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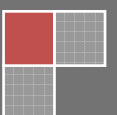
## Assessment of the Socio-Economic Implications of the Uganda's Draft Competition Policy and Law: Addressing Challenges at National and Regional Levels

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## Introduction

Three important parallel developments are currently underway in the East African Community (EAC) that is: (a) continuation of the internal process of integration where negotiations for the establishment of the EAC Common Market have been completed; (b) Tripartite discussions between the EAC, Southern African Development Community (SADC) and Common Market for Eastern and Southern Africa (COMESA) aimed at the integration of the three economic blocs; and (c) Negotiations for an Economic Partnership Agreement (EPAs) aimed at formation of a free trade area between the EAC and the European Union (EU). The comprehensive EPA negotiations are expected to end by December 2010. Efforts are on towards formulation of policies at national and at regional level to complement these developments in quest for sustainable economic growth and development.

Contemporary knowledge confirms competition law and the related competition policy as being one of the critical tools in promoting economic growth and development at national level, not only in developed countries but also in developing and least developed countries. It is also considered to have a significant bearing on the realisation of envisaged benefits to the EAC region, emanating from the ongoing developments indicated above.

From a regional perspective, the vision of EAC is, "to create a prosperous, competitive, secure, stable and politically united East Africa". The community further aims "to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through competitiveness, value added production, trade and investment". Economically, the EAC aims at increasing production in the region, boosting competition and achieving full economic integration whereby the region will trade as one block. To realise the region's vision, requires that individual country's policies are either aligned such that they are complementary to each other or that the region simply adopts same policies pertaining to key development aspirations. The mission of the individual EAC countries resonates with that of the EAC; and a competition law is important in the realisation of this mission.

Competition law is critical to govern domestic markets in the interest of the general populace. On the one hand, it aims to discipline behaviour of large firms especially Transnational Corporations (TNCs), which sometimes exhibit a tendency to corner markets; on the other, it can promote production efficiency among local firms by promoting a level playing field. The law is also useful to TNCs as it protects them from being exploited by dominant domestic firms, especially state owned. It is often pointed out that a competition law guarantees foreign investors a certain degree of fair competition in foreign markets. Competition law also plays a positive role in protection of consumers' interests and even in poverty reduction. For this to happen, however, the law must be adapted to the developmental level and needs of a country or region in which it is being implemented.

Given the acceleration of the EAC regional integration process, a pro-development competition law is essential to regulate markets at the national and regional levels. Moreover, harmonisation of national and regional competition law is important, as there could be problems if a regional competition law applies to transactions at a national level, as the experience of West Africa shows.

Specific to Uganda, explicit interest in the market competitiveness aspect is a fairly new phenomenon. Prior to the country's economic liberalisation policy that started in mid 1980's, government through a number of parastatals like the Uganda Electricity Board, Food and Beverages Uganda, Uganda Post Office, National Water and Sewerage Corporation and Uganda Transport Company, was an active player in the market. Very few companies or individual could compete with these parastatals as they were heavily subsidised by the government. They enjoyed monopoly in the market. Since the government believed that these parastatals were serving national interest, it could not come up with laws or policy that would lead to weakening the position of these parastatals. The *status quo* has changed now.

Over the last 20 years, the government in Uganda has slowly but consistently reduced its direct involvement in economic activities and has created bigger space for the private sector to operate. The policy direction is based on the neo-classical economic thinking that for optimal performance of an economy, the role of government should be that of creating an environment conducive for doing business, and not to engage in business itself. The 'invisible hand' of the market will then ensure that the best economic outcomes are realised for all parties, producers, consumers and government, in an economy. Because markets are seldom perfect and are sometimes vulnerable to abuse by dominant players, government have realised the need to come up with relevant regulatory framework and establish effective market regulators to ensure that national development imperatives and consumer welfare are not compromised.

Uganda has a draft competition bill in place (Uganda's Competition Bill 2004), as a proposed framework for ensuring competition in the local market as the government withdraws from direct participation in economic activities. Although the bill has potential advantages in terms of economic efficiency, there is an implicit risk that benefits may be skewed in favour of big business, as a result compromising consumer interests and welfare, and disadvantaging small local businesses.

To ensure that the draft bill and subsequent competition policy will indeed support national development imperatives and protect consumer welfare, independent assessment of the provisions of the draft, in this regard, is required. Areas of weakness or omissions need to be identified with the aim of coming up with recommendations to improve the draft to be approved and promulgated into law.

A number of studies carried out on competition policy and law have discussed extensively the advantages and disadvantages of a competition policy and law and also analysed the various existing competition policies (Roberts, 2004). Market efficiency and innovation are cited as some of the advantages of a competition policy and law while restriction of national policy space is often mentioned as a key disadvantage, especially for developing countries.

Specific to Uganda, the competition scenario study on country commissioned under the CUTS 7Up3 provides useful information on the state of competition in the Ugandan economy and its interface with national social economic imperatives in general. This study adds on this base information by extending the social economic assessment of the draft

competition bill to include direct evaluation of its implementation challenges at national and regional level, given the country's unique social-economic architecture. Since the bill is still in draft form, it is still open for amendments and input from country specific studies.

Hitherto, a number of key stakeholders in Uganda have not effectively participated in the processes of formulating of the competition bill mainly due to limited knowledge and appreciation of the importance of competition and competition policy on national development. Against this background, this study assesses socio-economic implications of Uganda's draft competition law and also the potential complementary role of the EAC competition law. The specific objectives of the study are to:

1. elucidate the concept of competition policy and law and its relationship to development and poverty reduction;
2. assesses the socio-economic implications of Uganda's draft competition law;
3. assess the complimentary role of the EAC Competition law to the Uganda's proposed competition reforms; and
4. give recommendations for pro-development national and regional competition policy and law.

The study is divided into four chapters. Chapter 1, after the introduction, discusses the concept of competition policy and law and its relationship to development and poverty reduction. This chapter also discusses the ongoing debates regarding the advantages and disadvantages of the competition policy and law; including the debates at multilateral level. Chapter 2 analyses the existing challenges as regards competition and development in Uganda. The analysis tries to interrogate the efficacy of the draft law to the country's socio-economic development. The third chapter considers the complimentary role of the EAC Competition law to Uganda's draft competition law. The last chapter gives recommendation for pro-development for national and regional competition policy and law.

## Chapter 1:

# Competition Policy and Law, Development and Poverty Reduction

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Competition law, in general, refers to a legal framework for enforcing market competition in a particular economy set by an Act of Parliament. Competition policy on the other hand refers to a set of laws, regulations and measures employed by governments aimed at ensuring that markets remain competitive through maintaining a fair degree of competition and eliminating restrictive business practices by private enterprises. Competition law and competition policy are closely related.

Restrictive, anti-competitive or unfair business practices are those practices that limit entry into a market by other enterprises or regulate supply in a way deemed harmful to other producers or to consumers – existing or potential. Such practices include anti-competitive agreements like collusions (when firms cooperate with each other to raise prices and increase profit) and predatory pricing behaviour whereby one firm lowers prices so much that rival firms are driven out of business and after which the firm raises prices to exploit the resultant monopoly power. Abuse of dominant position is another restrictive market practice. These practices, together with mergers and acquisitions reduce competition in the market. As such, competition law includes anti-monopolies (antitrust) aspects too. Sometimes the competition law may include regulation of state aid as is the case with the European Union (EU) but this is rare.

While trade policy focuses on conduct of governments in the trade arena, competition policy is aimed at potential transgression by firms in the market place. Competition policy does not aim at helping specific competitors but at establishing conditions of competitions in the market place. A key characteristic of competitive markets is that sellers and potential sellers are free to enter and leave the market as they want. In other words markets are perfectly contestable.

Competition policy and law serves a dual purpose of enhancing economic efficiency by motivating competition in an economy and by increasing consumer welfare through the elimination of predatory behaviour by dominant firms in the market. It is important to note that other policies that support economic efficiency may sometimes have trade off in terms of consumer welfare. In this regard, competition policy and law for developing countries should be flexible to allow national governments space to respond to development needs as they arise without being constrained by the law. However, this discretion may be vulnerable to abuse and may perpetuate market inefficiencies. Therefore, due care should be taken in putting in place and implementing such discretion.

Competition policy and law is associated with market liberalisation, increased trade and investment and subsequently job creation and general improvement in standards of living. The policy is also viewed as important for the improved participation of more people in the formal economy (Roberts, 2004). As such, competition in the market is considered as a pre-requisite for sustainable economic growth and development. A key constraint of competition policy and law implementation is a phenomenon of 'indistinguishability' which relates to the fact that it is often very difficult to tell whether a particular outcome is due to

deliberate uncompetitive behaviour or is the result of non-collusive or price-taking behaviour, given the conditions of the industry (Philips, 1998). Moreover, competition assessments are very information intensive, especially given the asymmetries that exist between the firm and the authorities (Simons, 2004). Many developing countries lack the political will to devote enough resources to market competition supporting activities, leading to sub-optimal outcomes even where the policy is in place.

The role of competition policy and law in development is not straightforward. For small and developing economies, allowing mergers could be a rational developmental decision. It enables the creation of feasible economic units able to realise economies of scale and to compete with TNCs in the long term. The question then arises whether Uganda's draft competition law should indeed be concerned with mergers, given that most of the domestic firms are very small and producing products at high average cost. These local firms require nurturing before being exposed to external competition. The assertion that competition will lead to economic efficiency, one of the main reasons given to have competition law in place, fails to recognise that this is only true if firms have achieved a particular production level threshold.

Competitive pressure for very small production units does not motivate efficiency but rather collapses it. It is against this background that discretion to merge may be allowed for some of the local firms that are struggling to reach profitable level of production and the result of which merger will be insignificant to the market. One way to do this is for merger regulations to outline the thresholds for notifiable mergers, such that the small firms of concern will not need approval to merge. It should be emphasised that often it is the small enterprises that have the highest job creation potential in developing countries. Collapse of such firms have dire consequences on middle and low skilled people that they employ, who constitute the majority of the youth in developing countries.

Singh (2002) proposes that the focus of the competition law should be the achievement of optimal rather than maximum competition given the implementation complexity pertaining to the implementation of the policy. The competition law should be aligned to other national policies and according to the overall country specific development objective(s). Industrial policy being the most common development policy among many poor countries, adjudication on the appropriateness of behaviour in terms of the competitiveness law should be based on how that particular behaviour affect competition and national industrial policy in tandem (Amsden & Singh, 1994).

Ultimately, each developing country should have its unique competition policy and law tailored to suit that country's specific development aspirations. In the case of the EAC, given the integration process underway, such policy ought to be harmonised across the region. Ratnakar and Knight-John (2004), contend that competition policy and law for developing countries must have development dimension if the policy is to serve national development objectives and improve on respective consumers' welfare.

Globalisation and subsequent privatisation of economic activities have eroded the role of governments as custodians of 'national interests' in determining national development discourse in developing countries. The role of government has been relegated gradually to

that of creating a conducive environment for the private sector to thrive. Under the circumstances, governments can only influence economic outcomes and consumer welfare through regulations. It is against this background that many developing countries have enacted or are in the process of drafting competition law.

According to Ratnakar and Knight-John (2004), to be relevant to development needs of a country, a competition policy and law has to take into account the development stage of the country, the specific development needs and institutional capacity and configuration of the country. Institutions should be widely defined to include aspects relating to implementation capacity and 'the rules of the game' in a particular country because therein lies the risk of state capture by the private sector. With the state capture by the private sector, a government loses its motivation to safeguard consumers' welfare. Issues pertaining to information access should be considered because corruption thrives in situations of information asymmetry. For example details on the recent discovery of oil in Uganda and exploitation agreement with multinational oil companies pertaining thereto are zealously guarded from the Ugandan public to the extent that the media had to go to a Court of Law to demand to access such documents. Surprisingly, the courts turned down the request based on the national interest aspect. Such circumstances point to the fact that coming up with a good competition law and subsequent competition policy may not necessarily guarantee consumer's welfare because it might be practically impossible to enforce the law in a particular country due to institutional and information constraints.

Various heterogeneous models of competition policy globally support 'flexible' competition policy argument. The US, EU and Japan have their own competition laws which they have modified according to their respective development priorities. The US, for example initially focused on antitrust actions; while the EU's competition is aimed at promoting harmonisation of its members' national competition policies. The EU competition law has tended to focus more on static efficiency and less on issues relating to social policy and state subsidies. It prohibits state aid although there are exemptions and exceptions. The Japanese competition law has evolved since 1940s.

Between 1950 and 1973 Japan was undergoing industrialisation. Japan aimed at high rates of profit and reinvestment for industry, an objective requiring "anti-competitive" actions such as sponsoring cartels, coordinating investment by rival firms and intervening in firm exit and entry. These actions contributed to the high concentration ratios in the Japanese economy. Japan viewed cartels very favourably. The government also rewarded companies with good performance in exports or technology innovations with subsidies and protection from imports. At its critical industrialisation stage, Japan promoted both cooperation and competition among cartels and oligopoly firms thus sacrificing static efficiency for the sake of maximising dynamic efficiency in the short term. Germany also pursued the same policy of encouraging rather than opposing cartels at a particular stage of its development trajectory.

The above examples point to the fact that competition policies ought to differ from country to country depending on their levels of development and their strategic objectives. From the perspective of developed countries, competition policy is for ensuring free and unhindered operation of their firms in developing countries. For developing countries on the

other hand, it is important that they curb the mega-mergers and acquisitions that threaten the competitive position of local firms, which are already facing intense foreign competition because of globalisation and increased liberalisation.

Another aspect pertaining to competition and consumer welfare relates to advocacy and pro-active protection of consumer interests. Because consumers act as individuals, they are often not in position to keep the market competition aspect on the agenda of government business. National government sign many agreements relating to trade and national development without explicit consideration of their implication to competition and consumer welfare in the domestic market. Individual consumers lack the capacity, resources and visibility to scrutinise governments to consider implication of government policy actions. According to Ratnakar and Knight-John (2004), it is the role of organised consumer bodies and NGOs to maintain broad-based awareness and advocacy work that speaks of the advantages of the competition policy and law, and that which highlight the development dimensions of the policy.

In case of tradeoffs between competition policy and other national policies, countries should make conscious decision as to what policy should take precedence over the other. This does not necessarily mean that competition policy is always in conflict with other national development policies. In fact competition policy should aim at complementing national policies in order to achieve the national development objectives.

Some of the proposals for designing a competition law that has a development dimension include but are not limited to:

- Allowing small and medium local enterprises to ‘strategically cooperate’ as long as the impact of their restrictive business practices is insignificant in the relevant market
- Granting exemptions to strategic growth-oriented sectors that need temporary protection from external competition pressures

## **1.1 Competition Policy in the Multilateral Negotiations**

The issue of competition policy has been intensely discussed at multilateral level. The first attempt to introduce competition rules was the Havana Charter, which was negotiated in 1947/8 to lay down the blueprint for the International Trade Organisation (ITO). This did include regulatory aspects, requiring nations to take appropriate measures against transnational restrictive business practices including price-fixing and market access limiting restraints. However, the Havana Charter was never adopted because the US withdrew its support.

There have been attempts to have a multilateral agreement on competition policy since the 1980s when the United Nations Conference on Trade and Development (UNCTAD) presented a “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UNCTAD Code)” to the United Nations General Assembly. The General Assembly accepted the UNCTAD Code as a non-binding recommendation. The rules provided for in the code have the explicit objective of furthering the trade and

development of developing countries. However support to the Code was short-lived due to a shift of approach by the US.

## 1.2 Competition Policy in the WTO

Developed countries especially the EU want a binding WTO agreement on trade and competition policy largely for reasons of market access. Competition policy was part of the “Singapore Issues” together with investment, government procurement and trade facilitation which developed countries wanted to put on the WTO agenda for negotiations. However, most developing countries opposed it especially on grounds of:

- Cost: That developing and poor countries would incur high costs in implementing and enforcing this set of new WTO disciplines
- It limited the ability of governments to promote industrial policies or other development policies.

As a result of the resistance from developing countries, negotiations towards binding multilateral discipline on competition policy were terminated and instead in July 2004 the WTO General Council set up a Working Group on the Interaction between Trade and Competition Policy to continue studying this issue. The Doha Declaration (Paragraph 25) mandated the Working Group to focus on the clarification of:

- Core principles, including transparency, non-discrimination and procedural fairness and provision on hardcore cartels.
- Modalities for voluntary cooperation and
- Support for progressive reinforcement of competition institutions in developing countries through capacity building.

Das (2002) argues that developing and poor countries should not only engage fully in the WTO Working Group discussions, but also raise the following additional issues for discussion:

- Obligations of the foreign firms to the host country
- Obligations of the home government to ensure the foreign firms fulfil their obligations
- Consider the relevant measures to be taken by domestic firms, governments, and by a possible multilateral framework to enable local firms to remain competitive and grow in the context of rapid liberalisation.
- Government policies and other measures and practices that directly or indirectly impede competition (i.e. anti-dumping actions, the protection of intellectual property, monopolies and oligopolies, big mergers and acquisitions) should be included in the list for clarification.

These developing countries’ demands should be reflected in their national competition laws and policies.

It would be interesting to see how far the multilateral debates have influenced the competition policies and laws at national and regional levels especially in Africa; and whether the issues they are advancing at the multilateral level have been factored into their competition policies.

## Chapter 2: Uganda's Draft Competition Law

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This chapter analyses Uganda's draft competition law in terms of its efficacy to socio-economic development. It attempts to assess how far the draft law will promote social and economic development in Uganda given the above discussion on ideal competition policy for a developing country. The chapter first discusses the country's prevailing development challenges in general and the competition challenges in particular.

### 2.1 Development and Competition Challenges in Uganda

In many developing countries in Africa, there is a prevalence of anti-competitive practices. These developing countries exhibit segmented product markets, discretionary government regulations and considerable corruption; hence they tend not to have a very competitive environment. There are considerable barriers to entry and exit, and policies often favour large firms in access to finance and other measures. Firm concentration ratios in developing countries are quite high relative to advanced countries, although the share of small enterprises in total employment is higher in developing countries. Although there are numerous micro-enterprises, most sectors are dominated by a few firms, providing scope for abuse of dominant position. Examples of such abuse (which are also prevalent in Uganda) include:

- Beer sector where vertical restrictive agreements limiting scope for competition at the retail level.
- Soft drinks – acquisition of local bottlers by multinational firms results in high structural concentration.
- Passenger Transport (buses, taxis, – *Matatu* owners cartel).

Consumer Education Trust (CONSENT) survey of 2003 on Competition and Consumer Protection Scenario in Uganda found that the Ugandan market was replete with anticompetitive practices. These included:

- Restrictive business practices
- Price cartels
- Market sharing behaviour

The survey further found that price discrimination, arbitrary prices for basic utilities - mainly water and electricity, and bid rigging were common in Uganda's market and were some of the ways through which anti-competitiveness behaviour was negatively affecting consumers and producers in the country. Moreover, the local firms were still too weak to compete with foreign companies; and even to break into the sectors dominated by the TNCs. These market conditions in Uganda create a strong case for a competition policy and law for the country.

### 2.2 Uganda's Draft Competition Law: Structure and Provisions

Unlike Kenya and Tanzania that already have operational competition policy and law in place, Uganda's competition law is still in draft form. Hence it can benefit from the

experiences of Kenya and Tanzania as these countries have operational competitive law and structure in place for some time. Subsequent discussion on the structure of Uganda's draft competition law also draws on the best practices from Kenya and Tanzania's competition policies.

Uganda's draft competition law has 10 sections dealing with preliminaries to the law, the Competition Commission of Uganda, jurisdiction, powers and authority of the Commission, and duties of the Competition Commissioner in section 1 to section 4. Section 5 deals with offences and penalties for not complying with provisions of the law. Prohibited behaviour and actions that constrain market competitiveness are stipulated in section 6. Details about prohibition against abuse of dominant position in the market are included in section 7. Prohibited anti-competitive agreements are stipulated in section 8. The last two sections address issues pertaining to advocacy and miscellaneous of the law.

In section 1, the objective of the Uganda's competition law is stated: "to foster and sustain competition in the Ugandan market so as to protect consumer interests while safeguarding the freedom of economic action of various market participants and to prevent practices that limit market access". The section also addresses aspects of commencement, interpretation, application and exemptions of the proposed law. Implicit to the law is the desire to grow the national economy without compromising on consumer welfare. This objective is in line with Kenya's and Tanzania's competition policy objectives, only differing in detail. Kenya's 2009 competition bill states the objective of its competition law is to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct. In the case of Tanzania, the country's Fair Competitive Act of 2003, states that the key objective of the competition law is to enhance the welfare of the people of Tanzania by promoting and protecting effective competition in the market and preventing unfair and misleading market conduct throughout Tanzania. By and large, the objective(s) of competition law in Uganda, Kenya and Tanzania are aligned. This alignment is important because the EAC competition is based on the respective countries Acts and international best practice. Alignment of objectives means that the EAC countries can only differ in detail and implementation in far as supporting the EAC competition law.

It is generally accepted that a competition law should be implemented by an autonomous body which has power and capacity to investigate anticompetitive practices and behaviour and impose penalties where applicable. In the case of Uganda, the proposed entity is to be called Uganda Competition Commission. Section two of the country's Competition Bill sets out the establishment of the Uganda Competition Authority, which will be a body corporate with perpetual succession to oversee the achievement the competition objectives and related functions stipulated in the Act. Procedures of establishing the Competition Commission and its composition are stated. The section further describes appointment procedures of the Commission Chairperson, Competition Commissioner and other members including terms pertaining to their respective appointment.

A noticeable difference in the specification of the fundamental characteristics of the Uganda Competition Commission to that of equivalent competition implementing entities in Kenya and Tanzania is that the Uganda Bill does not include an explicit clause on independence of the Competition Commission. The Kenyan competition bill mentions specifically that the

“Competition Authority shall be independent and shall perform its functions and exercise its powers independently and impartially without fear or favour” (Kenya’s draft Competition Bill, 2009). This omission, on part Uganda, has the potential to undo all the good intentions of coming up with the competition law if the competition happens to be compromised by either government or business lobbyists. It is prudent; therefore, that Uganda’s competition law include a clause on the independence of the Competition Commission.

Section three addresses the jurisdiction, powers and the authority of the Commission. It expounds on how the Commission will carry on its work in terms of mitigating non-competitive behaviour in domestic markets. The section sets out how Benches of the Commission will be established, distribution of work among Benches, procedure for deciding a case where Bench members differ and other working protocol of Benches. The section also includes details on how to deal with actions outside the country that have a bearing on the country’s competition, penalties of disobeying the Commission’s order as well the appeal process for accused parties.

Section four and five are devoted to the duties of the Competition Commissioner, offences and penalties respectively.

Aspects pertaining to the three main preoccupations of competition policy and law globally i.e. prohibition of certain agreements, prohibition against abuse of dominant position and regulation of combinations are dealt with in sections six, seven and eight respectively. From a comparative perspective, it is noticeable that Kenya’s Bill and Tanzania’s Act go into more detail to specify a range of activities that are subsets of these broad market competitiveness issues. The Fair Competition Act, 2003 of Tanzania includes for example separate sections on misleading and deceptive conduct (in the market), unfair business practices, and unconscionable conduct (Tanzania Fair Competition Act Section 3 – Section V). These issues are so prevalent in the Uganda market. There are so many fake products on the Ugandan market and it not uncommon to have media reports of people being negatively affected by a range of products on the market. The misrepresentation in the Ugandan market is more rampant among foods and beverages but also extends to pharmaceutical products. Specifications of common activities that characterise uncompetitive market practice and that have a bearing on consumer welfare in Uganda’s competitive law could be useful for the country.

Section nine of Uganda’s Competition Bill focuses on competition advocacy. Included in the section are details on the establishment of a Competition Fund. Section ten concludes with miscellaneous aspects.

As regards consumer well being, it is noticeable that the emphasis put on consumer welfare in Uganda’s Competition Bill is less compared to the case of Kenya and Tanzania. In Uganda’s case, consumer welfare is largely implied in the different sections, while the Kenyan and Tanzania’s Acts both have separate sections devoted to consumer welfare. The Tanzania Act addresses consumer welfare issues in Section 7 - Manufacturer’s obligations. Rules pertaining to unsuitable goods, false description, quality aspects and liabilities of manufacturers in the market are stipulated among others. Section 8 and Section 9 of the Act go further to specify how the competition law applies to product safety, product

information and product recall. Kenya's draft Competition Bill (2009) also has a separate section on consumer welfare (Section 6) dealing with more or less the same aspect highlighted in Tanzania's competition law.

Tanzania's competition law goes further to legislate establishment of National Consumer Advocacy Council whose functions are specified as to: (a) represent the interests of consumers by making submissions to, providing views and information to and consulting with the Commission, regulatory authorities and government ministries, (b) receive and disseminate information and views on matters of interest to consumers, (c) establish regional and sector consumer committees and consult with them, (d) consult with industry, government and other consumer groups on matters of interest to consumers. The provision for a consumers' interest safeguarding body is missing in the Uganda's draft competition law. Such explicitness on consumer welfare in competition law could be valuable addition to Uganda's draft competition law.

### **2.3 How developmental is Uganda's competition policy and law?**

This section discusses the implication of the draft competition on the socio-economic development of Uganda.

In terms of consumer welfare, the objective of Uganda's competition law is noble. As previously mentioned, it states that the Bill intends to "foster and sustain competition in the Ugandan market so as to protect consumer interest while safeguarding the freedom of economic actions of various market participants". It further states that the Bill is aimed at preventing practices which limit access to markets or otherwise unduly restrain competition, affecting domestic or international trade or economic development. Implicit to the objective(s) of the Bill is the assumption that competitive and unconstrained market leads to the maximisation of consumer welfare, increased economic activity and subsequently economic development. But how realistic are these assumption in Uganda's case and the EAC region in general?

The extent to which these assumptions are true has a bearing on the degree to which Uganda's competition law will indeed protect consumer welfare and stimulate economic activity especially for the local small and medium enterprises. It is important to note that these assumptions are dependent on a country's level of economic and market growth. A country needs to have fairly mature markets for it to start focusing on regulating them. In economies where markets are still informal and dysfunctional, government ought to concentrate on developing these markets before regulation. The Bill assumes that competition leads to perfect markets i.e. markets that maximise both resource allocation and technical efficiency in a particular economy. The assumed direction of causality is from competition to perfect markets. In practice, however, it is the nature of the market that influences competition not the other way round. One of the ways to influence competition in the market, practical terms, is to increase the number of 'comparable', participants in that particular market. It can therefore, be argued that a competition policy and law should have 'exception' or 'empowering' aspects that motivate increase of 'equal' participants in a particular market among other conditions. It is also true that concentrating on promoting unconstrained competition in the markets in order to protect consumer interest may lead to

the phasing out of smaller and nascent local industries and firms which cannot compete with the big foreign companies and firms. In this regard, careful balance between consumer interests' trade off and local business sustenance in the long run has to be considered.

From the production side, the Bill assumes that enabling competition in the local market will improve the country's competitiveness, increase international trade and ultimately improved welfare for the nationals. Broadly, competitiveness refers to "the degree to which it (a nation) can, under free and fair market conditions, produce goods and services that meet the test of international markets while simultaneously maintaining and expanding the real income of citizens (Clark and Guy, 2000). By implications, economic actors of a particular country need to have reached a level business acumen-ship and production efficiency to the extent that the goods and services they produce can compete on international markets. In terms of sustainable international competitiveness, there is general agreement that countries seeking to enhance their international competitiveness, have to engage in domestic R&D and subsequent innovative activities (Wint, 1998). The competition law just mentions about R&D and innovation activities in passing. To the extent that full compliance with the draft laws will limit activities that are contributory long term competitiveness such as R&D and subsequent innovation, such undertakings should be exempted from strict compliance with the law, at least in the short term Un-aided competition in international markets is a long call for many developing countries, like Uganda, and which cannot be achieved by a domestic competition law in isolation. Hence, although Uganda's competition law may be useful in protecting consumer welfare and could lead to efficient domestic market operations that may in turn have a positive effect on international trade, it is not sufficient to achieve these objectives in isolation.

In terms of focus, Uganda's draft competition law relates predominantly to three aspects:

- Anti competitive agreements
- Abuse of dominant position
- Combinations and mergers

Exemptions pertaining to the above apply to:

1. Enterprises dealing with national security or public interest
2. Practice or agreement arising out of and in accordance with any obligation assumed by Uganda under any treaty or international agreement, and
3. Enterprise that perform sovereign function on behalf of government that is functionally normally performed by the state such as making laws

In exemption 1 lies the Bill's recognition of the country's pro-development aspects. Public interest may be defined to include key economic activities that have a bearing on national poverty alleviation strategy; however the definition is not explicit in the Bill. Formation and merging of farmers' cooperative societies, an aspect key to improving incomes of poor farmers in the country, could potentially be allowed under this exemption. Otherwise, such action would be contrary to Section 43(1) and section 43(4) on anti competitive agreement. The former states that:

"An enterprise or association of enterprises shall not enter into any agreement or take decision or engage in 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."

Section 43(4) stipulate that “An agreement or concerted practice between enterprises at different stages or level of the production chain in respect of production, distribution, sale or price of or trade in goods or provision of services including exclusive supply and distribution agreement is an agreement in contravention of sub-section (1) if the agreement or concerted practice causes or is likely to cause an appreciable adverse effect on competition.

If the exemption of Section 4(2)a were not to apply to Section 43(1) and Section 43(4) the country’s efforts to reduce poverty via encouraging of farmers to form associations through which they can procure inputs, access credit and jointly market their produce would be constrained by the Competition Bill .

Another important pro-development part of the Bill is Section 43(5). It states that for the purpose of sub-section 4, that specifies applicable areas/aspects of the Bill, to determine whether there is adverse effect on competition, the Commission may take into account whether the agreement or concerted practices contribute to the improvement of production and promote technical and economic progress, while allowing consumers a fair benefit of the benefits. The discretion of the section allows space for some protection and nurturing of infant local business before being exposed to external competition.

Encouraging research and innovation are important pre-requisites for long-term national competitiveness. Section 43(6) protects owners of intellectual property rights. Despite the overall intention to encourage competition and removal of participation barriers in the market, the section protects any person or party from infringement on intellectual property rights granted in Uganda. Section 43(6) does not explicitly consider and protect the process of knowledge creation. It should be noted, however, that over protection of IP can be counter to R&D since most of the Intellectual Property protected in Uganda are not by Ugandan, in fact the country need less strict IP especially in areas of agriculture and medicines)

## **2.4 Competition Policy and Agricultural Sector**

The purpose of this section is to discuss in depth the competition in one of the key sectors of Uganda’s economy. Specific to Uganda, one cannot talk about poverty alleviation in the country without referring to the agricultural sector. More than 70 percent of Uganda’s population depends on agriculture to earn a living. Despite the large portion of the national population engaged in the agriculture, the sector contribution to GDP has been less than 20 percent and has declined over the period 2004 to 2008. Moreover, whereas as the country’s GDP increased by almost 40 percent between 2004 and 2008 (from 13.5 to 18.6 billion shillings), the increase in the value of agricultural activities within the same period was a mere 4.6 percent, from 2.7 to 2.9 billion shillings (Table 1). This is indicative of skewed sector income receipts from increasing economic activities.

<b>Table 1: Agricultural Sector Economic Activities at Constant 2002 Prices (in Shs billion)</b>					
<b>Year</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Fishing	308	352	342	322	291
Cash crops	282	223	218	235	262
Food crops	1,518	1,576	1,514	1,547	1,587
Live stocks	233	234	241	248	256
Forestry	431	457	476	486	507
<b>Total</b>	<b>2,773</b>	<b>2,842</b>	<b>2,791</b>	<b>2,838</b>	<b>2,902</b>
<b>Total country GDP at constant prices</b>	<b>13,467</b>	<b>14,814</b>	<b>15,859</b>	<b>17,156</b>	<b>18,582</b>

Source: UBOS

Given the fact that most of these people are still in abject poverty, it could be concluded with some support that agriculture is responsible for poverty in Uganda. Any efforts to tackle poverty in the country have to incorporate the country's agriculture sector.

An important way, therefore, through which the competition law would render itself useful in contributing towards socio-woes of the country, is by ensuring that there is competition among business entities that buy agricultural products. Competing to buy agricultural products from farmers would ensure that farmers get the best prices on the market. Given that the majority of the population of the country dependent on agriculture to earn a living, this will go a long in contributing towards poverty reduction. For the law to be useful to the agricultural sector one has to first acknowledge the unique characteristics of agricultural market in Uganda. This is what is happening today - there is competition but the farmers are not getting the best prices. In March 2010, the price of maize was just 100/= Uganda Shillings (an equivalent of US 5 cents). This is one area which should be exempted from competition and where government should come in to determine the price. Kenya is doing it through its produce marketing board. This unique aspect is not reflected in the draft competition law.

The market for agricultural products is characterised by lack of information. Even if there are so many small players in the market, they are practically not competing with each other because information of their transaction with one farmer is hardly passed on to the other. It is not uncommon for the produce buyers to negotiate a different price of similar crops for each household in the same village. Benefits of increase in international prices for agriculture products are also not passed to farmers again because of lack of information flow. Atangi-Ego (et al 2006) found that there was serious information asymmetry characteristic in the market for agricultural products in Uganda and as a result of which there existed no price transmission from border to producer prices for the non-traditional exports of beans, maize and banana, which are mostly exported to the regional market.

The market for agricultural products is also characterised by high transaction costs for output trading. This is due in part to poor road infrastructure, high fuel prices emanating from fuel tax and other miscellaneous costs like the intermittent road licenses imposed by local authorities. On average, transport cost is more than 50 percent of the income received

by farmers when they decided to bring their products to the capital city where prices are often higher and reasonable.

Lack of storage facilities given the perishable nature of agricultural products tends to make the price elasticity of demand very high during the harvest season while supply is almost inelastic. What is on the market cannot be changed irrespective of the price buyers are willing to pay. Tomato farmers have to sell their produce in a matter of days, otherwise they lose out completely. Such situations are exploited by produce buyers paying the farmers very low prices, knowing well that the later bargaining power get eroded with time if there are no storage facilities. As an example, the kilogram of maize was 700/= Uganda shillings (an equivalent of US 35 Cents) in December 2009. During the February 2010 harvest period the price of maize reduced to 200/=Uganda shillings (an equivalent of US 10 Cents) a decrease of more than threefold. Because of lack of storage facilities, farmers had to sell their maize at this low price. Many of them were not be able to realise their envisaged income. Those who had used loaned money to increase their output lost their collateral that they deposited with lending financial institutions. Such a situation further pushes farmers down the poverty line.

Related to lack of storage facilities by farmers, agricultural products the world over are prone to price fluctuation in the market place. At the local level, this is due, in part, to the produce coming to market during a particular period – the harvest period. Dependence on natural season coupled with lack of storage facilities implies the supply of agricultural products cannot be evenly distributed throughout the year. As stipulated by the law of demand and supply, prices reduce during the harvest period and increase during the non-harvest period. At international level, price reduction may also be reflected in the fluctuating terms of trade. Ultimately price fluctuations lead to receipt of low prices by the farmers on average.

Lack of quality standards and quality control in the local market for agricultural products has made local farmers vulnerable to exploitation as a result of product differentiation based on ‘artificial’ quality standards set by the produce buyers. Maize buyers for example pay different prices based on whether the maize is clean (used interchangeably with being white) or dry ‘enough’. Farmers are often at a disadvantage to contest the pronouncement on quality of their produce by the buyers.

There is a general tendency of exporters of agricultural crops to form associations with a supposed view of joint negotiation with government on bottlenecks they face to export the produce. A survey covering 352 agricultural output traders in Uganda conducted in 2000 found that more than 91 percent of exporters belong to Trader Associations (Nkonya, 2006). The Associations have motivation and opportunity to price-fixing to the detriment of the individual farmers that sold them produce. The extent to which the Associations do indeed price fix is an aspect that requires more research.

For many poor farmers in Uganda, another reason that they get very little income from their products is because of a series of informal middlemen/women who source their produce under various unconventional trade practices. The farmers are sometimes advanced money at the stage of preparation of their fields with the understanding the harvest will be shared.

Under this arrangement, the farmers have limited ability to negotiate for better prices at the harvest time. Another practice that has emerged in rural agriculture communities is the sale of 'fields' of their produce before harvest time. Because of financial pressures, many farmers sell their 'fields' to middle men for a quick buck. Output is estimated at the discretion of the middlemen leading to farmers getting even lesser income. Although there are government programmes like NAADS intended to assist poor farmers, because they do not offer outright cash to farmers, these exploitative 'market' tendencies continue to thrive.

Apart from international agricultural price fluctuations, a well thought through and formulated Competition Law for Uganda can improve the incomes and general welfare of country's population dependent on agriculture. It minimises exploitation of farmers by ensuring that they are paid market value of their produce, that they get farm inputs at lower prices and by ensuring that international price increase of agricultural produce are transmitted largely to them given that this is the largest and poorest portion of the country's population, the policy potentially can contribute towards poverty reduction in Uganda.

The above non-conventional market practices have direct bearing on farmers' welfare and the agricultural sector. Yet, these issues are not covered under the draft law. It has to be acknowledged, however that competition law is not the panacea for all market maladies. Nonetheless, the state and centrality of the agricultural sector reinforces the necessity to exempt such sectors from competition

## **2.5 Implementation Aspects of Uganda's Competition Policy and Law**

For Uganda's competition law to be operational and meet its objectives there should be a functional national Competition Commission. According to the Competition Bill, the Commission has to be headed by a Chairperson who is supposed to be a qualified person that can be appointed as a judge of the High Court, or has experience and knowledge related to market competition aspects of not less than 15 years. The Chairperson for Commission and other members have to be appointed by the President on the recommendation of the Chief Justice or his or her nominee, the Minister responsible for Finance and the Attorney General. Neither the Chairperson nor any of the members will represent any specific shareholders. Their nomination is at the sole discretion of the Ministers or the President. The draft law does not provide for transparent nominations procedures apart from specifying pre-requisite qualification and standing in society.

The stipulated process of appointing the Commission's Chairperson in Uganda is very political compared to that of Kenya, where the appointment of the Competition Authority's Director General (the equivalent of the Chairperson of the Competition Commission in Uganda) follows the normal recruitment process of a senior public servant. The bureaucracy in the appointing a Competition Commissioner is likely to delay operation of the Commission and subsequently the competition law in Uganda. Historical precedent reveals that the President takes time before he appoints people to such important positions. As an example, the appointment of a new Judge to the Supreme Court after the death of a previous one, took a period of three yet the Supreme Court is more relevant to daily functioning of the government the Competition Commission. Unless supported by intense

lobbying and advocacy by civil society, consumer and private sector associations, establishment of the Uganda Competition Commission and recruiting all the relevant personal, and the subsequent implementation of the competition policy in Uganda is likely to be delayed. Progress on finalising implementation of the EAC Competition policy may, however, assist in exerting additional pressure to Uganda government to expedite the policy implementation process.

Apart from establishing the Competition Commission, implementation of the competition policy and law in Uganda will face a number of institutional challenges. As regards inquiry into anti-competitive agreements by the Commission, Section 14 of the Competition Bill states that an inquiry may be initiated by:

- a. Receipt of a complaints of facts which constitute such action, from any Person, Consumer or Trade Association
- b. A reference made to the Commission by the Minister
- c. Commission's own knowledge or information

The section presupposes, implicitly, that there is a critical mass of Consumers, Consumer Associations or even organised Private Sector Bodies that understand and can articulate the national competition law on competition. Moreover, that these different parties are prepared to pro-actively be on look out for anti-competitive agreements, and that when they sense/find the behaviour in the market place, that they will duly report such to the Competition Commission. Also assumed is that fact that the parties have time, resources and expertise to identify the uncompetitive behaviour and follow it through to the Competition Commission. This is a long call for an average Ugandan consumer and even for Consumer and Private Sector Associations unless the later have a separate budget devoted for such. It should also be noted that having competitive market environment is a public good/service. When achieved, everybody gets the benefit there from, whether they participated in creation of the environment or not. This makes for efforts to create a competitive environment in the market being vulnerable to the 'free rider' problem.

Economic theory explains that normal markets fails to supply the right quantity of public goods and services as the few people who may be willing to incur the cost of 'buying' or 'bringing about' the public good or service are not able to internalise all the benefits because of the non-exclusive nature of such goods/services. The theory suggests that such public goods should be supplied by governments, using tax revenue. Hence, by implication all cost pertaining to bringing about and ensuring competitive markets in the local economy should literary be met my government. However, given that many governments in developing countries struggle to meet the fundamental civil obligation of providing public goods, it is imperative that the 'third sector' i.e. civil society and other organised non-governmental entities come in to fill the gap. But these can only able to play this supplementary role if they have funding. So specific to the anti-competitive agreements in the market place, the third sector in Uganda need to have funds and capacity to carry out research relating to market competition, and constructively engage government and the Competition Commission on arising issues on behalf of the Consumer without expecting any returns, as the intended outcome is a public service.

The case where the inquiry into uncompetitive market agreements is supposed to be initiated by the Minister, there should be structures that support the Minister to get this information. These are not in place yet. The current capacity of Uganda's ministry of Trade and Industry is limited in this regard. Market competition inquiry is information intensive. The ministerial route to initiate anti-competitive inquiries is likely to be weak without the market information collection structures as it is still the case in Uganda. Moreover, the effectiveness of market information gathering will depend on the budget allocation to the task. Without proper sensitisation of the Minister and key decision makers in the ministry on the importance and relevancy of the competition policy to the country's development aspirations, less money is likely to be allocated to the market competitiveness research. Again the lobbying and advocacy work of the third sector can play an important role in influencing government officials to allocate reasonable resources to support activities associated with competition policy implementation.

Dependence on the Competition Commission's own pro-active program to monitor the market will be the most optimal way to start inquiries into anticompetitive agreements in the market. But, as previously mentioned, this will also depend on resources, technical expertise and political space that will be available and allowed to the Commission. The Competition Bill proposes that the Commission's activities will be funded from a Competition Fund that will be credited with funds from:

- Fees from any person filing a complaint or any other application under this Act including merger filing
- Money received as costs, as may be directed by the Commission
- Grants and donations from Government, companies or other institutions
- Interest on accrued amounts

None of these income sources seems to be certain and significance of funds that each source will bring into the Competition Fund cannot be established in advance to allow for proper planning for the Competition Commission to execute its mandate. Uncertainty pertaining to the Commission's source of funds could potentially constrain its pro-active activities in the market to establish anti-competitive behaviour.

In terms of investigating combinations, 'intending combiners' are obliged to publish details of the combination within 10 working days after the Commission's direction, in such a manner, as the Commission thinks suitable, for bringing the combination to the attention of the public and persons who would be affected by it. The expectation is that parties or entities to be affected will submit, in writing, their objection on the proposed combination to the Commission. Information dissemination in Uganda is so inadequate, besides very few people ever bother to read 'government legal documents'. Information pertaining to issue of the law has been mystified in the country such that many Consumers and even Consumer Bodies considers it to be a preserve of lawyers and the legal fraternity. It is therefore unlikely that published information on intended combinations will come to the attention of parties who will potentially be affected by the action. Consumer and Private Bodies may assist in this regard, by using their networks to disseminate published information on competition related aspects but can only do so if they have a section devoted to this type of research and information dissemination.

Finally, acts taking place outside Uganda but which have an effect on competition in the local market will present a unique challenge for the Competition Commission. Section 26 of the Competition Bill states:

*“Where any practice of an enterprise, falling under this Part or Part IV as the case may be, is carried outside Uganda, but has or is likely to have an appreciable adverse effect on competition in Uganda, the Commission shall have jurisdiction to make such order as may be necessary to combat the practice”.*

Enforcing this provision is problematic because it has to deal with the issue of sovereignty of laws of different countries. Limitations faced by individual countries like Uganda to enforce this provision, in isolation, was key motivation for coming up with the EAC Competition Policy.

Institutional arrangements for the enforcement of anti-competitive behaviour and also to provide exemptions in those identified sectors are important. The respective institutions should be independent, both financially and in terms of appointment and other attribute.

In all, initiation of inquiry into anticompetitive practices in the market place requires that Uganda Competition Commission is well staffed and funded, that Consumer and Private Sector bodies are able to pro-actively monitor market activities, report and follow through their concerns with the Commission.

## Chapter 3: The EAC Competition Policy

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Competition is also one of the elements contained in the protocol to establish the EAC Customs Union under Article 75(1) of the Treaty establishing the EAC. Against this background, the Council of Ministers during its first meeting held on January 08-13, 2001 decided that:

1. An EAC Competition Policy and Law be developed, the activities of which should be determined by the principle of subsidiarity. The objective of the Competition Policy, which should cover all economic sectors, should be to ensure, protect and promote free competition;
2. The secretariat be mandated to facilitate the process of developing a model EAC Competition Policy and Law on the basis of the existing Partner States Competition Policies and Laws and other relevant materials;
3. A competent, strong, independent and autonomous regional authority should be established to implement the Community's Competition Policy and law; and
4. The EAC Competition Policy and Law should be concluded in tandem with the Protocol on the Establishment of the East African Customs Union.

To underlie the EAC Competition Policy is the issue of subsidiarity – the policy has to be limited to cross-border restraints of competition and to restraints from outside the EAC, leaving national restraints to Partner states. The policy is based on the existing partner states Competition Policy and Law benchmarked to international best practice.

Internationally, the Competition Law deals with three broad issues:

1. Control and elimination of restrictive trade agreements among enterprises
2. Control mergers and acquisitions
3. Control abuse of dominant position in the market

The EAC Policy was based on the following principles:

- The principle of supra-nationality – established at above individual nation i.e. EAC level and has precedence over Partner State's national Competition Policies – Principle of voluntarily ceded supremacy.
- Principle of subsidiarity – that the policy is limited to cross-border restraints of Competition and to restraints from outside the EAC, leaving national restraints to Partner States
- Duty of loyalty – that Partner States should cooperate in the implementation of the policy
- Rule of law – that the policy would be transposed into legal rules that meet the requirements of transparency and legal certainty; this means that the scope of prohibitions should be defined as clearly as possible.
- Objectives of the policy would be limited to the protection of free competition. But it should cover, however, all economic sectors and all market players irrespective of their private or public nature. Partner States and their authorities are, therefore, also subject to Competition Policy to the extent that they engage in economic transactions on markets.

- Effects principle – that the territorial scope of Competition Policy would be defined so as to cover all restraints that have an anti-competitive effect within the EAC irrespective of the place of origin of the restraint
- That Partner States' Competition policies should be brought into line with the EAC policy

What the EAC Competition Policy seeks is complementary to Uganda's Competition Law in that the former seeks to promote and protect small and medium enterprises, individuals, organisation and associations within the region in light of the EAC Common Market Protocol signed in November 2009. The protocol allows free movement of goods, labour, services and capital. It includes the complete elimination of all tariff and non-tariff barriers and a common external tariff.

## Chapter 4: Recommendations on Ideal Competition Law for Uganda

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In determining the contours of a national or regional competition policy and law, the development dimension is critical. However, at present there is hardly any common understanding let alone agreement among countries what the competition concept and issue means, especially in terms of its interaction with trade and its relationship with development. The whole set of issues pertaining to competition, competition law and competition policy and their relation to trade and to development are complex (Khor, 2008). Yet appreciation of these linkages is necessary if Uganda and the EAC countries are to come up with a pro-development competition laws.

As the study has indicated, competition policy and law has many dimensions, the most predominant being about the restriction of the powers and scope of the large corporations especially TNCs. Competition is also linked to market access in which foreign firms and their products and services should have the right to free competition against local firms. This market access dimension is also linked to consumer protection. This is the competition model being pushed by the developed countries in the WTO and other bilateral agreements. This model of competition policy may not be appropriate for EAC countries as it may hinder the growth of local firms/farms; and make them even less able to compete or survive against the large foreign companies especially in the face of globalisation.

Uganda's draft competition policy puts more emphasis on "free competition" and consumer protection at the expense of nurturing and protecting of the local firms at least in the initial stages. Ironically this model of competition, which removes assistance and protection from local firms in the name of "free competition", facilitates greater monopolisation by the large foreign companies eventually resulting in less competition. The study indicates that this is already evident in Uganda and in East Africa in such sectors as the beer industry. The model propagated in the Uganda draft law may not be able to address such imbalances. Although it may be argued that it might be better not to have a competition law at all if a country thinks the market is not ready for competition from foreign companies, benefits of competition to local consumer and firms creates a strong case to have such the law even under the circumstance.

It is important that Uganda and the EAC countries design a competition policy and law that takes into account the country's/region's long term development strategies, respective level of development, the dynamic factors in the global economy such as the rapid technological changes, global economic crises and the high degree of capital mobility. The domestic competition laws and regulations should be flexible and dynamic enough to respond to and even pre-empt the changing circumstances of a rapidly globalising world and changing global economic environment. The Uganda draft competition law should therefore provide for a strategic encouragement of mergers among local firms in order for them to be able to compete with the foreign firms. The policy should provide clear guidelines for awarding and executing these concessions to avoid abuse and misuse. The law should mention sectors to be exempted and provide flexibility for the consideration of inclusion of other sectors in

future as the situation warrants. One of the key sectors for exemption should be the agricultural sector and its attendant agro-industries.

A clear articulation of the relationship between the draft law and other policies such as industrial policy and intellectual property is essential since competition policy and law is just one of the many development policies. The interface between these policies and other sector regulations that have a bearing on competition ought to be examined in order to achieve harmonisation and coherence in the development process.

The competition law should be sensitive to the development of other sectors of the economy. The current draft falls short of this complementation. For example in regard to Intellectual Property Rights, the draft law, section 42(6) (b) provides that:

*“The prohibition of certain anticompetitive agreements does not 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 rights”.*

This provision grants immunity for actions by intellectual property owners who would otherwise violate other provisions of the draft law. This exception is extraordinary under international best practices and sacrifices a key flexibility available under the World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property (TRIPS) for the promotion of access to medicines. The TRIPS agreement recognises the key role that competition law should play in restraining abusive practices by Intellectual Property (IP) owners. Section 8 of the TRIPS agreement recognises the authority of countries to address the “control of anticompetitive practices in contractual licenses” and powers of “specifying in their legislation licensing practices or conditions that may in particular cases constitute abuse of intellectual property rights having an adverse effect on competition in the market.”

It should be noted that a competition law alone, however good it might be, is no guarantee that it will achieve its set objectives. Other supportive measures include an independent and strong competition authority capable of discharging its duties without fear or favour, and a healthy competition culture. This entails the existence of an enlightened civil society, private sector and consumer organisations that bring to light anticompetitive practices to the attention of the competition authorities and to ensure successful implementation of the competition law. A competition culture in Uganda and EAC in general is still very low. Appreciation of linkages between competition issues, development and poverty reduction is also limited among key stakeholders. This culture needs to be inculcated among stakeholders by government and civil society organisations.

Uganda and the EAC countries still have the policy space and flexibility to put in place a pro-development competition policy and law, and to regulate competition in a way that supports their long term development strategies since there is as yet no binding competition policy agreement at the WTO level and also at bilateral levels. The need to have such a pro-development competition policy/law at national and regional levels is one of the reasons that developing countries resisted the negotiations of a binding multilateral competition policy in the WTO. This space should therefore be utilised. EAC countries

should also ensure that these flexibilities and policy space are not compromised in the ongoing multilateral and bilateral negotiations.

## **The Way Forward**

For the EAC regional in general, to actualise potential benefits of having a competition policy and law in place the following are important:

1. Stakeholder awareness on the importance and relevancy of having competitive markets in the EAC region should increased. Stakeholders should be empowered and motivated to participate in the formulation of regional competitive laws taking into account countries' stage of development, necessary exceptions and appropriate tradeoffs.
2. There should be a coordinated mechanism to monitor and report on uncompetitive behaviour in the market when the competition law(s) comes into force. Moreover adequate resources should be devoted to disseminating competition related information to market participants
3. There should be a strong body to safeguard against state capture in the implementation of the competition policy. A single EAC market with the potential to become bigger after extension to include COMESA and SADC is likely to attract big businesses keen to do business in the region. Despite all the benefits that may follow, there is always a threat of national governments being compromised by big business in as far as safeguarding consumer welfare.
4. Lobbying of and support to EAC governments to devote adequate resources to respective Competition Commission(s) and to be transparent in appointing personal to the Commissions ought to be on going.

These aspects can be served by relevant CSOs at national level provided they are resourced to do so. However, since the matters to be dealt with cut across the EAC region markets, there is a need to have a regional entity, recognised by all member states, to coordinate/support activities of national CSOs as regard market competition issues.

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