FOREWORD

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

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

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

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

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

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

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

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

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

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

Munakupya Hantuba March 7th 2002
President - Economics Association of Zambia

PREFACE

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

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

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

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

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

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

Competition law and policy has an integral role to play in the promotion of healthy competition in the economy, thereby advancing economic efficiency and consumer welfare. This will not be achieved without sustained public awareness programmes. In this regard, the report also examines the attempts which have so far been made to disseminate information on the rights of consumers.

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

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

February 2002
Lusaka

Mwamba Makasa
Coordinator CUTS-ARC

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LIST OF ABBREVIATIONS

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

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7 –UP COUNTRY PAPER ON THE COMPETITION REGIME IN ZAMBIA

CHAPTER ONE

INTRODUCTION

1.1 Context of Competition Policy in Zambia

Competition policy refers to measures and instruments used by government to determine the conditions of competition prevailing in the markets[1]. The colonial government used discriminatory measures by offering African farmers prices lower than those enjoyed by European settlers. For ten years after independence, the government unified markets, abolished racial segregation and encouraged free markets. In 1974 the government replaced free prices with price controls, ostensibly to encourage equity. Since this proved to result in the promotion of production activities that did not improve the country's comparative advantage, the government decided to return to a price system that was determined by free market forces. Market liberalisation, privatisation and public sector restructuring became the hallmarks of the national context of competition policy in Zambia.

1.2 The Perceived Role of Competition Policy in the Country

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

1.3 Summary of the Major Arguments of the Paper

Competition policy is all those measures and policies used to regulate enterprise behaviour and industry structure[2]. In the context of this country, competition policy augments economic restructuring through privatisation, market liberalisation and consumer protection policies. Competition law is a regulatory mechanism for the realisation of market liberalisation, where the market is regulated by freely determined prices rather than by commands, as it was in the centralised and planned economy that was attempted in the second republic. Competition law sets the rules for fair trade, enterprise development and the promotion and improvement of efficiency of production. It is for this reason that competition policy and law was established. It aimed to provide an enabling framework for private sector development by seeking to increase productivity and growth of the industrial and commercial sectors by implementing decisions that help to level the market and encourage entrepreneurship. Competition law helps to reduce corruption, bribery and rent-seeking behaviour of economic agents. Competition policy and law contribute to the structural diversification of the economy,

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[1] See Richardson, J, (1998).

[2] CUTS, (2001).

employment growth and a more equitable distribution of income and other economic opportunities. In short, competition law and policy are tools for meeting broad social and economic objectives by acting to improve management accountability, encourage efficient deployment of assets, and improve corporate governance.

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

1.4 Outline of the Rest of the Paper

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

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

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

CHAPTER TWO

SOCIO-ECONOMIC/DEVELOPMENT CONTEXT

2.1 Geography

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

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

2.2 People

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

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

2.3 Vital Statistics

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

[3] UNDP, (2001).

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

2.4 Government

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

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

2.5 Socio-economic Context

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

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

The external sector balance closely reflects the internal fiscal position of the economy. The revenues - expenditure gap is also very small. Domestic expenditures are 94 percent of revenues. The government therefore has a difficult debt service burden at home, similar to that abroad. Several structural reform programmes supported by the International Monetary Fund, the World Bank, and bilateral donors to relieve the fiscal burden through privatisation, cost sharing, reduction of civil service emoluments and

[4] UNDP, (2001).
[5] World Bank, (2001).
[6] Ibid.

market liberalisation have been tried. But the structural adjustment programme, which started in earnest in 1989, has yet to be followed by growth of production.

Agriculture output, which accounts for the livelihood of most of the population, continues to be dependent on rainfall, rather than improvements in productivity. Production of major products: grains and pulses; livestock and livestock products; oils; tobacco; and cotton has declined. Base metal mining production has also declined by more than half. Lead and zinc operations at Kabwe have ceased, and production of industrial minerals, fertilisers, chemicals and textiles have either stalled or drastically fallen. Unemployment has risen dramatically, making the official estimate of 24 percent current unemployment a gross understatement. Annual growth of the labour force is 2.8 percent.[7]

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

2.6 Market Structure and the Nature of Concentration

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

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

[7] World Bank, (2001).

Table 1: Indicative Market Structure for Zambia - 1991 and 2000

Item	Service	Nature of Market	
		1991	2001
Petroleum	Imports/ Wholesale	Monopoly	Oligopoly
Fertiliser	Imports/ Wholesale	Monopoly	Competition
Copper	Export Marketing	Monopoly	Competition
Production activities	Maize milling	Monopoly	Competition
	Vegetable oil	Monopoly	Competition
	Cement	Monopoly	Monopoly
	Textile	Oligopoly	Oligopoly
Services	Banking	Oligopoly	Oligopoly
	Broadcasting	Monopoly	Oligopoly
	Insurance	Monopoly	Oligopoly
	Telecommunications	Monopoly	Oligopoly

Source: 7-Up Country Researchers' Assessment

There are several reasons for the high level of market concentration in the Zambian economy. The first is that the economy is very small. Secondly, the history of state ownership and controlled markets means that one or two large foreign-owned enterprises dominate some sub-sectors. Thirdly, the small size of the enterprises in the manufacturing sector makes it highly amenable to inter-locking directorship and domination by a single multinational company, for example Lonhro, or the Commonwealth Development Corporation.

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

2.7 The Public Sector

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

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

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

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

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

2.8 The Role of Foreign Investment

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

Deleted: Global Development Finance – World Bank Country Tables 2000

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

Table 2: Foreign Direct Investments in millions of US$

Country	1988-1993 Average	1994	1995	1996	1997	1998	1999
Uganda	9	88	125	120	175	210	180
Tanzania	7	50	150	149	158	172	183
Zambia	99	40	97	117	207	198	163
Zimbabwe	3	41	118	81	135	444	59

Source: World Investment Report 2000 Annex table B.3

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

2.9 Export Orientation

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

Analysis of the external sector 1975-98 shows that average annual exports have gradually declined over the years, but imports have consistently recorded positive annual growth rates. As a result, terms of trade have gradually deteriorated. Export unit values declined by 33 percent between 1995 and 1998.[10] Import growth has been accompanied by declining manufacturing. The composition of imports has changed substantially from capital and intermediate goods to capital and final goods.

2.10 Import Penetration

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

[8] WIR (2000), table B4.
[9] World Bank, (2001). The exact figure for 2000 was 56.4 percent.
[10] World Bank, (2000).

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

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

CHAPTER THREE

PUBLIC POLICY CONTEXT

3.1 Background

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

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

In addition, the crop marketing functions were carried out by the state-owned National Agricultural Marketing Board. This was later to be unbundled into several crop-marketing companies. The Lint Company of Zambia was involved in the marketing of exportable crops, cotton, soya beans and sunflowers. The National Tobacco Corporation was responsible for the marketing of tobacco. Virtually every sector of the economy was dominated by a state-owned company. A number of these companies were monopolies. The Zambia Sugar Company was established to produce cane sugar through the Nakambala Sugar Plantations and also operated the processing operations. In addition, the state owned a number of large farms such as tea and coffee plantations, beef and pork production farms and processing plants under the Agricultural Development Corporation. The Zambia Forest Industries Corporation was involved in the management of plantations for the production of timber, and wood processing activities. There were similar arrangements for metal fabrication, roads and rail transport.

Thus, the public economic policy of Zambia evolved on a path of import substitution industrialisation, pervasive trade controls, expansion of the state sector and neglect of agriculture from 1965 to 1980. By 1980, it was clear that these policies had failed. It was realised that inward-looking policies gave stimulus to activities that were not consistent with the country's comparative advantage. In 1987, the government tried a homegrown economic reform programme, which was called 'growth from own resources'. This programme also failed to last. In 1989 the government gradually moved to policies that stimulate competition. In 1990 a new era based on plural party government was established and elections were held in 1991, which resulted in the establishment of a government committed to economic reforms.

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

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

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

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

3.2 Trade Policy and Agricultural Reforms

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

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

Table 3: Agriculture Reforms

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

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

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

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

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

Table 4: Shares of Non-Traditional Exports (NTE's) in 2000

Product	Earnings (thousands of US$)	Percent of Total
Fresh Flowers	30,780.7	14.6
Cotton Yarn	22,447.7	10.6
Sugar	20,831.2	9.9
Fresh Vegetables	16,056.0	7.6
Copper Rods	12,081.8	5.7
Gemstones	11,983.0	5.7
Tobacco	8,333.0	4.0
Coffee	7,376.4	3.5
Subtotal	129,889.8	61.6
Total NTE's	210,835.5	100.0

Source: Bank of Zambia

A study commissioned by the World Bank and the Ministry of Commerce and Industry revealed that there was a good measure of import protection despite the removal of quantitative import controls and tariff reforms[5]. The study showed that enterprises selling in the domestic market and facing competition from outside the COMESA area had effective rates of protection ranging from 40 to 70 percent. This means that enterprises that faced competition from duty paying imports received more than enough protection to run efficiently provided they were reasonably well suited to Zambia's comparative advantage. However, the study found a number of import competing activities facing difficulties:

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

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

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[11] World Bank, Report No 15477-ZA.

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

Lack of access to credit due to high interest rates and insufficient demand are the most important causes of poor business performance. Those enterprises involved in less competitive activities have to shake up, while others still need to get used to operating in an uncontrolled market environment and learn to fend off import competition. Outside the copper industry, there are very few activities in which Zambian firms are able to penetrate foreign markets. Potential for this is limited to copper fabrication, yarn, sugar and cement. It will be seen later that market liberalisation proceeded against the backdrop of an escalating financial crisis. This coincided with the lifting of controls on interest rates and measures to tighten the money supply. Farm loan interest rates went up from 50 percent to 120 percent and many farmers went under.

3.3 Investment Policies

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

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

The government has so far not shown sufficient political will towards investment promotion. For instance, despite the enactment of the Small Enterprise Development Promotion Act of 1997 for the renewal of small-scale industrial development, the law has yet to be implemented due to lack of political will. There have been a number of initiatives to encourage the growth of investments in agro-processing and other manufacturing areas such as the Ministry of Commerce and Industry's externally-funded *Matching Grant Scheme*. These measures have favoured existing enterprises and have also been characterised by under-use. In 2001, the government amended (Amendment No. 2 Act of 2001) the Customs and Excise Act, Cap 322 of the Laws of Zambia, and passed a new law enabling the establishment of *Export Processing Zones*. The law provides for duty exemptions and other tax reductions to investors operating in declared tax free zones for a period of ten years. The competition benefits of this scheme remain dubious at this stage and are likely to remain limited to the promotion of resource-based industries, which seem to be doing well even without special export protection.

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

3.4 Privatisation

The government set about the dismantling of the state-owned sector, which accounted for 80 percent of GDP, with the enactment of the Zambia Privatisation Act and the establishment of the Zambia Privatisation Agency in 1992. Beginning with smaller companies, privatisation went into full swing in 1996/97. By the year 2000, 248 out of 280 companies had been sold. The privatisation of the mines was delayed amidst allegations of incompetence and corruption. At any rate, a veil of secrecy and behind the scenes manoeuvres shrouded the whole process. Delays in the privatisation of the mines added to investor uncertainty. A number of other factors could have contributed to the investor wait-and-see attitude. Persistent uncertainty made investors hesitant about any significant commitment. The effects of market liberalisation, price decontrol, removal of subsidies, and reduced government participation decreased protection. Nevertheless uncertainty about whether these policies would continue increased.

Table 5: Privatisation Programme Status - 1994 to 2000

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

Source: Zambia Privatisation Agency (2000)
*Total number of Government departments identified for commercialisation

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

3.5 Communications

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

The telephone communication market has yet to be completely privatised. Even though the sector has been opened to hyper-market mobile phones, the main carrier, the state-owned Zambia Telecommunications Company (ZAMTEL) has yet to be privatised. Despite the available infrastructure, indicators of telephone connections show a relative decline. ZAMTEL marketing is clearly not devoted to seeing market expansion. Telephone lines per 1000 persons were 9.4 in 1999 and 9.0 in 2000. The small but significant increase in internet hosts of 0.1 per 1000 persons in 1999 to 0.5 per 1000 persons in 2000 indicates a growing demand for communications services. Clearly, a high degree of market concentration exists in this state dominated public utility. Competitive behaviour has yet to be seen. For example, a considerable backlog of internet service providers waited for more than 18 months pending the appointment of the Communications Authority Board, but the communications authority allowed ZAMTEL to participate in internet service provision in competition with its subscribers. The playing field has yet to be levelled.

3.6 Electricity

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

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Table 6: Market Shares of Existing Power Generation Stations

Name of Station	Installed Capacity	Percentage Market Share
Kariba North	598 MW	41.1
Kafue Gorge	730 MW	50.1
Victoria Falls	105 MW	7.2
Small Power Stations	138 MW	2

Source: ZESCO Annual Report March 31st 1993

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

3.7 Water and Sanitation

In 2000, the population that had access to safe water was estimated at 58 percent[12]. Access to safe water and sanitation services was greater in urban areas, at 93 percent, than in rural areas, which had only 38 percent of safe water coverage. To increase service delivery in this sector, the government established the Water and Sanitation Council to regulate the commercialisation of the water supply and to promote private sector participation in this sector. To this end, seven water companies were established between 1999 and 2000, and an Asset Holding Company was established to provide water and sewerage services to mining townships in the Copperbelt province of Zambia. It is too early to judge the growth of competition in this sector or the performance of the new regulatory body. What is clear is that the Water Supply and Sanitation Council will have to exert competitive pressures on the utilities and municipal companies through more appropriate pricing than it has to date.

3.8 Fiscal and Monetary policies

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

Zambia has improved its fiscal and monetary policies. However, fiscal and monetary conditions remain linked to the fortunes of the mining industry. When the Zambian mining industry sneezes, the rest of the economy catches a cold. The role of the mining industry in Zambia can be understood in terms of Dutch Disease effects on the

[12] GRZ, *Economic Report* 2000.

rest economy[13]. Accordingly, a decline in rents from copper has led to a sharp fall in fiscal revenue. Fiscal revenue fell from 30 percent of GDP in 1970-74 to 19 percent in 1980–90. Over the same period revenue from mining declined from 10.8 percent of GDP or 36 percent of total fiscal revenue to 1.6 percent of GDP or 8.4 percent of revenue.[14] Expenditure decline has been delayed because of consumer and producer subsidy policies. The effect of falling revenues was increasing interest rates, reduced capital expenditure and an increase in domestic credit. These factors contributed to a poor investment climate.

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

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

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

Occasionally net foreign exchange supplies have exceeded demand. The commitment to holding down inflation could be one motive for meeting government cash needs through sales of foreign exchange, but this may also be due to domestic price increases relative to foreign prices. In some cases, it may have been driven by political expediencies to slow down exchange rate depreciations. The effects have been bursts of foreign exchange appreciation. For example, the real exchange rate went up by 4.6 percent in 1999 and 2.6 percent in the first half of 2000[15]. Exchange rate appreciation has also contributed to the erosion of trade liberalisation gains.

There have been no winners from the structural adjustment programme. Observers have blamed poor programme design and badly thought out sequencing of reform phases. There is now some agreement that the removal of foreign exchange restrictions prior to stabilisation contributed to inflation and a credit crunch on the private sector. The high cost of borrowing delayed the emergence of rural crop marketing, and

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[13] It has been argued elsewhere that even though the copper industry has given the country a stronger purchasing power, it has largely disadvantaged other exporting sectors, which compete with it for capital and labour. In the absence of the copper industry, the exchange rate would have been lower and this would have benefited exporters and import-competing activities.

[14] World Bank, (1995).

[15] GRZ, (2000), p16.

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reduced the private sector investments that were required for structural adjustment. Clearly, agriculture and copper mining should have received attention earlier. Delays in the privatisation of the mines and the restructuring of agricultural marketing caused investor uncertainty, delayed investment, and sacrificed potential economic growth.

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

3.9 Banking and Financial Services

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

During the early 1990s, a number of small-scale commercial banks emerged and set up branches in Lusaka and the Copperbelt. The proliferation of small-scale nationally owned commercial banks demonstrated how easy it had become to establish a commercial bank. It would seem that many of these banks were set up to provide cheap capital sources to their owners. Many of them could not survive competition and collapsed due to their own inadequacies. Their collapse revealed that weaknesses in regulatory frameworks, inadequate supervision, under-capitalisation, insider-borrowing and unqualified banking practices were common among these banks. These factors all contributed to the series of bank failures that highlighted the need for the strengthening of banking laws.[16]

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

Improvements in the bank and non-bank financial regulatory framework have not changed the nature of competition, which still favours high levels of vertical

[16] Researcher's own observation.

concentration and oligopoly markets. Anti-competitive behaviour is common, and abuses of dominant behaviour are implied in many of the services provided. The ZCC has yet to have a significant effect on the market behaviour of dominant banks.

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CHAPTER FOUR
SCOPE OF COMPETITION LAW

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

4.1 Aims and Objectives of the Competition Law

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

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

The ZCC's function is to monitor, control and prohibit acts or behaviour that are likely to adversely affect competition and fair trading in Zambia.

4.2 Prohibitions

Anti-competitive practices that are prohibited in Zambian law include, among others, any agreements, decisions or concerted practices that have as their object the prevention, restriction or distortion of competition. Prohibitions under the Act relate to[17]:

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

4.3 Anti-Competitive Trade Practices

Section 7 prohibits agreements or concerted practices between enterprises that have the object of preventing, restricting or distorting competition to any appreciable

[17] Zambia Competition Commission *Competition Rules in Zambia*, p2.

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extent in Zambia or any substantial part of it. A concerted practice in itself is not necessarily anti-competitive. For it to be anti-competitive, it should be an agreement between enterprises whose purpose is to prevent, restrict, or distort competition in a relevant product or geographic market. Such an agreement should affect the free flow of the process of competition as felt by affected parties or as seen by the ZCC itself.[18]

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

4.4 Vertical Restraints and Abuse of Dominant Position

Vertical Restraints

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

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

There are a number of examples from the brief history of the ZCC that can be used to demonstrate the application of this part of the Act. A good example is the exclusive dealing agreement between Hybrid Poultry Farm (HPF) and Galaunia Farms Limited, which was notified to the ZCC and investigated in 2000.[19] HPF agreed to a sell Mariandale Farm and the poultry processing plant to Galaunia Holdings (GH). However, the sale agreement had exclusive dealing clauses and conditions. According to the agreement, Galaunia Holdings would only purchase day old chicks from Hybrid Poultry Farm, and HPF were granted right of first refusal should GH resell the farm. Furthermore, GH would not raise any other poultry apart from broiler chickens, and could not go into business hatching chickens. In addition, the parties also agreed that GH would have the right of first refusal should HPF sell any shares, and that HPF should also have the first right to participate in an out-grower scheme should GH come up with one.

The ZCC noted that the parties to this transaction were two leading players in the poultry sector, with HPF dominating the upstream market (60 percent) while GH

[18] Zambia Competition Commission, *Competition Rules in Zambia,* p2.
[19] Lipimile, G, (2001), p 3-5.

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dominated the downstream sub-sector. With an uptake of 48,000 day-old chicks per week at its Mariandale and Diamondale Farms, GH was clearly the largest buyer in the poultry market. The ZCC found that the parties had taken advantage of their dominant positions in the market. By motive and concerted practice, the parties were foreclosing competition in day-old chicks, table broiler birds and frozen chicken. These acts were therefore in direct contravention of section 7 of the Act. The Board of Commissioners accordingly nullified the agreement.

Box 2 shows another example of ZCC actions under this clause. However, in this case it relates to the direct abuse of a dominant position of market power. It is important how the abuse of dominance is determined.

Abuse of Dominant Position of Market Power

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

It seems that the definition of a dominant position of market power is restrictive and needs to be broadened to include other factors such as turnover, the degree of economic concentration, the absence of substitutes and/or the ability of the firm to raise or lower prices. For example, an enterprise may control 25 percent of the market, but if the rest of the market is dominated by an assortment of dissimilar units, it may well have dominant power. For this reason, in the United Kingdom a monopoly is presumed to exist if a company supplies 25 percent or more of the goods or services of a particular type[20].

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

Box 2

The Zambian Breweries Plc Case of Exclusive Distributorship and Coolers Usage Agreements.

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[20] UNCTAD, (2000), p20.

Zambian Breweries is a monopoly undertaking controlling 95 percent of the clear beer market. It forbade distributors from carrying competing brands in coolers supplied by the company. The ZCC nullified the agreements and declared exclusive distributorship anti-competitive. The Cease and Desist orders of the Commission preserved the competition process in the market, and the traders' freedom to make independent decisions was protected.

4.5 Mergers and Takeovers

Section 8 of the Act deals with mergers and takeovers. Under the Act, firms are required to fulfil mandatory pre-notification requirements to the ZCC in order to identify and resolve problems before the restructuring is undertaken. This is a crucial aspect of competition law in Zambia because it gives the country leverage to challenge foreign mergers and acquisitions that may have influence within its territory. Again, the Commission assesses whether the proposed merger or acquisition is likely to prevent, distort or lessen competition. The Commission rightly puts greater emphasis on horizontal mergers than vertical ones - unless the latter are employed to foreclose distribution channels to competitors. Analysis for merger control in Zambia involves determining the relevant market and assessing the likely effects on it. The presence of entry barriers and the motivation for the transaction are also considered.

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

The Act has set two thresholds for the assessment of mergers and takeovers. One is to deal with situations of unilateral market power or single firm dominance. This threshold is set at where the merged firm has more than 50 percent of the market. The other is to deal with the situation of concentrated markets, such as an oligopoly. This threshold is set at where not more than two undertakings share in excess of 50 percent of the market. Although thresholds are set for the purpose of screening market concentrations, there are people in Zambia who want them lowered.[21]

In the case where a takeover is completed abroad, the law in Zambia considers it to have taken place in the country, as long as there are domestic subsidiaries in operation. Such a merger is said to have domestic effects if the merger affects the structural conditions of the enterprise concerned. This is more likely if both enterprises were

[21] Participants of the second national reference group meeting expressed this view

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operating in Zambia prior to the merger, whether directly or through subsidiaries or affiliates, but there may also be domestic effects even if only one company previously operated in Zambia.

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

4.6 Horizontal agreements

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

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

These arrangements, whether formal or informal, verbal or written, are forbidden outright. Numerous examples of such practices have come before the ZCC. For example the ZCC intervened in the price fixing arrangements of insurance companies in the Insurance Brokers' Association of Zambia. The insurance companies were alleged to have agreed to standardise the commission rates payable to insurance brokers for all types of risk. They also standardised the maximum free cover limit at K65 million for group life assurance and had engaged in the unethical practice of bypassing brokers and dealing directly with brokers' clients at significant discounts. The insurance companies discontinued these practices upon the intervention of the ZCC. Standardising commission rates and setting a maximum free cover limit would have led to reduced competition.[22]

4.7 Anti-Competitive Trade Practices by Associations

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

[22] ZCC, (2001a), p9.

are signs that bus operators are beginning to set fares independently for different services, in defiance of the UTTA recommended fares.

4.8 Controlling Monopolies and Concentrations of Economic Power

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

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

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

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

We have already noted that one of the objectives of the Act is to define a set of rules regarding agreements between firms that restrict competition or abuse a dominant position, including attempts to create dominant positions. Another major objective is the efficient allocation of resources, and the maximisation of national welfare by ensuring that competition is not distorted or hampered through the abuse of dominant positions.[23] It follows that the aim of the Act is not to restrict monopolies *per se*. Indeed, monopolies are not inherently bad. The Commission may therefore allow a merger to take place if even though such an action would result in the creation of a monopoly, its prohibition would cause the failure of other social objectives. This is what is known as *rule of reason.*

4.10 Unfair Trading/Consumer Welfare and Protection

Section 12 contains provisions aimed at protecting consumers. This is because competition rules are closely related to consumer interests. This section caters for the protection of consumers' economic interests, and standards for the safety and quality of

[23] Hoekman, B, and Holmes, P, (1999).

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consumer goods. In this regard, the Zambian law prohibits misleading and deceptive conduct, false and misleading representations, limiting liability for defective goods, or any act aimed at bringing about a price increase.

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

4.11 Powers of Enforcement

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

The Zambian Competition Authority has no power to issue legally binding orders prohibiting parties from conduct found to have violated the law. The Commission is required to take all cases to a Court of Law for judicial determination.

The Act does not provide for sanctions that could vary in relation to the gravity of offences or the profits from such activities. It seems necessary that serious activities such as collusive bidding should be made criminal offences. It also seems logical that fines should be indexed to inflation, since the K10 million fine suggested by the Act is now a paltry sum.

There are many ways that a competition authority can exercise its powers. The ZCC has yet to exercise the range of legal options available to it. If prompt action is required, it can make interim measures to prohibit or discontinue illegal conduct without resorting to costly litigation.

The exercise of powers under Part III of the Act continues to be difficult. When traders persistently ignore civil and criminal law, the Commission is obliged to seek assurances about their future conduct. If they refuse to give such assurances the Commission can initiate proceedings against them, but resource constraints make it difficult to monitor compliance agreements or institute litigation.

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CHAPTER FIVE

ASSESSING COMPETITION LAW: DEVELOPMENT NEEDS AND PUBLIC POLICIES

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

Competition policy is a very broad area and competition law is not completely new. Competition policy comprises measures and instruments used by government to influence the “conditions of competition” that reign in the markets.[24] Competition law, or anti-trust law as it is sometimes referred to, is only one of the components of competition policy. Other components of policy include privatising state-owned companies, deregulating activities, cutting subsidies, and reducing discrimination against foreign products or producers.

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

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

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

[24] Richardson, J. David (1998).

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

5.1 Competition Policy and the Size of the Economy

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

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

5.2 Competition Policy and Industrial Structure

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

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

5.3 Competition Law and Foreign Direct Investment

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

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

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

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

Zambian competition law only considers the domestic effects of trans-boundary abuses. The board of the competition Commission has granted unconditional authorisation for mergers between a foreign company and one operating through a subsidiary in Zambia as long as the merger would not affect the conditions for market competition within Zambia. For instance, the board authorised the merger of British Petroleum (BP) and the American Oil Company (AMOCO) because AMOCO was not operating in Zambia. Similar reasons were advanced in the authorisation of the international merger between Total and a Belgian oil company, Petrofina, because it would not affect the status of competition in the Zambian market.[25]

5.4 Competition Policy and Consumer Law

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

In the words of the Competition and Fair Trade Act, Chapter 417 of the Laws of Zambia, sub-section (a) a consumer is defined as any person *"who purchases or offers to*

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[25] Zambia Competition Commission, (2001), p20.

purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purposes of using them in the production and manufacture of any other goods or articles for resale; (b) to whom a service is rendered." In short, section 12 stipulates consumer protection by granting rights to safety, information, choice, hearing and a clean environment. In this regard, the ZCC has a Consumer Complaints Desk for the purpose of redressing consumer complaints.

Consumer protection should be seen in terms of the nature of the market. In a situation where there are many players in the market, it is assumed that the consumer is able to choose freely among competing products, as opposed to where a single firm dominates the market. In the case of a market with many players and many products, consumer protection pertains to the instance of market failure, or where a firm may give misleading information. In that event, the competition authority would act against what it considers as an unsatisfactory practice. Such a practice would have led to an unfair advantage for the executor. This is different from the case of a market where there is no competition. In the event that there is no competition, the intervention of a competent regulatory body would be required. But, if there was no competent regulator, it would still be up to the competition authority to apply measures that would compel such a firm to behave as if it were in a competitive market.

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

5.5 Sector Regulating Bodies

There are a number of sector regulation bodies in Zambia. The Communications Authority provides for the regulation and licensing of broadcasting and communication activities. The Energy Regulation Board regulates energy supplies and consumption, and stipulates conditions for electricity generation, transmission, the distribution of commercial energy such as petroleum products and coal, and the establishment of solar energy utilities. The Road Traffic Commission regulates the transport sector while the Water and Sanitation Council regulates the activities of water utilities. The Zambia Wildlife Authority is responsible for the regulation of Wildlife Estates, and the utilisation and trade of wildlife products. The Pharmaceuticals and Poisons Board is responsible for regulating the manufacture and trade of pharmaceutical products, and the administration and distribution of medicines and poisons. In addition, the Pensions and Insurance Authority, the Securities and Exchange Commission and the Bank of Zambia are involved in different aspects of the financial market.

All the sector specific regulatory bodies deal with technical aspects of the industry but have considerable limitations regarding competition issues of the industries concerned. The regulatory bodies established after the ZCC do have explicit competition provisions, unlike the older ones such as the Road Traffic Commission, which entertains anti-competitive associations and practices within the sector. The point is that sector regulatory bodies deal with some aspects of trade and consumer welfare from a more technical level, while the ZCC is well placed for regulating market behaviour. There is a very strong case for harmonising the regulation of technical and market behaviour of economic agents among the sector regulators. This is particularly necessary in the banking and non-banking financial services sector where anti-competitive market behaviour continues unchecked.

However, the ZCC and other sector regulatory bodies are interlocked in their operations. For example, Section 6(d) of CAP 436 of the laws of Zambia provides for energy regulation and reads that "*The Board shall in conjunction with the Zambia Competition Commission established by the Competition and Fair Trade Act monitor the levels and structures of competition within the energy with a view to promoting and accessibility to any company or individual who meets the basic requirements for operating a business within Zambia.*" Similarly the Communications Authority is linked to the ZCC at board level and is equally empowered to satisfy competition needs. It has therefore been acting together with the ZCC to restructure the Zambia Telephone Company in advance of privatisation by unbundling the internet, landline and mobile services into separate companies. The ZCC also sits on the Water and Sanitation Council.

Clearly, the relationship between the ZCC and the sector regulators needs strengthening at policy and operational levels. We have seen how some sectors have aligned technical and market related regulation and how others are still disjointed. The harmonisation of the legal framework is therefore an immediate requirement and the establishment of operational frameworks is yet another challenge for the medium-term.

CHAPTER SIX

ADMINISTRATIVE STRUCTURE AND FUNCTIONS

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

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

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

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

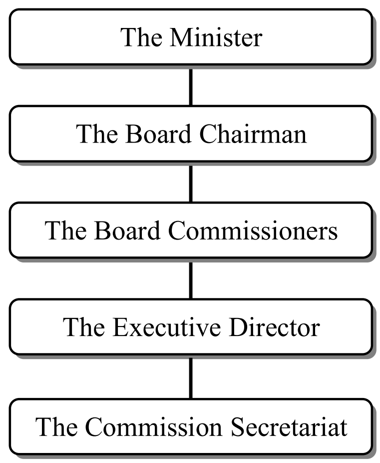
The advantages of a representational board are that it brings in influential and well-respected persons to give the commission a level of credibility, at the same time as providing key linkages with government, industry and civil society. The weakness of this arrangement is that such a board relies heavily on the secretariat. Such members are probably short of time and therefore can only provide distant level oversight. In short, the members of this type of board are likely to accomplish the following:

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

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

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

Chart 1: Structure of the Zambian Competition Commission



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

6.1 Functions

Broadly, the functions of the commission relate to monitoring, regulation, information and public assistance. Specifically, the functions of the commission are to:

- Monitor, control and prohibit conduct likely to adversely affect competition and fair trading in Zambia;
- Prohibit anti-competitive trade practices;
- Regulate monopolies and concentrations of power;
- Authorise conduct that is not prohibited out-right by the Act;
- Provide information for the guidance of consumers and business persons regarding their rights under the act; and

- Co-operate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the Act.

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

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

CHAPTER SEVEN

CAPABILITIES OF ZAMBIA COMPETITION COMMISSION

7.1 Infrastructure Facilities

The ZCC is accommodated in rented offices with an area of 652 square metres. Space and facilities are fairly adequate. Officers are provided with computers and share a photocopier. The Commission does not have a library or documentation centre even though space for one is available. A registry is used as a repository of printed materials and receives 16 periodicals and four national newspapers. The Commission has minimal communication facilities. There are three telephone lines and one fax line. There is also electronic mail connectivity, but no internet connection.

7.2 Financial Resources

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

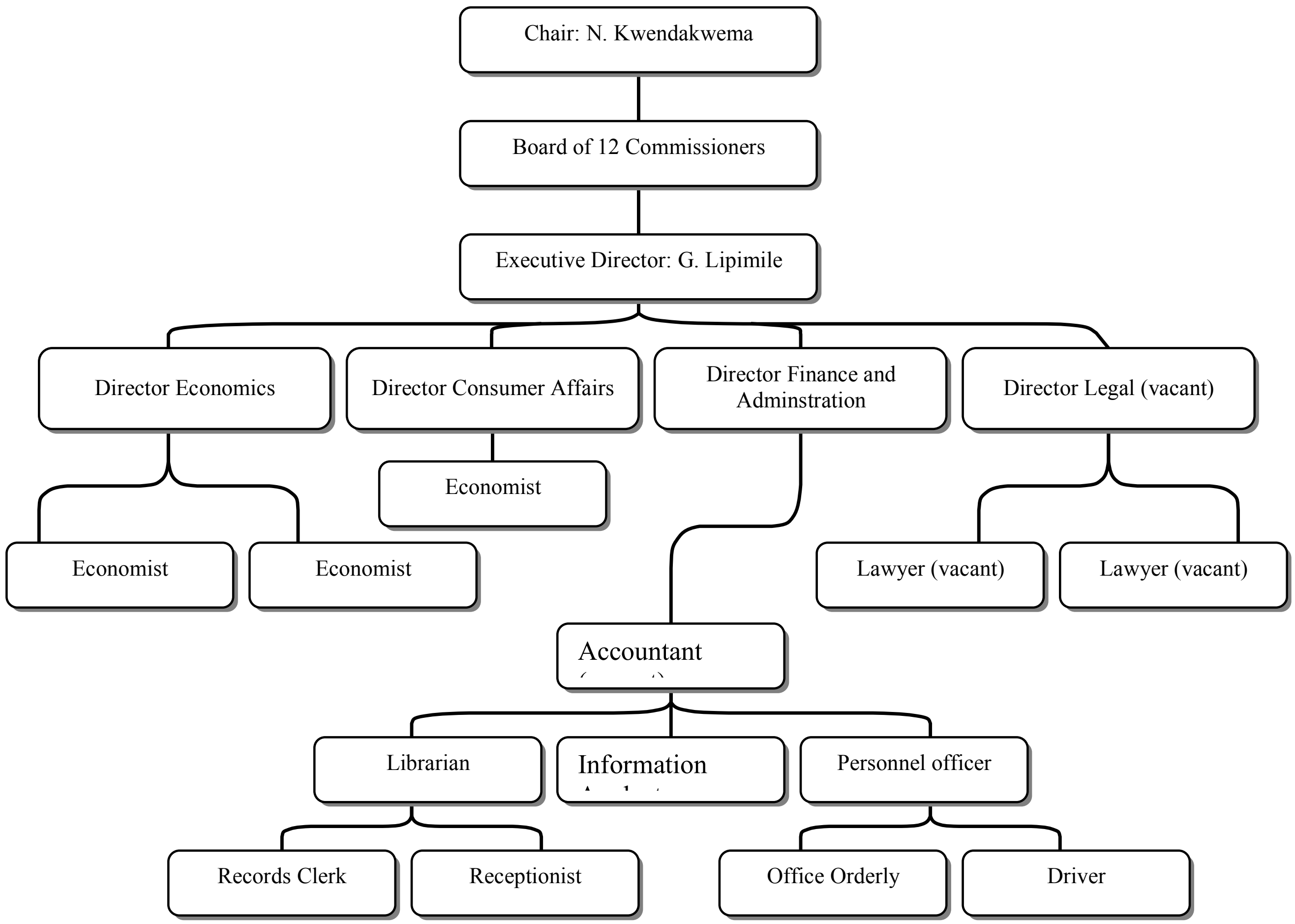
Table 7: The Pattern of ZCC Expenditure - 1997 to 2000 in Million Kwacha.

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

7.2 Human Resources/Staff

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

Chart 2: Detailed Structure of the Zambian Competition Commission



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

Table 8: Authorised and Existing Staff Positions of the Zambia Competition Commission

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

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

Despite low staff levels the Commission has handled a total of 172 cases between 1998 and 2000. The most frequent cases related to complaints concerning restrictive business practices, followed by notices of mergers and acquisitions and trade agreements. Table 8 summarises the record of complaints considered by the commission during the 1998-2000 period.

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

Table 9: Record of Cases Received By the ZCC between1998 and 2000

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

Source: ZCC Annual Report 2000

7.3 Capacity Needs Assessment of the Zambia Competition Commission

It was stated earlier that the ZCC as an authority is still in its youth. Insufficient government funding is stifling its growth. Not only is there a critical shortage of staff, but the Commission also has to produce a number of internal documents such as pamphlets about various aspects of the functions of the Commission and other relevant information such as an Annual of Case Records and newsletters. Not only does the Commission deserve a full complement of staff, but office equipment such as computer equipment and accessories are inadequate and sometimes archaic. It is incredible that an important office such as the ZCC does not have a website or even an internet connection. These services are crucial for the preparation of public education materials and awareness raising activities. Further, for the Commission to be proactive, baseline market surveys should be undertaken in order to understand, for example, the nature of the economy and the levels of market concentration. Some of the capacity needs of the ZCC are discussed in the sections below.

7.4 Strategic Planning

In order to build upon the activities undertaken by the ZCC so far, there will be a need to develop a consensus on the application and implementation of competition law and policy. A strategic planning process is one way that such a consensus could be achieved through a wide involvement of interest groups. Only then will it be easier to determine the internal capacity that the ZCC needs and the means to achieving its goals. It will be through this process that appropriate organisational rules and procedures will be prepared. This exercise would also facilitate the process of consumer policy making and enforcement by enabling transparency and predictability of the Commission's work and decisions. Procedural guidelines would specify how the public could interface with the commission on each section of the Act. In addition, they could also detail a requisite institutional liaison structure that the public could use to access the Commission's staff and/or compliance agents, depending on the relevant sections of the Act and the nature of the case involved. Needless to say, this exercise would assist in the identification of key areas of law and government, private and business practices that inhibit competition and hence consumer welfare.

7.5 Public Awareness

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

7.6 Baseline Market Studies

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

- Market concentration and possible areas for restrictive business practices;
- Ways in which competition and consumer laws can be harmonised;

- The liberalisation of the market in Zambia, with a view to enhancing domestic and foreign market contestability.

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

CHAPTER EIGHT

SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

8.1 The Economy and Public Policy

Zambia has moved towards a competitive regime by reducing the role of the government in the economy and removing high levels of ownership concentration through market liberalisation, privatisation and public participation. This has certainly improved the framework for competition policy and the administration of competition law. However, there are some outstanding issues related to the harmonisation of various policies, particularly the sequencing of liberalisation and macroeconomic stabilisation policies. As a small economy, the adoption of open trade policies has been well received because it eases the barriers to enterprise growth. However, taxation policies have been criticised for eroding the possible gains of liberal trade. The lack of government support for small-scale industrial development is a matter of serious concern. In some cases, government operations in the foreign exchange market have led to an increase in real exchange rates, thereby harming export competitiveness contrary to trade policy objectives. In short, public policy has had contradictory effects on competition. There is therefore a need for the refinement of the public policy mix to enhance competitiveness and level the playing field for competition among economic agents.

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

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

8.2 Competition Law

Although competition law was recently introduced to Zambia, the establishment of the Zambia Competition Commission and specific sector regulators represents tremendous progress. Legal draftspersons have taken note of the need for inter-relationships between the ZCC and sector regulators. In the near future, the ZCC may be overburdened by multiple representations on various sectors. It is therefore necessary to prepare guidelines for institutional liaisons among regulators. This is of immediate concern because some specific regulators do not seem to be concerned by competition issues. This seems to be the case in the banking industry, where improvements in prudential regulations have not had competition overtones.

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

It has also been pointed out that the absence of legally binding decisions on the part of the ZCC makes it dependent on slow and costly litigation processes. It is therefore suggested that the law should be amended to allow for the Competition and Fair Trade Tribunal to expedite the mediation and disposal of disputes.

8.3 Capacity and Resources

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

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

ANNEX 1: Exchange Rates - Units of National Currency/US Dollar

	1980	**1990**	**1999**	**2000**
K/US$	0.8	30.3	2,388.0	3,110.8

Source: World Bank, (2001)

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