



UGANDA LAW REFORM COMMISSION

A STUDY REPORT ON COMPETITION LAW

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UGANDA LAW REFORM COMMISSION

LOCATION.

The Uganda Law Reform Commission premises are located at -
Workers House, 8th Floor,
Plot 1, Pilkington Road,
Kampala, Uganda.

The address for correspondence is –

Uganda Law Reform Commission
P.O. Box 12149,
Kampala, Uganda
Telephone: 256-41-341138/ 341083/346200-2
Fax: 256-41-254869
E-mail: lawcom@infocom.co.ug
ulrc@ulrc.go.ug

Web: www.ulrc.go.ug



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FOREWARD

The Government of Uganda, basing on the findings of the Commercial Justice Reform Programme baseline study and in consultation with stakeholders developed a four year detailed strategy for the reform of the commercial justice system. The strategy focused on four essential areas; the commercial courts, the commercial registries, the legal profession, the commercial regulatory environment and commercial laws.

In furtherance of the programme, the Uganda Law Reform Commission (ULRC) with the support of the Justice, Law and Order Sector proposed to reform key selected commercial laws that affect the basic operating environment of businesses to promote private sector business operations.

It should be noted that the commercial justice system in Uganda has fared badly because commercial life has been encumbered for several decades. This has caused inadequacy in Government delivery and led to the slow development of the private sector.

The commission, having appreciated the fact that law cannot be adequately reformed without appreciating the political, cultural and socio-economic context in which it operates and as a measure towards operationalising the people's constitutional right to participate in the law making process carried out wide consultations with the relevant stakeholders and individuals with a wide range of expertise on policy and business issues. As a result of these involving endeavours, many Bills have been prepared made.

The commission appreciates the responses from the participation of all stakeholders and is indeed confident that the recommendations contained in this report and Bill will, due to the fact that the public have had an input, be easily enforceable in our society.

The Uganda Law Reform Commission is grateful to the Commercial Justice Reform Programme under the Justice Law and Order Sector for funding the completion of the laws under the commercial law project.

Special thanks go to the various stakeholders from the judiciary, the Uganda Law Society, academia, the business community and all institutions and individuals who contributed by participating in the consultations carried out by the commission.

**Professor Joseph M.N. Kakooza,
Chairman, Uganda Law Reform Commission.**

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LIST OF ACTS, CONVENTIONS AND PAPERS.

LIST OF ACTS.

1. Adulteration of Produce Act, Cap. 27.
2. Business Names Registration Act, Cap 109.
3. Constitution of the Republic of Uganda.
4. Contract Act, Cap. 73.
5. Customs (Dumping and Subsidies: Rates) Act, Cap. 336.
6. Customs Management Act.
7. Food and Drug Act, Cap. 278.
8. Income Tax Act, Cap. 340.
9. Land Act, Cap. 227.
10. Liquor Act, Cap. 93.
11. Local Governments Act, Cap. 243.
12. National Drug Policy and Authority Act, Cap 206.
13. Patents Act, Cap. 216.
14. Public Enterprises Reform and Divestiture Act, Cap 98.
15. Public Health Act, Cap. 281.
16. Sale of Goods Act Cap. 82;
17. Trade (Licensing) Act, Cap. 101.
18. Uganda National Bureau of Standards Act, Cap.327.
19. Value Added Tax Act, Cap. 349.
20. Weights and Measures Act, Cap.103.

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LEGISLATION - OTHER COUNTRIES.

1. East African Excise Management Act, Cap. 28.
2. Mauritius - the Export Service Zones Act 1981.
3. Zanzibar Free Economic Zone Authority (ZAFREZA).

CONVENTIONS.

1. Common Market for Eastern and Southern Africa Treaty .
2. Customs (Dumping and Subsidies) Act, Cap. 26 of the Acts of the Community (formerly legal notice No.3 of 1959).
3. East African Common Services Organisation; East African Customs & Transfer Tax Management Act, Cap 27.
4. General Agreement on Tariffs and Trade 1947.
5. Tokyo Round (1973-79) Code.
6. UNCTAD, Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.
7. WTO Agreement on Agriculture.
8. WTO Anti-Dumping Agreement.
9. WTO Subsidies and Countervailing Measures Agreement.

PAPERS.

1. National Gender Policy 1997.
2. Plan for Modernisation of Agriculture (PMA).
3. Poverty Eradication Action Plan.
4. Report by Reid & Priest on Consumer Protection, 1998.
5. Report by Reid & Priest on the Sale of Goods, 1997.
6. Uganda Law Reform Consultation Paper, on Sale of Goods 1999.

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ACRONYMS/ ABBREVIATIONS

EAC	East African Community.
FDI	Foreign Direct Investment.
RPM	Resale Price Maintenance.
UCDA	Uganda Coffee Development Authority.
UNCTAD	United Nations Conference on Trade and Development.
WTO	World Trade Organisation.

Preface.

Establishment of the Uganda Law Reform Commission.

The Uganda Law Reform Commission was established in 1990 by the Uganda Law Reform Commission Act, Cap. 25. Prior to this enactment, law reform was the responsibility of the department of law reform and law revision of the Ministry of Justice which had been set up in 1975. In 1995 with the promulgation of the Constitution, the commission became a constitutional commission by virtue of article 248 of the Constitution.

Composition of the commission.

Under section 3 of the Uganda Law Reform Commission Act, Cap. 25, the commission consists of a chairman and six other commissioners, all of whom are appointed by the President on the advice of the Attorney General.

The chairperson and four of the commissioners are lawyers who are retired or sitting judges of the Court of Appeal or High Court of Uganda; or are lawyers qualified to be appointed as judges of the Court of Appeal or High Court of Uganda; or are senior practising lawyers or senior teachers of law at a university or similar institution of law in Uganda. The remaining two commissioners as set out by section 4(2), are non-lawyers but persons who have distinguished themselves in disciplines relevant to the functions of the commission.

Additionally, section 12 empowers the Attorney General, on the advice of the commission, to appoint experts or consultants in any specific aspect of law reform undertaken by the commission.

The commission is serviced by a secretariat composed of an executive secretary and other staff. The commission has three departments which are: the law reform department, the law revision department and the department of finance and administration. The staff of the commission consists of lawyers and non-lawyers appointed by the Attorney General from among persons who are either public or non-public officers.

Functions of the commission.

The main function of the commission as set out under section 10 of the Uganda Law Reform Commission Act, Cap. 25, is to study and keep under constant review the Acts and other laws of Uganda with the view of making of recommendations for their systematic improvement, development, modernisation and reform with particular emphasis on-

- (a) the elimination of anomalies in the law, the repeal of obsolete and unnecessary laws and the simplification and translation of the law;
- (b) the reflection in the laws of Uganda of the customs, values and norms of society in Uganda as well as concepts consistent with the United Nations Charter for Human Rights and the Charter of Human and Peoples' Rights of the African Union;
- (c) the development of new areas in the law by making the laws responsive to the changing needs of the society in Uganda;
- (d) the adoption of new or more effective methods or both for the administration of the law and dispensation of justice; and
- (e) the integration and unification of the laws of Uganda.

Powers of the commission.

In the performance of its functions, the commission may-

- (a) receive, review and consider any proposals for the reform of the law which may be referred to it by any person or authority;
- (b) prepare and submit to the Attorney General, from time to time, for approval, programmes for the study and examination of any branch of the law with a view to making recommendations for its improvement, modernisation and reform; and those programmes shall include an estimate of the finances and other resources that will be required to carry out any such studies and the period of time that would be required for the completion of the studies;
- (c) undertake, pursuant to any such recommendations approved by the Attorney General, the formulation of draft bills or other instruments for consideration by the Government and Parliament;
- (d) initiate and carry out, or with the approval of the Attorney General, direct initiation and research necessary for the improvement and modernisation of the law;
- (e) provide, at the instance of the Government, to Government Ministries and departments and other authorities concerned, advice, information and proposals for reform or amendment of any branch of the law;
- (f) encourage and promote public participation in the process of lawmaking and educate and sensitise the public on lawmaking through seminars, publications and the mass media; and
- (g) appoint or empanel committees, in consultation with the Attorney General, from among members of the commission or from among persons outside the commission, to study and make recommendations to the commission on any aspect of the law referred to the committees by the commission.

Profile of the commission.

Vision.

The vision of the commission is to promote, in Uganda, a legal system with just and up-to-date laws, easily accessible to all.

Mission statement.

To contribute to sustainable development, an equitable and just legal system through revision, harmonisation, development and reform of the law.

Values of the commission.

The commission-

- (a) seeks to be impartial at all times in all dealings with its clients,
- (b) endeavours to operate with integrity and in a professional way,
- (c) is committed to equity and pragmatic diversity in the workplace,
- (d) respects and values the contribution of the people, and
- (e) endeavour to communicate consistently and effectively with our stakeholders in all our projects.

Slogan.

“Law reform for good governance and sustainable development”.

Justification for legal reform.

The Ugandan society, like all societies, is in a constant state of change caused by political, social and economic factors yet there have been few changes in the law since the inception of English law in Uganda in 1902. In addition, there are emerging cultural patterns and gender relations, new Government policies such as decentralisation, privatisation, economic liberalisation, poverty eradication, private sector development and the modernisation of agriculture. However, there have been few changes in the law yet the law, at any given time, has to effectively respond to social changes and to the aspirations of the people. There is need for extensive research including the need for wide consultations with stakeholders when proposing reforms in any area of the law.

Current members of the Uganda Law Reform Commission.

1. Professor Joseph Moll Nnume Kakooza.

Professor Kakooza is a holder of the degrees of B.C.L. and LL.B. of the National University of Ireland, Dublin; LL.M. (Harvard); M.Litt. and a Postgraduate Diploma in Anthropology of the University of Oxford; Certificate in International Relations, of the University of Oslo; Barrister-at-Law, of the Inner Temple, London and Advocate of the High Court, Uganda.

Professor Kakooza served as a lecturer at the Faculty of Law, University College, Dar-es-Salaam as a senior lecturer and founding head (later twice dean) and finally Professor of Law at Makerere University. He has been a visiting scholar at Harvard Law School; guest lecturer at the college of criminal justice, Northeastern University Boston and visiting professor, College of Law, University of Florida. He is currently teaching law at Kampala International University and medical jurisprudence in the Faculty of Medicine, Makerere University, part-time. He is widely published particularly in criminal justice and family law and he is a member of many professional organisations. He is listed in the international publication of WHO IS WHO in Education and was given the award of MAN OF THE YEAR, 2003, by the American Biographical Institute, Inc.

Professor Kakooza has, among other spells of public service, served as Ag. Judge of the High Court of Uganda, Ag. Solicitor General, President of Uganda Industrial Court; and commissioner of law reform. He was acting chairman of the commission from 2000 to 2002 when he became the chairman.

He has been in charge of the Domestic Relations Law Project and Labour Laws Project. He is currently in charge of the Intellectual Property Law Project, the Reform of the Accountants Act Project, the Living Law Journal Project, the Sentencing Legislation Reform Project and Community Law Reform Programme.

2. Ms. Percy Night Tuhaise.

Ms. Tuhaise is a holder of the degrees of LL.B and LL.M of Makerere University, Kampala; a Postgraduate Diploma in Legal Practice of the Law Development Centre, Kampala. She also holds various certificates in human rights teaching and research (Ottawa Canada 1991), (Strasbourg, France, 1995). She is the deputy director and a principal lecturer of the Law Development Centre, Kampala. She is also an advocate of the High Court of Uganda. Ms Tuhaise was appointed a part-time commissioner in 1995. She assisted commissioner Kibuka in the Rape and Defilement Project. She has been in charge of the Business Associations cluster of the Commercial Law Project and Succession Law Project and is currently in charge of the Codification of the Contracts Law Project under the Commercial Law Project II and Simplification of the Penal Code Act Project. She is also a member of the editorial board for law revision.

3. Mr John Mary Mugisha.

Mr. Mugisha holds the degree of LL.B of Makerere University and a Postgraduate Diploma in legal practice, LDC. He was appointed a part-time commissioner in 1999. He is a principal lecturer at the Law Development Centre, Kampala and an advocate of the High Court of Uganda. Mr. Mugisha is a former President of Uganda Law Society; Vice President of the East African Law Society; lead counsel for the Constitutional Review Commission; and deputy secretary general in charge of Eastern Africa, International Bar Association (IBA). He is also a member of the Law Council representing the Uganda Law Society. Mr. Mugisha has been the commissioner in charge of Secured Transactions and Fair Trade Clusters of the Commercial Law Reform Project. He is currently in charge of subsidies and countervailing measures, under the Commercial Law Reform Project II and Trial Procedures Reform Project under the Criminal Law Reform Project I.

4. Dr. Lillian Tibatemwa-Ekirikubinza.

Dr. Tibatemwa-Ekirikubinza is a holder of a PhD in law from the University of Copenhagen, Denmark; an LL.M in Commercial Law from the University of Bristol, UK; an LL.B (Hons) degree from Makerere University and a Postgraduate Diploma in Legal Practice from the Law Development Centre, Kampala. She was the deputy dean of the Faculty of Law, Makerere University and is currently the Deputy Vice Chancellor in charge of academic affairs at Makerere University and a part time commissioner of the of the commission since 1999.

Dr. Tibatemwa-Ekirikubinza is widely published in areas of women's law; children's rights and constitutionalism. Her publications include "Women's Violent Crime in Uganda: More Sinned Against Than Sinning" (1999). Her latest publication is entitled "Gender and Human Rights: A Case Study of Polygamy Among the Basoga of Uganda" (2003).

Apart from being a commissioner of the Uganda Law Reform Commission where she has been in charge of various projects namely: the Insolvency Cluster of the Commercial Law Reform Project I, the Domestic Violence Project, the E-Commerce, Computer Crime and E-Evidence Project under the Commercial Law Reform Project II. Dr Tibatemwa-Ekirikubinza has also held other positions of responsibility among which are: board member of the Uganda National Bureau of Standards, member of the academic board of Makerere University Business School, Nakawa and a complimentary member of the British Institute of International and Comparative Law.

Former members of the Uganda Law Reform Commission.

1. Justice Sir Harold G. Platt.

Justice Sir Harold Platt is a holder of MA of Oxford University after his first degree in India. He retired but was actively involved in various aspects of the legal field. He served in various capacities in East Africa including: Chairman Uganda Law Reform Commission 1994-2000, where he was in charge of the Commercial Law Project among others; judge of the Supreme Court of Uganda 1989-1994, judge of the High Court and Court of Appeal Kenya 1968-1989; Government service, provincial magistrate Tanzania 1962-1972, colonial legal service Tanganyika 1954-1962 and in legal practice 1951-1954. Justice Sir Harold Platt was called to the Bar in 1952 after serving in the royal air force from 1942-1947.

2. Professor Eric Paul Kibuka.

Professor Kibuka holds a B.A and PhD of Makerere University. He was a director of the United Nations African Institute for the Prevention of Crime and Treatment of Offenders, Kampala. He was appointed a part-time commissioner in 1995. He is a retired lecturer of sociology at Makerere University. Professor

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Kibuka was in charge of the Rape and Defilement Law Project. He was also in charge of the Decriminalisation of Petty Offences Project as well as the Contracts Law Project.

3. Ms. Hilda A. Tanga.

Ms. Tanga is a holder of a B.A degree in education and a postgraduate diploma in Human Resources Management. She has been a graduate teacher at Kololo S.S.S; lecturer in business communication at the National College of Business Studies; Ag. registrar and deputy academic registrar at the Uganda Polytechnic Kyambogo. Ms. Tanga has also been an adhoc consultant with Management Training and Advisory Centre (MTAC) on management and training of trainers. She is currently an examiner with the Uganda National Examinations Board (UNEB) and National Business Examinations Council (Nakawa).

4. Ms. Filda Mary Lanyero Ojok.

Ms. Mary Lanyero was a senior lecturer and dean of the Faculty of Arts, Institute of Teacher Education, Kyambogo. She is also involved with various non-Governmental organisations in various capacities. Ms. Lanyero holds certificates from the American Studies Winter Institute, USA. She holds a masters degree in international relations, Carleton University Ottawa, Canada and a B.A of Makerere University majoring in history and literature in English. Ms. Lanyero was a teaching assistant, University of Carleton, Ottawa Canada.

5. Mr. Francis Butagira.

Mr. Butagira was appointed commissioner on 22nd January 1996. He holds the degrees of LL.B Makerere University and LL.M (Harvard). He is an advocate of the High Court of Uganda and former principal lecturer at the Law Development Centre.

6. Mr. Richard Aboku Eryenyu.

The late Richard Aboku Eryenyu served as commissioner from 19th January 1996 until his death on 7th April 1999. He was an LL.B graduate of Makerere University and a chief magistrate.

EXECUTIVE SUMMARY.

1. Background.

The Uganda Law Reform Commission (ULRC) funded by the Justice Law and Order Sector of the Ministry of Justice and Constitutional Affairs has commissioned studies of which this study forms a part with a view of reviewing existing laws and drafting new ones. The overall objective was to improve the country's commercial laws so as to improve the environment that will attract foreign investment into the country and promote the national and international competitiveness of Uganda's products and services. This process of reform is global and even developed countries – and in Africa industrially advanced countries such as South Africa - have already largely reformed their commercial laws to improve their international competitiveness.

This study was undertaken as part of that process of reform to modernise Uganda's laws some of which have remained virtually unchanged since they were introduced in the late 19th century by the colonial Government. With regard to competition, it had become increasingly apparent that Uganda lacks laws to deal with national and global competition issues. It was to meet this need that the consultants were requested to examine the need for a competition law as part of a fair trade law regime.

Uganda has no specific competition law. The central concern of competition law is to prevent unfair competition that causes economic injury to business through deceptive or wrongful business practices. Most developing countries have enacted laws governing competition to ensure that the market is economically efficient, protects consumer welfare and provides a balanced development of the economy.

2. Objectives of the study.

The objectives of the study was to inquire into the need for and suggest whether to enact new legislation relating to competition and in particular-

- (a) to ascertain the need for new laws where non currently exist in particular in relation to the law on competition;
- (b) whether there is need for a 'written' national competition policy;
- (c) whether there is need to establish a competition commission or authority to implement and enforce the law; and
- (d) to improve the existing legal framework to foster business ventures within a competitive framework.

3. Methodology.

The commission contracted a team of consultants to undertake the study. Among the national representatives of stakeholders interviewed and whose reports the consultant considered were-

- (a) Ministry of Tourism, Trade and Industry;
- (b) Ministry of Energy and Natural Resources;
- (c) Ministry of Foreign Affairs;
- (d) Ministry of Justice – Attorney General;
- (e) Ministry of Justice – Registrar General's Department;
- (f) Deregulation Project in the Ministry of Finance, Planning and Economic Development;
- (g) East African Team of Consultants on Competition;
- (h) Faculty of Law, Makerere University;
- (i) Judiciary – Commercial Court;
- (j) Law Development Centre;
- (k) Uganda Investment Authority;

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- (l) Uganda Law Reform Commission;
- (m) Private Sector Foundation;
- (n) Uganda Consumer Protection Association;
- (o) Uganda Revenue Authority;
- (p) Uganda Law Society;
- (q) Uganda Manufacturer's Association;
- (r) Uganda National Council for Science and Technology; and
- (s) Uganda Performing Artists Society.

Consultative meetings were held with the above stakeholders and others during the study with the main aim of establishing existing facts and consensus on the way forward. These stakeholders formed a taskforce that made proposals for the consultants to consider and then reviewed the consultant's recommendations.

Focus group discussions were held under the auspices of the commission. The discussions involved key policy makers and interested parties from Government and Non-Governmental Organizations. Officials from relevant Government departments presented position papers or official positions where relevant.

Literature review was conducted by the consultant on the existing statutory law, international and regional instruments ratified by Uganda, case law, comparative studies from other jurisdictions as well as local research. Finally, a three-day residential stakeholder workshop was held to discuss the findings of the study and seek views on the draft recommendations.

(4) Key issues.

The key issues for reform were-

- (a) need for a national competition policy and law;
- (b) establishment of a competition commission and its composition;
- (c) competition provisions in relation to mergers, cartels, monopolies, restrictive practices, abuse of dominant position, restrictive trade practices; etc; and
- (d) investigation of complaints and offences and penalties;

(5) Summary of recommendations.

- (a) Uganda needs a competition policy and law.
- (b) Such competition law will bring Ugandan law in line with the regional partners;
- (c) The competition law should apply to all sectors of the economy.
- (d) A competition commission should be set up to administer and implement the competition policy and the law for the control of anti-competitive practices and encourage competition;
- (e) The law should be known as the Competition Act and should, among others, create, encourage and protect competition, encourage innovation, strengthen the efficiency of production and distribution of goods and services, protect and promote social welfare and interests of Ugandan consumers;
- (f) The scope of the competition law should be as wide as possible to avoid any significant risk of conflict with the international community and investors and to avoid protection of inefficient industry.

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- (g) The scope and objectives of the competition law should include provisions to deal with cartels and other agreements, abuse of dominant position and mergers.
- (h) The broad objectives of the law should be to control or eliminate restrictive agreements or arrangements among enterprise or mergers and acquisitions or abuse of dominant positions of power which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade and economic development.
- (i) The law should cover agreements among enterprises including horizontal and vertical agreements.
- (j) The proposed law should cover agreements or arrangements whether in writing or oral, formal or informal.
- (k) The law should contain examples of prohibited general practices that are commonly occur to form cartels or fix prices;
- (l) Concerted practices be prohibited including; price fixing, collusive tendering, market or customer allocation, restraints on production or sales including by quota, concerted refusals to purchase or to supply, collective denial of access to an arrangement or association which is crucial to competition.
- (m) The law should provide against abuse of dominant position in the market.
- (n) The law should provide for regulation of combinations and mergers.

CHAPTER 1

COMPETITION LAW AND POLICY.

1.1 Introduction.

Competition lies at the heart of any successful market economy and is crucial to the protection of consumers' interests and the efficient allocation of resources. It is a process whereby undertakings constantly try to gain an advantage over their rivals and win more business by offering more attractive terms to customers or by developing better products or more effective ways of meeting their requirements. Competition has several dimensions of which price is only one, albeit in many markets the most important. It encourages the development of new or improved products or processes and enhances economic growth and living standards.

The objectives of competition law however remain unclear even in the European Union which was the first regional trade agreement to adopt region-wide competition policy. However, in our context, it can be said that the objective of competition policy should be to ensure that the benefits of liberalisation, privatisation and removal of Governmental restrictions are not reduced by private restrictions on competition.

Given the above, it is clear that some problems such as single firm abuse of market power form a central concern of competition laws. Indeed, the subject of restrictive business practices by dominant firms has been exhaustively discussed under the United Nations Conference on Trade and Development (UNCTAD) forum, leading to the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices approved in 1980 and amended in 2000. These rules provide a non-exhaustive list of practices considered restrictive.

Despite the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, there is substantial disagreement among experts and considerable divergence among jurisdictions about the range of practices that should be condemned. It is agreed that competition laws should constrain firms with substantial market power from exercising that power in a manner that controls prices, limits production and keeps out competitors. However apart from these activities that are regarded as 'such core conduct', there is considerable disagreement among jurisdictions on the competitive effects of other practices for example, vertical restraints employed by a dominant firm in a single market or across international boundaries.

1.2 A national competition policy.

Uganda does not have a specific competition policy. The need for a written or specific competition policy is often debated with no clear result. A competition policy should cover, among others, domestic and international trade practices, consumer interests, incorporated and unincorporated businesses and parastatals, minimisation of regulatory restrictions on competition; needs of the economy in light of structural reforms and privatisation; limiting the role of prices oversight and redressing any competitive advantages of any Government businesses relative to private businesses, etc.

1.3 Relationship between competition law and policy.

Competition law cannot be regarded in isolation from competition policy. Competition policy is generally regarded as that set of public policy tools that lay the foundations for a market economy by allowing for the efficient allocation of resources. A competition policy is not just trade practices law. It includes both policies that are specifically directed at promoting competition and policies that have an indirect impact on competition. Its impact may be on either market structure influencing the incentives for competitive conduct or have a direct impact on market conduct.

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At best competition policy can be seen as just one of a set of policy tools required to create an efficient market economy and as such, competition law cannot be considered in an isolated manner. The law itself can never guarantee that markets will function effectively unless a broad range of other Government policies conform to basic market principles. Trade policy, industrial policy, privatisation, deregulation, regional policy, social policy, consumer protection policy all need to be conducted in a manner compatible with the market mechanism for an economy to function as efficiently as possible.

Competition policy therefore refers to Government measures that directly affect the behaviour of enterprises and the structure of industry. An appropriate competition policy includes both-

- (a) policies that enhance competition in local and national markets such as liberalised trade policy, relaxed foreign investment and ownership requirements and economic de-regulation; and
- (b) competition law also referred to as antitrust or antimonopoly law, designed to prevent anticompetitive business practices by firms and unnecessary Government intervention in the marketplace.

1.4 Justification of the need for competition law.

The Government's general policy thrust aims to divest, liberalise and generally open up the economy to as many players in the private sector as possible. In practice, Government actions are largely supportive of competition and of non-interference in the market. A comprehensive law reform exercise has been ongoing for the past three years or so and will recommend changes in any laws that appear not to be business-friendly.

However, surprisingly the report "Uganda Commercial Justice Sector Study" commissioned by the Ministry of Justice and Constitutional Affairs and the Ministry of Finance, Planning and Economic development stated in its appendix that "new legislation is not a priority in respect of competition law". The proposed competition bill that was drafted in 1998 still remains not enacted.

Therefore as Uganda has no specific competition law, our nearest relevant laws are modelled on the British collection of laws relating to competition such as the Resale Prices Act, Restrictive Trade Practices Act that were replaced by the U.K Competition Act 1998 that came into effect on March 1, 2001¹.

The central concern of these laws is to prevent unfair competition primarily in form of torts that cause an economic injury to a business through a deceptive or wrongful business practice. Unfair competition is generally broken down into two broad categories, first, to refer only to those torts that are meant to confuse consumers as to the source of the product and secondly to refer to those "unfair trade practices" that comprise all other forms of unfair competition.

Under the context of our law, unfair competition does not refer to the economic harms caused by dominant business forms or monopolies which are considered under the antitrust legislation of developed countries. The most familiar example of unfair competition considered in this regard is trademark infringement (under the Trade Mark Act), misappropriation or unauthorised use of intangible assets not protected by trademark or copyright laws, false advertising, "bait and switch" selling tactics, unauthorised substitution of one brand of goods for another, use of confidential information by former employees to solicit customers, theft of trade secrets, breach of a restrictive covenant, trade libel and false representation of products or services. Further as far as can be ascertained, there is currently no law or set of laws that exclusively address the subject of compensation in business such as price maintenance boycotts, etc.

¹ The Act mirrors Articles 81 and 82 (formerly Articles 85 and 86) of the EC Treaty The Act by prohibiting
a) written or oral agreements which prevent, restrict or distort competition and which may affect trade within the United Kingdom and b) conduct by undertakings which amounts to an abuse of a dominant position in a market and which

A number of other examples can help to illustrate the inadequacy and scattered nature of the law on competition in Uganda and the need for its consolidation, modernisation and institutionalisation². The examples include:

1.4 (i) Monopolies.

Monopolies are not generally subjected to any restrictions or control but in certain sectors such as finance and insurance there are general practice rules at least on mergers and similar phenomena. In general it would be safe to say that any regulations to prohibit or sanction restrictive practices³.

Many basic services are still only available largely from public enterprises with either total or near total monopoly positions⁴. These enterprises are allowed to set their prices subject only to Ministerial approval. Among these are the National Water and Sewerage Corporation, the Uganda Electricity Distribution Company Limited, the Uganda Railways Corporation. But as has been alluded to already, the legal monopolies in a number of these areas have been removed although in many cases the state enterprise remains the major service provider.

1.4 (ii) Price controls.

Government can interfere with market forces through price fixing and monopoly creation. In Uganda, the vast majority of marketing and exporting monopolies have been dismantled including the once powerful Coffee Marketing Board, the Lint Marketing Board and the Produce Marketing Board. In their place promotion and supervisory agencies have been put in place with no trading activities.

However, the pace of liberalisation in Uganda has not always been matched by the repeal or reform of the laws that tend to regulate the market. Such un-repealed laws include the Distribution and Price of Goods Act, the Trade (Licensing) Act and the Liquor Act. These Acts were used in the past to regulate business and raise revenue through licensing (see section on Licensing Act) which sets maximum prices for certain goods (essential commodities) and prohibits consumption of certain goods, respectively.

According to distribution and price of goods law, the Minister responsible for commerce can set a maximum price for virtually any good and require all those selling such product to comply. By this same Act, the Minister may use his powers to “requisition” goods. It should be noted that these powers have not been used for a long time.

With regard to price fixing, again there are no instances of Government proclaiming prices either of everyday traded goods or of so-called farm-gate prices. All these are left to the laws of supply and demand. Note however that the Uganda Coffee Development Authority (UCDA) Act permits the UCDA to “monitor the price of coffee in order to ensure that no export contract for sale of coffee is concluded at below the minimum price.” In general, Government has eliminated price controls in the domestic market for example price setting for petroleum products was discontinued in 1996⁵.

² See Competition Policies in Uganda – A paper presented by Vincent Mayiga, Ministry of Tourism, Trade and Industry, at the East African Cooperation Workshop on the Member State’s Competition Policies, Sheraton Kampala

³ The COMESA Treaty however, enjoins members to prohibit any agreement between undertakings or concerted practice that has as its objectives or effect the prevention, restriction or distortion of competition within the common market (Art.55). Even this has the rider that in essence says that the Council of Ministers may exempt any agreement or practice which seems to improve production or distribution of goods or to promote technical or economic progress and results in consumers getting a fair share of benefits.

⁴ For private companies, to the extent that the Companies Act sets uniform rules for registration, reporting and the requirements for annual audits, it contributes in some way to ensuring a level playing field, as the returns annually filed with the Registrar of Companies, are open and available for public scrutiny. The Registrar is empowered to strike off the register persistent flouters of this requirement, but there is evidence that this power is used either sparingly, selectively or not at all.

1.4 (iii) Technology.

In respect of protection of technology (general intellectual property) the relevant laws are the Patent Act; Copyright Act and the Trademarks Act. The Copyright and Trademarks Acts are now woefully inadequate and are the subject of review.

Government is also in the process of incorporating the TRIPS Agreement of the WTO into Uganda's domestic law by the year 2005. The Copyright Act in particular needs to take into consideration recent developments in technology and the computer industry. However as it stands, the Copyright Act covers literary musical or artistic works, cinema, films, gramophone records and broadcasts. Protection is for periods of 50 years in case of broadcasts, published literary, musical or artistic works and 45 years for published phonograph records and films. For a work to qualify for protection, the author must be a citizen or resident of Uganda or a country listed in a schedule of the Act which is currently under review. It includes most of the major countries of the world save Kenya and Tanzania.

Under the Trademarks Act, any mark may be registered for an initial period of seven years that may be renewed for subsequent fourteen years periods. The Registrar has the authority to cancel the registration if the mark was registered without any intention to be used and has not been used especially if it has not been used for a continuous period of five years. The Act does not cover service marks but is being reviewed to cover them.

The Patent Act grants protection to any inventions be they products or processes that are new or involve an inventive step and are industrially applicable. This definition does not cover discoveries and mathematical theories, plant or animal varieties or biological processes for the production of plants or animals among other schemes and methods. The Act includes a public interest provision allowing for a statutory decision that excludes certain kinds of products or processes from being patented. This decision may be valid for a period of up to two years.

A patent owner has exclusive right to exploit the invention (over an initial 15 years) and if infringed recourse to the High Court for damages, injunction and other measures. As has already been cited, the Patent Act prohibits patent holders from engaging in anti-competition practices when licensing users of their patents. It should also be taken note of that the same law provides for the possibility of compulsory licensing although to date there are no instances of compulsory licensing. The cases in which licensing may compulsorily proceed are:

On the grounds of vital public interest in which Government agencies or designated persons may at any time obtain authorisation to exploit a patent invention. In such case the patent owner must be offered the opportunity to comment and is entitled to adequate compensation.

Ugandan courts can grant compulsory licensing if after specified periods the patented invention has not been worked in Uganda: the degree of working does not meet domestic demand; working is hindered or prevented by importation of the patented product; or the patent owner has refused to grant a licence on reasonable terms. The law on patents prohibits restrictions that a patent owner may not impose on licensee. These restrictions are considered "harmful" to the economic interests of Uganda and include certain exclusive dealings limits on levels of production and exportation; and sale and resale price maintenance stipulation.

Agricultural Products: Agriculture is the main stay of Uganda's economy. The Adulteration of Produce Act first enacted in 1901, prohibits acts that tend to falsify, deteriorate or increase the apparent bulk or weight or conceal the inferior quality of produce by the combination, admixture or addition of water. The "produce" referred to in this Act are: India-rubber, gutta-percha, coffee, tea, cotton, gums, tobacco, grain, oils, rice and every other produce whether raw or wholly or partly manufactured. The Food and Drugs Act has similar

stipulations in respect to foods and drugs. In addition, it (the Food and Drugs Act) also covers description, advertising and labelling of foods or drugs.

The law that is being proposed would aim at dealing with acts of unfair competition as covered under the various laws outlined above and many others while expanding it to deal with the economic harms caused by dominant business forms or monopolies as Uganda becomes more and more integrated into the global market.

1.5 Meaning of competition law and policy.

The commission's research identified and focused upon the following issues-

- (a) whether a competition law is essential to attaining competition policy objectives especially if Uganda maintains a liberalised economic policy;
- (b) how the introduction of a competition law will affect the international competitiveness of Uganda's domestic firms;
- (c) law and institutional structure;
- (d) how the enactment of a competition law will affect Uganda's ability to compete for foreign investment against countries that have not enacted a competition law;
- (e) what social impact competition law would create;
- (f) application of competition law;
- (g) whether there is need for a written or fixed national competition policy;
- (h) what risks or obstacles against enacting a competition law exist within Uganda; and
- (i) the difficulties in obtaining support for the enactment of a competition law in Uganda.

These issues are briefly considered below.

1.5 (i) Objectives of competition policy.

Competition law and policy can be seen as just one of the broad set of policy tools required to create an efficient market economy and as such competition law cannot be considered in an isolated manner. The law itself can never guarantee that markets will function effectively unless a broad range of other Government policies conform to basic market principles. Trade policy, industrial policy, privatisation, deregulation, regional policy, social policy and consumer protection policy all need to be conducted in a manner compatible with the market mechanism for an economy to function as efficiently as possible. These policies need to be conducted in a complementary manner and it is important that a mechanism exists for incorporating the "competition dimension" within Government decisions on such policies. Experience suggests that in the process of transition to a less regulated and more open economy the existence and application of competition law can usefully support other policy initiatives.

1.5 (ii) Justification – the need for a competition law.

Competition law and policy should only apply to prevent market failure or where such failure has occurred, to correct it. Competition laws should therefore not be in conflict with the effective operation of the market mechanism. Competition law should not stifle business and investment but instead create a competitive environment in which firms can have a degree of certainty that they would not be subject to anti-competitive practices that would lower the cost of capital. The regulatory cost would fall in the main upon those firms that seek to distort the competitive process.

Competition law requires the application of a rule of reason with little in the way of per se rules. Because of this, it is argued that this will increase uncertainty in that businesses will not be able to assess in advance what might be viewed as anti-competitive. Competition law being accompanied by comprehensive guidelines on how it is to be applied resolves this uncertainty.

1.5 (iii) Need for comprehensive guidelines.

A competitive economy in which anti-competitive entry barriers are removed will allow businesses to respond more quickly to the need for change than one in which entry barriers are prevalent. While it is true that many entry barriers are due to Government regulation, it is equally true that firms in dominant positions have every incentive to erect strategic barriers. In Uganda, this has been reported in the oil distribution industry.

Despite the significant benefits of competition law, it is the case that the successful introduction of such law often faces significant difficulties. In Uganda such foreseeable difficulties include-

- (a) bureaucratic resistance. This may be due to, among others the enforcement of competition policy and legislation by an agency has associated costs such as well-trained manpower, equipment, running costs, etc.
- (b) a bad reputation for the public sector, excessive bureaucracy, corruption and lack of transparency;
- (c) an inadequate judicial system;
- (d) weak professional and consumer groups; and
- (e) lack of resources and professional expertise within the competition authority. This means, among others, that necessary programs to change business and consumer behaviour will be slow or even absent leading to slow or non change of mentality and slow growth of a competition culture or even frustration of process.

1.5 (iv) Framework for competition law in Uganda.

As a minimum competition law for Uganda, the commission envisages a law that covers abuse of dominance, restrictive agreements and mergers and acquisitions.

It should be pointed out that trade liberalisation is not a substitute for domestic competition law. This is because in economic terms, not all goods are tradable either because of high transport costs or because they are location specific that is services and this limits the general applicability of the substitution argument. Secondly, the impact of trade liberalisation depends on the nature of supply and demand for goods in the economy and the nature of competition between domestic firms and importers and most crucially upon the strategic reactions of domestic firms. Ugandan firms, faced by rising import competition, have shown every incentive to minimise the effect of trade liberalisation by creating barriers to the entry and growth of imports.

Literature surveyed and our reality suggest that trade policy and competition law should be complements. It appears that if the full benefits of liberalisation are to be achieved, a domestic competition law is required.

1.6 Progress at East African Community (EAC) level.

Promoting competitive markets involves opening up of the economy, deregulation and putting in place private sector development strategies. A clear understanding is required on how to deal with non-performing and imperfect market systems and the relationship between markets, institutions and the Government as well as the structure of incentives that govern the implementation of competition policy.

The EAC development strategy (2001-2005) states that "in order to operationalise a common market, the development strategy will ensure that formulation of a common competition policy, harmonise export promotion policies and cooperate in developing their capacity to compete internationally"

In this respect the EAC secretariat recommended the establishment of a common competition policy for East Africa with the objective of ensuring, protecting and promoting free competition. A competent, strong and independent autonomous central common authority is to be established to implement the policy. It has been agreed that all EAC states must have in place competition laws and policies.

1.7 Introduction of competition laws and the international competitiveness of domestic firms vis-à-vis the encouragement of monopoly rents.

Competition law can pose a danger to competitiveness of local firms. This can happen if competition law limits the formation of large internationally competitive Ugandan firms. Competition law may limit the ability of domestic firms to become internationally competitive because it makes it difficult to coordinate their business policies and strategies with domestic rivals by agreement. Equally a law directed at controlling mergers would also hinder such strategic amalgamations necessary to obtain international competitiveness.

However, the above fear is offset by the argument that monopolies often enjoy their “monopoly rents” without becoming more competitive abroad at the expense of domestic consumers and eventually at the development of the economy as a whole. Without a merger control system, Uganda is deprived of the power to challenge foreign mergers and acquisitions which might have adverse effects on the Ugandan economy.

Additionally the risks, uncertainties and lower profit rates associated with a competitive domestic market would prevent domestic firms from engaging in sufficient research and development (R&D), innovation and improvements in product quality.

Any competition law for Uganda must therefore consider-

- (a) the role of economies of scale, minimum efficient scale and optimal number of firms for competitiveness;
- (b) the relationship between size and efficiency;
- (c) the role of agreements particularly export agreements in export success;
- (d) the evidence on mergers and efficiency for example, Japanese and German laws encourage small and medium size firm agreements and arrangements in the face of monopoly competition; and
- (e) the evidence on the relationship between research and development and innovation with firm size.

Extensive study of each of the above issues is beyond the context of this study. However, at a minimum, the effects of increased domestic competition and action against anti-competitive agreements on efficiency must be studied.

1.8. Social impact of competition law.

Competition law must concentrate on employment effects. Increasing competition in a given sector of the economy should raise efficiency and lower prices. Competition law must increase labour productivity. To achieve the above, there must be social and industrial policy to create new firms. Normally, when a competition law is introduced, there are initial first round job losses in the sectors in which competition is introduced especially if it is in an area where Government had given support and subsidies.

Considerable social problems will be created from loss of employment. It will be important to introduce social measures that are complementary to competition law to overcome such problems. Such policies should be directed at removing institutional obstacles to enable redeployment in other sectors for example training and measures to assist mobility.

1.9 Scope of competition law.

Competition law should include cartels and other agreements as well as abuse of dominant position and mergers. Competition law should apply to all sectors and it is particularly important that the views of a competition authority should be considered in any privatisation proposals. If the competition law is limited in its scope and applicability a significant risk of conflict with the international community and investors will arise and inefficient industry may be protected. The law and those who apply it should have a high status within Government and competition objectives need to be treated equally alongside other policies such as privatisation

1.10 Application of competition law.

As already stated above, the application of competition law depends on various factors such as market power, externalities and information problems. In Uganda, the common risks that have to be faced in introducing competition law may include-

- (a) pursuit of "competition" in areas in which it is inappropriate;
- (b) undue bureaucratic control of the market mechanism and concern from other agencies such as the Uganda Investment Authority, Uganda Manufacturers Association and others over loss of policy control;
- (c) competition that is highly interventionist and very costly to the public and the consumer;
- (d) competition legislation that would increase the costs of doing business;
- (e) competition legislation that would be too general so as to be unenforceable; and
- (f) competition law that may undermine the ability of business to adapt quickly to market changes and form barriers for development especially in certain industry sectors where mergers and acquisitions are common commercial practices without any concomitant anti-competitive implications.

1.11. Law and institutional structure.

There are two differing forms of law and institutions required to successfully implement competition law. The prohibition model as favoured in the European Union and much of Eastern Europe or the administrative model.

In the prohibition model, the law attempts to say what is likely to be anti-competitive leaving the courts to enforce the law and set precedent by case law. Under the administrative model more discretion is left to the competition authority to both enforce the law and to set the precedent, perhaps by published guidelines.

In Uganda, a mixture of these approaches should be followed given the existing and future court caseload, the need for an independent and expert judiciary and the rapid expansion in business activity. International experience shows that the most efficient type of administrative authority is a quasi-autonomous or independent body of Government free from political interference with strong judicial and administrative powers for conducting investigations, applying sanctions and providing for the possibility of recourse to higher formal courts of law.

1.12 Conclusion.

The role of competition law in the economy cannot be underestimated. Its effect and influence on both business and the consumer is considerable as indicated above. Competition law only comes to public attention when unfair business practices have been uncovered or where high profile investigations such as those into imported goods prices are being undertaken. Competition law can however be used to distort the economy and protect inefficient enterprises or inefficient monopolies from being taken over and transformed. It has to be said that this is usually the result of political interference in competition law and policy.

CHAPTER 2

KEY PROVISIONS OF THE PROPOSED LAW AND RECOMMENDATIONS

2.1 Title of the law

There is no common rule for the title of restrictive trade practices law. The Commission noted that the different titles adopted generally reflect the objectives and hierarchy of the law as well as legal traditions of the countries concerned.

Three alternative titles for the proposed law were identified-

- (a) fair trade practices,
- (b) anti-monopoly law, and
- (c) Competition Act.

The commission noted that Acts titled Trade Practices Act dealt with competition, consumer protection and anti-dumping. Examples of such Acts include the Australian Trade Practices Act, 1974 and the Tanzanian Fair Trade Practices Act, 1994. It was a recommendation of the taskforce that since competition, anti-dumping and consumer protection are new laws, they should be separate laws for each of them. The commission agreed to this recommendation.

The title of Competition Act is adopted instead of anti-monopoly law because under the proposed Competition Act, anti-monopoly issues are addressed. The commission recognised that countries with similar competition laws as the Ugandan Bill such as India and Zambia referred to their legislation as Competition Acts. Usage of the word Competition Act will make it clear as to what the aims of the Act is, that is, the prevention of anti-competitive practices in Uganda

Recommendation 1.

The Act should be called the Competition Act.

2.2 Restrictive trade practices.

Restrictive trade practices are a set of various unfair means which enterprises may use to distort or eliminate competition in order to acquire and abuse monopoly power.

The various types of restrictive trade practices can be broadly classified into three categories-

- (a) restrictive agreements or arrangement,
- (b) abuse of dominant position in the market, and
- (c) concentration of market power through mergers, acquisitions and other forms of control.

2.3 Restrictive agreements or arrangements.

Agreements among enterprises are basically of two types, horizontal and vertical.

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Horizontal agreements are those concluded between enterprises engaged in broadly the same activities that are between producers or between wholesalers or between retailers dealing in similar kinds of products. The suppliers who enter into this agreement decide to stop competing with each other. For this, they agree to share the relevant market, to fix a monopoly price and to cooperate in eliminating any potential new entrant into the market. Vertical agreements are those between enterprises at different stages of the manufacturing and distribution process for example manufacturers of components and manufactures of products incorporating those goods, between producers and wholesalers. Some agreements can be both vertical and horizontal for example price fixing agreements.

Agreements or arrangements whether in writing or oral, formal or informal, should be covered by the Act. It is important to adopt a comprehensive definition of an agreement. The legislation of Pakistan defines an agreement as including “any arrangement or understanding whether or not in writing and whether or not is intended to be legally enforceable. Some other jurisdictions refer to agreements in any form”. The law of Spain refers to multiple possibilities that go beyond agreements namely “collective decisions or recommendations or concerted or consciously parallel practices”.

Where the agreements are in writing, there can be no legal controversy as to their existence although there might be about their meaning. However, the commission noted that enterprises frequently refrain from entering into written agreements particularly where law prohibits it. Informal or oral agreements raise the problem of proof since it has to be established that some form of communication or shared knowledge of business decisions has taken place among enterprises leading to concerted action or parallelism of behaviour on their part. In consequence, proof of concerted action in such instances is based on circumstantial evidence. Parallelism of action is a strong indication of such behaviour but might not be regarded as conclusive evidence. An additional and important way of proving the existence of an oral agreement, far superior to evidence of parallel behaviour, is by direct testimony of witnesses.

Establishing whether parallel behaviour is a result of independent business decisions or tacit agreement would probably necessitate an inquiry into the market structure, price differentials in relation to production costs, timing of decisions and other indications of uniformity of enterprises behaviour in a particular product market. A parallel fall in prices can be evidence of healthy competition while parallel increases should amount to evidence of agreement or arrangement sufficient to shift the evidential border to the enterprise or enterprises involved which ought in turn to produce some evidence to the contrary. However, the Commission notes that parallel price increases particularly during periods of general inflation are as consistent with competition as with collusion and provide no strong evidence of anti-competitive behaviour.

2.4 Practices generally prohibited.

The restrictive trade practices listed in (a) to (g) are given by way of example and should not be seen as an exhaustive list of practices to be prohibited.

Although the listing comprises the most common cases of restrictive practices, it can be expanded to other possibilities by introducing terms as “of the following agreements” and “prohibition” the expressions “among other possibilities,” “in particular” such as for example in Hungary or “among others” such as for example in the Colombian legislation or by adding “other cases with an equivalent effect”. The commission notes that this will make the clauses under restrictive trade practices, general. There are others not expressly mentioned which the competition commission may consider restrictive as well.

2.4 (a) Agreements fixing prices or other terms of sale.

Price fixing is among the most common forms of restrictive trade practices and irrespective of whether it involves goods or services, is considered as *per se* violation in many countries. Price fixing can occur at any

level in the production and distribution process. It may involve agreements with respect to prices of primary goods, intermediary inputs or finished goods. It may also involve agreements relating to specific forms of price computation including the granting of discounts and rebates.

Price fixing may be engaged in by enterprises as an isolated practice or it may be part of a larger collusive agreement among enterprises regulating most of the trading activities of members involving for example collusive tendering, market and customer allocation agreements, sales and production quotas etc. Also, agreements fixing prices or other terms of sale may include those relating to the demand side such as is the case of cartels aimed at or having the effect of enforcing buying power.

In regard to international trade, it is worth pointing out that while price fixing with respect to goods and services sold domestically has been subject to strict control, under restrictive trade practices legislation price-fixing with respect to exports has, by and large, been permitted on the grounds that such activities do not affect the domestic market. In some countries the legislation specifically exempts exports cartels on condition that they are notified and registered and that they do not adversely affect the domestic market.

2.4 (b) Collusive tendering.

Collusive tendering is inherently anti-competitive since it contravenes the very purpose of inviting tenders that is to procure goods or services on the most favourable prices and conditions. Collusive tendering may take different forms namely; agreements to submit the lowest bid, submission of cover bids (voluntary inflated bids), not to bid against each other, on common norms to calculate prices or terms on bids, to “squeeze out” outside bidders, designating bid winners in advance on a rotational basis or on a geographical or customer allocation basis. Such agreements may provide for a system of compensation to unsuccessful bidders to divide among unsuccessful bidders at the end of a certain period.

Collusive tendering is illegal in most countries. Even countries that do not have specific restrictive trade practices laws often have special legislation on tenders. Most countries treat collusive tendering more severely than other horizontal agreements because of its fraudulent aspects and particularly its adverse effects on Government purchases and public spending. For example in the People’s Republic of China, the bid will be declared null and void and according to circumstances, a fine will be imposed. In Kenya, collusive tendering is considered a criminal offence punishable by up to three years’ imprisonment where two or more persons tender for the supply or purchase of goods or services at a price or on terms agreed or arranged between them except for joint tenders disclosed to and acceptable to, the persons inviting the tender.

2.4 (c) Market or customer allocation.

Customer and market allocation arrangements among enterprises involve the assignment to particular enterprises of particular customers or markets for the products or services in question. Such arrangements are designed in particular to strengthen or maintain particular trading patterns by competitors forgoing competition in respect of each other’s customers or markets. Such arrangements can be restrictive to a particular line of products or to a particular type of customer.

Customer allocation arrangements occur both in domestic and international trade. In the latter case they frequently involve international market divisions on a geographical basis, reflecting previously established supplier-buyer relationships. Enterprises engaging in such agreements virtually always agree not compete in each other’s home market. In addition, market allocation arrangements can be designed specifically for this purpose.

2.4 (d) Restraints on production or sales including by quota.

Market-sharing arrangements may also be devised on the basis of quantity allocations rather than on the basis of territories or customers. Such restrictions are often applied in sectors where there is surplus capacity or where the object is to raise prices. Under such schemes, enterprises frequently agree to limit supplies to a proportion of their previous sales and in order to enforce this, a pooling arrangement is often created whereby enterprises selling in excess of their quota are required to make payments to the pool in order to compensate those selling below their quotas.

2.4 (e) Concerted refusals to purchase or concerted refusal to supply.

Concerted refusals to purchase or to supply or the threat thereof, are one of the most common means employed to coerce those who are not members of a group to follow a prescribed course of action. Group boycotts may be horizontal (that is, cartel members may agree among themselves not to sell to or buy from certain customers) or vertical (involving agreements between parties at different levels of the production and distribution stages refusing to deal with a third party, normally a competitor to one of the above).

Boycotts are considered illegal in a number of countries particularly when they are designed to enforce other arrangements such as collective resale price maintenance and collective exclusive dealing arrangements. For example, boycotts or stop lists for collective enforcement of conditions as to resale price maintenance are prohibited in the United Kingdom. In India, agreements that restrict or withhold output of goods are subject to notification as are agreements designed to enforce any other agreements.

Concerted refusals to supply whether it be to domestic buyer or importer, are also a refusal to deal. Refusals to supply potential importers are usually the result of customer allocation arrangements whereby suppliers agree not to supply other than designated buyers. They can also be a result of collective vertical arrangements between buyers and sellers including importers and exporters.

Recommendation 2.

- (a) The following agreements between firms should be prohibited when causing an adverse effect on competition-
 - (i) agreements fixing prices or other terms of sale;
 - (ii) collusive tendering;
 - (iii) market or customer allocation;
 - (iv) restraints on production or sale including sale including sale by quota;
 - (v) concerted refusals to purchase; and
 - (vi) concerted refusal to supply.

- (b) To determine whether there is an adverse effect on competition, the following factors among others should be taken into account by the competition commission such as whether the agreements or concerted practices-
 - (i) result in the creation of barriers to entry;
 - (ii) result in forcing competitors out of the market;
 - (iii) result in foreclosing competition by hindering entry into the market;
 - (iv) result in any consumer benefit or pro-competitive impact.

- (v) contribute to improved production and distribution and promotes technical and economic progress while allowing consumers a fair share of the benefits.

Authorisation or exemption. Restrictive agreements and arrangements when properly notified in advance and when engaged in by firms subject to effective competition may be authorised or exempted when the Competition Commission finds that the agreement as a whole will be to the benefit of the public.

2.5 Abuse of dominant position in the market.

A dominant position refers to the degree of actual or potential control of the market by an enterprise or enterprises acting together or forming an economic entity. The commission has identified two scenarios where abuse of dominant position occurs-

- (a) where an enterprise either by itself or acting together with few other enterprises, is in a position to control a relevant market for a particular good or service or groups of goods or services, or
- (b) where the acts or behaviours of a dominant enterprise limit access to the relevant market or otherwise unduly restrain competition having or being likely to have adverse effects on trade or economic development.

The concept of abuse of dominant position refers to the anti-competitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market. In this concept there are two elements, namely the question of dominance and the ability to exert market power.

A firm holds a dominant position when it accounts for a significant share of a relevant market and has a large market share than its next largest rival. When a firm holds market shares of a certain percentage or more, it's usually a dominant firm which can raise competition concerns when it has the capacity to set prices independently and abuse its market power.

Market power represents the ability of a firm (or a group of firms acting jointly) to raise and profitably maintain prices above the level under competition for a significant period of time. It is also referred to as monopoly power. The exercise or abuse of a dominant position of market power leads to reduced output and loss of economic welfare in addition to higher than competitive prices, the exercise of market power can be manifested though reduced quality of service or a lack of innovation in relevant markets.

Factors that tend to create market power include a high degree of market concentrations, the existence of barriers to entry and a lack of substitutes for a product. Abuse of dominant position may vary from one section to another. Abuses include; charging unreasonable or excessive prices, price discrimination, predatory pricing, refusal to deal or to sell, tied selling or product bundling etc.

One major element of dominance is the degree of actual or potential control of the market by an enterprise or enterprises acting together. The control can be measured on the basis of market shares, total annual turnover, size of assets, number of employees etc. It should also focus on the ability of a firm or firms to raise prices above (or depress prices below) the competitive level for significant period of time. The commission recommends that Uganda should provide in its legislation what percent of market share will be taken to be dominant. A percentage figure of 33 percent was agreed upon by the taskforce after considering several indicators for example the production base, the nature of the current business environment, costs, size of the market and promotion of investment.

This percentage (plus other factors if necessary) will either be used as a jurisdiction and handle for initiating investigations or as critical market share where firms are obliged to notify the authority. Examples of countries

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dominance with percentages are the United Kingdom - 25 percent - where a monopoly is presumed to exist if a company supplies or purchases 25 percent or more of all the goods or services of a particular type in the United Kingdom or in a defined part of it. The UK law defines a complex monopoly as a situation where a group of companies that together have 25 percent of the market all behaves in some way that affects competition. The commission has identified other countries' levels of dominance wit-

- (a) Poland - when market share exceeds 40 percent;
- (b) The Czech Republic - 30 percent;
- (c) Lithuania - 40 percent; and
- (d) Russian Federation - 65 percent.

In Germany, the legislation contains several presumptions namely; at least one enterprise has one third of a certain type of goods or commercial services and a turnover of at least DM 250 million in the last competed business year; three or fewer enterprises have a combined market share of 50 percent or over; five or fewer enterprises have a combined market of two thirds or over. This presumption does not apply to enterprises which recorded turnovers of less than DM 100 million in the last completed business year.

2.6 Criteria for defining market dominance.

Specific criteria defining market dominance can however be difficult to lay down. For example, in the Michelin Judgment⁶, the Court of Justice of the European Community stated that under Article 82 of the EEC treaty a dominant position refers to a situation of economic strength which gives the enterprise the power to obstruct the maintenance of an effective competition in the market concerned and because it allows the enterprise to conduct itself in a way that is independent from its competitors, clients and finally consumers. In addition to market share, the structural advantages possessed by enterprises can be of decisive importance. For example in the United Brands Judgment⁷ Case 27/76 *United Brands v. Commission* [1978] 1 CMLR 429, the European Community Court of Justice took into account the fact that the undertaking possessed a high degree of vertical integration that its advertising policy hinged on a specific brand ('chiquita') guaranteeing it a steady supply of customers and it controlled every stage of the distribution process which together gave the corporation a considerable advantage over its competitors. In consequence, dominance can derive from a combination of a number of factors that if taken separately would not necessarily be determinative.

A dominant position of market power refers not only to the position of one enterprise but also to the situation where a few enterprises acting together could wield control. This clearly refers to highly concentrated markets such as in an oligopoly, where few enterprises control a large share of the market, thus creating and enjoying conditions through which they can dominate or operate on the market very much in the same manner as would a monopolist. This is the same criteria that the European Commission had adopted. In consequence the cumulative effect of use of a particular practice such as tying agreements may well result in an abuse of a dominant position.

⁶ 2002/405/EC, Commission Decision 20 June 2001 COMP/E-2/36.041/PO-Michelin, OJ, 31 May 2002, L143/1 *Nederlandsche Banden-Industrie Michelin v Commission* (C322/81) [1983] ECR 3461.

⁷ Case 27/76 *United Brands v. Commission* [1978] 1 CMLR 429.

Recommendation 3.

No enterprise shall abuse its dominant position. For purposes of determining whether an enterprise enjoys a dominant position, one or more of the following factors may be taken into account-

- (a) a market share of 33 percent;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) technical advantages enjoyed by the firm;
- (f) dependence of consumers;
- (g) entry barriers if any;
- (h) countervailing buying power;
- (i) market structure and size of the market; and
- (j) any other factor which the Competition Commission considers to be relevant.

2.7 Acts or behaviours considered as abusive.

Usually, competition laws provide only some examples of acts or conduct considered abusive and prohibited these include a whole range of firm strategies aimed at raising *barriers to entry* to a market.

Barriers to entry to a market refer to a number of factors that may prevent or factors that may prevent or deter the entry of new firms into an industry when incumbent firms are earning excess profits. These are two broad classes: structural (or economic) and strategic (or behavioural).

Structural barriers to entry arise from basic industrial characteristics such as technology, cost and demand. There is some debate over what factors constitute relevant structural barriers. The widest definition suggests that barriers to entry arise from product differentiation, absolute cost advantages for incumbents and economies of scale. However, there is another analysis providing a narrower definition. It suggests that barriers to entry arise only when an entrant must incur costs that incumbents do not bear. Therefore this definition excludes scale economies and advertising expenses as barriers because these are costs that incumbents have had to sustain in order to attain their position in the market.

Strategic barriers to entry refer to the behaviour of incumbents. In particular, incumbents may act so as to heighten structural barriers to entry or threaten to retaliate against entrants if they do enter such threats must, however, be credible in the sense that incumbents must have an incentive to carry them out if entry does not occur. Strategic entry deterrence offer involves some kind of pre-emptive behaviour by incumbents for example, pre-emption of facilities by which an incumbent over-invests in capacity in order to threaten a price war if entry actually occurs.

(a) **Predatory behaviour towards competitors such as using below-cost pricing to eliminate competitors.**

One of the most common forms of predatory behaviour is generally referred to as predatory pricing. Enterprises engage in such behaviour to drive competing enterprises out of business with the intention of maintaining or strengthening a dominant position. The greater the diversification of the activities of the enterprise in terms of products and markets and the greater its financial resources, the greater is its ability to engage in predatory behaviour. The Peoples Republic of China law for countering unfair competition states that an enterprise(s) or individuals(s) may not sell its or his goods at a price that is below the cost for the purpose of excluding its or

his competitors. Legislations of Mongolia and Hungary have similar provisions and the Commission recommends that Uganda adopts a similar provision in its competition law.

Predatory behaviour is not limited to pricing. Other behaviour includes, an acquisition with a view to the suspension of activities of a competitor, excessive pricing or the refusal of an enterprise in a dominant position to supply a material essential for the production activities of a customer who is in a position to engage in competitive activities

(b) Price discrimination.

Price discrimination is an indispensable tool for firms to maximise their profits from whatever market position they hold and raise or defend that position against other firms. However discrimination can also be used by holders of market power to avoid competition by increasing market shares and or barriers to entry. Types of price discrimination include-

- (a) personal discrimination - Haggle every time;
- (b) group discrimination for example, predatory price cutting aimed at driving out a competitor;
or
- (c) product discrimination - pay-for-the label: The premium label (or most notorious) gets a higher prices, even if the goods is the same as a common brand.

(c) Discriminatory pricing or terms or conditions in the supply or purchase of goods or services.

Closely related to predatory pricing is the practice of discriminatory pricing. While below cost pricing vis-à-vis direct competitors may be predatory, discriminatory pricing can also be predatory for example discounts based on quantities. However it's important to point out that in many cases quantity discounts often reflect reduced transaction costs or have the purpose of meeting competition and should not be discouraged. Injury to competitors of the favoured purchaser should not in itself concern competition authorities because competition laws should protect competition and not competitors. The commission recommends that examples of discriminatory pricing such as discounts and bonuses that correspond to generally accepted commercial practices that are given because of special circumstances such as anticipated payment, quantity, volume when granted in similar conditions to all consumers should not constitute a case of abuse of dominate position.

The proscription of discrimination also includes terms and conditions in the supply or purchase of goods or services e.g. the extension of differentiated credit facilities or ancillary services. The prohibition of discrimination is not limited to price based discriminations but also refers to credits, provision of services and payment for services provided in respect of the goods. The commission however notes that differential terms and conditions should not be considered unlawful if they are related to cost differences. More generally, preventing firms from offering lower prices to some customers may well result in discouraging firms from cutting process to anyone.

(d) Fixing the prices at which goods sold can be resold.

Fixing the resale price of goods usually by the manufacturer or by the wholesaler is generally termed as Resale Price Maintenance (RPM). Under this practice, the supplier dictates the final downstream price.

(e) Partial or complete refusal to deal on an enterprise's customary commercial terms.

Commonly referred to as 'refusal to deal' this practice is adopted by the supplier to coerce the distributor to adopt an anti-competitive practice. In case of non-compliance the distributor encounters difficulty in obtaining products from suppliers. This practice is feasible only when the number of suppliers is less and the number of

(f) Exclusive dealing arrangements.

This is a commercial practice where an enterprise receives the exclusive rights frequently within a designated territory to buy, sell or resale another enterprises goods and services. As a condition for such exclusive rights, the distributor is required not to deal in or manufacture competing goods. Under such arrangements, the distributor relinquishes part of his commercial freedom in exchange for protection from sales by competitors of the specific product in question.

(g) Market or customer allocation.

Arrangements between the supplier and his or her distributor often involve the allocation of a specific territory (territorial allocation) or specific type of customer (customer allocation) that is where and with whom the distributor can deal. For example, the distributor might be restricted to sales of the product in question in bulk from the wholesalers or only to selling directly to retail outlets.

The purpose of such restrictions is usually to minimise intra-brand competition by blocking parallel trade by third parties. The effects of such restrictions are manifested in prices and conditions of sale particularly in the absence of strong inter-brand competition in the market.

Territorial allocation: Under this the supplier designates a certain territory to the distributor with the understanding that the distributor will not sell to customers outside that territory. Furthermore, the distributor is restricted from selling the products to customers who may in turn sell the products in another area of the country.

Customer allocation: This relates to the case in which the supplier requires the distributor to sell only to a particular class of customers e.g. only to retailers. Reasons for such a requirement are the desire of the manufacture to maintain or promote the product image or quality or that the supplier may wish to retain for himself or herself bulk sales to large purchasers such as sales of vehicles to Government. Customer allocations may also be designed to restrict final sales to certain outlets for example approved retailers meeting certain conditions. Such restrictions can be designed to withhold suppliers from discount retailers or independent retailers for the purpose of maintaining resale price and limiting sales and serves outlets.

Territorial and customer allocation arrangements enable suppliers when in a dominant position in respect to the supply of a product in question, to insulate particular markets from one another and there by engage in differential pricing according to the level that each market can bear.

(h) Tied selling.

This is basically making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee. Under this practice, the supply of particular goods or services is made dependent upon the purchase of the goods or services from the supplier of his or her designee. Tying arrangements are normally imposed in order to promote the sale of slower moving products and in particular those subject to greater competition from substitute products. By virtue of the dominant position of the supplier in respect of the requested product, he is able to impose as a condition for its sale the acceptance of the other products.

(i) Authorisation.

Acts, practices or dominance of positions that are not prohibited by the law may be authorised by the Act if notified and all relevant facts are disclosed to the Competition Commission and the affected parties have an

opportunity to be heard and if it is then determined that the proposed conduct as altered or regulated if necessary, will be consistent with the objectives of the law. Acts or behaviours suspected to be abusive should be examined in terms of their purpose and effects in the actual situation. In doing this, it is clearly the responsibility of the enterprises to advance evidence of the appropriateness of their behaviour in a given circumstance and it's the responsibility of the Competition Commission to accept it or not.

Recommendation 4.

- (a) The Act should prohibit acts or behaviours involving an abuse of a dominant position of market power where-
 - (i) an enterprise, either by itself or acting together with other enterprises, is in a position to control a relevant market for a particular good or service or groups of goods or services; or
 - (ii) the acts or behaviours of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition and have or are likely to have adverse effects on trade.
- (b) The Act should prohibit acts or behaviours considered an abusive, e.g.
 - (i) predatory behaviour towards competitors such as using below - cost pricing to eliminate competitors.
 - (ii) discriminatory pricing or terms or conditions in the supply or purchase of goods or services.
 - (iii) fixing the prices at which goods sold can be resold.
 - (iv) when not for ensuring the achievement of legitimate business purposes such as quality, safety, adequate distribution or service:-
 - (v) partial or complete refusal to deal on an enterprise's customary commercial terms;
 - (vi) exclusive dealing arrangements;
 - (vii) market or consumer allocation; and
 - (viii) tied selling.

2.8 Regulation of combinations (mergers).

(i) Definition of mergers.

Concentration of economic power occurs inter-alia through mergers, takeovers, joint ventures and other acquisitions of control such as interlocking directorates. A merger is a fusion between two or more enterprises where the identity of one or more is lost and the result is a single enterprise. The take over of one enterprise by another usually involves the purchase of all or a sufficient amount of shares of another enterprise to enable it to exercise control and it may take place without the consent of the former. A joint venture involves the formation of a separate enterprise by two or more enterprises.

Such acquisitions of control might in some cases lead to a concentration of economic power which may be horizontal (for example, the acquisition of a competitor), vertical (between enterprises at different stages of the manufacturing and distribution process) or conglomerate (involving different kinds of activities). In some cases such concentrations can be both horizontal and vertical and the enterprises involved may originate in one or more countries.

(ii) Importance of merger control.

Some countries with small markets believe that merger control is unnecessary because they do not want to impede restructuring of firms trying to obtain "critical mass" which would enable them to be competitive in world markets. Others believe that having a 'national champion' even abusing a monopoly position domestically might allow it to be competitive abroad in third markets. Two objectives can be made to these views.

First, it is often the case that monopolies enjoy them “monopoly rent” without becoming more competitive abroad at the expense of domestic consumers and eventually the development of the economy as a whole.

Second, if the local market is open to competition from imports or Foreign Direct Investment (FDI), the world market might be relevant for the merger control test and the single domestic supplier might any way be allowed to merge it should also be noted that prohibiting a cartel while being unable to act against the cartel members if they merge, is unwarranted. Moreover, by not having a merger control system, a host country deprives itself of the powers to challenge foreign mergers and acquisitions that might have adverse effects on the national economy.

As a rule, merger control aims at preventing the creation through acquisitions or other structural combinations of undertakings that will have the incentive and ability to exercise market power. Mergers that are in unusually concentrated markets or that create firms with usually high market shares are thought more likely to affect competition.

Depending on the degree of experience of the competition authorities and varying from one jurisdiction to another, the test of the legality of a merger is derived from the laws on dominance or restraints or a separate test that is developed and phrased in terms of measures of the actual or potential effect on competition and the competitive process. As a consequence merger law was often included with the abuse of a dominant position.

Most merger control systems apply some form of market share test either to guide further investigation or as a presumption about legality. Most systems specify procedures for pre-notifications to enforcement authorities in advance of larger, more important transactions and special processes for pre-expedited investigations in order that problems can be identified and resolved before the restructuring is actually undertaken when the merger is consummated.

Merger control analysis incorporated the following aspects-

- (a) relevant market definition in geographical or product aspects;
- (b) characterisation of the products that actually or potentially competes;
- (c) firms that might offer competition;
- (d) the relevant shares and strategic importance of those firms with respect to the product markets;
and
- (e) the likelihood of new entry and the existence of effective barriers to new entry.

2.9 Notification and criteria of notification.

The commission has noted that in many countries the control of mergers and other firms control a system of notification prior to consummation of mergers such as in the United States and the European Unions. Some countries have retained a mandatory system of notification after consummation of the merger and a few countries have submitted merger control only to a voluntary notification process. The commission recommends that Uganda adopts notification that is mandatory only when the enterprises concerned have or are likely to acquire, a certain level of concentration.

The main indicators used for examining such concentration of economic power are market shares, total annual turnover, number of employees and total assets. The other factors including the general market structure the existing degree of market concentration, barriers to entry and the competitive position of other enterprises in the relevant market as well as the advantages currently enjoyed and to be gained buy the acquisition, are also taken into account in assessing the effects of an acquisition. However it is important for Ugandans notification scheme not to be interpreted as attempting to undertake pro-competitive activities. In the European Union,

the obligation to notify a concentration is based on the worldwide, community wide or national aggregate turnover of the concerned undertaking.

The commission notes the need of a comprehensive system of merger control within the East African Community (EAC). The EAC could adopt the same merger system the European Union adopted in 1989. Its merger regulation is based on the principle of the “one stop shop” - once a transaction has triggered the application of European competition Authority powers (e.g. the European Community through its Directorate General for Competition), the national competition authorities of the member states are precluded from applying their own competition laws to the transaction (except in very limited circumstances). The application of this principle is aimed at strengthening the firm’s certainty with regard to international transactions (which otherwise could fall under the review of multiple national merger control authorities.) This principle of the “one stop shop” has been strengthened by the modification, in an attempt to reduce the need for the business community to make multiple applications for clearance with national merger regulators.

2.10 Types of concentrations.

Horizontal acquisitions are clearly the type of actually which contributes most directly to concentration of economic power and which is likely to lead to a dominant position of market power, there by reducing or eliminating competition. In fact, one of the primary purposes of anti-monopoly legislation has been to control the growth of monopoly power which is often created as a direct result of integration of competitors into a single unit. Horizontal acquisitions of control are not limited to mergers but may also be effected through takeovers, joint ventures or interlocking directorates. Horizontal acquisition of control, even between small enterprises while not necessarily adversely affecting competition in the market may nonetheless create conditions that can trigger further concentrations of economic power and oligopoly.

Where the acquisition of control is through the establishment of a joint venture, the first consideration should be to establish whether the agreement is a restructure agreement or arrangement. These kinds of agreements such as agreements to fix prices, collusive tendering, refusal to supply etc, are prohibited. They further involve market allocation arrangements or likely to lead to allocation of sales and production.

Vertical acquisitions of control involve enterprises at different stages in the production and distribution process and may entail a number of adverse effects for example; a supplying enterprise that merges or acquires a customer enterprise can extend its control over the market by foreclosing an actual or potential outlet for the products of its competitors. By acquiring a supplier, a customer can similarly limit access to supplies of its competitors.

Conglomerate acquisitions which neither constitute the bringing together of competitors nor have a vertical connection (that is, forms of diversification into totally unrelated fields) are more difficult to deal with, since it could appear ostensibly that the structure of competition in relevant markets would not change. The most important element to be considered in this context is the additional financial strength that the arrangement will give to the parties concerned.

A considerable increase in the financial strength of the combined enterprise could provide for a wider scope of action and leverage vis-à-vis competitors or potential competitors of both the acquired and the acquiring enterprise and especially if one or both are in a dominant position of market power.

Cross-frontier acquisitions of control - Mergers takeovers or other acquisitions of control involving trans-national corporations should be subject to some kind of scrutiny in all countries where the corporations operates, since such acquisitions of control, irrespective of whether they take place solely within a country or abroad, might have direct or indirect effects on the operations of other units of the economic entity. For example, in Australia, was introduced to cover overseas mergers of foreign corporations with subsidiaries in Australia.

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Subsection 50(A)(1) provides that the tribunal may, on the application of the Minister, the commission or any other person, make declaration that the person who as a consequence of an acquisition outside Australia, obtains a controlling interest defined by subsection 50(A)(8) in one or more corporations, would or would be likely to dominate a substantial market for goods or services in Australia and that the acquisition will not result in a public benefit. The term “substantial market for goods and services” is used to make it clear that the provision applies only to markets of a similar magnitude to those to which section 50 applies. Examples of action against international mergers taking place outside the national borders but having effects in the national territory are provided by the Federal Cartel Office of Germany, in the Bayer or Firestone and Phillip Morris or Rothmans mergers cases.

Recommendation 5

- (a) Notification. The Competition Commission should receive notice of mergers, takeovers, joint ventures or other acquisitions of control whether of a horizontal, vertical or conglomerate nature, when at least one of the enterprises is established within the country; and the resultant market share in the country or any substantial part of it relating to any product or service is likely to create market power especially in industries where there is a high degree of market concentration, where there are barriers to entry and where there is a lack of substitutes for a product supplied by incumbent.
- (b) Prohibition. Mergers, takeovers, joint ventures or other acquisitions of control whether of a horizontal vertical or conglomerate nature, are prohibited when-
 - (i) the proposed transaction substantially increases the ability to exercise market power (for example to give the ability to a firm or group of firms acting jointly to profitably levels for significant period of time); or
 - (ii) the resultant market share in the country or any substantial part of it, relating to any product or service will result in a dominant form or have an adverse effect on competition in a market dominated by few firms.
- (c) For the purposes of determining whether a combination would have an adverse effect on competition in a market, the following factors may be taken into account
 - (i) the actual and potential level of competition through imports in the market;
 - (ii) the extent of barriers to entry to the market;
 - (iii) the level of combination in the market;
 - (iv) the degree of countervailing power in the market;
 - (v) the likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
 - (vi) the extent of competition remaining in the market;
 - (vii) the extent to which substitutes are available in the market or are likely to be available in the market;
 - (viii) the market share of the parties involved in the combination, individually and as a combination;

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- (ix) the likelihood that the combination will result in the removal from the market of a vigorous and effective competitor;
 - (x) the nature and extent of vertical integration in the market;
 - (xi) whether the benefits of the combination outweigh the adverse impact of the combination, if any.
- (d) Investigation procedures. The Competition Commission shall enquire into every merger, takeover, joint venture or other acquisitions of control to satisfy itself that such combination does not cause or is likely to cause an adverse effect on competition within the relevant market.
- (e) No firm should effect a merger until the expiration of a set waiting period from the date of issuance of notification, unless the Competition Commission shortens or extends the period.
- (f) The Competition Commission shall have the power to demand documents and testimony from the parties and from enterprises in the affected relevant market or lines of commerce.

2.11 The Competition Commission.

(i) Introduction.

In reaching most of its conclusions and recommendations, the commission studied the set ups of Competition Commissions in other countries. It is noted that the organisational structures of Competition Commissions in countries varies with each country, often having distinct features of its own. It is crucial to ensure that the commission can operate effectively. The set up of the Uganda Competition Commission should be carried out after a detailed study on its establishment and operation has been undertaken. However, this part of the report attempts to highlight major features of the Competition Commission.

Recent enactments of legislation and legislative amendments in different countries show trends towards the creation of new bodies for the control of restrictive business practices or changes in the existing authorities in order to confer additional powers on them and make them more efficient in their functioning. In some cases, there has been a merging of different bodies into one empowered with all functions in the area of restrictive business practices, consumer protection or corporate law. This is the case for example, in Pakistan where the Government decided to establish a corporate authority to administer the Monopolies Ordinance together with other business laws.

(ii) Composition of the authority, chairmanship and members.

Probably the most efficient type of administrative authority is one which is a quasi-autonomous or independent body of the Government with strong judicial and administrative powers for conducting investigations, applying sanctions, etc. while at the same time providing for the possibility or recourse to a higher judicial body. Note that the trend in most of the competition authorities created in the recent past (usually in developing countries and countries in transition) is to award them as much administrative independence as possible. This is very important because it protects the commission from political influence.

Review of other countries' legislations reveals that the number of members of an authority differs from country to country. In some legislation the number is not fixed and may vary within a minimum and maximum number such as Switzerland. Other countries state in their legislation the exact number of members for example in Algeria, Portugal, the Republic of Korea and the Russian Federation. Other countries such as Australia have

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left to the appropriate authority the choice of the number of members. In many countries, the law leaves to the highest authority the appointment of the Chairman and the members of the commission.

In other countries, a high Governmental official is designated to occupy the post by the law. In Argentina, the President of the Competition Commission is an Under-Secretary of Commerce and the Minister of Economics appoints the members. In some countries such as India, Malta and Pakistan, it is obligatory to publish the appointments in the official Gazettes for public knowledge. Certain legislation establishes the internal structure and the functioning of the Competition Commission and establishes rules for its operation while others leave such details to the commission itself.

The commission observed that in some countries is the partial or total change regarding the origin of the members of the national authorities in relation to restrictive business practices. This is the case in Chile where under previous legislation members of the resolute commission were basically officers from the public administration while at present such posts include representatives from the university.

(iii) Qualifications of persons appointed.

Several laws establish the qualifications that any person should have in order to become a member of the authority. For example, in Peru members of the multi-sectoral free competition commission must have a professional degree and at least 10 years of experience in its respective field of knowledge. In Brazil, members of the administrative economic protection council are chosen among citizens reputed for their legal and economic knowledge and unblemished reputation.

In a number of countries the legislations state that the persons in question should not have interests that would conflict with the functions to be performed. In India for example a person should not have any financial or other interest likely to affect prejudicially his functions. In Germany, members must not be owners, chairpersons or members of the board of management or the supervisory board of any enterprise, cartel, trade industry association or professional association. In Hungary, the President, Vice-Presidents of the office of economic competition and the senior officials and members of the competition council may not pursue other activities of profit other than activities dedicated to scientific, educational, artistic, authorial and inventive pursuits as well as activities arising out of legal relationships aimed at linguistic and editorial revision and may not serve as senior officials of a business organisations or members of a supervisory board or board of directors.

(iv) Tenure of office.

The tenure in office of the member of the Competition Commission varies from country to country. At present, members are appointed in Australia and Italy for 7 years, in Argentina for 4 years, in Canada and Mexico for 10 years and in Bulgaria, India, the United Kingdom and Pakistan for 5 years. In Lithuania, the law refers to tenure of 3 years. In Brazil it is for 2 years and in other countries such as Peru and Switzerland, it is for an indefinite period. In many countries such as Thailand, the Republic of Korea, Argentina, India and Australia, members have the possibility of being reappointed but in the case of Brazil this is possible only once.

(v) Removal of members of the authority.

The proposed Competition Bill should put in place an appropriate authority with powers to remove from office a member of the Competition Commission who has engaged in certain actions or has become unfit for the post. For example, becoming physically incapable is a reason for removal in Hungary, Thailand, the Republic of Korea and India; becoming bankrupt, in Thailand, India and Australia; in Mexico they can only be removed if they are charged and sentenced for severe misdemeanour under criminal or labour legislation;

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abusing one's position and acquiring other interests, in India; failing in the obligations that one acquires as a member of the Administering Authority, in Argentina and Australia; being absent from duty, in Australia.

Another cause for removal is being sentenced to disciplinary punishment or dismissal for example in Hungary or imprisonment in Thailand. In the people's Republic of China where a staff member of the State organ monitoring and investigating practices of unfair competition acts irregularly out of personal considerations and intentionally screens an operator from prosecution, fully knowing that he had contravened the provisions of china's law, constituting a crime, the said staff member shall be prosecuted for this criminal liability according to law.

(vi) Immunity of members against prosecution or any claim relating to the performance of their duties or discharge of their functions.

In order to protect the members and officers of the Competition Commission from prosecution and claims, full immunity may be given to them when carrying out their functions. In Pakistan for example, the authority or any of its officials or servants have immunity against any suit, prosecution or other legal proceeding for anything done in good faith or intended to be done under the Monopolies Law.

(vii) The appointment of staff.

There are variations for the appointment of staff of the Competition Commission. In some countries such as Pakistan and Sri Lanka, the Administering Authority appoints its own staff. In others, the Government has this power. In the case of Uganda, since all staff are public officers, then they will have to be appointed the Ministry of Public Service.

Recommendation 6.

- (a) The Competition Commission should consist of a chairperson and ten members, who shall be persons of ability, integrity and standing who have been or are qualified to be High Court Judges or have special knowledge and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, accountancy, information technology and management.
- (b) The chairperson and members should be appointed by the President on the recommendation of a committee.
- (c) The chairperson and members should hold office for a term of five years, eligible for reappointment.
- (d) Considering the need to keep the Competition Commission free from any form of interference, the chairperson and members should be fairly highly paid. The chairperson will be paid a salary equal to that of a Judge of the Court of Appeal while members a salary equal to that of a High Court Judge.
- (e) A competition commissioner should be appointed by the Minister for the purposes of assisting the Competition Commission in conducting inquiry into contraventions of the provisions of the Act and for the conduct of cases before the Competition Commission.
- (f) The post of deputy competition commissioner should be specifically established under the Act. This deputy will assist the Competition Commissioner in the important and sensitive work of conducting inquiries and leading cases before the Competition Commission. The Minister should appoint the deputy.
- (g) The Competition Commission should have other categories of officers and employees as may be determined by the Minister.

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- (h) No civil suit or criminal prosecution or other legal proceeding should lie against the Minister, chairperson or a member of the Competition Commission or other for anything which is done in good faith or intended to be done in pursuance of the Act.
- (i) The chairperson and members and staff and other employees of the Commission should be public officers.

(i) **Administrative procedures.**

The proposed Competition Bill will establish a more open and detailed procedure for handling investigations and proceedings by the Competition Commission. The Bill shall permit the Competition Commission to initiate investigations ex officio or upon receiving complaints or petitions from private parties or other Government agencies. Private parties will have a right to participate formally in the Competition Commission proceedings. The Competition Commission shall be required to respond to all petitions or complaints within a specified time. The Competition Commission has the right to reject a petition if it concludes that it does not state a potential violation.

The Competition Commission must conduct formal proceeding before reaching a conclusion that a violation has occurred. The prosecutions will be lead by the competition commissioner. Private parties including petitioners and third parties with an appropriate interest in the case can participate in the hearing and offer evidence.

To ensure that the Competition Commission operates effectively, there should be constituted 'benches' made up of members of the Competition Commission. The idea is to have the 'benches' to hear the cases filed with the commission. There will be benches for combinations (mergers), dominant position, restrictive agreements, anti-dumping, subsidies and any other benches as the competition commission may establish. These benches are called subsidiary benches and they will be under a bench called the principal bench that will be chaired by the chairperson of the Competition Commission.

The commission however noted that the procedure of the Competition Commission could become too cumbersome and slow. The unconstrained participation of private parties in the hearings could lengthen the proceedings unnecessarily. The Competition Commission should adopt procedures for handling petitions and for the participation of private parties in their proceedings that are vigorous but fair consistent with the requirements of the law to ensure against excessive demands on the Competition Commission's resources.

Recommendation 7.

- (a) There should be constituted benches of the Competition Commission to exercise jurisdiction, powers and authority of the Competition Commission.
- (b) A complaint or reference should be instituted before the Competition Commission.
- (c) The manner of conduct of inquiries by the Competition Commission should be set out in the Act, specifically:
 - (i) appearance before the Competition Commission;
 - (ii) procedure of investigations and inquiry of complaints;
 - (iii) Findings and orders of the Competition Commission upon investigation;
 - (iv) Disclosure.

(ii) **Jurisdiction, Powers and Authority of the Commission**

Most legislations dealing with restrictive trade practices establish a list of functions and powers that the Competition Commission possesses for carrying out its tasks and a general framework for its operations. It

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is important to mention that all these functions are related to the activities that the Competition Commission might develop as well as the means usually at its disposal for carrying out its tasks.

(a) Making inquiries and investigations as a result of receipt of complaints

The Commission may act on its own initiative or following certain indications that the restrictive practice exists for example as a result of a complaint made by any person or enterprise. The Commission has identified examples of information to be supplied to the Competition Commission in a complaint. These include;

- 1) Details about the complainant and about the firm(s) complained of;
- 2) Details about the substance of the complaint;
- 3) Evidence as to why the complainant has a legitimate interest;
- 4) Details of whether a similar complaint has been made to any other authorities (for example sector Ministries or agencies) or is the subject of proceedings in a court;
- 5) Details of any products or services involved and a description of the relevant market;
- 6) A statement of what remedies are sought from the Competition Commission.

Information gathered by other Government departments such as the internal revenue, foreign trade, customs or foreign exchange control authorities, if applicable may also provide a necessary source of information. The Commission recommends that Uganda should institute or improve on procedures for obtaining information from enterprises necessary for their effective control of restrictive trade practices. The Commission should also be empowered to order persons or enterprises to provide information to call for and receive testimony. In the event that this information is not supplied, the obtaining of a search warrant or a court order may be envisaged, where applicable, in order to require that information be furnished and/or to permit entry into premises where information is believed to be located. Examples of documents that the Competition Commission may inspect include;

- (i) Financial records;
- (ii) Sales records;
- (iii) Production records;
- (iv) Travel records
- (v) Diaries;
- (vi) Minutes or notes of meetings held either internally or with third parties;
- (vii) Records and copies of correspondence (internal and external), personal memoranda including telephone numbers and fax numbers used during particular periods, records of electronic mail;
- (viii) Photographic materials

It is indispensable to mention that in the process of investigation, the general principles and rules of due process of law must be duly observed.

In many countries including Argentina, Australia, Germany, Pakistan, Peru as well as in the European Community, the Competition Commission has the power to order enterprises to supply information and to authorise a staff member to enter premises in search of relevant information. However, entry into premises may be subject to certain conditions. For example, in Argentina a court order is required for entry into private dwellings while in Germany searches while normally requiring a court order, can be conducted without one if there is a “danger in delay”.

(b) Taking the necessary decisions including the imposition of sanctions or recommending same to a responsible Minister.

The Commission would need as a result of inquiries and investigations undertaken to take certain decisions as for example, to initiate proceedings or call for the discontinuation of certain practices or to deny or grant authorisation (especially in cases of restrictive agreements and abuse of dominance of matters notified or to impose sanctions as the case may be.

In seeking authorisations, enterprises would be required to notify the full details of intended agreements or arrangements to the Competition Commission. The particulars to be notified depend on the circumstances and are unlikely to be the same in every instance. The information required could include, *inter alia*-

- (a) the names(s) and registered address(es) of the party or parties concerned;
- (b) the names and addresses of the directors and of the owner or part owners;
- (c) the names and addresses of the (major) shareholders with details of their holdings;
- (d) the names of any parent and interconnected enterprises;
- (e) a description of the products or services, concerned;
- (f) the places of business of the enterprise(s), the nature of the business at each place and the territory or territories covered by the activities of the enterprises(s);
- (g) the date of commencement of any agreement;
- (h) its duration or if it is terminable by notice, the period of notice required; and
- (i) the complete terms of the agreement whether in writing or oral, in which oral terms would be reduced to writing.

In seeking authorisation, it is for the enterprises in question to demonstrate that the intended agreement will not have the effects proscribed by the law or that it is not in contradiction with the objectives of the law.

(c) Sanctions .

(i) Fines.

In the European Union and several other countries, competition agencies or bodies have powers to impose fines while in other countries for example Australia and the United States, the power to impose fines is vested in the courts.

Fines may also vary according to the type of infringement or according to whether the infringement was committed wilfully or negligently or they may be expressed in terms of a specific figure and or in terms of the minimum or reference salary, and/or they may be calculated in relation to the profits made as a result of the infringement. Moreover, in certain countries such as Germany, a fine of up to three times the additional receipt obtained as a result of the infringement can punish an offence. Treble damages are also important in cases of price-fixing in the United States. In Peru, in case of recurrence the fine could be doubled.

It would seem logical that the fines be indexed to inflation and that account be taken of both the gravity of the offences and the ability to pay by enterprises so that the smaller enterprises would not be penalised in the same manner as large ones for which fines having a low ceiling would constitute small disincentive for engaging in restrictive practices.

Recent enforcement attitudes towards arrangements have been to seek deterrence by means of very substantial fined for companies. In the European Union fines imposed by the Commission can reach up to 10 percent of

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infringe article 86 of the Treaty of Rome (abuse of a dominant position) an, consequently a fine of 75 million ECUs was imposed. Such a firm attitude towards infringement of EC competition law was confirmed recently in the case of three cartels (on steel bars, carton and cement) which were condemned in 1994 to pay fines of ECU 104, 132.15 and 248 million respectively. In the United States, legislation was enacted in 1990 raising the maximum corporate fine for antitrust violation from US \$ 1 million to US \$ 10 million.

(ii) Imprisonment (in cases of major violations involving flagrant and international breach of the law or of an enforcement decree, by a natural person).

The power to impose imprisonment would normally be vested in the judicial authority. In certain countries such as Japan and Norway, the power to impose terms of imprisonment is reserved for the judicial authorities on the application of the Administering Authority.

In some countries such as Argentina and Canada, the courts are responsible for decisions under the restrictive trade practices legislation; the courts have the power to impose prison terms. In the United States, criminal antitrust offences are limited to clearly defined “per se” unlawful conduct and defendant’s conduct which is manifestly anti-competitive: price-fixing, bid-rigging and market allocation. Only the Sherman Act provides criminal penalties (violations for sections 1 and 2) and infractions may be prosecuted as a felony punishable by a corporate fine and three years’ imprisonment for individuals.

(iii) Restitution to injured consumers and Interim orders or injunctions.

The Competition Commission may, by an interim measure, prohibit in its decision the continuation of the illegal conduct or order the elimination of the current state of affairs, if prompt action is required for the protection of the legal or economic interests of the interested persons or because the formation, development or continuation of economic competition is threatened. The competition Board may also require a bond as a condition.

(iv) Permanent or long-term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.

Within this framework and as an additional measure, the possibility may be considered of publishing cease and desist orders as well as the final sentence imposing whatever sanction the administrative or judicial authority have considered adequate as is the case in France and in the European Community. In this was the business community and especially consumers would be in a position to know that a particular enterprise has engaged in unlawful behaviour.

(v) Divestiture (in regard to completed mergers or acquisitions) or rescission (in regard to certain mergers, acquisitions or restrictive contracts).

The commission may order “partial or total deconcentration” of the merger. In the United States, divestiture is a remedy in cases of unlawful mergers and acquisitions. It is also to be noted that divestment powers could be extended to include dominant positions.

Recommendation 8

- (i) Where during an inquiry before the commission it is proved to the satisfaction of the commission that an act in contravention of the Competition Act has been and continues to be committed or is about to be committed, the Competition Commission may grant a temporary injunction restraining any party from carrying on such Act.

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- (ii) The provisions of the Civil Procedure Rules as far as relevant, shall apply to a temporary injunction issued by the Competition Commission.
- (iii) Any person may make an application to the commission for an order for compensation for any loss or damage shown to have been suffered as a result of any contravention of this Act.
- (iv) Imprisonment terms shall be provided for in the Act as penalties for breaches of the provisions Act.

2.12 Review and appeals.

In many instances, the circumstances prevailing at the time of decision-making may change. It is recalled that the Competition Commission can for example, periodically or because of change of circumstances, review authorisations granted and possibly extend, suspend or subject the extension to the fulfilment of conditions and obligations. Therefore, persons should be equally given the possibility of requesting review of decisions when circumstances prompting the decisions have changed or have ceased to exist. Persons considering themselves aggrieved may appeal against the order to the bench that passed it for review.

The Uganda Law Reform Commission notes that the right to appeal is a constitutional right. A review of legislations in several countries reveals that several countries legislations provide for the right of appeal against the decision of the Competition Commission specifically in the law. Other countries acknowledge this right as automatically existing under their civil and criminal laws. It is recommended as was done in Sweden that the Ugandan legislation should specifically provide for appeals from the decisions of the Competition Commission. These appeals following the example of India, Austria and Peru, should go directly to the Ugandan High Court.

Recommendation 9.

- (a) Persons considering themselves aggrieved by orders of the Competition Commission may apply to the bench which passed the order for a review of the order.
- (b) An appeal shall lie against any order passed by the Competition Commission to the High Court.

2.13 Competition advocacy.

A fledging competition agency enforcing a new competition law is often at a disadvantage in dealing with economic giants in the economy. One way of over coming this in balance is to 'systematise' competition advocacy for example creating permanent working groups or commissions on which the competition commission is represented and meets regularly to review Government policy within an activity. Such a system ensures the regular participation of the competition agency in the formulation of national economic policy. Also as in most activities of the Competition Commission, public relations are an important part of effective competition advocacy.

To perform its task as competition advocate, the Competition Commission will have to be well funded. As a Government body it will automatically receive funds from Government to perform its duties under the Act. However, the Uganda Law Reform Commission is of the view that these funds which often are in limited supply could be supplemented by other funds. A competition fund is created and shall be credited with monies like fees from filing complaints, application fees and monies from costs, interest on the above-mentioned monies and interest or income from the investments from the fund. The taskforce however noted the danger of leaving the total management of the competition fund to the Competition Commission alone. A possibility of misuse of the fund was observed. To ensure accountability, the taskforce agreed that accounts of the fund shall be submitted to the auditor general for audit after each financial year.

Recommendation 10

- (a) The Competition Act should explicitly create the role of competition advocate for the Competition Commission. The Act should authorise the Competition Commission to submit opinions on draft legislations and policies of Government where relevant.
- (b) There shall be established a competition fund which shall be used for the promotion of competition advocacy, creating awareness about competition issues and training.

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ANNEX 1

THE COMPETITION BILL, 2004

Arrangement of Clauses.

Clause.

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3. Interpretation.
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5. Establishment of the commission.
6. Composition of the commission.
7. Appointment of chairperson and members.
8. Term of office of chairperson and members.
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10. Salary and allowances of chairperson and members.
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19. Procedure for deciding the case where members of a bench differ in opinion.
20. Place of filing complaints.
21. Procedure for inquiry on complaints under section 16.
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24. Findings and orders of the commission.
25. Consequences of non-disclosure.
26. Acts taking place outside Uganda but having an effect on competition in Uganda.
27. Power to award interim relief.
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29. Appearance before the commission.
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31. The power of commission to regulate its procedure.
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37. Competition commissioner to investigate contraventions.

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38. Penalty for failure to comply with directions of commission and competition commissioner.
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PART VI - PROHIBITION OF CERTAIN AGREEMENTS.

43. Anti-competitive agreements.

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44. Abuse of dominance.

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45. Obligation to give notice of combination in certain cases.
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47. Competition advocacy.
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49. Restriction of disclosure of information.
50. Members and staff of the commission to be public servants.
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55. Power to make regulations.
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UGANDA LAW REFORM COMMISSION
THE COMPETITION BILL, 2004

A BILL FOR AN ACT
ENTITLED
THE COMPETITION ACT, 2004.

An Act to foster and sustain competition in the Ugandan market so as to protect consumer interest while safeguarding the freedom of economic action of various market participants and to prevent practices which limit access to markets or otherwise unduly restrain competition, affecting domestic or international trade or economic development and to establish a Commission therefore.

PART 1- PRELIMINARY.

1. Commencement.

Subject to the provisions of section 3, this Act shall come into force on such date as the Minister may, by statutory instrument appoint and different dates may be appointed for different provisions and any reference in any provision of this Act to the commencement of this Act shall be construed as a reference to the commencement of that provision.

2. Interpretation.

In this Act, unless the context otherwise requires,

- 'acquisition' means directly or indirectly acquiring or agreeing to acquire shares, voting rights, management control or control over assets in any enterprise;
- 'agreement' includes any arrangement or understanding or action in concert whether formal or not, in oral or writing whether or not it is intended to be specifically enforceable;
- 'bid rigging' includes agreements, decisions or understanding between enterprises involved in the same manufacturing, trading or service rendering activity which has the effect of eliminating competition for bids or adversely affect or manipulate the bidding process;
- 'cartel' includes an association of producers, sellers, distributors, traders or service providers who by agreement between themselves control or attempt to control the production, distribution, sale or price of or trade in goods or provision or rendering of service;
- 'benches' means benches established under section 16;
- 'joint venture' means an enterprise subject to joint control by two or more under takings which are economically independent of each other;
- 'judicial member' means a member who is or has been or is qualified to be a judge of the high court;
- 'commission' means the competition commission of Uganda established under section 4;
- 'combination', means the acquisition by a person directly or indirectly of shares in the capital of an enterprise or voting rights or, any assets of an enterprise, so as to acquire direct or indirect control thereof; acquisition of control by a person or entity over an enterprise when such person or entity already has direct or indirect control over another enterprise engaged in production, distribution and trading of the same or substitutable goods or provision of the same or substitutable service; merger or amalgamation of two or more enterprises;
- 'competition' means the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in that market and includes; competition from imported goods and services supplied by a person not resident or carrying on business in Uganda;

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‘competitor’ means a person who produces, distributes or supplies substantially similar goods or services, at the same stage of production or distribution of services, in relation to another person or entity;

‘consumer’ means any person who buys goods or uses services for consideration which has been paid or partly paid and partly promised or is to be paid under a system of deferred payment and also includes any person who uses such goods or services with the approval of the buyer, irrespective of whether such purchase or use is for a personal or commercial purpose;

‘competition commissioner’ means the competition commissioner appointed under subsection (1) of section 11;

‘court’ means the High Court of Uganda;

‘enterprise’ means any economic activity, irrespective of private or public ownership or an affiliated group of undertakings; and ‘unit’ or ‘division’ in relation to an enterprise includes- a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; and any branch office established for the provision of any service;

‘financial institution’ means public financial institutions specified in or under the law governing banking, financial institutions and companies and includes a Government financial, industrial or investment corporation;

‘goods’ means goods as defined in the law governing sale of goods and includes products manufactured, processed or mined; debentures, stocks and shares after allotment and in relation to goods supplied, distributed or controlled in Uganda, goods imported into Uganda;

‘market’ means a collection of goods among which buyers are or would be willing to substitute and a specific territory which could extend beyond the borders of the republic of Uganda, in which are located sellers among which buyers are or would be willing to substitute;

“member” means a member of the commission appointed section 6;

“Minister” means the Minister responsible for trade;

“notification” means a notification published in the Gazette;

“practice” means and includes any economic action taken by a person or an enterprise;

“price” in relation to the sale of any goods or to the performance of any services, includes every valuable consideration whether direct or indirect or deferred and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;

“regulations” means regulations made by the commission under section 54;

“service” includes provision of facilities or intangibles for a price or fee but does not include the rendering of any service free of charge;

“shares” means shares in the share capital of a company carrying voting rights and includes any security which would entitle the holder to receive shares with voting rights;

“trade” means any trade, business, industry or occupation relating to the production, supply, distribution or control of goods and includes the provision or rendering of any services;

3. Application.

- (1) This Act applies to -
 - (a) anti-competitive agreements;
 - (b) abuse of dominant position;
 - (c) combinations and mergers.
- (2) The Minister in consultation with the Competition Commission may, by notification, from time to time, exempt the application of this Act or any part thereof, for such period as it may specify in the notification -

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- (a) any class of enterprises if such exemption is necessary in the interests of national security or public interest;
- (b) any practice or agreement arising out of and in accordance with any obligation assumed by Uganda under any treaty or international agreement.; and
- (c) any enterprise which performs a sovereign function on behalf of the Government.

PART II - COMPETITION COMMISSION OF UGANDA

4. Establishment of the Competition Commission.

- (1) There is established for the purposes of this Act, a commission to be known as the Uganda Competition Commission to exercise the jurisdiction, powers and authority conferred to it under this Act.
- (2) The commission shall be a body corporate with perpetual succession and a common seal and shall, in its own name be capable of -
 - (a) entering into any contract, acquiring, holding and disposing of property, moveable and immovable necessary for the achievement of its objectives and performance of its functions under this Act;
 - (b) suing and being sued;
 - (c) doing and suffering all acts and things as a body corporate may lawfully do and suffer.

5. Composition of the commission.

- (1) The commission shall consist of a chairperson and ten other members.
- (2) The chairperson and the members shall be persons of ability, integrity and standing who are or have been or qualified to be High Court Judges or have special knowledge of and professional experience of not less than fifteen years in international trade, economics, business, commerce, information technology, law, finance, accountancy, management, industry, public affairs, administration or any other matter which in the opinion of the Minister would be useful to the commission.
- (3) The chairperson and other members shall be full-time members.

6. Appointment of chairperson of the commission.

- (1) The chairperson and members shall be appointed by the President on the recommendation of a committee consisting of -
 - (a) the Chief Justice of Uganda or his or her nominee;
 - (b) the Minister responsible for finance; and
 - (c) the Attorney General.
- (2) No appointment shall be invalidated merely by reason of any vacancy or any defect in the constitution of, the committee appointed under subsection (1).

7. Term of office of chairperson and members.

- (1) The chairperson and members shall hold office for a term of five years from the date of appointment or until they attain

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- (a) in the case of chairperson, the age of seventy years; and
 - (b) in the case of any other member, the age of sixty-five years, whichever is earlier.
- (2) Subject to the provisions of subsection (1) the chairperson and the other members shall be eligible for reappointment in accordance with the provisions of section 6.
 - (3) The chairperson or a member shall not, for a period of six months from the date on which he or she ceases to hold office, hold any employment in or be connected with the management or administration of any enterprise or undertaking which has been a party to any proceedings before him or her, under this Act.
 - (4) A vacancy caused by the resignation or removal of the chairperson or any member under section 8 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 6 and 7.
 - (5) The chairperson and every other member shall before entering upon his or her office make and subscribe to an oath of office and secrecy in such form, manner and before such authority as may be prescribed.
 - (6) The chairperson shall exercise such financial and administrative powers over the benches as may be vested in him under the regulations. Provided that the chairperson shall have authority to delegate such of the financial and administrative powers as he may think fit to any member or officer of the commission subject to the condition that the member or such officer shall while exercising such delegated powers, continue to act under the direction control and supervision of the chairperson.
 - (7) In the event of the occurrence of any vacancy in the office of the chairperson by reason of his or her death, resignation or otherwise, the most-senior member holding office for the time being shall act as the chairperson, until the date on which a new chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon this office.
 - (8) Where the chairperson is unable to discharge his or her functions owing to absence, illness or any other cause, the most senior member holding office for the time being shall discharge the functions of the chairperson until the date on which the chairperson resumes his or her duties.

8. Resignation, removal and suspension of chairperson and members.

- (1) The chairperson or any member may by notice in writing under his or her hand addressed to the President resign his or her office.
Provided that the chairperson or a member shall unless he or she is permitted by the President to relinquish his or her office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his or her successor enters upon his or her office or until the expiry of his or her term of office which ever is the earliest.
- (2) The chairperson or a member shall not be removed from his or her office except by an order made by the president on the ground of proved misbehaviour or incapacity, after an inquiry made by a judge of the Supreme Court, in which such chairperson or member had been informed of the charges against him or her and given a reasonable opportunity of being heard in respect of those charges.

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- (3) The minister may by rules regulate the procedure for the investigation of misbehaviour or incapacity of the chairperson or the member referred to in subsection (2).
- (4) The president may suspend from office the chairperson or a member in respect of whom a reference has been made to the Supreme Court under subsection (2) until he or she has passed an order on receipt of the report of the judge of the Supreme Court on such reference.
- (5) Notwithstanding anything contained in subsection (1) or subsection (2), the president may, by order, remove the chairperson or any other member from his or her office if such chairperson or such member-
 - (a) is adjudged an insolvent;
 - (b) engages during his or her term of office in any paid employment outside the duties of his office;
 - (c) is convicted of any offence involving moral turpitude; or
 - (d) is, in the opinion of the President, unfit to continue in office by reason of infirmity of body or mind.

9. Salary and allowances of chairperson and members.

- (1) There shall be paid to the chairperson a salary which is equal to the salary of a Judge of the Court of Appeal.
- (2) There shall be paid to a member a salary which is equal to the salary of a Judge of the High Court.
- (3) The allowances and other terms and conditions of service of the chairperson and members shall be as may be specified by the Minister.
- (4) The salary, allowances and the other terms and conditions of service of the chairperson or a member shall not be varied to his or her disadvantage after appointment.

10. Vacancy or defect not to invalidate proceedings.

No act or proceeding of the commission shall be invalidated merely by reason of-

- (a) any vacancy or any defect in the constitution of the commission;
- (b) any defect in the appointment of a person acting as the chairperson or as a member; or
- (c) any irregularity in the procedure of the commission not affecting the merits of the case.

11. Appointment of Competition Commissioners.

- (1) The Minister shall by notification appoint a competition commissioner for the purposes of assisting the commission in conducting inquiry into contraventions of the provisions of the Act and for the conduct of cases before the commission.
- (2) The conditions of service of the competition commissioner shall be such as may be specified by the Minister.
- (3) The competition commissioner shall be a lawyer appointed from amongst persons known for their integrity and objectivity and who have expertise in investigation, knowledge of accountancy, management, business, public administration, international trade or economics.

12. Officers and other employees of the commission.

- (1) The commission shall have such other categories of officers and employees as may be determined by the Minister.
- (2) The officers and employees of the commission shall discharge their functions under the general supervision of the chairperson.
- (3) The salaries and allowances and other conditions of service of the officers and employees of the commission shall be determined by the Minister.

PART III- JURISDICTION, POWERS AND AUTHORITY OF THE COMMISSION

13. Inquiry into Anti-Competitive Agreements.

The commission may inquire into any action which is alleged to be in contravention of subsection (1) of section 42 or subsection (1) of section 4, upon-

- (a) receipt of a complaint of facts which constitute such action, from any person, consumer or trade association;
- (b) a reference made to it by the Minister;
- (c) its own knowledge or information.

14. Inquiry into combinations.

Without prejudice to the provisions of section 13, the commission shall on receipt of a notice under section 44 or otherwise inquire into every combination referred to in subsection (2) of section 45 with a view to satisfy itself whether such combination causes or is likely to cause an appreciable adverse effect on competition within the Ugandan market.

15. Reference by statutory authorities.

- (1) Where in the course of a proceeding before any statutory authority entrusted with the responsibility of regulating any utility or service, an issue is raised by any party that any decision that such statutory authority has taken or proposes to take, is or would be as the case may be, contrary to the provisions of this Act, then such statutory authority shall make a reference to the commission.
- (2) On receipt of such a reference, the commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order as it deems fit. Provided that where any reference has been made to the commission under this section, the statutory authority concerned shall not make any final order till the opinion of the commission has been made available to it.

16. Benches of the commission.

- (1) There are established benches of the commission.
- (2) The jurisdiction, powers and authority of the commission may be exercised by benches.
- (3) The chairperson shall appoint members to the benches.

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- (4) Every bench shall consist of at least one judicial member.
- (5) The bench over which the chairperson presides shall be the principal bench and the other benches shall be subsidiary benches.
- (6) The places at which the benches shall ordinarily sit shall be such as the Minister may by notification, specify.

17. Distribution of business amongst the commission and benches.

- (1) Where any benches are constituted, the chairperson may, from time to time, by order make provisions as to the distribution of the business of the commission amongst the benches and specify the matters which may be dealt with by each bench.
- (2) If any question arises as to whether any matter falls within the purview of the business allocated to a bench, the decision of the chairperson thereon shall be final;
- (3) The chairperson may-
 - (a) transfer a member from one bench to another; and
 - (b) authorise a member at one bench to discharge the functions of the a member of another bench.
- (4) The chairperson may for the purpose of securing that any case or matter which, having regard to the nature of the questions involved, requires or required in his or her opinion or under rules made by the minister in this behalf, to be decided by a bench composed of more than two members, issue such general or special orders as he or she may deem fit.

18. Procedure for deciding the case where the members of a bench differ in opinion.

If the members of a bench differ in opinion on any point, they shall state the point or points on which they differ and make a reference to the chairperson who shall either hear the point or points himself or herself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case including those who first heard it.

19. Filing complaints.

- (1) A complaint or reference, shall be instituted before the commission.
- (2) The Minister shall make rules specifying -
 - (a) the manner in which a complaint or reference shall be made to the commission;
 - (b) the fees to be paid on filing of the complaint.

20. Procedure for inquiry complaints.

- (1) On receipt of a complaint or a reference from the Minister or on its own knowledge or information under section 19, if the commission is of the opinion that there exists a prima facie case, it shall direct the competition commissioner to cause an investigation to be made into the matter.

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- (2) The competition commissioner shall submit the report on his or her findings within such time period as may be specified by the commission.
- (3) The commission shall forward a copy of the report to the complainant or the minister as the case may be.
- (4) If on the basis of the report submitted under subsection (2) or otherwise the commission is of the opinion that any action or practice is in contravention of subsection (1) of section 42 or subsection (1) of section 43 the commission shall direct the competition commission to inquire into the matter.
- (5) If the report of the competition commissioner recommends that there is no contravention of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of competition commissioner.
- (6) If after hearing the complainant, the commission agrees with the recommendation of the competition commissioner, it shall dismiss the complaint.
- (7) If after hearing the complainant, the commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.

21. Orders by the commission after inquiry.

- (1) Where after inquiry, the commission finds that such agreements, decisions or concerted practices or the actions of a dominant enterprise, are in contravention of Part III as the case may be, it may pass an order:-
 - (a) directing the enterprise or the enterprises as the case may be, involved in such agreement, decision or concerted practice or abuse of dominance, to discontinue and not repeat such agreement, decision or concerted practice or abuse;
 - (b) directing the enterprises involved in such agreement, decision or concerted practice or abuse of dominance as the case may be, to make payment of fine which shall be not more than ten percent of the average of the turnover for the last three years, of each of such enterprises involved;
 - (c) awarding compensation to parties in accordance with the provisions of section 27;
 - (d) directing that the agreements shall stand modified in respect thereof in such manner as may be specified by the commission;
 - (d) directing the enterprises concerned to abide by such other orders and directions including payment of costs as may be given by the commission, to sub serve the purposes of this Act; or
 - (e) in appropriate cases, recommend to the Minister, the division of a dominant enterprise.
- (2) If the commission so recommends, the Minister may, notwithstanding anything contained in any other law for the time being in force, by an order in writing, direct the division of an enterprise, to ensure that the enterprise does not abuse its dominant position.
- (3) Notwithstanding anything contained in any other law for the time being in force, the order referred to in subsection (2) may provide for all such matters as may be necessary to give effect to the division of an enterprise, including-
 - (a) the transfer or vesting of property, rights, liabilities or obligations;

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- (b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of any shares, stock or securities;
- (d) the payment of compensation;
- (e) the formation or winding up of an enterprise or the amendment of the memorandum and articles of association or any other instruments regulating the business of any enterprise;
- (f) the extent to which and the circumstances in which provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof; or
- (g) the continuation with such changes of the parties to any legal proceedings as may be necessary.

22. Procedure for investigation of combinations.

- (1) The commission shall examine every notice of disclosure given under section 44 as soon as it is received.
- (2) The commission shall within seven working days of receipt of the said notice of disclosure of the combination, hereinafter referred to in this part as the combination which is complete in all respects, direct the parties to the combination to publish details of the combination within ten working days of its direction, in such manner as it thinks suitable, for bringing the combination to the attention of the public and persons who would be affected by it.
- (3) The commission may invite any person affected or likely to be affected by combination, to file their written objections before the commission within fifteen working days of the date on which the details of the combination are published under subsection (2).
- (4) The commission may within fifteen working days from the expiry of the fifteen working days period specified in subsection (3) above, call for such additional or other information as it may deem fit from the parties to the combination.
- (5) The additional or other information called for by the commission shall be furnished by the parties to the combination within fifteen days of the expiry of fifteen working day period specified in subsection (4).
- (6) After receipt of all information and within a period of forty-five working days from the expiry of the period as prescribed in subsection (5), the commission shall proceed to deal with the case in accordance with the provisions of this section.

23. Findings and orders of the commission upon investigation.

- (1) Where the commission is of the opinion that a combination has no adverse effect on competition, it shall by order approve the proposed combination.
- (2) Where the commission is of the opinion that a combination may not have an adverse effect on competition, it shall propose to the concerned parties, conditions subject to which it proposes to approve the said combination.
- (3) Where the parties to a combination agree with the modifications proposed under subsection (2), they shall within thirty working days intimate their acceptance of the modifications to the

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commission; or where parties to a combination do not agree with the conditions proposed by the commission, they shall apply to the commission for further modifications as they may consider necessary.

- (4) Where the commission agrees with the modifications suggested by the parties, it shall by order approve the combination subject to such modifications.
- (5) where the commission does not accept the modifications suggested by the parties, then, the parties shall be given a further period of thirty working days within which to signify their assent to the combination as proposed to be approved subject to such modifications specified under subsection (2).
- (6) Where the parties fail to convey their assent, at the end of the thirtieth working day or the sixtieth working day as the case may be, the combination shall be deemed to have been disapproved by the commission.
- (7) Where the commission is of the opinion that the combination, has or is likely to have an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
- (8) where the commission does not, at the expiry of a period of 90 working days from the date of publication referred to in subsection (2) of section 21, reach a decision in accordance with provisions of subsection (1), subsection (2) or subsection (7), the combination shall be deemed to have been approved by the commission.
provided that the period of thirty days specified in each of subsection (3) and subsection (5) shall not be affected by the expiry of the ninety day limitation prescribed in this subsection so long as the decision required to be reached by the commission under subsection (2) has been reached by the commission within the ninety working day stipulation under this sub-section.
- (9) When any extension of time is sought at the instance of parties to the combination, the ninety working day period shall be reckoned after deducting the extended time granted at the request of parties.

24. Consequences for non-disclosure.

- (1) If a person who is liable to notify to the commission in terms of section 44, fails to do so and it is brought to the notice of the commission by a reference made by the Minister or on perusing the order of any High Court or any regulatory, statutory or Governmental authority, at any time after such liability to notify has come into effect, that the person, though liable to notify under section 44 has failed to so notify, the commission shall forthwith issue to the person concerned to show cause why action should not be taken against that person.
- (2) Upon receipt of the notice, the person concerned shall state the reasons for failing to notify in contravention of section 44.
- (3) If after inquiry, the commission is of the opinion that the reasons for non-disclosure are not satisfactory, the person liable to give notice under section 44 shall be liable to a penalty of fifty currency points for each day during which such failure has continued.
- (4) The maximum penalty shall not exceed the amount of penalty leviable for a delay of one hundred days. Provided that pending an inquiry, the combination shall not be stopped from taking effect.

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- (5) If the commission arrives at a decision under subsection 3, it shall also forthwith start investigation in terms of section 25 and reach a conclusion under section 25.
- (6) If the commission reaches a conclusion under subsection (1) of section 26, then no action except levying of fine under subsection (3) shall be taken against the persons.
- (7) If the commission reaches a conclusion under subsection 7 of section 25, then notwithstanding anything inconsistent under any other law for the time being in force, in addition to the levying of fines under subsection 3, the commission shall also direct that the combination or acquisition as the case may be, shall be deemed to be void as on that day.
- (7) Without prejudice to the aforesaid, the commission may, notwithstanding anything inconsistent under any other law for the time being in force, shall, in the case of a merger, direct a de-merger. In other cases, the commission shall evolve a mechanism to reverse the combination and pass such directions or orders or take such other steps as may be required including framing of a scheme, for reversing the combination.

25. Acts taking place outside Uganda but having an effect on competition in Uganda.

Where any practice of an enterprise or enterprises, falling under Part II, Part III or Part IV as the case may be, is carried on outside Uganda but has or is likely to have an appreciable adverse effect on competition in Uganda, the commission shall have jurisdiction to pass such orders as may be necessary.

26. Power to award interim relief.

- (1) Where during an inquiry before the commission it is proved to the satisfaction of the commission, by affidavit or otherwise, that an act in contravention of subsection (1) of section 43 or subsection (1) of section 44 has been committed and continues to be committed or that such an act is about to be committed, the commission may grant a temporary injunction restraining any party from carrying on such an act until the conclusion of such inquiry or until further orders without granting notice to the opposite party, where it deems it necessary.
- (2) The provisions of Civil Procedure Rules, shall as far as relevant, apply to a temporary injunction issued by the commission under this section as they apply to a temporary injunction issued by a civil court and any reference in any such rule to a suit shall be construed as a reference to any inquiry before the commission.

27. Power to award compensation.

- (1) Without prejudice to any other provision of this Act, any person may make an application to the commission for an order for the recovery from any enterprise such compensation as it deems fit, for any loss or damage shown to have been suffered as a result of any contravention of the provisions of Part II, Part III or Part IV having been committed.
- (2) The commission may, after an enquiry made into the allegation made in the application filed under subsection (1) make an order directing the owner of the enterprise to make payment to the petitioner, of the amount determined by it as realizable from the enterprise or the owner thereof as compensation for the loss or damage caused to the petitioner by reason of such act carried on by such enterprise.

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- (3) Where any loss or damage referred to subsection (1) is caused to numerous persons having the same interest, one or more of such persons may with leave of the commission, petition under subsection (1) for and on behalf of or for the benefit of, the persons so interested and thereupon, the relevant provisions of Civil Procedure Rules, SI 65-3, shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the commission and the order of the commission thereon.

28. Appearance before the commission.

A complainant and the competition commissioner may either appear in person or authorise one or more chartered accountants or company secretaries, cost accountants or legal practitioners or any of his or its accredited officers to present his or her or its case before the commission.

29. Manner of conduct of inquiry.

- (1) The commission while adjudicating on any matter shall ordinarily call for evidence by way of affidavit.
- (2) A witness may with the leave of the commission, be summoned for cross-examination or for seeking clarifications.

30. Power of commission to regulate its procedure.

- (1) The commission shall be bound by the procedure laid down by the Civil Procedure, Rules but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Minister, the commission shall have powers to regulate its own procedure including the fixing of places, duration of oral hearings where granted and times of its enquiry.
- (2) The commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Civil Procedure, Rules while trying a suit, in respect of the following matters-
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) requiring the discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) issuing commissions for the examination of witnesses or documents;
 - (e) subject to the provisions of Evidence Act, requisitioning any public record or document or copy of such record or document from any office;
 - (f) dismissing an application in default or deciding it *ex parte*;
 - (g) any other matter which may be prescribed.
- (3) Every proceeding before the commission shall be deemed to be a judicial proceeding within the meaning of the Civil Procedure Act and the commission shall be deemed to be a civil court for the purposes of the Act.
- (4) The commission may call upon such experts from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the commission before any inquiry or proceeding before it.

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- (a) to produce before the commission and allow to be examined and kept by the commission such books, accounts or other documents in the custody or under the control of the person so required as may be specified or described in the requisition, being documents relating to any trade practice, the examination of which may be required for the purposes of this act;
- (b) to furnish the commission such information as respects the trade practice as may be required for the purposes of this Act or such other information as may be in his or her possession in relation to the trade carried on by any other person.

31. Review of orders of the commission.

- (1) A person considering himself or herself aggrieved by an order of the Commission from which an appeal is allowed by this Act but no appeal has been preferred may within thirty days of the date of the order, apply to the Bench which passed the order for a review of the order and the Bench may make such order thereon as it thinks fit: Provided that the commission may entertain a review application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time.
- (2) An order shall not be modified or set aside without giving an opportunity to be heard to the person in whose favour the order is given and to the competition commissioner where he or she was a party to the proceedings.

32. Rectification of orders.

Any clerical or arithmetical mistakes in any proceedings, amendment of proceedings, declaration or order of the commission or error therein arising from any accidental slip or omission may, at any time, be corrected by the commission either on its own motion or on the application of any party and the provisions of the Civil Procedure Rules, shall be applicable in this respect.

33. Execution of orders of the commission.

An order passed by the commission under this Act shall be enforced by the commission in the same manner as if it were a decree or order made by the High Court.

34. Penalty for disobeying orders of commission.

- (1) Without prejudice to any other provision in this Act, if any person contravenes without any reasonable excuse, any order of the commission or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter, unless in the meantime the commission directs his or her release and shall also be liable to a penalty of ten currency points.
- (2) The commission may while making an order under this act, issue such directions to a person or authority, not inconsistent with this act as it may think necessary or desirable, for the proper implementation and/or execution of the order and any person who fails to comply with any obligation imposed on him or her under such direction may be ordered by the commission to be detained in civil prison for a term not exceeding one year, unless in the meantime the commission directs his or her release and/or shall also be liable to a penalty of ten currency points.

35. Appeals.

- (1) An appeal shall lie against any order passed by the commission to the High Court.
- (2) No appeal shall lie against any decision or order made by the commission with the consent of the parties.
- (3) Every appeal under this section shall be preferred within a period of thirty days from the date of the decision or order appealed against; provided that the Supreme Court may hear the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

PART IV - DUTIES OF THE COMPETITION COMMISSIONER.

36. Competition commissioner to investigate contraventions.

- (1) The competition commissioner shall, when so directed by the commission, assist the commission in investigating into any contravention of the provisions of the Act or rules or regulations made under the Act.
- (2) The competition commissioner shall have the powers conferred upon the commission under subsection (5) of section 30.

PART V - OFFENCES AND PENALTIES.

37. Penalty for failure to comply with directions of commission and competition commissioner.

Without prejudice to provisions contained elsewhere in this Act, if a person fails to comply with an obligation imposed upon him or her by the commission under subsection (5) of section 30 or the competition commissioner, under subsection (2) of section 36 pertaining to investigations, he or she shall be liable for a penalty of one currency point for each day that such person fails to comply with directions given by the commission or the competition commissioner.

38. Penalty for failure to give notice under section 44.

A person, being a party to a combination which is required under section 44 to be notified to the Commission, fails to give such notice shall be liable to a penalty of one currency point for every day during which such failure continues.

39. Penalty for making false statements or omission to furnish material information.

A person being a party to a combination:

- (a) makes a statement which is false in any material particular, knowing it to be false, or
- (b) omits any material particular knowing it to be material, shall be liable to a penalty which shall not be less than fifty currency points and not more than one thousand currency points.

40. Penalty for offences in relation to furnishing of information.

- (1) If any person, who furnishes or is required to furnish any particulars, documents or any

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- (a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or
 - (b) omits to state any material fact knowing to be material; or
 - (c) wilfully alters, suppresses or destroys and document which is required to be furnished as aforesaid, he or she shall be liable for penalty not exceeding ten currency points.
- (2) Without prejudice to the provisions of subsection (1), the commission may also pass other order as it may deem fit including closing the case for defence, in the case of a respondent or dismissing the complaint, in the case of a complainant.

41. Contraventions by companies.

- (1) Where a contravention of any of the provisions of this Act has been committed by a company, every person who, at the time the contravention took place, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable.
- (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act has been done by a company and it is proved that the contravention has been done with the consent or connivance, of or is attributable to any wilful neglect on the part of , any director, manager, secretary or other officer of the company such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

PART VI - PROHIBITION OF CERTAIN AGREEMENTS.

42. Anti-competitives agreements.

- (1) No enterprise or association of enterprises shall enter into any agreement or take any decision or engage in any concerted action, in respect of production, supply, distribution, acquisition or control of goods or the provision of services which causes or is likely to cause an appreciable adverse effect on competition.
- (2) Any agreement reached or decision taken or concerted action engaged in, in contravention of subsection (1) shall be void.
- (3) Any agreement entered into between enterprises or decision taken by an association of enterprises including cartels or concerted practices between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services, which-
 - (a) directly or indirectly fixes purchase or selling prices;
 - (b) limits or controls production, supply, markets, technical development or investment;
 - (c) shares markets or sources of production supply by territory, type, size of customer or in any other way;
 - (d) directly or indirectly results in bid rigging or collusive tendering, shall be presumed to have an adverse effect on competition.
- (4) Any agreement or concerted practice between enterprises at different stages or levels of the production chain in different markets, in respect of production, distribution, sale or price of or trade in goods or provision of services including -
 - (a) tie – in arrangement;
 - (b) exclusive supply agreement;

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- (c) exclusive distribution agreement;
 - (d) refusal to deal ;
 - (e) resale price maintenance,
- shall be an agreement or practice in contravention of subsection (1) if such agreement or concerted practice causes or is likely to cause an appreciable adverse effect on competition.
- (5) For the purposes of subsection (4), to determine whether there is an adverse effect on competition, the following factors, among others may be taken into account by the Commission such as whether the agreements or concerted practices-
- (a) result in creation of barriers to new entry, or,
 - (b) result in forcing existing competitors out of the market, or,
 - (c) result in foreclosing competition by hindering entry into a market;
 - (d) result in any consumer benefit or pro-competitive impact ;
 - (e) contribute to the improvement of production and distribution and promote technical and economic progress while allowing consumers a fair share of the benefits.
- (6) The provisions of this Part shall not-
- (a) apply to any agreement, decision or concerted action leading to any combination, even if no notice is required to be given to the commission under section 44.
 - (b) restrict the right of any person to restrain any infringement of intellectual property rights granted in Uganda or to impose such reasonable conditions as may be necessary for the purposes of protecting or exploiting such intellectual property rights.
 - (c) restrict the right of any person to export goods from Uganda, to the extent to which the agreement, decision or concerted action relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

PART VII - PROHIBITION AGAINST ABUSE OF DOMINANT POSITION.

43. Abuse of dominance.

- (1) No enterprise shall abuse its dominant position.
- (2) For the purposes of this section, dominant position means a position in the market and materially restrain or reduce competition in the market for a significant period of time; and where shares by that person or enterprise of the relevant market exceeds 35 per cent.
- (3) For the purposes of determining whether an enterprise enjoys dominant position or otherwise, one or more of the following factors may be taken into account -
 - (a) market share of over 33%;
 - (b) size and resources of the enterprise;
 - (c) size and importance of the competitors;
 - (d) economic power of the enterprise including commercial advantages over competitors which may be gauged with reference, among other factors, to product range, established trade marks, customer loyalty, vertical integration of the firm, sales or service network;
 - (e) technical advantages enjoyed by the firm which may be judged with reference, among other factors, to patents, know-how and copyright;
 - (f) dependence of consumers;
 - (g) monopoly status or dominance acquired as a result of any Act or by virtue of being an undertaking of the Government, Government company or a public sector undertaking;

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- (h) entry barriers if any which may be judged with reference, among other factors, to regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high switching costs for customers;
 - (i) countervailing buying power;
 - (j) market structure and size of market.
 - (k) any other factor which the commission considers to be relevant.
- (4) For the purposes of subsection (1), abuse of a dominant position having an adverse effect on competition, competitors or consumers occurs when an enterprise -
- (a) directly or indirectly imposes unfair or discriminatory purchase or selling prices or conditions including predatory prices;
 - (b) limits production, markets or technical development to the prejudice of consumers;
 - (c) indulges in actions resulting in denial of market access;
 - (d) makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
 - (e) uses dominance in one market to move into or protect other markets.
- (5) For the purpose of clause (a) of subsection (4) "predatory price" means the sale of a product or provision of a service with a view to eliminate competition or the competitors, at a price that is below the cost of production of the goods or provision of service, the cost of such production or provision being computed in accordance with regulations made by the commission in this behalf.
- (6) The relevant market may be determined with reference to the relevant product market or the relevant geographic market or with reference to both. For the purposes of this subsection;
- (a) "relevant product market" means, a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use and factors relevant for determining a product market may include-
 - (i) physical characteristics or end use;
 - (ii) price;
 - (iii) consumer preference;
 - (iv) exclusion of in-house production;
 - (v) existence of specialized producers;
 - (vi) industry product classifications
 - (b) "relevant geographic market" means a market comprising the area in which the enterprises concerned are involved in the supply and demand of products or services, in which the conditions of competition are distinctly homogenous and can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas and for determining a geographic market, inter-alia the following factors may be taken into account, namely :-
 - (i) regulatory trade barriers;
 - (ii) local specification requirements or differing national standards;
 - (iii) national procurement policies;
 - (iv) adequate distribution facilities or differing national standards;

- (vi) language;
- (vii) consumer preferences;
- (viii) need for secure or regular supplies or rapid after-sales services.

PART VIII- REGULATION OF COMBINATIONS.

44. Obligation to give notice of combinations in certain cases.

A person who proposes to enter into an agreement or combination as provided in subsection (2) of section 45, shall give notice to the commission in the prescribed form, specifying the details of the proposed agreement or combination within seven days of the occurrence of any of the following events:

- (a) the board of directors of respective companies accepting a proposal of merger or amalgamation;
- (b) the conclusion of negotiations of an agreement for acquisition or acquiring of control;
- (c) the execution of a joint venture agreement, shareholder agreement or technology agreement, in relation to any joint venture:

Provided that any acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund pursuant to any covenant of a loan agreement, share subscription or investment agreement or financing facility, upon the filing of an exemption application in the prescribed form, specifying the extent and terms of control, the circumstances for exercise of such control, the consequences of default and control of the enterprise, the commission shall grant an exemption from filing the notice required under this section:

Provided further that a public financial institution, foreign institutional investor, bank or venture capital fund shall not be exempt from filing a notice under this section, in relation to any inter-related or controlled enterprise at the time of acquisition or establishing a combination.

45. Commission to inquire into certain acquisitions, mergers and joint ventures.

- (1) The commission shall enquire into every combination referred to in subsection (2) for satisfying itself that such combination does not cause or is not likely to cause any adverse effect on competition within the relevant market in Uganda.
- (2) The following combinations shall be enquired into by the commission for the purposes of subsection (1), namely:-
 - (a) any acquisition where-
 - (i) the parties to the acquisition namely, the acquirer and the company whose shares, voting rights or assets are being acquired, jointly would have assets worldwide, exceeding five hundred currency points a turnover worldwide, exceeding one thousand five hundred currency points; or
 - (ii) the group to which the entity in which the shares, assets or voting rights as the case may be, have been acquired will belong will have,
 - (aa) in Uganda, assets in excess of two thousand currency points or a turnover exceeding six thousand currency points; or
 - (bb) worldwide, assets in excess of one billion U.S. dollars or turnover in excess of half a billion U.S. dollars.
 - (iii) acquiring of control by a person over an enterprise where such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of the same or substitutable goods or provision of the same or substitutable service if ,

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- (iv) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control, jointly, would have assets worldwide, in excess of five hundred currency points or a worldwide turnover, in excess of currency points one thousand five hundred; or
- (v) the group to which the enterprise over which control has been acquired, along with the enterprise over which the acquirer already has direct or indirect control jointly belong would have -
 - (aa) in Uganda of assets in excess of two thousand currency points or a turnover exceeding six thousand currency points; or
 - (bb) world wide assets in excess of one billion U.S dollars or a turnover exceeding of half a billion U.S dollars;
 - (cc) any merger or amalgamation in which the entity remaining after merger or the entity created as a result of the amalgamation as the case may be,-
 - (i) would have assets worldwide, of a sum exceeding five hundred currency points or a worldwide turnover, in excess of one thousand five hundred currency points ; or
 - (ii) the group to which the entity remaining after merger or the entity created as a result of the amalgamation as the case may be, will belong, will have
 - (a) in Uganda, assets exceeding two thousand currency points or a turnover exceeding of six thousand currency points; or
 - (b) worldwide, assets in excess of one billion U.S. dollars or a turnover exceeding of half a billion U.S. dollars.
 - (dd) Any joint venture where the group or groups as the case may be, to which the joint venture will belong, jointly, would have-
 - (i) in Uganda, assets exceeding two thousand currency points or turnover exceeding six thousand currency points; or
 - (ii) worldwide assets exceeding one billion U.S dollars or a turnover exceeding three billion U.S dollars.
 - (ee) For the purposes of this Part, group means two or more enterprises which directly or indirectly have-
 - (i) the ability to exercise 49% or more of the voting rights in the other enterprise; or
 - (ii) the ability to appoint more than half the members of the Board of Directors in the other enterprise; or
 - (iii) the ability to control the affairs of the other enterprise.
 - (ff) For the purposes of this part, control means and includes the right by one or more enterprises, either jointly or singly, to exercise restraint or direction over another enterprise.
- (3) Notwithstanding anything contained in subsection (2) the commission shall, on the expiry of a period of two years from the commencement of this Act and thereafter every two years, in consultation with the Minister by notification, revise, on the basis of the wholesale price index, the value of assets in Uganda for the purposes of subsection (2).
- (4) For the purposes of determining whether a combination would have the effect of or be likely to have an adverse effect on competition in a market, the commission may, inter alia, take into account one or more of the following factors -
 - (a) the actual and potential level of competition through imports in the market;
 - (b) the extent of barriers to entry to the market;
 - (c) the level of combination in the market;
 - (d) the degree of countervailing power in the market ;

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- (e) the likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
 - (f) the extent of effective competition remaining in a market;
 - (g) the extent to which substitutes are available in the market or are likely to be available in the market;
 - (h) the market share of the parties involved in the combination, individually and as a combination;
 - (i) the likelihood that the combination would result in the removal from the market of a vigorous and effective competitor;
 - (j) the nature and extent of vertical integration in the market;
 - (k) the possibility of a failing business ;
 - (l) the nature and extent of innovation
 - (m) whether the benefits of the combination outweigh the adverse impact of the combination, if any.
- For the purposes of this section, “market” means a relevant market as defined in subsection (6) of section 43.

PART IX - COMPETITION ADVOCACY.

46. Competition advocacy.

In formulating a law or policy, the Minister may make a reference to the commission for its opinion on possible effect of such law or policy on competition and on receipt of such a reference, the commission shall within sixty days, give its opinion to the Minister.

47. Establishment of competition fund.

- (1) The Minister shall establish a fund to be called the competition fund.
- (2) there shall be credited to the Fund the following amounts:
 - (a) the fees received from any person for filing a complaint or any application under this Act;
 - (b) the monies received as costs, if so directed by the commission, from parties to proceedings before the commission;
 - (c) grants and donations given to the fund by the government, companies or any other institutions for the purposes of the fund;
 - (d) the interest accrued on the amounts referred to in clauses (a) to (c);
 - (e) the interest or other income received out of the investments made from the fund.
- (3) The fund shall be utilised for promotion of competition advocacy, creating awareness about competition issues and training, in accordance with such rules as may be prescribed.
- (4) The fund shall be administered by a committee of such members of the commission as may be determined by the chairperson.

PART X - MISCELLANEOUS.

48. Restriction on disclosure of information.

No information relating to any enterprise, being an information which had been obtained by or on behalf of the commission for the purposes of this Act shall without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or with any other law for the time being in force.

49. Members and staff of the commission to be public servants.

The chairperson and other members and the officers and other employees of the commission shall be deemed to be public servants.

50. Act having overriding effect.

No civil suit, criminal prosecution or other legal proceedings shall lie against the Minister or against the chairperson or other member or any other person authorised by chairperson or other member for anything which is done in good faith done or intended to be done in pursuance of this Act or any rule or order made there under.

51. Protection of action in good faith.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

52. Exclusion of jurisdiction of civil courts.

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the commission is empowered by or under this Act to determine and no injunction shall be granted by any court or any authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

53. Power to make rules.

- (1) The Minister may, by notification, make rules to carry out the provisions of this Act.
- (2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters-
 - (a) the conditions of service of members of commission and the competition commissioner;
 - (b) the duties and functions of the competition commissioner;
 - (c) the traveling and other expenses payable to persons summoned by the commission to appear before it;
 - (d) any other matter which is required to be or may be, prescribed.
- (3) The rules made under this Act shall, soon after they are made, be laid before Parliament by the Minister.
- (4) Where Parliament makes any modification to the rules or decides that the rules should not have been made, the rules shall have effect as modified or shall be of no effect. Provided that such modification or annulment shall be without prejudice to the validity of any thing previously done under those rules.

54. Power to make regulations.

- (1) The commission may, make regulations by notification in the Gazette, for the efficient performance of its functions under this Act.
- (2) In particular and without prejudice to the generality of the foregoing provisions such regulations may provide for all or any of the following matters-

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- (a) the conditions of service as approved by the Minister, of persons appointed by the commission;
 - (b) the form and manner in which notice may be given or applications may be made to it under this act and the fees payable therefore;
 - (c) the particulars to be furnished under this act and form and manner in which and the intervals within which may be furnished;
 - (d) the issue of processes to government and to other persons and the manner in which they may be served;
 - (e) the payment of costs of any proceedings before the commission by the parties concerned and the general procedure and conduct of the business of the commission;
 - (f) the manner in which every authenticated copy of any order made by the commission in respect of any restrictive or unfair trade practice shall be recorded;
 - (g) any other matter for which regulations are required to be made under this Act.
- (3) The regulations made under this Act shall, soon after they are made, be laid before Parliament by the Minister.
 - (4) Where Parliament makes any modification to the regulations or decides that the regulation should not have been made, the regulation shall have effect as modified or shall be of no effect; provided that such modification or annulment shall be without prejudice to the validity of any thing previously done under those regulations.

55. Non-disclosure of information.

No information relating to any enterprise, being information which had been obtained by or behalf of the commission for the purposes of this Act shall without the previous permission writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or with any other law for the time being in force.

56. Power to make rules.

- (1) The Minister may, by notification, make rules to carry out the provisions of this Act.
- (2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely-
 - (a) the conditions of service of members of commission and the competition commissioner;
 - (b) the duties and functions of the competition commissioner;
 - (c) the travelling and other expenses payable to persons summoned by the commission to appear before it;
 - (d) any other matter which is required to be or may be, prescribed.

UGANDA LAW REFORM COMMISSION

PUBLICATIONS OF THE UGANDA LAW REFORM COMMISSION
ANNEX 2

No.	Publication.
1.	A Study Report on Rape, Defilement and Other Sexual Offences.
2.	A Study Report on the Reform of the Law of Domestic Relations.
3.	The Sixth Revised Edition of the Laws of Uganda, 2000.
4.	A Field Study Report on Voices of the People on Trial Procedures, Sentencing and Decriminalisation of Petty Offences.
5.	A Study Report on Company Law.
6.	A Study Report on Competition Law.
7.	A Study Report on Contracts Law.
8.	A Study Report on Cooperatives Law.
9.	A Study Report on Copyright and Neighbouring Rights Law.
10.	A Study Report on Electronic Transactions Law.
11.	A Study Report on Geographical Indications Law.
12.	A Study Report on Industrial Property Law (Patents, Industrial Designs Technovations and Utility Models)
13.	A Study Report on Insolvency Law.
14.	A Study Report on Intellectual Property - Traditional Medicine Practice.
15.	A Study Report on Intellectual Property Rights - Trademarks and Service Marks Law.
16.	A Study Report on Intellectual Property Rights -Trade Secrets Law.
17.	A Study Report on Law Relating to Trial Procedure Law.
18.	A Study Report on Plant Variety Protection Law.
19.	A Study Report on Quadhi's Courts Law.
20.	A Study Report on Reform of the Laws Relating to Chattel Securities.
21.	A Study Report on Reform of the Laws Relating to Hire Purchase.
22.	A Study Report on Reform of the Laws Relating to Mortgage Transactions.
23.	A Study Report on Sentencing Guidelines.
24.	A Study Report on the Law for Establishment of Special Economic Zones.
25.	A Study Report on the Proposals for the Reform of the Accountants Act, Cap 266.
26.	A Study Report on the Reform of Business Associations - Partnerships Law.
27.	A Study Report on the Reform of Selected Trade Laws - Consumer Protection Law.
28.	A Study Report on the Reform of Selected Trade Laws - Sale of Goods and Services Law.
29.	A Study Report on the Reform of Selected Trade Laws - Trade Licensing Law.
30.	Handbook on Making Ordinances and Byelaws in Uganda.
31.	How Our Laws Are Made.
32.	Report on the Background Study on the Legal Implementation of the World Trade Organisation Agreements.
33.	Report on the Law Relating to Publishing Horrific Pictures and Pictures of the Dead in the Press and Pornography.