UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Independent Review Report:

The Fair Competition Act 2009, the Consumer Protection Act 2010 and the Fair Trading Commission Act 2009 of the Seychelles

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ACRONYMS USED

CCC	:	COMESA Competition Commission
CCOPOLC	:	Competition and Consumer Policy and Law Committee
COMESA	:	Common Market for Eastern and Southern Africa
EEMZ	:	Exclusive Economic Maritime Zone
EU	:	European Union
FTC	:	Fair Trading Commission
IPRs	:	Intellectual Property Rights
ICN	:	International Competition Network
ICPEN	:	International Consumer Protection Enforcement Network
IMF	:	International Monetary Fund
GDP	:	Gross Domestic Product
NATCOF	:	National Consumer Forum
OFC	:	Offshore Financial Centre
PUC	:	Public Utilities Corporation
PPP	:	Purchasing Power Parity
SADC	:	Southern African Development Community
SCCI	:	Seychelles Chamber of Commerce & Industry
SENPA	:	Seychelles Enterprise Promotion Agency
SFA	:	Seychelles Fishing Authority
SBS	:	Seychelles Bureau of Standards
SIB	:	Seychelles Investment Board
SIBA	:	Seychelles International Business Authority
SLA	:	Seychelles Licensing Authority
SMB	:	Seychelles Marketing Board
SPTC	:	Seychelles Public Transport Corporation
SRC	:	Seychelles Revenue Commission
SSDS	:	Seychelles Sustainable Development Strategy
STC	:	Seychelles Trading Company
UNCTAD	:	United Nations Conference on Trade and Development
WTO	:	World Trade Organisation

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PREFACE

This report is an independent review of the competition and consumer protection legislation of Seychelles. The following is the description of duties under the terms of reference (TOR) of the review:

> Arising from a technical assistance request by the Government of Seychelles to carry out an independent review of the *Fair Competition Act*, the *Consumer Protection Act* and the *Fair Trading Commission Act*, UNCTAD engaged a consultant to undertake the review of the 3 pieces of legislation (thereafter "Acts"). The three Acts are enforced by the Fair Trading Commission (FTC) of the Seychelles.
>
> In order to facilitate this work, an examination of the Acts, the institutional and power sharing arrangements assessment will be carried out and a comprehensive report is to be prepared for Seychelles. Information gathered from broad-based consultations with a cross-section of stakeholders during fact-finding mission to Seychelles and review of existing enforcement information will constitute the basis of the Report
>
> The consultant is responsible for the preparation of the review report "Independent Review Report of the Fair Competition Act, Consumer Protection Act and the Fair Trading Act" (hereinafter: "the Report").
>
> The consultant is to prepare a review report based on the experience of the Fair Trading Commission and other key stakeholders. The report must include a review of the background of the Fair Competition Act, the Consumer Protection Act and the Fair Trading Commission Act. It should assess the experience of the enforcement of the Acts, review the institutional framework, make proposals for revisions of the Acts as well as put forward recommendations on areas requiring further attention and improvement. In setting out its recommendations on areas that might benefit from improvement, the Report should specify amendments to the Acts if any. In preparing the Report, the consultant should be guided by the United Nations Set of Principles on Competition, the UNCTAD Model Law, the recommendations of the various working groups of the International Competition Network (ICN), the UN Guidelines for Consumer Protection.

The consultancy was undertaken by Mr Alex Kububa and Mr Carl Buik ('the reviewers'). The report is based on extensive desk research, and a fact-finding visit to Seychelles for stakeholder consultations. The desk research covered review of Seychelles' competition and consumer protection legislation, and related policy documents. The fact-finding visit to Seychelles was undertaken during the period 8 – 12 October 2012. During that visit, a total of 50 individuals from 17 organisations[1] were interviewed.

The reviewers' approach to evaluating the competition and consumer protection legislation and the performance of the FTC was to:

- research the economic and social history, the prevailing economic circumstances and the relevant law of the Seychelles;
- consult the relevant Members of Parliament, Ministers, the Judiciary, senior bureaucrats, business and consumer representatives in the Seychelles;
- make comparisons with the UNCTAD Model Law on Competition and the UN Guidelines for Consumer Protection adopted by the UN General Assembly in 1985;

[1] The organisations consulted were: (i) the Office of the Vice-President; (ii) the National Assembly of Seychelles (the Parliamentary Committee on Finance and Public Accounts); (iii) Ministry of Finance, Trade & Investment; (iv) the Fair Trading Commission; (v) the Central Bank of Seychelles; (vi) the Seychelles Public Transport Corporation; (vii) Attorney-General's Office; (viii) Supreme Court of Seychelles; (ix) Public Utilities Corporation; (x) Small Enterprises Promotion Agency; (xi) Seychelles Media Commission; (xii) Seychelles Chamber of Commerce & Industry; (xiii) Seychelles Investment Board; (xiv) Seychelles Licensing Authority; (xv) National Consumer Forum; (xvi) National Bureau of Statistics; and (xvii) the Seychelles Revenue Commission (Customs Division).

- compare the range and prevalence of activities and enforcement responses available to the FTC through the Acts and its actual performance against the theoretical compliance pyramid model;
- make comparison with some other competition and consumer protection legislations, including the laws of the Common Market for Eastern and Southern Africa (COMESA), Mauritius, Namibia, South Africa, Zambia, Zimbabwe and Australia; and
- draw on many years of the reviewers' combined experience as competition and consumer protection investigators, researchers and managers.

EXECUTIVE SUMMARY

This report was prepared following a review of the competition and consumer protection laws of the Seychelles. Those laws are the *Fair Competition Act 2009*, the *Consumer Protection Act 2010* and the *Fair Trading Commission Act 2009*. This report was prepared by Mr Alex Kububa and Mr Carl Buik following a request by the Government of the Seychelles to UNCTAD. The review consisted of preparatory research, interviews with key stakeholders in the Seychelles and subsequent correspondence.

A draft of this report was commented on by the Fair Trading Commission and UNCTAD in December 2012 prior to its finalisation and submission in January 2013.

The competition and consumer protection laws and the enforcement authority, the Fair Trading Commission, are integral to the challenge of increasing citizen welfare in a market economy. However, they are only part of the solution to the challenge. Other policies and legislation are needed to complement these laws and the FTC. While it is inevitable that the success of competition and consumer protection regimes will be largely evaluated by complaints resolved and penalties imposed because they are visible and easy to measure, a more comprehensive evaluation, though more difficult to measure, would be the incidence of voluntary compliance.

The reviewers examined the legislation for internal coherence and compared them to other national laws and authorities. Stakeholders alerted the reviewers to their assessments of the laws and the FTC's performance and to country relevant conditions.

The reviewers concluded that:

- the *Fair Competition Act* includes most, but not all of the elements usually encompassed in a national competition law. There are important omissions and some significant uncertainties of application.

  It was noted that some sector regulation laws also include competition elements. This apparent diffusion of competition law application and enforcement has the potential to reduce the economy wide benefits of the competition policy/law and increase compliance costs and uncertainties for business. The absence of an articulated national competition policy exacerbates these problems.

- the *Consumer Protection* Act includes all of the elements usually encompassed in a national consumer protection law. While it is not as expansive in its coverage as some other consumer protection laws, it does address the areas of major consumer concern as expressed in consumer complaints and by stakeholders. It was noted that other national laws also include explicit consumer protection elements and that there is no published consumer protection policy.

  In respect of the enforcement of the law there were 3 main conclusions that go to the concern that the Act lacks teeth:

  - the principal sanctions imposed to date are fines and they have tendered to be well below the specified maximum fines.

  - the use of a wider range of sanctions and remedies will provide the FTC with great flexibility how it responds to non-compliance and will facilitate and encourage increased compliance.

- the specified maximum fines are below that likely to provide a substantial deterrent effect, particularly were the potential profits from contravening conduct are significant.

- the *Fair Trading Commission Act* provides the institutional arrangements necessary for the enforcement of the competition and consumer protection laws. The reviewers major concerns are that the integrated structure whereby the investigative (Secretariat) and determinative (Board) arms are incorporated under the umbrella of the FTC (Commission) gives rise to significant due process concerns. It was also concluded that the maximum fines for contraventions of the *Fair Competition Act* are inadequate to encourage compliance.

- the Fair Trading Commission has active programmes of advocacy, education and enforcement. A significant proportion of the FTC's resources are allocated to consumer protection and it has a good number of successfully resolved cases to its credit. Significantly fewer resources are allocated to competition related functions.

The staff of the FTC are diligent, dedicated and have appropriate academic qualifications. Their hands-on experience is limited. Major challenges face the FTC, as they do all competition and consumer protection authorities, especially young ones. These include:

- managing and responding to stakeholder expectations that may sometimes arise

- working with new legislation where there are gaps and uncertainties.

- increasing and broadening staff experience

- developing appropriate strategies and prioritization of tasks

- encouraging and facilitating the development of a business culture of compliance through advocacy, education and enforcement

The reviewers make a number of recommendations for consideration by the Government of the Seychelles, the Fair Trading Commission and other stakeholders. In respect of:

- the *Fair Competition Act* recommendations were made concerning across a number of issues including:

    - the desirability of developing a comprehensive competition policy

    - clarification of the range of company mergers and acquisitions encompassed by the merger provisions of Act and trigger thresholds for their application

    - the economy wide coverage of the Act

    - the definition of 'dominance' and listed types of 'abusive conduct'

    - differentiation between vertical and horizontal conduct provisions

    - clarification and rationalization of the types of conduct that can be authorised

- the *Consumer Protection Act* recommendations were made concerning across a number of issues including:
    - the desirability of developing a comprehensive consumer protection policy
    - low cost access to information required for voluntary compliance
    - additional and increased sanctions and remedies
    - rationalization of important definitions across the three Acts
- the *Fair Trading Commission Act recommendations* were made concerning:
    - the respective roles and responsibilities of the FTC Secretariat and Board
    - rationalization of important definitions across the three Act
    - continuation of investigations on public interest grounds
    - the size, composition and remuneration of the FTC's Secretariat
    - the size, composition and remuneration of the FTC's Board
    - the role and responsibilities of the CEO
- the Fair Trading Commission recommendations were made concerning:
    - a proposed policy rational for enforcement strategies and decisions
    - staff and Board member development
    - investigations
    - case hearings and determinations
    - relationships with stakeholders including NATCOF and sector regulators
    - advocacy and education

Recommendations have also been made concerning the need for rationalisation of important definitions across the three Acts.

The reviewers overall assessment was that while identified legislative amendments are required to bring the laws and institution up to 'best practice' standards, the Seychelles is being well served by the Commissioners, CEO and staff of the FTC, given the current legislation and their short experience.

1. SOCIO-ECONOMIC BACKGROUND

The Seychelles consists of an archipelago of about 115 islands in the Indian Ocean northeast of the island of Madagascar off the coast of the African continent. The islands are scattered over an area of an Exclusive Economic Maritime Zone (EEMZ) and cover an area of 1.37 million square kilometres. The principal islands are Mahé (142 square kilometres), Praslin (38 square kilometres), and La Digue (10 square kilometres). The population of Seychelles is approximately 89,188 (2011 est.)[2], and its capital and largest city is Victoria, with a population of approximately 26,000 (2009 est.)[3]. The monetary unit is the Seychelles Rupee (SCR), which stood at SCR10 to US$0.77 as at 24 September 2012[4].

Seychelles is one of the highest achieving territories in Africa in terms of Gross Domestic Product (GDP) per capita (US$9,440.095 at real exchange rates and US$17,560.062 at purchasing power parity (PPP) 2008 estimate).[5]

Seychelles' economic freedom in 2012, as measured by The Heritage Foundation, in partnership with Wall Street Journal, is a score of 53.0, making the economy the 132nd freest in the 2012 Index[6], out of 179 ranked countries. In Sub-Saharan Africa, Seychelles was ranked 27th among 46 countries. In the East and Southern African region, Seychelles was ranked 11 out of 19 countries, while in the Southern African region, it was also ranked 11 out of 15 countries.

According to The Heritage Foundation's Economic Freedom research[7], Seychelles' GDP (PPP) in 2012 is US$2.1 billion, with an annual growth of 6.2%. Inflation (CPI) was -2.4%.

The Seychelles was uninhabited when the British East India Company arrived on the archipelago in 1609.[8] The French claimed the islands in 1756 and administered them as part of the colony of Mauritius. The British gained control of the islands through the Treaty of Paris (1814) and changed the islands' name from the French Séchelles to the Anglicised Seychelles. The islands became self-governing in 1975 and independent on 29 June 1976.

Having gained independence from Britain in 1976, Seychelles became a one-party socialist State under President France-Albert René in 1977 (the first President, Mr. James Mancham, was overthrown in 1977 by the then Prime Minister, Mr. France-Albert René). After adopting a new constitution by referendum in 1992, Seychelles held its first multi-party elections in 1993. President René was re-elected and his Seychelles People's Progressive Front (SPPF) won 27 of the 33 seats in the People's Assembly. In April 2004, President France-Albert René stepped down after 27 years in power, and his Vice President, Mr James Alix Michel, who had also served in the Government for 27 years, assumed the Presidency. In July 2006, President Michel won re-election with 53.7% of the vote, and is in office up to now.

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[2] HighBeam Research, (http://www.infoplease.com/ipa/A0107955.html)
[3] Ibid.
[4] CoinMill.com – The Currency Converter (http://coinmill.com/SCR_USD.html)
[5] World Bank, "2005 International Comparison Program", as quoted in http://en.wikipedia.org/wiki/Economy_of_Seychelles
[6] The Heritage Foundation's Index of Economic Freedom take into account four factors: (i) rule of law (property rights, and freedom from corruption); (ii) limited government (government spending, and fiscal freedom); (iii) regulatory efficiency (business freedom, labour freedom, and monetary freedom); and (iv) open markets (trade freedom, investment freedom, and financial freedom), http://www.heritage.org/index/country/seychelles.
[7] Ibid.
[8] HighBeam Research, http://www.infoplease.com/ipa/A0107955.html

Historically, the economy of Seychelles was based on plantations with cinnamon, vanilla, and copra as the chief exports. In 1971, with the opening of the international airport on the island of Mahé, tourism became the dominant industry. In the Seychelles, the marine ecosystem and the low-lying coastal belts are the backbone of the islands' socio-economic development. As such, industrial fishing, notably tuna fishing, is an important foreign exchange earner. Earnings are growing annually from licensing fees paid by foreign trawlers fishing in Seychelles' territorial waters. In 1995, Seychelles privatized the Seychelles Tuna Canning Factory, 60% of which was purchased by the American food company Heinz.

The Government of Seychelles has moved to reduce the dependence on tourism by promoting the development of farming, fishing, and small-scale manufacturing. However, despite attempts to improve its agricultural base and emphasise locally manufactured products and indigenous materials, Seychelles continues to import 90% of what it consumes. The exemptions are some fruits and vegetables, fish, poultry, pork, beer, cigarettes, and a few locally made plastic items. Imports of all kind used to be controlled by the Seychelles Marketing Board (SMB), a government parastatal that used to operate all the major supermarkets and was the distributor and licensor of most other imports.[9] However, the breakup of the SMB begun in 2006 as a result of the liberalization of domestic trade under the International Monetary Fund (IMF) structural adjustment programme, and that was one of the reasons that triggered the establishment of a competition authority to regulate competition among privatized companies.[10]

As a small island state, the Seychelles economy is very sensitive to fluctuations in the major economies. Not only does it depend on tourism which is notoriously volatile, but it imports over 90% of its total primary and secondary production inputs.[11] The country's major imports are machinery and equipment, foodstuffs, and petroleum products, and its major import sources (2008 figures) are Saudi Arabia (17.2%), Singapore (12.2%), France (10.1%), Spain (8%), Germany (7%), India (6.9%), and South Africa (4.6%).[12] Its major exports are canned tuna, frozen fish, cinnamon bark, copra, petroleum products (re-exports), and the major export destinations (2008 figures) are the United Kingdom (21.1%), France (19.1%), Mauritius (10.1%), Japan (7.9%), Italy (7.8%), and The Netherlands (6%).

In an attempt to reduce this vulnerability, approximately 30 parastatal companies were created covering all sectors of the economy in the mid-1980s. As a result, State-owned and parastatal enterprises have come to account for more than half of Seychelles' GDP and two-thirds of formal employment.[13]

In addition to the ongoing emphasis on developing the tourism and building/real estate markets, the Government of Seychelles has renewed its commitment to developing its financial services sector. Government officials and industry participant believe this could overtake the tourism industry as the chief pillar of the economy by 2017.[14] The passage of a revised Mutual Fund Act 2007, Securities Act 2007, and Insurance Act 2007 are meant to be the catalyst to move Seychelles from just another offshore jurisdiction to a full-fledged Offshore Financial Centre (OFC).[15] The Seychelles International Business Authority (SIBA) is charged with overseeing the quickly growing offshore industry. Furthermore, boasting of its good quality telecommunications system, its privatization of the Port of Victoria in 1994, and new regulations to encourage the private sector, specifically the legal environment for investment, Seychelles is promoting itself as an international business centre.[16]

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[9] Wikipedia, 'Economy of Seychelles' (http://en.wikipedia.org/wiki/Economy_of_Seychelles)

[10] Submissions by the Trade Department of the Ministry of Finance, Trade and Investment, represented by the Director General (Trade), Ms. Cillia Mangroo, during the fact-finding visit to Seychelles.

11 Wikipedia, 'Economy of Seychelles' (http://en.wikipedia.org/wiki/Economy_of_Seychelles)

12 Ibid.

[13] http://unfccc.int/resource/ccsites/seychell/backgrnd/index.htm

[14] Wikipedia, 'Economy of Seychelles' (http://en.wikipedia.org/wiki/Economy_of_Seychelles)

[15] Ibid.

16 http://motherearthtravel.com/seychelles/history.htm

The Government of Seychelles has detailed its economic development targets in successive five-year plans.[17] The plan for 1985-89 emphasised tourism, agriculture, and fisheries. It proposed to improve the balance of payments by achieving 60 % self-sufficiency in food and by stimulating tourism. Improved productivity, increased exports and a lowering of the unemployment level were additional aims. The 1990-94 plan stressed the need to attract foreign investment and the need for greater food self-sufficiency. Seychelles has recently prepared the new *Seychelles Sustainable Development Strategy* (SSDS) 2011-2020, and a new *National Development Plan* will be prepared over the course of 2012.[18]

The Seychelles 2017 Strategy lays out key elements towards the economic development of the country. In his foreword in the Strategy document, President Michel made the keynote statement "Seychelles' strategy for 2017 provides a template for sustained growth through a strategic positioning of Government as facilitator. Wealth creation which will benefit the whole population is at the heart of this approach. Full Government support is available where necessary, with the emphasis remaining on the empowerment of economic actors in the productive sectors of our economy… Tourism and fisheries will continue to be the main drivers of growth and creators of wealth. Through strategic re-investment, the expansion of revenue in these two sectors will also enable the generation of growth throughout the economy and allow new entrepreneurial initiatives to emerge in previously untapped areas".

The Executive Summary of the Seychelles 2017 Strategy document gives the strategy's Mission Statement as "To double the GDP of Seychelles by 2017 through focused fisheries and tourism expansion programmes, the development of the financial services industry and the resultant growth of other economic sectors. This growth will be achieved while generating the maximum level of local participation, enhancing Seychelles' human resource capacity, securing the highest environmental standards, creating efficient and transparent governance and fostering strategic national and international partnerships". It is further stated that to achieve the doubling of the country's GDP by the year 2017, "it is the Government's policy to create economic conditions conducive to increased wealth generation by private businesses and individuals. The Government proposes to accomplish this by curtailing its role as an economic actor and to focus instead on operating as an economic facilitator, allowing Seychellois and international business to benefit from an increasingly business-friendly economic environment, streamlined regulatory structure and capable human resource base".

Economic areas covered by the Seychelles 2017 Strategy include: (i) tourism (the sector directly supports around 7,260 job and the combination of direct and indirect tourism-generated employment is estimated to account for in excess of 40% of the total national workforce); (ii) fisheries (the fisheries strategy of the Government is to increase the yield, value of the yield and the financial benefit of fisheries to Seychelles by maximizing the domestic processing, promoting export and increasing Seychellois stockholding in the industry. The role of the Seychelles Fishing Authority (SFA) as a body to promote Seychellois industry involvement will be bolstered – the Authority will adopt a more commercial orientation and be charged with developing strategic partnerships between international and Seychellois investors); (iii) financial market (the strategic objective is to facilitate the development of the financial services sector both to complement growth of the fisheries and tourism sectors and as an internationally recognized jurisdiction for offshore services); (iv) offshore petroleum activity; (v) monetary and exchange rate policy; (vi) mobilization of savings; (vii) fiscal policy; (viii) government restructuring and business facilitation (the Government is committed to providing an efficient and transparent service, to reducing the size of government in favour of the private sector and improving service delivery through the adoption of

17 Photis Coutsoukis, 'Seychelles Economic Development'
(http://www.photius.com/countries/seychelles/economy/seychelles_economy_economic_development.html)
18 African Economic Outlook, 'Seychelles' (http://www.afrianeconomicoutlook.org/en/countries/east-africa/seychelles)

technological advances); (ix) civil service; (x) law and order; (xi) utilities; (xii) construction; (xiii) transport (Government support and subsidization of the Seychelles Public Transport Corporation (SPTC) will be maintained to ensure the geographic mobility of Seychelles human resource pool as a key element necessary for sustainable growth, but the public transport policy will be revised to allow private participation alongside the public transport service, with the attendant benefits associated with the introduction of private sector competition); (xiv) land management; (xv) environment; (xvi) agriculture (Seychelles' agricultural policy is to ensure food security through the most economically effective methods available, given the numerous constraints to intensive agricultural production (such as climate, soil type, and limited available land) present in Seychelles – the agriculture strategy will focus on subsistence farming as well as on small to medium scale agricultural and livestock production (destined primarily for domestic consumption) in which Seychelles has established comparative advantage); (xvii) support services; (xviii) education; (xix) health; (xx) employment; (xxi) social development; (xxii) community development; and (xxiii) housing.

Seychelles is a member of the COMESA, a regional economic grouping of 19 countries[19] with the objective of creating a free trade area and common tariff structure. COMESA has adopted, and is implementing, a regional competition policy and law. The Chief Executive Officer of the competition authority of Seychelles is a member of the current Board of Commissioners of the COMESA Competition Commission (CCC).

Seychelles is also a member of the Southern African Development Community (SADC), another regional economic grouping of 15 countries[20], whose goal is to further socio-economic cooperation and integration, as well as political and security cooperation, among its member States. SADC Heads of State and Government in September 2009 signed a Declaration on Regional Cooperation in Competition and Consumer Policies. The competition authority of Seychelles actively participates in the Competition and Consumer Policy and Law Committee (CCOPOLC) established under the Protocol.

Seychelles' competition law, which is enshrined in the *Fair Competition Act, 2009*, was assented to by the President in October 2009 to come into operation in April 2010. The competition authority to enforce the law, the FTC, was established under the *Fair Trading Commission Act, 2009* and commenced its operations in November 2009.

The enactment of the competition law however preceded the formal adoption of a comprehensive competition policy, a process that is still ongoing. As advised by the Senior Legal Officer in the FTC, Ms. Chantale Barallon, in an electronic mail (email) message of 24 September 2012, "… there is no competition policy in existence … the policy is currently being worked on by the Commission … to be presented to Cabinet by our Minister of Finance". Elements of the competition policy that Seychelles is currently implementing have however been pronounced in a number of statements. For example, the Chief Executive Officer of the FTC, Mr. Daniel Gappy, at a workshop on the principles and laws of trade and competition policy for the business community that was held in December 2009 and jointly organized by the Division of Trades in the Ministry of Finance and the World Trade Organisation (WTO)[21] explained the tenets of the Commission's competition policy guidelines as follows: (i) competition is a key driver of the competitiveness of national economies and puts pressure on enterprises to reduce costs, improve quality, undertake innovation and generally to strive towards excellence; (ii) Seychelles, like

[19] COMESA Member States are: (i) Burundi; (ii) Comoros; (iii) Democratic Republic of Congo; (iv) Djibouti; (v) Egypt; (vi) Eritrea; (vii) Ethiopia; (viii) Kenya; (ix) Libya; (x) Madagascar; (xi) Malawi; (xii) Mauritius; (xiii) Rwanda; (xiv) Seychelles; (xv) Sudan; (xvi) Swaziland; (xvii) Uganda; (xviii) Zambia; and (xix) Zimbabwe.

[20] SADC Member States are: (i) Angola; (ii) Botswana; (iii) Democratic Republic of Congo; (iv) Lesotho; (v) Madagascar (vi) Malawi; (vii) Mauritius; (viii) Mozambique; (ix) Namibia; (x) Seychelles; (xi) South Africa; (xii) Swaziland; (xiii) Tanzania; (xiv) Zambia; and (xv) Zimbabwe.

[21] Reported in the *Seychelles Nation* newspaper of 17 December 2009.

most other countries that have embarked or moved towards a market-based economy, recognizes competition as a central principle to its economic reform; (iii) competition is accepted as the lifeblood of a market economy as it spurs innovation and higher productivity, leading to accelerated economic growth; (iv) the present economic reforms in Seychelles will give rise to competitive forces in the economy which will create a new model for a market-driven economy; and (v) market economy is a system in which economic decisions and the pricing of goods and services are guided solely by the aggregate interaction of a country's citizens and businesses, with little government intervention.

Elements of the country's competition policy in operation are also contained the descriptive explanation of the term 'competition' on the FTC's website, as reproduced in the Box below:

Competition: The overall benefit of competition is clear. Effective competition provides significant benefits for consumers through greater choice, lower prices and better quality of goods and services. Competition also provides strong incentives for enterprises to be more efficient and innovative, thereby helping raise productivity growth across the economy and enhancing the competitiveness of the country as a whole.

Competition is a situation in a market in which enterprises or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share. Competition in this context is often equated with rivalry. Competitive rivalry between enterprises can occur when there are two enterprises or many enterprises. This rivalry may take place in terms of price, quality, service or combinations of these and other factors which customers may value. Such a competitive situation may also be effected by 'market contestability'. That is, competition also comes from enterprises or sellers that could enter the market.

Competition is not just about the behavior of enterprises in the market, but produces significant benefits to the consumers, business community and the country as a whole. The most obvious benefits of competition is that it results in goods and services being provided to consumers at competitive prices, better quality and consumers have wider choices.

Competition has a positive impact, not only on the well being of consumers, but also on a country's economy as a whole. Competition bolsters the productivity and international competitiveness of the business sector and promotes dynamic markets and economic growth. Competition in the local market will also enhance the competitiveness of local businesses and products in regional and international markets which are paramount to Seychelles new emerging market economy. Competition can also play a vital role in creating the conditions necessary to attract inward investment and capital for the development of the country.

It is recommended that while the FTC is leading the process of the drafting of a comprehensive competition policy for Seychelles, the Commission should obtain the assistance of local, regional and international experts in doing so since the preparation of a comprehensive competition policy requires extensive research on current economic and legal environments in the country, the region, and the world at large.

The enactment of the *Consumer Protection Act, 2010*, which was assented to by the President in November 2010, replaced the previous *Consumer Protection Act, 1997*. The current law, as described and evaluated below, is comprehensive in coverage and provides the FTC with most of the powers and options it needs to administer and enforce the Act. However, it is not the only legislation providing consumer protection. Since its Independence, the governments of Seychelles have emphasized consumer welfare across a range of policies and laws. Examples include the policies and regulation of the Seychelles Public Transport Corporation (SPTC), the Public Utilities Corporation (PUC) and the

Seychelles Licensing Authority (SLA). It however remains the case that there is no specific, articulated consumer protection policy.

Entrusting the administration and enforcement of the *Consumer Protection Act* to the FTC is significant for a number of reasons. Firstly, it demonstrates a commitment to an economic development agenda based on maximizing Seychellois welfare via effective markets driven by the process of competition.

Secondly, it implicitly acknowledges that effective markets require efficiency on both the supply (business) and demand (consumer) sides. Anti-competitive conduct directly affects the ability of individual businesses to make decisions that best suit them. The inevitable flow-on effect is that consumers have less choice, poorer quality products and higher prices than they would have absent the anti-competitive conduct. A comprehensive and well-enforced competition law can be a very powerful consumer protection law. However, market can fail for reasons other than anti-competitive conduct. When they do, consumers are immediately and adversely affected through poor quality or unsafe goods, unfair contractual terms, misleading business conduct, refusal to honour warranties, etc. Often the flow-on effect is that legitimate businesses who trade by the rules are disadvantaged and lose sales as consumers are lured away by false promises or cannot distinguish between legitimate and rogue traders.

Thirdly, it reflects the imperative for small States to minimize administrative overhead costs and to benefit from regulatory synergies wherever possible. Of course, entrusting a single agency with the dual responsibility for both competition and consumer regulation is not without controversy because it does present the agency with the challenge of prioritizing and allocating resources and activities appropriately. What is 'appropriate' will change as the economy evolves, compliance improves and unlawful damaging conduct is detected.

Consumer protection is not the sole province of regulation and regulators. Since its establishment 18 years ago, the National Consumer Forum (NATCOF) of Seychelles has represented and advocated for consumers and their interests. As an essential stakeholder in the consumer interest it can be expected to be both the greatest supporter and critic of the FTC in both its competition and consumer protection functions.

2. CURRENT LEGISLATIONS ON COMPETITION AND CONSUMER PROTECTION

The FTC was established under the *Fair Trading Commission Act, 2009* and primarily administers the *Fair Competition Act, 2009* and the *Consumer Protection Act, 2010*. The Commission may also enforce any written laws relating to consumer protection, fair competition and other written law that it has jurisdiction to administer.

2.1. FAIR TRADING COMMISSION ACT

The Fair Trading Commission Act, 2009 of Seychelles (FTC Act 2009) has the following preamble "[a]n Act to provide for the establishment of a Fair Trading Commission, to safeguard the interests of consumers, to monitor and investigate the conduct of business enterprises, to promote and maintain effective competition in the economy, and to provide for matters connected therewith". The establishment of a Fair Trading Commission (FTC) under the Act therefore is related not only to the enforcement of the country's competition law but also to consumer protection law.

The Act is in 9 Parts, as follows, with 57 sections:

- Part I: Preliminary
- Part II: Fair Trading Commission
- Part III: Staff of Commission
- Part IV: Finances of Commission
- Part V: Complaints to, Investigations by, and Procedures before the Commission
- Part VI: Hearings before Commission
- Part VII: Appeal Tribunal
- Part VIII: Appeal from Tribunal
- Part IX: Miscellaneous.

Part I: Preliminary

This Part provides for the short title of the Act, which is provided for in terms of section 1 of the Act as the 'Fair Trading Commission Act, 2009'. Section 2 provides for the interpretation of up to 10 terms used in the Act, including the terms 'Board', 'Commissioner', and 'Tribunal', for the common understanding of the provisions of the Act.

Part II: Fair Trading Commission

Section 3 of the *Fair Trading Commission Act* establishes the FTC as a body corporate. The import of establishing the FTC as a body corporate is that the Commission is capable of suing and being sued in its corporate name and of performing all acts that a body corporate may by law perform.

The functions of the FTC in terms of section 4(1) of the Act are "to enforce any written laws relating to consumer protection, fair competition and other written law which it has jurisdiction to administer". In carrying out its functions, the Commission is required in terms of section 4(2) of the Act to promote efficiency and competiveness among business enterprises, and also to improve the standards of service, quality of goods distributed and services supplied by business enterprises. This formulation implies a preeminent role for the FTC as the national champion of competition and consumer protection policy and law. Diminution of this preeminent role would fragment the implementation of these policies. In turn, the essential universality of application would be foregone and implementation rendered less effective. Furthermore, administrative costs to government and compliance cost borne by business would likely be increased.

The Chief Executive Officer of the FTC, in consultations held during the fact-finding visit to Seychelles, was of the opinion that the name of the competition authority, *Fair Trading Commission*, was misleading to the general public as to the business of the Commission, with some members of the public thinking that the Commission is in commercial trading. To correct that misconception, the Commission is branding itself in the media as a *competition and consumer protection authority*. It is however noted that the name *Fair Trading* for competition authorities is common worldwide, in both developed and developing countries. It also seems suitable for authorities like the FTC with the dual mandates of competition and consumer protection. Alternatively, a longer but potentially more informative name such as the *Competition and Consumer Protection Commission* (CCPC), similar to that of the competition authority of Zambia, might be considered.

The FTC has wide ranging powers under section 4(3) of the Act for the performance of its functions, including powers to: (i) review commercial activities against consumer and business interests; (ii) prevent abuse of dominant positions, eliminate anti-competitive practices, and prevent or control anti-competitive

mergers; (iii) receive and evaluate consumer complaints; (iv) educate or assist consumers in resolving complaints; (v) investigate restrictive business practices; and (vi) monitor and determine standards of services.

Even though section 4(1) of the *Fair Trading Commission* implicitly gives the FTC primary responsibility over the enforcement of competition law in the Seychelles as a regulator, the Government has also established a number of sector regulators, some of them with competition functions. Regulated sectors in Seychelles include the banking services sector, the communications services sector, the energy sector, and the media services sector. Sector regulators with some competition functions include the Central Bank of Seychelles and the telecommunications regulator, the Communications Division in the Department of Information Communication Technology in the Vice-President's Office. The particular competition functions of the Central Bank are in area of mergers and acquisitions in the financial services sector, as confirmed by the Bank's First Deputy Governor, Mr. Christophe Edmond, in an interview held during the fact-finding visit to Seychelles. The Director for Policy and Regulatory Affairs in the Communications Division, Mr. Mahinda De Silva, submitted that even though the Division has conducted investigations into competition and consumer complaints in the broadcasting and telecommunications sector, the Division is more concerned with issues of a technical nature in such complaints.

The relationship between the FTC and sector regulators is elaborated in more detail under the section on 'Institutional Framework'.

Section 5(1) of the Act provides that the President upon the advice of the Minister responsible for Trade should appoint a Board comprising 5 Commissioners, and the Chief Executive Officer of the Commission as an *ex officio* member of the Board, as well as the Chairperson of the Board. Section 5(2) of the Act provides that the Commissioners appointed "shall be persons from the public and private sector appointed by virtue of their qualifications and experience in law, economics, accountancy or commerce".

The appointment of the Commission's Chief Executive Officer as an *ex officio* member of the Board of Commissioners has the clear potential to invite natural justice and "due process" challenges in the Board's *quasi-judicial* consideration of competition and consumer protection cases.

The appointment to the Board of Commissioners of only 5 members, with the provisions of section 15 of the Act that 3 Commissioners should constitute a quorum for any meeting of the Board, has also already caused decision-making problems on the Board. Furthermore, in terms of section 6(1) of the Act, Commissioners are appointed for terms of 3 years. This has raised enforcement concerns in the Commission, at both Secretariat and Board levels. These issues will further be analysed in detail below under the section on 'Institutional Framework'.

The Act gives clear, and common, grounds for disqualification for appointment as a Commissioner. The disqualification grounds in terms of section 7 of the Act are related to insolvency and conviction of fraudulent or dishonesty acts. The grounds for removal of a Commissioner from office are also clear and reasonable. In that regard, section 8(1) of the Act provides that "[t]he President may remove a Commissioner from office upon being satisfied that the Commissioner: (a) is for whatever reason, incapable of performing the functions of a Commissioner; (b) has neglected the duty of a Commissioner or has engaged in misconduct; or (c) has been absent, without leave of the Board, from 3 consecutive meetings of the Board".

Part III: Staff of Commission

The Chief Executive Officer of the FTC is appointed in terms of section 20 of the *Fair Trading Commission Act* by the President upon the advice of the Minister, and on terms and conditions as determined by the President. The functions of the Chief Executive Officer are provided for under section 21 of the Act as to be "(a) responsible to the Commission for the administration of this Act, any written law relating to consumer protection, fair competition and other written law which it has jurisdiction to administer; and (b) responsible for the supervision of the staff and work of the Commission".

Besides the Chief Executive Officer, section 22 of the Act provides that the Commission should "employ such other members of staff as it considers necessary, on such terms and conditions as it considers fit". Section 23 of the Act further provides that "[t]he members of staff employed under section 22 *shall investigate* such matters as are stipulated by the Chief Executive Officer and report their findings to him or her" (own emphasis), thus confirming in the Chief Executive Officer's Secretariat the investigative functions of the Commission.

Section 24 of the Act gives the Commission powers of appointing or engaging persons having special or technical knowledge to assist it in the performance of its functions.

The Act has under section 26 strict confidential information provisions, which have the effect of instilling in the business community confidence in assisting the Commission in its investigations. The relevant provisions of section 26(1) of the Act provide that "[a] member of staff or an expert retained by the Commission shall not otherwise than in the discharge of duties of the member of staff or expert retained, without the consent in writing given by the Board, publish or disclose to an unauthorized person, the contents of any document, communication or information whatsoever, which relates to any enterprise or any investigation being undertaken by the Commission.

Part IV: Finances of Commission

Section 27 of the *Fair Trading Commission Act* provides that the funds of the FTC consist of "(a) moneys appropriated by the Appropriation Act and paid to the Commission; and (b) moneys lawfully charged by the Commission", and that the Commission may apply the funds "(a) in payment of: (i) expenses incurred by the Commission in the performance of its functions; and (ii) such remuneration and allowances due to the Commissioners, the staff of the Commission and any experts retained by the Commission; and (b) to create any reserves determined by the Commission".

Section 28 of the Act provides for the Commission's accounts and audit. The financial year of the Commission in terms of section 28(1) of the Act is the calendar year. The Commission is required in terms of section 28(2) to "keep proper accounts and other relevant records in the form and manner approved by the Auditor-General". It is also required in terms of section 29(1) of the Act to submit to the Minister, not later than 4 months after the end of each financial year, "(a) a report of the activities and operations of the Commission throughout the preceding financial year in such detail as the Minister may direct; and (b) a statement of the audited accounts of the Commission for the preceding financial year pursuant to section 28".

Section 29(2) of the Act provides that a copy of the Commission's annual report and statement of the audited accounts should be "printed and submitted to the National Assembly not later than 3 months from the date of receipt thereof by the Minister".

Even though the FTC came into effective operation in November 2009 it has still not submitted in terms of section 29(1) of the *Fair Trading Commission Act* any Annual Report on its activities and accounts to

enable the Minister to meet his obligations under section 29(2) of the Act. The Chief Executive Officer of the Commission, Mr. Daniel Gappy, attributed the non-submission of the Report to problems in the auditing of the Commission's accounts under the relevant Government legislation.

Part V: Complaints to, Investigations by, and Procedures before Commission

Part V of the *Fair Trading Commission Act* more or less replicates, with the inclusion of consumer protection complaints, the provisions of the *Fair Competition Act* related to the submission of restrictive business practices complaints, investigation of the complaints, and procedures followed by the Commission.

Section 32(2) of the Act however provides that "[t]he Commission may decide not to investigate a complaint against an enterprise where in response to a complaint made directly to an enterprise, the complainant, in the opinion of the Commission, has obtained reasonable redress". A decision not to investigate a complaint if the complainant has obtained reasonable redress may not be appropriate for competition complaints, most of which not only affect the direct complainants but other industry players as well. It has now been generally accepted that the role of competition law enforcement is not to protect individual competitors but to promote the whole process of competition. Therefore, competition authorities should be obliged to investigate competition complaints for the purposes of promoting competition in the market by preventing abuse of dominant positions, or eliminating anti-competitive practices, unless "the complaint is trivial, frivolous or vexatious" or "is not made in good faith" as provided for in section 32(1) of the *Fair Trading Commission Act*.

Even in the case of consumer cases, if the complaint reveals a systemic problem it should be pursued in the public interest. It would be a mistake for a consumer protection agency to narrow its thinking to just obtaining a resolution for those few consumers who take the time and effort to complain. A more effective and efficient agency should always encourage its staff to think big, think market wide. Furthermore, resolved cases build precedent and inform both businesses of their obligations and consumers of the protection delivered by active enforcement. This imperative is explained in more detail below with reference to the 'pyramid of enforcement'.

It is therefore recommended that the provisions of section 32(2) of the *Fair Trading Act* be deleted from the Act

The investigative powers of the Commission are provided for under section 33 of the Act. Section 33(1) provides that "[f]or the purpose of the performance of its functions under this Act or any written law that the Commission has jurisdiction to administer, the Commission shall have power: (a) to hold inquiries; (b) to administer oaths; (c) to summon and examine witnesses; (d) to compel the production of such books, records, papers and documents as it may consider necessary or proper for any proceeding, investigation or hearing held by it; (e) to examine any document produced; (f) to require that any document submitted to the Commission be verified by affidavit; (g) to seize documents; (h) to adjourn investigations; (i) to make test purchases; (j) to inspect goods; and (k) to do all necessary and proper acts in the lawful exercise of its powers or the performance of its functions".

The Commission also has powers in terms of section 33(2) of the Act to hear oral evidence from a person who "(a) in its opinion will be able to furnish any information required by it; or (b) will be affected by an investigation or hearing". The Commission further has powers in terms of section 33(4) to issue summons "for the attendance of a witness or other persons or for the production of documents for the purpose of an investigation".

Section 34 of the Act provides the Commission with search and seizure powers. Section 34(1) provides that "[w]here during an investigation, the Commission has reasonable cause to suspect that: (a) an offence has been committed under this Act, any written law relating to consumer protection, fair competition or other written law which it has jurisdiction to administer; and (b) any book, document or article relating to the offence is being kept or concealed in a building or place; the Commission shall apply to a magistrate for a search warrant to search and seize that book, document or article".

Part VI: Hearings before Commission

Section 38 of the *Fair Trading Commission* provides that "[t]he Commission shall have *exclusive jurisdiction* to hear and determine matters under *any* written law relating to consumer protection, fair competition or other written law which it has jurisdiction to administer" (own emphasis). Again, this formulation implies a preeminent role for the FTC over competition and consumer protection matters.

Section 39(1) of the Act gives the Commission powers to conduct hearings into competition and consumer protection complaints. However, section 39(2) provides that "[a]t a hearing before the Board in respect of a breach of any written law relating to consumer protection, fair competition or other written law which the Commission has jurisdiction to administer, *the complainant is entitled to be heard in person or represented*" (own emphasis). While these provisions are in line with the principles of natural justice that the Commission is obliged under section 41(2) of the Act to have regard to in formulating and issuing procedural rules that govern the conduct of hearings before it, the rules of natural justice include the need to take all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given an adequate opportunity to make representations in the matter. In any competition case, and in many consumer protection cases as well, complainants are not the only ones whose interests are likely to be affected by the outcome of the investigation, but also the respondents and other interested stakeholders. The respondents and other interested parties should also be entitled to be heard in person or represented at the Commission's hearings.

The Attorney General, in consultations held with him during the fact-finding visit to Seychelles, was also of the opinion that the hearings provisions of the Act need to be strengthened on areas such as the rights of the parties, equal opportunity given to both parties to make representations, and the publication of the Commission's findings for transparency.

It is therefore recommended that section 39(2) of the *Fair Trading Commission Act* be amended to entitle respondents and other interested parties in a competition or consumer protection case also to be heard at the Commission's hearings.

Part VII: Appeal Tribunal

Section 44 of the *Fair Trading Commission Act* establishes the Appeal Tribunal as a tribunal of record. Schedule 2 to the Act makes further provisions on the Tribunal.

Paragraph 2 of the Schedule to the Act provides that the Tribunal consists of a Chairperson, who should be an Attorney-at-Law, and 3 other members who should have knowledge and experience in economics, business or consumer affairs. It also provides for the appointment of a Secretary to the Tribunal.

Members of the Tribunal are appointed by the Minister responsible for Trade in terms of paragraph 3 of the Schedule to the Act, and hold "office for such term as is specified in the member's instrument of appointment".

The removal of members of the Tribunal from office is transparently laid down for justifiable reasons. In terms of paragraph 6 of the Schedule to the Act, "[t]he Minister may remove a member from office if he or she is satisfied that: (a) the member is permanently incapable of performing his or her duties; (b) the member has engaged in dishonourable conduct; (c) the member is incompetent; or (d) the member has neglected his or her duty".

Paragraph 10 of the Schedule to the Act provides that "[a] member of the Tribunal may hold that office concurrently with any other office". These provisions recognize the situation in Seychelles, and in most other developing countries, which do not favour the establishment of a full-time specialist Tribunal because of resource constraints, in terms of both skills and finances.

Also in recognition of the fact that members of the Tribunal may not possess specialized skills to deal with particular competition and consumer protection appeals, paragraph 14 of the Schedule to the Act provides that "the Chairperson of the Tribunal may appoint as a special adviser for a proceeding, a person whose specialized knowledge or experience is such that he or she will be able to assist the Tribunal in that proceeding", but not as a member of the Tribunal.

Paragraph 15(1) of the Schedule to the Act obliges the Tribunal to have regard to any direction concerning the policies of the Government given to it in writing by the Minister, but paragraph 15(2) provides that "[t]he Minister shall not give a direction to the Tribunal in respect of an appeal before the Tribunal or a direction that would derogate from the duty of the Tribunal to act judicially". The giving of governmental policy directions to the Tribunal should not be seen as unwarranted interference in the independence of the Tribunal, as long as the directions do not encroach on the Tribunal's decision-making autonomy on specific cases. The implementation of competition policy must be in conformity with that of other socio-economic policies of the Government.

Paragraph 21 of the Schedule to the Act provides that the Tribunal should decide an appeal by reference to the grounds of appeal set out in the notice of appeal, and that in disposing of an appeal, the Tribunal may do one or more of the following: "(a) confirm the determination appealed against; (b) quash that determination; (c) vary that determination; (d) remit the matter to the Commission for reconsideration and determination in accordance with the directions, if any, given to it by the Tribunal; (e) give the Commission directions for the purpose of giving effect to its decision".

Part VIII: Appeal from Tribunal

Section 45(1) of the *Fair Trading Commission Act* provides that a party aggrieved by a decision of the Tribunal may appeal against the decision to the Supreme Court of Seychelles. Section 46(1) provides that [o]n appeal, the Supreme Court may: (a) affirm, reverse, amend, alter an order or direction of the Tribunal; (b) remit the matter to be further determined by the Tribunal with its opinion on the matter; or (c) make such orders as it thinks fit".

It is important to note that appeals against the decisions of the Tribunal cannot be used to unnecessarily delay the execution of the order or direction given. In that regard, section 47 of the Act provides that "[a]n appeal shall not operate as a stay of an order or direction given by the Tribunal, except an order imposing a financial penalty on an enterprise". However, the exception in respect of the non-staying is worth noting because to date fines have been the primary sanction imposed by the Board.

Part IX: Miscellaneous

The *Fair Trading Commission Act* gives the FTC some exemptions from liability. In that regard, section 48 provides that "any person performing functions under this Act shall be deemed to be a public officer for the purposes of the Public Officers (Protection) Act and of sections 372 and 373 of the Penal Code".

The Public Officers (Protection) Act (Act 24/1976) provides as follows:

> "3. No action to enforce any claim in respect of –
>
> (a) any act done or omitted to be done by a public officer in the execution of his office;
> (b) any act done or omitted to be done by any person in the lawful performance of a public duty; or
> (c) any act done or omitted to be done by a person lawfully acting in aid of, or lawfully giving assistance to, a person referred to in paragraph (a) of (b),
>
> shall be entertained by a court unless the action is commenced not later than six months after the claim arose.
>
> 4. Where, in an action to enforce a claim in respect of an act or omission referred to section 3, the court certifies on the record that the public officer or person concerned acted or, as the case may be, omitted to act, upon reasonable or probable cause, the plaintiff is not entitled to more than nominal damages or to any costs of the action.
>
> 5. (1) No action shall be brought against any person exercising judicial functions and in respect of any matter within his jurisdiction unless it is expressly alleged that he acted maliciously and without reasonable and probable cause and the burden of proving that he so acted rests with the plaintiff in the action.
>
> (2) In any action brought against any person exercising judicial functions in respect of any matter over which he had no jurisdiction or in which he exceeded the jurisdiction conferred on him, it shall be a good defence if the person proves that he did not act maliciously and without reasonable or probable cause.
>
> 6. Any person who, by force, hinders or obstructs –
>
> (a) any public officer in the performance of his duty;
> (b) any person lawfully acting in aid of, or lawfully giving assistance to, a person referred to in paragraph (a) or (b),
>
> is guilty of an offence and liable on conviction to a fine not exceeding ten thousand rupees or to imprisonment for a term not exceeding two years, or both".

Sections 372 and 373 of the Penal Code are contained in the Code's Chapter XXXVIII on *Secret Commissions and Corrupt Practices.* The sections make it a criminal offence for any public officer to accept or obtain any gift or consideration as an inducement or reward to show favour or disfavor to anyone in the performance of his official duties. It is also an offence for anyone to give or agree to give any gift or consideration to any public officer as an inducement or reward for doing any act in his official duties to show favour or disfavor to any person.

In her written representations to the consultants, the Senior Legal Officer in the Legal Department of the FTC however submitted that "other elements such as immunity of employees of the Commission are referred to in the Public Officers (Protection) Act, however it would be beneficial if an immunity clause for the staff of the Commission be included in the FTC Act". Since the force of the Public Officers (Protection) Act is provided for, and enshrined, in the *Fair Trading Commission Act*, which covers the

staff of the Commission engaged in both competition and consumer protection operations and activities, having a specific immunity clause for staff included in the FTC Act might be an unnecessary duplication, and could actually water down the enforcement strength of the Public Officers (Protection) Act on staff of the Commission.

Sections 49 to 54 of the Act provides for the imposition of fines and penalties for: (i) obstruction of investigations by the Commission; (ii) obstruction of execution of search warrants given to the Commission; (iii) destruction or alteration of records that are required to be produced to the Commission; (iv) giving false or misleading information to the Commission; and (v) failure to comply with Commission directions or orders.

In most cases, the penalty is a fine not exceeding SCR100,000 or imprisonment for a term not exceeding 2 years, or to both. However, where the person is a person other than an individual in cases of destruction of records and failure to comply with Commission orders, the fine is up to SCR400,000. Furthermore, section 54(1) of the Act provides that in case of a continuing offence by an enterprise regarding non-compliance with an order of the Commission, "a further fine of 10,000 rupees for each day or part thereof during which the offence continues" shall be imposed.

Section 54(2) of the Act further provides that "[w]here it is proved that an enterprise has failed to obey an order of the Commission made under this Act, every director and officer of the enterprise is liable on conviction to a fine not exceeding 100,000 rupees or to imprisonment for a term not exceeding 2 years or to both, unless that individual proves that all necessary and proper means in his or her power were taken to obey and carry out the order of the Commission".

Even though it is noted that the Secretariat has not reported any unresolved problems in respect of obstruction or failure to comply with Commission orders, and that to date the Board has not imposed any fines or other penalties for failure to comply with orders, the above penalties and fines under the Act were found not to be deterrent enough by the Parliamentary Committee on Finance and Public Accounts in consultations held during the fact-finding visit to Seychelles. The Committee therefore felt that the Act does not give the Commission sufficient powers to deter. Similar views were also expressed by the Attorney General, Mr. Roney James Govimden, and in the National Assembly of Seychelles.

It is recommended that fines provided under the *Fair Trading Commission Act* for breach of the Act be made more deterrent. In some competition and consumer protection jurisdictions in the region, such as that of Zambia, fines of up to 10 % of the offending enterprises' annual turnovers are imposed.

Section 55(1) provides that any person is liable in damages for any loss caused to any other person by engaging in conduct that constitutes "(a) a contravention of any of the obligations or prohibitions imposed by this Act; (b) the inducing by threats, promises or otherwise, of the contravention of any provision; (c) being knowingly concerned in or party to any contravention referred to in paragraph (a); or (d) conspiring with any other person to contravene any provision referred to in paragraph (a)". The statute of limitation on the above is provided for in section 55(2), which provides that "an action under subsection (1) may be submitted before the Commission at any time within 3 years of the date that the cause of action arose".

Section 56 of the Act provides against contempt of the Commission, as follows: "A person who insults, interrupts or otherwise commits any contempt of the Commission commits an offence and is liable on conviction to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 2 years".

Section 57 of the Act provides that the Minister may make regulations for giving effect to the provisions of the Act. The regulations thus made may be, *inter alia*: "(a) for amending a Schedule; (b) for prescribing the form under this Act; (c) for fees or charges: (i) for applications and appeals; (ii) in connection with services given under this Act".

2.2. FAIR COMPETITION ACT

The *Fair Competition Act, 2009* of Seychelles came into operation on 5th April 2010. Like most other competition legislation worldwide, the *Fair Competition Act* covers the three major competition concerns of: (i) anti-competitive agreements (of both horizontal and vertical nature); (ii) abuse of dominance, or monopolization; and (iii) anti-competitive mergers.

The preamble to the Act states that it is "[a]n Act to promote, maintain and encourage competition, to prohibit the prevention, restriction or distortion of competition, and abuse of dominant positions in trade, to ensure that enterprises, irrespective of size, have the opportunity to participate equitably in the market place and provide for matters connected therewith". The import of the preamble is that it clearly gives the objectives and purpose of the law in accordance with the economic developmental dictates of Seychelles as announced by the Government in various statements.

As submitted by senior officials of both the FTC and the Trade Department of the Ministry of Finance, Trade and Investment during the fact-finding visit to Seychelles, the process of drafting the Act was largely based on the scrutiny of the competition legislation of Barbados. Barbados was chosen because it is a small island State as well as a Commonwealth country, similar to Seychelles. It is therefore not surprising that many of the provisions of the *Fair Competition Act* follow the drafting style of Caribbean competition legislation, particularly that of Jamaica and Barbados. While there is nothing wrong in that, Seychelles is a member of COMESA, and COMESA requires that competition legislations of its member States should conform, and be harmonized, to the COMESA Competition Regulations.

The *Fair Competition Act* is in 8 Parts, with 55 sections. The following are the eight parts of the Act:

- Part I: Preliminary
- Part II: Fair Trading Commission
- Part III: Restrictive Business Practice (with six sub-parts of: abuse of dominant position; agreements, etc., preventing, restricting or distorting competition; resale price maintenance; control of merger situation by Commission; anti-competitive business conduct; and authorization)
- Part IV: Investigation by and Hearing Before Commission
- Part V: Assessment of Restrictive Business Practice
- Part VI: Determination of Cases by Commission, Penalties and Remedies
- Part VII: Appeal
- Part VIII: Miscellaneous.

Part III of the Act, on Restrictive Business Practices, presents particular problems of comprehension and ease of enforcement. The Part is in 6 sub-parts, dealing with 'Abuse of Dominant Position', 'Agreements etc Preventing, Restricting or Distorting Competition', 'Resale Price Maintenance', 'Control of Merger Situation by Commission', 'Anti-Competitive Business Conduct', and 'Authorisations'. There is an element of repetition and duplication in the sub-parts, which does not make it easy to enforce the law. For example, resale price maintenance is treated separately in one sub-part (Sub-Part III), while common practice is to treat this restrictive business practice either as an abusive practice of a dominant company or

as a vertical restraint. Also, while there is a sub-part on anti-competitive agreements (Sub-Part II), that prohibits various horizontal agreements (e.g., those fixing purchase of selling prices, limiting or controlling production, dividing markets, and collusive tendering), there is also a separate part on anti-competitive business conduct (Sub-Part V) that specifically deals with price fixing, bid-rigging, and production limitations, which are actually anti-competitive agreements of a horizontal nature. The treatment of the same horizontal agreements under the two sub-parts is different. The sub-parts on abuse of dominant position and anti-competitive agreements have provisions allowing enterprises to apply to the Commission for guidance on whether or not its conduct or intended practice is likely to be prohibited under the Act for it to be allowed, yet there is another sub-part on authorisations (Sub-Part VI) which provides for authorisations, on application, of conduct or practices that might be prohibited under the Act.

Specific problems in the above connection are analysed in detail below under the relevant Parts of the Act, with appropriate recommendations given.

Part I: Preliminary

The preliminary provisions of the Act cover sections dealing with the short title and commencement, interpretation, and application of the Act. Section 1 of the Act provides for the short title of the Act as the '*Fair Competition Act, 2009*'.

Section 2 of the Act is the interpretation, or definitional, section. Definitions are very important in competition law, and in any other law, since, as stated in the UNCTAD Model Law on Competition[22], they "make the reading of the law easier, and prevent confusion or ambiguity. For this purpose, they stipulate those elements that are essential for the application of terms which in ordinary usage may have uncertain or multiple meanings. They may also attribute a meaning to a term that is different from its common usage, e.g., by broadening or restricting the term's significance within the meaning of the law". It has also been advanced that "a frequent technique to formulate legal definitions uses definitions that result from established decisional practice and are therefore without ambiguity and will not give rise to troublesome variations in case law that subverts the intent of the legislation as a whole"[23].

In the case of the definitional section of the *Fair Competition Act*, it is presumed that most, if not all, of the definitions used are from established decisional practice in Seychelles. A number of the definitional terms are also in line with international best practice in competition legislation, such as defining the commonly used terms 'acquire', 'agreement', 'enterprise', 'restrictive business practice', and 'merger'.

The two common systems of defining terms are used in the *Fair Competition Act*. These are having a preliminary catalogue of definitions in section 2 of the Act for terms that are used in various sections of the Act, and defining a term only in the Part or section of the Act where it is actually used. The use of both systems of defining terms in the Act facilitates the easier interpretation of the provisions of the Act. However, some specific terms are defined in the preliminary catalogue of common definitions in section 2 of the Act, and not in the sections of the Act where they are actually used. Such terms which should be defined in the respective sections of the Act where they are actually used include 'exclusive dealing', 'merger', 'restrictive business practice', and 'tied selling'.

[22] United Nations Conference on Trade and Development, 'Model Law on Competition', United Nations, New York and Geneva, 2010, available at http://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx

[23] Ibid.

Some of the definitional or interpretation issues identified are specific to the FC Act 2009 and are referred to immediately below. Others are relevant to the consistency between the various legislations administered by the FTC and are referred to further below.

The definition of the term 'merger' in the Act is rather restrictive since it does not cover some common types of mergers and business combinations. The term is defined as to mean "the acquisition or establishment, direct or indirect, by one or more enterprises, whether by purchase of shares or assets, lease of assets, amalgamation or combination or otherwise of control over the whole or a part of the business of *an immediate competitor, supplier, competitor, supplier, consumer or other enterprise*" (own emphasis). While the definition clearly includes horizontal mergers (i.e., those between firms that produce and sell the same products) and vertical mergers (i.e., those between firms operating at different stages of production), it seems not to cover conglomerate mergers (i.e., those between firms in unrelated business).

On the face of it the words 'other enterprise' in the definition of 'merger' might be interpreted as to refer to conglomerate mergers. However if the application of the *ejusdem generis* rule is invoked, the words 'other enterprise' cannot be used to apply to a totally different meaning to the preceding words 'competitor', 'supplier' and 'consumer'. The South African courts have summarized the rule as follows:

> "The *eiusdem generis* rule, a rule of restrictive interpretation (more often referred to as a 'principle'), holds that where words of a limited or particular meaning are followed by a phrase of general application the meaning of the phrase is restricted so as to conform to the generic meaning of the preceding words."[24]

Therefore using the *ejusdem generis* rule, there must be a distinct genus or category to the general application words 'other enterprise' *vis-à-vis* the specific words 'competitor', 'supplier' and 'consumer'. Thus the words 'other enterprise' should not have a completely different meaning on their own from the words 'competitor', 'supplier' and 'consumer' to make the term 'merger' as defined in the *Fair Competition Act* to include conglomerate mergers, which have been defined as "between firms in unrelated business" and bring together firms that do not compete with each other in any product market and do not have vertical integration.

For example, using the *ejusdem generis* rule, an acquisition of a construction company by a fishing company should not be considered a 'merger' as defined in the Act, since the combination brings together firms that do not compete with each other in any product market and do not have vertical integration, unless the transaction has significant horizontal or vertical elements.

However, as noted by Advocate A.P. De Bourbon S.C. in his 2006 opinion on *Blanket Mine (1983) (Private) Limited and Competition and Tariff Commission*, the courts are always cautious in applying the *ejusdem generis* rule. The following passage from the textbook Craies on Statute Law 7th edition at 181 is often quoted:

> "The *ejusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the Legislature."

It has been found from practice in developing countries that transactions involving conglomerate mergers can also raise serious competition concerns. Conglomerate mergers may grant the merged entity market power, allowing it to foreclose competitors in separate but related markets.[25] In Zimbabwe, for example,

[24] Du Plessis: Statute Law and Interpretation 25 LAWSA, para 305.

[25] United Nations Conference on Trade and Development, 'Model Law on Competition', United Nations, New York and Geneva, 2010.

the 2004 acquisition of a small soft beverages company by Delta Corporation, a large conglomerate company, resulted in complaints by other soft beverages companies that Delta Corporation used its financial muscle to buy from the sole local supplier of all the concentrates used in the production of the beverages, thus denying the competing companies supplies of the concentrates, or forcing them to import the concentrates at higher cost.[26]

The transatlantic *GE/Honeywell merger* is also a case in point. According to Patterson and Shapiro (2001)[27], on 2 May 2001, the Antitrust Division of the U.S. Department of Justice announced that it had reached an agreement in principle with General Electric Company and Honeywell International Inc. that resolved the Division's antitrust concerns with the companies' proposed merger. On 16 May 2001, the Canadian Competition Bureau informed the companies that it would not take any action to challenge their merger. On 3 July 2001, the European Commission announced that it had determined to prohibit the transaction. The core of the EU's objection to the merger was expressly based on the conglomerate character of the merger, from its 'portfolio effects' approach. The EU's conglomerate case was based on the theory that the merged entity would engage in foreclosure through packaged offers. In that regard, it was noted that the merged entity would be able to offer a package of products that has never been put together on the market prior to the merger and that could not be challenged by any other competitor on its own.

It is therefore recommended that the term 'merger' in the *Fair Competition Act* be amended to unequivocally include all the three types of mergers (i.e., horizontal mergers, vertical mergers and conglomerate mergers), as well as other business combinations. In that regard, the following definition of 'mergers and acquisitions' in the UNCTAD Model Law on Competition can be considered:

"'Mergers and acquisitions' refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates".

The definitions of the term 'merger' in the Competition Act No. 89 of 1998 of South Africa and the Competition and Consumer Protection Act, 2010 (No. 24 of 2010) of Zambia are also appropriate.

Section 12 of the South African Act, on merger defined, provides as follows:

"(1) (a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through –

(i) purchase or lease of the shares, an interest or asses of the other firm in question; or
(ii) amalgamation or other combination with the other firm in question."

The Zambian Act in terms of section 24, on definition of merger, of Part IV on Mergers provides as follows:

"(1) For the purposes of this Part, a merger occurs when an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or

[26] 'Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part I', Competition and Tariff Commission, Harare, 2006.

[27] Donna E. Patterson and Carl Shapiro, 'Transatlantic Divergence in *GE/Honeywell*: Causes and Lessons', Antitrust, Fall 2001.

when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

(2) A merger contemplated in subsection (1) may be achieved in the following circumstances:

- ***(a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;***
- ***(b) where an enterprise amalgamates or combines with another enterprise; or***
- ***(c) where a joint venture occurs between two or more independent enterprises."***

The term 'enterprise' is defined in the Act as to mean "any person, firm, partnership, corporation, company, association, or other juridical person engaged in commercial activities for gain or reward, and includes its branches, subsidiaries, affiliates or other entities directly or indirectly controlled by it". The Director of the Competition Department of FTC, Mr. Francis Lebon, in an interview during the fact-finding visit to Seychelles submitted that the definition seem not to cover trade associations of individual undertakings since such associations are not directly engaged in commercial activities. Therefore, while it is suspected that a number of trade associations in Seychelles are engaging in collusive and cartel-like behavior, the investigation of that conduct is being hindered by the definition of the term 'enterprise', which seems not to include associations that are not directly engaged in commercial activity.

The above interpretation of the definition of 'enterprise' in the Act by the FTC's Director for Competition sounds like a misunderstanding of the nature of collusion. If owners/directors, or senior officials, of enterprises are taking part in discussions at or under the auspices of an association then the enterprises are participating in collusion and should therefore be caught by the anti-competitive agreements provisions of Act. Ditto if the directors and senior officials accept the direction of an association on the understanding that their competitor will do likewise. Also, in any case, the definition of 'anti-competitive practice' is section 2 of the FC Act 2009 applies to conduct by associations that restrictive trade or competition, and does not refer to 'enterprise' but only to such competition restricting practice.

It is however noted that the Legal Department of the FTC's Secretariat submitted as follows with regards to the above:

> "There exists an inconsistency between the meaning of association in the Registration of Associations: 'association' *means two or more persons who have agreed to contribute by their knowledge, energy, fortune or other lawful means or by a combination of any of such means towards the attainment of a common object which shall not be pecuniary gain to themselves and which shall not be contrary to law, morality and public policy …*
>
> If they are collecting pecuniary gains in through collusive commercial activities, it can be stated that they are not an association as per the RoA Act and still be found in breach of FCA as enterprises".

The definition of an 'association' might not be relevant in the application of the *Fair Competition Act*. The definition of the term 'enterprise' in the Act is very broad and includes individuals and judicial persons. So, if the association is a registered company, it is caught, and if it is not, then the individuals are still caught under the term 'enterprise' in the Act. However, it seems that there is no prohibition on *aiding and abetting* a contravention, and perhaps there should be such a prohibition in order to capture those who are constructive in the creation and maintenance of concerted actions without actually being participants.

It is recommended that a new offence of "aiding or abetting a contravention" of the *Fair Competition Act,* and *Consumer Protection Act,* be created.

The definitional section of the *Fair Competition Act* however does not include the definitions of some common competition terms, such as 'assets', 'confidential information', 'dominant position', 'horizontal agreement', 'essential facility', 'excessive price', 'negative clearance', 'regulator', and 'vertical agreement', some of which are referred to in the relevant sections of the Act. The Legal Department of the FTC's Secretariat also felt that the term 'undertaking' should be defined in the Act. The term 'undertaking is defined in different ways in competition legislations in the region. For example, in some competition legislations, such as those of Namibia, Zimbabwe, and COMESA, the term is defined as meaning a commercial enterprise. The COMESA Competition Regulations in particular defines the term as to include "any person, public or private, involved in the production of, or the trade in, goods, or the provision of services", and the Competition Act [*Chapter 14:28*] of Zimbabwe defines the term as to mean any person engaged for gain in the production or distribution of a commodity or service". These definitions are akin to the definition of 'enterprise' in the *Fair Competition Act*. In other competition legislations, however, the term is defined as meaning a commitment or promise provided to the competition authority by a person or enterprise to address any identified competition concern. This meaning is the one that is contemplated under sections 48 and 49 of the *Fair Competition Act*, but is not defined in the Act.

It is recommended that the above common competition terms be defined in the *Fair Competition Act*. The following appropriate definitions of the terms are suggested in the UNCTAD Model Law on Competition, or made in some other competition legislations in the region, such as those of COMESA, Namibia, South Africa and Zambia:

Term	Definition
Assets	In relation to an enterprise, includes physical assets, businesses, shares and other financial securities, brands and intangible assets including goodwill, intellectual property rights and knowhow.
Confidential information	Means trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.
Dominant position	Means a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors.
Essential facility	Means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers.
Excessive price	Means a price for a good or service which bears no reasonable relation to the economic value of that good or service, or is higher than the economic value of the good or service.
Horizontal agreement	Means an agreement between enterprises each of which operates, for the

	purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market.
Negative clearance	Means the certification by the Commission that an otherwise anti-competitive conduct can be allowed under conditions specified by the Commission.
Regulator	Means a regulatory body or agency, or a Government department that exercises functions of prudential, technical or economic regulation on the basis of statutory powers.
Relevant market	Refers to the general conditions under which sellers and buyers exchange goods and services, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods and services within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products of services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount.
Vertical Agreement	Means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.
Undertaking	Means a commitment, promise or other future conduct that a person or enterprise provides to the Commission in order to address any concern raised by the Commission.

The definition of terms in the Interpretation sections of the *Fair Competition Act* and the *Consumer Protection Act* are not consistent. Some terms are defined in one Act and not in the other and where they are defined in both Acts, the definitions are not always the same.

Where terms are inconsistently defined there is potential for confusion for business, consumers, FTC staff and Commissioners that may result in unnecessary costs and delays in resolving matters. Problematic definitions identified are:

- 'business': the term 'business' as defined in the *Fair Competition Act* (section 2) "(a) means the carrying on of any commercial activity for gain or reward; and (b) includes: (i) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in goods for gain or reward; or (ii) acquiring, supplying and otherwise dealing in services for gain or reward".

  However, the term 'business' as defined in the *Consumer Protection Act* "(a) means carrying on of any commercial activity for gain or reward; and (b) includes a trade or profession and activities of a profession or trade association or of a public body".

- 'consumer': the term 'consumer' in the *Consumer Protection Act* is defined as to mean "a person: (a) who acquires or offers to acquire goods otherwise for the purpose of resale but does not

include a person who acquires goods for the purpose of using them in the production or manufacture of any other goods or articles for sale; (b) to whom a service is rendered".

The term is however defined in the *Fair Competition Act* as to mean "any direct or indirect users of a product or service supplied by an enterprise in the course of business, and includes: *(a) another enterprise that uses the product or service thus supplied as an input to its own business;* (b) *a wholesaler, a retailer* and a final consumer" (own emphasis). In some other competition legislation in the region, the term 'consumer' is defined as to only refer to final end users of the goods or services in question, and to exclude a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration, as it is defined in the *Consumer Protection Act*.[28]

The Chief Executive Officer of the FTC, Mr. Daniel Gappy, in an interview held during the fact-finding visit to Seychelles, agreed that the different definitions of the term 'consumer' in the two Acts under the administration of the Commission might present enforcement problems for the Commission, but that this is a gray area which the Commission is looking at. It is however noted that the term 'consumer' as defined in the competition legislation of Seychelles takes into account the peculiarities of the country's economy, which is characterized by large imports for both its primary and secondary production inputs. There is therefore need for the intermediate users of the inputs to be protected as consumers against the anti-competitive practices of the suppliers.

- 'goods': the term 'goods' is defined in the *Consumer Protection Act* to include "substances, growing crops and things comprised in land by virtue of being attached to land, and any ship, aircraft or vehicle", while in the *Fair Competition Act* it is defined to include "all chattels *other than money, securities or choses* in action" (own emphasis).

  The definition of 'goods' in the *Fair Competition Act* has the wording similar to that of the Fair Competition Act, 1993 of Jamaica and creates the particular problem that it may mean that the entire financial services sector of Seychelles is exempt from the Act.

- 'service': the term 'service' is defined in the *Consumer Protection Act* to mean "a service of any description, whether industrial, trade, professional or otherwise: and (a) includes the sale of goods where the goods are sold in conjunction with the rendering of a service; and (b) is construed in accordance with subsection (3) (i.e., "does not include a reference to the rendering of any services under a contract of employment")".

  The same term 'service' is however defined in the *Fair Competition Act* to simply mean "a service of any description, whether industrial, trade, professional or otherwise".

Where a definition appears to be inadequate there is potential for confusion for business, consumers, FTC staff and Commissioners that may result in unnecessary delays in resolving matters. Problematic definitions identified are:

- 'Commission': the term 'Commission' is defined in the *Fair Competition Act* as meaning "the Fair Trading Commission established under section 3(1) of the Fair Trading Commission, 2009". As used in the legislation the term appears to be confusing *vis-à-vis* the term 'Board'. It is also

[28] Examples of such legislation include the new Competition and Consumer Protection Act, 2010 (No.24 of 2010) of Zambia, the Competition and Fair Trading Act (Cap. 48:09) of Malawi, and the COMESA Competition Regulations.

unclear when certain statutory powers should be taken by the Chief Executive Officer or by the Board.

- 'Minister': the term 'Minister' is defined similarly in both the *Fair Competition Act* and the *Consumer Protection Act* as to mean "the Minister responsible for Trade". As a consequence of this tight definition a reassignment of responsibilities among Ministers may require legislative amendment if it was proposed to assign responsibility for competition and/or consumer protection policy to a Minister not primarily responsible for trade, for example to a Minister responsible for economic development, industry or justice.

Where a term is defined in only one Act but used in both, then its omission in one creates a potential for confusion for business, consumers, FTC staff and Commissioners that may result in unnecessary costs and delays in resolving matters. Where a term is only used in one Act then its omission in the other is not a problem. Problematic definitions identified are:

- 'document': the term 'document' is defined in the *Fair Competition Act* to include "(a) anything on which there is writing; (b) a map, plan, drawing or photograph; (c) anything from which sounds or visual images are capable of being reproduced; (d) any record created, stored, generated, received or communicated by electronic or electromagnetic means". The term is however not defined in the *Consumer Protection Act* even though it is also used in that Act.

- 'prescribed': the term 'prescribed' is defined in the *Fair Competition Act* as to mean "prescribed by regulations". Again, the term is not defined in the *Consumer Protection Act* but is also used in that Act.

It is recommended that the inconsistencies in definitions in the *Fair Competition Act* and *Consumer Protection Act* be avoided, with the more comprehensive definition in one Act being adopted for the other, unless it distorts the meaning in that Act. In particular:

- **the definition of the term 'consumer' in the *Consumer Protection Act* should be redefined in the same way as in the *Fair Competition Act* since there is also need for the intermediate users of inputs to be protected as consumers against both anti-competitive and unfair trade practices of the suppliers;**

- **the definition of the term 'goods' in the *Fair Competition Act* should follow that in the *Consumer Protection Act* since it excludes the financial services sector. Alternatively, the term can be defined in both Acts in the same way as defined in the COMESA Competition Regulations as follows: "'goods' when used with respect to particular goods, includes any other goods that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints";**

- **the definition of the term 'service' in the *Fair Competition Act* should be redefined in the same way as in the *Consumer Protection Act*, but with the inclusion of the word 'financial' to read: "a service of any description, whether industrial, trade, *financial,* professional or otherwise …" since it is important to explicitly refer to financial services in both competition and consumer protection legislation considering the growing impact, complexity and importance of financial services in the Seychellois economy, as well as for consumers.**

Section 3 of the *Fair Competition Act* provides for the application of the Act. Section 3(1) of the Act provides that "this Act shall apply to every economic activity within, or having an effect within, Seychelles". While the provisions do not give the Act extraterritorial application and jurisdiction, they give the FTC the necessary powers of addressing competition concerns arising from practices originating from outside Seychelles but which have effects in Seychelles. Such powers are necessary in dealing with, say, transnational mergers that are concluded outside Seychelles but affect economic activity in Seychelles through the principal partners' local subsidiaries or agents.

Section 3(2) of the Act provides that "[t]his Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods and services within a market in Seychelles *which is open to participation by other enterprises.*" (own emphasis). The application of the competition law to the State if it, or its agents, engages in commercial activity is good practice since competition law is, or should be, general law of general application. However, since the application of the Act to commercial activities of the State only refers to markets which are open to participation by other enterprises, that effectively exclude markets that are dominated by statutory monopolies. For Seychelles, which still has a number of State-owned enterprises (SOEs), some of which are in monopoly positions, such exclusion exempts a large number of enterprises from the application of the competition law.

It was however submitted during the fact-finding visit to Seychelles that not many statutory monopolies exist in the country following the privatization of most SOEs. The Seychelles Chamber of Commerce & Industry, represented by its Vice Chairman, Mr. Dolor Ernesta, and Secretary-General, Mrs. Germaine Michaud, advised that SOEs are no longer a major threat to private companies since none of them are now in a monopoly position, including the Seychelles Trading Company (STC), which used to monopolise the importation of goods into Seychelles, and the Seychelles Public Transport Corporation (SPTC). The Seychelles Investment Board (SIB) also confirmed that most of the SOEs have been privatized and no longer have statutory monopolies. For example, the STC no longer has a statutory monopoly and competes with private sector companies. Most of those SOEs that still have statutory monopolies operate in security or strategic sectors, such as the petroleum sector.

However, the fact remains that there are still some statutory monopolies in Seychelles, as confirmed by SIB. Even SPTC has the monopoly in road public transport, though it no longer has monopoly in the special hire transport business, as confirmed by its Chief Executive Officer, Mr. Geffy Zialor, during the fact-finding visit. Such monopolies should not be exempted from the application of the Act to guard against their abuse of those positions.

As observed by the Legal Department of the FTC's Secretariat, the comprehensive competition policy being formulated can provide for the opening up of the sectors that are dominated by statutory monopolies, but the need remains that the exemption of any such sectors in the Act should be removed.

It is therefore recommended that section 3(2) of the *Fair Competition Act* be amended by the deletion of the phrase 'which is open to participation by other enterprises' to simply read: "This Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods and services within a market in Seychelles".

The other exemptions that are provided for under section 3(3) of the Act, and listed in Schedule 1 of the Act, are standard exemptions in competition legislations worldwide, and relate to collective bargaining agreements, and international agreements that are entered into by Seychelles.

Part II: Fair Trading Commission

Section 4 of the *Fair Competition Act* gives the responsibility of administering the Act to the FTC. The functions of the Commission are provided for under section 5(1) of the Act, as follows:

> "The Commission shall –
>
> (a) be responsible for the promotion and maintenance of fair competition;
>
> (b) carry out on its own initiative or at the request of any person or enterprise *that has an interest in a matter*, such investigations in relation to the conduct of trade –
>
> (i) as will enable it to prevent the use of business practices in contravention of this Act; or
> (ii) as it may consider necessary or desirable in connection with any matters falling within the provisions of this Act;
>
> (c) keep under review commercial activities to ensure that practices that may adversely or unfairly affect the interests of consumers and businesses are prevented or terminated;
>
> (d) take such action as it considers necessary –
>
> (i) to prevent the abuse of a dominant position by an enterprise;
> (ii) to eliminate anti-competitive practices; and
> (iii) to prevent or control anti-competitive mergers;
>
> (e) make available to consumers general information with respect to their rights and obligations under this Act; and
>
> (f) perform such other functions to give effect to this Act." (own emphasis)

The FTC's functions are wide-ranging, and are all directed at promoting competition in the economy of Seychelles. The Commission not only has the function of investigating anti-competitive practices, but also has the function of preventing such practices. It further has the function of educating consumers on their competition rights and obligations. It is noteworthy that the definition of 'consumer' in the Act not only refers to the final consumer but includes enterprises that use the supplied product or service as an input to their own businesses, and wholesalers and retailers, who all are key stakeholders in any competition regime who need to be protected against anti-competitive practices.

It is also noted that the FTC can carry out investigations into anti-competitive practices and consumer concerns on its own initiative or at the request of other persons or enterprises. This is common practice worldwide that does not limit a competition authority's source of competition and consumer complaints. However, the provision that the Commission should only carry out investigations at the request of persons or enterprises that have direct interest in the matter may in fact limit the Commission's source of complaints. While the intention is to allow only those persons or enterprises that have *locus standi*[29] to request for a Commission investigation, the provision effectively rules out Commission investigations from anonymous complainants or whistle blowers, who might not want to indicate their interest in the matter for fear of being identified. Anonymous complainants or whistle blowers have been found to be very useful sources of complaints in cartel cases.

[29] In law, *locus standi* means the right to bring an action, to be heard in court, or to address the court on a matter before it. *Locus standi* is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case (USLegal Inc. http://definitions.uslegal.com/1/locus-standi)

It is noted that the Legal Department of the FTC's Secretariat advised that an anonymous tip can lead to a complaint being initiated by the Commission. It therefore looks as though the FTC has acted on anonymous complaints where there may be no interest despite the limitation of the existing drafting of the Act.

It is recommended that section 5(1)(b) of the *Fair Competition Act* be amended by the deletion of the phrase 'that has an interest in a matter' to read: "carry out on its own initiative or at the request of any person, such investigations in relation to the conduct of trade: (i) as will enable it to prevent the use of business practices in contravention of this Act; or (ii) as it may consider necessary or desirable in connection with any matters falling within the provisions of this Act", so as not to limit the sources of the FTC's competition complaints.

The FTC has wide powers under section 6(1) of the Act for the effective performance of its functions. These include powers to: (i) enter into contracts; (ii) conduct hearings; (iii) issue orders and directions; (iv) impose remedies or financial penalties; (v) impose fines; and (vi) to cooperate with authorities in other countries entrusted with competition functions. The Commission's power to cooperate with authorities in other countries on competition matters is of particular importance in the development of competition policy and law at a regional level under COMESA and SADC.

Part III: Restrictive Business Practice

Part III of the *Fair Competition Act* on restrictive business practices has six sub-parts, on: (a) abuse of dominant position; (b) agreements preventing, restricting or distorting competition; (c) resale price maintenance; (d) control of merger situation; (e) anti-competitive business conduct; and (f) authorizations.

(a) Abuse of Dominant Position

Section 7(1) of the Act prohibits abuse of dominant position, "if it may adversely or unfairly affect trade within Seychelles". The term 'trade' is defined in terms of section 2 of the Act as to mean "any trade, business, industry, profession of occupation relating to the supply or acquisition of goods or services".

In terms of section 7(2) of the Act, "an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors". While this dominance test is more or less in line with the UNCTAD Model Law on Competition[30], it is subjective and gives wide discretion to competition authorities in determining dominance. In some jurisdictions, the use of market share thresholds is used to determine dominance. For example, in the Zambian competition legislation[31], "a dominant position exists in relation to the supply of goods or services in Zambia, if: (a) thirty % or more of those goods or services are supplied or acquired by one enterprise; or (b) sixty % or more of those goods or services are supplied or acquired by not more than three enterprises".

The Director of the Competition Department of the FTC however advised during the fact-finding visit to Seychelles that while the abuse of dominance threshold is not specifically provided for in the Act, the

[30] United Nations Conference on Trade and Development, 'Model Law on Competition', United Nations, New York and Geneva, 2010

[31] The Competition and Consumer Protection Act, 2010 (No.24 of 2010), of Zambia.

administrative guideline being followed by the Commission is a 40% market share threshold, similar to the statutory merger notification threshold.[32] However, the Director acknowledged that the 40% market share threshold has no research basis on the actual situation in Seychelles.

The UNCTAD Model Law on Competition, while noting that the use of market share thresholds in determining dominance enhances the efficiency of the enforcement of the competition authority and gives entrepreneurs legal certainty, also notes some pitfalls in the use of that method. In that regard, it has been found that "market share thresholds pose the risk of underemphasizing or overemphasizing market share in certain cases, leading to over-enforcement or under-enforcement. *Therefore, it is not advisable for a competition law to stipulate irrefutably that a company is dominant when it reaches certain market share thresholds.*" (own emphasis).[33]

In any case, market share is only one of the many factors that are involved in assessing dominance.[34] While a large market share gives the presumption of dominance, other relevant factors in the determination of market power include entry barriers, countervailing power, and import competition.

It is recommended that the *Fair Competition Act* specifically provides under section 7(2) a dominance threshold based on market share to avoid the subjective determination of dominance. In that regard, the utility of the 40% market share threshold that is currently being used by the FTC as an administrative guideline can be assessed with a view to formalise it in the Act.

Section 7(3) of the Act lists the conduct that constitutes abuse, as: (i) restricting the entry of any enterprise into a contestable market; (ii) preventing or deterring any enterprise from engaging in competitive conduct; (iii) eliminating or removing any enterprise from any market; (iv) imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory; (v) limiting production, markets or technical development; (vi) applying dissimilar conditions to equivalent transactions with other trading parties; (vii) making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such agreements; and (viii) exclusive dealing, market restriction or tied selling.

The above abusive conduct of dominant enterprises are of both exclusionary and exploitative nature, as per standard practice. According to Anderson, Daniel and Heimler (1999)[35], "two broad types of business conduct have traditionally been recognized as abusive by competition laws and enforcement agencies: (i) exploitative abuses, in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices; (ii) exclusionary abuses, in which a firm attempts to suppress competition – for example, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices".

However, while the list of abusive conduct in section 7(3) of the *Fair Competition Act* is clearly not exhaustive, it omits some common abusive conduct. For example, denying access to an essential facility

[32] FTC Guidelines on Abuse of Dominance.

[33] United Nations Conference on Trade and Development, 'Model Law on Competition', United Nation, New York and Geneva, 2010.

[34] As concluded at the Breakout Session of the Unilateral Conduct Working Group of the International Competition Network (ICN) during the 10th ICN Annual Conference, held at The Hague, The Netherlands, during the period 17-20 May 2011.

[35] In "A Framework for the Design and Implementation of Competition Law and Policy", The World Bank, Washington, D.C.,and Organisation for Economic Co-operation and Development (OECD), Paris, 1999.

is omitted in the Act as an abusive practice of a dominant or monopoly enterprise. For Seychelles, which has a number of privatized SOEs that used to be in monopoly positions, the abusive conduct of denying access to essential facilities to other emerging competitors would be a serious anti-competitive practice.

The Legal Department of the FTC's Secretariat submitted with regards the above that while denying access of an essential facility is not specifically mentioned in section 7 of the Act, that practice was being covered by conduct mentioned in sections 7(3)(c) and 7(3)(e), i.e., "eliminating or removing any enterprise from that or any other market" and "limiting production, markets or technical development to the prejudice of consumers". However, denying access to essential facilities is a serious anti-competitive practice that is peculiar, or more related, to markets that formerly were statutorily monopolized, while the conduct that is mentioned in sections 7(3)(c) and 7(3)(e) of the Act applies to general abuses of firms in dominant positions.

It is recommended that while the list of conduct that constitutes abuse by firms in dominant positions cannot be exhaustive, certain abuses are widespread in Seychelles and should be added to the list under section 7(3) of the *Fair Competition Act*. Examples of such abuses include denial of access to essential facilities.

Section 7(4) of the Act introduces the desired 'rule-of-reason'[36] consideration in dominance cases. In terms of that section, "[a]n enterprise is not to be treated as abusing a dominant position: (a) if it is shown that its behavior was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit; (b) if the effect or likely effect of its behavior in a market is the result of its superior competitive performance; or (c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights: (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology".

However, while the general treatment under competition policy and law of intellectual property rights (IPRs) like copyrights, patents and trademarks is done under abuse of dominance, providing the rights as one of the exceptions of abusing a dominant position under section 7(4) of the Act seems misplaced since in many other competition legislation IPRs are exempted from the application of competition law (with the proviso stated in section 7(4) of the Act) under the application provisions, together with collective bargaining agreements.

Sections 8, 9, and 10 of the Act provide for the Commission's consideration of requests by enterprises who suspect that their conduct constitute abuse of dominant position with a view to the Commission giving the applicant enterprise guidance as to whether or not the conduct infringes competition law. While such provisions are desirable, they are better placed in the Sub-Part on Authorisations to be analysed below.

[36] Rule of Reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive (and efficiency) features of a restrictive business practice against its anti-competitive effects in order to decide whether or not the practice should be prohibited ('Glossary of Industrial Organisation Economics, Competition Law and Policy Terms', OECD, Paris, 1991).

(b) Agreements Preventing, Restricting or Distorting Competition

Section 11(1) of the *Fair Competition Act* provides that "agreements between enterprises, trade practices or decisions of enterprises, or undertakings or concerted practices of enterprises that have or are likely to have as their object or effect the prevention, restriction or distortion of competition within Seychelles, are prohibited *unless they are excluded in accordance with the provisions of this Sub-Part*" (own emphasis).

In terms of section 11(2) of the Act, the prohibition under section 11(1) applies to agreements, practices, undertakings or decisions that: "(a) directly or indirectly fix purchase or selling prices, or determine any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) provide for the artificial dividing up of markets or sources of supply; (d) affect tenders to be submitted in response to a request for bids, including: (i) not to submit a bid in response to a call or request for bids or tenders; or (ii) as bidders they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves, unless enterprises are not able to submit their bids individually; (e) apply dissimilar conditions to equivalent transactions with other parties engaged in the same trade, thereby placing those other parties are a competitive disadvantage; or (f) make the conclusion of agreements subject to acceptance by parties other than the offeror of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of such agreements".

The above provisions do not distinguish between horizontal agreements and vertical agreements. The distinction between horizontal and vertical agreements is amply explained in the UNCTAD Model Law on Competition[37], as follows:

Distinction between Horizontal and Vertical Agreements

Agreements among enterprises are basically of two types, horizontal and vertical. Horizontal agreements are those concluded between competitors, where the term "competitor" means firms operating at the same functional level of the production or distribution chain to compete for the same customers. An agreement between potentially competing firms can also form a horizontal agreement. Potential competitors are firms that are capable and likely to enter the relevant market and which can put competitive constraints on actual competitors.

Vertical agreements are those between enterprises at different functional levels of the production and/or distribution chain. In other words, they are agreements between suppliers and their customers, such as between manufacturers of components and manufacturers of products incorporating those components, between producers and wholesalers, or between wholesalers and retailers. Particular agreements can have both horizontal and vertical aspects.

The main distinction between these two types of agreement is that, while horizontal agreements, especially ones to raise prices and restrict output, are harmful to competition in most cases, vertical agreements usually pose less threat to competition, and may often be beneficial from an efficiency perspective. Based on this finding, many jurisdictions apply different legal standards to the assessment of horizontal and vertical agreements, generally treating horizontal agreements more strictly.

The non-distinguishing between horizontal agreements and vertical agreements in the Act might cause confusion and enforcement problems since the treatment of such agreements under competition law and policy is different. Most horizontal agreements are inherently harmful to competition and are therefore *per se* prohibited, while some others are considered using the rule-of-reason approach since they may have efficient elements, and even be pro-competitive. On the other hand, most vertical agreements are considered using the rule-of-reason approach.

[37] United Nations Conference on Trade and Development, 'Model Law on Competition', United Nations, New York and Geneva, 2010

Among horizontal agreements, there is also a distinction between hard-core cartels and other types of anti-competitive agreements. Hard-core cartels "are anti-competitive agreements between competitors with no other purpose of effect than to raise prices or reduce output"[38]. The four types of horizontal agreements that generally fall within the definition of 'hard-core cartels' are price fixing, market sharing, bid rigging, and output restriction. Group boycotts by businesses may also fall within an expanded list of hard-core cartels.[39] It is noted in the UNCTAD Model Law on Competition that as opposed to hard-core cartels, other types of agreements between competitors may produce some benefits. For example, joint marketing that enables products to reach customers more quickly and efficiently can produce some efficiency gains. However, as also stated in the Model Law, these types of agreements may also harm competition by reducing the ability or incentive of participating firms to compete independently or by curtailing or facilitating anti-competitive agreements.

It is widely accepted that hard-core cartels are always anti-competitive and that they could be reasonably presumed to be illegal without further inquiry, or are *per se* prohibited. As ruled by the United State Supreme Court on the *Northern Pacific Railway Co. Case*[40], "there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have cause or the business excuse for this use". Other horizontal agreements, and most vertical agreements, are considered using the 'rule-of-reason' approach because they might have pro-competitive or efficiency features.

It is therefore recommended that the provisions on anti-competitive agreements be split to deal separately with horizontal agreements and vertical agreements. Under horizontal agreements, there should be a clear distinction between hard-core cartels, which should be *per se* prohibited, and other agreements, which should be considered using the rule-of-reason approach. Therefore, since the anti-competitive business conduct provided for under Sub-Part V of Part III of the Act refer to hard-core cartel activities of price fixing, production limitation and bid rigging, they should be provided under the sub-part dealing with horizontal agreements. Resale price maintenance under Sub-Part III of the Act should be provided for under the sub-part dealing either with vertical agreements, but still *per se* prohibited because of the severity of the practice in Seychelles and the fact that it constitutes vertical price fixing.

It is also noted that section 11(3) of the Act provides that the prohibition of agreements between enterprises, etc., under section 11(1) "applies only if the agreement, practice, undertaking or decision, is or is intended to be, implemented in Seychelles". Since the Act does not distinguish between horizontal agreements, particularly hard-core cartels, and vertical agreements, these provisions might cause enforcement problems in dealing with international cartels that are implemented in other countries but ultimately affect the economy of Seychelles.

Submissions were made by the public procurement officials of the Ministry of Finance, Trade & Investment during the fact-finding visit to Seychelles that there is an omission in the *Fair Competition Act* that make it very difficult to detect and prove collusion in government tenders. The omission is that the Act does not recognize inter-locking directorships in the facilitation of collusion between enterprises.

[38] Ibid.
[39] Ibid.
[40] *Northern Pacific Railway Co. v. United States,* 356 US1 (1958).

Section 11(4) of the Act recognizes that certain agreements should not be prohibited because of their pro-competitive and/or efficiency features, or have been authorized by the Commission. This should only apply to those agreements that are not hard-core cartels which should be *per se* prohibited as explained above. However as has already been analysed above, agreements referred to under this Sub-Part of the Act do not distinguish between the more harmful horizontal agreements, including hard-core cartel arrangements, and vertical agreements. The distinguishing between such anti-competitive agreements should be made in the Act itself, and not left to guidelines, as suggested by the Legal Department of the FTC's Secretariat.

Also, in virtually all other jurisdictions, hard-core cartel arrangements are not subject to authorisations by competition authorities.

Section 12 of the Act deals with agreements containing exclusionary provisions. Such agreements usually fall under the category of vertical agreements, and it is therefore suggested that they be provided for under the section(s) that deal with all other vertical agreements.

Sections 13, 14, and 15 of the Act make provision for an agreement to be examined by the Commission on application by a party to it, if the party considers that the agreement may prevent, restrict or distort competition within Seychelles. The provisions cover notification of such agreements to the Commission for guidance on whether or not the agreement infringes the provisions of the Act, and the effect of the guidance given. The provisions are however better placed in the Sub-Part on Authorisations, and not in this Sub-Part.

(c) Resale Price Maintenance

The provisions on resale price maintenance, sections 16 to 20 of the Act, are comprehensive and cover the necessary features and treatment of this serious anti-competitive practice. Resale price maintenance is a form of vertical price fixing, and is *per se* prohibited in many countries.[41]

The UNCTAD Model Law on Competition lists resale price maintenance as one of the common vertical agreements that raise competition concerns, it also notes that the practice can also constitute an abusive behavior of a dominant firm.[42] There is nothing wrong in having separate provisions on resale price maintenance, as is done in the Fair Competition Act, 2009 of Seychelles. As observed in the UNCTAD Model Law on Competition, "competition laws can contain general provisions concerning only anti-competitive horizontal agreements, leaving vertical agreements to be covered by a number of individual provisions dealing, for example, with resale price maintenance, exclusive dealing, tying and bundling, etc".[43]

It is nevertheless suggested, as recommended above, that the individual provisions dealing with resale price maintenance in the Act be placed in a part of the Act covering vertical agreements for the better guidance of competition law enforcers.

(d) Control of Merger Situation

Section 21 of the Act prohibits mergers that are not permitted by the Commission. In that regard, it is provided that "[a]ll mergers involving an enterprise that: (a) by itself controls; or (b) together with any

[41] 'Glossary of Industrial Organisation Economics, Competition Law and Policy Terms', OECD, Paris, 1991.

[42] United Nations Conference on Trade and Development, 'Model Law on Competition', United Nations, New York and Geneva, 2010.

[43] Ibid.

other enterprise with which it intends to effect the merger is likely to control, 40 per cent of a market or such other amounts as the Minister may prescribe are prohibited unless permitted by the Commission in accordance with this Sub-Part".

The above provisions also provide for the merger notification threshold of 40% control of a market. Section 2(2) of the Act provides that "[e]very reference in this Act to … 'market' is a reference to a market for goods or services supplied in Seychelles".

Merger notification thresholds are required and necessary since not all mergers need to be notified. Such a requirement would add a significant and unnecessary compliance burden for the business community and an equally heavy burden for the competition authority that has to review the notifications.[44] Merger notification thresholds may be based on the merging parties' annual sales (or turnover), total assets, or both (size-of-the-transaction test). Alternatively, they can be based on the parties' share of the relevant market (market-share test). It has been found that in most instances, notification mechanisms that use market-share thresholds to trigger reporting obligations are likely to be inferior to size-of-the-transaction tests.[45] The reason is that calculation of a firm's market share is more subjective and prone to manipulation than the calculation of turnover or assets. Disagreements between the competition authority and the merging parties are therefore bound to arise on the definition of relevant markets, and the level of the merging parties' activities in those markets, with the merging parties naturally trying to convince the competition authority that the merger is below the notification threshold. The 'size-of-the-transaction' merger threshold method however has a major disadvantage of being prone to frequent currency fluctuations since the thresholds are expressed in monetary terms. There would therefore be need to constantly review the thresholds. Another drawback of monetary thresholds is their easy manipulation by the merging parties. An agreed method of calculating the turnover and/or asset values would therefore also need to be provided for in the relevant regulations.

On balance, it is suggested that the 'size-of-the-transaction' method be used for determining merger notification thresholds, and not the market-share method that is provided for under section 21 of the *Fair Competition Act*. Details of the methods used in the determination of merger notification thresholds can be made in guidelines, as suggested by the Legal Department of the FTC's Secretariat, but the methods should be enshrined in the Act itself.

However, it is noted that the merger control provisions of the Act do not specifically provide for the charging of merger notification fees. Merger notification fees are now becoming an important source of funding for competition authorities, even those in developed countries like the United States of America. The importance to countries in developing and transition economies for such fees as part of their operating funds is even greater. The competition activities of most, if not all, such countries are grossly under-funded. It should also be noted that merger notification fees not only go a long way in assisting in meeting the high costs of merger review and examination, but also discourage the conclusion and hence chance notification of evidently anti-competitive mergers, or those that are purely for empire building with little or no efficiency benefits.

It is noted that the charging of merger notification fees has already been provided for in the draft regulations that the FTC has sent to the Attorney General's Office. It is however also known that the issue has been outstanding for a long time, possibly because it is not statutorily supported by the Act.

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[44] "A Framework for the Design and Implementation of Competition Law and Policy", The World Bank, Washington D.C., and OECD, Paris, 1999:

[45] William E Kovacic, "Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies", University of Cincinnati Law Review, Vol. 66, No. 4, Summer 1998.

Section 22 of the Act provides for pre-merger notification to the Commission. Pre-merger notification provides competition authorities with the opportunity to stop the merger if it will result in a substantial lessening of competition in a relevant market since it is much easier to stop the merger in advance rather than to try to 'unscramble the eggs' once the merger has been consummated.[46] In a pre-merger notification situation, the competition authority is therefore not so much constrained in terms of the most suitable remedies, and the costs to the merging firms for the implementation of the remedies are minimised. It can also be argued that political pressure in favour of a merger are not so high in a pre-merger notification situation because there would not be so many stakeholders in the transaction at that stage. In a pre-merger notification situation, information on the merger is also easily gathered and available from the merging parties in their quest to have the transaction approved.

Not all mergers are harmful to competition, and it can safely be concluded that most mergers are part of the competitive process.[47] Competition authorities therefore need to examine mergers quickly, particularly in the case of pre-merger notification, in order not to unnecessarily prolong the execution of pro-competitive mergers, or those with overwhelming efficiency benefits. Delay is likely to increase both the cost and commercial risk of proposed mergers to the parties. This is one of the reasons why in most competition jurisdictions competition authorities are given specific time limits to consider mergers.

There are basically two stages in merger examination. The first is to determine whether the merger raises any competitive concerns. This determination can be achieved without a full analysis, and most competition authorities take no further action if no serious competition concerns are found at this stage. The second stage begins when the possibility of competitive harm is identified and a more complete examination is required. Again, should at any point during this stage it be concluded that there is no basis for concern, the investigation should be closed, not only in order to avoid unnecessary delay in completing what could be a pro-competitive transaction but also to conserve the scarce resources of the competition authority.

The merger control provisions of the *Fair Competition Act* (Sub-Part IV of Part III of the Act) are not comprehensive enough, and only cover basic issues such as merger application, or notification, and permission of mergers. There is a convergence of views amongst competition analysts on the basic elements or issues that should be incorporated or addressed in any system of merger control. Some of those elements and issues are listed in the Box below.[48]

- Which transactions should be characterised as mergers? How should the acquisition of minority shareholdings and of assets be dealt with? Will joint ventures be considered as a matter of merger control or under the legal provisions that prohibit cartels?
- How should the jurisdictional test be framed for determining those mergers that can be investigated? Should the test be based on turnover, the value of assets acquired, market share or some other criterion?
- To what extent should a system of merger control apply to transactions consummated outside a country but which have effects within it?
- Should mergers be subject to a system of mandatory pre-notification, or should it be a matter for the parties to decide whether to notify? In the latter case, in what circumstances and for how long after a merger has

[46] Mark A.A. Warner, *International Aspects of Competition Policy – Possible Directions for the FTAA,* in "World Competition: Law and Economics Review", Vol. 22 No.1, March 1999.

[47] "A Framework for the Design and Implementation of Competition Law and Policy", The World Bank, Washington D.C., and OECD, Paris, 1999.

[48] Richard Whish, *Competition Law* (Fourth Edition), Butterworths, London, 2001: pp. 732 – 733.

been completed should a competition authority be allowed to review a case?

- What should be the time period within which a merger investigation must be completed?
- What should be the substantive test for reviewing mergers? Should it be based solely on competition criteria, or should any of the other issues of a public interest nature also be taken into account?
- How should the specific issues of (a) efficiency and (b) failing firms be dealt with?
- What mechanism should be put in place for the negotiation of remedies that would overcome any problems identified by the competition authority?
- Who should make decisions in merger cases?
- What system of judicial review or appeals should be put in place to test the findings of the decision-maker in merger cases? How quickly will any judicial review or appeal be completed?

It is therefore recommended that the merger control provisions of the *Fair Competition Act* cover all the above basic elements or issues of merger control. In particular, provision should be made for 'size-of-the-transaction' merger notification thresholds (i.e., based on merging parties' annual sales (or turnover), total assets, or both), and the charging of merger notification fees.

(e) Anti-Competitive Business Conduct

Proscribed anti-competitive business conduct under Sub-Part V of the *Fair Competition Act* are the hard-core cartels practices of price fixing, production limitation and bid rigging. Section 25(1) of the Act describes acts of price fixing as "(a) by agreement or promise, intimidation or threat or any like means, attempt to influence an increase, the maintenance or a reduction of the price at which any other enterprise supplies or offers to supply, or advertises for goods or services; or (b) refuse to supply goods or services to, or otherwise discriminate against any other enterprise engaged in business because of the low pricing policy of that enterprise or for any other reason".

The above provisions are important in that they clearly describe acts of price fixing, including boycotts by cartel members against deviating enterprises.

Section 25(2) rightly states the prohibition of price fixing does not apply to enterprises that are affiliated to each other. Section 25(3) also provides that publication of advertisements by a supplier of goods other than a retailer of resale prices of the goods constitutes price fixing, "unless the price is so expressed as to make it clear to any person which becomes aware of the advertisement that the goods may be sold at a lower price".

It is noteworthy that price fixing under the *Fair Competition Act* relates to both unilateral conduct and collusive action.

Section 26(1) of the Act prohibits collusive action restraining competition through production limitation. Arrangements related to the introduction or maintenance of quality or other standards are however exempted under section 26(2) from the prohibition.

Section 27(1) of the Act outlaws collusive bid-rigging, but limits such conduct to situations where "two or more persons … enter into an agreement whereby: (a) one or more of them agree to undertake not to submit a bid in response to a call or request for bids or tenders; or (b) as bidders or tenderers they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves". Situations of bid-rigging, or collusive tendering, should not be exhaustive since big-rigging come in many different and innovative forms.

(f) Authorisations

Sub-Part VI of the *Fair Competition Act* provides for authorizations of anti-competitive practices. In that regard, section 28(1) of the Act provides that "[n]otwithstanding this Act, an enterprise that proposes to enter into or carry out an agreement or to engage in a business practice which, in its opinion, is an agreement or practice affected or prohibited by this Act, may apply to the Commission in the prescribed form for an authorization to do so". Section 28(2) goes on further to provide that "[t]he Commission upon receipt of an application under subsection (1) may grant an authorization, where it is satisfied that the agreement or practice, as the case may be, is likely to promote the *public benefit* and is reasonable in the circumstances" (own emphasis).

Section 28(1) does not make it clear which anti-competitive agreements or practices are subject to authorization by the Commission. In most cases, and in accordance with international best practices, horizontal agreements of a hard-core cartel nature, and other *per se* prohibited conduct and practices, are not subject to authorization.

'Public benefit' referred to in section 28(2) is also not defined, such that it gives the competition authority wide discretion in considering applications for authorization, which discretion might be abused. In some other competition legislations, public interest factors that must be taken into account are specifically provided, and include: (i) promotion of technical or economic progress, and transfer of skills; (ii) promotion of employment; and (iii) enhancing the competitiveness, or advance or protection of the interests of small and medium-sized businesses. Guidelines may further clarify this highly controversial concept of public benefit, which is provided for in the Act.

It is recommended that *per se* prohibited anti-competitive agreements and practices not be subject to authorization under the *Fair Competition Act*. It is also recommended that 'public benefit' be clearly defined in the Act.

Section 29 provides for the effect of an authorization granted by the Commission, that "nothing in this Act shall prevent the applicant from giving effect to any provision of an agreement, or from engaging in any practice, to which the authorization relates". Section 30 provides for the revocation or amendment of the authorization. Section 31 provides that the Commission should keep a Register of Authorisation which should be available for inspection by members of the public.

Part IV: Investigation by and Hearing before Commission

In terms of section 32 of the *Fair Competition Act*, the Commission may initiate a complaint against an alleged restrictive business practice, and section 33(1) of the Act provides that any person may submit information concerning, or submit to the Commission, a complaint against an alleged restrictive business

practice. The Commission is obliged under section 34 of the Act to investigate complaints against or allegations of restrictive business practices, as well as proposed mergers.

The Commission's investigative powers under section 34(2) of the Act facilitate the undertaking of dawn raids, and include entering and searching premises, and inspecting and removing for copying any documents.

Section 35(1) of the Act provides for the discontinuation of the Commission's investigations if the Commission is of the opinion that the matter being investigated does not justify further investigation. Section 35(2) however provides that "[w]here the Commission discontinues an investigation under subsection (1) it shall: (a) within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and (b) *submit a report of the discontinuation to the Minister within 3 months of such discontinuation*" (own emphasis).

The requirement that the Commission should report to the Minister its decisions to discontinue competition investigations limits its independence and reduces its decision-making autonomy. The purpose and limitations of that requirement is also not stated in the Act, such that it opens the Commission to political interference in its decision-making processes. In any case, the Commission is required in terms of section 29(1)(a) of the *Fair Trading Commission Act* to submit to the Minister not later than 4 months after the end of each financial year "a report of the activities and operations of the Commission throughout the preceding financial year in such detail as the Minister may direct".

It is therefore recommended that the provisions of section 35(2)(b) of the *Fair Competition Act* be deleted from the Act.

The Chief Executive Officer of the Commission is required in terms of section 36 of the Act to submit reports on the conclusion of investigations into restrictive business practices and mergers to the Board of Commissioners, which in terms of section 37(1) of the Act is in turn required to convene a hearing into the findings. The requirement to hold hearings into the conclusion of competition cases is in line with the rules of natural justice.[49]

Part V: Assessment of Restrictive Business Practices

Section 38 of the *Fair Competition Act* provides that the Commission in the assessment of restrictive business practices related to abuse of dominant position, anti-competitive agreements, and mergers under Sub-Parts I, II and IV respectively, should "have regard to the desirability of maintaining and encouraging competition and the benefits to be gained in respect of price, quantity, variety and quality of goods and services".

The Commission is however required to first determine whether competition in any market is adversely affected in that, "in the case of: (a) a restrictive agreement, the agreement has the object or effect of preventing, restricting or distorting competition; (b) a monopoly situation, the conduct of one or more parties (i) has the object or effect of preventing, restricting or distorting competition, or (ii) in any other

[49] The rules of natural justice are the minimum standards of fair decision-making imposed on persons or bodies acting in a judicial, or *quasi-judicial*, capacity. The main element of the rules of natural justice is the right to a fair hearing. The right to a fair hearing requires that an individual shall not be penalized by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer it and the opportunity to present his own case.

way constitutes exploitation of the monopoly situation; (c) a merger situation, a proposed merger will result or is likely to result, in a substantial lessening of competition within any market …". The above determination tests, particularly the merger control determination test of substantial lessening of competition, are universal.

According to section 39, "[t[]he Commission shall, in relation to every agreement falling under Sub-Parts III and V of Part III establish whether on the facts of the case, the parties to the agreement have infringed the prohibition imposed under those Sub-Parts". Sub-Part III of Part III relates to resale price maintenance, and Sub-Part V to anti-competitive business conduct (price fixing, action to restrain competition through production limitation, and bid-rigging). Hard-core cartels involving horizontal price-fixing and bid-rigging, and vertical price-fixing through resale price maintenance are thus treated as *per se* prohibitions by not requiring the Commission to first determine whether competition in any market is adversely affected, as is the requirement under section 38. This is good. However, hard-core cartels are also by Sub-Part II (agreements preventing, restricting or distorting competition), which assessment is dealt with under section 38 and requires the Commission to examine the effect on competition although the *per se* prohibition would substantially relieve the Commission from such analysis in case of hard-core cartels.

Furthermore, the fact that there is no distinction between horizontal and vertical agreements, and that assessment of agreements under Sub-Parts III and IV are different from that of Sub-Parts I, II and IV might cause confusion amongst the enforcers of the law as well as the parties to the investigation.

Appropriate recommendations on the above concerns have already been made above under the section on 'Agreements Preventing, Restricting or Distorting Competition'.

Section 40(1) of the Act provides that the Commission before deciding on any remedial action to be taken on adverse or unfair effects on competition of a restrictive business practice, or merger, should consider any offsetting public benefits of the practice or merger. In terms of section 40(2) it is provided that "a benefit shall be considered for the purposes of subsection (1) if it is shown that the effects of any absence, prevention, restriction or distortion of competition are outweighed by specific gains of: (a) the safety of goods and services; (b) the efficiency with which goods are produced, supplied or distributed or services are supplied or made available; (c) the development and use of new and improved goods and services and in means of production and distribution; or (d) the promotion of technological and economic progress". It is also provided that the benefits should be shared by consumers and businesses in general.

Part VI: Determination of Cases by Commission, Penalties and Remedies

The Commission determinations and remedies on restrictive business practices and mergers provided for under Part VI of the *Fair Competition Act* are standard and universal, as summarized in the Table below:

Restrictive Business Practice	Section of FCA	Provided for Remedies
Abuse of Dominant Position	41(1)	Where the Commission determines that any conduct falls within the scope of Sub-Part I of Part III (i.e., abuse of dominant position), it shall prepare a report indicating the conduct that constituted the abuse and: • shall notify the enterprise of its finding accompanied by a copy of the report;

		• shall direct the enterprise to cease the abusive conduct within a specified period; and • may require the enterprise to take such further action as in its opinion is necessary.
Agreements Preventing, Restricting or Distorting Competition	42(2)	Requirement that the offending enterprise: • terminate or amend an agreement; • cease or amend a practice or course of conduct in relation to prices; • supply goods or services or grant access to facilities; • separate or divest itself of any enterprise or assets; • provide the Commission with specified information on a continuing basis; within such time as may be specified by the Commission.
Anti-competitive mergers	44(1)	Where a merger proposed is likely to result in unfair competition, the Commission may: • direct the enterprises within an agreed period to divest interests or part of their combined businesses or operations, if it is satisfied that such divestment would make the merger less likely to lessen competition or to adversely affect the interests of consumers or the economy; • direct the enterprises to desist from completion or implementation of the merger in so far as it relates to the market in Seychelles; • direct the enterprises to adopt or desist from such conduct, including conduct in relation to prices, as is specified in the direction as a condition of proceeding with the merger.
Agreements on Resale Price Maintenance, Price Fixing, Production Limitation, Bid-Rigging	45(1) and (2)	Where the Commission determines that an agreement under Sub-Part III (resale price maintenance) or Sub-Part V (price-fixing, production limitation and bid-rigging) of Part III is unlawful or anti-competitive respectively, it shall prepare a report of its findings, and: • shall notify the enterprise or enterprises of its findings accompanied by a copy of the report; • shall declare the agreement null and direct the enterprise to rescind it; and • may require the enterprise to take such further action s in is opinion is necessary. The Commission shall also direct the enterprise to cease the anti-competitive business conduct where it determines that a conduct under Sub-Part V of Part III is anti-competitive.

The above provided-for remedies are of a both structural and behavioural nature. Structural remedies often entails divestiture, while behavioural remedies require a commitment on the part of the enterprise to

behave or not to behave in a particular way. Alberto Heimler (1998)[50] identified a number of pros and cons of structural and behavioural remedies, which are shown in the Table below:

Type of Remedy	Pros	Cons
Structural Remedies	• The restriction is eliminated once and for all. • The remedies do not require continuing oversight. • In the case of mergers, the fix-it-first policy is quickly accomplished because the parties have an interest to merge.	• It may be difficult to find a suitable purchaser in the required time. • Since the company is forced to sell, the sale price may become too low, and the competition authority ma be forced to reconsider.
Behavioural Remedies	In the case of mergers, the merger is allowed and (apparently) its perceived negative effects are eliminated.	• Conduct is very difficult and costly to monitor. • By constraining conduct of a dominant firm also competitors are negatively influenced (if prices do not increase, competitors do not enter the market, etc.).

Structural remedies are generally preferred. They are more effective in the long run, and do not require continuing oversight or regulation by the competition authority. Most competition authorities, particularly those in developing countries, do not have the necessary resources to effectively monitor behavioural remedies.

In place of, or in addition to, the above remedies, the Commission may in terms of section 46(1) of the Act impose a financial penalty on an enterprise. Section 46(2) of the Act however provides that "where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of 5 years".

The Commission may also in terms of section 47(1) of the Act take interim measures where it has reasonable grounds to suspect that irreparable damage to a particular person as a consequence of the restrictive business practice under investigation may occur before the conclusion of the investigation. These are very important provisions, particularly in abuse of dominance cases that prevent unwarranted market exits.

Section 48(1) of the Act allows any enterprise to offer a written undertaking to the Commission to address any concern that has arisen or is likely to arise during an investigation in respect of a restrictive business practice subject to investigation. Such an undertaking may be offered before the start of an investigation of at any stage during an investigation.

[50] Alberto Heimler, in a presentation on "Merger Review" delivered at the First International Training Program on Competition Policy, organized by the Regulatory Reform and Private Enterprise Division of the Economic Development Institute of the World Bank, and held at Washington D.C. (USA) during the period 13-18 December 1998.

Part VII: Appeal

In terms of section 50 of the *Fair Competition Act*, "a party dissatisfied with an order or direction of the Commission may appeal to the Tribunal against, or with respect to, the order or direction". Section 52(1) of the Act provides that a person dissatisfied with an order or direction of the Tribunal may appeal to the Supreme Court.

Part VIII: Miscellaneous

The miscellaneous provisions of Part VIII of the *Fair Competition Act* provides for the enforcement of the Commission's directions, undertakings or orders. In that regard, section 53 of the Act provides that "a person who fails or refuses to comply with a final direction, order or undertaking of the Commission or order or direction of the Tribunal commits an offence and is liable *on conviction*: (a) where the person is an individual, to a fine not exceeding 100,000 rupees or to imprisonment for a term not exceeding 2 years, or to both; or (b) where the person is a person other than an individual to a fine not exceeding 400,000 rupees" (own emphasis).

The imposition of fines and imprisonments on conviction as provided for above is of important significance since it means that the Commission on its own does not have powers of imposing the fines and imprisonments but has to go through the courts.

Section 54(1) of the Act gives the Ministers the important powers of making regulations under the Act. The relevant provisions state that "the Minister may make regulations for giving effect to the provisions of this Act".

2.3. CONSUMER PROTECTION ACT

The *Consumer Protection Act* was assented to by President Michel on 25 November 2010. It is the Seychelles national consumer protection legislation, replacing the earlier *Consumer Protection Act 1997*. The Act includes all of the elements usually encompassed in national consumer protection laws. It consists of 81 sections conveniently arranged in ten parts each given a useful descriptive heading, making the Act easy to navigate.

Part I: Preliminary

Part I consists of the section specifying the short title of the Act and those dealing with *Interpretation*. The definitions of key terms raise no serious concerns, however there are potentially problematic inconsistencies between what the definitions provided in the *Consumer Protection Act* as compared with the *Fair Competition Act*, and the inconsistencies between what is defined and what is not, as between the two Acts. The inconsistencies are outlined above in the section dealing with the *Fair Competition Act*.

Part II: Fair Trading Commission

As noted above, the *Consumer Protection Act* vests the FTC with the responsibility for administering the Act. As also noted above, the FTC also has responsibility for administering the *Fair Competition Act* and its competition provisions. This part also sets out the consumer protection objectives of the FTC, its functions, including receiving complaints, investigation suspected contraventions, reporting and determinations.

The *Consumer Protection Act* objectives of the FTC are set out in section 3 of the Act:

- 'the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally'. This objective directly reflects the strategic reliance of well-functioning markets to maximize consumer welfare and sits very well with the competition objectives of the FTC;

- 'reducing any disadvantages experienced by consumers, in accessing any supply of goods or services, by reason of their illiteracy, vision impairment or limited fluency in a particular language'. The specific objective of reducing the special disadvantages of nominated groups of consumer is reflected in the substantive conduct provisions relating to *Disclosure of Information* (for example section 19: Information to be in plain and understandable language), *Fair and Honest Dealing* (for example the unconscionable conduct prohibitions of sections 34 & 35) and related regulation such as the requirement that labeling be in at last one of the 3 national languages Creole, English and French;

- 'promoting fair business practices'. This is a general and common objective that underpins all of the substantive conduct provisions of Parts III – V;

- 'protecting consumers from: (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) misleading, unfair, deceptive or fraudulent conduct'. These objectives are clearly related although the concepts are somewhat different. Generally what is misleading, deceptive or fraudulent is easy to conceptualise and prohibitions are relatively easy to explain. Contraventions are more likely to be systemic, for example in advertising or a particular business model. Consequently prohibitions on misleading, deceptive or fraudulent conduct are a central element in all general consumer protection laws. On the other hand inequitable conduct is more difficult for many to conceptualise because of its more subjective nature. Although contraventions may be systemic, it is more common for them to be the result of aberrant conduct by individuals in opportunistic circumstances. Nevertheless the consequences of inequitable conduct can often be horrendous for the victims. Inequitable conduct provisions are not routinely found in many basic consumer protection laws. However, as noted above, these prohibitions contribute to the attainment of the second objective, as by its definition the conduct affects consumers and small traders with particular disadvantage. Without the prohibitions on inequitable conduct the *Consumer Protection Act* would be risk failing the most disadvantaged Seychellois at their time of most acute distress;

- 'improving consumer awareness and information, and encouraging responsible and informed consumer choice and behavior'. When consumers are well informed about the goods and services on offer, aware of their rights and responsibilities as consumers, and are confident in lodging complaints with the FTC, they will be more willing to buy new products and to purchase from new traders. This will complement and reinforce the pro-innovation and pro-efficiency effects of the competition law. Together these effects will generate market driven, rather than regulator driven, compliance with the *Consumer Protection Act*;

- 'promoting consumer confidence, empowerment and the development of a culture of consumer responsibility through education and advocacy'. This objective can be read in tandem with the previous objective and recognises the essential role of advocacy and education in promoting both direct consumer empowerment and consumer recognition of the *Consumer Protection Act* as a driver of better market outcomes for consumers. One of the advantages of the dual responsibility model is that in pursuing this objective the FTC will also be advocating to consumer that the competition law is also a consumer law and advocating to business that the *Consumer Protection Act* is pro-business because it prohibits conduct that unscrupulous traders may use to unfairly

compete against their fair dealing competitors.

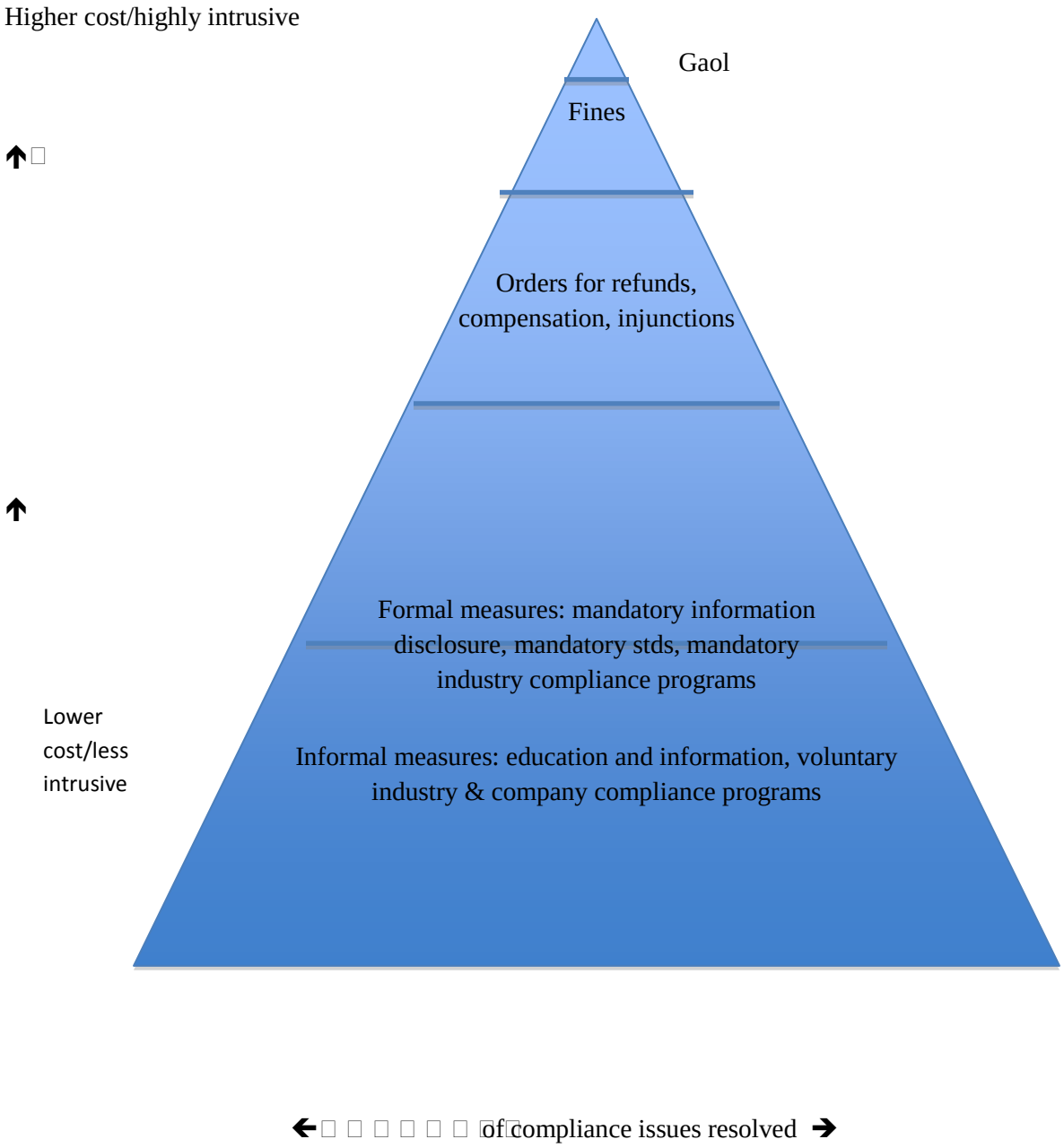
- 'providing for an accessible, efficient, harmonised, and effective system of redress for consumers'. This final objective is a practical one and is often overlooked in new competitions laws. Accessibility, efficiency, harmonization (within the *Consumer Protection Act* and between it and other pro-consumer regulation, particularly and most obviously with the competition law) and effective redress are the essential links between the substantive prohibition provisions and both business compliance and consumer confidence. This objective recognises that the best-drafted substantive prohibitions will deliver little to consumers or businesses if redress is inadequate.

Neither the Secretariat, Commissioners nor any other stakeholders interviewed expressed any view on the objectives of the FTC as specified in section 3 or otherwise. It is noted that the objectives make no mention of consumer safety, which is surprising given that Part VI of the Act addresses this important area of consumer concern.

It is recommended that the *Consumer Protection Act* be amended to include a reference to consumer safety in the objectives list in section 3.

The listed *Consumer Protection Act* functions of the FTC (section 4 of the Act) are comprehensive and consistent with the effective operation of a national consumer protection agency. Importantly, the FTC can commence an investigation upon complaint or on its own initiative. This is essential, as an effective agency will often detect contraventions in the absence of formal complaints. This 'own initiative' investigatory power also demonstrates that the FTC should not be seen simply as the champion of individual consumers but of consumers collectively and the process of well function markets more generally. Also noteworthy among the listed functions are the ability of the FTC to implement a range of resolutions to contraventions, reflecting an implicit adoption of the 'compliance pyramid' regulatory model. (see below).

A *Compliance Pyramid* illustrating the effect of resolving more compliance issues at a lower cost while reserving the strongest and most costly interventions for the most detrimental conduct and culpable market participants.



This diagram was adapted from the *Compliance Pyramid* p117 Robin Brown: The UN Guidelines: Making them work in developing countries.

More efficient authorities will seek to resolve compliance problems using the quickest, least costly processes available to it. For example, the FTC's educational activities and business self-regulation will cost less and be more timely than prosecutions seeking gaol sentences. The hierarchy of responses is

illustrated on the 'enforcement pyramid' with lower cost, less intrusive options shown at the base of the pyramid and the higher cost, more intrusive options shown towards the top. However, the success of lower cost resolutions is likely to be much greater if businesses know that more intrusive options are available to the FTC and that the FTC is willing to use them where it believes that options lower down the pyramid are unlikely to work. Broadly, the more options available to the FTC and the more the FTC demonstrates that it is willing to go to the top of the pyramid, the more likely it is that the most efficient and effective process can be employed for any compliance problem. Herein may lie the answer to the National Assembly's criticisms of the FTC and its legislation. The FTC has a fairly standard, but modest range of responses open to it, including gaol sentences. However, the Board has not yet imposed or even signaled a willingness to go to the top of the pyramid. It is hardly surprising therefore that there may be a perception that there is 'no bite'. If the pyramid model is accepted as having validity then it is not surprising that the Secretariat's well qualified staff are working efficiently and diligently and yet are still perceived to be making insufficient difference to competition and consumer protection compliance.

None of the stakeholders interviewed expressed any specific concerns about the functions of the FTC as specified in section 4. Members of the Parliamentary Committee on Finance and Public Accounts of the National Assembly of Seychelles and the NATCOF executive did express a generalised concern that the three Acts (and therefore the FTC) lack 'bite' or 'teeth'.

It is recommended that the Secretariat explicitly adopt the concept of the pyramid of enforcement responses and continue its current practice of attempting to resolve most complaints through negotiations and warnings.

It is also recommended that the Secretariat use more serious contraventions, or contraventions by repeat offenders, to test the limits of the law with a view to increasing the likelihood that more low level contraventions will be resolved quickly and at low cost.

Public accountability of the FTC in respect of the use of its powers, particularly the power to investigate is essential, as it is in respect of any regulator. This is typically done through the agency's Annual Report, through appropriately worded media releases and, increasingly, through agency web sites. Additionally it is reasonable that the parties most immediately and directly concerned with an investigation (usually confined to the complainant and the party investigated, or the respondent) be directly notified when an investigation is concluded so that they can proceed with their business with some certainty. However, subsection 7(2)(b) of the Act is noteworthy because while it appears to be inspired by a desirable intention that the FTC report on its activities and account for investigations that are discontinued, it is inconsistent with the apparent overall intention of the *Consumer Protection Act* that the FTC function as a independent regulator. This issue is also discussed elsewhere above in this report.

Section 7(2)(b) of the Act obliges the FTC to report to the Minister on the reasons why investigations were discontinued within 3 months of *each* decision. It is entirely appropriate that the Minister have confidence in the ability and integrity of the Secretariat and Commissioners and in the effective and efficient management of the Commission. However, this does not require the Minister to be informed in respect of each and every decision in respect of individual investigations. On the contrary this requirement risks fuelling criticism of the FTC as being indistinguishable from the Ministry. Interestingly none of the stakeholders interviewed commented on the section 7(2)(b) reporting requirement. The CEO has advised that the FTC has not adhered to this reporting requirement 'due to it being impractical'. (See recommendation in respect of 35(2)(b) of the *Fair Competition Act* earlier on).

The CEO has advised that notifications of discontinuance of investigations are being sent to the Board. The question then arises as to what happens next? Can the Board nevertheless determine the case in accordance with section 33(3) of the Fair Trading Commission Act? Can the complainant take the matter to the Tribunal (once it is established) and ask for either a decision on the information available to the Board or a direction to the FTC that it reopens the investigation? These questions expose the problem that the legislation does not distinguish between the Secretariat and the Board. As noted above at**,** there is a real concern that the investigative body (the Secretariat) should be separate from the determinative body (the Board). However, as drafted it does seem that the Board could direct the Secretariat to reopen an investigation.

The same issue arises in respect of the Board advising the Secretariat as to whether certain elements of the case are missing before the case goes before the Board. From an operation and procedural perspective this should not happen, but the current drafting leaves such a development as a real possibility, should the Board be so minded.

Section 8 also imposes a related reporting requirement that raises concerns. The first issue is the terminology used. As has been noted elsewhere, the term 'Commission' is ambiguous. In section 8 'Commission' seems to mean the 'Board' as no other meaning would make sense. The second issue is whether it is appropriate for the CEO to report in this way to the Board. Given the Board is established as a deliberative body and is not expressly provided with any administrative functions it does not seem appropriate that *all* decisions to discontinue investigations be reported to it. Investigations can be discontinued for many reasons, including compelling evidence that the conduct did not occur, insufficient evidence of a contravention, priorities for resource allocation, low probability of a meaningful outcome, lack of resources, etc. All of these mean that there is no matter to take to the Board. These are clearly matters for the Secretariat rather than the deliberative body, the Board.

Section 9 requires the Commission (read Board) to convene a hearing upon receipt of a report submitted pursuant to section 8. Given the cases concerned are discontinuances; it seems unnecessary to mandate hearings. It would seem reasonable that any consideration of discontinuances could be appended to regular Board meeting as a standing agenda item. Section 9 would become redundant if the section 8 reporting requirement is repealed.

None of the stakeholders interviewed commented on the section 8 reporting requirement, or the section 9 hearing requirement.

It is recommended that the issue of discontinuance reporting be one of the issues considered when clarifying the respective roles of the Board and Secretariat.

Part III Unfair Contract Terms

Part III prohibits what are termed 'unfair contract terms'. These provisions reflect the experience that in many situation consumers apparent choice in the market is rendered illusory because they have no real chance to negotiate the terms of contract. While a significant proportion of unfair contracts are likely to be found in mass markets where standard form contracts are the norm, they may also be encountered wherever there is significant power imbalance between traders and consumers, for example where there is a monopoly or oligopoly, where demand in inelastic, consumer are poor, or less educated.

However, consistent with the reliance on well-functioning markets to maximize consumer welfare it is important to ensure that unfair contract provisions do not unnecessarily and unreasonably impinge upon the right to the freedom of contract. Provisions similar to those in Part III are increasingly common in consumer protection laws and these provisions reflect common drafting and good practice in modern consumer protection regulation. It is likely that compliance will be enhanced if a guideline was available to businesses explaining the provisions and providing illustrative examples of 'at risk' contract terms.

None of the stakeholders interviewed, including those representing business interests, expressed any concern about the provisions of Part III or their enforcement by the FTC. Complaints categorized as concerning unfair terms constituted only 1% of complaints received by the FTC in 2011.

It is recommended that the Secretariat publish a guideline explaining the unfair contract terms provisions.

Part IV Unfair Trade Practices

This part consists of 4 groups of prohibitions under the headings of 'Disclosure and Information', Fair and Responsible Marketing', 'Fair and Honest Dealing', and 'Right to Choose'.

'Disclosure and Information'

Sections 19 – 26 are intended to ensure that consumers are provided with certain essential information about the goods and services on offer so that they can make more informed purchasing decisions. This essential information includes price (section 20), full cost (section 26) and such trade descriptions as are prescribed by the Minister. A non-exhaustive list of information that may be prescribed is provided (section 22). It is not clear how traders and consumer can efficiently identify what trade descriptions as been prescribed. Similarly it is not clear how traders can efficiently ascertain which goods must have expiry dates section 24) and what are the determinates of expiry dates for particular products.

Non-compliance with the obligation to provide prescribed trade descriptions (including expiry dates and language requirements) is subject to both sanctions (fines pursuant to section 67) and liability for damages for loss or damage caused by omission of the information (section 23). Misleading trade descriptions are subject to sanction only.

It is recommended that the FTC website include a page either listing any applicable trade description prescribed by the Minister and required expiry dates, or providing links to other government sites where that information can be obtained.

In addition to the requirement to display prescribed trade descriptions there is also an obligation on traders not to display or supply goods where the retailer 'knows or could reasonably determine, or has reason to suspect' that the trade descriptions on the goods is misleading. This obligation is justified because almost inevitably the trader will be in a better position than consumers to determine whether or not descriptions are misleading. Reflecting the dual conditions of a high level of imported goods and a significant number of disadvantaged consumers, there is also a general requirement (section 19) requiring that information is to be provided in plain and understandable language. Compliance with this general requirement is assisted by section 19(2) that sets out a practical description of plain language.

The requirement to provide a sales record disclosing specified information (section 25) has particular merit because this requirement is likely to have the effect of eliminating many trader/consumer misunderstanding as well as facilitating proof of the basic elements of the transaction. Where traders use electronic cash registers or offer electronic credit facilities, meeting this obligation is straightforward. However, for those traders, particularly micro businesses that do not use electronic devices, this requirement may be problematic.

There is a cost of compliance with these provisions that must be borne by manufacturers or retailers. Depending upon the relative elasticities of supply and demand, all or some of the costs of compliance will be passed on to consumers. Consequently, consumer protection legislation must balance the costs and benefits of each disclosure requirement. Interestingly, none of the business representatives interviewed express concern about the mandatory disclosure requirements.

NATCOF executives and the FTC Secretariat both identified failures to comply with these disclosure requirements as being concerningly prevalent, particularly in grocery retailing. Complains received by the FTC do not reflect these observations: failure to display expiry dates rate 0%, failure to provide a sales receipt rate 1%, complaints about product labeling and trade descriptions rate 0%, information to be in plain and understandable language rated 1%. It would be interesting to explore this apparent inconsistency.

It is recommended that the FTC consider the potential of enlisting the cooperation of NATCOF in an ongoing monitoring programme focusing on the display of expiry dates, the failure to label in a an appropriate language and failing to provide receipts, with a view to contributing to FTC enforcement actions.

'Fair and Responsible Marketing'

Sections 27 and 29 prohibit the quasi-fraudulent conduct of bait advertising and referral selling. These are standard prohibitions in almost all consumer laws. Although this conduct is sure to exist in the Seychelles, none of the interviewed stakeholders referred to this type of conduct or the relevant provisions and the Secretariat's complains data do not show them to be a cause of frequent complaint.

Section 28 provides for the Minister to make regulations in respect of distance selling. To date, the Minister has not made any such regulations. None of the interviewed stakeholders referred to problems with trader to consumer distance selling or the relevant provisions and the Secretariat's complains data do not show them to be a cause of frequent complaint. However, given the ubiquity of net access and the relative ease of small-scale importation into the Seychelles it is likely that issues associated with distance selling will become a more common topic of complaint in the future.

None of the stakeholders interviewed, including those representing business interests expressed any concern about sections 27 - 29 or their enforcement by the FTC. From complaint summaries it appears that bait advertising, distance selling and referral selling have not been the subject of a single complaint.

'Fair and Honest Dealing'

The provisions under the heading *Fair and honest dealing* take two different approaches. Sections 30 – 32 (misleading or deceptive conduct, false representations) and sections 35 - 37 (offering gifts and prizes with the intention of not delivering, dishonestly accepting payment and pyramid selling) might be

described as the universal core prohibitions of almost all consumer protection laws. They are relatively straightforward in concept and drafting. In the world of consumer protection enforcement these prohibitions are usually the least problematic to prove because the elements are clear and easily understood but both traders and consumers. If the evidence is there to be had, it is usually obtainable and relatively unambiguous.

The prohibitions on inequitable conduct (sometimes cast as unconscionable conduct, a term used in the section objectives but not in the substantive provisions) on the other hand is often more difficult for traders and consumers to understand because it is not defined in absolutes but in relative terms where conduct is measured against a range of criteria which may be more of less relevant in particular transactional circumstances. The inclusion of the prohibitions on inequitable conduct in both consumer transactions and business transaction is an acknowledgement that small enterprises are often no better able to protect themselves against unscrupulous traders than are consumers. These provisions are not a protection against the consequences of poor judgment or bad luck; these are protections in very limited circumstances where there is a significant power and information imbalance between the contracting parties and the conduct by the more powerful party is reprehensible, as distinct from being merely 'hard' or 'tough'. It is noted that this protection for SMEs has been achieved without the need to expand the definition of the term 'consumer'.

None of the stakeholders interviewed expressed any concern about sections 30 – 37 or their enforcement by the FTC. Misleading or deceptive conduct in relation to goods or services accounted for only 1% of complaints in 2011.

'Right to Choose'

Section 38 is a long and detailed section setting out consumers' rights in the event of receiving unsolicited goods and the related processes to ensure that while on one hand consumers are not put to expense because they have received unsolicited goods while providing basic protection of traders' legitimate rights on the other. On the basis of experience in many other countries appears to be a necessary and uncontroversial provision that elicited no comment form Secretariat or stakeholders. The summary of complaints records does not show any complaints concerning unsolicited goods.

Part V: Fair Value, Good Quality and Safety

Sections 40 sets out mandatory standards for performance of services. The list of requirements is modest but adequate and uncontroversial. The remedies are limited but functional and in most cases sufficient; remedy of any defect or a proportional refund. The use of the word 'proportional' (meaning 'a part considered in relation to the whole') by itself in section 40(2)(b) raises the question as to whether the Secretariat could advise, or the Board order, a full refund in appropriate cases, for example where no service, or only an inconsequential element of the contracted service had been provided.

It is recommended that section 40(2)(b) of the *Consumer Protection Act* be amended to read: 'refund to the consumer a reasonable portion *or the whole* of the price paid for the service performed and goods supplied, having regard to the extent of the failure.

Significantly the choice of refund is at the discretion of the consumer. This may appear to be a controversial empowerment and was criticised by a business representative stakeholder. It is certain that had the provision been drafted to give the discretion to businesses, consumer representatives would be expressing concerns. The current drafting is to be preferred because it shifts the balance of discretion to

the party harmed by the contravention rather than giving it to the party who has failed to meet one or more mandated standard. Consequently it puts some added pressure on businesses to comply. The compliance incentive is increased by section 41 that provides for damages due to a failure to perform services to a required standard.

Complementing section 40 (which relates to services) is section 42, which creates warranties in respect of unsuitable, defective and unsafe goods. With one notable exception the warranties are similar to those in many other national consumer laws; 'fitness for purpose', 'in good working order or not defective' (sometimes called by the less useful term 'merchantable quality') and 'useable or durable for a reasonable period of time, having regard to use'. The exception is the somewhat vague and potentially uncertain warranty in section 42 that goods must be of 'good quality'. The issue here is that what is 'good quality' is more subjective than the other warranties and that both traders and consumer anticipate that the quality of goods varies over time and often in response to price. If over enforced there is potential for this warranty to reduce the market availability of lesser quality, lower priced goods, which may be the only option for low-income consumers.

Section 43 provides a 6 months warranty on parts used in repairs. While at first reading a blanket 6 months period may seem a high threshold, in practice this warranty is tempered by the requirement that the ordinary wear and tear must be taken into account.

Section 44 provides a comprehensive regime for warning consumers of the fact and nature of risks inherent with products and their use. To avoid consumer confusion and trader uncertainty and higher than necessary compliance costs it will be necessary to harmonise the advocacy, awareness and enforcement activities associated with this provision with other regulation relating or particular types of risk, e.g. chemical, electrical, medical etc. It will also be important to monitor how traders go about meeting their compliance obligations. If the provision is to have ongoing utility, it is essential that warnings be clear and succinct, avoiding the common scenario where consumers remain ignorant of relevant risks because of the over-supply of marginally useful information.

It should be noted that failures to meet the required standards for the performance of services (section 40) and goods (section 42) do not merely given rise to rights that may be privately enforced, as is the case in common law, contract law and some national consumer protection laws. Failures to meet the required standards constitute contraventions of the Act and the FTC is empowered to take action in response. This is significant because it gives the provisions 'bite' or 'teeth', simply because they are less likely to be flouted if there is public enforcement and because consumers who have been harmed by contraventions are more likely to enjoy a remedy. A number of stakeholders including NATCOF voiced the view that the failure to meet standards of goods and service of the type addressed here constitute a frequent and serious problem for consumers the Seychelles.

Conduct address in Part V is a major area of complaint to the FTC. The complaints summary for 2011 showed that complaints concerning:

- warranty for unsuitable, defective and unsafe products accounted for 23% of total complaints received;

- standards of performance of services accounted for 14% of total complaints received;

- liability for damage due to failure to perform services to required standard accounted for 2% of total complaints received; and

- warranties on repaired goods accounted for 1% of total complaints received.

Part VI: Consumer Safety

Sections 49–59 provide a comprehensive regime for establishing 'General Safety Requirement', the means of determining the Requirement in particular cases, of investigating potential contraventions, and resolutions to contraventions. While the general layout of the regime is logical, the detail of individual sections is complex, making awareness training for businesses more difficult than it will be for other Parts and certainly more difficult than is desirable.

Several elements of the consumer safety provisions should be noted:

- the exception provided subsection 50(4)(a) provides a potential hole in the product safety net because it provides that supplying an unsafe product is not a contravention if 'the person reasonably believed that the goods would not be used or consumed in Seychelles'. Is the potential harm to Seychellois outweighed by other policy considerations such as the cost to business and less competitive exports? Are there any significant exports that would be adversely affected? Is it defensible to include this defence when the number one area of consumer complaint is about unsafe or poor quality imported goods? Repealing subsection 50(4)(a) would contribute to simplifying the Part and increase the product safety net over the Seychellois.

- subsection 50 (4)(b)(ii) provides a defence 'if the person neither knew nor had reasonable ground for believing that the goods failed to comply with the general safety requirement'. This might be described as a *defence of ignorance* because a trader would be in a safer position if he did not make enquiry or did not have in place a product safety compliance program than if he did. An alternative that would encourage compliance without creating strict liability would be to recast the defence along the lines of 'if the person could not have known nor found out from reasonable enquiry that the goods failed to comply with the general safety requirement'.

- subsection 50(5)(a) makes it clear the mere fact that the goods in question were not actually acquired for a person's private use or consumption, does not absolve the trader from the obligation to meet the general safety requirement. This provision is a valuable aid to enforcement because it removes a 'technical' defence in situations where the particular goods were purchased by an investigating officer of the FTC or by a business complainant.

- subsection 50(5)(b) is a difficult provision to understand but it seems to exclude from the definition of 'in the course of carrying on a retail business' goods that have 'not previously been supplied in Seychelles'. The logic of this carve-out is not apparent.

It is recommended that:

- **subsection 50 (4) (a) be repealed**

- **subsection 50 (4) (b) (ii) be amended to replace the words 'the person reasonably believed that the goods would not be used or consumed in Seychelles' with words similar to 'if the person could not have known nor found out from reasonable enquiry that the goods failed to comply with the general safety requirement'**

- **subsection 50 (5) (b) be repealed.**

- A hierarchical progression of regulatory responses are provided which gives the FTC both a flexibility in action to match varying degrees of harm or potential harm from unsafe products (Voluntary recalls section 58, Prohibition and Warning Notices section 52, compulsory recall of goods section 54 and fines) and the ability to undertake both quick, decisive action when serious contraventions are detected in the market (Powers of the Commission section 57 and Notice to produce information section 53).

  To date:

  - no Prohibition and Warning Notices pursuant to section 52 have been issued;
  - no Notices to produce information pursuant to section 53 were issued;
  - seven Notices for product recall have been issued, pursuant to section 54. Five were in respect of substandard electrical cables with false descriptions. Two were in respect of a toy cap gun and capsule that can cause harm to children using the toy. In each case the Notice was complied with;
  - no Notices pursuant to section 57 were issued;
  - no voluntary recalls have been notified pursuant to section 58. (Probably because no voluntary recalls were undertaken.)

- sections 53 and 57 are clearly intended to aid investigations by empowering the FTC to obtain information that would otherwise not be obtainable. Such powers are commonplace in both consumer protection and competition laws. It is reasonable that there be some limits to restrict the otherwise unfettered ability of the FTC, or others, to make use of information obtained pursuant to these powers. For example in some jurisdictions the information cannot be used in only civil and not criminal cases. However, subsection 57(6) seems to severely limit the use of such information to the point where it is questionable whether the power is at all useful: "… shall not be admissible in evidence against that person – (a) in any proceeding instituted by that person; (b) in any other proceedings, except proceeding against that person for a contravention of a provision of this section'. It would seem that such information cannot be used by the FTC in any case it may take, except in respect of an action for failure to adequately respond to a Notice issued pursuant to section 57. It is not apparent why (a) is required given the wide application of (b). All in all if it difficult to see why the FTC would bother exercising its powers under section 57.

  In a small economy such as the Seychelles where business anonymity is impossible and reputation is likely to be relatively more important, it is not altogether surprising that that as a consumer protection authority, the FTC has not found it necessary to use its powers under section 57. However, it is surprising that this power has not yet been used in respect of competition investigations since such powers are heavily relied upon in most jurisdictions.

Part VII: Industry Codes

Around the world the role of industry codes in consumer protection is a mixed one. On one hand there is the real potential that industry codes could deliver problem specific, efficient and effective consumer protection at a low cost to the government and business. On the other hand there are often concerns that industry codes are nothing more than code for 'self-regulation', which itself is sometimes crudely referred

to as ‘leaving a fox in charge of the hen house’. Whether industry codes will deliver efficient and effective consumer outcomes will depend upon the circumstances of each code: the dynamics of the industry, the particular consumer problems being encountered and the form and substance of any supporting regulation. Section 61 sets up the basic prohibition, that a participant in an industry shall not ... contravene an applicable industry code. Section 62 empowers the Minister to prescribe industry codes, to declare an industry code … and to make such provision as the Commission recommends fit for the registering of persons bound or otherwise affected by an industry code.’

The understandable concerns that consumer may have about mandated industry codes delivering pro consumer outcomes may be mitigated by the significant safeguards in the regulation. Importantly the process for establishing an industry code includes a consultation process during which the Commission seeks public comment and consults with industry and ’relevant accredited consumer protection groups’. It is not clear what is meant by ’relevant *accredited* consumer protection groups’. Interestingly a code recommended to the Minister may be different to an existing industry code (subsection 63 (2)). The Commission is charged with monitoring and reporting on mandated industry codes (section 64), which should preclude any worry that they may be a case of ‘set and forget’.

To date the FTC has not recommend any industry Code to the Minister and the Minister has not mandated any code.

Part VIII: Penalties and Remedies

Commonly accepted objectives of sanctions (penalties and remedies) provided by consumer protection laws and imposed by authorities include:

- stopping the contravening conduct;
- undoing the harm so far as that is possible;
- clawing back ill-gotten gain;
- encouraging future compliance by the contravener;
- encouraging market wide compliance;
- punishment of the contravener.

Penalties, usually in the form of a fine, are the most commonly provided and imposed sanction. Unless they are token or disproportionately low compared to the ill-gotten gain, penalties are readily recognised as a punishment. Section 67 confers on the Commission the power to order penalties in respect of a contravention of any prohibition in the Act, although this is not absolutely clear since section 67 refers to ‘any requirement or prohibition contained *in sections* [own emphasis] the Commission …’

Section 67 seems to confer on the Commission the power to order penalties in respect of a contravention of any prohibition in the Act, although this is not absolutely clear since s 67 refers to ‘any requirement or prohibition contained in sections …’.

The maximum penalties are set at SCR100,000 (equivalent to approximately US$7,740) for an individual and SCR400,000 (equivalent to approximately US$30,970) in the case of a person other than an individual (i.e. a legal person or a company). By way of comparison this compares with a maximum

penalties under the *Australian Consumer Law* of approximately US$220,000 for individuals and US$1,1000,000 for body corporates. Adjusting for the difference in GDP per person between the Seychelles and Australia this still has the notional comparative Australian maximum fines at approximately US$135,000 for natural persons and US$674,000 for body corporates. While it is not suggested that the Australian level of fines are the optimum level or have any relevant precedent value, it does raise the question as to whether the level of fines in the *Consumer Protection Act* are at a level that is likely to encourage long term compliance.

The setting of appropriate penalties in particular cases is usually guided by precedent. However, in the case of the *Consumer Protection Act,* section 67 sets out factors that should be considered when determining the appropriate penalty. This list is appropriate and quite comprehensive of relevant factors. It is important that consumers, business and the government understand how and when the Board considers these and other relevant factors in each case. Predictable and rationally based sanctions will encourage compliance and give confidence to consumers and government that the law is being applied appropriately in each circumstance. Reported determinations (see Attachment 1) show that the largest fine so far imposed by the Board was SCR60,200 or 15% of the maximum fine for corporations of SCR400,000 provided in the Act.

So far the records of Board decisions have not explained the reasoning for fines imposed (see the observations below on the fine imposed in the Airtel case.) and observers are left wondering as to why higher penalties have not been imposed when the law provides for it.

It is also important that the maximum fines for contravention consumer protection provisions:

- Provide scope for the Board to impose meaningful penalties in gross cases where:
    - consumer detriment is substantial;
    - where the ill-gotten gains were substantial and not recoverable; or
    - the conduct is particularly reprehensive, for example repeat offences, offences against vulnerable groups etc.

- Maintain a level of comparison with the fines available in respect of contraventions of the *Fair Competition Act*. For example, if the fines for anticompetitive conduct are increased over time and those for consumer protection contraventions are not, the lagging consumer protection penalties risks sending a signal that consumer protection is the 'poor cousin' to competition concerns and that compliance with these obligations are less necessary.

As a response to the criticism that the FTC/*Consumer Protection Act* lacks bite, it has been suggested that the Act be amended to specify a formula for the imposition of fines. While superficially attractive as a solution, the sentencing flexibility lost with the use of a formula seems an undesirable trade-off because of the wide variability in the circumstances involving, and resulting from, contravention of consumer protection provisions. Rather, a wide discretion should be left to the Board to match the sanction to the case in question. The disinclination of the Board to impose fines to the maximum now available or to provide sentencing explanations in its decisions should be otherwise addressed.

It is recommended that:

- **the maximum fines be increased to a level where they provide the Board with penalty options to provide a significant deterrent to the worst contraventions and to reflect the**

quite significant financial incentives some times attaching to unlawful conduct in a commercial environment.

- **section 67 be amended to read:**

67.(1) Where the Commission determines after a formal hearing that a person has contravened any requirement or prohibition contained in sections the Commission may order the person-
(a) in the case of an individual, to pay a penalty o f a sum not exceeding SCR1,000,000; or
(b) in the case of a person other than an individual, to pay a penalty of a sum not exceeding SCR4,000,000.

Penalties for breach of provisions of this Act

(2) Where a body corporate is found to be in breach of this Act, any director or officer of the body corporate who knowingly authorised, permitted or acquiesced in the act or omission that constituted the breach shall also be liable to a penaltyofasumnotexceedingSCR1,000,000.

- **The routinely consider each of the factors listed in section 67 and any other factors it considers it believes relevant when imposing sanctions, and that its reasoning be referred to in its written determinations.**

It is of note that subsection 67 (4) specifies that penalties collected by the Commission shall be paid into the Consolidated Fund. This issue is discussed elsewhere in this report.

Section 68 provides that, in addition to a penalty imposed under section 67, the Commission:

(a) shall where applicable, direct the person to cease the conduct constituting the contravention within a specified period;
(b) may require the person to take such further action as in its opinion, is necessary.

An order under section 68(a) is akin to an injunction and so is clearly directed towards stopping the conduct. Section 68(b) is cast so widely that the Board seems to have a power to responsibly challenge its imagination. Perhaps this power could be directed towards undoing harms caused by contraventions, clawing back ill-gotten gains, encouraging future compliance by the contraveners and encouraging market wide compliance.

Potentially some or all of the following orders may come within the ambit of section 68(b) orders:

- payment of contributions to consumer and/or business educational campaigns
- the implementation of corporate compliance programs
- restricting the activities of contraveners, for example banning there participation in certain types of business or in certain capacities, e.g. as directors or managers
- a form of ‘corporate probation’
- a form of corporate community service

- corrective advertising

Ultimately how wide and useful section 68(b) is in delivering the various objectives of sanctions will need to be tested both by the Board and Courts. Certainly this process could be beneficially focused and accelerated if the Secretariat engaged with stakeholders in respect of the need to meet objectives in addition to punishment, stopping the conduct and compensation.

Importantly section 70 establishes that a person who fails or refuses to comply with an order, direction or undertaking of the Commission or of the Tribunal commits an offence. In this case, while the maximum fines are modest there is provision for a term of imprisonment not exceeding 2 years. The provision of a potential prison term provides a powerful compliance incentive not only by individuals bit also by corporations, because of the practical truism that nothing focuses the mind of the corporation more than the threat of jail time for the executives.'

It is recommended that:

- **consideration be given to amending the *Consumer Protection Act* to provide a wider range of sanctions and remedies.**
- **the Board consider the expanded use of section 68(b) where it thinks appropriate.**

Part IX: Enforcement

The first section of this Part is both the simplest and the most significant; it vests the Commission with the power to enforce the *Consumer Protection Act* in accordance with this Part. The Part then goes on to provide the Commission with a range of enforcement responses, including: compliance notices (section 72), interim orders (section 74) and other orders (section 76), the ability of the Commission to accept undertakings (section 75). The time limitation on making other orders is very adequate; any time within 5 years from the time when the matter giving rise to the application occurred.

To date 78 Compliance Notices pursuant to section 72 have been issued. All were in the retail sector for supply expired goods, goods without understandable language or not providing a receipt. No Interim Orders pursuant to section 74 have been issued. The Secretariat has been accepting undertakings were appropriate cases as a matter routine, although no statistics on this are collected and published. No Other Orders pursuant to section 76 have been made.

To date only 3 matters have been appealed to the Tribunal (all consumer protection cases) and these all involve the same party.

In the early days of a competition law, a consumer protection law, or in deed any regulator with enforcement responsibilities, one can expect legal challenges that test the laws and their application by the authority. To date there have been only two such challenges. The first challenge alleges abuse of power, intention to close down a business, malicious intent on the part of an investigator. That case is still before the Supreme Court, adjourned *sine die* (without date) and is unlikely to be of any useful precedent value. The second is an appeal against the Board's decision to hear a case *ex parte*.

Part X: Miscellaneous

This final part of the Act is short in length but nevertheless very important. Section 77 provides for appeals by parties who are dissatisfied with an order or direction of the Commission. Unfortunately since the appeal is to be lodged with the Tribunal and the Tribunal does not yet exist, this provision is effectively inoperable.

As was noted earlier, the *Consumer Protection Act* is not the only consumer protection regulation in the Seychelles. Consequently it is appropriate that the FTC form working relationships with other relevant regulators to ensure the effective and efficient implementation of their respective responsibilities and the implicit consumer protection policy. The objective of these relationships would be to ensure quicker and more effective resolution of consumer problems and the minimisation of regulatory costs through the avoidance of duplication. The FTC interaction with other regulators is discussed below in Sub-Part 3.4 of this Report.

Section 79 of the Act confers upon the Commission the responsibility for the promotion of awareness in consumer matters. As noted elsewhere in this report this responsibility is an integral component of a strategic approach to the long-term minimization of consumer problems.

Finally section 80 of the Act confers upon the Minister the power to make regulations in respect to a wide range of matters relevant to the *Consumer Protection Act*.

Other Consumer Protection Legislation

While other existing legislation make mention of the general aim to protect consumers and include specific service quality provisions (for example the Broadcasting and Telecommunications Act), none include provisions similar to Parts III – IX of the *Consumer Protection Act*. However, some Bills currently being drafted (for example the Electronic Communications Bill, amendments to the Food Act, the Seychelles Media Commission Act) to include consumer protection provisions.

The move to include consumer protection provisions in wider legislation is to be applauded. It is likely that many consumer protection problems are product or industry specific in occurrence, so that where there is a specific regulator it should be well placed to facilitate better outcomes for consumers. Close liaison and issue specific cooperation between authorities will be essential for:

- increased consumer confidence that their interests are being prioritised and effectively managed by government

- reduced compliance uncertainties and costs for businesses

- more effective and efficient advocacy and education and intelligence gathering by consumer protection authorities

Of course sector specific regulators must guard against the risk of capture by the industry they regulate. Close liaison and co-operation with the general consumer protection regulator can mitigate this risk.

Perhaps somewhat controversially, the reviewers differentiate between the proliferation of competition and consumer protection provisions and their respective enforcement responsibilities. In a nutshell:

- there are likely to be greater economy-wide effects from contraventions of the competition provisions than from contraventions of the consumer protection provisions;

- many of the competition provisions are complex and their meaning will be developed by a consistent history of both administrative application and adjudicative precedent. In contrast most of the consumer protection provisions are not complex;

- many consumer problems are amenable to resolution by negotiation between the parties and by directions of the relevant authority (for example clarification of technical, performance or disclosure standards). This is not the case with most anti-competitive conduct;

- many consumer protection problems are public in their occurrence or in their resolution. This not the case with most anticompetitive conduct which is secretive post the enactment of a competition law. If a problem is detected and dealt with by one regulator, the general regulator may not even be aware of the matter.

Consequently:

- There is a strong argument that the delivery of effective competition policy and law requires the general competition authority (the FTC) to have an over-arching responsibility. This is particularly important in areas such as mergers and hard-core cartels.

- While there is a need for all authorities with consumer protection responsibilities to liaise and co-operate there is not a strong argument for the general authority to have an overarching responsibility.

In considering recommendations in respect of amendments to the *Consumer Protection Act* it is important to note that: (i) the Act was only enacted in 2010; (ii) not all of the provisions of the Act have been utilized in the course of investigations or before by the Board; and (iii) the Board has not imposed sanctions to the maximum provided by the Act.

Coverage of the Consumer Protection Act

The reviewers have concluded that while the coverage of the *Consumer Protection Act* is superior to many consumer laws in the developing world, it is not comprehensive. Seychellois are entitled to expect that their consumer protection regime delivers a comprehensive regime of compliance, detection, investigation, determination and sanctions. Consideration should be given to widening the scope of protection provided by the Consumer Protection Act to include:

- Provisions specifically giving consumers the right to restrict unwanted direct marketing.

- Provisions relating to:

    - consumers' right to select suppliers;

    - expiry and renewal of fixed-term agreements;

    - pre-authorisation of repair or maintenance service;

    - consumers' right:

(i) to cooling-off period after direct marketing;
(ii) to cancel advance reservation, bookings or order;
(iii) to choose or examine goods;
(iv) with respect to delivery of goods or supply of service; and
(v) to return goods;

- disclosure of reconditioned or grey market goods;
- disclosure by intermediaries;
- identification of deliverers, installers and other;
- negative opinion marketing;
- catalogue marketing;
- trade coupons and similar promotions;
- customer loyalty programmes;
- promotional competitions;
- alternative work schemes;
- agreements with persons lacking legal capacity;
- over-selling and over-booking.

The South African Consumer Protection Act provides an excellent model for consideration.

It is acknowledged that the problems and issues addressed by these types of provisions are not currently the subject of significant complaint to the FTC. Lack of reporting is not evidence that the problems are not affecting Seychellois. It could be the case that consumers are simply accepting of the *status quo*, they are not convinced that there is any point in reporting these concerns, or that other problems are of greater concern. In any case determination of this issue was beyond the scope of this consultancy. The reviewers stop short of making any recommendations in respect of the above points

Of course, amending the Act to include these additional protections will take the Seychelles legislation further away from harmonisation with the consumer provisions of the COMESA Competition Regulations. This is a 'cost' that would need to be balanced against the potential benefits to the Seychellois. Harmonisation is an obligation of COMESA membership but should not mean the maintenance of the lowest common denominator when it comes to consumer protection. Rather, it places an onus to ensure that compliance with the national laws is not at odds with harmonization and freer intra-regional trade.

The reviewers propose that amendments to expand the coverage of the *Consumer Protection Act* by the insertion of new contraventions should be considered a longer-term goal and a lower priority compared with recommendations directed to towards more effective and efficient enforcement of the current provisions. The FTC should provide the Department of Trade in the Ministry of Finance, Trade and Investment, and the Attorney General's Office with periodic advice on: (i) emerging areas of consumer

problems that are not adequately addressed by existing provisions; and operational problems arising from the current drafting of the Act.

Potential New Short Term Expansion of FTC Consumer Protection Role

The reviewers understand that the Seychelles Government is intending to make significant changes to the taxation regime, including the introduction of value-added-tax (VAT). Major changes in tax regimes, whatever their policy objectives, are seldom popular if only because those who benefit are usually quiet while those who will pay more are usually vocal in their criticism. The debate about and ultimate success of, a new tax regime is made more difficult if businesses take the opportunity to increase prices beyond the effect of the new taxes (or fail to fully pass on decreases) while justifying (or blaming) increases on the imposition of the new tax.

In Australia, the introduction of a new GST was accompanied by new powers for the Australian Competition and Consumer Commission (ACCC) to combat 'price exploitation'. The result was that the GST introduction was less controversial, and price changes only reflected the actual net effects of the tax changes. That was a widely acknowledged win for all stakeholders: the government, business, consumers and the ACCC.

This new and temporary role should not be confused with price setting. Businesses remained free to make their own individual decisions as to what prices they charged before and after the new tax. What they were prohibited from doing was unjustifiably blaming their decision to increase prices on the new tax. Because the responsibilities were additional the ACCC's historic role additional funding was provided by government.

It is proposed that urgent consideration be given to amending the *Consumer Protection Act* to give the FTC specific powers in the relation to business pricing conduct during the phase-in period of the new tax regime.

It is recommended that consideration be given to amending the *Consumer Protection Act* to give the FTC specific powers in the relation to business pricing conduct during the phase-in period of the new tax regime, together with appropriate funding.

3. INSTITUTIONAL FRAMEWORK

3.1. Institutions

There are two main institutions that are provided for under Seychelles' competition and consumer protection legislation: (i) the FTC; and (ii) the Appeal Tribunal.

3.1.1. The Fair Trading Commission

The FTC is an autonomous Statutory Body established under the Fair Trading Commission Act, 2009 to administer and enforce the Fair Competition Act, 2009 and the Consumer Protection Act, 2010. The Commission is a quasi-judicial body with both investigative and adjudicative functions. In practice, but not specifically provided for in any of the Acts that the FTC administers, the Commission has two

operating arms: (i) a Board of Commissioners, which is its adjudicative arm, as well as its governing body; and (ii) a Secretariat, which is its investigative and administrative arm.

As pointed out by the Secretariat of the Commission, the separation of the Commission's investigative and adjudicative functions under the *Fair Trading Commission Act* is not clear and may cause enforcement problems in the future. The Legal Department of the Commission correctly pointed out that the Act does not clearly define when and what sort of actions should be taken by the Secretariat (i.e., the Chief Executive Officer and staff of the Commission) and by the Board of Commissioners due to the term 'Commission' referring to both Board and staff. The term 'Commission' is defined under the Act as to mean "the Fair Trading Commission established under section 3(1)" and this section merely states that the Fair Trading Commission is established as a body corporate. While the term 'Commission' in the Act therefore refers to both the staff and members (i.e., Commissioners) of the Commission, the Board of Commissioners is separately defined in the Act (in terms of section 2 of the Act, the term 'Board' is defined as to mean "the Board of Commissioners appointed under section 5(1)(a), and the term "Commissioner" is defined as to mean "a member of the Board").

The statutory functions of the Commission in terms of section 4(1) of the *Fair Trading Commission Act* include both case investigative and adjudicative functions, which are not apportioned between the Commission's Secretariat and Board of Commissioners. It is however inferred in section 23 of the Act that the Secretariat is the investigative arm of the Commission, through the provision that "[t]he members of staff employed under section 22 *shall investigate* such matters as are stipulated by the Chief Executive Officer and report their findings to him or her". Further, it has become established practice in Seychelles that the Secretariat investigates competition and consumer complaints and submits reports on the findings to the Board of Commissioners. Similar arrangements are in place in other competition jurisdictions in the region in similar situations as Seychelles, such as Namibia, Zambia and Zimbabwe, by virtue of the fact that full-time Secretariats have more time to undertake investigations than part-time Boards of Commissioners.

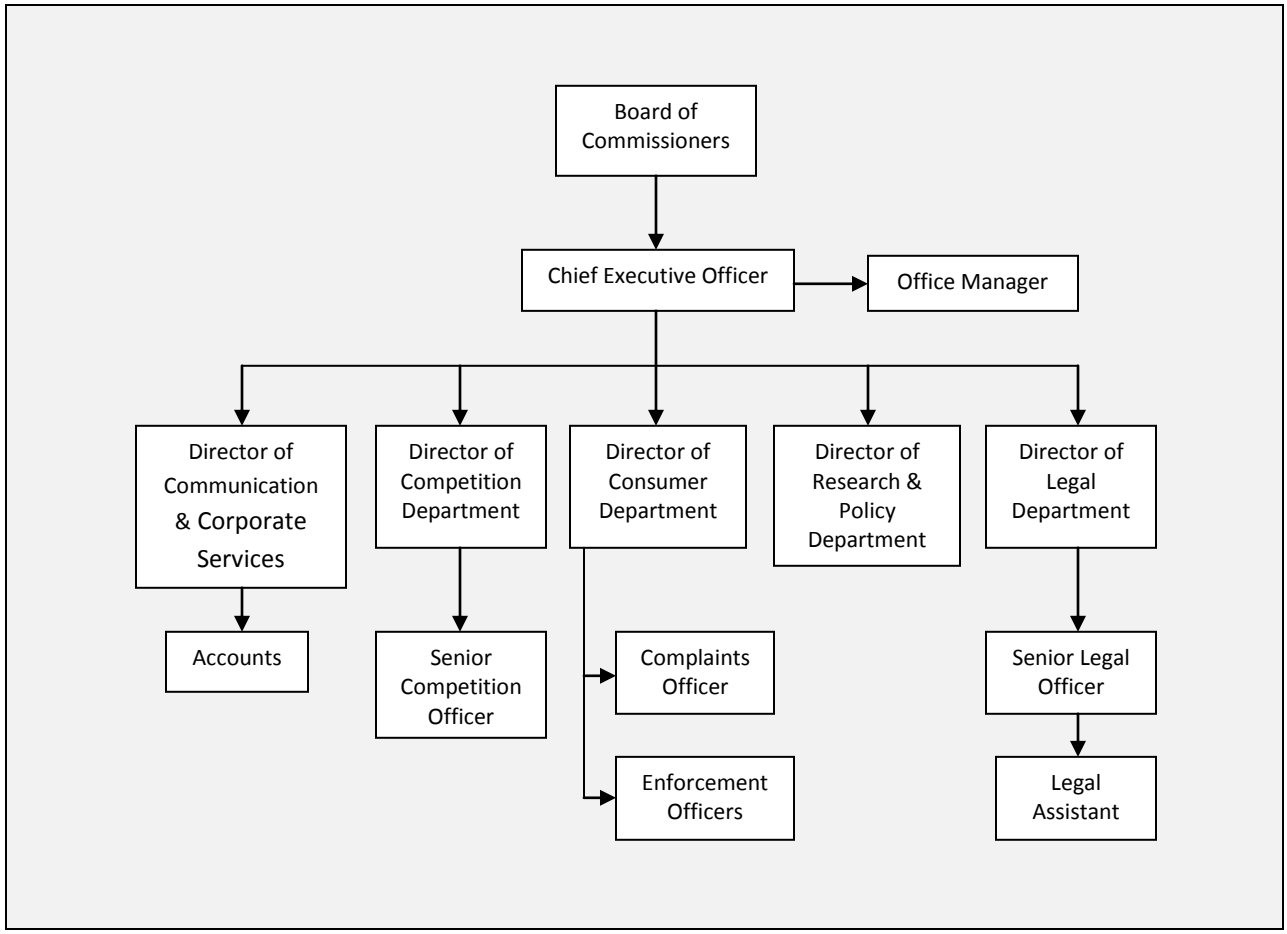
Unclear statutory separation of a Commission's investigative and adjudicative functions however has grave legal implications. In Jamaica, for example, the constitutional validity of the country's Fair Trading Commission was successfully contested in 2001 before the Court of Appeal, rendering the competition authority practically inoperative and many core provisions of the Fair Competition Act unenforceable.[51] The fundamental issue in this instance was the lack of separation of the adjudicative functions from the investigative functions under the Act. The Court of Appeal found the lack of separation of the adjudicative and investigative functions contrary to the principles of natural justice. The Jamaican competition authority had no choice but to revert to moral suasion and voluntary compliance to fulfill its mandate.

It is recommended that there be a clear separation of the FTC's investigative and adjudicative functions under the *Fair Trading Commission Act*, with the Commission's Secretariat being formally given statutory investigative functions and the Board of Commissioners adjudicative functions with well-defined responsibilities and spheres of operation.

The current organizational structure of the Commission is shown in the Figure below.

[51] UNCTAD Report on Voluntary Peer Review on Competition Policy: Jamaica, United Nations, New York and Geneva, 2005.

Organisational Structure of the Fair Trading Commission



Source: Fair Trading Commission, Seychelles

During the fact-finding visit to Seychelles, the staff and Chief Executive Officer of the Commission expressed concerns that the above organizational structure is not conducive to efficient interaction between staff, and allocation of staff attributes to cases. Particular concerns were expressed in respect of the functions of research and policy, legal, and communication that support the core functions of competition and consumer protection. These concerns will be analysed below under the section on the Secretariat.

(a) Board of Commissioners

The Commission's Board of Commissioners was appointed in terms of section 5 of the *Fair Trading Commission Act* for a three-year term of office, which expires in November 2012. The Chief Executive Officer of the Commission is an *ex officio* member of the Board. In terms of section 5(2) of the Act, appointed members of the Board should be "persons from the public and private sector appointed by virtue of their qualifications and experience in law, economics, accountancy or commerce". The statutory composition of the Board is 5 members.

The Commissioners, meeting together, act as the strategic decision-making body for the FTC as an institution. They also take decisions on all investigations of restrictive practices under the *Fair*

Competition Act and the *Consumer Protection Act* conducting hearings with the parties concerned and where necessary, imposing directions or agreeing to undertakings.[52]

At the time of the fact-finding visit to Seychelles, the FTC's Board of Commissioners had 4 members, following the resignation in of the Chairman, Mr. Shelton Jolicoeur, a lawyer, as follows:

FTC Board Member	Full-Time Occupation
Mrs. Dolly Tirant	Manager, Corporate Business Unit of the Mauritius Commercial Bank (Seychelles) Limited
Ms. Annie Vidot	Loans Manager, Development Bank of Seychelles
Ms. Jenna Thelermont	Assistant General Manager, Seychelles Savings Bank Limited
Mr. Philippe Chong Seng	Managing Director, Epsilon Electrical Consultancy

The following are the brief biographies of the then members of the Board, demonstrating that their appointment was in accordance with the requisite qualifications and experience:

Annie Vidot

Mrs. Vidot completed her BA (Hons) in Accounting and Finance at the London Metropolitan University, UK, in 2004, as well as several courses in related fields: Banking & Development, International Ireland Ltd., Dublin/London, 2007; Compliance & Risk Management Programme, Bakerplatt, Jersey, 2006; Anti-Money Laundering Refresher Training, Bakerplatt, Jersey, 2006; SME Financing and Development, Malaysia, 2010.

She has been the Loans Manager at the Development Bank of Seychelles since 2007 and has held several posts in the banking sector. For instance, Internal Auditor, Development Bank of Seychelles (2005-2006), Project Officer/ Senior Project Officer, Development Bank of Seychelles (1995-2005), Audit Assistant/ Audit Supervisor, Ministry of Finance, 1993-1995.

Dolly Tirant

Mrs. Tirant is a Chevening Scholar with an MSc in International Banking & Finance from Heriot Watt University, Edinburgh, Scotland. Her first degree was a Bachelor of Commerce with a major in Banking and Finance from the SNDT Women's University, Bombay, India.

For the last 9 years she has been working with The Mauritius Commercial Bank (Seychelles) Ltd. She is presently the Corporate Manager. Prior to this she worked for 15 years with the Ministry of Finance, Seychelles, in Financial Planning and Control, Investment and Trade. Her last position with the Ministry was Director of Financial Services.

Mrs. Tirant is a member of the Soroptimist Club of Victoria, an international women's service club recognized by the UN that promotes the rights and welfare of women and children.

Jenna Thelermont

Ms. Thelermont has been the Assistant General Manager of Seychelles Savings Bank since 2007, after occupying the post of Finance Manager at the same bank for 11 years.

She has completed several studies in finance and accounting, from AAT at the Seychelles Institute of Management (in 1991) to ACCA at the Financial Training Company, UK (1999). She has also followed short courses in the subject, for instance, Certificate in Bank Card Management, Institute of Financial Services (2004) and Strategy & Management in Banking Programme, International.

[52] FTC website, http://www.ftc.sc/index.php?option=com_contents&view=article&id=21&Itemid=90

Philippe Chong Seng

Mr. Chong Seng is a Chartered electrical engineer presently engaged in electrical consultancy work. He has extensive experience in operations and management of utilities at government, parastatal and private company levels. He is presently interested in energy savings and alternate energy issues with a view to reducing the country's total dependence on fossil fuels for its energy needs.

Source: FTC website

However in January 2013, Board membership was however changed by the Minister to its full statutory complement as follows:

- a new Chairman was appointed, Mr. Collin Jean-Louis, from the Ministry of Finance, Trade & Investment;
- two other new members were appointed, Mr. Michael Nalletamby, PS from the Ministry of Industry and Natural Resources, and Mr. Victor Pool, a counsel from the Attorney-General's Office;
- two old members were reappointed, Mr. Philippe Chong Seng and Ms. JennaThelermont; and
- two old members were retired, Mrs. Annie Vidot and Ms.Dolly Tirant.

The Act does not specify how many times the Board should meet, only that it "may meet at such times as the Chairperson may determine". In practice however, the Board meets twice a month on average, once on administrative matters and once on consumer/competition cases.

Consultations with both the Secretariat and the Board of Commissioners during the fact-finding visit to Seychelles identified quorum concerns over the composition of the Board. As has already been stated, the Board is made up of 5 Commissioners, who are appointed on a part-time basis, and Board decisions are taken on the basis of majority voting. Section 15 of the Fair Trading Commission Act, 2009 stipulates that 3 Commissioners should constitute a quorum for any meeting of the Board. The disclosure of interest provisions of section 11 of the Act mean that in case of conflict of interest, Board members need to abstain from voting, after disclosing the interest. The previous Board of Commissioners had three members who had direct interests in the banking services sector, and felt obliged to recuse themselves from any competition and consumer protection decision involving players in that sector, or any of their major customers, thus affecting the Board's decision-making quorum. The Board was thus rendered impotent to decide on any case affecting the banking and financial services sector.

The above concerns were also highlighted in the Massimiliano Report under the EU TradeCom Facility Project for Seychelles.[53]

The appointment of members to the Board of Commissioners on terms of only three years was also raised as a concern by both the Secretariat and Board of Commissioners during the fact-finding visit to Seychelles. It was submitted that the period is far too short to enable members to grasp the intricacies of competition and consumer protection law and policy, enabling them to effectively contribute to decision-making on such matters. In this regard, it was noted that none of the present members of the Board had previous exposure to competition or consumer protection law before joining the Commission, with the

[53] Massimiliano Gangi (Team Leader), 'Technical Assistance to the Seychelles Ministry of Finance in Implementing the Fair Trading Commission of Seychelles', Project Management Unit of the ACP TradeCom Facility, Brussels, December 2010.

only effective training given to them in these fields being a *Course on Competition Law Enforcement*, which was an induction course for the Commissioners on institutional and organizational aspects of competition law enforcement, and intermediate training on investigative procedures and case handling for investigative officers and case handlers of the FTC. The course was organized by UNCTAD and undertaken in March 2012, despite the terms of office of the Commissioners ending in November 2012.

More competition and consumer protection adjudication courses are required for the Board of Commissioners, given the Board's limited knowledge and experience in this field, and the fact that an increasing number of cases, particularly consumer protection cases. Consideration could also be given to assigning a regional or international competition and consumer protection expert for a period of 3 to 6 months to assist in the training of the Board of Commissioners and in the implementation of the required changes in the Board's procedures.

It is recommended that membership of the FTC's Board of Commissioners be increased from 5 to 8 members to ease quorum problems on the Board. For the same reasons, members of the Board should be drawn from diverse economic backgrounds to avoid one sector dominating its membership. The recent Board appointments are therefore in the right direction.

It is also recommended that the terms of office of members of the Board be increased to a maximum of 5 years to enable the members to fully contribute to the operations of the Commission with sufficiently accumulated experience as competition and consumer protection adjudicators. The terms of the members should however be staggered to avoid sudden and total exit of experience and knowledge.

It is further recommended that technical assistance and capacity building be given to the Board of Commissioners in the highly specialized area of competition and consumer protection adjudication, including the provision of an expert consultant for a period of 3 to 6 months to assist in the training of Board members and implementation of the required changes in the Board's procedures.

The appointment of the Chief Executive Officer of the Commission as an *ex officio* member of the Board of Commissioners is also cause for concern. The Chief Executive Officer heads the Commission's Secretariat, essentially the Commission's investigative arm, while the Board is the Commission's adjudicative arm. Natural justice principles dictate that there should be a clear separation of the competition authority's investigative and adjudicative functions, otherwise the Commission's decisions on competition or consumer protection, cases can successfully be appealed against in law courts, as happened in Jamaica.

It is noted that the Massimiliano Report welcomed the *ex officio* Board membership of the Chief Executive Officer since this would build a strong linkage between the Board and the staff. The Chief Executive Officer can still link the Board with the staff without necessarily being a member of the Board as they would in any case be required to be the technical resource persons at Board meetings on the operations and activities of the Commission.

It is also noted that the Board of Commissioners in consultations held during the fact-finding visit to Seychelles advised that the Chief Executive Officer only participates in the Board's deliberations and decision-making on administrative matters, and not on the determination of competition and consumer cases, which are considered at separate meetings. It was also advised that the Chief Executive Officer does not discuss with the Board investigations into competition and consumer complaints before the

submission of the reports on the investigations to the Board. The above precautions are only administrative however, and are not enshrined in the Act.

It is recommended that the *ex officio* membership of the FTC's Chief Executive Officer to the Board of Commissioners under section 5(1) of the *Fair Trading Commission Act* be removed to avoid conflict of interests problems in the Board's determination of competition and consumer protection cases. Alternatively, a separate Board could be established to only consider and adjudicate on competition and consumer protection cases, on which the Chief Executive Officer would not be a member.

The question of Commissioners' fees was also raised by the Commissioners during the fact-finding visit to Seychelles. It was submitted that members are given a fixed Board fee that is not adequate for the work involved, which includes hearings and a lot of reading before meetings. It was found that members of the Board of Commissioners of the FTC are presently receiving relatively higher monthly fees than the average fee of members of most other boards of Statutory Bodies. The current Board fee of the Chairperson of the FTC is SCR12,000 per month, while that for the other members of the Board is SCR5,000 per month. Average Board fees in most other Statutory Bodies are SCR3,000 per month for chairpersons, and SCR1,500 per month for other members.

The current fees consist of only a single component, a monthly fee paid regardless of the number of days work required in that month. There is no allowance for time spent preparing for meetings (often referred to as 'reading time') that can be significant if there are several cases to be determined at a particular meeting, or if there are any substantial competition cases to be heard. Currently it is likely that the Commissioner workload is relatively evenly shared because all are routinely asked to attend each meeting and because of quorum requirements.

The responsibilities and work requirements of Boards of competition authorities in the region are however higher than those of Boards of other parastatal organisations in terms of preparation for meetings, through reading of massive volumes of documents, and actual participation in meetings, including lengthy hearings into competition cases. The opportunity costs of part-time Board members of attending meetings and hearings are also very high, given the fact that they have full-time jobs elsewhere.

The above observations raise two issues:

(i) are the current level of fees appropriate given: the level of skills and experience required of Commissioners; the nature of the duties undertaken by Commissioners; and the fees paid to the members of other statutory boards with deliberative responsibilities?; and

(ii) is the current single component fee structure appropriate given:
   (a) it is almost certain Commissioner workload will increase;
   (b) if more Commissioners are appointed to reduce quorum-forming difficulties then it is likely that not all Commissioners will undertake the same workload.

It is recommended that in addition a fixed monthly fee, members of the FTC's Board of Commissioners also be paid sitting fees for attending and participating at Commission meetings, including hearings.

(b) Secretariat

The Secretariat of the Commission is headed by the Chief Executive Officer, and consists of five Departments: (i) the Communication & Corporate Services Department; (ii) the Consumer Affairs Department; (iii) the Competition Department; (iv) the Research & Policy Department; and (v) the Legal Department.

- The Communication & Corporate Services Department's major areas of responsibilities are on awareness and sensitization on competition and consumer protection laws. The Department also undertakes normal administrative work, such as financial and human resources management. The operational Departments of Competition and Consumer Affairs have also been given advocacy and awareness functions.

- The Consumer Affairs Department enforces the Consumer Protection Act.

- The Competition Department's main responsibility is to enforce the Fair Competition Act, and undertakes investigations based on complaints of restrictive business practices.

- The Research & Policy Department undertakes market studies and assists in the economic analyses of competition cases. It has designed a database on both competition and consumer cases, and is working on a comprehensive competition policy.

- The Legal Department is mainly a vetting department. In that regard, it is linked to all the other departments of the Commission and vets all the cases investigated by the Consumer Affairs and Competition Divisions. It also undertakes legal drafting work and is involved in the drafting of Memoranda of Understanding (MOUs) with other organisations.

The Commission's Secretariat is understaffed in certain areas. As at the time of the fact-finding visit to Seychelles, the Secretariat had a small staff complement of 17, as shown in the Table below:

Department	No. of Officers	Position	Incumbent
Office of the Chief Executive Officer	1	Chief Executive Officer	Mr. Daniel Gappy
Communications & Corporate Services Department	3	Director	Mrs. Luciana Lagrenade
		Accountant	Ms. Venissa de Letourdie
		Office Manager	Ms. Helene Marie
Consumer Affairs Department	7	Director	Mr. Georges Tirant
		Complaint Officer	Ms. Gina Servina
		Enforcement Officer	Ms. Nanet Bristol
		Enforcement Officer	Ms. Dolores Barrack
		Enforcement Officer	Ms. Lorraine Fred
		Enforcement Officer	Mr. Angelo Lesperance
		Enforcement Officer	Mr. Jude Bistoquet
Competition Department	2	Director	Mr. Francis Lebon
		Competition Analyst	Mrs. Nathalie Edmond

Research & Policy Department	1	Director	Ms. Juliette Dorizo
Legal Department	2	Senior Legal Officer	Ms. Chantale Barallon
		Legal Assistant	Ms. Aisha Gerry
Board Secretariat	1	Legal Secretary (to the Board only)	Ms. Laura Lalande
Total	**17**		

The staff complement has since risen to 20 employees, with the appointment of an additional Competition Analyst in the Competition Department and two additional officials in the Consumer Affairs Department, an Enforcement Officer and a Consumer Analyst.

It would be fair to state that all young competition and consumer protection authorities could usefully apply more staff than their current complement, particularly with a view to evaluating complaints more quickly and with a stronger strategic focus. More staff means that investigations should be undertaken more quickly and thoroughly, and that staff on more complex cases (or cases at a more intense phase such as presenting matters for determination) have less distraction from their remaining caseloads. As important as the total number of staff are how these numbers are allocated and the strategies in place to manage the workload to match staff numbers.

It was noticed during the fact-finding visit to Seychelles that there is rivalry between the Secretariat's Departments, particularly between the Competition Department and Consumer Affairs Department, for attention, recognition and resources. While the rivalry was not counter-productive, and actually built a strong bond between the Departments, it could be counter-productive if not harnessed and directed to inter-Departmental cooperation. For example, the Legal Department believed that it was overloaded. Its work is split 50:50 between competition and consumer protection, with the Senior Legal Officer concentrating on competition issues while the Legal Assistant concentrates on consumer protection issues. This has led to the Consumer Affairs Department believing that it is receiving inferior legal service to the Competition Division. It was however explained that the Legal Assistant is attached to the Consumer Affairs Department to help in the presentation of cases before the Board of Commissioners, while legal issues relating to that Department are still being vetted by the Senior Legal Officer.

Specific institutional arrangement issues raised by the Chief Executive Officer included: (i) whether the Commission's lawyers and economists should operate in separate departments or in one department; (ii) how the research unit can timeously facilitate the work of the competition and consumer protection departments; and (iii) whether the combination of communication and awareness functions in one department is appropriate.

All of the above institutional issues can be addressed by adequately resourcing the Departments, in terms of manpower, and giving each Department functions that are specific, but supportive of the activities of the other Departments.

The Competition Department only has three members, the Director and two Competition Analysts, yet it is expected to handle all of the common competition concerns outlined in the *Fair Competition Act*, of abuse of dominance (or monopolization), anti-competitive agreements (of both horizontal and vertical nature), and anti-competitive mergers, all of which require different approaches of a highly specialized nature that require the accumulation of skills. The current complement of staff assigned to competition does not appear to be sufficient to undertake a major case, or if that was done, to undertake any other competition investigations simultaneously. It is noted that the Competition Department is assisted in its

investigations by the Research & Policy Department and the Legal Department, both of which are also under-staffed and have officials not specifically trained in competition case handling.

While closer integration of support staff (i.e., staff other than those undertaking investigatory functions) and additional legal resources would be very helpful and necessary, this will not address the basic lack of capacity. The current complement of support staff assigned to competition does not appear to be sufficient to provide the timely and case specific advice and research function being demand with the current workloads. This situation will be exacerbated if workloads increase.

What is required is a beefing up of the staff establishment of the Competition Department to enable it to have enough staff members that individually specialise in the three common competition concerns of monopolization, anti-competitive agreements, and anti-competitive mergers. The effective handling of competition cases also requires the services of Economists and Lawyers. The Department should therefore have a mixture of Economists and Lawyers as Case Officers.

The current complement of staff assigned to consumer protection work appears to be handling the current workload (complaints, investigations and presentations to the Board), albeit with a possible trade-off in respect to not prioritizing more strategic activities, such as a program to address the apparently systematic problems in the retail sector. It is noted that the National Consumer Forum (NATCOF) expressed concern that some consumer complaints are taking too long to resolve, but did not identify any specific cases. While the reviewers did not examine case files to determine whether this was a reasonable complaint or simply a difference in expectations, it is clear that the progress of each investigation is closely monitored by both the Director and the CEO. It is noted that the Board has made no adverse comments on the timeliness of matters brought before it. The reviewers concluded that timeliness of case resolutions is not a systemic problem.

NATCOF clearly has significant further potential for providing the FTC with grass roots intelligence and co-operation in undertaking market surveys and monitoring. This potential is likely to be more forthcoming if NATCOF's current concerns are more fully addressed.

In some jurisdictions (for example in the United Kingdom with its Enterprise Act 2002) designated consumer protection organisations are given a special status to submit complaints on behalf of consumers that are then fast-tracked through the authority's investigative process. Potential advantages of this system are:

- the authority receives better quality complaints, because there has already been subject to some prioritization and preliminary data obtained; and

- an effective consumer organization is rewarded with a more responsible role and is better able to understand the required processes of the authority.

It is recommended that both the concept of providing for a designated 'super complaint' and the practicality of designating NATCOF as a super complainant be explored.

The Research & Policy Department and the Legal Department have staff complements of 1 and 3 respectively. The single member of the Research & Policy Department also assists the Competition Department in competition investigations. Ideally, she should concentrate purely on research work, which should include the undertaking of studies into competition in various industries and economic sectors of Seychelles, and the analysis of concentration levels in the industries and sectors, for the

Commission's proactive intervention. A lot of studies are also required in the consumer field, such as studies on frequent and prevalent consumer concerns. It is therefore not surprising that the Commission's research unit is unable to undertake timely research and studies to complement and support the work of the Competition and Consumer Affairs Departments.

The Legal Department is also assisting the Competition Department in the investigation of competition cases, as well as assisting the Consumer Affairs Department it that Department's investigations. It is therefore no wonder that the Department feels that it is overloaded, and that there is an element of duplication of work between the Department and the other two Departments that is causing staff frustrations. The recruitment of lawyers as Case Officers in the Competition Department, to work together with that Department's economists, should relieve the Legal Department from the competition investigations obligations and enable it to concentrate on its core business, which is to give legal advice to the Commission as a whole, draft legal notices, review the provisions of the competition and consumer protection legislation, prepare cases for law courts, etc. Filling the vacant position of Director Legal, while maintaining the number of staff providing legal support, will clearly assist the situation.

The Communications & Corporate Services Department has only three staff members, who perform a multitude of somewhat unrelated functions, including visibility and awareness, sensitization of competition and consumer protection laws, and normal office administrative work. It is highly unlikely that the current three staff members of the Department possess all the necessary skills among them for the effective undertaking of the Department's multiple functions, which are all important functions for the smooth operation of the Commission.

It is recommended that the Competition Department of the FTC's Secretariat should have a mixture of economists and lawyers as Case Officers, with the immediate recruitment of an economist and a lawyer to beef up the understaffed Division.

It is also recommended that the vacant posts in the Secretariat, particularly that of Director in the Legal Department, be filled as a matter of urgency.

It was however observed that there is an element of duplication of work between the Commission's Departments, which might lead to staff frustration and reduced opportunities to build experience and specialization. The need was identified for more closely integration of the work undertaken by Communcations & Corporate Services Department and the Legal Department, which act more like support Departments, with that of the more operational Competition Department and Consumer Affairs Department.

The following generalized conclusions can be reached on the FTC Secretariat's staffing situation:

- The number of consumer protection complaints is far greater than the number of competition complaints, and this will certainly remain the case.

- Competition investigations are more complex and longer than consumer protection cases, and therefore require more staff hours per investigation.

- There is some ability to move staff between competition and consumer complaints, particularly at the junior investigator level and to meet short-term demand for resources, for example to interview witnesses, prepare background information, undertake raids, etc.

- There may be some ability to determine how many complaints go through to preliminary or substantive investigation. For example, by encouraging appropriate resolution of consumer complaints at a pre-investigation or pre-Board level (i.e., lower down the resolution pyramid). The ability to do this may be affected by community and government expectations.

- Allocation and management of support staff can make a significant difference to how much can be achieved by higher level or specialized staff.

3.1.2. The Appeal Tribunal

The Appeal Tribunal, established under the *Fair Trading Commission Act*, is an important institution in the enforcement of Seychelles' competition and consumer protection laws. However, the Tribunal had still not been established at the time of the fact-finding visit to Seychelles, because, as explained by the Chief Executive Officer of the FTC, the chairperson of the Tribunal must be a senior lawyer, and such lawyers are in short supply in Seychelles.

While no case involving competition decisions of the FTC has been appealed, three appeals in cases involving consumer protection decisions have been made, and these are being held in abeyance pending the establishment of the Tribunal. In respect of the individual cases appealed it might reasonably be said that 'justice delayed is justice denied'. However, it is also clear that 'street smart' parties might contemplate lodging an appeal because there is no immediate prospect of that appeal being heard, and so any penalty or order of the Board would be rendered ineffective. Also, precedents inform business, consumers and the FTC staff about the meaning of provisions, of the evaluation of evidence and the likely imposition of penalties, orders and remedies. In doing so, they promote both compliance and more effective and efficient administration by the FTC.

The Attorney General, in consultations held during the fact-finding visit to Seychelles, was of the opinion that the absence of the Tribunal provided for in the Fair Competition Act to hear appeals against the decisions of the Commission is a serious legal omission, and that appellants may win cases against the Commission on technicalities because of the absence of the Tribunal. He also confirmed that it had not been possible to establish the Tribunal because of the provision that its chairperson must be a senior legal person, and that the number of eligible lawyer in Seychelles is so small that not many of them would want to be appointed to the Tribunal in sacrifice of the more lucrative private practice.

The same sentiments were echoed by the Chief Justice of the Supreme Court of Seychelles, The Honourable Fredrick Egonda-Ntende. He advised that the Revenue Commission had similar problems of having provisions in its enabling Act on the establishment of a Tribunal, which never took off. The establishment of the new institution was problematic in terms of the number of eligible lawyers available in Seychelles.

Both the Attorney General and the Chief Justice however queried the need to have a special Tribunal on competition and consumer protection cases. The Attorney General was of the opinion that it might not be viable for a small economy like Seychelles to have a specialised Tribunal solely concentrating on competition and consumer protection matters. In his view, what is needed is a multi-disciplined body that would justify work it handles.

The Chief Justice was of the view that given the resources available to Seychelles, the question can be asked whether the country needs a Tribunal on competition and consumer protection, or whether appeals on competition and consumer protection decisions should be made direct to the Supreme Court. He noted that while that could shorten the appellant process, it would also increase the workload of the already

over-stretched Supreme Court, which only has six judges. He also advised that a commercial list under the Supreme Court was established in April 2012, which is presently being looked after by the Chief Justice. The commercial list had so far handled two cases, and the planned case handling time is six months. If competition and consumer protection appeals are channeled to the Supreme Court's commercial list, the list could carry the load.

Both suggestions made by the Attorney General and Chief Justice on having alternative appeal bodies on competition and consumer protection decisions of the FTC have merit. The Attorney General's suggestion of a multi-disciplined appeal body is akin to the arrangement in Zimbabwe, which is working quite well. In Zimbabwe, appeals against the decisions of the competition authority are made to the Administrative Court, which hears appeal cases on decisions of public administration bodies, such as regulatory authorities, municipalities, etc. Given the current limited number of appeals against the FTC's competition and consumer protection decisions, the commercial list of the Supreme Court could adequately handle such appeals. The Supreme Court is also an appropriate appeal body for consumer cases. In Seychelles, court cases of values below SCR350,000 are considered by the Magistrates Court, while those above SCR350,000 are considered by the Supreme Court. The FTC has handled consumer cases valued of up to SCR600,000[54].

A factor relevant to the consideration of an appropriate appeal function must be the cost of bringing an action as doing so before a higher court such as the Supreme Court may be significantly more expensive than before administrative boards or inferior courts. This consideration is more significant in consumer protection cases where all parties, consumers and many traders alike, have relatively modest incomes and assets, and where the values of the relevant transactions and harm are likely to be relatively modest when compared to typical competition cases.

It is recommended that the Appeal Tribunal as provided in all the three Acts under the administration of the FTC (i.e., the *Fair Trading Commission Act*, the *Fair Competition Act* and the *Consumer Protection Act*) be established without further delay.

3.2. Budget and Financial Resources

Section 27(1) of the *Fair Trading Commission Act* provides that "the funds of the Commission consist of: (a) moneys appropriated by the Appropriation Act and paid to the Commission; and (b) *moneys lawfully charged by the Commission*" (own emphasis). Section 57 of the Act also empowers the Minister to make regulations for, *inter alia*, "fees or charges … in connection with services given under this Act". Section 27(2) further provides that "the funds of the Commission may be applied by the Commission: (a) in payment of: (i) expenses incurred by the Commission in the performance of is functions; and (ii) such remuneration and allowances due to the Commissioners, the staff of the Commission and any experts retained by the Commission; and (b) to create any reserves determined by the Commission".

The Commission's sources of income are therefore very limited to governmental subventions. Even though the Act empowers the Minister to prescribe fees for services rendered by the Commission, and the Commission has already requested the Minister to prescribe merger notification fees, no such fees have yet been prescribed. The use of the funds is also specified in the Act.

The annual budget of the Commission is very small, less than US$1 million. The Chief Executive Officer of the FTC advised during the fact-finding visit to Seychelles that in 2012 the Commission was

[54] As advised by the Chief Executive Officer of the FTC, Mr. Daniel Gappy, during the fact-finding visit to Seychelles.

appropriated a sum of SCR8.050 million by the Government for its operations, and that it has submitted a bid for SCR10.000 million for the coming 2013 financial year.

In a June 2011 policy paper on 'Independence of The Fair Trading Commission' that the FTC submitted to the then the Minister of Finance, Trade and Investment, and now the Vice President, His Excellency Mr. Danny Faure, the Commission lamented over its lack of budgetary independence and the level of its government grant. The views expressed in that regard are reproduced in the Box below:

> The World Bank stated in its report on 'Building Institutions for Markets' that "the competition authority should be independent of a government ministry and should have its own budget" (World Bank, 2002). This has been reiterated by the CUTS Centre who believes that "a combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is that they become subject to political influence" (CUTS Centre, 2003). Funding through the Government can also be used by the latter to organize other types of interference in the law enforcement process. In some cases, the Government can threaten to withhold or squeeze funding if the authority is too strict on politically connected firms.
>
> Budgetary independence refers to the role of the government in the determination f the size and use of the authority's budget, including staffing of the authority and salary levels. A competition authority who independently decides over the sources, size and use of its budget is better able to withstand political interference to ensure that competent staff is hired. If the budget is too small the authority will not be able to attract highly qualified staff and pay market rate salaries.
>
> *The mere fact that the Commission is classified as a public body under category 2 indicates lack of financial independence. At present, the Commission is fully budget dependent and has to negotiate with the Ministry of Finance for its budget needs. The Commission is under close scrutiny by the Ministry of Finance for all its expenditure. The size and use of its budget including staffing and salary levels are determined by the Government.*

Source: 'Independence of The Fair Trading Commission', FTC, June 2011

During the fact-finding visit to Seychelles, the Chief Executive Officer of the FTC clarified that Seychellois public organisations are classified as follows for funding purposes:

- Government : Group 1
- Statutory Bodies : Group 2
- Semi-Autonomous Bodies : Group 3

Group 2 public organisations, in which the FTC falls, have some flexibility in employment, and do not have to follow the wage/salary grids in Group 1.

The Commission therefore recommended that "the classification of the Commission as a regulatory body under category 2 of the Ministry of Finance classification strategies of budget dependent public bodies by the Ministry of Finance be reviewed and that the Commission is classified as an independent institution like the Central Bank and SIBA".

While the Government should be the major funder of the Commission's operations, since the Commission is a Statutory Body with non-commercial functions of a regulatory nature, the situation in most developing countries is that the resources of governments are meagre and spread over many requirements. Competition authorities in developing countries are therefore mostly under-funded, and rely heavily on

service fees and charges. In Zimbabwe, for example, fees and levies constituted 68% of the competition authority's budget during the 2011 financial year, while the Government grant constituted only 30%.[55] In Zambia, the competition authority can charge merger notification fees of up to US$600,000 per transaction.[56]

In Seychelles, the FTC can augment its Government grant under the *Fair Competition Act* by charging merger notification fees, authorization fees, and fees for giving advisory opinions on restrictive business practices.

A challenge facing all competition and consumer protection authorities is that any significant ability to raise funds off budget will attract criticisms. Anticipated criticisms include: (i) that resources are being allocated to activities more because of their income earning contribution than for other reasons; (ii) essential activities are not being undertaken because they do not contribute to FTC income; (iii) the FTC is not acting with competitive neutrality, for example, by providing advisory opinions at fees less than charged by independent lawyers or economists; and (iv) the FTC is giving more favourable treatment to those who have contributed to income, for example, by paying for advisory opinions.

These criticisms should be anticipated when planning and delivering of FTC activities. When criticisms are received, the relevant activities should be reviewed and modified as appropriate. To some extent, the fact that it is the Minister and not the FTC who sets relevant fees will help to deflect criticisms from the FTC. However, the potential for valid criticism should be considered by the FTC when it is recommending merger thresholds or fee levels to the Minister. Providing full public disclosure of income in the Annual Report may also reduce suspicions that anything inappropriate is occurring.

3.3. Institutional Independence

The June 2011 policy paper on 'Independence of The Fair Trading Commission', referred to above under the section on Budget and Financial Resources, that the FTC submitted to the then Minister of Finance, Trade and Investment, and now the Vice President, went further than dealing with the Commission's budgetary and financial independence and dealt with the whole institutional and personal independence of the Commission.

The policy paper outlined the importance of competition, that effective competition provides significant benefits for consumers through greater choice, lower prices and better quality of goods and services. Competition also provides strong incentives for enterprises to be more efficient and innovative, thereby helping raise productivity growth across the economy and enhancing the competitiveness of the country as a whole.

The paper also noted that simply enacting laws and developing policies on competition will contribute little to an efficient market and attractive investment environment without effective implementation of the laws and policies. Effective policy implementation requires that the competition authority has the resources and political support to do the job properly, and effective enforcement of competition law is largely dependent on the institution that entrusted with its implementation. There is therefore wide understanding that independence is one of the most significant pre-conditions behind the success of national competition authorities. Independence of a competition authority is deemed important firstly based on its broad functions. Basically a competition authority has the important functions of enforcing antitrust laws and controlling mergers. Its functions are much wider when the same institution is

[55] Annual Report: 2011, Competition and Tariff Commission, Zimbabwe.

[56] 'Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe', United Nations, New York and Geneva, 2012.

responsible for the enforcement of consumer protection law, as is the case for Seychelles' Fair Trading Commission. In discharging these functions, the authority acts as a quasi-judicial body and should therefore follow a consistent methodology which has to be applied independent of specific cases, without interference from political agents or agents of the private sector. The independence of the authority also assures the credibility of the authority.

The paper looked at three broad dimensions of independence and assessed them against the FTC, and concluded that the Commission lacks most of the elements for an independent competition authority, and more so for an institution which also administers the country's consumer protection law. The assessed dimensions of independence were institutional independence, personal independence, budgetary independence.

The following is the reviewers' critical appraisal of the assessments made by the FTC:

Independence Dimension	**FTC Assessment**	**Reviewers' Appraisal Views**
Institutional Independence	The independence of a competition authority is largely dependent on its institutional set up. Institutional independence "refers to the degree of freedom, which the competition authority has to undertake its daily task without the interference or direct supervision from the government" (Afifi, 2010). This includes the status of the authority as an institution separate from the executive branch of government. "Agencies under the direct supervision of the government are less independent" (Voigt, 2006). A good competition authority is expected to maintain an arm's length distance from the government (and other political and special interest groups) to demonstrate their independence, while remaining influential with government (in order to carry out effective advocacy) (ICN, 2009).	It is now an accepted fact that competition authorities to be effective require institutional independence in the undertaking of their daily tasks without the interference or direct supervision from the governments. While in the past a number of competition authorities worldwide were departments or Divisions of government Ministries, the trend now is to establish 'independent' authorities for the purposes of avoiding political and special interest groups influences. In the COMESA/SADC region, all the newer competition authorities in countries such as Botswana, Malawi, Mauritius, Namibia, Swaziland, Zimbabwe and Zambia, were established as independent authorities. In South Africa, the Competition Board, a Government department, was turned into the

		Competition Commission, and in Kenya, the old Monopolies & Prices Commission, which was effectively a department of the Ministry of Finance, was recently turned into an independent Competition Authority of Kenya. In some jurisdictions, the independence of competition authorities from outside influence is enshrined in the competition legislations. For example, it is provided in terms of section 5 of the Competition Act [*Chapter 14:28*] of Zimbabwe that "subject to this Act, in the lawful exercise of its functions under this Act the Commission shall not be subject to the directions or control of any other person or authority".
	1. The Competition Authority's Relationship vis-à-vis the Government This is whether or not the competition authority forms part of government Ministry or it is under the direct supervision of the government or whether it reports directly to the Parliament. Agencies under the direct supervision of the government are less independent. *Since its establishment, the Fair Trading Commission falls under the Ministry of Trade and Finance. The Fair Trading Commission is classified as a Regulatory body (category 2) according to the Ministry of Finance classification of*	Under the Fair Trading Commission Act, 2009 of Seychelles, the Fair Trading Commission in terms of section 3(2) is established as a body corporate. It therefore is a legal person on its own capable of suing and being sued in its corporate name, and not established as part of a government Ministry or intended to be under the direct supervision of the government. Competition authorities are however aligned to particular government Ministries mainly for accountability and budgetary allocations purposes, as well as for policy guidance purposes. This is imperative since such authorities in

	budget dependent public bodies. The document further states that the staff of category 2 public bodies shall be considered "as part of the general government (which includes the whole public sector)" and "the government rules and wage structure shall apply". This classification clearly impacts on the independence of the Commission in carrying out its mandate as it is viewed as another government apparatus rather than as an institution created to work with all and in all sectors. The Commission mandate is wide and its classification under category 2 limits is operating effectiveness, credibility, flexibility and professionalism (retention/requirement of qualified staff).	almost all the countries are Statutory Bodies established by Acts of Parliament. Alignment of the Fair Trading Commission of Seychelles to the Ministry of Finance, Trade and Investment is therefore not peculiar. Ministries responsible for competition authorities in the region include the Minister of Trade and Industry in South Africa, the Minister of Trade and Industry in Namibia, the Minister of Commerce, Trade and Industry in Zambia, and the Minister of Industry and Commerce in Zimbabwe.
	In addition, according to section (29) of the Fair Trading Commission Act of 2009, the Commission is under obligation to submit to the Minister a annual report of its activities and operations "as the Minister may direct" in addition to its annual statement of audited accounts. A copy of the two reports shall also be submitted to the National Assembly.	The submission of Annual Reports (incorporating activity reports and audited financial statements) to the responsible Ministers, and ultimately to Parliament) is also not peculiar to Seychelles, and is in fact an accepted practice for accountability purposes.
	The above clearly shows that in terms of its relationship vis-à-vis the government the Commission is not independent. Although there has been no interference per se from government so far, with regards to investigation of cases, there is the potential for it to happen under the current institutional set up which would have a detrimental effect on the credibility of the Commission because of the way outsiders would view its	Governments are bound to give competition authorities policy directions, and there is nothing fundamentally wrong with that. Competition policies are government policies that must be implemented in coherence with the country's other socio-economic policies for economic development. In any case, competition policy should aimnot only at promoting and maintaining competition, but should also be implemented in

	independence or lack thereof.	support of other government policies since those policies affect competition in one way or another. Government policy directions to competition authorities should however remain such, and should not extend to directing the day to day operations of the authorities. What is however of concern in Seychelles is the classification of the Fair Trading Commission under the Ministry of Finance, Trade and Investment as a regulatory (category 2) budget dependent public body for the purposes of the determination of staff remuneration and conditions of service. What this means is that salary/wage levels in the Commission are aligned to those in the general Civil Service. As assessed by the FTC, the classification of the Commission as a category 2 budget dependent public body impacts on its independence in the carrying out of its mandate as it is viewed as just another government body. It is general practice worldwide that salaries and conditions of service in the Civil Service are not as competitive as those in the other sectors. The nature of the work of competition authorities is however so specialized that it requires highly qualified personnel in the fields of economics, law, business administration and accounts, which are highly demanded on the job market. To align salaries and conditions of service in competition authorities to those in the

		Civil Service would adversely affect the attraction and retention of suitably qualified and experienced personnel in the authorities. The authorities would therefore merely be used as stepping stone training grounds.
	2. The Competences of Competition Authority That is whether the competition authority has sufficient competences to fulfill its role of promoting competition. Competences that can enhance the institutional independence of the competition authority can be recapped into the following main competences, namely: the power to initiate competition cases, the power to issue binding decisions, the power to impose sanctions, the discretion to decline review of competition cases, and the power to comment on and recommend improvements in public policy, regulation and legislation. Such an authority would thus have the discretion to set its own priorities as to the identification and investigation of competition cases and the pursuit of competition complaints. It would also have the discretion to decline to investigate cases where it considers the motives of the complainant to be suspect (UNCTAD, 2008) as is the case for the Commission. *The FTCA provides for the Commission*	As assessed by the FTC, the Fair Trading Commission Act, 2009 gives the Commission sufficient competences to fulfill its role of promoting competition, including powers to initiate competition investigations, to issue binding decisions, to impose sanctions, to recommend improvements in public policy, regulation and legislation, etc. The carrying out of investigations by the staff of the Commission's Secretariat whilst the hearings and the final decisions are conducted and taken by Commission's Board of Commissioners reinforces the effective separation of the Commission's investigative and adjudicative functions for natural justice purposes, and thus enhances its competences. However, the reviewers noted that section 35 of the Fair Competition Act, 2009,while rightly providing that the Commission has powers to discontinue investigations if it is of the opinion that the matter being investigated does not justify further investigation, also provides that the Commission should "submit a report of the discontinuation to the Minister within 3 months of such

	to "have all powers for the performance of its functions and discharge of its duties …" (Section (3), FTCA). The Commission has the power to carry out investigations in relation to the conduct of business in Seychelles to determine if any enterprise is engaging in practices that are in contravention of the FTCA, FCA, and Consumer Protection Act ("the CPA). *Such investigations may be self-initiated by the Commission or be carried out following a complaint. The Commission has the discretion to decline to investigate cases where it suspects "the complaint is trivial, frivolous or vexatious" (FTCA, section 32.(1) (a)) or "the complaint is not made in good faith" (FTCA, section 32.(1)(b)).* *The Commission's powers include but are not limited to holding inquiries, administering oaths, conducting hearings, imposing remedies or financial penalties, conducting searches and seizing documents or articles.* *All investigations are carried out by the staff whilst the hearings and the final decisions are conducted and taken by the Board of Commissioners.*	discontinuation". The requirement that the Commission should report to the Minister its decisions to discontinue competition investigations limits its independence and reduces its decision-making autonomy. The purpose and limitations of that requirement is also not stated in the Act, such that it opens the Commission to political interference in its decision-making processes. The reviewers are accordingly making appropriate recommendations in another part of this report on addressing the above observations.
	3. Government Powers in Relation to Competition Law Government powers may take several forms, including giving instructions to	The FTC is correct in its assessment that a competition authority will be less independent if the Executive branch of government has the power to give instructions and to override the

	the competition authority or overruling the competition authority's decision. The authority will be less independent if the executive has the power to give instructions and to override the authority's decisions. *According to section 57(1) of the FTCA and section 54(1) of the FCA "the Minister may make regulations for giving effect to the provisions of" the Acts. In addition under section 21 of the FCA, the Minister has the power to prescribe the percentage of market power of a firm for a merger to be prohibited. However, the Commission's decision can only be overruled by the Tribunal (FTCA, section 50) and the Supreme Court (FTCA, section 43).*	authority's decisions. However, the provisions of the Fair Trading Commission's enabling Acts cited by the FTC in the assessment do not seem to illustrate the extent of the situation in Seychelles. Section 57(1) of the Fair Trading Commission Act, 2009 provides that "the Minister may make regulations for giving effect to the provisions of this Act", and the provided for regulations refer to, *inter alia*, amending Schedules to the Act, prescribing forms, and fees or charges for application and appeals and in connection with services given by the Commission. Section 54(1) of the Fair Competition Act, 2009 also similarly provides that the Minister may make regulations for giving effect to the provisions of the Act, including regulations on amending the Schedule to the Act. Section 21 of the Fair Competition Act, 2009 provides that the Minister may prescribe merger notification thresholds. The making of regulations giving effect to the Acts by the Minister, or the Minister's prescription of merger notification thresholds, does not amount to the Minister giving operational instructions to a competition authority. Rather, it reinforces the authority's operations. Regulations and merger notification thresholds must have legal force, and in most countries this legal force comes through the *gazetting* of Statutory Instructions, which form part of the enabling Act's subsidiary legislation. Statutory Instruments are issued by the

		responsible Ministers, and not by the competition authorities. The Minister should however only issue Statutory Instruments that are proposed by the competition authority. As correctly assessed by the FTC, the Commission's decisions can only be overruled by the Appeal Tribunal and the Supreme Court in terms of the provisions of the Fair Trading Commission Act, 2009, and not by the Minister.
Personal Independence	Personal Independence refers "to the freedom of the members of the decision making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not being influenced by political considerations or their individual interests" (Afifi, 2010). It includes the manner in which management and staffs are appointed, their tenure and dismissal. Independence is best served if there are clear rules on hiring and firing. Under such rules staffs of competition agencies should enjoy security of tenure, enabling them to speak and take action without fear of removal by the present Government. In addition personal independence includes the openness and transparency of decision-making of the competition authority.	The FTC's assessment on personal independence is correct.
	1. Appointment Mechanism That is whether appointments of	The appointment of members (Commissioners) and management of competition authorities differ from one

	members of the management and decision-making body of the competition authority are made by government or parliament. It is considered less conducive to independence if the appointment is by government than appointment by representatives of more than one branch of the government. Mateus (2007) stressed the importance of appointing the board members *…+ to be designed in a careful manner, because the board enjoys a high level of discretionary power in applying the competition law provisions in each case. In fact, the board members are like judges and therefore consideration should be given to candidates with high level of integrity. Mateus argues that the process is too important to be left only to the government and that at least a parliamentary hearing should be carried out. He further argues that it is not advisable that the appointment process should be left only to the parliament, since this tends to reproduce the representation of political parties, which leads to a highly politicized board. *In the case of Seychelles, the Board of the Commission and the Chief Executive Officer are all appointed by the President upon the advice of the Minister (FTCA section 5 (1)).*	jurisdiction to another. In Zambia, for example, the Competition and Consumer Protection Act, 2010 provides in its First Schedule that members of the Board of Commissioners is appointed by the Minister, and section 6 of the Act provides that "the Board shall appoint an Executive Director on such terms and conditions as the Board may determine". In Namibia, the Competition Act, 2003 also provides in terms of its section 5(1) that members of the Commission are appointed by the Minister, and section 13(1) provides that the Commission (meaning the Board of Commissioners) appoints the Secretary (i.e., the chief executive officer of the Commission). In Zimbabwe, section 6 of the Competition Act [*Chapter 14:28*] provides that members of the Commission are appointed by the Minister in consultation with the President, and section 17 provides that the Director of the Commission is appointed by the Board of Commissioners on terms and conditions fixed by the Board with the approval of the Minister. It is therefore common practice in the region that members of the Boards of Commissioners of competition authorities are appointed by the responsible Ministers. The involvement of the Minister and the President in the appointment of chief executive officers of competition authorities in the region is however not direct. In most cases, while the Boards of Commissioners have the statutory responsibilities of appointing the CEOs,

		in practice they have to seek the authority of the President, through the responsible Ministers, to confirm the appointments.
	2. Appointment Criteria That is whether the appointment is based on a member's individual experience and background or is based on the representation of the government or interests groups and whether the competition authority has sufficient rules to control any possible conflict of interests which may arise thereof. In reality the head of the authority largely determines the authority's priorities and the outcomes of its decisions *…] it is thus crucial that he not be politically oriented towards any specific group of interests. (Gal, 2004) *According to section 5(2) of the FTCA, "the Commissioners appointed under subsection (1)(a) shall be persons from the public and private sector appointed by virtue of their qualifications and experience in law, economics, accountancy or commerce".* *The Board of Commissioners at present comprise of 5 persons from the private sector only, with background in Law, accounting, finance, commerce and electrical engineer. It must be noted that 3 of the Board members are from the banking sector. This may pose problems if the Board has to conduct hearings in cases related to the banking sector since*	It is agreed that the appointment criteria of members of the Boards of Commissioners of competition authorities must be clear and objective for independence purposes. The relevant provisions of the Fair Trading Commission Act, 2010 of Seychelles gives specific guidelines on the selection of individuals to be appointed as Commissioners in terms of section 5(2) of the Act as per the FTC's assessment. Similar guidelines are given in the competition legislations of Zimbabwe ("the persons to be appointed … shall be chosen for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment and, in selecting such persons, the Minister shall ensure that so far as possible all interested groups and classes of persons, including consumers, are represented on the Commission"), Namibia ("whenappointing members of the Commission the Minister must select persons who, in the opinion of the Minister, have expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs"), and Zambia (members of the Board of Commissioners appointed by the Minister should comprise "(a) a representative from the Ministry responsible for commerce; (b) a

	according to section 11 of the FTCA, a commissioner who is directly or indirectly interested, in a private capacity in the subject of consideration, shall disclose that interest and shall not take part in any consideration or discussion of, or vote on any question relating to that matter. Furthermore section 15 of the FTCA states that "three commissioners shall constitute a quorum for any meeting of the board".	representative of the Attorney General; and (c) five other members, with experience and knowledge in matters relevant to this Act"). The old Competition and Fair Trading Act, Chapter 417 of Zambia that was repealed by the Competition and Consumer Protection Act, 2010 was more specific in the composition of the Board of Commissioners. The Schedule to that Act provided for the following composition of the Board: "(a) a representative from each of the Ministries responsible for finance, and commerce and industry; (b) a representative of the Zambia Bureau of Standards; (c) two representatives from the Zambia Council of Commerce and Industry, each representing different sections of that body; (d) a representative of the Law Association of Zambia; (e) a representative of the Zambia Federation of Employers; (f) a representative of the Zambia Congress of Trade Unions; (g) two persons representing consumer interests and appointed by the Minister; (h) a representative of the Engineering Institute of Zambia; (i) a representative of the accounting profession; and (j) the Economics Association of Zambia". It was also provided that members of the Board would be nominated by their respective institutions and appointed by the Minister. While the old system of selecting Board members in Zambia had its pros in that it ensured representation of as many relevant sectors as possible on the Board, and to a certain extent safeguarded

		members' tenure on the Board, it also had its cons. The major one being the real possibility that members of the Board would feel obliged to safeguard the sectoral interests of their respective institutions, and thus compromise their objectivity. The problem cited in the FTC's assessment of the composition of the Commission's Board of Commissioners that created conflicts of interest in the consideration of competition cases affecting the banking and financial services sector was also noted by the reviewers. In that regard, even though the composition of new Board that came into office in January 2013 has avoided the recurrence of that problem, recommendations are being made in another part of this report that members of the Board should be drawn from diverse economic backgrounds to avoid one sector dominating its membership.
	3. Appointment Term That is whether the appointment term is short or long and whether it is renewable. It is assumed that staffs of the competition authority, whose terms are renewable and cannot be removed from office, except by legal procedure, have less incentive to please those who appointed them in their decision making. *In the case of the Commission, the Commissioners are appointed for a term*	The appointment term of the members of the Board of Commissioners has also been considered by the reviewers in another part of this report. The reviewers noted that the appointment of members of the Board on terms of only three years raised stakeholder concerns as being too short to enable members to grasp the intricacies of competition and consumer protection laws and policies to enable them to effectively contribute to decision-making on such matters.

	of 3 years and may be re-appointed. (FTCA, section 6). As a regulatory body (Category 2), the Chief Executive Officer should be placed on a Public service Commission Contract for a period of 3 years whilst the employees should be employed under continuous employment with the exception of the Senior officers who should be placed on Public Sector renewable Contracts for a period of 2 years.	Accordingly, it is being recommended that the terms of office of members of the Board should be increased to 5 years to enable the members to fully contribute to the operations of the Commission with sufficiently accumulated experience as competition and consumer protection adjudicators. The above, with adequate protection against arbitrary removal from office, would go a long way in ensuring the operation of the Board in an independent manner. It is normal practice that chief executive officers of competition authorities, and some of their senior staff, are put on fixed-term employment contracts that ensure their tenure against arbitrary dismissal.
	4. Appointees' Remuneration That is whether or not the salaries of the members of management and of the decision-making body are determined by the government and whether salaries can be increased or decreased by the government. If the government determines the salaries of the staff of the competition authority, this may raise incentives to take preferences for the members of government into account. *The remuneration for the Commissioners*	The issue of Commissioners' remuneration has also been considered by the reviewers in another part of this report. The reviewers noted that current Commissioners' fees consist of only a single component, a monthly fee paid regardless of the number of days work required in that month. There is no allowance for time spent preparing for meetings (often referred to as 'reading time') that can be significant if there are several cases to be determined at a particular meeting, or if there are any

	and the CEO are determined by the Minister (FTCA, section 19 and 20 respectively) whereas for the staff of the Commission, the government rules and wage structure should be applied. On the contrary it is stipulated under section 22 of the FTCA that "The Commission shall employ such other members of staff as it considers necessary, on such terms and conditions as it considers fit".	substantial competition cases to be heard. The responsibilities and work requirements of Boards of competition authorities in the region are however higher than those of Boards of other parastatalorganisations in terms of preparation for meetings, through reading of massive volumes of documents, and actual participation in meetings, including lengthy hearings into competition cases. The opportunity costs of part-time Board members of attending meetings and hearings are also very high, given the fact that they have full-time jobs elsewhere. It is therefore being recommended that in addition to a fixed monthly fee, members of the FTC's Board of Commissioners should also be paid sitting fees for attending and participating at Commission meetings, including hearings. While the fixed monthly Commissioners' fees, and the level of the sitting fees, would have to be determined by the Minister in accordance with the provisions of section 19 of the Fair Trading Commission Act, 2009, the amount of the sitting fees payable to individual Commissioners will depend on the Commissioner's attendance and participation at Commission meetings and not on decisions of the government. As noted in the FTC assessment, section

		22 of the Fair Trading Commission Act, 2009 provides that "the Commission shall employ such other members of staff (other than the Chief Executive Officer) as it considers necessary, on such terms and conditions as it considers fit". The Board of Commissioners therefore has the statutory powers of determining the salaries and other conditions of service of staff of the Commission, and should therefore be allowed to exercise those powers. The provisions of section 20 of the Act should also be amended to provide for the appointment by the Board of Commissioners of the Commission's Chief Executive Officer on such terms and conditions as the Board may determine.
	5. Dismissal of Appointees That is whether the law sets out conditions for dismissing the members of the management and of the decision-making body, whether such conditions are easy or difficult of be met and whether dismissal decisions have to be reasoned. *According to section 8 (1) of the FTCA, the President has the power to remove a Commissioner from Office for reasons of incapability of performing the functions of the Commissioner, neglecting the duty, engaging in misconduct, and being absent without leave from 3 consecutive meeting of the Board. The dismissal of the staff of the Commission should be as stipulated in the Public Sector Contract*	As pointed by the FTC in its assessment, section 8(1) of the Fair Trading Commission Act, 2009 provides for clear and transparent grounds for the removal of a member of the Commission from office, which are: (a) incapability of performing the functions of a Commissioner; (b) negligence in the duty of a Commissioner or misconduct; or (c) absence without leave of the Board from 3 consecutive meetings of the Board. The grounds for the dismissal of staff of the Commission, including the Chief Executive Officer, should be clearly laid out in the Commission's Employee Rules and Regulations adopted by the Board of Commissioners.

	for senior officers or Public Service order for other employees.	
	6. The Openness and Transparency of Decision-Making That is whether the competition authority has an obligation to publish its decisions and whether the rules governing the publication guarantees transparency. Inevitably many decisions involve commercially sensitive material that would be difficult to disclose. But the presumption should be in favour of openness in the decision making process, making it possible for the public to scrutinize regulatory decisions, and thus minimizing the risk of political interference. In principle, both the independence and the accountability of an institution can be enhanced by greater transparency; transparency ensures that the authority take full responsibility in view of the public for the decisions they take. For instance, the independence of the Competition Commission will be enhanced if its recommendations to the executive are made public, since the executive will have to bear full responsibility if it overturns a recommendation. *The FTCA provides for the Commission to undertake studies and publish reports and information regarding matters affecting-the interests of consumers and enterprises under section 5 (c). In*	The FTC's assessment on the openness and transparency of the Commission's decision-making is supported. The Commission should have final decision-making powers on competition and consumer protection matters that fall under the purview of its enabling Acts, and on recommendatory powers on advocacy matters arising from its studies. In both instances, openness and transparency of its findings are required, subject to the rules of confidentiality.

	addition the Act stipulates that the Commission "shall within one month of giving a decision publish that decision in writing with supporting reasons". (FTCA, section 43). In accordance with the FTCA, the Commission is currently publishing its decisions in the Seychelles nation and once its website becomes operational the commission will publish all its guidelines, regulations, decisions and reports on its website for public access.	
	7. Judicial Review of Competition Authority's Decision That is whether the competition authority's decision is subject to judicial review and whether such review is on the merit or only on procedural issues. The possibility of appealing against decision both on procedural and substantive aspects increases the incentives to apply the competition law independently. *The Commission's decision is subject to review by a Tribunal and ultimately by the Supreme Court. "A party dissatisfied with an order or direction of the Commission may appeal to the Tribunal against, or with respect to, the order or direction" (FTCA, section 50). Furthermore, "a person dissatisfied with an order or direction of the Tribunal may appeal to the Supreme Court against, or with respect to, the order or direction" (FTCA, section 51).*	The FTC's assessment on judicial review of the Commission's decisions is also supported.
Budgetary	The World Bank stated in its report on	The reviewers' examination of

Independence	"Building Institutions for Markets" that "the competition authority should be independent of a government ministry and should have its own budget." (World bank, 2002). This has been reiterated by the CUTS Centre who believes that "a combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is that they become subject to political influence." (CUTS Centre, 2003). Funding through the Government can also be used by the latter to organize other types of interference in the law enforcement process. In some cases, the Government can threaten to withhold or squeeze funding if the authority is too strict on politically connected firms. Budgetary independence refers to the role of the government in the determination of the size and use of the authority's budget, including staffing of the authority and salary levels. A competition authority who independently decides over the sources, size and use of its budget is better able to withstand political interference to ensure that competent staff is hired. If the budget is too small the authority will not be able to attract highly qualified staff and pay market rate salaries. *The mere fact that the Commission is classified as a public body under category 2 indicates lack of financial independence. At present the Commission is fully budget dependent and has to negotiate with the Ministry of*	Seychelles' Fair Trading Commission's budgetary independence is outlined in the above section 3.2. (Budget and Financial Resources) of this report, and considers the same issues in the FTC's assessment. The FTC is correct in the conclusion of its assessment that "the mere fact that the Commission is classified as a public body under category 2 indicates lack of financial independence. At present the Commission is fully budget dependent andhas to negotiate with the Ministry of Finance for its budget needs. The Commission is under close scrutiny by the Ministry of Finance for all its expenditure. The size and use of its budget including staffing and salary levels are determined by the Government". As suggested earlier, the Commission therefore needs to be reclassified as an independent institution, like the Central Bank of Seychelles and the Seychelles International Business Authority (SIBA), from its present classification as a regulatory (category 2) budget dependent public body to ensure its financial independence. However, the mere reclassification of the Commission alone without lessening of its dependency on government appropriations will not make the Commission financially independent. The Commission will have to explore and develop other sources of funding for its operations. Section 57(1) of the Fair Trading Commission Act, 2009 provides

	Finance for its budget needs. The Commission is under close scrutiny by the Ministry of Finance for all its expenditure. The size and use of its budget including staffing and salary levels are determined by the Government.	that the Minister may make regulations for giving effect to the provisions of the Act, including for fees or charges for application and appeals and in connection with services given by the Commission. The FTC can therefore augment its government grant by charging reasonable merger notification fees, authorization fees, and fees for giving advisory opinions on restrictive business practices. In countries such as South Africa, Namibia, Zambia and Zimbabwe such administrative fees constitute a substantial portion of the operating budgets of the competition authorities, and have gone a long way in ensuring the authorities' financial independence. Consideration can also be given that Seychellois sector regulators share the fees they receive and collect from players in the sectors that they regulate with the FTC for the purposes of promoting competition in the regulated sectors.

The policy paper concludes by noting that independence without accountability will not work since accountability is the flip side of independence, which is equally important. The accountability of a competition authority includes the requirement of the authority to ensure that the rules and procedures on which decision-making processes are constituted are laid down clearly so that the other parties, which re undertakings, consumers and public institutions, are aware of the limits of the authority's power for conducting investigations and applying sanctions. Furthermore, accountability includes submitting reports such as annual reports and audited accounts to the Legislature, which may have a special Committee to scrutinize and debate its contents and mechanism that enables those aggrieved by a decision of the competition authority to issue a formal complaint or appeal.

Regarding the situation in Seychelles, the paper noted the following:

"The FTCA provides for the Commission to be accountable. Section 17 sets the obligations of the Commission to issue "Guidelines on the economic and legal analysis which shall be used for the determination of cases under this Act" and "guidelines on the principles which shall be used for the determination of penalties or remedies imposed under this Act, any written law relating to consumer

protection, fair competition and other written law which it has jurisdiction to administer, and manner in which turnover is to be calculated." The Commission has already drafted two regulations; Procedure for Hearing and draft regulations for procedures in investigations which will be finalised soon. The Commission has also finalized its guidelines for definition of relevant market required investigation and analysis of competition related cases.

Furthermore under section 29 of the FTCA the Commission is under an obligation to submit an annual report of its activities and operations and its annual audited accounts to the Minister and to the National Assembly".

A number of the independence issues that were raised in the FTC's policy paper were also considered by the reviewers, with appropriate comments and recommendations made in the relevant parts of this report. The reviewers therefore generally agree and support the policy paper's recommendations, which are reproduced in the Box below:

It is clear that the Fair Trading Commission lacks most of the elements required for an independent competition authority and more so for an institution which also administers the consumer protection law.

It is therefore recommended that required amendments be made to the Fair Trading Commission Act of 2009 so that the Fair Trading Commission has substantial degree of institutional and personal independence.

In addition it recommended that the international standard is adopted regarding the budgetary independence of the Commission. The Commission should be given total control of its budget (resources). This should not be without responsibility and good governance since the Commission has to be made accountable for its expenditure annually as stipulated in the FTCA.

Consequently it is recommended that the classification of the Commission as a regulatory body under category 2 of the Ministry of Finance classification strategies of budget dependent public bodies, by the Ministry of Finance be reviewed and that the Commission is classified as an independent institution like Central Bank and SIBA.

Furthermore it must be noted that Competition and consumer law and policies apply across all sectors of the economy, therefore making the Commission by virtue of its roles and functions, the economic regulator of regulators. Technical regulation is generally regarded as an ex ante exercise while competition enforcement is generally an *ex post exercise* (except in merger analysis, which is generally a forward looking exercise). Additionally, technical regulation is generally a structural issue, while competition enforcement qualifies as a *behavioural issue*. Thus, it makes sense to give the responsibility of behavioural and ex post issues to the competition authority while structural and ex ante issues are handled by the sector regulator. In most countries, the Commission is an independent professional institution that positioned itself on top of all regulators as a general market auditor, examining all sectors of the economy for the benefit of competition and consumer protection.

Moreover the *mandate* of the Commission extends beyond merely enforcing the competition law. It must also participate broadly in the formulation of the country's economic policies which may adversely affect competitive market structure, business conduct, and economic performance. The Commission must

assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalisation, and otherwise minimise unnecessary government intervention in the marketplace.

It is therefore crucial to make the Commission a totally independent authority in order to ensure effective implementation of competition and consumer related policies and laws. This will enhance the power of the Commission to be able to dissuade firms from behaving unlawfully, as the Commission independence will help build a strong positive reputation of the Commission as one which is transparent, impartial, unbiased and credible and one which is not prone to influence by market players but apply competition principles uniformly across all sectors.

3.4 Case Handling

Since commencing operations in 2010, the FTC has handled over 280 cases, of which 274 were on consumer protection and 16 on competition.

(a) Competition Cases

The Director for Competition in the FTC, Mr. Francis Lebon, in an interview held during the fact-finding visit to Seychelles, confirmed that the Commission had so far handled 17 competition cases, and currently had 3 cases under investigation, as follows:

Year	Ref No.	Case	Source of Complaint	Status
2010	FCA01	FTC vs Land Marine Limited (abuse of dominance in Port services)	FTC	Resolved
	FCA02		Business	Pending
	FCA03	FTC vs STC (resale price maintenance)	FTC	Closed
	FCA04	FTC vs L'Air Dezil (merger)	FTC	Closed
2011	FCA05	FTC vs STC (franchising)	FTC	Closed
	FCA06	Airtel vs Cable (IOIG) (exclusivity)	Business	Closed
	FCA07	Mr. Morin vs UCPS (dissimilar conditions to similar transactions)	Business	Resolved
2012	FCA08		Business	Active
	FCA09	FTC vs Dan Import (resale price maintenance)	FTC	Resolved
	FCA10	Louis Bossy vs STC (predatory pricing)	Business	Resolved
	FCA11	Pierre Dodin vs Seypec (resale price maintenance)	Business	Resolved
	FCA12	Le Chevalier Restaurants vs Seychelles Breweries (withholding supplies)	Business	Resolved
	FCA13	Davidson Madeleine vs Department of Transport (unfair setting of taxi fares and quotas)	Business	Resolved
	FCA14	Intelvision	FTC/ Consumers	Closed
	FCA15		FTC/ Consumers	Active
	FCA16		FTC	Active
	FCA17	GIBB vs Seychelles Pension Fund (unfair practice in tendering process)	Business	Resolved

The Commission rightly publicized the handling of its first competition case in a Press Release, as follows:

Press Release

The Fair Trading Commission (FTC) has settled it first case (FCA01) of **Abuse of Dominance** (under section 7, of the Fair Competition Act), in Port Services at Port Victoria.

In 2010, following a complaint lodged at the Commission by a competitor, the Commission investigated the conduct of *Land Marine LTD*, and concluded that Land Marine LTD was applying dissimilar conditions to equivalent transactions between its own inland transportation business and that of its competitors in the downstream market, thereby placing its competitors at a competitive disadvantage.

Land Marine Limited has subsequently opted into a voluntary understanding in writing with the Commission pursuant to **section 48 of the Fair Competition Act, 2009** which is opined to satisfactorily address the concerns highlighted in the investigation report.

On July 11, 2012, the Board of Commissioners endorsed the said undertaking as final settlement of the matter.

As per section 49 (1) of **the Fair Competition Act of 2009, the Commission shall keep under review the compliance with directions given by it and the performance of undertakings given by an enterprise**.

Source: FTC

In terms of Part III of the FC Act 2009, competition cases handled by the Commission are divided into five categories: (i) abuse of dominant position (Sub-Part I); (ii) anti-competitive agreements (Sub-Part II); (iii) resale price maintenance (Sub-Part III); (iv) mergers (Sub-Part IV); and (v) anti-competitive business conduct (Sub-Part V). The Table below shows the trend in cases handled by the Commission since 2010:

Case Category	**2010**	**2011**	**2012** (to Oct)	**Total**
Abuse of Dominant Position	2	0	4	6
Anti-Competitive Agreements	0	3	1	4
Resale Price Maintenance	1	0	2	3
Mergers	1	0	0	1
Anti-Competitive Business Conduct	0	0	2	2
Total Cases	**4**	**3**	**9**	**16**

Abuse of dominant position cases have so far led the number of competition cases handled by the Commission (38 %), followed by anti-competitive agreements (25 %), and resale price maintenance (19 %).

It is interesting to note that the FTC has so far examined only one merger transaction, which was subsequently withdrawn by the merging parties, according to the Director for Competition in the Commission's Secretariat. The Commission was, however, not involved in the examination of the acquisition of a 40 % shareholding in Air Seychelles by ATL of Abu Dhabi since that transaction was handled at the higher level of Government. The Director for Competition in the Commission submitted

that there might be many mergers going on in Seychelles, which the FTC is not aware of because the existence of the Commission as a competition authority is not much known by the business community, with many people recognising it solely as a consumer body.

The Principal Secretary in the Ministry of Finance, Trade and Investment, Mr. Steve Fanny, during the fact-finding visit consultations, was of the opinion that merger control should not be rushed in Seychelles because of limited activity in that area, and the smallness of the country's economy.

Merger control is a necessary requirement in any economy, regardless of the size of the economy. This is due to the fact that mergers can reduce the number of competitors in a market, increasing market concentration and this may give rise to the creation or enhancement of market power, and the exercise of that power. The coordinated effects of mergers also increases the risks of collusion among market players. In fact, mergers have been seen as formalizing collusive arrangement between competitors. It has been found that it is easier to deal with the anti-competitive effects of mergers *ex-ante* than it is to control the resultant market power and collusion ex-post.

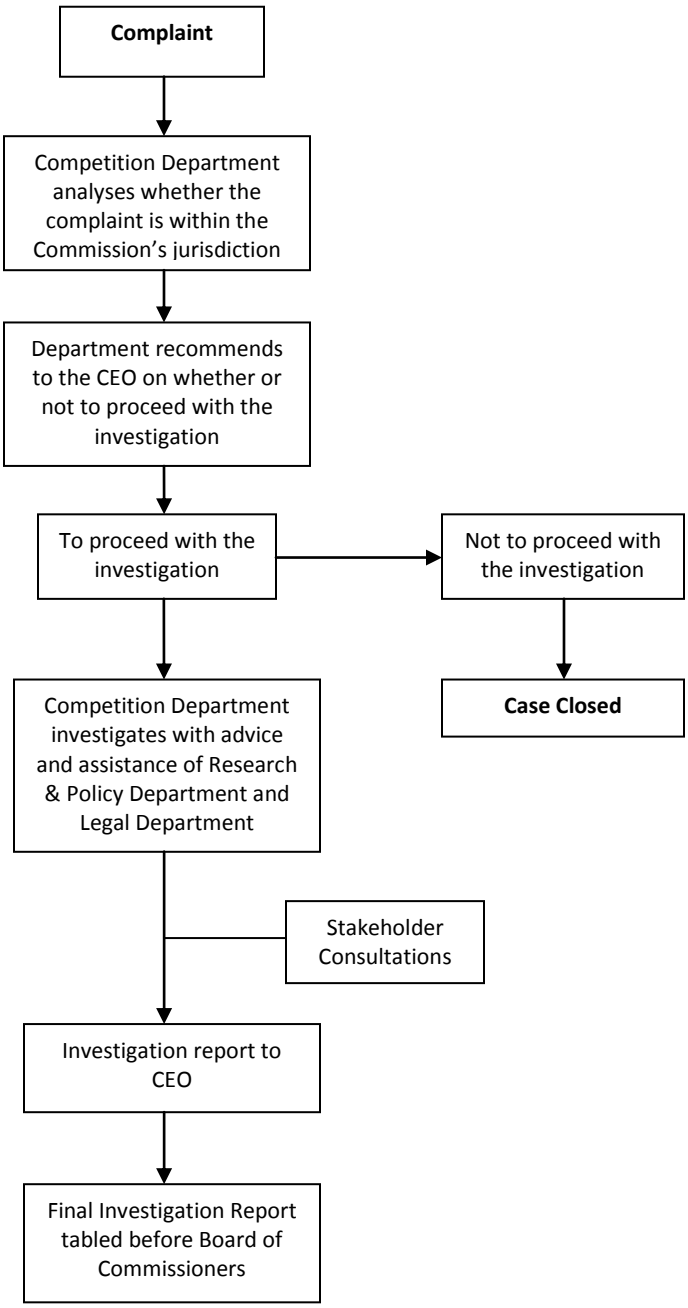
Further, while merger activity may be low in Seychelles at present, the indications are that activity will increase in the near future. The Seychelles 2017 Strategy that the government is pursuing calls for, *inter alia*, "generating the maximum level of local participation (in the Seychellois economy) … and fostering strategic national and international partnerships". Mergers and acquisitions, both between local companies and between local and foreign companies, will therefore play an important role in the execution of the Strategy.

It is also interesting to note that most of the competition cases handled by the Commission so far have been concluded either by closure, presumably for absence of serious competition concerns, lack of evidence, lack of jurisdiction, or by resolution, through consent agreements and undertakings. It seems, from the stakeholder submissions made during the fact-finding visit to Seychelles, that none of the companies investigated by the Commission for competition infringement has been penalized, thus giving the wrong impression that the Commission does not have effective punitive powers.

It is further interesting to note that about half of the competition cases so far investigated by the FTC were initiated by the Commission, thus giving credence to the views expressed by the Director for Competition in the Commission that the existence of the Commission as a competition authority is little known by the business community.

The handling of competition cases by the FTC is a highly consultative process. According to the Commission's Director for Competition, the process starts with the lodging of complaint, which the Competition Department then decides if it is within the Commission's jurisdiction. A report on the analysis is made to the Commission's Chief Executive Officer with recommendations on whether or not to proceed with the investigation. If the decision is to proceed with the investigation, the Competition Department does so with the advice and assistance of the Research & Policy Department and the Legal Department. Stakeholder consultations are held, and the comments of the Legal Department on the findings are incorporated in the investigation report. The final investigation report is submitted to the Chief Executive Officer for tabling before the Board of Commissioners.

The above case handling procedure, which is graphically traced below, is in accordance with the relevant provisions of the FC Act 2009 (Part IV of the Act, sections 32 – 36). It is also worth noting that the Board of Commissioners is obliged, in terms of section 37(1) of the Act, to convene a hearing upon receipt of an investigation report from the Chief Executive Officer.

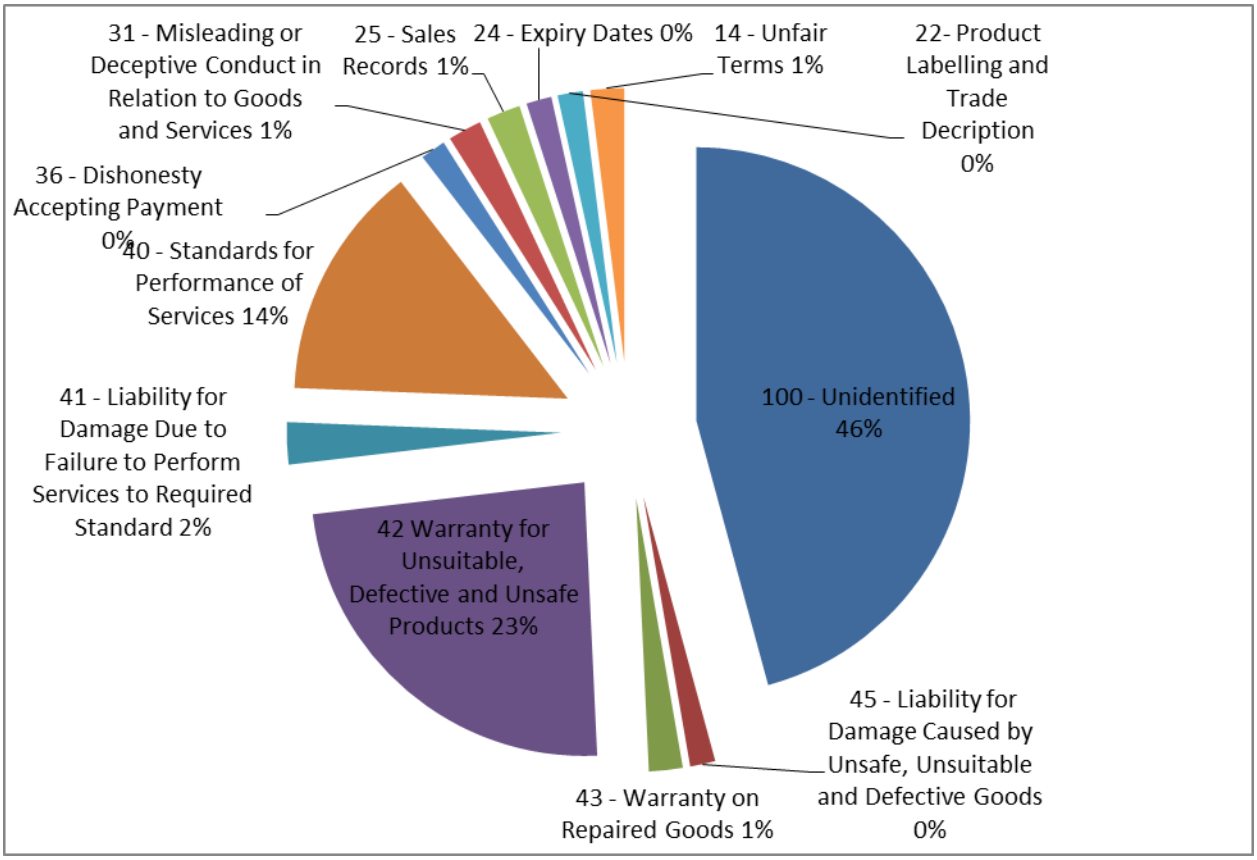


(b) Consumer Protection Cases

Information about conduct with consumer protection concerns

Most information about marketplace conduct of concern to consumers is brought to the FTC's attention by complainants. The Secretariat prepares an annual summary of complaints received. A pie-chart showing the relative numbers of complaints by issue complained about for 2011 is shown below:

Consumer Complaints for 2011



The following figures are based on the above summary. The major problems reported by consumers were:

- Warranties for unsuitable, defective and unsafe products, 23%
- Standards of performance of services, 14%

Interestingly, problem areas referred to by some stakeholders as being major areas of concern did not feature in the complaints data, including:

- Expiry dates, 0%
- Sales records, 1%
- Information must be in plain and understandable language, 1%,

Likewise, areas of complaint that are the 'bread and butter' of many national consumer protection authorities did not rate high in the complaints data:

- Misleading and deceptive conduct (all), 1%

- Unfair terms, 1%

- Product labeling and trade descriptions, 0%.

Unfortunately, the classification and presentation of data on the subject of complaints was not particularly useful as 46% of complaints had the subject listed as 'unidentified' and 10% were recorded as 'multiple sections'. The Secretariat has advised that the complaints statistics are being reviewed so as to more usefully describe those complaints previously listed as 'unidentified' or 'multiple sections'.

Overwhelmingly complaints are received from complainants visiting the FTC's Victoria office. A minority of complaints are submitted by letter and even fewer by email. Information about conduct of concern to consumers is also brought to the FTC's attention by informal and informal referrals from stakeholders, the observations of individual FTC officers and from FTC monitoring activities.

During the last full year (2011) 264 consumer complaints were received. Of these:

- 17 complaints (6%) were found not likely to involve contraventions of the Consumer Protection Act

- 155 complaints (59%) were resolved to the satisfaction of the complainant.

- 14 complaints (5%) progressed to substantive investigations that were determined by the Board

- 78 complaints (30%) were still being investigated at the end of the reporting year.

Remarkably, of the 169 relevant complaints that were resolved to the satisfaction of the complainant during the year, a huge 92% were resolved without the delay and cost of proceeding to a determination of the Board. This is an enviable record of efficient and effective resolution of individual complaints.

All complaints are initially recorded and assessed by a designated complaints officer. On initial screening, that officer may decide that:

- the complaint does not suggest a contravention of the Consumer Protection Act. In that case the complainant is advised accordingly.

- the complaint does suggest a likely contravention the conduct was not serious and the harm was relatively minor. In this case the officer may suggest to the complainant that he/she attempt a negotiated resolution with the trader.

- the complaint does suggest a likely contravention and the conduct was not minor and/or the harm is relatively significant. In this case the officer refers the complaint to the Director Consumer Protection for his assessment with a view to undertaking an initial investigation.

It was noted that FTC staff have a program of visits to areas of Mahé outside of Victoria and to the other inhabited islands.

Initial Investigations

The Director Consumer Protection may make, or instruct one of his staff to make initial enquiries of the trader subject to the complaint, or to obtain publically available information. However, the close level of

interaction between the Director and the CEO, mean that the decision to make initial enquiries is essentially a joint one between the Director and the CEO.

Upon receipt, complaints are recorded and subject to an initial screening by an enforcement officer, the Director of the Consumer Department. The CEO reviews each complaint. An officer of the Consumer Department will then either attempt a mediation approach or pursue the investigation further with a view to it going to the Board for a determination.

Substantive Investigations

On the basis of the initial assessment and initial enquires, the Director and CEO will decide whether to undertake a more substantial investigation with a view to taking the matter before the Board. This may also happen if a negotiated resolution was not obtained from the trader. Again there are no formal criteria for further investigation. In the process of obtaining evidence staff may interview traders (including the subject of the complaint), consumers (including the complainant) and obtain information or evidence from various government agencies and departments, including the Standards Authority and Customs. Goods may also be purchased as evidence to provide samples for testing and examination and to prove supply.

It is not currently known whether the Commission's powers to obtain evidence have been used in consumer protection investigations, and if so, how often.

To date the origin of all consumer protection investigations has been consumer complaints. There has been no analysis of complaints to identify systemic problems, although this is probably because the total number of complaints is so small that they can still be easily presented in a simple spreadsheet.

The FTC does not issue media releases during investigations.

Consumer Protection Cases Taken to the Board

To date, all of the cases considered by the Board have been consumer protection matters. A full list of the cases considered and their outcomes is provided as Attachment 1.

Papers for the Board are prepared by the Director and his staff in collaboration with an officer from the Legal Department and at the Direction of the CEO. The CEO approves all documents going to the Board and these are provided to the Commissioners prior to the meeting.

Cases are presented to the Board by the Director and/or an officer from the Legal Department. The CEO, the Director Consumer Protection, the case assigned Legal Officer and the relevant case officer(s) attend Board meetings and may be required to give evidence. The Commissioners stated that they were quite satisfied with the quality and timeliness of the papers they received from the Secretariat.

The FTC routinely issues a media release following a Board determination. Media releases are prepared by the Director Consumer Protection and/or the Director Communications. The CEO reviews and approves all media releases prior to issue.

The FTC's web site provides the determinations in 9 cases; 5 from 2011 and 4 from 2012. These determinations are summarised in Attachment 1 below.

The publication of these determinations on the web site provides a desirable level of transparency to the work of the Secretariat, by showing the types and range of matters investigated, and the reasoning of the

Board when determining cases. Over time this will build an important set of precedents that will facilitate business compliance as businesses and their advisors see the integrity of the determinative process and the consequences of contraventions. These determinations will also inform consumers and consumer representatives about the range of protections provided by the Consumer Protection Act and the evidence required by the Board and the types of penalties imposed and orders made by the Board.

It is difficult to draw too many inferences about the Secretariat's case selection criteria, investigatory priorities from such a small number of Board determinations.

It is noted that:

- none of the determinations make any adverse comments:
    - on the merits of matters brought to the Board
    - the quality of the submissions presented by the Secretariat
    - the conduct of investigatory officers;

- where a finding is made against the respondents they are routinely advised of their rights of appeal;

- it is not clear in all cases where an FTC officer directed a trader to take action to resolve the apparent contravention, whether that the direction was informal or in the form of a Compliance Notice;

- it is not clear whether the failure to comply with a Compliance Notice attracted an additional penalty;

- not all of the determinations list each of the provisions relevant in cases;

- in some determinations the Respondent was informed that interest would accrue on unpaid costs or penalties. While this is a sensible and reasonable order, the authority to do so was not apparent in the record of the determination;

- in one case (Global Internet Café) the matter was closed and marked as 'withdrawn' because the complainant and the respondent had settled. While this may have been the appropriate determination in this particular matter, it raises the issue as whether the Secretariat is investigating complaints on behalf of each individual complainant or in the public interest. Quite probably it may be either or both, depending upon the case. This leaves open the question as to whether the withdrawal of a complaint will be sufficient reason to close a case where the Secretariat believes that a determination should be made in the public interest. For example, where the conduct is particularly reprehensible and deserving of a penalty, or is illustrative of widespread contraventions in the market and findings of fact or imposition of penalties would aid compliance efforts;

- the penalties imposed are considerably below the maximum available penalty. Except in one case (Airtel) it is clear from the determinations that the relatively low penalties imposed are simply a reflection of the relativity minor nature of the contraventions. It may be that some of the criticisms about the 'lack of teeth' may be fueled by the nature of the cases so far considered by the Board rather than the level of fines imposed;

- there are no reported determinations of alleged contractions of:
    - Expiry dates
    - Plain language
    - Poor quality goods

  These 3 are problems areas are frequently reported in developing counties and are, according to some stakeholders interviewed, commonly encountered in the Seychelles;

- there was only one case alleging unsafe goods (Aarjay) and this concerned the supply of material to a building site rather than consumer products sold by retailers. Product safety problems that are frequently reported in developing counties are, according to some stakeholders interviewed, commonly encountered in the Seychelles;

- there was only one case alleging misleading representations (Airtel). In this case the fine was SR 50,000 (US$3,800). No reasoning for the level of penalty is recorded other than that 'all the evidence adduced to the Board' was considered. Interestingly, this fine is significantly less than the fine imposed on Aarjay, where there was no evidence of a system contravention.

  It was not clear from the determination whether the Board had before it evidence based estimates of how many subscribers had been affected by the overcharging (although a figure of 38,000 is referred to), over what period and at what additional aggregate cost to consumers. Surprisingly, no estimate of the ill-gotten gain is referred to. Taking some possibly inaccurate assumptions, if each of 38,000 customers was overcharged for SMSs by 15 cents (i.e. 55 cents rather than 40, a 138% mark-up) Airtel would have made a profit from the conduct (after paying the fine) if each customer only sent 9 SMSs during the relevant period.

The Secretariat advised that during 2011, 17 cases were presented to the Board. Subsequently, 11 determinations were made in 2011 and one in 2012. A further case was settled between the parties prior to a determination being made. During 2012, 15 cases were sent to the Board. 7 determinations were made. These figures indicate that the Board is not progressing through cases to determination in a timely manner, given that members are provided with papers before the hearings and that all matters have been relative straightforward consumer protection cases and none have been competition matters. As noted elsewhere, the problems with frequent declared conflict of interest is a partial explanation. Recommendations to increase the number of Board members, to increase the quantum of fees and to pay a sitting fee may also assist. It is suggested that the CEO work with the Board members to identify what are the causes of delay.

3.5. Relations with Sector Regulators

Seychelles has a number of sector regulators, most of which were established well before the FTC, with some therefore having some competition functions. Sectoral regulation in Seychelles is in sectors such as the financial services sector (the Central Bank of Seychelles, and the Seychelles Investment Bureau), the communications sector (the Communications Division in the Department of Information Communication Technology), the energy sector (the Energy Commission), the media services sector (Seychelles Media Commission), and the fishing industry (the Seychelles Fishing Authority).

In its September 2012 Research Note on *Best Operational Framework between The Fair Trading Commission and Sector Regulators,* the Commission correctly observed that "the establishment of the Fair Trading Commission mandated to enforce the competition and consumer protection Acts, which

cover all sectors of the economy, has created some level of confusion and conflict with regards to certain sector regulators' role and mandate vis-à-vis competition and consumer related issues".

The jurisdictional conflict between competition authorities and sector regulators over competition matters is worldwide, and has been discussed and debated upon in various international fora, notably the UNCAD, ICN and OECD.

UNCTAD undertook a study on the interface between competition authorities and sector regulators for the Intergovernmental Group of Experts on Competition Law and Policy.[57] It was noted that despite potentially playing complementary roles in fostering competitive markets and safeguarding consumer welfare, the different approaches employed and different perspectives held by competition policy and sector regulation can be a source of friction. Any friction is heightened by the blurring of the distinction between economic and technical regulation and competition enforcement, which are common regulatory tasks. The Box below describes the common regularly tasks as identified by OECD[58]:

- **Competition Protection:** controlling anti-competitive conduct and mergers.
- **Access Regulation:** ensuring non-discriminatory access to necessary inputs, particularly network infrastructure.
- **Economic Regulation:** adopting measures to control monopoly pricing.
- **Technical Regulation:** setting and monitoring standards to ensure compatibility and to address privacy, safety and environmental concerns.

Source: OECD

It was noted that while it might appear logical to confine sector regulators to economic and technical regulation and assign competition protection to competition authorities, the distinction between economic and technical regulation and competition regulation can often be blurred. In that regard, UNCTAD gave the example of telecommunications in which technical decision regarding spectrum use and accompanying decisions about licences affect the intensity of competition in the sector. Therefore, the determination of reasonable access conditions and their enforcement are an issue in which both the competition authority and the industry regulator have some degree of competence.

It was also found that jurisdictional conflicts occur as a result of ambiguities in the law as to whether sector regulation or competition law has precedence with regard to competition issues. In many instances, as is the case of Seychelles, sector regulators preceded competition authorities and were thus given responsibility for competition issues in their respective sectors. Even in cases where new sector regulators have been created after competition authorities, again as is the case of Seychelles, most countries choose to assign them competition responsibilities as a means of infusing and diffusing competition principles in the sector-regulatory regime.

As noted by UNCTAD, different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and competition authorities. UNCTAD has classified the various coordination approaches taken by different countries into five types, as shown in the Table below:

[57] UNCTAD, *Best Practices for Defining Respective Competences and Setting of Cases which Involve Joint Action by Competition Authorities and Regulatory Bodies* (TD/RBP/CONF.6/13/Rev.1 and TD/B/COM.2/CLP/44/Rev.2, of 17 August 2006).

[58] OECD, *Relationship between Regulators and Competition Authorities*, 1999.

Type	Approach
I	To combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority.
II	To combine technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions.
III	To combine technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority.
IV	To organize technical regulation as a stand-alone function for the sector regulator and include economic regulation within the competition authority.
V	Rely solely on competition law enforced by the competition authority.

All the Seychellois sector regulators that were consulted during the fact-finding visit to Seychelles indicated that they have, or should have, good working relationships with the FTC:

- The Communications Division in the Department of Information Communication Technology advised that it wants a good relationship with the FTC since there is need to have a forum which facilitates the two regulators to work together and come to a sort of compromise position when issues of competition in the regulated sector comes. A Memorandum of Understanding (MoU) with the FTC was therefore being negotiated. Under the MoU, the two regulators may refer some complaints to each other for investigation. The draft MoU also provides for the two regulators to seek and give advice to each other.

  The Legal Department of the FTC's Secretariat however advised that Communications Division in the Department of Information Communication Technology refused to enter into an MoU or sign a terms of reference with the FTC and stated that they would prefer meeting with the Commission on a case by case basis.

- The Central Bank of Seychelles also advised that it would want to develop an MoU with the FTC. Under such an MoU, the competition aspects in the banking services sector would be handled by the FTC, while the technical aspects would be retained by the Bank. However, given the current inability of the FTC to proceed with cases in the banking sector, due to vested interests of most Board members and quorum issues, this is not something that the FTC appear ready to take on in the immediate and near future.

- The Seychelles Media Commission advised that its enabling Act does not give it any competition functions, but gives it some consumer protection functions, such as prohibiting misleading advertising. Even though the Commission has had little contact with the FTC, it is prepared to cooperate with the FTC in the promotion of competition in the media sector.

- The Seychelles Licensing Authority advised that it works closely with the FTC, and there is constant exchange of information between the two regulators on areas that relate to their respective functions. The Authority was establishing a direct web access to the FTC on its licensing operations.

The FTC has also established informal working arrangements with the Small Enterprise Promotion Agency (SENPA), the Seychelles Chamber of Commerce & Industry (SCCI), the Customs Division of the Seychelles Revenue Commission (SRC) and the Public Utilities Corporation (PUC).

The Senior Legal Officer in the FTC's Legal Department confirmed that the Commission has concluded and signed MoUs with the Seychelles Licensing Authority and the Standards Bureau. The Commission

was currently negotiating MoUs with the Central Bank of Seychelles and the Communications Division in the Department of Information Communication and Technology and NATCOF, with the only stumbling block being the sharing of concurrent jurisdiction on competition. The negotiations with the Central Bank and the Communications Division are bound to be difficult and protracted. From consultations held with the Central Bank during the fact-finding visit to Seychelles, the reviewers got the impression that the Bank would not want to share jurisdiction with the FTC over mergers between banks. Even though the Bank admitted that it had not yet examined any merger transaction in the banking services sector, it had already drafted internal guideline on the assessment of such mergers.

While it might be argued that mergers in the financial services sector are likely to be of scope and complexity that the FTC is ill-equipped to handle, other competition authorities in the region have managed to successfully handle such mergers, in close cooperation with the relevant sector regulators. In Zimbabwe, for example, the competition authority has primary responsibility over the examination of mergers, with the Competition Act [*Chapter 14:28*] providing that "[w]here a statutory body established to regulate the activities of any person or class of persons authorizes a merger between two or more such persons, such body shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission in terms of this Act for the final authorization of the merger". For mergers in the banking services sector, the competition authority shares jurisdiction with the Reserve Bank of Zimbabwe. In practice, the two authorities have agreed that the competition authority assesses the competitive effects of such mergers in terms of lessening of competition in the relevant markets (which might extend beyond the financial services sector), while the central bank considers technical issues such as exchange control implications and protection of depositors' funds.

The proposed Electronic Communications Bill to be administered by the Communications Division duplicates the provisions of the Fair Competition Act and Consumer Protection Act administered by the FTC. The Bill aims at repealing and replacing the Broadcasting and Telecommunications Act, 2000 (Act 2 of 2000). In consultations with the Communications Division during the fact-finding visit to Seychelles, the Division advised that this is the second attempt at repealing the Broadcasting and Telecommunications Act. The first attempt was in 2009 when both the Fair Competition Act and the Consumer Protection Act were in the process of being finalized. The Division therefore decided to postpone the process of repealing the Broadcasting and Telecommunications Act so as to take into account the relevant provisions of the competition and consumer protection legislation.

The FTC has made representations on the duplication of the Bill with the Acts under its administration, and the relevant Ministry has accordingly responded to those representations, as follows:

Comments Made By FTC	**Response By The Ministry**
The Bill is in direct conflict with: a) Section 4(1) of the Fair Trading Commission Act, 2009 (FTC Act) which states: *"The functions of the Commission are to enforce any written laws relating to consumer protection, fair competition and other written law which it has jurisdiction to administer."* b) Section 4(3) of the FTC Act which states: *"The Commission --- may: .. (c) receive and evaluate consumer complaints; … (e) investigate whether enterprises are engaged in restrictive business*	The primary objectives of this EC Bill is to provide a regulatory framework for the electronic communications and broadcasting sectors and to provide the legal framework for regulation of these sectors; to make provision for the regulation of electronic communications services, electronic communications network services and broadcasting services; to provide for the granting of licences and licence obligations; to provide for the control of the radio frequency spectrum and numbering; and to provide for matters incidental thereto. In doing so, this Bill is also designed to protect competition in a market, and its primary responsibility of the Ministry to protect both competitors and consumers

practices; (f) monitor the standard of activities supplied by service providers to ensure compliance; (g) determine the standard of services applicable to service providers." c) Section 38 of the FTC Act which states: *"The Commission shall have <u>exclusive jurisdiction</u> **to hear and determine** matters under any written law relating to consumer protection, fair competition or other written law which it has jurisdiction to administer."*	in electronic communications service and broadcasting service. However, this Bill is unique because it empowers the Ministry to consult other institutions for consideration of public interest concerns when deciding on various matters. The section 7(5) of the Bill quotes: "The Ministry and the competent authorities, particularly in the area of competition and consumer protection, shall jointly cooperate, whenever necessary, in matters of common interest". The provisions of fair competition and consumer protection are included in ICT Acts, Communication Acts, EC Acts, Telecom Acts, in many countries where sector specific regulators are mandated to oversee the competition and consumer protection even though where general competition legislation is in place.
PART IX: CONSUMER PROTECTION a) All consumer complaints should go through FTC and FTC shall liaise with DICT for their technical expertise in the sector when investigating consumer complaints. b) FTC shall deal with consumer complaints in the electronic communication service and broadcasting service sector and shall carry out its enforcement as per the Consumer Protection Act 2010 (CP Act) which shall include the imposition of penalties and directives. c) Any provision relating to consumer protection in the proposed Electronic Communications Bill mus be in strict conformity with CP Act. The Bill must ensure that all providers are subject to the CP Act. d) The creation of a General Customer Code is supported. However, this must be done in accordance with section 60 of the CP Act which makes provision for mandatory and voluntary industry codes. Such codes must be proposed to the Minister and must have a committee who shall draw up the general code.	(a) (i) In the electronic communications services, consumer complaints have many aspects and it has a wider coverage such as quality of service standards, new service connections, service disconnection, fault repairs, billing, charging, call centre answering time, credit management, telephone directory inquiry, operator assistance services, contracts and agreements. In this regard, Ministry has all technical expertise to investigate such matters and even now Ministry is dealing with such complaints under the existing B & T Act, 2000. (ii) In the broadcasting services, the Media Commission has the power to deal with complaints in respect of content issues which the Media Commission has jurisdiction to entertain, examine and pronounce its views concerning television or sound broadcasting. It may be noted that the Ministry has the mandate to investigate technical complaints such as failures, low signal strengths and coverage issues related to broadcasting services. (iii) In relation to Radio Frequency Management, Ministry is mandated to investigate radio frequency spectrum complaints, especially the harmful interference. (b) The interpretation of consumer in the EC Bill is different than in FC Act, FTC Act and CP Act. (c) The provisions made to give effect to this section apply without limiting the generality of the FC Act 2009, FTC Act 2009, and CP Act 2010, and its application to provisions of this Act in any way in accordance with the section 79(2) of the proposed EC Bill. (d)

	General Consumer Code will be drafted by the Ministry in lin with international best practices. The section 60 of the CP Act 2010 provides only the interpretation of terms under industry codes.
PART IV: FAIR COMPETITION a) The Bill duplicates the role of FTC. The FTC is mandated under section 5 of the Fair Competition Act 2009 (FC Act) to promote and maintain fair competition, carry out investigations and review commercial activities. Therefore, all investigative functions shall be carried out by FTC and FTC shall consult DICT for their technical expertise as a sector regulator. b) No obligations can be imposed on an operator who has significant market power unless the operator is using this significant market power to restrict or present competition. c) The proposed Bill may make mention of the types of prohibited conduct under the FTC Act but shoul not have its own definitions of such conduct. DICT may make use of FTC's guidelines which details the conduct and methods of analysis under the FC Act. To have more than one definition in different laws will create unnecessary confusion. d) The Ministry may recommend to FTC that a market research be conducted in a specific sector. FTC shall then engage the relevant sector regulator in order to gather information to conduct the market research.	(a) Many countries have a general competition authority as well as a sector-specific ICT regulator. Under the mandate of this Bill, the Ministry shall perform the functions and duties in relation to competition among operators in electronic communications or broadcasting markets in Seychelles. Wherever a conflict arises between the provisions of this Bill and the provisions of any other legislation regulating competition in electronic communications of broadcasting markets in Seychelles, including but not limited to the Fair Competition Act, 2009, the provisions of this Bill shall prevail. (b) Ministry disagrees with this argument. Typically, in countries where general competition legislation is in place, ex-ante remedies are imposed by the sector specific regulator. The additional obligations are specified and imposed on dominant operators in order to open the market to competitive entry and activity and to prevent anti-competitive behavior. (c) The point on mentioning the types of prohibited conduct, having its own definitions, under the EC Bill without contradicting the provisions in the FTC Act is noted. In regard to making use of FTC's guidelines please refer to the section 42(2) of the EC Bill. (d) Pursuant to section 40(2)(c) of the EC Bill, the Ministry will seek the advice of the Fair Trading Commission.
PART VIII: TARIFFS a) The principles of tariff regulation contain elements that will limit investment and innovation. b) DICT must ensure that it is transparent with its method of regulating tariffs. The concept of regulated and unregulated service is unattainable as the market must constantly be regulated to ensure that there is fair competition.	(a) There are 14 subsections under principles of tariff regulation in section 70 of the Bill. FTC has not mentioned the specific clauses that will limit investment and innovation. (b) Pursuant to section 42 of the EC Bill, Ministry will determine whether or not a relevant market of an electronic communication service or broadcasting service is effectively competitive after a market analysis. Pursuant to section 45 of this Bill, Ministry will make an official announcement about markets for which their tariffs must be approved by the Ministry prior to the service being offered to the public by operators.

	Under a fully competitive environment, market forces are more effective than regulation in providing consumers with a wide choice of services at reasonable prices. Hence, Ministry recognizes the vital role of protecting consumers by promoting the competitiveness of the ICT industry in Seychelles and proper legislative authorization has been made for strict price regulation only on regulated services.

The above clearly shows that there is a wide divergence of views between the FTC and the Ministry for Information Communication and Technology on competition jurisdiction in the communications sector, which will make it extremely difficult for the Commission and the Communications Division to reach consensus on a concurrent jurisdiction MoU. As explained earlier, there are compelling reasons why the national competition authority should be tasked with primary responsibility of promoting competition in the whole economy, albeit in close cooperation with sector regulators.

Apart from the issue of jurisdictional conflicts over competition matters, the FTC's negotiations with the Central Bank and the Communications Division can be protracted because none of the regulators are statutorily obliged to conclude such agreements. Unlike Seychelles' Consumer Protection Act, 2010, which have specific provisions on relationship with regulatory and other authorities (particularly the provisions of section 78(1) that "the Commission may … negotiate and enter into agreements with any regulatory authority which exercises jurisdiction over consumer matters within particular industry or sector, so as to: (i) co-ordinate and harmonise the exercise of jurisdiction over such matters within that industry or sector; and (ii) to ensure the consistent application this Act"), the Fair Competition Act, 2009 does not have such provisions on relations with sector regulators with competition functions.

It is noted that section 6(1)(a) of the *Fair Competition Act* gives the Commission powers to "enter into such contracts as may be necessary or expedient for the purposes of performing its functions under this Act". These provisions however do not specifically refer to concurrent jurisdiction agreements with other sector regulators with competition functions, and also do not oblige the other sector regulators to conclude such agreements with the FTC.

The competition legislations of other countries in the region, such as in Namibia, South Africa, and Zambia, have specific provisions that oblige the competition authorities and sector regulators to conclude and enter into concurrent jurisdiction over competition matters.

Credit should be given to the FTC for its endeavours to conclude and sign MoUs with sector regulators with competition functions. However, the MoU template it is using in the negotiations, which is based on its September 2010 Research Note on *Best Operational Framework between The Fair Trading Commission and Sector Regulators, "*combines the technical and economic regulation in a sector regulator and leave the competition enforcement exclusively in the hands of the competition authority", which is akin to Type I of UNCTAD's classification of coordination approaches taken by different countries to ensure coordination and policy coherence between sector regulators and competition authorities. The problem with this approach is that it removes all economic regulation functions and responsibilities from the competition authority. Economic regulation includes adopting measures to control monopoly pricing, which is a major competition function under abuse of dominance, or monopolization. The proposed procedures for merger application and complaints handling under the template also need to be revised, as they remove some basic powers and responsibilities from the competition authority, e.g., the power and responsibility of making final determinations on competition cases without referring such decisions to other bodies.

During consultations held with the Parliamentary Committee on Finance and Public Accounts of the National Assembly of Seychelles, the Committee stressed that the FTC should become the focal point of regulators to ensure coordinated operations of the country's regulators.

It is recommended that the FTC should be given statutory supremacy over competition matters in Seychelles. Those sector regulators with competition functions should be obliged by Statute to negotiate and conclude concurrent jurisdiction agreements with the FTC on the promotion of competition in their respective sectors. In that regard, the following provisions borrowed from the Competition Act, 2003 (No.2 of 2003) of Namibia are suggested for incorporation in the *Fair Trading Commission Act*:

"(1) If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of [this Act] within a particular sector, the Commission and that authority –

(a) must negotiate an agreement to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
(b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

(2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must –

(a) identify and establish procedures for the management of areas of concurrent jurisdiction;
(b) promote co-operation between the regulatory authority and the Commission; and
(c) provide for the exchange of information and the protection of confidential information.

(3) An agreement referred to in subsection (1) must be published in the Gazette."

3.6. Strategic Plans

In line with good corporate governance, the FTC has worked out its Three-Year Strategic Plan: 2012-2015 to guide and lead its operations. The following are the Commission's Mission Statement, Vision and Core Values under the Plan:

Mission Statement	**Vision**
To advocate in favour of sound competition and consumer protection policies to safeguard the interest of consumers and the competition process and implement those policies through advocacy, market studies and enforcement in partnership with all stakeholders.	Championing market efficiency for consumers socio-economic welfare

Core Values

Committed to the following core values and principles:

- **Integrity** – behaving in an ethical, legal and transparent manner;
- **High Performance/ Excellence** – investing in continuous professional development of staff;

- **Quality Service** – offering people-friendly services;
- **Consumer Rights Advocacy** – empowering consumers to exercise their rights;
- **Teamwork** – working collaboratively within FTC and maintaining good relations with our stakeholders;
- **Dynamism/ Innovativeness** – responding to new challenges with creative solutions.

The following are the strategic issues under the Plan, which are detailed in the Table below, together with the goals: (i) pro-active advocacy; (ii) broad-based development and enactment of FTC regulations; (iii) continuous professional development of staff; and (iv) engage in policy development:

Strategic Issue	**Goals**
Pro-Active Advocacy	1. Public awareness of FTC's mission; 2. Awareness of consumers of their rights and responsibilities; 3. Awareness of businesses of their obligations and liabilities; 4. Effective business conduct and practices throughout Seychelles. To achieve Goals 1 & 2, the FTC intends to: • Set-up an advocacy section/unit. To achieve Goal 3, the FTC intends to: • Disseminate tailored information to businesses. To achieve Goal 4, the FTC intends to: • Undertake remedial reviews with relevant businesses following complaints and periodical market researches; • Implement advocacy programmes targeting relevant sectors.
Broad-Based Development and Enactment of FTC regulations	1. Enactment of comprehensive regulations relating to competition and consumes; 2. Broad support for enforcement of FTC regulations. To achieve Goal 1, the FTC intends to: • Review and adapt international best practices; • Outsource drafting of regulations; • Consult stakeholders. To achieve Goal 2, the FTC intends to: • Lobby government to champion the regulations; • Consolidate the investigation and inspection unit; • Network with relevant stakeholders; • Conclude MOUs with strategic enforcement agencies.
Continuous Professional Development of Staff	1. Have a staff training plan; 2. Realize a technically-qualified staff team; 3. Foster a high-performing team. To achieve Goal 1, the FTC intends to: • Develop the plan on a comprehensive training needs and analysis. To achieve Goal 2, the FTC intends to: • Invest in local and international training programmes;

	• Partake in exchange programmes with international commissions. To achieve Goal 3, the FTC intends to: • Implement a comprehensive compensation scheme; • Institutionalize a performance-management system.
Engage in Policy Development	1. Active involvement of FTC in policy development and analysis relating to business; 2. Increased influence of FTC in national economic regulation. To achieve Goal 1, the FTC intends to: • Lobby for FTC's participation in policy development fora; • Undertake advocacy programmes to increase the visibility of FTC; • Enter into strategic alliances with key partner agencies. To achieve Goal 2, the FTC intends to: • Secure MOUs with Ministries responsible for economic regulation; • Recommend amendments to the *Fair Trading Commission Act*.

The numerous action plans that have been worked out to tackle the strategic issues and meet the goals under the Three-Year Strategic Plan are tabulated in the Box below.

SN	Year	Month	Target
1	2012	Jan	Secure budgetary independence
2	2012	Jan	Start fortnightly sessions with consumer groups on rights and responsibilities
3	2012	Jan	Start participating in international conferences (ICN, OECD, ICPEN, etc)
4	2012	Jan	Launch quarterly collection of economic data
5	2012	Jan	Draw up a project for technical assistance in drafting the regulations
6	2012	Feb	Start quarterly meetings with regulators to address emerging issues
7	2012	Mar	Outsource a comprehensive training needs analysis (TNA) of all staff and training plan
8	2012	Mar	Assess market concentration
9	2012	Mar	Start enforcing advocacy programmes as part of recommended remedies for cases within a month of FTC's published decision
10	2012	Mar	Secure work attachment for senior staff in overseas jurisdictions
11	2012	Mar	Create an action plan for sensitizing government
12	2012	Mar	Secure technical assistance to review existing policies and recommend alignments
13	2012	Mar	Audit FTC's functions
14	2012	Apr	Launch quarterly dissemination/education of citizens via mass media
15	2012	Apr	Attend quarterly international workshops and seminars
16	2012	Apr	Draw up protocols for joint interventions
17	2012	Apr	Develop a bottom-up compensation scheme for each department
18	2012	Apr	Conduct workshops and seminars targeting government agencies
19	2012	Apr	Draft required amendments and submit to Cabinet
20	2012	Jun	Compile an internal Standard Operating Procedure (SOP) manual
21	2012	Jun	Start bi-annual evaluation of awareness programmes
22	2012	Jun	Start regular meetings with sector regulators to address issues of public interest
23	2012	Jun	Outsource development of performance management system
24	2012	Aug	Identify target businesses in priority sectors
25	2012	Aug	Secure funding from government budget for the training plan
26	2012	Oct	Launch monthly tailored sessions with various business groups
27	2012	Nov	Start annual distribution of leaflets on the FCA and CPA

28	2012	Nov	Conduct anniversary lecture
29	2012	Dec	Undertake training in competition & consumer laws and application
30	2012	Dec	Develop advocacy programmes for highly concentrated sectors
31	2012	Dec	Seek partnership with regional competition and consumer agencies
32	2012	Dec	Implement the action plan
33	2012	Dec	Start conducting quarterly awareness sessions with government bodies, private bodies, consumers and other relevant stakeholders
34	2012	Dec	Negotiate MOUs with the ministries responsible for economic regulation
35	2012	Jan	Launch quarterly recording and monitoring of the level of complaints from businesses
36	2013	Jan	Draw up a Cabinet memorandum on competition policy in Seychelles
37	2013	Jan	Start continuous capacity-building sessions for staff
38	2013	Jan	Start MOU negotiations with strategic enforcement agencies
39	2013	Feb	Liaise with AG's Office for tabling of the amendments
40	2013	Mar	Engage senior staff to conduct in-house seminars
41	2013	Jun	Start bi-annual alerts on policy matters for government agencies
42	2013	Dec	Purchase ICT resources for publication purposes
43	2013	Dec	Start annual attachments in overseas jurisdictions
44	2013	Dec	Launch annual newsletter on FTC's challenges and achievements
45	2013	Dec	Start annual meeting with stakeholders
46	2014	Jan	Recruit 12 additional qualified staff
47	2014	Dec	Recruit at least 2 staff for the unit with marketing & PR experience
48	2014	Dec	Enter into TOR on policy development with other agencies

Source: Fair Trading Commission, Seychelles

The FTC's Three-Year Strategic Plan tackles many of the issues that the reviewers identified during the fact-finding visit to Seychelles as requiring tackling for improved implementation of competition and consumer protection policies and laws in the country. The execution of most of the action items under the Plan however will require more resources than are currently available to the Commission. It is therefore not surprising that some of the timelines in the Action Plan have not been met.

In adopting the Three-Year Strategic Plan, the FTC is however travelling in the right direction and should be given all the necessary support by its stakeholders, in both the public and private sectors of the Seychellois economy.

4. OTHER RELEVANT ISSUES

The other pertinent issues impacting on the effective implementation of competition policy and law in Seychelles that were identified by, or brought to the attention of, the reviewers during the fact-finding visit to that country included: (i) the location and characteristics of the office building of the Commission; (ii) human resources; and (iii) advocacy.

4.1. Office Premises

The limitations of the FTC's present office premises were amply outlined in the Commission's draft annual report for the year ending December 2011, which has yet to be published. The submissions made in that regard are reproduced in the Box below:

> The Commission moved into its present location 3rd Floor Orion Mall Complex in August 2010, after it had spent its first nine months sharing offices with the Energy Commission. In January 2011, it completed the refurbishment of Room 206 in the same complex to house its Consumer Protection Department.

FTC's present location is spacious enough for its present number of staff. However, though centrally located and within easy reach of commuters and consumers, it is actually problematic. For instance, it is in the centre of a mall, hence the Commission must put up with uncontrollable noise throughout the day from the volume of people and traffic going about their business within the vicinity.

Security at the building is limited to one post. This post does not enjoy a central location from which a proper monitoring of entry and exit of members of the public can be conducted. This, consequently exposes the Commission to theft and vandalism that cannot be traced. To date, the Commission has lost two laptop computers from its offices that had been accidently left unattended, and access to which had been possible via the main door, which in turn had been left unlocked.

The building itself is not very appropriate for the Commission considering the Commission's mandate. In the first instance, the building is a potential hazard: it is cracked. Secondly, it leaks but the landlady is not willing to engage in repair works in the areas that leak until Orion Complex Management sees to the structural repair work first. Thirdly, the staircase is rather narrow, therefore posing a potential handicap in the event of an emergency evacuation. Furthermore, the Commission is frequently harassed for payment of service charges for sub-standard services, like the escalator that is frequently out of order, or for the only lift to the building, also used by the other tenants to transport their merchandise and which sometimes leaves patrons waiting unnecessarily.

In the second instance, the Commission is spread out and across the two extreme sides of the building, consequently obliging staff to waste time migrating from one office to another and wasting otherwise productive time, unnecessarily.

The Commission has however taken lease of new offices in an adjacent modern building, which was in the final stages of construction by the time of the fact-finding visit. The Chief Executive Officer of the FTC assured the reviewers that the new office premises that the Commission was due to occupy before the end of this year, solves all the problems associated with the present offices.

Of particular importance will be that all the Commission's operational Departments will be housed under 'one roof' for the facilitation of intra-office communications and cross-fertilisation of ideas.

4.2. Human Resources

As in any regulatory organization, the quality and quantity of the human resource is a key determinate of its success as a regulator, every bit as much as the comprehensiveness and cohesion of the relevant policies, the appropriateness of the legislation and the support of major stakeholders, particularly the relevant Minister.

There are many factors determining whether the quality and quantity of human resources are optimal, and these include the health of national markets (in terms of the strength of competition processes and the application of other pro-competition and pro-consumer regulations), the roles and responsibilities of the agency, the comprehensiveness, and coherence, of the legislation it must enforce, the expectation of stakeholders and the available operational budget.

The implementation of competition policy and law is relatively new in Seychelles, having effectively commenced only in 2009 (the same however cannot be said for consumer protection since the National Consumer Forum (NATCOF) has been in existence and operational for over 18 years). Competition policy and law is also not being taught at the University in Seychelles. The recruitment ground for the FTC is therefore very small. It is noteworthy that most of the current senior staff of the Commission were 'head-hunted' in relation to the necessary skills required by the Commission. The crucial post of Director (Legal) in the Commission has remained vacant throughout the year, indicative of the smallness of the

Commission's recruitment ground for lawyers. The dearth of lawyers in Seychelles was also raised by the Attorney General and the Chief Justice of the Supreme Court of Seychelles during the fact-finding visit to Seychelles.

The current staff is nevertheless adequately qualified, with qualifications in relevant fields such as economics, law, management and accounts. The FTC also has in place an effective staff development programme. For example, the Commission is financing post-graduate studies being undertaken by the Directors, as well as those being undertaken by the Accountant and the Office Manager.

The skill sets required in the staff of a competition and consumer protection agency are diverse. Clearly because the functions of the agency involve the enforcement of laws with an economic rational, it is essential that most of the staff have qualifications in either or both of law and economics. However, because the FTC is a regulatory agency it is also essential that included in the staff complement are officers with particular skills in research and public relations. Formal qualifications are essential as an indicator or a given level of understanding and knowledge, and higher degrees are reasonably expected to evidence a more sophisticated comprehension of a particular subject area.

As has already been pointed out above, the reviewers noted that the staff of the FTC are either suitably qualified or demonstrably committed to obtaining suitable and higher qualifications. This commitment is attributable to both the drive of individual officers and to the support provided by the FTC. Staff who are studying are given an afternoon off per week to study, and all the fees are paid by the Commission with the costs of attending course-associated seminars, etc., met by the Commission. This is an investment in the future qualifications and productivity of the staff of the FTC and the wider public service of the Seychelles.

The reviewers concluded that the current range and levels of formal skills in the Commission are adequate and improving thanks to an established policy promoting formal studies, and that all staff, and the FTC, will benefit as they gain more hands-on experience in the functions of the Commission. The efflux of time, of course is only one of the determinants of experience. Other operational policies, such as staff reassignments and rotations, assigning responsibilities for interviews or presentations etc., downwards can increase both the quality and quantity of experience. Necessarily, these actions must be balanced against the associated risks and, in the case of the FTC, the small pool of staff.

All investigators need to have superior investigative skills. It was not possible to evaluate the extent to which individual staff members of the FTC possessed effective investigator skills. Perhaps because of both the institutional youth of the Commission and its small number of staff, there is not yet in place a system for building and expanding investigator skills.

Every bit as important as formal qualifications are the attitudes and passions of the staff. The reviewers have both managed well-qualified staff that were misplaced in a competition and/or consumer protection agency because of their attitude or lack of passion for the goals of the policy, law and agency. It was clear to the reviewers that the Chief Executive Officer of the FTC and the senior staff each have an admirable and necessary commitment to both the goals of the Commission and to the highest level of professionalism, and that they bring an enviable passion to the discharge of their duties.

The Chief Executive Officer of the FTC submitted during the fact-finding visit to Seychelles that staff of the Commission are competitively remunerated *vis-à-vis* similar Seychellois organisations, and that was confirmed by the other staff members interviewed. Staff salaries in the Commission are generally higher than equivalent positions in the general public service. As such, staff retention in the Commission is very good. Staff retention is often a difficult issue for young agencies as experienced staff are attracted to higher salaries and increased potential for promotion in senior government Departments and other

regulatory authorities, and more so to the private sector. The FTC's retention experience does not to match this common pattern.

However, *all* members of staff of the FTC are on 2-year renewable contracts of employment, regardless of their ranks. None of the staff members interviewed seemed concerned about this. Some even welcomed the arrangement since it afforded them an opportunity to negotiate more competitive conditions of service. While fixed-term employment contracts for senior members of staff, such as the Chief Executive Officer and Directors, are common in the region, they may not be suitable for lower level employees who need job security for self-development and motivational purposes.

In the reviewers' opinion, the staff effectiveness issues identified by the Chief Executive Officer are more to do with nuances of operational procedures and the personalities of staff, and their professional relationships with colleagues, than they do with the organizational structure. Relevant operation procedures include the identification of case officers for each investigation or project, and agreed allocation of primary responsibility for particular tasks, such as drafting media releases, preparing and delivering presentations, etc. This is not to say that a different organizational structure may not be preferred. In the light of the reviewers' comments this is clearly a matter for the Chief Executive Officer rather than for outsiders.

The Chief Executive Officer of the FTC impressed the reviewers as a capable leader who demonstrates by example to his staff a dedication to the goals of the organization and the relevant enabling legislation, and a strategic vision of how the Commission should fulfill its roles and responsibilities while maintaining the highest ethical standards and sound administrative practices.

The reviewers were also impressed by the calibre of the Commission's staff. As one might expect with a new agency, the experience of the staff in competition and consumer protection is limited. However, the staff demonstrated an enthusiasm and dedication both to the immediate challenge of analyzing complaints, planning and investigations. It was also clear that at the personal level, most staff members are devoting considerable personal time and effort to increasing their knowledge of competition and consumer protection issues, particularly the economic and legal underpinning of the competition and consumer protection regulation.

4.3. Advocacy, Education and Awareness

Although the terms 'advocacy' and 'education' or 'awareness' are often used interchangeably they do mean different things. Consequently advocacy goals, strategies and activities are substantially different to education goals, strategies and activities, although there will be some overlap. To the reviewers, advocacy is about taking the following types of action in support of the stated competition and consumer protection goals:

- Convincing stakeholders (government departments, Ministers, members of the National Assembly, fellow regulators, consumers, businesses) that the goals of both the Competition Act and the Consumer Protection Act are both desirable and attainable. The most important advocacy goals must be to facilitate a comprehensive acceptance that well-functioning markets will maximize consumer welfare and that effectively enforced consumer and consumer protection policies and laws are essential support for well-functioning markets.

- Convincing stakeholders that the FTC has the leadership to effectively and efficiently undertake each of its functions in support for well-functioning markets and for appropriate levels of enforcement when markets fail to deliver acceptable outcomes for consumers.

- Convincing stakeholders, particularly fellow regulators, government departments and Ministers, that the FTC's views and opinions are both valid and relevant to a broad range of economic and social issues. This is particularly important where there are established sector regulators or where there is significant government ownership or economic development initiatives.

Successful advocacy will deliver the FTC a 'seat at the table' when important economic initiatives are being discussed, help secure the FTC budget and more generally increase its power to persuade and influence. It will also increase the effectiveness of educational activities because it will increase the perceived relevance of both the laws and the FTC. Advocacy activities will need to have an educative element to ensure that the targets of the advocacy understand the practical application of the laws.

Education is the imparting of factual knowledge, in this case about the objectives and provisions of the competition and consumer legislation and the goals, functions and activities of the FTC. Education or raising awareness activities will often include an element of advocacy, to put the facts in context and to arouse interest and show relevance to stakeholders. Raising awareness often means the earliest attempts to educate when the relevant knowledge and interest is not high.

Both advocacy and education have their challenges that are common to both competition and consumer protection. However, there are some significant differences and these will influence the FTC's strategies and the content of its activities. Generally the goals and even the elements of consumer protection law are widely accepted by stakeholders and debate is more often on case specific detail. In the Seychellois context, an exception to this relates to warranties (this point is referred to a x). What is evidently proving difficult, is gaining acceptance that the competition process will work in consumer interests across the economy. Stakeholder after stakeholder dismissed an economy wide effect on the grounds that 'the Seychelles is too small'. The goals and the elements of competition are more difficult for some stakeholders to understand and accept. In part this is because of the political and economic history of the Seychelles and also because of the common view that 'the Seychelles is too small'.

The challenges facing educational strategies and activities are similarly split. The provisions of the Consumer Protection Act are relatively straightforward and the implicit policy largely aligns with most people's worldly experiences. Perhaps the biggest educational challenge is for the FTC who must manage expectations that it can immediately detect and fix each and every consumer's problem to their satisfaction. The concepts and the competition provisions of the Fair Trading Commission Act are more complex and therefore more difficult to explain, understand and accept. The level of stakeholder resistance to advocacy is likely to be greater with competition, where the mischief if not always immediately apparent, than consumer protection, where the rights and the wrongs of the situation are more often quickly apparent.

The FTC is still in its formative stages, having commenced operations only about two years ago. Expectations on it are however high in both the public and private sectors of the Seychellois economy. Most of the stakeholders that were consulted during the fact-finding visit to Seychelles were of the opinion that the Commission is doing a good job. These stakeholders included the Department of Trade in the Ministry of Finance, Trade and Investment, the Central Bank of Seychelles, the Seychelles Public Transport Corporation, the Seychelles Investment Board, and the Seychelles Licensing Authority.

Other stakeholders however felt that the Commission needed to do more in publicising itself. The Small Enterprises Promotion Agency advised that while competition law has had a good effect in Seychelles, the FTC needs to establish better relations with the Agency on how best small and medium-sized enterprises (SMEs) can be helped under the country's competition and consumer protection legislation. The Seychelles Investment Board was of the opinion that while the FTC is doing all it can to enforce the country's competition law, the competition authority is however still not widely known, and people want

to know what they can get out of it. The Seychelles Chamber of Commerce and Industry, which advised that it was not consulted in the drafting of both the Fair Competition Act and the Consumer Protection Act, expressed a wish for its members to be educated on the functions of the FTC.

It was also evident from consultations held with the Parliamentary Committee on Finance and Public Accounts of the National Assembly of Seychelles, and from reports on debates in Parliament on the inadequacies of the FTC, that the perceptions on the Commission's functions need to be corrected. That can be done through regular consultative meetings with Members of Parliament.

Consultations with senior staff of the FTC also revealed the perception that competition policy and law seem not to be high on the Government's priority agenda, and that was the reason why the Commission was receiving less explicit government support than believed necessary for comprehensive compliance and effective enforcement. The reviewers' consultations with the relevant Government authorities, particularly the Vice President and the Ministry of Finance, Trade and Investment, however showed that the Commission's operations have Government support and goodwill. What might be required is the Commission's active involvement in government policy development and formulation to avoid situations where new policies do not fully take into account competition and consumer protection issues. The Commission also advised that since its name, 'Fair Trading Commission', is a misnomer and misleads the general public as to the area of its operations, there is need for the rebranding of the Commission as a competition authority. To that end, the Commission is now producing newspaper articles every week on its activities and operations.

It was clear from stakeholder consultations held during the fact-finding visit to Seychelles that the FTC has been an active advocate and educator of competition and consumer protection law in Seychelles through its public education and awareness programmes. In its draft Annual Report for 2011, the Commission reported that it launched a Consumer Awareness session on the *Consumer Protection Act* via presentations to schools, post-secondary institutions, workplaces, districts and the local consumer group, the National Consumer Forum (NATCOF). Specific restrictions of the *Consumer Protection Act* were also published in the *Nation* national newspaper, and television spots of the restrictions were also aired at prime time on the national TV (SBC), both reaching a large percentage of the population.

The FTC has also established a website with various documents of an advocacy and awareness nature that can be downloaded, including competition cases handled by the Commission.

To better equip its Communications & Corporate Services Department in the undertaking of advocacy, the Commission's Director for Communications and Corporate Services in 2011 spent a weeklong attachment at the South African Competition Commission for empowerment in advocacy. The aim of the attachment was to engage in active learning from experienced professionals in the field. Areas covered included: (i) what is advocacy?; (ii) why should advocacy be conducted?; (iii) how should advocacy be conducted?; (iv) when should advocacy be conducted?; and (v) who should conduct advocacy?

It is noteworthy that the FTC's Three-Year Strategic Plan: 2012-2015 prioritises advocacy and awareness, and includes a number of related goals to be met during the Plan period, including: (i) fortnightly sessions with consumer group on rights and responsibilities; (ii) creating an action plan for sensitizing government; (iii) launching quarterly dissemination/education of citizens via mass media; (iv) conducting workshops and seminars targeting government agencies; (v) regular meetings with sector regulators to address issues of public interest; (vi) launching monthly tailored sessions with various business group; (vii) developing advocacy programmes for highly concentrated sectors; (viii) conducting quarterly awareness sessions with government bodies, private bodies, consumers and other relevant stakeholders; (ix) starting bi-annual alerts on policy matters for government agencies; and (x) launching annual newsletter on FTC's challenges and achievements.

It is recommended that the FTC should undertake more advocacy and awareness activities, aimed at Government Ministries, the Legislature and the Judiciary, as well as business and consumer associations, to increase its visibility. In that regard, the Communications & Corporate Services Department of the Commission's Secretariat should be adequately resourced and equipped, and work closely with the operational Departments of Competition and Consumer Affairs.

4.4. International Cooperation

The FTC of Seychelles has been in existence only since 2009, yet it is actively cooperating with various other competition authorities and organisations in the region and internationally. In the region, the FTC cooperates with other national competition authorities under COMESA, particularly through its representation on the current Board of Commissioners of the COMESA Competition Commission. It also cooperates with competition authorities under SADC through its participation in the Competition and Consumer Policy and Law Committee (CCOPOLC). Furthermore, the Seychellois competition authority is a member of the Southern and East African Competition Authority (SEACF) and the recently formed African Competition Forum (ACF).

Competition cooperation under COMESA provides wide opportunities for the FTC. Regional cooperation under COMESA is aimed at not only assisting those member States with no competition policies and laws, and competition authorities to implement and enforce the policies and laws, to formulate the policies laws and establish the implementation and enforcement agencies, but also to develop young competition authorities, particularly in case handling. The Work Programme of the COMESA Competition Commission also includes capacity building and exchange of information among national competition authorities through workshops and seminars.

Under SADC, an ambitious project under the European Union (EU)'s TradeCom Facility on the design and development of a case management online resource database was recently completed. Some of the key objectives of the database are to: (i) act as a central repository of information on both on-going and resolved competition and consumer protection cases; (ii) promote collaboration and cooperation on cross-border cases, e.g., making it easier to find out if particular parties/cases are being investigated by different authorities, repeat offenders, etc.; and (iii) provide easy access to case information and best practice in a user friendly fashion with search capability. The database is hosted on the SADC platform and use the SADC website domain: **http://www.sadc.int/competitioncases.**

It is recommended that the FTC continues to cooperate with other competition and consumer protection authorities in the COMESA and SADC regions, particularly with regards to use and contribution to the SADC's online resource database on competition and consumer protection cases.

At the multilateral level, the FTC has benefitted, or stands to benefit, from the programmes of relevant international organisations such as UNCTAD, the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), the International Consumer Protection Enforcement Network (ICPEN) and the World Trade Organisation (WTO).

The FTC has benefitted a lot from UNCTAD's Capacity Building and Technical Assistance Programme. Besides the current project on an independent review of the competition and consumer protection legislation of Seychelles, which is the subject of this report, UNCTAD in March 2012 organised an induction course for the Commissioners on *Institutional and Organisational Aspects of Competition Law Enforcement,* and intermediate training on *Investigative Procedures and Case Handling* for Investigative Officers and Case Handlers of the FTC.[59]

In its unpublished draft Annual Report for the year ending December 2011, the FTC also reported that discussions were underway with UNCTAD on a 3-year technical assistance project covering the following:

- Compilation of required guidelines and regulations in line with the *Consumer Protection Act* and the *Fair Competition Act*;

- Guidance in the manner to assess government policies and prepare policy papers for consumer and competition cases;

- The provision of a long term institutional framework for the Commission in relation to all sections;

- In-house training of staff in areas of complaint handling, investigation procedures, case compiling, report handling and Board hearings;

- Acquiring overseas attachments for senior staff in their relevant Departments to accelerate and broaden experience;

- Co-organising specific seminars for specific bodies in order to educate about the Commission and the two Acts, e.g., Ministries, authorities, private bodies; and

- Prepare and conduct an induction course applicable to all appointed Commissioners and future appointees to detail the role of a Commissioner and the conduct of hearings, as well as how decisions should be made and presented in line with the relevant law.

While some of the above projected activities might have been overtaken by events, it is suggested that discussions with UNCTAD should be pursued to fruition.

The deliberations of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy (IGE) have benefitted a lot of competition authorities worldwide, particularly those from developing countries, in the area of best practice in the implementation of competition policy and law. Like all the other competition authorities in the region, the FTC would also gain a lot from regular and consistent attendance and participation at meetings of the IGE.

Besides UNCTAD, the ICN has emerged as a leading international organization that promotes competition policy and law. The Network provides competition authorities with a specialised, yet informal, venue for maintaining regular contacts and addressing practical competition concerns. It largely works through five substantive working groups, addressing advocacy, agency effectiveness, cartels, mergers, and unilateral conduct. Working Group members confer primarily via conference calls and e-

[59] http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=48

mails, and hold periodic teleseminars and workshops. Annual conferences and workshops provide opportunities to discuss working group projects and their implications for enforcement.

The ICN does not exercise any rule-making function. Where the ICN reaches consensus on recommendations, or 'best practices', arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

An ICN programme that would be of particular interest to the FTC is the Advocacy and Implementation Network Support Program (AISUP) under which ICN members can seek advice about specific ICN work products or receive assistance on how ICN recommendations and other guidance documents might be implemented within their jurisdiction. Members request assistance through AISUP, and the requesting agency is paired with expert staff from other ICN member agencies. The supporting agencies provide the requesting agency with a thorough explanation of relevant ICN work products and implementation advice, as appropriate. Requesting agencies are then free to implement the advice if they choose to do so. Any ICN member may request assistance to participate in AISUP.

The Zambian competition authority, from the region, got assistance under the AISUP of the ICN in the review of the country's competition law, as well in cartel enforcement (leniency program) and market studies. It was paired with the Bunderskartellamt of Germany, and is also receiving from the German competition authority technical assistance is case handling on a regular and request basis.

It is recommended that the FTC continues and intensifies its active participation in the programmes of relevant international organisations, such as UNCTAD, ICN, OECD, ICPEN, etc. That way, the Commission will not only benefit immensely from international best practice but will receive direct notification of the organisations' programmes, including conferences and workshops. In particular, the Commission should pursue to fruition its discussions with UNCTAD on the 3-year technical assistance project.

5. FINDINGS AND RECOMMENDATIONS

The *Fair Trading Commission Act* is a fairly well drafted piece of legislation, and relatively few proposed revisions to the Act were identified from its review and the findings of the fact-finding visit to Seychelles. Even though the *Fair Competition Act* is comprehensive and contains all the basic elements of competition law, the arrangements of its various provisions on restrictive business practices is not coordinated, and thus confusing.

The *Consumer Protection Act* is a comprehensive consumer protection law that includes provisions in respect of each of the major areas expected of a modern consumer law. The reviewers did not identify any 'fatal flaws'.

The most significant drafting deficiency identified was the lack of clarity in the term 'Commission'. Given the distinct functions and activities of two arms of the FTC, the use of the generic term 'Commission' did not adequately distinguish between the determinative body referred to in the Act as the *Board of Commissioners* and the administrative/investigative body the reviewers have termed the *Secretariat*.

A significant observation was that there is no articulated Consumer Protection Policy. The absence of a policy has not stopped the FTC and a number of other regulators from vigorously undertaking their consumer protection functions. However, in the absence of a policy it is more likely that the various stakeholders will pursue their own agendas without regard to the functions and activities of fellow regulators. It is also more likely that consumer protection will be seen as simply the resolving of individual consumer problems rather than as a significant building block of national development in the way as competition law has been recognised. The reviewers were made aware of some informal liaison between some of the regulators, but concluded that these efforts need to be expanded. This is particularly important in a small economy where there must be less tolerance for duplication of effort or inefficient enforcement.

It is recommended that a comprehensive consumer protection policy be developed in consultation with stakeholders and published.

The FTC is a young agency with modest resources. On the basis of stakeholder interviews, interviews with Commissioners, the CEO and staff of the Secretariat, it is apparent that the FTC is a well lead regulatory agency that is functioning well. With one exception, the reviewers did not identify any 'fatal flaws' in the institutional arrangements, processes and procedures. The major institutional failing identified was the non-existence of the Appeal Tribunal. The immediate effect of the Appeal Tribunal not having been established is that when a party is dissatisfied with the determination of the Board, it may lodge and appeal but that appeal cannot be heard. The flow on effects are that a party who simply wants to nullify the Board's determination can do so simply by lodging an appeal knowing that it cannot be heard. This potential tends to bring the whole process into disrepute and may contribute to the view that the FTC/ *Consumer Protection Act* has no 'bite'. In the longer run the lack of a Tribunal denies the testing of the Board's determinations and the establishment of precedent.

The recommendations made in this report are based on the reviewers' findings and observations. The recommendations are aimed at optimal enforcement by the FTC of the three principal Acts under its administration. The assumption is therefore that resource constraints will not adversely affect the effective implementation of the recommendations. As such, the overriding recommendation is that the Government of Seychelles will give the FTC all the necessary resources.

For ease of reference, the recommendations made throughout this report are listed at 5.1 below with reference to the parts of the report to which they relate.

5.1. Recommendations on Competition Matters

Topic	Observation	Recommendation	Directed To
Revision of the *Fair Competition Act*	The definition of the term 'merger' in the Act is rather restrictive and does not cover some common types of mergers and business combinations, such as conglomerate mergers and joint ventures. While conglomerate mergers seem to be covered in the definition by the use of the word 'other enterprises', the use of the *ejusdem generis* rule in the interpretation of the definition could effectively rule out the coverage of such mergers in the definition.	The term 'merger' in the *Fair Competition Act* should be amended to include all the three types of mergers (i.e., horizontal mergers, vertical mergers and conglomerate mergers), as well as other business combinations.	Legislature
	The definitional section 2 of the *Fair Competition Act* does not include the definitions of some common competition terms, such as 'assets', confidential information', 'dominant position', 'horizontal agreement', 'essential facility', 'excessive price', 'negative clearance', 'regulator', 'vertical agreement', and 'undertaking' (meaning a commitment or promise to the Commission) some of which are referred to in the relevant sections of the Act.	Common competition terms should be defined in the *Fair Competition Act*.	Legislature
	The term 'goods' is defined in the *Consumer Protection Act* to include "substances, growing crops and things comprised in land by virtue of being attached to land, and any ship, aircraft or vehicle", while in the *Fair Competition Act* it is defined to include "all chattels *other than money, securities or choses* in action" (added emphasis). The definition of 'goods' in the *Fair Competition Act* creates a particular problem that it may mean that the entire financial services sector of Seychelles is exempt from the Act.	The definition of the term 'goods' in the *Fair Competition Act* should follow that in the *Consumer Protection Act*.	Legislature
	The term 'service' is defined in the *Consumer Protection Act* to mean "a service of any description, whether industrial, trade, professional or otherwise: and (a) includes the sale of goods where the goods are sold in conjunction with the rendering of a	The definition of the term 'service' in the *Fair Competition Act* should be redefined in the same way as in the *Consumer Protection Act*, but with the inclusion of the word 'financial'.	Legislature

	service; and (b) is construed in accordance with subsection (3) (i.e., "does not include a reference to the rendering of any services under a contract of employment")". The same term 'service' is however defined in the *Fair Competition Act* to simply mean "a service of any description, whether industrial, trade, professional or otherwise".		
	Section 3(2) of the *Fair Competition Act* provides that "[t]his Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods and services within a market in Seychelles *which is open to participation by other enterprises.*" (added emphasis). The application of the competition law to the State if it, or its agents, engages in commercial activity is good practice since competition law is, or should be, general law of general application. However, since the application of the Act to commercial activities of the State only refers to markets which are open to participation by other enterprises, that effectively exclude markets that are dominated by statutory monopolies. For Seychelles, which still has a number of State-owned enterprises (SOEs), some of which are in monopoly positions, such exclusion exempts a large number of enterprises from the application of the competition law.	Section 3(2) of the *Fair Competition Act* should be amended by the deletion of the phrase 'which is open to participation by other enterprises' appearing at the end of that section.	Legislature
	The provision of section 5(1) of the *Fair Competition Act* that the Commission can only carry out investigations at the request of persons or enterprises that have direct interest in the matter may limits the Commission's source of complaints. While the intention is to allow only those persons or enterprises that have *locus standi*[60] to request for a Commission investigation, the provision effectively rules out Commission investigations from anonymous complainants or whistle blowers, who might not want to indicate their interest in the matter for fear of	Section 5(1) of the *Fair Competition Act* should be amended by the deletion of the phrase 'that has an interest in a matter' appearing in the opening of (b) of sub-section (1).	Legislature

[60] In law, *locus standi* means the right to bring an action, to be heard in court, or to address the court on a matter before it. *Locus standi* is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case (USLegal Inc. http://definitions.uslegal.com/1/locus-standi)

	being identified. Anonymous complainants or whistle blowers have been found to be very useful sources of complaints in cartel cases.		
	In terms of section 7(2) of the *Fair Competition Act*, "an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors". This dominance test is rather subjective and gives wide discretion to the FTC in determining dominance. Some jurisdictions in the region use of market share thresholds is used to determine dominance.	The *Fair Competition Act* should specifically provide under section 7(2) a dominance threshold based on market shares, and that in that regard the utility of the 40% market share threshold currently being used by the FTC as an administrative guideline could be assessed with a view of formalizing it in the Act.	Legislature, on technical advice of FTC
	While the list of abusive conduct in section 7(3) of the *Fair Competition Act* is clearly not exhaustive, it omits some common abusive conduct. For example, denying access to an essential facility is omitted in the Act as an abusive practice of a dominant or monopoly enterprise. For Seychelles, which has a number of privatized SOEs that used to be in monopoly positions, the abusive conduct of denying access to essential facilities to other emerging competitors would be a serious anti-competitive practice.	Certain abuses that are widespread in Seychelles, such as denial of access to essential facilities, should be added under section 7(3) of the *Fair Competition Act* to the list of conduct that constitutes abuse by firms in dominant positions.	Legislature, on technical advice of FTC
	The provisions of section 11 of the *Fair Competition Act* do not distinguish between horizontal agreements and vertical agreements. This non-distinguishing between horizontal agreements and vertical agreements in the Act might cause confusion and enforcement problems since the treatment of such agreements under competition law and policy is different. Most horizontal agreements are inherently harmful to competition and are therefore *per se* prohibited, while some others are considered using the rule-of-reason approach since they may have efficient elements, and even be pro-competitive. On the other hand, most vertical agreements are considered using the rule-of-reason approach.	The provisions of the *Fair Competition Act* on anti-competitive agreements should be split to deal separately with horizontal agreements and vertical agreements. Under horizontal agreements, there should be a clear distinction between hard-core cartels, which should be *per se* prohibited, and other agreements, which should be considered using the rule-of-reason approach. Therefore, since the anti-competitive business conduct provided for under Sub-Part V of Part III of the Act refer to hard-core cartel activities of price fixing, production limitation and bid rigging, they should be provided	Legislature, on technical advice of FTC

	Among horizontal agreements, there is also a distinction between hard-core cartels and other types of anti-competitive agreements. Hard-core cartels "are anti-competitive agreements between competitors with no other purpose of effect than to raise prices or reduce output". The four types of horizontal agreements that generally fall within the definition of 'hard-core cartels' are price fixing, market sharing, bid rigging, and output restriction. Group boycotts by businesses may also fall within an expanded list of hard-core cartels. It is widely accepted that hard-core cartels are always anti-competitive and that they could be reasonably presumed to be illegal without further inquiry, or are *per se* prohibited. Other horizontal agreements, and most vertical agreements, are considered using the 'rule-of-reason' approach because they might have pro-competitive or efficiency features.	under the sub-part dealing with horizontal agreements. Resale price maintenance under Sub-Part III of the Act should be provided for under the sub-part dealing either with vertical agreements, but still *per se* prohibited because of the severity of the practice in Seychelles and the fact that it constitutes vertical price fixing.	
	The merger control provisions of the *Fair Competition Act* (Sub-Part IV of Part III of the Act) are not comprehensive enough, and only cover basic issues such as merger application, or notification, and permission of mergers. There is a convergence of views amongst competition analysts on the basic elements or issues that should be incorporated or addressed in any system of merger control, including time frames within which a merger investigation must be completed.	The merger control provisions of the *Fair Competition Act* should cover all basic elements or issues of merger control. In particular, provision should be made for 'size-of-the-transaction' merger notification thresholds (i.e., based on merging parties' annual sales (or turnover), total assets, or both), and the charging of merger notification fees.	Legislature, on technical advice of FTC
	Section 28(1) does not make it clear which anti-competitive agreements or practices are subject to authorization by the Commission. In most cases, and in accordance with international best practices, horizontal agreements of a hard-core cartel nature, and other *per se* prohibited conduct and practices, are not subject to authorization. 'Public benefit' referred to in section 28(2) is also not defined, such that it gives the competition authority wide discretion in considering applications for authorization, which discretion might be	*Per se* prohibited anti-competitive agreements and practices should not be subject to authorization under the FC Act 2009, and the term 'public benefit' referred to in section 28(2) of the Act in considering applications for authorisations should be clearly defined in the Act.	Legislature, on technical advice of FTC

	abused. In some other competition legislations, public interest factors that must be taken into account are specifically provided, and include: (i) promotion of technical or economic progress, and transfer of skills; (ii) promotion of employment; and (iii) enhancing the competitiveness, or advance or protection of the interests of small and medium-sized businesses.		
	Section 35(1) of the *Fair Competition Act* provides for the discontinuation of the Commission's investigations if the Commission is of the opinion that the matter being investigated does not justify further investigation. Section 35(2) of the Act however provides that "[w]here the Commission discontinues an investigation under subsection (1) it shall: (a) within 14 days of the discontinuation notify the parties concerned in the investigation of the discontinuation; and (b) *submit a report of the discontinuation to the Minister within 3 months of such discontinuation*" (added emphasis). The requirement that the Commission should report to the Minister its decisions to discontinue competition investigations limits its independence and reduces its decision-making autonomy. The purpose and limitations of that requirement is also not stated in the Act, such that it opens the Commission to political interference in its decision-making processes.	The provisions of section 35(2)(b) of the *Fair Competition Act* that where the FTC discontinues an investigation it should "submit a report of the discontinuation to the Minister" should be deleted from the Act.	Ministry of Finance, Trade and Investment
Increasing of Capacities of FTC staff	The Competition Department of the FTC's Secretariat is currently manned by only Economists, while the effective handling of competition cases requires the services of both economists and lawyers.	The Competition Department of the FTC's Secretariat should have a mixture of economists and lawyers as Case Officers, with the immediate recruitment of an Economist and a Lawyer to beef up the understaffed Division.	FTC
Comprehensive Competition Policy	The enactment of the competition law preceded the formal adoption of a comprehensive competition policy, a process that is still ongoing. The policy is being worked out by the FTC for presentation to Cabinet by the Minister of Finance.	The FTC should get the technical assistance of local, regional and international in the drafting of Seychelles' comprehensive competition since the process requires extensive research on current economic and legal environments in the country, the region, and the world at large.	UNCTAD

5.2. Recommendations on Consumer Protection Matters

Topic	Observation	Recommendation	Directed To
Consumer Protection Policy	There is currently no consumer protection policy. A policy would help focus debate on the widest range implementation strategies, priorities and performance.	A comprehensive consumer protection policy be developed in consultation with stakeholders and published.	Government
Aiding and abetting contraventions	There may be a legislative crack through which those persons who assist or facilitate contraventions escape sanction because they may not have committed a primary offence.	A new offence of "aiding or abetting a contravention of the *Consumer Protection Act*, and the *Fair Competition Act* " be created.	Government
Product Safety	The important Part VI Consumer Safety is not referred to in the objectives.	The *Consumer Protection Act* be amended to include a reference to consumer safety in the objectives list in section 3.	Government
Efficient and effective compliance	The explicit adoption of the pyramid of enforcement concept will provide a policy rationale for enforcement strategies and decisions.	The Secretariat explicitly adopt the concept of the pyramid of enforcement responses and continue its current practice of attempting to resolve most complaints through negotiations and warnings.	FTC
	The explicit adoption of the pyramid of enforcement concept will provide a policy rationale for enforcement strategies and decisions.	The Secretariat use more serious contraventions, or contraventions by repeat offenders, to test the limits of the law with a view to increasing the likelihood that more low level contraventions will be resolved quickly and at low cost.	FTC
Appropriate and respective roles of the FTC Secretariat and the Board	The lack of clarification for the respective roles of the FTC Secretariat and Board results in some confusion, apparently inappropriate work practices, communications and potential legal challenges.	The issue of discontinuance reporting be one of the issues considered when clarifying the respective roles of the Board and Secretariat.	FTC, Government
Unfair contract terms	Unlike many of the other proscribed conducts it is not always clear to businesses or consumers what might be an unfair contract.	The Secretariat publish a guideline explaining the unfair contract terms provisions.	FTC
Business access to information relevant to mandatory obligations and	Low or no cost access to information relevant to mandatory obligations and requirements will enhance compliance	The FTC website include a page either listing any applicable trade description prescribed by the Minister and required expiry dates, or providing links to other	FTC

requirements		government sites where that information can be obtained.	
More effective monitoring and involvement of NATCOF	Monitoring of market conduct can be expensive without the involvement of volunteers	The FTC consider the potential of enlisting the cooperation of NATCOF in an ongoing monitoring programme focusing on the display of expiry dates, the failure to label in a an appropriate language and failing to provide receipts, with a view to contributing to FTC enforcement actions.	FTC
Refunds for contravention of Part V provisions	The current words may be taken to preclude a full refund.	Section 40(2)(b) of the *Consumer Protection Act* be amended to read: 'refund to the consumer a reasonable portion *or the whole* of the price paid for the service performed and goods supplied, having regard to the extent of the failure.	Government
Product safety	Potentially significant restriction on the application of the protections without a readily apparent justification	(i) Subsection 50(4)(a) of the *Consumer Protection Act* be repealed. (ii) Subsection 50(4)(b)(ii) of the Act be amended to replace the words 'the person reasonably believed that the goods would not be used or consumed in Seychelles' with words similar to 'if the person could not have known nor found out from reasonable enquiry that the goods failed to comply with the general safety requirement' (iii) Subsection 50(5)(b) be repealed.	Government
Penalties and their application	Current maximum fines do not provide a significant deterrent to larger businesses contravening the Act If determinations do not explicitly state the rationale for penalties, observers are left in the dark as to whether all relevant factors were considered and while impose fines were set as they were.	(i) The maximum fines be increased to a level where they provide the Board with penalty options to provide a significant deterrent to the worst contraventions and to reflect the quite significant financial incentives some times attaching to unlawful conduct in a commercial environment. (ii) Section 67 of the *Consumer Protection Act* be amended to read: "67(1) Where the Commission determines after a formal hearing	Government, FTC

		that a person has contravened any requirement or prohibition contained in sections the Commission may order the person- (a) in the case of an individual, to pay a penalty o f a sum not exceeding SCR1,000,000; or (b) in the case of a person other than an individual, to pay a penalty of a sum not exceeding SCR4,000,000. Penalties for breach of provisions of this Act (2) Where a body corporate is found to be in breach of this Act, any director or officer of the body corporate who knowingly authorised, permitted or acquiesced in the act or omission that constituted the breach shall also be liable to a penaltyofasumnotexceedingSCR1,000,000." (iii) The FTC routinely consider each of the factors listed in section 67 and any other factors it considers it believes relevant when imposing sanctions, and that its reasoning be referred to in its written determinations.	
Sanctions and remedies	The wider the range and scope of available sanctions and remedies the greater the flexibility of the FTC to match the sanctions and remedies to particular circumstances and to respond appropriately to new or recurring compliance issues	(i) Consideration be given to amending the *Consumer Protection Act* to provide a wider range of sanctions and remedies. (ii) the Board consider the expanded use of section 68(b) where it thinks appropriate.	Government, FTC
Potential new and temporary role for FTC	The FTC is facing the challenge of raising its profile and creating a reputation as a regulator that is both market oriented and consumer focused. It would benefit form a high profile role that would be seen to deliver immediate benefits to consumers and the economy.	Consideration be given to amending the *Consumer Protection Act* to give the FTC specific powers in the relation to business pricing conduct during the phase-in period of the new tax regime, together with appropriate funding.	Government and FTC
NATCOF	The principal consumer organization is concerned that some complaints are taking too long to resolve. NATCOF has a presence and a sophistication	Both the concept of providing for a designated 'super complainant' and the practicality of designating NATCOF as a super complainant be	Government and FTC

	greater than average consumers.	explored.	

5.3. Recommendations on Fair Trading Commission Matters

Topic	Observation	Recommendation	Directed To
Revision of the *Fair Trading Commission Act*	Section 32(2) of the *Fair Trading Commission Act* provides that "[t]he Commission may decide not to investigate a complaint against an enterprise where in response to a complaint made directly to an enterprise, the complainant, in the opinion of the Commission, has obtained reasonable redress". A decision not to investigate a complaint if the complainant has obtained reasonable redress may not be appropriate for competition complaints, most of which not only affect the direct complainants but other industry players as well. It has now been generally accepted that the role of competition law enforcement is not to protect individual competitors but to promote the whole process of competition. Therefore, competition authorities should be obliged to investigate competition complaints for the purposes of promoting competition in the market by preventing abuse of dominant positions, or eliminating anti-competitive practices, unless "the complaint is trivial, frivolous or vexatious" or "is not made in good faith" as provided for in section 32(1) of the FTC Act 2009. Even in the case of consumer cases, if the complaint reveals a systemic problem it should be pursued in the public interest. It would be a mistake for a consumer protection agency to narrow its thinking to just getting a resolution for those few consumers who take the time and effort to complain.	The provisions of section 32(2) of the *Fair Trading Commission Act* that the FTC may decide not to investigate a competition complaint against an enterprise where the complainant subsequently obtains a reasonable redress should be deleted from the Act.	Legislature
	Section 39(1) of the *Fair Trading Commission Act* gives the Commission powers to conduct hearings into	Section 39(2) of the *Fair Trading Commission Act* should be amended to entitle respondents and other	Legislature

	competition and consumer protection complaints. However, section 39(2) of the Act provides that "[a]t a hearing before the Board in respect of a breach of any written law relating to consumer protection, fair competition or other written law which the Commission has jurisdiction to administer, *the complainant is entitled to be heard in person or represented*" (added emphasis). While the above provisions are in line with the principles of natural justice that the Commission is obliged under section 41(2) of the Act to have regard to in formulating and issuing procedural rules that govern the conduct of hearings before it, the rules of natural justice include the need to take all reasonable steps to ensure that every person whose interests are likely to be affected by the outcome of the investigation is given an adequate opportunity to make representations in the matter. In any competition case, and in many consumer protection cases as well, complainants are not the only ones whose interests are likely to be affected by the outcome of the investigation, but also the respondents and other interested stakeholders. The respondents and other interested parties should also be entitled to be heard in person or represented at the Commission's hearings.	interested parties in a competition or consumer protection case also to be heard at the Commission's hearings together with the complainant.	
	Sections 49 to 54 of the *Fair Trading Commission Act* provides for the imposition of fines and penalties for: (i) obstruction of investigations by the Commission; (ii) obstruction of execution of search warrants given to the Commission; (iii) destruction or alteration of records that are required to be produced to the Commission; (iv) giving false or misleading information to the Commission; and (v) failure to comply with Commission directions or orders. However in most cases, the penalty is a fine not exceeding SCR100,000 or imprisonment for a term not exceeding 2 years, or to both.	Fines provided under the *Fair Trading Commission Act* for breach of the Act should be made more deterrent.	Legislature

	The statutory functions of the FTC in terms of section 4(1) of the *Fair Trading Commission Act* include both case investigative and adjudicative functions, which are not apportioned between the Commission's Secretariat and Board of Commissioners. Unclear statutory separation of a Commission's investigative and adjudicative functions however has grave legal implications of due process and natural justice nature.	There should be a clear separation of the FTC's investigative and adjudicative functions under the *Fair Trading Commission Act*, with the Commission's Secretariat being formally given statutory investigative functions and the Board of Commissioners adjudicative functions with well-defined responsibilities and spheres of operation.	Legislature
	The independence of a competition authority is largely dependent on its institutional set up. This includes the status of the authority as an institution separate from the executive branch of government. Section 3 of the Fair Trading Commission Act needs to be amended to ensure such independence is granted.	Required amendments be made to the Fair Trading Commission Act of 2009 so that the Fair Trading Commission has substantial degree of institutional and personal independence.	
	A competition authority who independently decides over the sources, size and use of its budget is better able to withstand political interference to ensure that competent staff is hired. If the budget is too small the authority will not be able to attract highly qualified staff and pay market rate salaries.	The international standard should be adopted regarding the budgetary independence of the Commission. The Commission should be given total control of its budget (resources). This should not be without responsibility and good governance since the Commission has to be made accountable for its expenditure annually as stipulated in the FTCA.	
	The mere fact that the Commission is classified as a public body under category 2 indicates lack of financial independence. At present the Commission is fully budget dependent and has to negotiate with the Ministry of Finance for its budget needs. The Commission is under close scrutiny by the Ministry of Finance for all its expenditure. The size and use of its budget including staffing and salary levels are determined by the Government.	Consequently it is recommended that the classification of the Commission as a regulatory body under category 2 of the Ministry of Finance classification strategies of budget dependent public bodies, by the Ministry of Finance be reviewed and that the Commission is classified as an independent institution like Central Bank and SIBA.	

	The FTC's Board of Commissioners is made up of 5 Commissioners, who are appointed on a part-time basis, and Board decisions are taken on the basis of majority voting. Section 15 of the *Fair Trading Commission Act* stipulates that 3 Commissioners should constitute a quorum for any meeting of the Board. The disclosure of interest provisions of section 11 of the Act mean that in case of conflict of interest, Board members need to abstain from voting, after disclosing the interest. The previous Board of Commissioners, whose term of office ended in January 2013, had three members who had direct interests in the banking services sector, and felt obliged to recuse themselves from any competition and consumer protection decision involving players in that sector, or any of their major customers, thus affecting the Board's decision-making quorum. The Board was thus rendered impotent to decide on any case affecting the banking and financial services sector. While the new Board is drawn from a wider economic background, the problem would recur if not formally addressed. The appointment of members of the Board of Commission on terms of only three years also raised stakeholder concerns as being too short to enable members to grasp the intricacies of competition and consumer protection law and policy to enable them to effectively contribute to decision-making on such matters.	Membership of the FTC's Board of Commissioners should be increased from 5 to 8 members to ease quorum problems on the Board. For the same reasons, members of the Board should be drawn from diverse economic backgrounds to avoid one sector dominating its membership. The terms of office of members of the Board should also be increased to 5 years to enable the members to fully contribute to the operations of the Commission with sufficiently accumulated experience as competition and consumer protection adjudicators. The terms of the members should however be staggered to avoid sudden and total exit of experience and knowledge.	Ministry of Finance, Trade and Investment
	The appointment of the Chief Executive Officer of the Commission as an *ex officio* member of the Board of Commissioners is cause for concern. The Chief Executive Officer heads the Commission's Secretariat, essentially the Commission's investigative arm, while the Board is the Commission's adjudicative arm. Natural justice principles dictate that there should be a clear separation of the competition authority's investigative and adjudicative functions, otherwise the	The *ex officio* membership of the FTC's Chief Executive Officer to the Board of Commissioners under section 5(1) of the *Fair Trading Commission Act* be removed to avoid conflict of interests problems in the Board's determination of competition and consumer protection cases. Alternatively, a separate Board could be established to only consider and adjudicate on	Ministry of Finance, Trade and Investment and Legislature

	Commission's decisions on competition or consumer protection, cases can successfully be appealed against in law courts. While it is noted that the Chief Executive Officer only participates in the Board's deliberations and decision-making on administrative matters, and not on the determination of competition and consumer cases, which are considered at separate meetings, these precautions are only administrative and are not enshrined in the Act.	competition and consumer protection cases, on which the Chief Executive Officer would not be a member.	
	Seychelles has a number of sector regulators, most of which were established well before the FTC, with some therefore having some competition functions. Sectoral regulation in Seychelles is in sectors such as the financial services sector, the communications sector, the energy sector, the media services sector, and the fishing industry. As noted by the FTC, the establishment of the Commission mandated to enforce the competition and consumer protection Acts, which cover all sectors of the economy, has created some level of confusion and conflict with regards to certain sector regulators' role and mandate vis-à-vis competition and consumer related issues. Section 4(1) of the *Fair Trading Commission Act* gives the Commission primary responsibility over the enforcement of competition law in the Seychelles as a regulator.	The FTC should be given statutory supremacy over competition matters in Seychelles. Those sector regulators with competition functions should be obliged by Statute to negotiate and conclude concurrent jurisdiction agreements with the FTC on the promotion of competition in their respective sectors. In that regard, the relevant provisions of the Competition Act, 2003 (No.2 of 2003) of Namibia would provide a good guide.	Ministry of Finance, Trade and Investment and Legislature
Remuneration of Commissioners	The current Commissioners' fees consist of only a single component, a monthly fee paid regardless of the number of days work required in that month. There is no allowance for time spent preparing for meetings (often referred to as 'reading time') that can be significant if there are several cases to be determined at a particular meeting, or if there are any substantial competition cases to be heard. The responsibilities and work requirements of Boards of competition	In addition a fixed monthly fee, members of the FTC's Board of Commissioners also be paid sitting fees for attending and participating at Commission meetings, including hearings.	Ministry of Finance, Trade and Investment

	authorities in the region are however higher than those of Boards of other parastatal organisations in terms of preparation for meetings, through reading of massive volumes of documents, and actual participation in meetings, including lengthy hearings into competition cases. The opportunity costs of part-time Board members of attending meetings and hearings are also very high, given the fact that they have full-time jobs elsewhere.		
Building and Increasing Capacities of FTC officials	The FTC is currently understaffed, with a number of unfilled posts on its establishment, for the amount of work which it is expected to do	The vacant posts in the Secretariat, particularly that of Director in the Legal Department, should be filled as a matter of urgency.	FTC
	The FTC's Board of Commissioners requires more competition and consumer protection adjudication courses, given its limited knowledge and experience in this highly specialised field, and the fact that an increasing number of cases, particularly consumer protection cases. Consideration could also be given to assigning a regional or international competition and consumer protection expert for a period of 3 to 6 months to assist in the training of the Board of Commissioners and in the implementation of the required changes in the Board's procedures.	The FTC's Board of Commissioners should be given capacity building and technical assistance in the highly specialized area of competition and consumer protection adjudication, including the provision of an expert consultant for a period of 3 to 6 months to assist in the training of Board members and implementation of the required changes in the Board's procedures.	UNCTAD

5.4. Issues and Recommendations on Other Relevant Matters

Topic	Observation	Recommendation	Directed To
Appeals	The Appeal Tribunal, established under the *Fair Trading Commission Act*, is an important institution in the enforcement of Seychelles' competition and consumer protection laws. 'Street smart' parties might contemplate lodging an appeal because there is no immediate prospect of that appeal being heard, and so any penalty or order of the FTC Board of Commissioners would be rendered ineffective. Also, precedents	The Appeal Tribunal as provided in all the three Acts under the administration of the FTC (i.e., the *Fair Trading Commission Act*, the *Fair Competition Act* and the *Consumer Protection Act*) be established without further delay.	Ministry of Finance, Trade and Investment

	inform business, consumers and the FTC staff about the meaning of provisions, of the evaluation of evidence and the likely imposition of penalties, orders and remedies. In doing so, they promote both compliance and more effective and efficient administration by the FTC.		
Advocacy and Awareness	The FTC is still in its formative stages, having commenced operations only about two years ago. Expectations on it are however high in both the public and private sectors of the Seychellois economy. Most of the consulted stakeholders are of the opinion that the Commission is doing a good job, others feel that it needs to do more in publicising itself. Successful advocacy will deliver the FTC a 'seat at the table' when important economic initiatives are being discussed, help secure the FTC budget and more generally increase its power to persuade and influence. It will also increase the effectiveness of educational activities because it will increase the perceived relevance of both the laws and the FTC.	The FTC should undertake more advocacy and awareness activities, aimed at Government Ministries, the Legislature and the Judiciary, as well as business and consumer associations, to increase its visibility. In that regard, the Communications & Corporate Services Department of the Commission's Secretariat should be adequately resourced and equipped and work closely with the operational Departments of Competition and Consumer Affairs.	FTC
Increasing Capacities of FTC officials	Competition cooperation under COMESA provides wide opportunities for the FTC. Regional cooperation under COMESA is aimed at not only assisting those member States with no competition policies and laws, and competition authorities to implement and enforce the policies and laws, to formulate the policies laws and establish the implementation and enforcement agencies, but also to develop young competition authorities, particularly in case handling. The Work Programme of the COMESA Competition Commission also includes capacity building and exchange of information among national competition authorities through workshops and seminars. Under SADC, an ambitious project under the European Union (EU)'s TradeCom Facility on the design and development of a case management online resource database was recently completed. The database is hosted on the SADC platform and use the SADC website domain: **http://www.sadc.int/competitioncases.**	The FTC should continue to cooperate with other competition and consumer protection authorities in the COMESA and SADC regions, particularly with regards to the use and contribution to the SADC's online resource database on competition and consumer protection cases.	FTC

	The FTC has benefitted, or stands to benefit, from the programmes of relevant international organisations such as UNCTAD, the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), the International Consumer Protection Enforcement Network (ICPEN) and the World Trade Organisation (WTO). The FTC has benefitted a lot from UNCTAD's Capacity Building and Technical Assistance Programme. In its unpublished draft Annual Report for the year ending December 2011, the Commission also reported that discussions were underway with UNCTAD on a 3-year technical assistance project covering various relevant technical assistance areas. Besides UNCTAD, the ICN has emerged as a leading international organization that promotes competition policy and law. One particular ICN programme that would be of interest to the FTC is its Advocacy and Implementation Network Support Program (AISUP) under which ICN members can seek advice about specific ICN work products or receive assistance on how ICN recommendations and other guidance documents might be implemented within their jurisdiction.	The FTC should continue with increased intensity its active participation in the programmes of relevant international organisations, such as UNCTAD, ICN, OECD, ICPEN, etc. That way, the Commission will not only benefit immensely from international best practice but will receive direct notification of the organisations' programmes, including conferences and workshops. In particular, the Commission should pursue to fruition its discussions with UNCTAD on the 3-year technical assistance project, and should seek relevant assistance under the ICN's AISUP.	FTC

Attachment 1

REPORTED CONSUMER PROTECTION DETERMINATIONS BY THE BOARD: 2011 & 2012

Case	Conduct	Finding	Penalties, Orders
Global Internet Café (2011)	Misrepresentations with regards to standard, quality and value	None. The matter was settled between the parties, and the case closed as 'withdrawn'.	None. SCR1,800 refund for the mobile phone. Respondent advised to consult with the FTC Secretariat to discuss and resolve issue of representations with regards to standard, quality and value of mobile phones.
T.M.P. Company (Pty) Limited (t/a World Electronics) No.1 (2011)	Failure to comply with FTC direction, s42(1)(c)(iii); Denial of warranty by asserting limitations not provided for in the Act; Unfair contract term: limiting legal liability in respect of the quality of the product.	The watch was 'not in good working order or defective' as defined by s39. Contravention of s42(1)(c)(iii), refusal to refund the price of the watch. The warranty given by the Respondent fell short of the requirements of the Act and served the purpose of limiting its liability in respect of the quality of its products on sale.	Refund the purchase price of the watch, SCR600. Penalty of SCR2,000.
T.M.P. Company (Pty) Limited (t/a World Electronics) No.2 (2011)	Defective goods, a television; Failure to comply with FTC direction, s42(1)(c)(iii).	The television was 'not in good working order or defective' as defined by s39. Contravention of s42(1)(c)(iii), refusal to refund the price of the television. The warranty given by the Respondent fell short of the requirements of the Act and served the purpose of limiting its liability in respect of the quality of its	Refund the purchase price of the television, SCR3,400. Pay the complainant SCR200 for cost incurred. Pay the FTC costs of SCR1,500.

		products on sale.	
T.M.P. Company (Pty) Limited (t/a World Electronics) No.3 (2011)	Defective goods, a mobile phone; Failure to comply with FTC direction, s42(1)(c)(iii).	The mobile phone was 'not in good working order or defective' as defined by s39. Contravention of s42(1)(c)(iii), refusal to refund the price of the watch. The warranty given by the Respondent fell short of the requirements of the Act and served the purpose of limiting its liability in respect of the quality of its products on sale.	Refund the purchase price of the mobile phone, SCR3,800. Amend the terms and conditions of its warranty in accordance with the provisions of the Act relating to warranty of goods. Penalty of SCR3,500.
Universal Sharpening Tools (Pty) Limited (2011)	Failure to repair a chainsaw with due care and skill;	Case dismissed, insufficient evidence of a contravention.	The complainant was ordered to make full payment to the respondent prior to the return of the chainsaw.
Aarjay Construction (Pty) Limited (2012)	Alleged failure to provide services (house construction) in compliance with s40(1)(a), (b), (c) & (d); Alleged failure to meet the general safety requirement, s50(2)(b)(i).	Found: failure to provide services in compliance with s40(1)(a), (b), (c) & (d). Dismissed: failure to meet the general safety requirement s50(2)(b)(i).	Remedial work ordered. Costs awarded to the complainant. Fine of SCR60,200 (being 10% of the full contract value) of SCR602,000).
Airtel (Seychelles) Limited (2012)	Alleged charging a price higher than the stated price in respect of SMS charges, s21(1); Alleged misleading and deceptive conduct in respect of SMS charges, s30(1) and s32(f).	Found.	Fine of SCR50,000.
Mr. Evans Jules (2012)	Alleged failure to perform services and provide associated goods as undertaken in contract to supply and install a kitchen cabinet; Alleged failure to comply with an order, direction or undertaking, s70.	Found.	Refund of full amount paid by consumer. Fine of SCR500.

KAF Builders (2012)	Alleged failure to perform services and provide associated goods to the required standard, s40(1)(a) & (b); Alleged failure to perform services in accordance with s40(2)(b); Alleged failure to comply with an order, direction or undertaking, s70.	Found: failure to perform services and provide associated goods to the required standard, s40(1)(a) & (b), and failure to perform services in accordance with s40(2)(b).	Refund of full amount paid by consumer. Costs. Fine of SCR24,299 (being 5% of the full contract value).