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## **OECD Global Forum on Competition**

### **CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION**

#### **Contribution from Tanzania**

-- Session II --

*This contribution is submitted by Tanzania under Session II of the Global Forum on Competition to be held on 12 and 13 February 2004.*

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## **CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION**

*(A paper by G. Mkocha, Commissioner, Fair Competition Commission, Tanzania)*

### **Introduction**

1. This paper is divided into five parts, namely; the current state of affairs of competition policy and law in Tanzania, the challenges of competition authorities with regard to the need of such institutions, the challenges of competition authorities with regard to the design and implementation of competition policy and law, the challenges with regard to implementation of the law and the conclusion.

#### **1. The Competition Policy and Law state of affairs in Tanzania**

2. Tanzania is in her early stages of attempting to establish an appropriate and possibly an effective competition policy and law. The summary below outlines the stages which the current law is undergoing:

- The Act was passed by Parliament on April 2, 2003<sup>1</sup>.
- The President assented to it on May 23, 2003.
- The President's Office is in the process of assigning Ministerial responsibility for the Fair Competition Commission and Fair Competition Tribunal after which that decision will have to be published in the official government gazette.
- Once the Minister responsible for the institutions has been appointed, the Minister is required to publish in the government gazette the date on which the Fair Competition Act shall start to be used.
- After the Fair Competition Act operational date has been published in the government gazette, full recruitment of members of Commission and Tribunal, and their staff shall begin.
- Training of Commissioners, Members of the Tribunal and senior staff will follow after which the Commission and Tribunal should be launched.

3. Since ordinarily, there may be no time that a country should not be guided by law, the Fair Competition Act of 1994 (as amended)<sup>2</sup> remains operational until the new one is legally established by the above listed procedures.

#### **2. Challenges and obstacles with regard to the need for competition policy and law in Tanzania**

##### **2.1 *The genesis of competition policy and law in Tanzania***

4. In 1986, Tanzania decided that market forces would be the main determinants in the economy. Thereafter, the government embarked on a process of repealing most of the laws that had been put in place to administer the planned economy.

5. In 1993 the government was presenting the Bill to repeal the Price Control Act, 1973 when the parliamentarians requested the government to find out how the market economy could be fettered. The request was prompted by what was construed by the public as a “chaotic situation” due to the fact that nobody appeared to be accountable for anything which was taking place in what they called “free market” in the country.

6. The government agreed to the request and set up a task force to find out what legal frameworks and institutions were operating in developed market economies and whether Tanzania could adopt such mechanisms. The task force did its job and in 1994, the Fair Trade Practices Act, 1994 was passed by parliament. This law has recently been repealed and replaced by the Fair Competition Act of 2003.

## **2.2 *The challenges for starting a competition policy and law***

7. The playing ground for any competition policy and law is the market economy. In developed market economies, competition policy and laws are more than 100 years old. In Canada it was enacted in 1879 and in the USA it was done in 1889. In the developing world, especially in countries which were under centrally planned economies, there is no in-depth knowledge and experience of how the market economy works and how it is fettered in order for the market economy to bring about benefits to a wider society. Therefore, the knowledge, appreciation and experience gap between societies in developed market economy and ours is a huge challenge.

8. Tanzania has still an underdeveloped market. The challenges of developing the market are mainly four:

- Liberalisation of trade.
- Privatisation of State monopolies.
- Deregulation.
- Creation of a viable and dynamic national private sector.

9. Market economy is not necessarily an ideological concept. Done properly, it is a means for decentralizing economic decision making by giving chance to as many players as possible to participate in a particular economy. The societal wisdom of favouring market economy and political pluralism are based on the same logic and right of self-determination and choice. This is both a political and a conceptual challenge.

10. Competition policy and law aims at making sure the liberalisation process is not used to achieve negative results in society. Competition institutions can legally challenge in a transparent manner and check the privatisation process from being tools of simply transferring the power of former state monopolies to private monopolies. This is also a political as well as pure conflict of interests challenge.

11. Typically, competition authorities are referees between three important players namely: the producers of goods and services in the economy, the consumer, and the Government. The relevancy of governments as factors in competition issues is particularly in relation to introducing laws, regulations or conduct which may be anticompetitive. Of the three players, the consumer is the least developed and organised in Tanzania. This is an advocacy challenge.

12. The scenario where the societal collective will to implement competition policy and law is lacking was once ably termed by an expert on competition from Brazil as “political market failure”<sup>3</sup>.

### **2.3 *Challenges and obstacles with regard to the design and implementation of an appropriate competition policy and law in Tanzania***

13. The requirements of a proper design and implementation of competition policy and law institutions i.e. independence, due process, accountability and transparency assume a high level of commitment to good governance on the part of Government itself. If the Government cannot appreciate the need for proper functioning and the insulation of such organisations from improper conduct, that is, if the Government itself is not up to the mark, it is unlikely to supervise the creation of appropriate and effective competition institutions. This is a good governance challenge.

14. The long term nature of institutions building sometimes hides their import. The level of understanding and appreciation on the part of the authorities with regard to the role of institutions in the development of the particular society is crucial. Competition institutions are amongst market support institutions. Obviously if institutions are taken for granted, then care and time in developing the law, institutions and the appropriate attitude to competition issues cannot be guaranteed.

15. Since the capacity for designing the law is hardly available in developing countries, it would require some commitment from some leader in the developing country, especially political leadership, in order for the proposals by external experts to get both the political and bureaucratic attention and support required for the proposals to be accepted, adopted and made into a law that makes sense in the particular country's context. An example of what happens when the above aspects are lacking can be seen from what happened in the previous Fair Competition Act in Tanzania.

16. The previous Act was passed by Parliament in 1994 but had a lot of weaknesses and hence its repeal and replacement by the current Act. Some of the weaknesses of the previous Act that have been overcome by the new Act are as follows:

- The Act had both the powers of controlling monopolies and supervising competition issues which were deemed contradictory.
- The Act had stipulated that there would be a Trade Practices Commissioner, but it did not specify how he was going to be appointed and by whom (Section 3).
- The provisions against restrictive business practices were so broad that they could catch pro-competitive conduct and/or cover micro enterprises. (Part III).
- The Minister was allowed to order a successful trader to divest part of his operations without providing in the Act for protection of legitimate and successful competitors. (Part IV).
- The Minister was given powers to fix prices, which was the subject matter of the previous Price Control Act, 1973. (Part V).
- The merger provisions were too much dependent on the discretion of the Minister.
- The independence, accountability, and transparency requirements for competition policy and law implementing institutions were not clearly specified by the Act.

#### **2.4 Challenges and obstacles with regard to the implementation of the policy and law in Tanzania**

17. Such organisations require resources. When the Government has been made to keep away from running businesses, it makes good investment sense for the Government to allocate appropriate resources to the regulatory system. This is both a resource and good governance challenge.
18. It may be difficult to get the minimum critical mass of people to manage the institutions especially in an area where the Universities do not provide education on competition issues.
19. Lack of political pressure due to ignorance or lack of confidence of the general public that they have the power to influence policy and implementation of policies the majority may wish to pursue.
20. Lack of understanding of the proper interaction with other economic policies. It is sometimes difficult to convince even Ministers that some of trade policies are anti competitive and in the long run may be even detrimental to the economic interests they wish to pursue.
21. The intervention of interest groups. For example, where some of the senior officials are members of the boards of monopolistic partly state owned companies, it is possible for such officers being deliberately obstructive in making necessary provisions for the new Act to be operational.
22. Lack of one focal point with political determination to implement competition issues. In countries where there is no particular Ministry with a mandate for economic reconstruction or privatisation, the special interest group battles translate into lack of collective interest to implement the Act promptly.
23. Deliberate amnesia by powerful external opinion makers to recommend proper sequencing of trade liberalisation and privatisation processes and the creation of economic regulatory and competition institutions. The excuse is that it is difficult to get the required competence in place without delaying the privatisation agenda.

### **3. Conclusion**

24. In Tanzania we have just managed to get the Act which, in our opinion, is clearer and has most of the generic features of any competition law. But a good Act alone is not enough. We are at the moment involved in capacity building. We expect to recruit staff both from the public institutions and the private sector and provide on the job in-house training, give them study tours to learn from developed competition authorities.
25. After getting the minimum critical mass for carrying out key competition analyses, we expect to launch a general public education exercise through seminars and public lectures and media on the need for competition policy and law and how it is expected to operate.
26. We have so far got support in various forms from the UK/DFID, sida/Sweden and WB/FIAS/IFC. The DFID paid for the costs of hiring an expatriate to draft the first version of the Fair Competition Bill and also paid for stakeholders' meetings before the Bill went through the government process. Ida is currently paying for the capacity building which involves preparation of manuals and training in the procedures, analysis and code of conduct for the Commission and appellate Tribunal senior officials<sup>4</sup>. The WB/FIAS/IFC financed a study in Tanzania to establish the link between competition policy and law with foreign direct investment<sup>5</sup>. Through this study we were given practical guidance on how sub-sector economic analysis could be carried out. WB study also made some useful suggestions on how best the new Act could be designed.

27. We are of the opinion that a market system without appropriate market support institutions will lead eventually to the market system itself being socially discredited. We are aiming at a properly started competition authority from the beginning. Tanzania would welcome any constructive ideas and practical assistance to this endeavor.

**NOTES**

1. The current Act is the Fair Competition Act (No.8) of 2003
2. The previous Act was known as the Fair Trade Practices Act (No. 4.) of 1994 which in 2001 was amended and renamed the Fair Competition Act (No. 4.) of 1994
3. Oliveira, Gesner, Building a Culture of Competition in Developing Countries: Discussion Points at the Competition Meeting sponsored by DFID, London, in 2000.
4. The capacity building project financed by Sida is being carried out by Adam Smith Institute of London who won the international tender for the Sida capacity building project
5. The WB/FIAS/IFC Study document is titled, Tanzania Foreign Direct Investment and Competition Policy: Issues and Recommendations