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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

OECD Global Forum on Competition

CONTRIBUTION FROM ZAMBIA

This contribution was submitted by Zambia as a background material for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

English text only

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CONTRIBUTION FROM ZAMBIA

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Zambia Competition Commission

I. – COMPETITION LAW AND POLICY IN ZAMBIA

1. Introduction

The Zambia Competition Commission was established under the Competition and Fair Trading Act, Section 4 of Chapter 417 of the Laws of Zambia to prevent anti-competitive and restrictive business practices and promote consumer welfare. The law came into force in February 1995. Zambia Competition Commission is an autonomous corporate body under the Ministry of Commerce, Trade and Industry. It opened its doors to the public in March 1997. In the enforcement of the Act, the Commission has been guided by two principal aims, thus:

- To prevent anti-competitive conduct thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service; and
- To ensure the interests and welfare of consumers are adequately protected in their dealings with producers and sellers.

2. Objectives of the Act

The aims and objectives of the Act are:

- To encourage competition in the economy;
- To protect consumer welfare;
- To strengthen the efficiency of production and distribution of goods and services;
- To secure the best possible conditions for the freedom of trade; and
- To expand the base of entrepreneurship.

3. Functions of the Commission

- To monitor, control and prohibit conduct likely to adversely affect competition and fair trading in Zambia;
- To prohibit anti-competitive trade practices;
- To regulate monopolies and concentrations of economic power;

- To authorise conducts not prohibited out rightly by the Act;
- To provide information for the guidance of consumers and business persons regarding their rights under the Act;
- To cooperate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the Act.

4. Activities of the Commission relating to Competition Law and Policy

- a) During the year 2000, the Commission was very busy attending to various market violations that continued to increase. The globalisation of world trade naturally had an impact on competition in the region general and Zambia in particular. In responding to the globalisation trend, Multinational Corporations in the region and globally were involved in various forms of consolidations in response to increased competition in the regional market.
- b) During the year 2000, the Common Market for Eastern and Southern Africa (COMESA) launched its Free Trade Area (FTA). The launch of the COMESA-FTA meant that cross border trade is expected to increase with reduced tariffs among member states. The Southern African Development Community Trade Protocol was being finalised. This means that an FTA would be established among the SADC member states to promote trade and investment. It is obvious that the establishment of the two FTAs in Southern Africa offer great challenges for the competition law and policy in the region.
- c) Anticompetitive trade practices perpetuated in other countries had an effect on business in other member states where trade takes place. The need for the regional competition policy aimed at addressing competition concerns in the region does not require being over-emphasised. These regional trends shall be the major challenges of the competition authorities in the region. The Zambia Competition Commission is developing measures with other competition authorities in the region aimed at addressing anticompetitive practices in the region.
- d) Over the last three years of the Commission's life, a total of 172 cases were investigated and the Board of Commissioners made decisions in 135 of the cases. The distribution of cases against each section is as given below.

Section	% Proportion	Statistics
Anti-Competitive Practices (Section 7)	30	49
Mergers/Takeovers (Section 8)	39	48
Trade Agreements (Section 9)	11	14
Anti-Competitive Practices by Trade Associations (Section 10)	2	2
Unfair Trading – (Consumer Protection) (Section 12)	18	22
Total	100	135

- e) During 2000 a total of 69 cases were handled with 37 cases carried forward to the year 2001. The year 2000 was a year of merger activity under section 8 of the Act that represented 47% of the cases closed. The second largest area of violations was under Section 7 on anticompetitive practices, which represented 33% of the Commission's work. The summary of statistics for various sections of the Act are as given below:

Section	Number of Cases	% Proportion
Anti-Competitive Practices (Section 7)	15	33
Mergers/Takeovers (Section 8)	22	47
Trade Agreements (Section 9)	1	14
Anti-Competitive Practices by Trade Associations (Section 10)	0	2
Unfair Trading – (Consumer Protection) (Section 12)	8	-
Total	46	100

II – DESCRIPTION OF CASES

A **Cartel Cases**

1.0 Exclusive Dealing Arrangements between Hybrid Poultry Farm and Galaunia Farms Limited

1.1 Introduction and Background Information

1.1.1 The case arose from a revelation during a meeting between management of Hybrid Poultry Farm (HPF), Zambia Association of Manufacturers (ZAM) and Zambia Competition Commission (ZCC) that HPF and Galaunia Holdings Limited (GH) had earlier agreed to effect a sale of Mariandale Farm and the poultry processing factory to Galaunia Holdings subject to agreed exclusive dealing clauses and conditions.

1.1.2 In turn ZCC advised the parties to notify the said exclusive agreements as required under the Competition and Fair Trading Act Cap 417 of the Laws of Zambia.

1.1.3 ZCC instituted investigations drawing heavily on the parallel investigations on the intended takeover of Tamba Chicks Ltd. GH management was interviewed on the same.

1.2 Findings

1.2.1 During the investigations it was revealed that in the sale of Mariandale Farm, which specializes in the raising of Day Old Chicks (DOC) into table birds, HPF required GH to only purchase DOC from itself. Further GH was also required to consider HPF's right of first refusal should it intend to resell Mariandale Farm. GH was also not allowed to raise any type of poultry, at the farm, apart from broiler chickens, including the provision not to go into business of a chicken hatchery. The parties also agreed that GH should be accorded the right of first refusal should HPF intend to sell some of its shares and that HPF should be given the first right of refusal to participate in an out growers scheme should GH come up with one.

1.2.2 The ZCC noted that the parties to this transaction are the two leading players in the poultry sector's upstream (HPF) and downstream (GH) sub sectors. HPF is the dominant producer of DOC in Zambia with a 60% market share. GH with its Mariandale and Diamondale Farms has an uptake of 48,000 DOC per week and hence the largest buyer in the poultry sector.

1.2.3 The anti-competitive Clauses in the Sale and Purchase Agreements included among other provisions:

Clause 13: That GFL would not raise any type of poultry on Mariandale Farm other than broiler chickens.

Clause 14: That GFL and any subsidiary or associate company would not enter into the business of a chicken hatchery or breeder broiler production in Zambia.

- Clause 15: That GFL would only procure its DOC requirements exclusively from HPF.
- Clause 17: That GFL shall have the exclusive right to collect all chicken manure from HPF chicken houses located in the Lusaka/Chisamba area at a cost of US\$0.30 per 90kg bag.
- Clause 19: That GFL should give HPF the right to first refusal to purchase, within five years of completion date, should it decide to sell the business and vice versa.
- Clause 21: Should GFL develop and implement an out-grower scheme to grow broiler chickens, HPF shall be given the first refusal to participate in the scheme.

- 1.2.4 On the basis of the foregoing findings, it is evident that the parties had contravened the Act.
- 1.2.5 The exclusive dealing arrangements appear to have been over and above the offers each party made and hence the considerations made by the other.
- 1.2.6 The excesses hinge on the ulterior motives of the parties in as far as the poultry sector is concerned. The parties seem to have taken advantage of their dominant market positions upstream and downstream – where each party was dominant. The parties were, both by motive and concerted practices, foreclosing competition both in the DOC, table birds (broiler) and frozen chicken.
- 1.2.7 HPF and GH also entered into another agreement for sale and purchase of the Poultry Processing Company (PPC) with similar restrictive clauses.
- 1.2.8 These practices are in direct contravention of Section 7 of the Act and have the tenets of distractive cartel behaviour.

1.3 The Board of Commissioners found all the exclusive dealing provisions in the sale and purchase agreements by the parties anti-competitive and nullified them.

2.0 Oil Marketing Cartel

2.1 Introduction and Background Information

- 2.1.1 The Energy Regulations Board (ERB) is the Sector Regulator for the energy sector in Zambia, which includes petroleum products, electricity, solar energy and other forms of energy.
- 2.1.2 The Sector regulator has a mechanism through which price adjustment applications are handled. The system is that each Oil Marketing Company (OMC) has to individually apply to ERB expressing the need for a price adjustment and the procedure is documented and each OMC has a written statement from ERB. When ERB is satisfied with the need for a price adjustment (increase) it sets a price cap, which is the upper limit from the existing and ruling price levels being the lower end. The OMC are not allowed to set prices above the price cap.

- 2.1.3 All OMC buy their petroleum requirements from the Indeni Oil Refinery, which processes imported crude oil through Zambia National Oil Company (ZNOC). ZNOC sells the refined petroleum products on wholesale prices.
- 2.1.4 In May 1999, the Indeni Oil Refinery was gutted by fire and all Oil Marketing Companies were allowed by Government of the Republic of Zambia to import refined petroleum products. The ERB issued nine (9) OMC with import licenses and government reduced customs duty from 25% to 5%. Despite the various sources of imports, the pump prices of petroleum products remained the same.
- 2.1.5 When the repair work was completed at Indeni Oil Refinery, the government reinstated the 25% import duty on all petroleum products. The OMC jointly submitted a complaint to ERB on the effects of the government decision on their businesses.

2.2 Nature of the Cartel

- 2.2.1 The ERB and Zambia Competition Commission observed that Oil Marketing Companies in Zambia acted collectively in price adjustments since 1997.
- 2.2.2 The Oil Marketing Companies selected one company to apply for a price adjustment to the Sector Regulator and all the parties implement the decision of the Regulator uniformly at the same time.
- 2.2.3 The Oil Marketing Companies held regular meetings where exchange of information regarding sales volumes and prices take place. These meetings have been taking place for a long time.
- 2.2.4 Small OMC had attempted to charge lower prices on the basis of the their cost structures, but the cartel leaders immediately reacted by reducing pump prices to lower price levels at all service stations near service stations of defiant operators until they complied with standard behaviour on prices.

2.3 Legal Action

- 2.3.1 The Zambia Competition Commission working with the ERB have prepared documentation, received minutes of the meetings of the OMC, the nature of shared information with a view to lodge the case with High Court of Zambia for prosecution. Investigations have since been completed.
- 2.3.2 This is likely to be a landmark case in Zambia concerning cartel behaviour.

B. Takeover Cases

3.0 The Takeover of Chilanga Cement Plc by Lafarge of France.

3.1 Nature of the takeover.

The takeover of Chilanga Cement involved the sale, to Lafarge SA of France 51% shares owned by the Commonwealth Development Corporation (CDC) [through its subsidiary firm, Pan African Cement (PAC)] in the company. The institutions and individuals owned the balance of the shares.

3.2 Issues for consideration.

3.2.1 The primary issue that arose from this takeover was the fact that Chilanga Cement is a monopoly undertaking in Zambia that is, supplying over 50% of the cement consumed domestically. Prior to this transaction, the ZCC had reports suggesting that Chilanga Cement was abusing its dominant position in the market through excessive pricing and market sharing within the PAC cement group of companies. The effect of the market sharing was to prevent Zambian cement from being sold in Burundi, its main market prior to the takeover, which should in turn be supplied from Tanzania.

3.2.2 In terms of the competitive assessment, it was established that the parties were not in direct competition in Zambia because Lafarge never sold its cement from Zimbabwe and South Africa. However, it was observed that the Lafarge plants in Zimbabwe were a potential source of competition and posed the danger of being alternative sources of cement into the Zambian market in case Chilanga cement plant was closed down based on Lafarge's global economies of scale to maximize profits. Zambia at the time was categorized as a high cost producer of most merchandise including cement.

3.2.3 It was further observed that PAC also owned the Mbeya plant in Tanzania and another in Malawi, which were all part of the sale and purchase agreement. Thus it was seen possible for Lafarge to supply most areas in Zambia from its other plants in the neighbouring countries. The fear was that should such a situation arise, grave public interest issues would emerge including adverse effects on the employees, ancillary local enterprises and national trade.

3.3 Issues of Public Interest

3.3.1 The major concern for Zambia Competition Commission was the need to continue experiencing some domestic competitive pressures on the sole supplier of cement, the subject of the takeover. Import competition has therefore been looked at favourably but not at the expense of domestic production.

- 3.3.2 Secondly, it has felt that Zambia should continue with its pursuits for sources of hard currency because it is landlocked and its production systems were import-dependent. Accordingly, the initiatives aimed at earning Non-traditional exports (NTEs) through exports of cement and other products, is a national priority. The Burundi market is good for Zambia but the PAC plant in Tanzania is new and more efficient but not very competitive on quality of cement. On this basis cement exports to Burundi could not be safeguarded under a merged entity and that pricing of the commodity into that market had to be rationalized to the advantage of all parties.
- 3.3.3 The other concern is that Burundi, Zambia and Malawi are members of the COMESA Free Trade Area while Tanzania is not a member. While Zambia has a competition law to regulate behaviour of trans national corporations, Malawi and Tanzania did not have competition legislations. In the absence of a regional competition framework, any efforts to regulate behaviour of trans national corporations at the regional level were futile.

4.0 The Takeover of Tate and Lyle Shares in Zambia Sugar Plc by Illovo Sugar Limited.

4.1 Introduction and Relevant Background Information

- 4.1.1 Illovo is Africa's leading sugar producer and a significant manufacturer of downstream products with agricultural, manufacturing and other interests extending over six Southern African countries namely; Malawi, Mauritius, Mozambique, South Africa, Swaziland, and Tanzania. It also produces sugar from beet in the United States.
- 4.1.2 T&L is a British multinational company with business interests in Africa, United Kingdom, Western and Eastern Europe, North America, Australia and Asia. In Africa, T&L operates in the sugar and sugar packaging businesses in Botswana, Kenya, Zambia and Zimbabwe. It has business interests in Zambia Sugar and Kabwe Industrial Fabrics Company Limited in Zambia. T&L controls 50.87% share of Zambia Sugar Plc. T&L is listed on the London Stock Exchange.
- 4.1.3 T&L used its pre-emptive rights to acquire over 50% shares in ZS at the time of its privatisation. It is listed on the Lusaka Stock Exchange following its privatisation. ZS is the largest sugar manufacturing and refining company in Zambia with approximately 96% market share. It cultivates and mills sugar and markets refined sugar from its estates at Nakambala in Mazabuka.

4.2 Nature of the Takeover

- 4.2.1 The takeover was an acquisition of 50.87% shares in Zambia Sugar through the Lusaka Stock Exchange. Any acquisition of 50% or more shares by any one entity attracts the attention of the Zambia Competition Commission because is the same as acquisition of the whole organisation.
- 4.2.2 While the merger is a domestic transaction, in assessing the takeover, the Commission reviewed the regional impact of the merger because of the likely anticompetitive effects of the merger at the regional level.

4.3 Legal Contravention and Issues for Decision

- 4.3.1 The merger notification is in line with the provisions of Section 8 of the Competition and Fair Trading Act (Act) Chapter 417 of the Laws of Zambia that demands a mandatory notification of any takeovers/mergers or acquisition of assets of one company by another. Section 8(2) of the Act nullifies any merger or takeover that is not notified with the Commission.
- 4.3.2 The issue for decision was whether or not the proposed takeover of T&L shares and the management of ZS by Illovo were likely to restrict, distort or prevent competition to an appreciable extent in the market or substantial part of the market in violation of section 7 of the Act.

4.4 Major Findings

- 4.4.1 The motive of the takeover was not likely to lead to the prevention, distortion or restriction of competition in the relevant market (Zambia). In the domestic market, ZS is a de facto monopoly and the takeover of the major shareholding in the company is not likely to change its monopoly status in the market. At the regional level however, Illovo would still face competition from many regional players.
- 4.4.2 It was however, noted that the takeover by Illovo had the likely effect of creating a regional dominant firm because of its current regional coverage. Investigations revealed that Illovo had manufacturing and other interests extending over six Southern African countries namely: Malawi, Mauritius, Mozambique, South Africa, Swaziland, and Tanzania. The addition of Zambia obviously implies that Illovo becomes the regional dominant player controlling a significant share of the region market.
- 4.4.3 The motive of Illovo in acquiring the 50.87% shares of T&L in ZS is meant to consolidate itself at the regional level. In the region, Illovo is the leading supplier of sugar with 35% market share and it was likely to consolidate its position even further with the proposed acquisition of ZS. Its regional market share was likely to increase to 39%. The acquisition could be the removal of a potentially vigorous and effective competitor in the regional market.

4.5 Decisions of the Board of Commissioners

- 4.5.1 The Board of Commissioners authorised the application for the takeover of 50.87% shares of T&L in ZS by Illovo Sugar of South Africa be authorised since the takeover was not likely to lead to the restriction, prevention or distortion of competition in the relevant market (Zambia).
- 4.5.2 The impact of the takeover at a regional level has no legal basis for regulation. In the absence of a regional competition framework, there is no basis for rejecting the takeover. Currently Illovo has no sugar operations in Zambia. The takeover does not amount to the elimination of one competitor in the market.
- 4.5.3 The Board directed the Commission to request the Securities and Exchange Commission (SEC) to waive the requirement that Illovo should make a mandatory and equivalent offer to the minority shareholders to prevent entrenching the position Illovo in ZS. This is to prevent minority shareholders like CDC from selling their shares and ensure the participation of Zambian nationals and institutions in ZS. This request is based on public interest aimed at ensuring that basic industries in Zambia should at least be partly owned by Zambian citizens or institutions.

II. – QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

1. Please provide a citation and as much of the following information as possible for each case since January 1, 2000 in which your economy challenged a hard-core cartel – i.e., an anticompetitive agreement among competitors to fix prices, restrict output, rig bids, or divide or share markets.

- (a) Each **respondent's name**, the covered **product or service** and **geographic area**, and the approximate beginning and ending dates of the cartel.

No.	Respondent	Product/Service	Geog. Area	Time Span
1.	BP Zambia Limited	Petroleum	Zambia	1997-2001
2.	Caltex (Z) Limited	“	“	“
3.	Total Zambia Limited	“	“	“
4.	Mobil Oil (Z) Limited	“	“	“
5.	Agip Zambia Limited	“	“	“
6.	Hybrid Poultry Ltd Tamba Chicks Limited and Mariandale Poultry Farm	Poultry	Zambia with major concentrations in the Lusaka, Copperbelt Southern regions	1997-2000

- (b) Whether the **evidence of collusion** was direct (written or testimonial) or indirect; the nature of any indirect evidence.

Petroleum Sector

- i) **Direct:** decisions of the Cartel meetings as reported to the Energy Regulations Board (the Sector Regulator)
- ii) *Price adjustment applications by a designated member of the cartel to Energy Regulations Board upon approval of the application all oil marketing companies set the approved pump prices.*
- iii) **Indirect:** *Uniform price adjustments either upwards or downwards.*
- iv) *A junior employee of one the companies wondered why Oil Marketing Companies should be exchanging market information in a liberalised market.*

Poultry Sector

- i) **Direct:** *One player complained to the Commission and submitted copies of agreements compelling the parties buy day old chicks only from the cartel leader.*
- ii) **Indirect:** *Comparatively very similar prices.*

- (c) **Amount of commerce:** Estimated monetary value of all sales of the product or service in the geographic area during the cartel (i) annually and (ii) during the cartel. If possible, the same information for all sales by cartel members. For bid rigging, the magnitude of the contract(s) affected.

Sector	Annual Sales (US\$)	Cartel Sales (US\$)
Petroleum (Cartel)	316, 000, 000	425,000 000
Poultry (Price Fixing)	4, 617, 600	8, 773, 440

- (d) **Sanctions:** The monetary value of the fines and other financial sanctions imposed, in total and against each party, under (i) the competition law or (ii) other law. Rationale for the level of competition law sanction, such as a percentage of relevant turnover or of the illegal gain or the loss to victims. A description of other orders, including imprisonment.
- i) *Cease and desist orders issued, failure to comply attracts 100,000 penalty units fine under Section 16 of the Competition & Fair Trading Act, or imprisonment to 5 years, or both.*
- ii) *Relevant senior officers summoned and cautioned by the Commission*
- iii) *Undertakings signed with the Commission*

2. *From all of these cases, please consider when the facts most clearly illustrated the harmfulness of cartels and/or the knowledge of cartel members that the conduct was illegal and/or harmful.*

- i) *Consumers complained to the Commission of uniform high prices and common price increases by the players in the market and negative press reports.*
- ii) *An aggrieved party to the agreement lodged a complaint to the Commission*
- (a) *Please supply quotations (preferably) or descriptions of cartel members' oral or written statements concerning the cartel's **actual or intended effect on price.***
- i) *Copies of correspondence between the parties and minutes of their meetings.*
- ii) *Exchange of sales statistics and price application by one member and followed by others.*
- (b) *Please describe evidence concerning **changes in price or output** when the cartel was formed or when it ceased; **other harmful effects** of the cartel – e.g., on quality, entry, innovation, or efficiency; **changes in firm profits** when the cartel was formed or when it ceased; **excess profits** during the cartel.*

Changes in price or output- Petroleum Sector

- i) *Entry of two new players in the petroleum industry with wider consumer choice after Commission instituted investigations. Price discounts on the pump prices have been experienced in various service stations owned by the competitors.*

Harmful effects of the Cartel in the- Petroleum Sector

- ii) There was uniform price for all service stations despite differences in overheads thereby eliminating competition in the market.
- iii) There is absence of independent decision making by smaller operators. The cartel leaders meet deviation from standard behaviour harshly.

Changes in the Price or Output- Poultry Sector

- i) Entry of a formidable new competitor in the poultry industry after the Commission's intervention.
- ii) The output in terms of day-old chicks has significantly increased with increased customer choice.
- iii) The price of day-old chicks had reduced from the high of US\$0.76 to between US\$0.37 and US\$0.40 per chick, which reduced the overall price of table chickens.
- iv) The excess profits earned by the cartel leader were significantly reduced and the weaker cartel members immediately abandoned the cartel leader and stopped doing business with the cartel leader.

Harmful effects of the Cartel- Poultry Sector

- i) Prices had at one time increased to a price level of US\$0.76 per Day old chick.
- ii) Inconsistent quality of output and regulated output level to maintain high prices.

(c) *Please describe or quote the most **colourful statements** by cartel members revealing their intent, their lack of justification, their awareness of the illegality of their conduct, etc.*

Petroleum Sector

- i) "It is a global industry practice to exchange market information on prices"
- ii) "There has not been any harmful effects on the market"
- iii) "We've always been doing this and did not see anything wrong now..."
- iv) We are working together to resolve the oil marketing problems that the country was facing for the good of the economy.

Poultry Sector

- i) It is normal business practice to maintain long term contracts in the poultry industry.
- ii) These agreements are meant to protect the local industry and have maintained a disease free environment for a long time now.
- iii) The agreements have ensured consistent supply of output without any distortions in the market.

(d) *Please describe other **dramatic demonstrations** of cartels' harm, such as conduct aimed at particularly sympathetic victims (e.g., old people, children), or otherwise outrageous conduct (e.g., blowing up a factory).*

B. General Information on Sanctions

4. *Please indicate the applicable **standard of proof and the available sanctions** for competition enforcement in your economy, responding separately for each different type of enforcement (administrative, civil, or criminal) that is used.*
- i) *Sanctions are applicable to formal, informal, written and unwritten, implicit and explicit agreements or understandings amongst players.*
 - ii) *Administrative sanctions involve ordering the termination/revocation of an agreement forthwith (Cease and Desist Orders);*
 - iii) *civil sanctions involves payment of 100,000 penalty units, which is equivalent to ZK 18 million (US\$4762)*
 - iv) *Criminal nature of cartels may lead to a penalty as stated in iii above and /or an imprisonment term of up to 5 years in jail.*
5. *Please supply or describe any **general schedule or set of principles** used in your economy for calculating fines and other sanctions for (a) economic law violations or crimes in general, (b) competition law violations, and (c) procurement fraud, tax fraud, securities fraud, and other comparable offences. Please provide also the maximum penalties with respect to the above.*
- i) *Fines are based on penalty units as specified in the Act. Government normally establishes the value of a penalty unit through a Statutory Instrument every year.*
 - ii) *In addition, prison terms are specified up to a stated maximum of 5 years in the Competition and Fair Trading Act.*
 - iii) *Adjudicative powers in these matters lie with the High Court of Zambia.*