

Socio-economic Implications of the Uganda's Draft Competition Law *Addressing Challenges at National and Regional Levels*

The Ugandan market is replete with uncompetitive market practices. Therefore, there is a need to have a competition policy and law in place to ensure that consumer interests are protected as government withdraws from active participation in the market. Moreover, competition policy is also associated with increased investment and trade, and has a bearing on national poverty alleviation effort. The Policy is an important tool in the realisation of benefits of East African Community (EAC) integration.

However, there is an inherent risk that such benefits may be skewed in favour of foreign big business limiting envisaged socio-economics benefits of a competitive local market. Against this background, it is recommended that Uganda, in particular, and EAC, in general design a competition policy and law that takes into account the country's/region's long-term development strategies, respective level of development, and dynamic factors in the global economy such as the rapid technological changes. It should exempt the agricultural sector and its attendant agro-industries from full compliance and under specific circumstances allow for strategic mergers of local firms. Most important, the policy should not limit existing space and flexibility of the country/region to initiate appropriate development policies.

Introduction

Three important parallel developments are currently underway in the EAC: (a) continuation of the internal process of integration where negotiations for the establishment of the EAC Common Market have been completed and implementation is slated to commence in July 2010; (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 (EPA) between the EAC and the European Union (EU). There are also efforts geared towards formulation of policies at national and regional level to complement these developments in quest for sustainable economic growth and development.

Competition law is one of the tools considered to have a significant bearing on realisation of envisaged benefits to the EAC region emanating from the ongoing developments. Competition policy is a critical instrument for governing domestic markets for the benefit of the general populace. On one hand, it is a fundamental policy tool to discipline the operations of large firms especially Transnational Corporations (TNCs), and on the other, it can promote production efficiency among local firms.

Specific to Uganda, explicit interest in market competitiveness is a fairly new phenomenon. Prior to the country's economic liberalisation policy that started in mid 1980's the government through a number of parastatals was an active player in the market. Over the last 20 years, government has slowly reduced its involvement in the offer of goods and services and created bigger space for the private sector to take over this role. However, because markets are seldom perfect, government is putting in place a regulation to ensure that where the markets fail or act imperfectly, national development imperatives and consumer welfare are not compromised.

Towards this end, Uganda has drafted a national competition law. Although the law has potential advantages in terms of economic efficiency, there is an implicit risk that its benefits may be skewed in favour of big business, as a result compromising consumer welfare and disadvantaging growth of local small businesses. To ensure that the proposed competition law will indeed support national development imperatives and protect consumer welfare, independent assessment of the draft is required before it is promulgated into law. Against this background, this study assesses socio-economic implications of Uganda's draft competition law and provides recommendations for pro-development national and regional competition policy and law.

Competition policy, development and poverty reduction

Competition policy 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 by eliminating restrictive business practices by private enterprises. Restrictive, anti-competitive or unfair business practices are those 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 collusion – cooperation among firms 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. These practices, together with mergers and acquisitions reduce competition in the market. Because of this, competition policy and law normally includes both anti-monopolies (antitrust) aspects and regulation of state aid – subsidies and subsidy-like measures.

Competition policy is associated with market liberalisation, increased trade, improved investment, job creation and subsequently general improvement in standards of living. The policy is also viewed as being important for the improved participation of more people in the formal economy (Roberts, 2004). It is important that the competition policy and law be aligned to other national policies, and according to a country's specific development objective(s). Industrial policy being the most common development policy among many poor countries, adjudication on the appropriateness of firm behaviour in terms of the competitiveness law should be based on how that particular behaviour affects competition and national industrial policy in tandem (Amsden and Singh, 1994). Furthermore, to be relevant to development needs of a country, competition policy and law has to take into account the development stage of the country (Adhikari and Knight-John, 2004). It also has to consider the country's specific development needs and institutional capacity. In this regard, existence of various heterogeneous models of competition policy globally supports 'flexible' competition policy. It should also be noted that the issue of competition policy has been and is still intensely discussed at the multilateral level.

Competition in Uganda's market, the draft competition law and implementation challenges

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

- Restrictive business practices
- Price cartels
- Market sharing behaviour

The survey further found that consumer price discrimination, artificial prices for basic utilities – mainly water and electricity, and bid rigging were common in Uganda's market. These were some of the ways through which anti-competitive behaviour was negatively affecting consumers and producers in the country. Moreover, the local firms were still too weak to compete with the foreign companies and 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.

CUTS International supported a study of the Competition Scenario in Uganda in 2006, which brought forth a number of recommendations for the government at that time when the draft law was still under discussion in the Parliament. It also includes a second survey, undertaken in December 2005, which highlights low level of awareness of anti-competitive practices among the key stakeholders in Uganda. The study makes a number of recommendations, including the need for a competition law that ensures trade liberalisation is not undermined by anti-competitive behaviour.

Uganda's Competition Bill has 10 sections:

Section 1 – The objective of the Uganda's Competition Law states: *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 prevent practices that limit market access.* The section also addresses aspects of commencement, interpretation, application and exemptions of the proposed law.

Section 2 – It sets out the establishment of the Uganda Competition Authority, which will be a body corporate with perpetual succession to oversee the achievement of 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.

Section 3 – It 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 protocols of the Benches. It 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 orders as well as the appeal process for accused parties.

Section 4 and 5 – Both the sections are devoted to the duties of the Competition Commissioner, and offences and penalties respectively.

Section 6, 7 and 8 – These sections deal with prohibited agreements, abuse of dominant position and regulation of combinations.

Section 9 – It focuses on competition advocacy, including details on the establishment of a Competition Fund.

Section 10 – It concludes with miscellaneous aspects.

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*. The draft law is sensitive to the country's development needs by way of exemptions. However, exemptions are stated in generic terms and hence vulnerable to omission and misinterpretation. More critical is that the draft does not consider explicitly the unique characteristics of the agricultural sector that is crucial to the country's poverty reduction effort.

In as far as implementation is concerned, the stipulated process of appointing the Commission's Chairperson and Members is very political – to be appointed by the President at the recommendation of the Minister of Finance and the Attorney General. Initiation of complaints also requires understanding of the competitive law beyond the understanding of an average consumer, moreover keeping a look out and reporting on uncompetitive practices will have a cost that consumers may not be willing to incur – outcome(s) being a public good/service. Overall, the implementation of the law will be information intensive.

The EAC Competition Policy will be complementary to Uganda's draft 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.

Recommendations on Ideal Competition Law for Uganda and Way Forward

In determining the contours of a national or regional competition policy and law, the development dimension is critical. The whole set of issues pertaining to competition, competition law and policy and their relation to trade and 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.

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 lays more emphasis on "free competition" and consumer protection at the expense of nurturing and protecting 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 East Africa in sectors such as beer industry. The model propagated in the Uganda draft policy may not be able to address such imbalances.

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 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 policy/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 competition policy and other policies such as industrial and intellectual property is essential since competition policy 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.

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 anti-competitive 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 emerging and weak. 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.

REFERENCES

- Amsden, A. and Singh, A. 1994. The optimal degree of competition and dynamic efficiency in Japan and Korea. *European Economic Review*, vol. 38, no.(3/4), p. 940–51.
- Clark, J. and Guy, K. 2000. Innovation and competitiveness. *Technology Analysis & Strategic Management*, vol.10, no.3, p.363-394.
- CUTS International, 2006. Competition Scenario in Uganda, available at <http://www.cuts-ccier.org/7up3/pdf/CRR-Uganda.pdf>.
- Khor, M. 2008. Bilateral and regional free trade agreements: Some critical elements and development implications. Unpublished paper.
- Njoroge, P.M. 2006. Regional cooperation on competition policy and law – the East African Community experience. A paper presented to the IGE, UNCTAD, GENEVA, October 2006.
- Philips, L. 1998. *Applied industrial economics*. Cambridge: Cambridge University Press.
- Mehta, Pradeep S. and Nanda. N. 2004. Competition policy, growth and poverty reduction in developing countries.:// www.fias.net/ifcext/fias.nsf/Attachments.
- Ratnakar, A. and Malathy K. 2004. What type of competition policy and law should a developing country have? *South Asia Economic Journal*, vol 5, no1, p. 1-25.
- Roberts, S. (2004). The role for competition policy in economic development: the South Africa experience. *Development Southern Africa*, vol. 21, no. 1, p.227-243.
- SEATINI. 2010. TRIPs compliance and social welfare: The implications of intellectual property law reform for Uganda's socio-economic development. *SEATINI publication*, February
- Singh, A. 2002. Competition and competition policy in emerging markets: international and developmental dimensions. UNCTAD G-24 Discussion Paper Series No.18. New York/Geneva: United Nations.
- Wint, G.W. 1998. The role of government in enhancing the competitiveness of developing economies. *International Journal of Public Sector Management*, vol.11, no.4, p.281-299.
- WTO (World Trade Organisation). 2001. The Doha Declaration
- WTO (World Trade Organisation). 1994. Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs).

This Policy brief is adapted from the Research Paper "Assessment of Socio-Economic Implications of Uganda's Draft Competition Policy & Law: Addressing challenges at national & Regional Levels" written by Martin Kaggwa as part of the project, 'Building an Inclusive East African Community' with the support of Duetsche Gesellschaft für Technische Zusammenarbeit (GTZ).

© CUTS International 2010. This Policy brief is published by CUTS Geneva Resource Centre, 37-39, Rue de Vermont, 1202 Geneva, Switzerland. Ph: +41.22.734.6080; Fax: +41.22.734.3915; E-mail: geneva@cuts.org; Website: www.cuts-grc.org. CUTS Policy Briefs are to inform, educate and provoke debate on specific issues. Readers are encouraged to quote or reproduce material from this paper for their own use, but CUTS International requests due acknowledgement and copy of the publication.