FIFTH UNITED NATIONS CONFERENCE TO REVIEW
ALL ASPECTS OF THE SET OF MULTILATERALLY
AGREED EQUITABLE PRINCIPLES AND RULES FOR
THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES
Antalya, Turkey, 14–18 November 2005

THE ROLE OF ECONOMIC ANALYSIS IN COMPETITION LAW ENFORCEMENT

Submission by UNITED REPUBLIC OF TANZANIA

AYT.05-065

THE ROLE OF ECONOMIC ANALYSIS IN COMPETITION LAW ENFORCEMENT

By **Godfrey Mkocha, Director General, Fair Competition Commission, Tanzania**, as a partial contribution to Panel III at the Fifth UN Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles And Rules for the Control of Restrictive Business Practices, Antalya, Turkey, 14 to 18 November 2005.

1. Introduction

The object of this paper is to spell out the specific areas, according to the Tanzania competition law, which compel law enforcers to apply economic analysis.

An attempt is made in the paper to define the relevant terms in the Tanzania Competition Law and, using available world wide competition experience, to show the extent to which economic analysis is implied.

The presentation is limited by the absence of case law on competition in Tanzania because of the fact that Tanzania is at the very beginning of institutional building of competition policy and law enforcement institutions after the current new law was passed by Parliament in 2003.

2. The relevant sections of the Tanzania Competition Law

Section 3 of the Fair Competition Act of 2003 of Tanzania states,

"The object of this Act is to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to:

(a) increase the efficiency in the production, distribution, and supply of goods and services;
(b) promote innovations;
(c) maximize the efficient allocation of resources; and
(d) protect consumers."

Section 2 (b) of the same Act states, "competition", "market", and "dominant position in a market" are economic concepts and, subject to the provision of this Act, shall be interpreted accordingly."[1*]

The above quotations indicate the obvious fact that whoever has to enforce that Act would have to grapple with the economics involved in the objects of the Act, including the interpretation of the economic concepts and the relevancy of those concepts to the issue being considered at the particular time.

3. The extent to which economic analysis is implied by Tanzania Competition Law

3.1 Competition and competitor

According to Section 5 (2) and (3) of the Fair Competition Act, ““Competition” means competition in a market in Tanzania and refers to the process whereby two or more persons:

(a) supply or attempt to supply the same or substitutable goods or services to the persons in the same relevant geographical market; or

(b) acquire or attempt to acquire the same or substitutable goods or services from the persons in the same relevant geographical market.

A person is a “competitor” of another person if they are in competition with each other or would, but for an agreement to which the two persons are parties, be likely to be in competition with each other.”

The World Development Report 2002 on Building Institutions for Markets attempts to put forward four attributes which may be applied to gauge competition in both relevant product and geographic market. These are:

- The extent to which production is concentrated among a small number of firms. The indicators employed are:
- Four or five firm concentration ratios, the percentage of employment by the four large firms, the Herfindahl-Herschman index and the number of firms in the market.

- The consequences of market structures which are approximated by estimating the residual elasticity of demand of the firm’s own product. This measures the extent to which a price rise by the firm would lead customers to substitute away and buy from rival firms or turn away from the product completely.

- Looking at the behavior of the firms in order to infer the competition the firms perceive they are facing. The price-cost margin is employed in this measure.

- Assessing the contestability of the market. This aspect deals with potential competitors, that is, the possibility of others entering the market and therefore acting as a discipline on incumbent firms.2*

3.2 Market

According to Section 5(4) and (5) of the Fair Competition Act,

> “market means a market in Tanzania or a part of Tanzania and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services.

In defining markets, assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, shall be taken into account:

(a) competition from imported goods and services supplied by persons not resident or carrying on business in Tanzania; and

(b) the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market."1*

An attempt to elaborate how this could be done has been made in the publication, A Framework for the Design and Implementation of Competition Law and Policy, a World Bank document which suggests three concurrent conditions for the substitutability of a product:

- A small price increase, so that the reaction is geared to buyers of close substitutes not to distant substitutes.

- The reaction of buyers, that is whether there would be sufficient number of buyers switching to other substitutes to force the firm increasing the price to reverse his decision

- The "smallest market" principle, i.e. the market is widened only to close substitutes can be identified

Similarly, geographic market is defined by the substitutability of products made or sold at various locations. That is, buyers of a product sold at one location were to switch to buying one product from a source at another location in response to a small but significant but non transitory price increase, and then those locations are in the same geographic market. But in practice, transportation costs, transportation time, tariffs, and regulations are the determinants.3*

3.3 Dominant position in the market

According to Section 5(6) of the Fair Competition Act,

"A person has a dominant position in a market if both (a) and (b) apply:

(a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and

(b) the person's share of the relevant market exceeds 35 per cent."1*

In defining the dominance in the market, it appears that one has to grapple with the relevant market factors which have already been discussed.

Once the relevant market aspects have been dispensed with, then one has to look at the market share of the firm, possible entry barriers obtaining in the market, and the conduct of the particular firm.

4. The Role and Status of Competition Law and Policy in Tanzania

According to Prof. Douglass, markets allow people to use their skills and resources to engage in higher productivity activities if there are institutions to support such markets.

He specifies these institutions as:

- Rules
- Enforcement mechanisms and
- Organisations supporting market transactions

The functions of these institutions are to:

- Help transmit information
- Enforce property rights and contracts
- Manage competition in markets

Prof. Douglas reckons that all market supporting institutions therefore give people opportunity and incentives to engage in fruitful market activity. He therefore concludes that it is not only policy which matters but institutions as well.[4*]

In Tanzania, the realization of the role of appropriate market institutions has been taken seriously. Tanzania has just modernized the competition law and the employment of personnel in the competition policy and law implementing institutions is progressing in earnest.

The Organisation of Economic Cooperation Development 2003/4 Southern Africa Development Programme component on Competition Policy and Law Capacity Building Project funded by the United States Agency for International Development chose Tanzania to be one of the beneficiaries.

The project's initial object was to ascertain the country's specific needs in the field of competition and policy and develop an action plan. This project was carried out by Mr. Clark and M.Schechter, both Competition law experts based in Washington in the USA in collaboration with the three initial officials of the Tanzania Fair Competition Commission (FCC).

A paragraph of the executive summary of the findings indicates the state of play and way forward for competition policy and law in Tanzania as follows:

“The Fair Competition Act is a comprehensive, well drafted law. It properly focuses on enhancement of consumer welfare and promotion of efficiency as the objects of the Act. It specifies three types of anticompetitive agreements, abuse of a dominant position, and anticompetitive mergers. The legal standards that apply to these three types of abuses under the Act are consistent with good practice in competition law enforcement worldwide. The Act provides the FCC with adequate investigatory and information gathering tools, and with adequate sanctioning powers. The FCC is also given a broad range of powers. The FCC is also given a broad range of powers to conduct competition advocacy-to advocate for enlightened competition policy in other public policy contexts, including legislation, Government economic policy, trade, regulation and regulatory reform.”

The same study proposes four tasks to be undertaken in the following order:

- Capacity building
- Building a competition culture
- Law enforcement
- Competition advocacy [5*]

5. Conclusion

While competition policy is implemented through competition law following legal procedures, we reckon economic analysis shall play a crucial role in determining the outcome of competition cases and shall form the basis for advocacy programmes in Tanzania as indicated by this paper.

Godfrey Mkocha
Director General,
Fair Competition Commission
CRDB Head Office Building, Floor 7,
Azikiwe Street, Dar es Salaam, Tanzania.
Telephone: +255 22 2122 479
Fax Number: +255 22 2122 449
E-mail: godfrey48312@hotmail.com
godfrey48312@yahoo.com

Explanatory Notes:

1* The Fair Competition Act can be sourced under The United Republic of Tanzania, Acts Supplement No. 5 of 23rd May, 2003, Printed by the Government Printer, Dar es Salaam.

2* Building Institutions for Markets, World Development Report 202, the World Bank, Washington D.C, Oxford University Press, 2001.

3* A Framework for the design and implementation of competition law and policy, World Bank, OECD; Project Director, R. Shyam Khemani.

4* North, Douglass Cecil, Structure and Change in Economic History, W.W. Norton & Company, Inc. 1981.

5* An Assessment and Action plan for Competition Law and Policy in Tanzania, OECD paper, 2004.