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THE COMPETITION ACT OF 1995: A LEGAL ANALYSIS

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INTRODUCTION

The objective of this paper is to undertake a broad analysis of the desirability or otherwise of instituting competition law in Zimbabwe and an analysis of the Act itself in an endeavour to ascertain whether or not technically it is good law. For one to effectively discharge this mandate it is essential that one starts with a broad overview of competition and antitrust policies and legislation in order to ascertain an ideal structure within which such a policy can be adopted for Zimbabwe. To this end a brief analysis of the Zimbabwean economic structure is essential in order to illustrate the flaws in that structure which would have to be combated by a competition law. It is also necessary to look at what can be considered to be generally acceptable characteristics of effective competition law. It is only after this has been done that one can specifically evaluate the enacted legislation. It will therefore be necessary before rendering judgement on the Act to undertake a comparative study of similar legislation in other countries with the objective of borrowing from the strengths of other legislation governing different jurisdictional entities. Interviews were conducted with various interest groups with a view to ascertaining the different perceptions of the new law.

HISTORICAL BACKGROUND

After the Unilateral Declaration of Independence by the Rhodesian Front Government in 1965 the international community responded by imposing an arms embargo and economic sanctions. The Rhodesian economy became isolated and with the exception of occasional sanction busting plots and the South African Trade Lifeline, the main thrust became one of internal self-sufficiency. This entailed the promotion of massive import substitution programmes. The economy was characterized by the existence of major monopolies and the market itself was generally characterized by want of competition internally and externally. Even though economic sanctions were lifted at independence in 1980 the complexion of the economic structure did not change. The government then was flirting with marxian economic theories and the commandist character of the economy inherited from the Rhodesian Front era might have had its appeal. Right up to 1991 one can summarize the Zimbabwean economy as one characterized by general lethargy, antiquated capital equipment, huge budget deficits, foreign currency shortages, government sponsored monopolies and the usual consequences of lack of competition and monopolist structures such as general shortages, arbitrary prices and compromised quality. However, from October 1990 the government, in an attempt to resuscitate the economy, embarked on an IMF and World Bank sponsored Economic Structural Adjustment Programme (ESAP). In brief the thrust of this programme was the opening up of the economy to outside competition through a trade liberalization programme and structural adjustments of the economy itself in order to encourage internal competition.

THE ROLE OF LAW IN TRANSFORMING THE ECONOMY

The legal regime defines the market structure which exists in a country at each and every given period. The maintenance of a closed economy, for instance, entails the maintenance

of a stiff tariff regime, strict exchange control regulations and creation of public monopolies in essential aspects of economic activity. Similarly, the transition to a market economy can only be sustained by the repeal of restrictive laws and the promulgation of laws which promote entry and competition. Since the institution of ESAP in 1990 we have seen statutes being amended to allow competition. For example the removal of restrictive foreign exchange regulations; the erosion of price controls and the amendment of laws to erode monopolies and encourage competition for instance in the Dairy industry and the urban public transport sector. The proposed Competition law therefore is a natural and inescapable progression in the transformation of the economy from a command economy to a market economy. It is a trend which is evident for instance in the countries of Eastern Europe and the former Soviet Union where competition laws have become an integral aspect of the transformation process. The same trend is evident in African countries undergoing reform such as Kenya. It is however, important, to comprehend the fact that competition, once it has been introduced, has to be nurtured since it cannot on its own maintain itself. The natural tendency is for enterprises to expand into technological and organisational giants and to monopolize the means of production. To avoid this therefore, even in advanced market economies, there is always a need to maintain viable competition laws which act as watchdogs. It is for this reason that technologically advanced market economies such as the United States, the United Kingdom, Japan and Germany have varying types of competition laws.

Competition laws, usually referred to as anti-trust laws, come in various forms and it is important to draw the various distinctions before looking at a competition policy for Zimbabwe which would have to be served by the proposed Competition Law. When looking at competition laws it is essential to draw a broad distinction between two types;

- a) those competition laws adopting the "prohibition" principle and
- b) those competition laws which adopt the "control of abuse" principle.

The United States anti-trust law regime is the clearest example of a legal regime which adopts the "prohibition principle". The prohibition principle defines restrictive business practices, the acquisition of a dominant market position and monopoly power and proceeds to declare all these practices illegal in that economy.

The control of abuse principle is more tolerant; restrictive business practices and the acquisition of monopoly power are tolerated as long as there is instituted a sufficient regulatory mechanism to prevent any abuses arising from such dominance, the abuses being all the usual negative consequences of a monopoly situation. Most European countries including the United Kingdom and Germany adopt this "live on merit" or "control of abuse" principle.

It is the author's opinion that the control of abuse principle is more commendable than the American anti-trust approach. Monopolies *per se* are not necessarily undesirable and indeed in a developing market economy like ours they might actually be the essential driving force needed to render the necessary industrialization and commercialization of our economy. It would indeed be folly to ignore, in Zimbabwe's case, the inevitability and to some extent the desirability of some monopolies. The control of abuse approach recognizes that technological and economic progress might mean larger units and while this obviously increases the oligopolistic nature of an economy, it does not prohibit the increase in unit sizes of firms as long as the degree of residual competition is within the limits set out in the competition law. The only slight disadvantage with this approach is that experience in other countries for example Germany, shows that abuse control proceedings tend to be resource and time intensive.

A superficial glance at the new Competition Act and in particular Part V thereof which gives the competition commission the power to authorize certain restrictive practices, mergers and other monopolistic practices, confirms that the proposed approach is a basic compromise between prohibition and a check on abuses and it should be commended.

A COMPETITION POLICY FOR ZIMBABWE

If competition policy is to be effective in Zimbabwe, it must be clearly defined and implemented through a Competition Act. It is folly to start by having a Competition Act when there is no consensus on a clearly defined national policy on competition. A national competition policy must first appreciate the dangers to effective competition. It must be appreciated that both the state and the private sector pose particular dangers to competition. As far as the state is concerned, it poses a clear danger whenever it descends with all its weight into the market and acts on the same level with private enterprise and discriminates between buyers and sellers of goods and services in commerce. In Zimbabwe this is usually clear in transactions involving massive army or police acquisitions. This danger is always posed when a state abuses a dominant position in commerce. The state as a sovereign can also negate competition through the creation of public monopolies, and the granting of subsidies to dying industries in order to prop them up, which is in contravention of the market forces trying to pull the tied up resources towards more productive uses, and the institution of protectionist measures to keep out import competition.

Private sector dangers to competition usually come in the form of cartels that is, agreements between competitors not to compete at all or to compete only to a limited extent; and agreements to charge uniform prices. Sometimes firms agree that firm A would trade in Harare, firm B in Bulawayo and firm C in Mutare. In the first example price competition is eliminated and in the second example competition is altogether negated and all in all consumers are bound to pay higher prices. Mergers between private firms also reduce active participation in the competition process.

It is clear therefore that for effective economic competition to exist there must be a sufficiently substantial number of enterprises in the market enjoying the freedom of action to decide on basic matters such as quality, quantity and price. The enterprises must have a fair chance of making profits and the market structure has to be competitive and there should be realistic possibilities of market entry. For Zimbabwe to have a clearly defined competition policy it has to address the following five points:

1. Great efforts should be made to explain the market economy and all its essential elements to the public at large, the established business community and the emerging business community. This is the only way a culture of competition can be established.
2. Through this process of consultation, adequate and practical substantive laws on competition have to be formulated. These laws should evolve out of the competition policy formulated for the sole purpose of implementing competition.
3. The law should provide the appropriate procedures which provide for swift and effective action.
4. There should be provision for a clear institutional framework for the effective implementation of rules and procedures.
5. There should always be a structure which ensures that the competition policy is taken cognisance of when other government policies are formulated and implemented.

The competition policy which will be formulated will have to be implemented through a competition law. An effective competition law has certain essential characteristics.

1. It must be clear in its thrust. Its sole object should be the competition process and hence it should clearly and only aim at the promotion and protection of the process of competition. It is important to note that some competition laws in other jurisdictions have broader agendas than the mere protection of competition. Hungarian anti-trust legislation for instance incorporates a price control mechanism and other aspects of consumer protection. The international trend, however, clearly is for enacting an independent law confined to competition policy and then to amend existing legislation accordingly. To broaden the basic agenda of competition law jeopardizes its overall effectiveness and increases the risk of external pressure.

The policy as advocated above is however ideal only to a developed market economy. Economies in transition, for the simple reason that they are undergoing structural changes, need socially acceptable safety devices. Structural Adjustment usually entails wholesale abandonment of price controls and subsidies, leading to great social suffering. A counter balancing mechanism is therefore needed to ensure that the effects of further adjustment ie the creation of competition through the implementation of the competition policy, does not cause undue suffering. In these circumstances there is need to arm the competition authority with power to take into account the effects of prices, labour retention and other consumer interests before making a determination of the desirability or otherwise of an economic set up. This however should be viewed simply as a transitional safety valve.

2. It must be all embracing. Substantive competition law should apply to both the public and the private sector. This is the trend in most developed and developing countries including the countries of Eastern Europe. Further, competition law should be comprehensive, codified and easily accessible.
3. Competition law should provide for a procedure which is simple, transparent and above board. It should provide for clear powers of investigation, enforcement and penalties so that the commercial sector has absolute confidence in the competition system. There should be a clear right of appeal. Administrative decisions should be capable of being challenged firstly by way of review in the High Court and secondly by way of appeal on points of law in the Supreme Court. This is important because it will lead to the evolution of uniform case law. It will also further enhance the business community's confidence in the competition system because the Zimbabwean judicial system is still highly regarded for its competence and professionalism.
4. Competition law should provide for an independent competition authority. This is absolutely essential if people are to have confidence in the system at all. The business sector and the public have to be sure that the competition authority implements competition policy without fear or favour. The independence of the authority should relate both to its status as an entity (it should not be a state department) and to the people who serve on it. People should be appointed to the authority purely on professional grounds; they have to be highly qualified, well remunerated; they should be appointed for fixed terms and should only be dismissed under very strict conditions by formal public proceedings. Further, the back up staff should be extremely qualified.
5. Competition law should mandate the competition authority with an obligation to advocate competition policy nationally.

COMPETITION LAW AND LABOUR

Competition law marks the very essence of capitalist economies and Trade Unions operating in these circumstances have to be clear as to what broad perspectives to take. Under market

economies, workers have two main areas of concentration, namely maximum protection in terms of improved working conditions and enhanced job security. There is also an interest in job creation.

Trade Unions do better under capitalist economies by doing everything to enhance the power of workers, particularly organised labour, while at the same time weakening the power of capital. Accordingly, any analysis of competition law by Trade Unions must have regard to *inter alia*, the following four questions:

- 1 How does this impact on existing working conditions?
- 2 Does it enhance or weaken job security?
- 3 Does it promote the concentration of capital (e.g. with monopolies)?
- 4 What is its impact on organised labour?

These questions will be examined in different contexts as we analyse the provisions of the Act below.

EXAMINATION OF THE ACT IN THE LIGHT OF THE ABOVE

It is proposed to proceed by examining selected sections individually and progressively.

Section 2 Interpretation

The section endeavours to define important concepts in this area such as "controlling interest" "restrictive practice" "monopoly" "merger" and "substantial market control". While this attempt is totally commendable the result is however inadequate. The definitions are not precise. In practice what the monopoly commission will need are concrete guidelines to work on, for instance, it should be clearly ascertainable from just flipping through policy guidelines that a dominant market position entails 60% control of the market or some such other concrete guideline. The Act Against Restraints of Competition (ARC) of Germany of July 27 1957 as promulgated on September 24 1980, for example, provides clearer concrete guidelines to these concepts and should be used as a basic model. There should be clear guidelines on merger control procedures and this would be particularly helpful for the commission when it executes its duties under either Part IV or Part V of the Act.

Section 3 (Application of Act)

Section 3 (b) states that the Competition Act shall not be construed so as to prevent 'trade unions or other representatives of employees from protecting their members' interests by negotiating and concluding agreements and other arrangements with employers or representatives of employers in terms of the Labour Relations 1985 (No. 16 of 1985). The interpretation of "restrictive practice" under section 2 of the Act relates *inter alia* to acts which have the following effects;

- (i) restricting the production or distribution of any commodity or service.
- (ii) preventing the production or distribution of any commodity or service by the most efficient or economical means.
- (iii) preventing or retarding the development or introduction of technical improvements in regard to any commodity or service.

Assuming a trade union acting in its member's interest engaged in measures which have these restrictive effects (e.g labour boycotts, slow down, strikes) it will face difficulties not only under the Labour Relations Act but also under the Competition Act. In my opinion

this is undesirable. There is already sufficient legislation which fetters the freedom of the labour movement and we do not need any more. Subsection 3 1(b) should be amended so that it reads "The Competition Act shall not apply to Trade Unions".

The definition of a restrictive practice in section 2 of the Act is so wide as to cover important aspects of the power of organised labour, for instance, any form of collective job action as defined in the Labour Relations Act, 1985 will fall within the ambit of a restrictive practice. Further, the all important area of collective bargaining will be seriously jeopardised. Collective bargaining agreements providing very good working conditions may be seen as restrictive practices if they are conceived as curtailing the power of the employer to vary working conditions downwards.

It is therefore important that the whole Act be made inapplicable to Trade Unions, howsoever defined.

Section 3(3)

It is advisable to clarify the extent to which the state can be civilly liable. Aspects of enforcement of orders and state immunity have got to be harmonized if this subsection is to have any practical significance. There exist stringent restrictions to the enforcement of civil judgements against the state which are imposed by the State Liabilities Act. Hence related legislation would have to be amended to provide clarity in this area of law.

PART II COMPETITION COMMISSION

Section 4

This provides for the creation of an independent competition commission and is therefore to be highly commended. It is an improvement on commissions in other jurisdictions which are either a government department on their own or are in the Attorney General's offices because such commissions lack transparency and autonomy and are susceptible to political pressure.

Section 5

The Act should establish as one of the basic objects of the commission the active propagation of the national competition policy to the public and the commercial sector. There is need for public education in this field and the commission should be tasked with the obligation of spearheading this thrust.

Sections 6–12

Broad observations:

- (a) These sections give the state President the power to appoint members to the commission at his sole discretion. The Chairman and Vice-Chairman of the commission will also be appointed by the President. This is a bit contradictory because the objective of section 4 is the creation of the commission as an independent body. It is clear however that the independence of the commission will be greatly compromised given the appointment mechanism provided for. In interviews conducted during the course of this research it became quite clear that both the labour movement and commercial concerns would be happier with a situation where the President makes his appointments from lists submitted by organized industry, commerce, the professions,

the consumer council and other institutions which may be appropriate. In the United States members of the opposition are also appointed to such commissions. It is also important that once the members of the commission have been appointed they should be given the power to elect their Chairman and Vice-Chairman. Members of the commission should also only be removed through formal open proceedings.

Section 7 (c) In Particular

- (b) By virtue of the nature of the mandate of the commission, members of the commission are likely to be exposed to various temptations as certain sectors of the economy endeavour to avoid the commission's scrutiny. To that extent the moral calibre of appointees to the commission becomes extremely crucial. To my mind people appointed to this commission should be people who have, in their professional or private lives, exhibited conduct which is beyond reproach. It is my opinion therefore that once a person has been convicted of a crime involving fraud or dishonesty the person automatically ceases to possess those qualities expected of a member of such a commission. The issue of the penalty imposed on the person, let alone, whether or not he is subsequently pardoned by the President, is irrelevant.

It is clear in terms of section 27 (1) (d) that *existing monopolies* are covered and may have their monopoly status terminated by the commission. For labour, a difficulty which arises is the status of workers employed by the monopoly. This is where the concern with job security arises. The section has to be clear as to what happens to workers if a monopoly has been brought to an end. Is this retrenchment for purposes of retrenchment regulations in terms of the Labour Relations Act, 1985 or is it mere termination of employment? These issues are not clear and have to be clarified as it is important for workers to be protected, by being given the right of first refusal in any new businesses taking over broken monopolies, or by the consultation of Trade Unions where existing monopolies are to be broken up.

Section 13 (1) of the Act stipulates that the minimum number of meetings the commission can have within each financial year is six meetings. Given the wide range of obligations the commission is mandated to effect under Part IV and V of the Act, the minimum number of mandatory meetings is hardly satisfactory. The commission will have to be obligated to meet much more frequently and it would have to be serviced by a professional full time secretariat if it is to discharge its obligations well.

Section 16 (3)

Failure to disclose secret beneficial associations and interests under section 16 (1) and (2) is tantamount to the commission of a crime of dishonesty and, given the need for members to have unquestionable integrity as discussed above, section 16(3) should provide for the automatic removal of such a person from the commission. The Act only provides for the removal of a member of the commission only if he has been convicted of an offence of fraud or dishonesty and sentenced to a term of imprisonment imposed without the option of a fine.

Section 17

The appointment of Director of the commission is provided for under section 17. The Act however does not expressly stipulate the Director's powers and functions. The Director,

for instance, cannot on his own initiative undertake investigations without the authority delegating to him the power to initiate such a procedure. This weakens the effectiveness of the commission given the fact that it does not meet continuously. It is my submission therefore that the Act should clearly designate the powers of the Director to deal with routine matters so that the commission only concentrates on important matters of mergers and monopoly dominance.

Section 27 and 28

This section provides for the publication in the *Government Gazette* and a local newspaper of the commission's intention to undertake an investigation into restrictive practices, mergers and monopoly situations. The principle here is honourable because the greater the publicity the more chances there are of interested people getting notice to make written representations to the commission. In interviews conducted during the course of this research with the business sector, however, it was clear that the commercial sector has some reservations on this point. The main fear is that the publication of names of companies to be investigated exposes those companies to undue scrutiny and they may even suffer boycotts and lose business. A balance can be struck if the commission first carries out a discreet investigation to establish a *prima facie* case, and only after a *prima facie* case has been established should the commission resort to publication. Further, the commission should make greater use of section 29 which deals with negotiations and applications for authorization before resorting to either section 27 or 28.

Under section 28 the commission can prohibit certain economic activities pending investigation. This basically grants the commission power to issue provisional injunctions. It is important to note that such an order can cause severe prejudice not only to the proprietor of the affected firm, in terms of loss of production, but can also result in retrenchments and loss of livelihood. Two options can be pursued to alleviate this;

1. If there is unlikely to be severe prejudice to concerned parties it would be advisable to provide for production to continue while investigations are in progress and;
2. Even if the prejudice is likely to be severe, there is a need to shorten the time period within which the commission should complete its investigations while production is frozen. A possible period of one year pending investigations as stated in the Act is too long. Further, the question of who bears the prejudice occasioned to innocent parties during the period of investigation when economic activities are suspended should be addressed and a compensatory fund should be established for such purposes.

Section 30 and 31 Factors to be Considered By The Commission When Making Orders

Subsection 30 (1) (d) gives the commission power to regulate the price which any person named in an order by the commission can charge for any commodity or service. The definition of public interest in this section incorporates under section 31 (b) "promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities . . ." e.t.c. This provision has been criticized by the Zimbabwean business sector on the basis that if a price control regime is to be maintained it should be dealt with by one authority only; the Ministry which implements the Control of Goods Act. The argument advocated is that if the commission is to make decisions on price control then it should just make recommendations to the concerned ministry and the determination on prices should affect the entire industry.

The thrust should not be to control prices on the basis of information gathered during an examination of one company. The flipside to this argument is that in an economy in transition, competition policy should encompass social safeguards. Indeed in Zimbabwe the thrust all along has been to do away with price controls and they now hardly exist. To that extent the public interest in price control and retention of labour as provided under section 30(1) (d) should be important considerations when the commission makes its determinations. There should still be a way of regulating these socially important factors and the discretionary powers given to the commission have such an effect. A compromise has to be made. The competition commission has to have social obligations. Any determination it makes should take into full cognisance repercussions on price levels and labour retention. However, if the commission adopts a policy on these aspects the implementation of that policy should fall on another independent body which has as its main task the regulation of those aspects. It is quite contradictory to create on the one hand a body which should champion competition and on the other hand task the same body with powers which in effect lead to a distortion of competition, and a price and quality control regime has such a distorting effect. In both sections 30 and 31, there is no clear reference to the consideration of workers' interests when an order to terminate a monopoly is made.

Section 30 (3)(a): This provides that an order by the commission may provide for "the transfer or vesting of property rights, liabilities or obligations". It should be noted that private property is constitutionally protected. Further Section 30 (3)(a) should provide for more detailed safeguards to maintain the equities of the situation, for example the provision of compensation.

PART VI APPEALS

Section 39(1) of the Act grants the high court the power to hear appeals from the commission and to confirm, vary, reverse or set aside the decision which is the subject of the appeal or refer the matter back to the commission for further consideration. Given the pressures on the existing judiciary machinery and the current lack of expertise on the part of the legal profession on competition policies, it might be better to establish a separate machinery which deals exclusively with competition issues. In Germany, for example, the Act Against Restraints on Competition provides for the federal cartel office which operates just like a court. Decisions are made by a panel of three experts in competition law and they handle both administrative and quasi-criminal cases. The office has sweeping investigatory powers. Zimbabwe needs such a mechanism to ensure swift determination of cases from the commission. The commission itself should have power to grant temporary relief only and refer cases to this institution for confirmation. However, the High Court will retain the power to review decisions from such an institution and parties can refer disputes as to questions of law to the Supreme Court for final determination. Section 32 (Enforcement of orders) will therefore apply to confirmed orders. This will have the effect of reducing the number of cases which will be referred to the High Court and the Supreme Court since obvious errors by the commission will be detected at the confirmation stage.

SUMMARY OF RECOMMENDATIONS

The following recommendations have already been discussed in more detail within the body of the critique itself. They are however, summarized here for convenience of reference.

- (1) There is a need for national debate to map out a national competition policy. All interested groups should be encouraged to take part in the seminars and discussion groups. The public in general should also be educated on the implications of competition and a competition policy. This is essential because unless there is a consensus on a competition policy it will always be difficult to have a "magna carta" of competition law which will serve effectively the various interest groups. Ideally, competition law should be there to implement a clearly defined competition policy. Further, for competition law to be successful it has to be accepted and for it to be accepted people should be part and parcel of its formulation.
- (2) Section 2, the interpretation clause tries to define essential concepts such as "controlling interest", "monopoly situation" "restrictive practice" and "substantial market control". While this is commendable there is a need for more concrete guidelines in the definition of such terms. There is a need to agree on guidelines for instance on what "substantial market control" is and the thrust here should be on fixing definite percentages. The German Act Against Restraints of Competition (ARC) lays down basic concrete guidelines and should serve as a model in this area. Interested parties should therefore be invited to agree on a checklist for merger control procedures and this checklist should appear as a schedule to the Act. At the moment it is vague and the commission has too wide a discretion.

Section 3: Section 3 1(b) should be amended so that it states that the Competition Act shall not regulate Trade Unions.

- (3) **Section 5: Functions of Commission:** It should be clearly stated that one of the functions of the commission is to publicize the national competition policy and engage in mass education of the general populace in this regard.

- (4) **Membership of Commission (Section 6)**

This section should be amended so that it provides for the President to appoint members to the commission from lists submitted to him through the Minister of Trade and Commerce by various interest groups e.g the Trade Unions, Commerce, the Professions, the Consumer Council of Zimbabwe and other interest groups. This is essential if the autonomy of the commission is to be credible. This amendment should also apply to the filling of vacancies on the commission.

- (5) **Disqualification For Appointment As Member Section 7**

Sub Section 7(c) should be amended so that it provides for the disqualification of anyone who has been convicted of an offense involving fraud or dishonesty irrespective of whether or not he was sentenced to a term of imprisonment without the option of a fine. *Section 8* should be amended so that it provides for the removal of members from the commission only after formal public proceedings.

6. **Section 12: Chairman and Vice-Chairman of Commission**

This should be amended to provide for appointed members of the commission to elect their own chairman and vice-chairman.

7. **Section 13: Meetings and Procedure of Commission**

Sub Section 13 (1) should be amended to increase the number of mandatory meetings from six times in a financial year to at least ten times.

8. **Section 16: Members of Commission and Committees to Disclose Certain Connections and Interests**

Subsection 16 (3) should be amended so that it provides that anyone who contravenes section 16 shall be guilty of an offence of dishonesty and shall be automatically disqualified from continuing to serve as a member of the commission.

9. Section 17: Appointment and Functions of Director of Commission

The Director should be given specific power under this section to initiate investigations into routine issues. Substantive investigations into mergers, takeovers and monopolies should however remain the exclusive domain of the commission.

10. Section 27: Power of Commission to Investigate

This section makes it mandatory for the commission to publish in a local newspaper and the *Gazette* its intention to investigate a particular company. The section should be amended so that it obliges the commission to first investigate discreetly and only in those cases where it establishes a *prima facie* case should it proceed to publication.

Section 28: Prohibition of Certain Acts Pending Investigation

This section should be amended so that it provides for the prohibition of activities only in those extreme cases where it is deemed that irreparable prejudice will be occasioned by continued economic activity while investigations are in progress.

There should also be provision for a reserve fund which will address the issue of prejudice suffered during the period when there is no production should a concerned party be exonerated at the conclusion of investigations.

Further the commission should be obliged to submit the report on its investigation at the latest after six months and not after a year (for purposes of minimizing prejudice).

Sections 30 and 31: Regulation of Prices: Definition of "Public Interest"

The definition of Public Appeal under section 31 should be retained and the desirability of taking into account the likely effect of a restrictive practice, merger or monopoly situation on the level of prices and employment should be emphasised. Section 30 (1) (d) which gives the commission power to regulate the price charged by an entity is however undesirable and should be repealed. In circumstances where the commission feels that prices have to be regulated it should forward such a recommendation to a different price control machinery which has the responsibility of practically regulating prices across the board.

Section 30 (3)(a) should be reviewed in light of the constitutional protection of private property. In particular it should provide for a compensatory fund.

Section 39 Appeals

There should be provision for a specialist institution such as the cartel office in Germany or the office of Fair Trading in England which would hear cases referred to it by the commission. A right of review would lie to the High Court and aggrieved parties could still appeal to the Supreme Court on questions of law only. The commission itself should have power only to grant provisional relief. Section 32 (Enforcement of Orders) should therefore apply to orders confirmed by the specialist institution.

AGENDA

- (1) There is need to publicize the Competition Act through seminars and publications to ensure that our concerns are incorporated before its enactment.
- (2) A more thorough comparative study of competition laws in Kenya, South Africa and perhaps Germany is essential in order to assess the effectiveness of competition laws on the ground.

Interviews Conducted

1. Mr E. Moyo, Fredrick Neuman Foundation.
2. Mr Foroma, Confederation of Zimbabwe Industries.
3. Mr M. Tsvangirai, Mr Mudzengerere, Dr Kanyenze, Zimbabwe Congress of Trade Unions.
4. Mr Tshabangu, Deputy Secretary Ministry of Trade and Commerce.
5. Mr D. Ruhukwa, Mr T. Zizhou, Civil Division of the Attorney General's Office.

Comparative Work

1. Hungarian and Polish anti-trust legislation.
2. German Act against Restraint of Trade (it was hoped to also compare Kenyan and South African legislation in greater detail).
3. UK: The Fair Trading Act of 1993.



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