a result, Botswana companies are said to be awarded contracts ahead of South African firms, even if their bids are less competitive.

II. Nexus between Government and Big Firms

One of the reasons that act as an impediment for a number of African countries from adopting competition policy is on account of undue control and intervention by the government and lack of good governance. Governments are often alleged to provide extra benefits to certain companies or players and neglect other players in the market. In Mauritius, taking of funds from business houses for political party funding is a normal practice. Concerns have often been raised that such proximity could influence the government while framing policies aimed at private sector development, like a competition policy or law. A Mauritian newspaper report suggested that some private players were responsible for procrastinating the adoption of the country's competition law.[15]

The political and business relationships are such that the people in power make decisions based on their personal choice and connection, rather than on merits. Such action of the government leads to inefficiency and creates entry barriers for the new players from entering the market, which hampers the entrepreneurship spirit of prospective entrants.

III. Small and Medium Enterprises (SMEs)

SMEs are known for generating mass employment, promoting entrepreneurship and meeting broad local demands for goods and services. Due to important contribution they make, they are recognised as the *deriving forces of* economic growth and social development, in developing economies.

There is a growing realisation of the importance of SMEs to the economies of ESA countries. The Government of Kenya recognises the importance of the informal sector in employment creation, income distribution, and the rural-urban balance. Sessional Paper No 1, 1986 highlighted informal and small-scale enterprises as the primary vehicle for social and economic development. Successive National Development Plans have given prominence to the informal sector and have proposed that the government take on a facilitative role. Sessional Paper, No 1, 1992 "Small Enterprise and Jua Kali Development in Kenya", sets out a comprehensive policy framework for development, covering direct assistance to small enterprises; the transition of micro- and small-scale enterprises into medium-sized enterprises; access to credit for the informal sector; access to information on markets and technologies; and an enabling policy environment which would redress existing regulatory restrictions.

The development of SMEs is important for economic growth, employment, poverty alleviation, etc. Most of the competition laws have certain provisions, which address SMEs. Promotion of SMEs is the objective of many competition laws.

A large majority of the entrepreneurial activities in countries of the region is performed by SMEs, and therefore for the private sector to develop as a whole in them/region, it is critical that national governments draw up policies in the interest of SMEs. Many countries, like Mozambique lack a consistent policy for SMEs. However, on the other hand, Ethiopia has a clear policy to support SMEs. The government support is mostly channeled through the Federal Micro and Small Enterprise Development Agency (MSEDA) and increasingly through Regional MSEDAs. Activities include basic training in technologies

and business skills, development of low level service working premises, the provision of micro-credit and information on markets and techniques, etc.

In Uganda, the regulator, for need for transparency has tightened the procedure of public procurement. It is now governed by a separate policy and law and is under the regulatory oversight of an independent body – the Public Procurement and Disposal of Assets Authority (PPDA). Consequently, the steps taken by the regulator has a double benefit of improving transparency and as well as increasing competition as the new rules explicitly call for 'competitive bidding' for services and goods whose value exceeds US$5,000. Thus, the Uganda Government has taken steps to improve its policy to the benefit of the SMEs in the country – a step in the right direction as it would motivate new firms to enter the bidding process and develop their capacity over the process.

There is divergent opinion among experts as to whether SMEs would benefit from a competition law, and therefore, whether SMEs should be brought within the ambit of a country's competition law? African least developed country (LDC) governments are often reluctant to expose their SMEs to foreign competition, as they doubt the latter's potential to create job opportunities.[16] Such views originate from the belief that applying competition policy would unnecessarily restrain the governments from achieving other concurrent policy objectives. Countries like Zambia and Malawi have included expanding the base of enterprises as one of their major objectives.

IV. Privatisation and Liberalisation

Poverty related problems are exacerbated in African countries by factors, such as low level of human development, low levels of productivity, poor investment climate and infrastructure. Attempts are being made by the individual governments across the continent to tackle this problem by adopting poverty reduction strategies; sometimes supported by multilateral institutions. It has been noted that many public enterprises are inefficient and rely on subsidies, therefore, most governments have decided to privatise them (refer Box 5 on page 31) in order to improve their performance. In most cases, privatisation agencies have been established to spearhead the privatisation programmes. These programmes yield mixed results, depending on the level of preparation for privatisation, the type of public enterprise being privatised, and so on.

Box 5: Privatisation Trends in Africa

In 2004-2005, Sub-Saharan Africa (SSA) generated US$975mn from 23 transactions, representing just one percent of total global privatisation transaction value of developing countries. This is down from three percent in 2000-2003. Nigeria alone accounted for 70 percent, the bulk of which is due to a 25-year port concession. Tanzania and Ghana together accounted for another 12 percent, dominated by telecommunications. The rest is accounted for by Sudan, Kenya, Rwanda, South Africa and Madagascar, mainly through telecommunications transactions (Kikeri, Burman, 2007).

An analysis of sector trends for developing countries in general shows that three sectors accounted for about 90 percent of total transaction value, namely infrastructure (telecoms, electricity and natural gas, transport, water), finance (banks, insurance, other financial services), and energy (exploration and production of oil and gas, other hydrocarbons). Between 2000-2003 and 2004-2005, infrastructure's share of total value declined from 55 to 42 percent, the financial sector's share grew from 19 to 30 percent while the energy sector remained at about 15 percent (Kikeri, Burman, 2007).

During the period 2000-2005, SSA raised US$11bn in privatisation proceeds, representing three percent of the global total for developing countries. A total of 960 transactions were conducted in 37 countries of the region, and this represents the third highest number of transactions, behind Europe and Central Asia and Latin America. However, 70 percent of the transactions were low-value firms in competitive sectors. Four countries, namely South Africa, Nigeria, Ghana, and Zambia were the largest contributors. South Africa alone has accounted for up to 40 percent of the region's proceeds in recent years.

Source: http://www.africa-union.org/root/UA/Newsletter/EA/Vol.%201,%20No.%202 /Pamacheche_Koma.pdf

Regulatory reforms in the continent happened as a part of the overall market reforms and liberalisation process. These reforms came rather late, at various points in time, and did not follow any specific pattern, strategy or sequence. This is due to a multitude of reasons: the slow and unstable pace of general reforms, government changes, political unrest or civil wars, as well as the low level of development of the economies and the dearth of expertise. In many cases, the Bretton Woods Institutions provided the momentum for such reforms. However, it is due to the same set of reasons that the reforms undertaken have not been far-reaching in nature, as the experience of countries such as Malawi suggest (refer Box 6 on page 32).

Box 6: Privatisation Programme of Malawi

One of the objectives of the privatisation programme is to increase competition and reduce monopoly. The idea is that some public enterprises are monopolies in their sector because of protection afforded to them by legislation, Government policy, or their sheer dominant position. Privatisation can enhance competition in many ways.

First is that a monopoly can be broken down and be sold in bits that would compete with each other. An example would be the privatisation of Malawi Dairy Industries and Cold Storage Limited units. These are currently competing with each other in the market. The second involves cutting off protective legislation and policies surrounding a public monopoly before its privatisation. This exposes the sector and the privatised monopoly to competition.

However, not all privatised monopolies lead to increased competition. The privatisation of the entities in the sugar-processing sub-sector may have improved efficiency but has created a monopoly sugar company with no clear competition, even from imports. This is true of the Malawi Railways (1994) Limited and the Malawi Lake Services. Government presence may have assisted in terms of moderating price increases. Currently, there is no mechanism to moderate price increases.

Source: "From the Bottom Up", CUTS 7Up3 project Research Report (http://www.cuts-ccier.org/7up3/pdf/SynthesisReport.pdf

On the other hand, 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 on 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. Since the government withdrew itself from the total control of the economy, the private sector has played a leading role. 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).

However, 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. 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.

Even now, an enabling environment in the African countries remains to be fully developed. Despite significant progress made in terms of liberalising the business environment, several approvals are required to start a new business, which often takes substantial time and costs, acting as major obstacles for a new business operator to enter into the market and as a result it hampers private sector development. In Malawi and Uganda, business registration itself costs more than the per capita income of the country, while in Mozambique it takes 153 days to get a business registered.

In many of these countries, the cost involved is more than that in the US even in absolute dollar terms. Botswana has an industrial licensing policy that is quite restrictive as the licensing authority can refuse license on grounds of lack of technical skills or inadequate availability of raw materials or perceived impact on public interest, which can mean anything. In this regard, the Government is believed to be considering some changes, but the nature and extent of such changes are not yet clear. In Mozambique, the licensing requirements are too many and the process is quite lengthy and involves significant discretion and arbitrariness.

V. Transnational Corporations (TNCs)

Over the past decade most of the mentioned countries, have extensively liberalised their trade regimes and have opened up their markets for foreign trade. With this, the countries have become increasingly susceptible to anti-competitive practices that originate outside their own territories. TNCs have entered developing country markets or have increased their activities within those markets. The entering of TNCs can have positive effects for developing economies. It can bring in much needed investments and help economic development of a country, as well as increase the number of players in the market, thus having a positive effect on competition.

However, there are situations where the TNCs misuse their position in the markets for their own benefits by way of predatory pricing or exclusive dealing arrangements. In Namibia, reports suggest that local agencies are being

compelled by South African firms to enter into contracts that prevent them from supplying Namibian products to local chain stores. As a result of this unfair trade practice, many Namibian companies are losing their business and some are even on the verge of closure.[17] The South African competition agency allowed the merger of Glaxo Wellcome and SmithKline Beecham. This merger created a leading global pharmaceutical company with sales of £18.1bn (US$32bn) in the year 2000. The merger was allowed on the condition that they license out the products in which there could be heavy dominance in the post merger scenario.

8
Innate Systemic Weaknesses

It emerges from the above, that an effective competition regime comprises an essential element of the enabling environment that has the potential to catalyse private sector development in the region, by establishing a 'level playing field' (based on the principles of fairness and equity) for the players. This stimulates entrepreneurial spirit in the economy and encourages entrepreneurship development.

In-depth analysis of competition regimes in the ESA region has helped in identifying certain intrinsic weaknesses in the countries (most of which are consistent with those encountered in other parts of the developing world) in terms of their capacities in evolving and operationalising competition regimes, some of these weaknesses are presented below:

I. Designing a Competition Law

"There is no one size fits all competition law", says Frederic Jenny, a world figure on competition and a Judge in the Supreme Court of France. Different countries are in different stages of development with disparate cultures and administrative systems. A universal competition statute is not a practicality nor is it desirable. Every country should have the flexibility to order its own competition regime to suit its genius, goals and aspirations. Given these premises, designing of competition law needs to consider the country's systems, especially strengths, weaknesses, goals, objectives and constraints of finance and trained personnel to man the competition authority. The extent of political and economic development of a country is also germane to designing its competition law."[18]

"It is imperative to walk first and walk well before running. A country embarking on a competition law for the first time need not clothe its competition law with all the features, which a developed country may have.

Even if the law is so drafted that it encompasses most, if not all features of the laws of developed countries with rich experience in competition matters, it is desirable that the law is so calibrated that different features are enforced gradually over a period of time, instead of all at once. As stressed above, the law should reflect the genius of the country. Over ambitious approach may result in the law not being applied effectively or efficiently. It is important to remember that no law is better than a poorly administered law. It is in the design of the law that every country should address their best brains. Brains include lawyers, judges, economists, accountants, functionaries of the Government, consumer organisations, professional institutes, chambers of industry and commerce etc. Wide consultations should precede drafting of the law. Even after the draft is ready, it should be placed before the so-called brains and their feedback and suggestions secured before getting the legislation through the Parliament. A country's ethos should inform its competition regime".[19]

While lessons may be gleaned form the experience of different countries in designing and implementing competition laws, competition law at the national level should be looked at in the context of local economic, legal, sociological and political considerations.

II. Young and Evolving Competition Agencies

In most ESA countries, competition and regulatory laws are entirely new concepts and many do not have them at all or are in the process of adapting them. In several cases, such laws have been adopted due to external pressure (international financial institutions, donors, peers, etc.). Consequently, very few officials in the public service and political establishment appear to have understood what the new regime means and what it takes to have a well functioning competition regime. There is a felt need for guiding these institutions in the process of implementing their competition laws.

It is very important for the competition agencies and/or the line Ministry to learn from the rich experiences of advanced countries (it is essential to look at the experience of other developing and LDCs as well, rather than only following developed-country models). South Africa provides a good example, whereby experts from the Antitrust Division of the US, Department of Justice assisted the South African Competition Commission in dealing with mergers. Technical assistance can be provided bilaterally, multilaterally or on a regional basis. It is to be noted that there is already a lot of initiative in this area, which is being undertaken by international organisations, such as World Bank, United

Nations Conference on Trade and Development (UNCTAD), OECD, etc., which these young competition agencies need to be aware of.

III. Absence of a Competition Culture

Competition culture refers to the awareness of the general public, including the business community, politicians, etc, about the need for competition law/ policy and its benefits. On an average, most of the ESA countries have poor competition culture, as is witnessed in most other parts of the developing world. Competition culture is an essential pre-requisite for deriving the benefits of competition and its contribution to the furtherance of economic development.[20]

Most of the competition authorities face a major challenge of justifying its relevance to the business community and general public. The competition agencies in most of the ESA countries not only face problems in implementing and enforcing law but are also confronted with a certain degree of opposition from certain quarters. Even when competition agencies are *de jure* independent, their independence is threatened and made obsolete if their decisions are overruled or not carried out by the Government.

The Competition Authority needs to perform an important function in addition to curbing, if not eliminating anti-competitive practices in the market. The function is competition advocacy, which creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances.

An OECD Report observes that, "In virtually every member country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. This 'advocacy' can include persuasion offered behind the scenes, as well as publicity outside of formal proceedings. Some competition agencies have the power, at least in theory, to bring formal challenges against anti-competitive actions by other agencies or official or quasi-official bodies. More indirect, but still visible, is formal participation in another agency's public hearings and deliberations. What is appropriate depends on the particular institutional setting" (OECD, 1997).

In terms of advocacy, the Competition Authority should be enabled by appropriate provisions in the law, to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related

to competition. The Authority will therefore be assuming the role of a competition advocate, acting pro-actively to evolve policies that lower entry barriers, promote deregulation and trade liberalisation and establish competition in the marketplace. The law should seek to bring about a direct relationship between competition advocacy and enforcement of competition law. One of the main objectives of competition advocacy is to foster conditions that lead to a more competitive market structure and business behaviour without the direct penalty loaded intervention of the Competition agency.

At first glance, the advocacy role of the Competition Authority might seem somewhat of a luxury, especially for developing countries, which face numerous competing priorities in implementing competition disciplines. However, it cannot be gainsaid that competition policy advocacy has the potential for a significant impact upon general economic development. For example, the Zambia Competition Commission (ZCC) is quite actively involved in competition advocacy. It regularly organises periodic meetings with various stakeholders in the capital (Lusaka) and other towns. There is no doubt that competition advocacy involves certain expenditures for the Competition Authority, but such investment is bound to bear fruit in the long term by reducing possible hindrances to competition.

Competition advocacy and building capacity on competition in the developing countries would be the first step towards protecting and serving consumer interest.

IV. Resource Capacity Constraints

The benefits of having CPL are yet to emerge, as enforcement of the same has been hampered or delayed due to inadequate staffing, lack of resources, etc. For example, the budgetary allocations to the Kenya Competition Commission were not enough. Between 1998/99 and 2000/01 financial years (FYs), the Commission had received an average of only KSH17mn every year (approx. US$215,000 at current rates of exchange). Of more concern are the budgetary allocations for training: in 1998/99 there was no allocation for training, and only KSH600,000 (US$8,108) was allocated in 1999/2000.

Add to that, the limited staffing available is a challenge, because; it places a burden on the competition agency to respond readily to queries and complaints, etc.

Effective competition regime cannot be evolved and/or enforced without adequate human resources, i.e. a staff of sufficient size with adequate technical competence. Lack of human resources may lead to under-enforcement of the laws. It may also undermine the reputation and standard of the competition authority, especially where it results in incompetent enforcement.

Competition authorities thus need to employ lawyers, economists and investigators familiar with competition law and policy. In addition, several attorneys with litigation experience and a sound knowledge of administrative law and civil procedure should be hired. Competition agencies need to identify and plan activities given the budget and the staff available. The implementation of particular activities may require joint collaboration with utility regulators, which is to be carried out in mutual participation by the agencies and utility regulators.

In most developing countries, competent and qualified staff are not available and even, if available, are difficult to retain. For competition analysis, a multi-disciplinary approach is important. Economists, accountants, lawyers and experts in analysis have to constitute a team for analysing the market, the level of competition, extent of dominance etc. In merger cases, the resultant dominance and the potential harm to consumers need a multi-disciplinary analysis. Cartels are always difficult to proceed against, as there will be little documentary evidence to prosecute. Breaking a cartel would need carefully planned strategies and intelligent investigations. Likewise, predatory pricing has always been a challenge for investigators, as the *mens rea* of the offending parties is not easy to establish.

An added problem is that the pay scales and remuneration offered for the personnel of the Competition Authority are generally those of the Government, thus not attractive enough for talented people to offer their services. Lack of budgetary support and attractive remuneration are two key reasons, why top quality economists and lawyers do not feel attracted to seek employment in the office of the Competition Authority. Even if they seek employment, the Competition Authority may not be able to retain them in the wake of better remuneration offered by the private sector.

Competition authorities must therefore devise ways to overcome such obstacles. In the long run, low levels of professionalism can be countered by building links with universities and ensuring that they teach the appropriate relevant courses. In the short run, staff training programmes in procedural, methodological and substantive matters are key mechanisms for overcoming

human resource constraints. Such training can be provided internally, but often there is an important role for external training. Internships, or seconded staff from more mature authorities, should be arranged to guide staff while gaining practical experience. Technical cooperation agreements and exchanges with other competition agencies are crucial in this respect, as long as they match the learning curve and annual operational targets of the authority.

V. Resistance from Vested Interests

Benefits of a competition policy accrue both to consumers and the business community. While the benefits to the consumers are easily tangible, often firms do not understand the benefits that accrue to them. As a result, the business community often perceives competition law as an additional administrative burden. At times, the business and political community acts as speed breakers towards the successful implementation of competition policy/law. The national firms oppose the opening up of the market for competition from international companies, as they would find it difficult to survive against them.

Box 7: Establishment of Competition Law and Policy in COMESA Member States
The local business communities of most Southern African states do not share the idea that effective competition shall bring about the desired economic development in their respective countries. Results of interviews with businessmen and government officials in different COMESA member states showed that there was lack of knowledge or understanding of competition policy/law. Many were undecided whether their Government should divert resources from other scarce priorities to introduce competition law and a competition authority in their country.
Source: Comesa Consultancy report on the establishment of the Regional Competition Regulation, 2002

Any change is uncomfortable and takes time for people to accept it and thus business and political community would voice their concerns against the implementation of the same. It would be beneficial for the policy makers if they were able to highlight the long-term costs and benefits of having a competition policy/law, so as to get their support.[21]

VI. Civil Society and Consumer Movement

An active consumer movement makes a significant difference to the effectiveness of CPL. Empowered CSOs and organisations could be instrumental in bringing anti-competitive practices, such as abuse of dominance, cartelisation, etc, to the attention of the competition agencies. They will act as a positive pressure to counteract the opposition of inefficient businesses to the successful implementation of CPL. In many countries of the region, there is an absence of strong consumer organisations. In others like Botswana and Namibia, consumer organisation are either non existent, or have just emerged. So, there is a need to inspire and mobilise consumers to get together and develop a movement that might lead to establishment of consumer organisations.

VII. Regulatory Capture and Lack of Political Will

Assuming that the adoption and enforcement of a competition law is socially desirable for a developing country and that such policy fits well with the country's socio-economic situation. Will it be adopted and effectively implemented? The answer is not always positive. Policy makers those involved in making decisions underlying public policies do not always have the motivations to adopt socially desirable policies. There are certain forces present in countries that may lead decision makers to deviate from optimal social policy in the context of competition policy/law. The adoption of a competition law may encounter resistance from many groups in society.

Thus a question that arises, is why should policy makers be affected by certain forces in their decision making process, if they believe that the adoption of a competition policy/law is socially desirable? The problem is simply that, in the absence of constraints, both legislatures and government officials may have motivations to abuse their decision-making power by singling out particular individuals or groups and bestowing government largesse upon them in return for political support (Kaplow, 2003).

This problem is known as regulatory capture. Such capture arises when small groups with large per-capita stakes influence and cause the government to regulate in ways that are against the public interest and usually against consumers, who are poorly organised and have small per-capita stakes in the market. Regulatory capture is increased where the ultimate policy decision lies in the hands of one politician or a small group of politicians (e.g. the relevant minister or a legislative committee) rather than the government as

whole, as specific, well-organised sectors can ensure the politicians' re-election. Thus, in the fear of holding on to the chair, politicians are forced to take decisions which might be socially desirable.

The influence of politicians might be aggravated with regard to competition law. This is because the benefits of competition law enforcement are inherently non-sector-specific and it applies similar rules to all industries, rather than on the welfare of specific market players. It also lays out a long-term vision for society, beyond the immediate pain of the change in specific industries and beyond the profitability considerations of specific firms. For example, a merger that would create significant market power would be disallowed even if it results in financial loss for the firms wishing to merge. Thus, these two traits of competition law – non-sector-specific principles and its long-term horizon, create inherent political pressures to limit its adoption and effective implementation.

In addition to the above, adoption of a competition policy/law leads to a change from a centrally controlled market to a decentralised market regime. It involves significant decentralisation of decision making, shrinking size of the public sector dominance, etc. This often means the lessening of powers of the politicians, which they otherwise enjoyed for long years. Thus, the outcome often is that policy makers, even those convinced of the need for policy changes, cannot escape from the influence of politicians at the time of taking the decisions.

Existing evidence also suggests that Government's commitment to growth as a political objective, political maturity and overall political climate in a country, (refer Box 8 on page 43) may matter much more. What matters everywhere is sustained political leadership and how the political arrangements underpin the process. In developed countries, the origins of competition law can be traced back to the political concern not for market competition and competitiveness but for the impact on democracy's stability of excessive economic influence. The effectiveness of competition law in developed countries has clearly been dependent on the political climate.

Political will to create a strong competition regime from the outset is crucial for future success, as an agency will be able to balance the demands of various interest groups, among other challenges. Unfortunately, in most cases, the politicians and bureaucrats responsible for the state administration may try to further their interests by creating a weak competition agency over which they can continue to exert control.

Box 8: Mauritius Competition Law – Political Will

Lack of political will and private sector influence are the main causes for the considerable delay in the implementation of Competition legislation in Mauritius. As far back as 2001, the Government announced its decision to adopt a Competition law. Government took two years to present the law in Parliament.

It became clear that this decision aimed at affirming on international forums that Mauritius was in line with the exigencies of COMESA. In the meantime numerous changes had been made to the initial bill to satisfy the private sector. The loose definition of a monopoly situation, in the Competition Act 2003, for example, seems to have been suggested by the business community to render the law ineffective.

Source: Sahebdin, M (2007), "Political Economy Constraints in implementing Competition Regimes Experience from Mauritius". http://www.cuts-international.org/Mauritius/doc/Paper-3.doc

The Tanzania competition agency functions under the Ministry of Trade & Industry, its decisions are binding except in merger and acquisition (M&A) cases. In the *Kibo Breweries Vs. Tanzania Breweries Limited* case, the competition agency decision was binding and neither the Minister nor any other senior officer in the Ministry was required to play any role. However, the Permanent Secretary to the Ministry of Industry and Trade was a member of TBL's Board and supported the company in contravening the orders of the competition agency.[22]

An extremely powerful means for combating political influences on decision makers is the facilitation of a strong public opinion in support of competition.

For public pressure to exist, however, two conditions must be met:

- beneficiaries of the competition policy/law, consumers and market participants should be educated about the benefits of competition law enforcement; and
- competition authority, where it already exists plays an important role in educating consumer groups, businessmen and academia alike on the merits of effective competition enforcement.

VIII. Interface Problems

A major interface in many cases is that between sector-specific regulators and competition authority. The case of Tanzania is interesting. The conflicts between the competition authority and Tanzania Communication Commission (TCC) became obvious when the former filed a complaint against the latter for permitting dominance of two cell phone companies (Mobile and Tritel) in the country. The TCC subsequently permitted other cell phone providers (Vodafone) to enter the market in order to dilute concentration therein.

It is well recognised that regulated industries in African or developing economies are either under regulated or over-regulated, but never with the right dose of regulation. More often than not, industries are regulated by numerous institutions, which lead to regulatory complexities, confusion and risk.

The issues of interface arises, when a competition policy/law is implemented to respond to the emerging issues of market regulation, and firms and industries, which traditionally were subject to only sectoral regulation, are faced with regulation from both the competition authority and the sectoral regulators at the same time. The problem is that, historically, in most countries, these two types of regulatory institutions evolved as distinct agencies with relatively limited formal relationships. Therefore, when the interaction among sectoral regulators and competition authorities is ill-defined, the opportunities for turf-issues leading to disputes are multiplied, as seen in Box 9. In Kenya, the case of acquisition of the ABN AMRO Bank by Citibank was handled entirely by the Central Bank of Kenya (CBK) and competition concerns were not a factor in evaluating the case by the CBK. However, market for financial services being segmented, product wise, customer category wise and geographically, it was quite possible that the merger might have raised competition concerns in the relevant market.

Box 9: Overlap between ZCC and SEC
According to the Zambian regulations, when a company wants to sell/transfer its stocks in another company or partially owned subsidiary it must make a mandatory offer to minority shareholders to enable them to acquire these shares. The Securities Exchange Commission (SEC) has often exempted companies from this requirement, even when the ZCC opposed this. This effectively undermines the power of the ZCC.
Source: 'Pulling up our socks', A study of competition regimes of seven developing countries of Africa and Asia under 7Up project, CUTS International

The problems faced in Tanzania and Zambia can arise in other ESA countries as well. Since the sector specific regulators are often responsible for defining, 'entry condition', their actions directly affect the nature of competition after entry has taken place. Consequently, the conflicts between the sector specific regulators and competition authorities are expected to rise.

There are no clear cut solutions to this problem but recognition of the issue is a good starting point. One can then work towards a remedy. The South African example is a very instructive in this regard. The South African Government recognises the fact that the overlapping jurisdictions between competition authorities and regulatory bodies will create problems, as firms will take cases to forums that they believe to be most favourable. Therefore, it is stipulated that the Competition Act, will not apply to 'acts subjected to or authorised by public regulation'. But the firms used this provision to argue in the High Court that the Competition Act did not apply to the agricultural and banking sectors, as there are a series of other acts regulating the practices of these sectors.[23] As a result, the stipulation was removed from the Act.

The South African Competition Act provides for consultations to avoid situations of conflict between competition authority and regulatory agencies. A regulator's forum is established to implement this provision. Under this provision, the Commission is responsible to 'negotiate agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector'.

9
The Way Ahead

The operation of an effective CPL can introduce the principles of fairness and equity in the markets by providing equal opportunities for all the players to flourish. However, it needs to be backed by a strong commitment from the government to ensuring a competition culture in the market and a strong will to ensure protection of interests of all stakeholders. Wider public support and understanding is essential in order to complement the government's efforts to evolve a competitive market. A recent report by OECD agrees that lack of competition culture is the central impediment to the appreciation of the benefits of CPL. It appears that lack of competition culture is due to the self interest of those who expect to loose with the introduction of an effective competition regime, and who have the power to oppose it.

The enforcement of competition not only eliminates anti-competitive practices, but also offers benefits to the community at large. At the global forum on competition, the developing countries reported that, "CPL is not an end in itself. It is a key prerequisite for development of private sector growth and economy in the larger picture".

Competition issues are staging a comeback under the negotiations on Economic Partnership Agreements (EPAs) between the European Union (EU) and African, Caribbean and Pacific (ACP) countries. This requires the ESA countries, which have been negotiating vigorously; to adopt the process of implementation of a competition regime which can be linked to the implementation of the EPAs. Keeping in mind the political and economic developments under the EPAs, the ESA governments/stakeholders need assistance and guidance from the international community, especially from other experienced (developed and developing) countries and institutions that have substantial expertise on competition and regulatory affairs to take them through in the near future. Pro-active engagement of development partners in

this process is obligatory in order to facilitate this process. Undertaking any or all of the following interventions would prove beneficial:

- Technical assistance by a competition authority/organisation possessing the expertise to design interventions in these countries (which would encompass being aware of the socio-economic and political realities in these countries).
- Transferring the knowledge to research institutions/stakeholders on competition research and advocacy.
- Catalysing the reform process through capacity building trainings, information and experience sharing, technical and non-technical assistance, etc. (UNCTAD has been quite active in this regards in the region).
- Assistance and support in the process of evolving regional competition legislations by COMESA, EAC, SADC and SACU.

Some new and innovative initiatives like the 'Competition Assessment Framework' of Department for International Development (DFID), UK; OECD's 'Competition Assessment Toolkit' and the country-specific 'Competition Toolkit' developed by CUTS International are noteworthy new developments that would benefit the countries immensely in developing a 'level playing field' for business to thrive and economies to grow.

Annexure I:
Landmark Changes in National Economic Policy of Project Countries

Countries	Major Changes	Comments
Botswana	The Industrial Development Act 1998	Botswana's industrial development policy is broadly concerned with diversification of the economy. The provisions relating to exclusive manufacturing licenses under the Act are not seen to be compatible with the current international trading environment and, particularly, with Botswana's commitments under the World Trade Organisation (WTO).
	The Companies Act 1995	The Act is the key statute regulating market entry or the establishment of a business in Botswana. A review of the Act commissioned has been completed and a new law is in the offing, proposing drastic changes in the rules, regulations and procedures of incorporation and registration, management and administration of some companies, and shareholding and dealings in shares.
	The Trade and Liquor Act 1993	Regulated entry into businesses for the supply of goods and services, mostly to end-users. In order to promote a vibrant, competitive trading environment,

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Countries	Major Changes	Comments
		provision for setting up a tribunal or a competition regulator is very much felt.
Ethiopia	Change in Regime 1991	As a result of the change in regime Ethiopia abandoned socialist economic system and made transition to a market-oriented economic system.
	Industrial Development Strategy (Adopted since 2001)	Recognised private sector as the engine of growth and industrial development. Among the fundamental principles emphasised of note is coordination between Government and the private sector and Government' commitment to work towards creating enabling environment for the private sector. Identified priority sub-sectors to drive the industrialisation process.
Malawi	The Integrated Trade and Industry Policy (ITIP) 1998	To increase competition in the utilities sector, policy encourages private sector participation in telecommunications and in the provision of electricity. However, provides for companies belonging to the same owners to collude rather compete with each other.
	MPRS 2002	Malawi Poverty Reduction Strategy (MPRS) recognised the private sector as the driving force for growth, with Government, non-governmental organisations (NGOs) and donors as mere facilitators of growth in terms of creating enabling environment.
Mauritius	Industrial Expansion Act, 1993	Schemes were set up under the Development Bank of Mauritius to finance projects that would not meet the

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Countries	Major Changes	Comments
		lending criteria required by commercial banks at subsidised interest rates. Abolished custom duties on raw materials
	SMIDO 1994	The objective of Small and Medium Industries Development Organisation (SMIDO) is to provide direct support to small and medium enterprises in upgrading managerial, technical and marketing skills.
Mozambique	Economic Rehabilitation Programme 1987	It was essentially SAP of the IMF and the World Bank. Later on in 1989, it was renamed as Economic and Social Rehabilitation Programme (ESRP). The objective was to create a market oriented economy and included stabilisation measures, such as fiscal adjustments, monetary restraints and devaluation of the currency as well as price and trade liberalisation.
	Mozambican Industrial Policy, 1997	Provides no instruments that would allow the Government to implement its policies and mobilise cooperation of the private sector.
Namibia	White Paper on Industrial Development of August 1992	Prevented further creation of monopolies through exposing industry to import competition. Limited Government intervention in the market to situations where it is meant to control monopolies, based on non-economic factors and unfair competition, such as dumping. A new industrial development policy is being worked upon.

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Countries	Major Changes	Comments
	Export Processing Zone (EPZ) Act 1995	The Act provided for setting up EPZs for encouraging export of manufactured products. But due to regional restrictions on importation of products produced under the EPZ regime, the picture on the ground has been disappointing
	National Policy and Programme on Small Business Development 1997	The main objectives were promoting employment, reducing poverty and inequality, increasing growth and economic diversity. Another important objective was to help historically disadvantaged persons.
Uganda	SAP 1981	The SAP failed to revive the economy amidst civil war leading to collapse of the programme and military coup.
	End of Civil War 1986	New Government established over a platform of national unity and broad-based economic reform.
	ERP 1987	Economic Recovery Programme (ERP) - standard IMF/World Bank SAP with financial assistance from the IMF, the World Bank and donors.
Kenya	The Price Control Act, 1956	Protection of the consumer base was maintained through a price control regime.
	The Monopolies and Price Control Act, 1988	An Act was passed to promote competition and prevent monopolies. The Monopolies and Prices Commission was created.

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Countries	Major Changes	Comments
	The Kenya Communications Act, 1998	The Act established three main organs within the communication sub-sector, including Communications Commission of Kenya (CCK), Telkom Kenya Ltd and Postal Corporation of Kenya.
	The Electric Power Act, 1997	The Electricity Regulatory Board (ERB) was established under the Act for regulation of Power Sector.
South Africa	The Competition Act, 1998	The Act was passed to address prohibited practices (horizontal and vertical restrictive practices) and mergers. The Competition Commission, the Competition Tribunal and the Competition Appeal Court were established under the Act.
	The Consumer Affairs (Unfair Business Practices) Act, 1988	The Act was passed to protect consumers by prohibiting and controlling certain business practices.
	The Telecommunications Act, 1996	The Act provided the regulatory framework for the telecommunications industry.
	The Independent Communications Authority Act of South Africa, 2000	The Act provided the regulatory framework for communications sector.
	The Electricity Act, 1987	The Act established the regulatory framework for the Electricity sector.

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Countries	Major Changes	Comments
Tanzania	The Regulation of Prices Act, 1973	A price-control system was introduced by the regulation.
	The Fair Trade Practices Act, 1994	The Act covered restrictive business practices, misuse of market power, control of monopolies and concentration of economic power through M&As.
	The Fair Competition Act, 2003	The Act was passed to promote and protect competition in markets and prevent unfair and misleading market conduct. The Fair Competition Commission (FCC) was created under the Act.
Zambia	The Competition and Fair Trading Act, 1994	The Act was passed to prevent anti-competitive trade practices, regulate monopolies and strengthen the efficiency of production and distribution of goods and services. The ZCC was created by the Act.
	The Energy Regulation Act, 1995	The Act provided the regulatory framework for the Energy Sector.

Source: "From the Bottom Up", CUTS 7Up3 project Research Report (http://www.cuts-ccier.org/7up3/pdf/SynthesisReport.pdf and internet

Annexure II:
Linkages between Sector Regulator and Competition Agency in Select ESA Countries

Countries	Situation
Botswana	The Botswana Parliament passed the National Competition Policy for Botswana in August 2005. In order to ensure that the Competition Policy is properly implemented, the Botswana Government plans to formulate a Competition Act, through which competition in the market place will be regulated. The Botswana Government recognises the important role and advantages of having sector regulators such as the Bank of Botswana (BoB) and the Botswana Telecommunications Authority (BTA). However, it is planned that all these will fall under the ambit of the future Competition Law. The Government also intends to harmonise all legislation related to the Competition Policy in order to ensure consistency between them. In sectors characterised by economic/ commercial activities, complex science, engineering and technology or having natural monopoly or other special elements, the future Competition Authority and Sector Specific Regulators will collaborate and complement each other.
Ethiopia	Ethiopia's Trade Practices Proclamation No. 239/2003 was legislated with the purpose of regulating trade practices in the country.

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Countries	Situation
	The proclamation is silent about whether unfair or restrictive trade practices (RTPs) in regulated sectors like telecommunications and energy will come under its jurisdiction. It is said that the sectoral regulatory agencies already established are to protect the market from anti-competitive practices in these specific sectors.
Kenya	The Monopolies and Price Control Act, 1998, is the competition law of the country. The Act had created the Monopolies and Prices Commission to carry out its objectives. As the SOEs have been privatised in Kenya, the Government created regulatory authorities for those industries, without allowing for an interface with the competition authority. The Kenya Communications Act (KCA), 1998, the Electric Power Act, 1997, are some of the major Acts relating to sectoral regulation. Sectoral regulators had determined issues of competition law, as they emerged from their sectors, without recourse to the competition authority. There is possibility of the amendment of the competition law in future which will take care of such issues and other concerns like infusion of competition into public procurement, review of current exemption clauses, etc.
Malawi	The CFTA, which was assented to by the President on December 30, 1998, and gazetted on December 31, 1998, started being developed immediately after the Cabinet approval of the Malawi Competition Policy in 1997. The Act has overriding power over all other sectoral regulations if the latter happens to restrict economic freedom in the market.
Mauritius	According to Section 66, in the Competition Act 2007 of Mauritius, the Competition Commission and sector regulators shall enter into memorandum of understanding governing the effective exercise of their respective

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Countries	Situation
	responsibilities & establishing mechanisms for practical co-operation in the exercise of their responsibilities, including the case of sector specific expertise of regulators in respect of investigation under the Act.
Mozambique	Mozambique does not have a competition law at the moment, though the Ministry of Trade and Industry in Mozambique has started preparing the ground for a competition policy to be adopted very soon, and has plans to subsequently draft a competition law for the country. In such a context, competition issues in regulated sectors are naturally being taken care of by the sectoral regulators. For example, the Telecommunications Law 1992 of Mozambique has "promotion of fair competition and consumer protection" as one of the objectives and has some substantive provisions, as well. Hence, the issue of interface is likely to arise once a competition law comes into force. The nature of interface problem will depend the way the forthcoming competition law is drafted.
Namibia	The Competition Act made provisions for the establishment of the Namibian Competition Commission (NaCC) to implement the Act. With regard to the interface problem between the competition agency (which is yet to be fully operational) and the existing sectoral regulators, the Act has binding effects on the State, when the State engages in trade or business for production, supply or distribution of goods or provision of any service, though the State is not subject to any provision relating to criminal liability. The Act also applies to activities of statutory bodies, except in cases when such activities are authorised by any other law.
South Africa	The Competition Act, 1998, is the Competition Law of the country. The Act deals with two main areas, prohibited practices and mergers. The Competition Act had set up three

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Countries	Situation
	institution: the Competition Commission, the Competition Tribunal and the Competition Appeal Court, for fulfillment of its objectives. A number of sectoral regulators are created by the Independent Communications Authority Act, 2000, South African Civil Aviation Authority Act, 1998, and other Acts, which take care about sectoral regulation in the country. The Competition Act may be amended in future to strengthen the Competition Authority.
Tanzania	The Fair Competition Act, 2003, is the Competition Law of the country. It replaced the Fair Trade Practices Act of 1994. Under the Act, the Fair Trade Commission and a Tribunal are supposed to hear complaints concerning anti-competitive activities and UTPs by companies or group of companies. The Energy and Water Utilities Regulated Authority Act, 2001, the Surface and Maritime Transport Regulatory Authority Act, 2001, the Civil Aviation Regulatory Authority Act, 2003, the Communications Regulatory Authority Act, 2003, provides the regulatory framework in the respective sectors.
Uganda	Uganda neither has a law nor a policy on competition. In Uganda, regulatory reform as well as process of establishment of a framework on competition regulation, has induced important debates about the degree to which sectors being opened up to greater competition should also be subject to general competition laws enforced by the same competition agency responsible for protecting competition in other sectors of the economy. However, the draft competition law in Uganda gives the competition agency the ultimate authority with regard to competition regulation. It provides that: "where in the course of a proceeding before any statutory authority entrusted with the responsibility of regulating any utility or service, an issue is raised by any party that any decision that the statutory authority has taken or proposes to take, is or would be, as the case may be, contrary to the provisions of this

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Countries	Situation
	Act, then the statutory authority shall make a reference to the Commission".
Zambia	The CFTA, 1994, is the competition law of the country. The law established the ZCC which monitors, controls and prohibits acts which are likely to adversely affect competition and fair-trading in Zambia. The Electricity Act, the Dairy and Dairy Products Act, the Energy Regulation Act, are the major Acts which provide the regulatory framework in the respective sectors. The competition law may undergo amendment in the future to establish clear relationship between the ZCC and sectoral regulators both at policy and operational levels and to address the concerns of the small-scale sector.

References

Bastos, F. and John, N. (June 2004), "Productivity and the Investment Climate: What Matters Most?" Working Paper 3335, World Bank, Washington, D.C.

CUTS (2002), "Competition Law & Policy – A Tool for Development in Tanzania"

CUTS International (2003), "Pulling up our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia", under the 7Up Project *http://www.cuts-ccier.org/*

CUTS International (2007), "From the Bottom Up – Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa", Jaipur, India

Chakravarthy, S. (2007), "Economic Reforms and Competition Policy and Law in Developing Countries", *http://www.cuts-international.org/Mauritius/doc/Paper-1.doc*

Frederic, J. (2003), "Foreword - Pulling up our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7Up Project", *http://www.cuts-ccier.org/*

Khemani, R. and Dutz, M. (2007), "Competition Law & Policy – Challenges in South Asia", The World Bank, USA

Levenstein, M.C. and Suslow, V.Y. (2001), "Private International Cartels and their Effects on Developing Countries", Background paper for the World Bank's *World Development Report 2001*

Mabuza, C. and Plessis, L. (2005), "Free Trade and Competition Policy in Africa", Competition Commission of South Africa, South Africa.

OECD (2004). "Accelerating Pro-Poor Growth through Support for Private Sector Development", OECD, Paris

Phillips, M. (2007), "Tackling the Tyranny of Vested Interests: Competition Policy as Political Governance", DFID, UK

Planning Commission of India (2007), "Report of the Working Group on Competition Policy", Government of India.

Sahebdin, M. (2007), "Political Economy Constraints in implementing Competition Regimes Experience from Mauritius",
http://www.cuts-international.org/Mauritius/doc/Paper-3.doc

Sengupta, R. and Dubey, C. (March 2008), "Competition Policy Enforcement Experiences from Developing Countries and Implications for Investment", Paper presented on behalf of CUTS International at OECD Global Forum on International Investment VII.

Tesfayohannes, M. (2006), "Elements of SMEs Policy Implementation in Sub-Sahara Africa: The Case of Botswana", University of Waterloo.

Endnotes

1 CUTS 7Up1 project (http://www.cuts-ccier.org/7Up1-overview.htm)
2 CUTS 7Up3 project (www.cuts-international.org/7up3.htm)
3 CUTS 7Up4 project (http://www.cuts-ccier.org/7up4/En/index.htm)
4 See Bastos, F. and John, N. (June 2004), *"Productivity and the Investment Climate: What Matters Most?*" Working Paper 3335, World Bank, Washington, D.C, available at *https://rru.worldbank.org/PapersLinks/Open.aspx?id=3349*
5 Frederic, J. (2003) "Foreword - Pulling up our Socks – A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project" *(http://www.cuts-ccier.org/)*
6 *Ibid*
7 Planning Commission of India (2007), "Report of the Working Group on Competition Policy", Government of India.
8 Sengupta, R. and Dube, C. (2008), 'Competition policy enforcement experiences from developing countries and implications for investment' presented on behalf of CUTS at Organisation for Economic Cooperation and Development (OECD) Global Forum on International Investment VII, March 2008, Paris (France)
9 Levenstein, M.C. and Suslow, V.Y. (2001), Private International Cartels and their Effects on Developing Countries, Background paper for the World Bank's *World Development Report 2001*.
10 Available at *http://www.oecd.org/dataoecd/43/63/36427804.pdf*
11 Tesfayohannes, M. (2006),"Elements of SMEs Policy Implementation in Sub-Sahara Africa: The Case of Botswana", University of Waterloo
12 OECD (2004). Accelerating Pro-Poor Growth through Support for Private Sector Development, OECD, Paris
13 Phillips, M. (2007) "Tackling the Tyranny of Vested Interests: Competition Policy as Political Governance", DFID, UK
14 Supra note 8
15 Sahebdin, M. (2007), "Political Economy Constraints in implementing Competition Regimes Experience from Mauritius". Available at *http://www.cuts-international.org/Mauritius/doc/Paper-3.doc*

16 Mabuza, C. and Plessis, L. (2005), "Free Trade and Competition Policy in Africa", Competition Commission of South Africa

17 *www.allafrica.com*, July 12, 2006

18 Supra Note 5

19 *Ibid*

20 Chakravarthy, S. (2007) "Economic Reforms and Competition Policy and Law in Developing Countries". Available at *http://www.cuts-international.org/Mauritius/doc/Paper-1.doc*

21 Supra Note 5

22 CUTS (2002), "Competition Law & Policy – A Tool for Development in Tanzania".

23 Interestingly, in the case of a proposed merger between two of the four national retail banks, the courts ruled that jurisdiction lay with the Minster of Finance. The Competition Tribunal therefore could not decide on the merger. The Competition Commission prepared a report and submitted to the MOF opposing the merger on grounds of likely reduction in competition. The Minister followed the Commission's advice and disallowed the merger.

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