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## **Global Forum on Competition**

### **CRISIS CARTELS**

#### **Contribution from Zambia**

-- Session III --

*This contribution is submitted by Zambia under session III of the Global Forum on Competition to be held on 17 and 18 February 2011.*

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## THE ZAMBIAN EXPERIENCE WITH CARTEL ENFORCEMENT

-- Zambia\* --

### 1. Background Note

1. Zambian competition law regime has existed since 1994 and has been implemented through an independent/autonomous competition authority – previously known as the Zambia Competition Commission and now as the Competition and Consumer Protection Commission. The previous Competition and Fair Trading Act was repealed in August 2010 because of its inherent weaknesses in both content and context in the implementation and/or enforcement of key anti-competitive trade practices and their enforcement, notably on cartels. The Competition and Consumer Protection Act No. 24 of 2010 (herein called the **Act**) replaced the old law and created the Competition and Consumer Protection Commission, with increased powers of investigations, subpoena of witnesses and documents, search powers and appointment of independent inspectors to assist in cases.

2. The Government of Zambia has demonstrated greater political will towards competition and consumer protection by drafting and adopting the first ever comprehensive National Competition and Consumer Protection Policy. This was in May 2010. On cartels, the policy states as follows:

*Cartels are ... a conspiracy against the public. They subject consumers to high fixed prices, market allocation and bid-rigging, among other anti competitive practices which all prevent effective competition amongst competitors. Such conduct would also result in preventing effective market participation of any enterprise that may not be part of the cartel as cartel members act as a concealed "monopoly". Government can be susceptible to cartels in state contracts by public tender. Unfortunately, cartels involving bid rigging usually are a huge cost on Government and tax payer 's money. The cartel cases are criminal in nature and attract stiff punitive measures<sup>1</sup>.*

3. Arising from the foregoing, the Government has committed to the following:

- (i) *The competition authority shall undertake periodic research to ascertain the existence of cartels in the economy*
- (ii) *Exposure of cartels to the public (name and shame)*
- (iii) *Establishment of close relationships with competition authorities in other countries and collaborate in investigation and prosecution of cartels*
- (iv) *Collaboration with internal security wings in cartel identification and investigations*
- (v) *Government will establish a mechanism to encourage informers and provide for their protection*
- (vi) *Government will put in place enforcement mechanism such as stiffer penalties that will deter persons from forming cartels.*

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\* Contribution submitted by Mr. Thula Kaira, Executive Director, Competition and Consumer Protection Commission.

<sup>1</sup> National Competition and Consumer Protection Policy, Paragraph 2.2.5, page 7.

## 2. Zambia's challenges in cartel enforcement

4. The liberalization of the economy came with its own challenges among them the entrenchment of cartels amongst the private market players after the State sold its commercial/business entities. However, the repealed Competition and Fair Trading Act did not allow for a leniency program on cartel members who reported on the existence of a cartel. It was therefore difficult to obtain evidence to prove cartel behavior as cartels are ordinarily clandestine in nature. Since 1997, the Commission has successfully uncovered two cartel cases. These were in the poultry sector in 1999 and another in the oil marketing sector in 2001. However, these cases were administratively dealt with after the parties agreed to desist from the conduct and entered into an agreement with the Commission.

### **Case 1. Cartel in the Poultry Sector involving Hybrid Poultry, Galaunia Farms, Tamba Chicks and Eureka Chickens**

In 1998, the Commission discovered a cartel in the day old chicks and chicken broiler markets. Three out of four cartel members walked into the Commission offices and confessed that they had been “forced” to sign a market allocation agreement – by a dominant firm.

The Commission was relatively young in existence and this was the first time it was dealing with a cartel case. Further, the Commission was understaffed and underfunded

The Commission nullified the reciprocal arrangements and the market allocation agreements that existed between the competitors as well as the largest customers.

**SOURCE:** Zambia Competition Commission, Annual Report 1999

### **Case 2. Oil Marketing Cartel involving BP, Caltex, Total and others**

The Commission found the oil marketing companies with “smoking-gun” evidence of a price cartel. The Commission engaged with the energy regulator to prosecute the cartel on the understanding that legal fees were to be borne by the regulator – as the Commission had no staff/or money to litigate the case

Along the way, the regulator withdrew from the case as it was found that the alleged “fixed-price” was actually the “price-cap” that was set by the energy regulator. The Commission faced a dilemma as to whether price-cap setting was equivalent to price fixing in the competition law context. While the Commission found that it was price fixing, the Commission issued a cease and desist order after the parties agreed and case was closed. **SOURCE:** Zambia Competition Commission, Annual Report 2002

5. The maximum fine a cartel member could be fined under the old law was US\$2,000, in addition to a jail sentence of not more than 5 years. In criminal cases, the Commission was at the time reckoned to operate under the guidance of the Director of Public Prosecutions (DPP). However, the position was clarified later when the Commission was gazetted as a public prosecutor and could thus move the courts in criminal matters without the guidance of the DPP.

6. The following challenges have stood out before the 2010 legal reforms.

## **2.1 High staff turnover**

7. For an agency to successfully bust and prosecute a cartel, it should have the necessary capacity in terms of resources and trained staff that have the zeal, credible knowledge and ability to detect, investigate and prosecute cartels. While resources have increased considerably over the last 3 years, the challenge has been developing and retaining the “zealous cartel-buster” – a dedicated team to the long period of the meticulous and passionate investigation is a gap we have recently begun to mould or seal within our system.

8. The high staff turnover has contributed to cases taking longer as new officers wait to be trained and/or get a grip of the case details, what has been unearthed and what is yet to be unearthed.

9. In addition, the Commission has realised the need to develop and use a variety of techniques and methods to detect cartel activity, including a mix of both reactive and proactive methods that will increase the opportunities for detecting cartels.

## **2.2 Leniency program**

10. A useful contemporary tool for cartel busting has been hailed to be a leniency program – of which countries such Brazil and South Africa would be near role-models for Zambia. While generally leniency does exist under the Zambian criminal justice system (through the DPP), a specific leniency to competition cases was found necessary by the Government, which was a recommendation from the National Policy.

11. The new Competition and Consumer Protection Act has provided for leniency program. Specifically section 79 of the Act has provided thus:

*“The Commission may operate a leniency program where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act”.*

12. Section 79(2) has further provided that the details of a leniency program under subsection (1) shall be set out in any guidelines of the Commission. Therefore, the Commission has been empowered by the new Act unlike in the Competition and Fair Trading Act to come up with guidelines which it may deem fit and appropriate for the realization of the goal of a leniency program. As the Brazilian and South African experiences show, leniency by competition law authorities can aid fight the most sophisticated hard core cartels. Leniency programs can facilitate the severing of the policy of concealment among cartel plotters. Leniency program may undeniably enhance the Commission's ability to detect and prosecute cartels.

13. With section 79 of the Act in place, it is very likely that most of these perceived anti-competitive practices in the economy would be uncovered and hopefully successfully prosecuted. In addition, Zambia developed a competition policy in 2010 to really spell out government intention, commitment and strategy in so far as competition is concerned. The policy has thus demonstrated the political will that is there to curb anti-competitive practices including cartels that may prevail in the economy

## **2.3 Cooperation with domestic law enforcement agencies and international counterparts**

14. Cooperation with other wings such as the police is critical. The Commission is developing working linkages with the police and other economic crime investigating wings to ensure that where there is a dawn raid, forensic evidence experts can be used to assist the Commission retrieve critical information. There is need for the Commission to develop a good working relationship with domestic law enforcement

agencies and international counterparts to have regular contact in order to promote cooperation and the sharing of information as far as permitted by applicable laws, treaties and/or applicable laws. The OECD Global Forum on Competition and the International Competition Network working group system have provided useful learning platforms for the Commission.

#### **2.4 Education and outreach programmes**

15. The Commission's cartel investigations need to be reviewed and repositioned vis-à-vis the public. The Commission will have to focus on education and outreach programmes to raise awareness about cartel behaviour and its harmful effects of cartels on the economy and consumers; to educate people about the operation of the law and the typical signs of cartel conduct, and to generate leads about cartel activity which may be a source for the initiation of a formal investigation. A nation wide radio and television program has been rolled-out since 2010 to educate the public on general anti-competitive trade practices common in our industry, with a particular emphasis on cartels and the likely indicators such as similar prices, terms and conditions, common agents, etc in order for consumers to alert the Commission on possible cartel existence.

#### **2.5 Investigation techniques**

16. In today's world of advancing technologies, more and more information is being generated, stored and distributed by electronic means. This requires the Commission to increase the use of digital evidence gathering techniques as a frequent or standard tool in the fight against cartels. The Commission has not developed in-house expertise but has developed useful links with other specialised agencies to cooperate with.

#### **2.6 Powers of investigation**

17. The Commission is now clothed with powers to subpoena witnesses and call for production of documents without going through the Court process – as the situation was before 2011. The Commission had previously found it difficult to obtain information as suspected persons were not obliged to submit or facilitate such information to or for the Commission. Where they refused, the Commission had to take them to the ordinary court system where a whole case would be commenced. This process discouraged the Commission from vigorously pursuing cartels and instead focused on administrative resolution. New legal reforms have, e.g under Section 80 of the new Act, provided that a court of competent jurisdiction shall have jurisdiction over any person for any act committed outside Zambia which, if it had been committed in Zambia, would have been an offence under the Act. Extradition of offenders shall be possible under the *Mutual Legal Assistance in Criminal Matters Act*.

18. Under Section 83, where an offence is committed by an incorporated or unincorporated body, every director or manager shall be deemed to have committed the offence unless they prove they were not aware or they took "reasonable" steps to prevent the commission of the offence [Section 82 provides a penalty not exceeding 100,000 penalty units (ca. US\$ 3,500) or one year jail or to both].

#### **2.7 Active enforcement**

19. We have realised that despite all the foregoing, notably a leniency program, successful cartel detection and prosecution would only be possible where the public do not perceive or apprehend that the Commission has no capacity to move a case beyond a certain level. Members of the public need to be convinced that they are dealing with a serious and "no-bluffing" enforcer who will e.g. smoke them out unless they come out. Over the last three years, the Commission has worked itself well into the hearts and minds of the public by taking on a number of multinational entities for various cases ranging from abuse of

dominance to consumer protection issues. The notable cases have involved South African Breweries (SAB-Miller), BP and British American Tobacco. The Commission also successfully sought judicial review on the application of competition law to State-owned companies. These results have increased the Commission's visibility and accorded it the respect that it is not a mere source of threats but will take a step further to find evidence and prosecute accordingly.

## **2.8 *Existing cartel investigations***

20. The public have become increasingly aware of the functions of the Commission and the legal mandate to bust cartels that the law grants the Commission. Members of the public have reported various possible cartels in the fertiliser, maize-meal, wheat-milling and public procurement sectors. The Commission has been investigating these "for years" and the public have become impatient with the slow pace – and lack of arrest or fining of alleged cartel-members. The Commission has painstakingly tried to explain its investigative process and also avoided giving out too much information that could jeopardise the investigation strategies. A recent submission has pointed out at the uniform legal fees charged by lawyers in Zambia – which case has aroused great public interest and high expectations from the Commission.

## **3. Conclusion**

21. While the public have begun to "detect" cartels in various sectors of the economy, the Commission is careful not to excite public expectation of its investigations. Various cartel allegations have been received and it is the Commission's burden to explain that some of the allegations from the public are not necessarily cartels – and even where they show a semblance of a cartel, the Commission has to investigate the case and find the relevant evidence. With public excitement, there is need to maintain sobriety and professionalism in the investigation process.

22. Since cartels are typically shrouded in secrecy, their detection and the strategies that should be used by the Commission during the investigatory period are of utmost importance to effective enforcement. The challenges to successful enforcement such as increasing investigative capacity to detect cartels; use of robust investigatory methods; and prioritizing multiple enforcement matters to make the best use of resources are important.

23. Further, the Commission needs to reach out to all stakeholders and emphasize the dangers of cartels to the economy in order to increase the chances of detection and subsequent prosecution.