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Taking the Right Steps *Competition Administration in Eastern & Southern Africa*

Introduction

Over the period between 80s and 90s, countries in Eastern & Southern Africa (ESA) made considerable progress towards evolving market-oriented economies, moving away from their erstwhile centralised regimes. However, the need for a comprehensive regulatory framework accompanying this process, failed to catch the attention of the government planners. Absence of regulatory oversight has adversely affected the capacity in many of these countries to reap benefits from the reform process.

Across the globe a host of developing and least developed economies have awakened to the reality that an effective competition law constitutes an indispensable element of a functional regulatory regime, which contributes to economic development and growth. Many ESA countries embraced competition laws in the later half of the 90s – as a means to usher and sustain economic development and industrial growth. While, one motivation behind such steps has been to attract private sector participation (both domestic and foreign investment) in the economy, the others included obligations under international and bilateral commitments.

In order to achieve the targeted objectives and make the reforms process beneficial to the economy, competition laws in developing countries need to be well-adapted to their national development circumstances. Lawmakers need to take cognisance of the local economic, social, political and cultural dimensions, while developing national competition legislations. By no means these should be a replicate of a developed-country style law.

Further, the effectiveness of a competition law can be enhanced considerably if it is supported, promoted and enforced by efficient institutions. Institutions that have clarity over their role and mandate, possess inherent mechanisms for co-ordination with other institutions, are well equipped and endowed with sufficient resources.

Public acceptance of the need and benefits from a competitive environment is primordial in ensuring stakeholders' participation and contribution into the process of implementing the law. One way of achieving this is through a long-term, multi-stakeholder programme aimed at public education and capacity development on competition policy and law issues.¹

CUTS 7Up3 project

CUTS undertook research on the state of competition regimes in seven countries of the region under a project entitled 7Up3 (*Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa*)². It was anticipated that the outcomes from the research on competition (something that had not been done before in a systematic fashion in the project countries) would inform stakeholders within the government, civil society and business community about the state of competition in these countries, and help them in assuming appropriate roles in contributing to the process of evolution of competitive environments. Further, the research findings would also educate 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 competition issues pertaining to these countries, such that these authorities are able to create synergies between the process of implementation of the regional competition legislations and the respective national laws. Moreover, this information would also be useful for sensitising the international donor community of the need to channel support for promoting healthy competition culture in the region as a requisite to achieving economic growth and consumer welfare.

This briefing paper summarises the research findings of the 7Up3 project on the state of competition in ESA, and has been developed to help the project countries take the right steps forward in implementing their competition regimes.

Political Economy Context

Odds & Evens

The seven ESA project countries³ exhibit a number of dissimilarities in addition to having certain commonalities between them.

Among the seven countries, four are designated as least developed countries (LDCs), while three are developing. It includes the third largest (populated) country of Africa – Ethiopia – as well as one of the smallest – Mauritius.

Three of the countries, Ethiopia, Malawi, and Uganda, have had a history of command and control type one-party rule; while one country, Mozambique had a history of protracted civil war and large-scale destruction. Two of them, Botswana and Mauritius have shown vibrant democracy and political stability, and are among the best-governed countries in Africa, since their independence in the 1960s. They also happen to be the richest countries in the continent. All countries have a history of significant state participation and intervention in economic affairs.

Though all are developing countries, there are wide variations in terms of per capita income among them. While Botswana, Namibia and Mauritius have per capita income of more than US\$2000, the remaining others have less than US\$300.

As regard economic structure, the divergence is quite stark, also. Botswana and Mauritius have, as their share of agriculture in GDP only two and six percent, respectively. In Mauritius, the service sector accounts for as high as 64 percent of the GDP, while in Botswana it is 54 percent. At the other extreme is Ethiopia where agriculture accounts for 46 percent of the GDP and the industry share is merely 10 percent.

Regional and International Commitments

Except Ethiopia, all 7Up3 countries are founding members of the World Trade Organisation (WTO). Three of them, Botswana, Malawi and Mauritius have been members of WTO's predecessor General Agreement on Tariffs and Trade (GATT) for decades. Ethiopia is an observer of the WTO.

All countries are also parties to the Africa, Caribbean and the Pacific (ACP) arrangement that started in 1975, when the first 'Lomé Convention' was signed.

Four project countries, Ethiopia, Malawi, Mauritius, and Uganda, are members of the COMESA. Five countries of the group – Botswana, Malawi, Mauritius, Mozambique, and Namibia – are members of another regional group, the SADC. Two of these, Botswana and Namibia are also members of the SACU. Uganda is party to another regional grouping, the EAC.

Botswana is the only country of the group that has a bilateral Free Trade Agreement (FTA) with another country in the region – Zimbabwe. Thus, Botswana seems to be the most open country in the group and Ethiopia, arguably, the least open of the lot.

Competition Policy and Law

National Legislations

The importance of competition in the market is recognised in all the 7Up3 countries. Malawi and later Botswana have adopted a stated competition policy. The other countries save Botswana, Mozambique and Uganda have adopted a competition law. Botswana is discussing a 'Draft' competition bill. Uganda has drafted a competition bill that is under review in the country, while Mozambique has developed a draft competition policy and has embarked on the process to develop a law.

As regards consumer protection, it is well recognised now that promoting competition in the market needs to be complemented by protecting interests of consumers – either by having both these elements integrated into a hybrid act, or by having them as separate legislations to be implemented by separate agencies.

A brief overview of the competition and the consumer protection laws in the 7Up3 project countries is presented in Table 1.

Regional Advances on Competition

COMESA – Article 55 of the COMESA Treaty is dedicated to "Competition" and makes it imperative for member states to prohibit practices that retard free and liberalised trade; and prevent, restrict or distort competition in the common market. The treaty required the Council (of Ministers of the Common Market) to frame regulations to regulate competition in Member States. This regulation (COMESA Competition Policy and Regulation) was adopted by the Council in 2004. COMESA has been actively working towards the establishment of the COMESA Competition Commission to implement these regulations. The COMESA Board of Commissioners has been operational since 2007. For specific sector regulation, competition rules have been adopted by the Council of Ministers to regulate competition in those sectors. The first sector covered so far is air transport.

Current members of the bloc include Burundi, Comoros, Democratic Republic of Congo (DR Congo), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.⁴

EAC – EAC comprising Burundi, Kenya, Rwanda, Tanzania and Uganda as members is also mandated to develop a regional competition policy, and harmonise national competition laws in the Member States. EAC has adopted the regional competition bill in September 2006.

SADC – The SADC Secretariat is developing a regional cooperation framework on competition and consumer protection policy for the Member States.

Member States comprise Angola, Botswana, D R Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe,

For SADC, the adoption and effective enforcement of competition and consumer laws by the member states is an integral component of the implementation of the integration agenda leading to the realisation of the Free Trade Area by 2008, and Customs Union by 2010.

SACU – SACU has a mandate to have a competition arrangement within its framework. Presently, SACU is developing a cooperation mechanism on competition policy with assistance from the UNCTAD.

Botswana, Lesotho, Namibia, South Africa and Swaziland are members of the SACU.

Table 1: Competition Policy, Competition Law and Consumer Law at a glance

Country	Competition Policy and Law	Consumer Protection Law
Botswana	<ul style="list-style-type: none"> Competition policy adopted in 2005. Discussing a draft Competition Bill, developed in 2007. 	<ul style="list-style-type: none"> Has a Consumer Protection Law since 1998, but its implementation has not been taken seriously.
Ethiopia	<ul style="list-style-type: none"> The Government issued a <i>Trade Practice Proclamation</i> in 2003 to promote competition in the market and regulate trade practices. Trade Practice Investigation Commission (TPIC) has been active as a competition agency in the country. 	<ul style="list-style-type: none"> Ethiopia does not have a Consumer Protection Law.
Malawi	<ul style="list-style-type: none"> Malawi embraced a Competition Policy in 1997. A Competition and Fair Trading Act was adopted in 1998, and the Malawi Competition and Fair Trade Commission has been active since 2003. 	<ul style="list-style-type: none"> Consumer Protection Act 2003 contains provisions for regulating the fair business practices, and provides for the establishment of Consumer Protection Council. Not much progress with this has happened since.
Mauritius	<ul style="list-style-type: none"> The National Assembly passed the Competition Act in 2007, with the objective to safeguard and promote competition in Mauritius. 	<ul style="list-style-type: none"> The Consumer Protection (Price & Supplies Control) Act was adopted in 1998.
Mozambique	<ul style="list-style-type: none"> The Ministry of Trade and Industry has developed a draft Competition Policy and embarked on the process to have an act soon. 	<ul style="list-style-type: none"> Mozambique has no Consumer Protection Law. It is neither known if the Government is considering one in near future, nor it is known if the competition law being considered would have consumer protection provisions as well.
Namibia	<ul style="list-style-type: none"> The <i>Regulation of Monopolistic Conditions Amendment Act</i>, 1958 regulated competition issues in Namibia. In 2003 the Competition Act was introduced in the country. The Namibia Competition Commission has been established under the provisions of this Act, and is presently preparing the ground for initiating its functions. 	<ul style="list-style-type: none"> Steps have been initiated by the Ministry of Trade and Industry to draft a Consumer Protection Act.
Uganda	<ul style="list-style-type: none"> A Competition Bill was drafted in 2004, and has undergone certain refinements, though the exact refinements are not known. 	<ul style="list-style-type: none"> Uganda is also considering a Consumer Protection Law and a draft is ready since 2000.

African Union (AU) Commission – The Commission has initiated a consultative process on ‘Harmonisation of Business Laws in Africa’ in 2006. Competition laws and consumer protection laws have been identified as priority areas in the harmonisation exercise.

Some countries have multiple memberships, i.e., are members of more than one regional bloc. For example, Zambia and Zimbabwe are both members of COMESA as well as SADC. So, a competition case that involves these two countries could either be resolved by the COMESA or the SADC regional competition legislations. Clear-cut guidelines or mechanisms should therefore be developed under the regional competition legislations of how to cooperate and resolve such cases.

Market and Competition

Markets in all the seven countries are relatively small in size. Even in the biggest of them, i.e. Ethiopia, the purchasing power parity (PPP) adjusted GDP, is less than US\$50bn, which is less than one fifth that of Bangladesh and one-sixtieth of India. The smallest market in the group is that of Malawi, which is one-eighth of the market size of Ethiopia. This makes introducing and maintaining competition difficult, as the small size of the markets cannot sustain too many firms. Moreover, even today, a large part of the GDP involving a large section of the population comes from the subsistence sector, especially in LDCs like Ethiopia, Malawi, Mozambique and Uganda. This means the size of the markets in these countries are

Table 2: Products with High Market Concentration*

Country	Sectors
Botswana	<i>Long distance transport, hotel & restaurant, agriculture. A little less in manufacturing, finance</i>
Ethiopia	<i>Cement, sugar, mineral water, plastic products, soaps, soft drinks</i>
Malawi	<i>Manufacturing (agro-based – tobacco, cotton), finance</i>
Mauritius	<i>Utilities, beer, tobacco, pharma products, cement & petro products (import and distribution), banking, insurance</i>
Mozambique	<i>Sugar, tobacco, soft drinks, beer, cement, banking, insurance</i>
Namibia	<i>Banking</i>
Uganda	<i>Utilities, finance, manufacturing (food processing)</i>

***Note:** Based on information available during the project research activities undertaken in the project countries. There may be several other products with high market concentration

even smaller than their size of GDP or population would indicate. In addition, the entire economy of these countries does not function as an integrated market due to poor internal transportation and communication infrastructure.

The traditional state ownership of many firms and industries, notwithstanding the mass privatisation wave recently, has resulted in the existence of a huge state sector, comprising of many dominant enterprises in several key sectors of these economies. There are instances where private companies operate side by side with State-owned Enterprises (SoEs) or *Parastatals* as they are referred to. But the latter draw undue advantage from their ownership status. Among the various dominant SoEs, several are reported to have engaged in anticompetitive practices. For instance, the Botswana Meat Commission, which holds monopoly over exportation of beef and beef products, is reported to be underpaying the farmers⁵. Similar allegations also exist in Mauritius against the State Trading Corporation, Agricultural Marketing Board, and Mauritius Meat Authority.⁶

In none of these countries, except, to some extent to Botswana, can one get data publicly available on market shares and structures. Some information is available only about the number of firms in an industry at the aggregated level. However, even this number is often misleading.

Arguably, in small economies, competition can be enhanced and maintained by allowing free imports. But even high import duty can be competition-neutral, particularly in industries where there is not enough domestic manufacturing capacity and demand is met largely through imports. Thus, the trade orientation is considerably high in these countries as compared to countries like India (30 percent) and US (20 percent). A very high level of trade orientation in Mauritius has also to be understood in context of the country increasing its export of manufactured goods substantially with high import content and low value-addition in recent years. However, in some industries, competition concerns may arise where there is significant domestic capacity or industry and where goods and services are not easily tradable. Botswana, Ethiopia, Malawi and Uganda are particularly vulnerable in this regard, as all are landlocked. This is often observed in bulky goods like cement where high transportation costs make import uncompetitive.

As regards market concentration, there are some products like tobacco, soft drinks, beer, cement and financial services, where market tends to be concentrated in almost all countries.

Barriers to Competition

Promoting and maintaining competition is not an easy task in developing countries, particularly in those of small size. The market structure, though often capable of giving a reflection as to the degree of competition, may not be the best indicator while formulating or implementing competition policy in small developing countries. These countries, thus, may rely more on notion of contestability rather than competition within the market *per se* in the structural sense. The contestable market theory⁷ argues that what is important is not actual but potential competition. Hence, the mere threat of entry by new rivals ensures that the firm or firms will earn normal profits and deliver allocative and productive efficiency. This also means that existing firms act competitively.

Unfortunately, policy-induced entry barriers are quite high in the 7Up3 countries, which are hardly good to promote market contestability. However, bringing down the trade barriers is not easy⁸, because for many countries, custom duty is a major source of revenue and developing countries might want to protect their infant and emerging industries.

Due to low level of awareness and reporting on competition cases in 7Up3 countries, it is difficult to assess if market contestability is high enough or to get a fair picture of existing entry barriers, especially those erected by existing market players.

Nevertheless, several policy or practice-induced barriers can be observed in these countries. In Ethiopia, for example, there are several industries reserved for the *Parastatals*. Despite significant progress made in terms of liberalising the business environment, several approvals are required to start a new business, which often take substantial time and costs, acting as major obstacles for a new business operator to enter into the market. In Malawi and Uganda, for example, 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 all these countries, except Ethiopia, the cost

involved is more than in the US even in absolute dollar terms. In Botswana and Mozambique, the licensing requirements are restrictive and the process involves significant discretion and arbitrariness. The labour policy, particularly tripartite wage negotiation mechanism followed in Mauritius is considered to be investor unfriendly and work as a significant entry barrier.

Evolution of Regulatory Regimes

Regulatory reforms in the 7Up3 countries happened as an indispensable part of market reforms and liberalisation process. These reforms happened rather late and did not follow any specific pattern, strategy or programme due to many reasons, such as 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 reforms were pushed as being part of the Structural Adjustment Programme (SAP).

Sectoral Regulation and Competition

Background

In rapidly growing economies, regulation provides a stable environment for firms by instilling predictability and certainty. Regulatory regimes that encourage competition and innovation are particularly necessary in promoting industrial competitiveness, employment and economic growth. More importantly, it helps to address market failures, which may prevail when market forces are left to themselves, especially in certain sectors such as: telecommunications, energy (electricity, oil and gas), transport (seaports, civil aviation, roads and highways, railways), water, and financial sector (banking, capital market, insurance), etc. Hence, it is appropriate to ensure

optimal degree of competition that involve some degree of rivalry to reduce inefficiency in the use of resources at the micro level but not too much competition that would reduce the propensity to invest.

Regulatory Autonomy

The adoption of sectoral regulations, as well as the establishment of sectoral regulatory agencies is primordial, but their effectiveness depends on the operational performance of the regulators.

To be effective, regulators must have clear legal authority and the capacity to carry out their mandate. They should operate within a statutory framework with substantive and procedural requirements that ensure integrity, independence, transparency and accountability.

The essential attributes for an autonomous regulator include those related to:

- Mandate (clearly defined by law and not being subject to ministerial control or discretion);
- Institution (a multimember commission composed of experts should enjoy security of tenure); and
- Budget (access to independent sources of funds).

Of the few regulators that have been recently established in the 7Up3 countries, none of them possess any high degree of autonomy. The case of the telecom regulators in all seven project countries shows that the agencies' independence is highly susceptible to the negative effects of corruptive powers in the government, as well as to the lobbying of big foreign and domestic businesses. They are also carved out of the line ministries, so the legacy of the old mechanism is still very strong.

Interface Issues

The majority of the 7Up3 countries have already adopted a competition law and sectoral regulatory

Table 3: Interface between Competition Authority and Sector Regulators

Botswana	The Draft Competition Bill establishes detailed methodology of cooperation between the sector regulator and the competition authority, whereby the competition authority can use sector-specific experts in investigating sector specific cases, in cooperation with the sector regulator.
Ethiopia	It is said in the Trade Practices Proclamation that the sectoral regulatory agencies already established are to protect the market from anticompetitive practices in these specific sectors.
Malawi	The Competition and Fair Trading Act has overriding power over all other sectoral regulations if the latter happens to restrict economic freedom in the market.
Mauritius	The Commission and regulators shall enter into a memorandum of understanding governing the effective exercise of their respective responsibilities and establishing mechanisms for practical co-operation in the exercise of those responsibilities, including the use of the sector specific expertise of the regulators in respect of investigations under this Act.
Mozambique	Competition issues in regulated sectors are being taken care of by the sectoral regulators owing to inexistence of competition law in the country.
Namibia	The Competition Act applies to all economic activity in Namibia or having effect in Namibia, except: collective bargaining activities or collective agreements, concerted conduct to achieve a non-commercial socio-economic objective, and in relation of goods, which Minister of Trade and Industry declares by notice in the Government Gazette to be exempt from this Act.
Uganda	Debates take place about the degree to which sectors being opened up to greater competition should also be subject to general competition laws enforced by the competition agency responsible for protecting competition in other sectors of economy. The Draft Competition Law gives the competition agency the ultimate authority with regard to competition regulation.

provisions as well. However, no clear delineation has been made between the responsibility of the sectoral regulators and the competition authorities.

Regulated industries in these countries are often under-regulated or over-regulated. They are also overseen by multitude of institutions, which tends to increase regulatory complexity, confusion and risk. Historically, the two types of regulatory institutions, sector regulators and competition authority, evolved as distinct agencies with relatively limited relationship. Therefore the ill-defined interaction multiplies the opportunities for turf-disputes and legal-wrangling. In addition to the strong legacy of the old administrative system, the low degree of autonomy of the regulators and the lack of delineation in power and authority are the main causes leading to this situation.

Some advances have recently been noticed in the region with regards defining the contours of the relationship between the competition authority and sector regulators. As illustrated in Table 3, the draft Competition Bill of Botswana charts out in detail, the elements of cooperation between the competition authority and the sector regulators. This is hinted at, to some extent in the new Mauritius Competition Act as well, though the details are absent. Other governments in the region should elicit lessons for themselves from the experiences of competition authorities that have successfully forged an efficient relationship with sector regulators, within the region and outside.

Policy Considerations

In the absence of a competition policy and law, an effective regulatory framework, i.e. a regulator with functional autonomy is essential, particularly in utility sector. In order to facilitate the development of markets, a right regulatory and political environment is a pre-requisite.

The role of the regulator is to advise line ministry on policy, solve dispute among service providers and ensure that rules and regulations governing the business are followed. The line ministry should not have superseding

powers in matters of appeal against the decisions of the regulators, as this undermined its power and independence. A regulator should comprise expert and competent non-political staff, and to be free from bureaucratic control.

Anticompetitive Practices

Since the 7Up3 countries do not have enough experience of implementing a competition law, the anticompetitive practices discussed in this paper are suspect in nature – in the absence of definitive investigation or adjudication into these cases. The anticompetitive practices discussed are based primarily on media reports and those reported by project partners during their interaction with the stakeholders.

As found in the survey, **collusive behaviour** or **price-fixing** is quite common in all project countries.

Cartels very often work under the sham covers of business or trade association. The Sugar Syndicate in Mauritius is a classic example.

Another anticompetitive practice which is quite common is **collusive tendering**, especially in the market for government contracts for infrastructure construction.

SoEs are monopolist and dominant in several sectors. In fact, the dominance of SoEs need not be avoided in natural monopoly situations as this can be better than dominance of private companies. However, due to absence of an appropriate regulatory framework, the **abuse of dominance** by SoEs is prevalent in several countries.

As most of the 7Up3 countries depend on other countries for a majority of their requirements of manufactured goods, many of the anticompetitive practices may originate from the countries from where such goods are sourced. It is difficult to trace such practices with cross-border dimension and take appropriate action. One advantage for Botswana, Namibia, Malawi and Mozambique is that a huge share of their imports either originates or passes through South Africa, so they do not need to look at too many countries. Many

Table 4: Most Common Anticompetitive Practices in 7Up3 Markets

	Botswana	Ethiopia	Malawi	Mauritius	Mozambique	Namibia	Uganda
Collective price-fixing	+++	+++	+++	+++	+++	+++	+++
Market sharing	+++		++	+++	++	+++	
Bid-rigging	++	+++	+++	++	++	+	+++
Tied selling					+	++	
Resale Price Maintenance			+	++	+	+++	++
Exclusive dealing	+++		++		++	++	
Price Discrimination			++		+++	+++	+++
Predatory pricing	++		+		+	++	
Unreasonably high price							
Refusal to deal					+	+	
Unfair Trade Practices	++	+++			++		+++

Source: Compiled from 7Up3 Research Report, 'From the Bottom Up' at www.cuts-international.org/7up3.htm

Note: (++) Significant

(++) Moderate

(+): Existing but insignificant

Box 1: Motor Manufacturers Suspected of Fixing Vehicle Prices

The South African Competition Commission initiated a formal investigation into the high prices of vehicles. The Commission started with a formal investigation of manufacturers into alleged setting a minimum resale price, collusion and price coordination.

Namibians that keep up-to-date with South African news, that local motor dealers are influenced in the same way by vehicle manufacturers.

Information gathered by the Commission suggest that the manufacturer imposes a minimum resale price on a dealer and by so doing limits a dealer's ability to offer discount.

The findings by a Tribunal of Investigation, appointed by the Commission, will not relate to the companies' activities outside South Africa, as that would be in violation of the South African Competition Act. "However, seeing that the Namibian Competition legislation is in place the findings should serve as a basis for guidance in dealing with practices of this nature in Namibia", said Ntuli. She added that the Commission could also assist Namibia with advice regarding anticompetitive practices. "The Namibian authorities should inform companies that operate in Zambia anticompetitive behaviour is similarly punishable in Namibia under the provision of the Competition Act.

Extracted from 'The Namibia Economist', May 14, 2004 (<http://www.economist.com.na/2004/14may/05-07-19.htm>)

of the anticompetitive practices that occur in South Africa also occur in the neighbouring and closely integrated countries as well. Though such practices may be stopped in South Africa, they may continue unabated in other countries.

Perspectives on Competition

The effectiveness of any law in a country depends on the extent to which the law has actually evolved in the country in tandem with socio-economic and historical developments. The necessary amount of acceptability and ownership of the law among stakeholders is only possible if their expectations are taken into consideration, while drafting law. This was one of the most important findings of the 7Up3 projects that came out with the suggestions of a bottom-up approach to the formulation and enforcement of a competition regime.

The broad groups of stakeholders whose behaviour and interest are important for the competition culture in a country are: consumers, business, government, and the political class. The effectiveness of a regulatory regime in a jurisdiction, thus, depends on the extent to which it succeeds in bringing balance among objectives that these groups pursue.

Stakeholders' Perspective

Level of Awareness

A Survey was carried out in the project countries and it was found that a large percentage of the respondents do not know about competition laws.

Prevalence of Anticompetitive Practices

The majority of respondents felt that the prevalence of anticompetitive practices were moderate to significant across the countries.

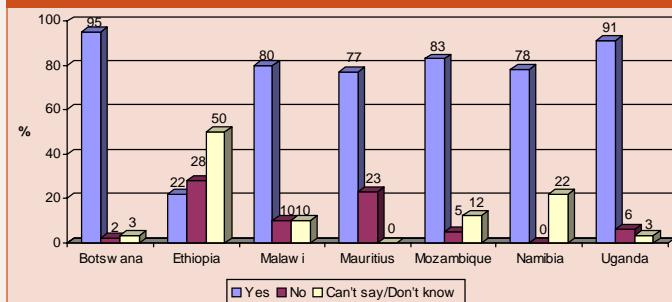
Need for Competition Law

An overwhelming majority of respondents endorsed the need to enact a comprehensive law.

Objective of Competition Law

A majority expressed that the law should focus on both economic efficiency and consumer welfare aspects.

Figure 1: Need for Competition Law



Status of Competition Authority

Most respondents were of the view that the proposed competition authority should be autonomous and independent except for Mozambique where the majority wanted it to be under the relevant ministry.

Conclusion

Governments in many countries are often reluctant to adopt and implement a competition law with the pretext that the business is not prepared for it. However, the survey undertaken as a part of the 7Up3 project indicates a general willingness in a majority of stakeholders to accept national competition legislations and contribute in the implementation process.

Box 2: Key Research Findings

- Prevalence of parastatals having undue advantage from their ownership status, and reports of anticompetitive practices by some of them;
- Existence of policy-induced barriers to competition, including requirements for many approvals to gain permission to commence a business;
- Influence on sector regulations of corruption, and the susceptibility of regulators to lobbying by large enterprises;
- Lack of balance in the nature of regulation in many instances;
- Role of trade associations in fostering the operation of cartels; and
- Apparent frequency of collective price fixing and of bid rigging.

7Up3 countries that have adopted the law for some years now (Ethiopia, Malawi) have only just started to show some urgency in implementing it. Namibia, the other country with a competition law (since 2003) is yet to start implementing the law, and is engaged with having the commission set into order. All of these countries would require support from the international competition community (donors working on competition issues, organisations specialising on competition policy and law issues and experts/scholars on the subject) in order to facilitate effective implementation of the competition acts. It has been noticed that Mauritius has adopted a competition law within the life period of this project. Therefore, the need for capacity building of the competition agency is also applicable for them.

Given the fact that resources allocated to developing country competition agencies is not huge (given the resource constraints the governments face), it would be irrational to assume that the resource that the governments of the above countries would allocate to them would be sufficient enough to promote a healthy competition culture through the activities of the competition commission, only. This, therefore, brings forth the need to strengthen the capacity of civil society to complement the government in its efforts to promote competition and curb anticompetitive practices.

The state of the existing regulatory framework, not only of competition, but also for sectoral laws, in most 7Up3 countries is quite inadequate. Many sectors that require regulation urgently remain unregulated or under-regulated or inappropriately regulated. In many cases, in spite of having created (or claimed to have created)

autonomous regulatory institutions, the line ministry continues to intervene in regulatory affairs. This affects functions of the regulatory institutions and creates conflict of interests.

Despite pursuing market-oriented economic policy reforms, for over a decade, the markets are far from being developed in ESA. This calls for a critical review of regulation and competition policies and a thorough assessment of their impact on competitiveness, economic development, growth and consumer welfare.

In sum, all countries need to adapt a holistic approach to implementing competition law, consumer protection law and sectoral regulatory laws through a harmonious process. The challenge lies in making the markets more competitive and in creating independent effective regulatory institutions that address market failures, fairness and distributional objectives. The response to such challenges lies, to a great extent, in an adequate capacity building of the regulators, policy makers and other stakeholders.

Box 3: Issues for Further Research

- Business Welfare aspect of Competition Policy and Law
- Impact of Privatisation on Competition
- Competition Policy and Law and the Impact on the Poor
- Political Will and Competition Administration
- Competition as means of regulating TNC behaviour
- Sectoral Studies on Competition (e.g. in Agriculture, Public Health, Informal Sector, etc.)
- Linkages between Competition and Consumer Protection

Endnotes

- 1 This understanding lies at the heart of CUTS mission to promote a healthy competition culture globally, which the organisation has been pursuing through a research-based advocacy and capacity building methodology. This methodology entails involvement of multiple stakeholders through a participatory process to understand and promote the need for a functional national competition regime. Recognised by the international competition fraternity as the *7Up Model*, this approach has been effective in raising the ante on competition policy and law issues at the national level in various developing and least developed countries of Asia and Africa (extracted from CUTS work on competition policy and law issues, found at www.cuts-ccier.org).
- 2 CUTS 7Up3 project (www.cuts-international.org/7up3.htm)
- 3 Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia and Uganda.
- 4 COMESA, 2007, "COMESA In Brief", Common Market for Eastern and Southern Africa, Lusaka, pp. 1-6.
- 5 This was reported in the 'Daily News' newspaper of Botswana, on 10.03.05.
- 6 CUTS, 2007, 'From the Bottom Up', Jaipur, pp 111-112.
- 7 Developed by American economist William J Baumol, Contestable Markets Theory defines Contestability as the effectiveness of barriers to entry and exit in a market. Perfect competition, with complete freedom of movement, is perfectly contestable. By removing or reducing barriers, competition will be enhanced. (Source: W J Baumol, J C Panzar and R D Willig, *Contestable Markets and the Theory of Industry Structure*, New York, 1982).
- 8 Though considerable progress has been made as a part of the Economic Partnership Agreements (EPAs), which would bring down duties with effect from January 01, 2008.

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