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# Quarterly Competition Review

**Centre for Competition, Regulation and Economic Development**

### In this issue:





## Editor's note

There is a critical gap in the depth and volume of research into the areas of competition and regulation as they relate to the African continent. Work in the field is growing as African countries see competition policy and enforcement as increasingly relevant to their growth and development challenges, and there are many new and under-resourced authorities doing this work around the continent. In this context, there is a need to fill the gap by providing insightful and in-depth analysis.

The CCRED Quarterly Review aims to provide a useful review of developments in competition policy and jurisprudence throughout the African continent, with a particular focus on developments in the application of competition economics. It aims to provide critical analysis and develop a body of knowledge that is both interesting and helpful for the practitioner. The Review contains a number of analytical pieces usually focused on trends which we observe throughout the continent either in merger activity or enforcement actions. This is supplemented with a series of informational pieces that share the experiences and activities of authorities around the continent.

In this edition of the Review, we focus in on the explosive impact of mobile banking on competitive dynamics in the banking sector. We assess the decisions in Botswana and South Africa on exclusive lease agreements in grocery retail, the competition effects of tax havens, progress at the COMESA Competition Commission, and recent developments in the construction sector. We hope that you find the Review topical, interesting and relevant to your work.

*Thando Vilakazi*

## Welcome from the CCRED Director

The Centre for Competition, Regulation and Economic Development (CCRED) was established in 2011 as part of the Department of Economics and Econometrics, in the Faculty of Economic and Financial Sciences at the University of Johannesburg. We aim to meet the needs for improved research and teaching in the rapidly growing area of competition and regulatory economics. In this regard there are three main pillars of CCRED's work:

- Locus of knowledge and information on competition and regulation
- Centre for specialised education, training and advice
- Leading in research on key questions in this field, especially applied to important markets and industries

We are a small team of economists, most of whom have experience in working on competition cases with competition authorities. We are strong believers in the importance of understanding firm conduct - for competition cases, the work of economic regulation, and in wider economic development questions. Please check our website for details about our published research and the CCRED working paper series. This also includes a set of recent papers reviewing economic regulation in South Africa under the Regulatory Entities Capacity Building Project.

Our major projects at the moment include work on understanding barriers to the entry and growth of smaller firms and new participants, and on competition issues and the development of regional value chains in Eastern and Southern Africa. I look forward to sharing the findings in future issues.

The website also contains details of the Competition Economics Winter School on 11-13 June this year which we hope you can join us for.

*Simon Roberts*

# Mobile money: taking on the big banks

Anthea Paelo

Africa has enormous potential for growth in the telecommunications industry especially since there is only about 47% penetration currently.[1] One of the fastest growing areas in the telecoms industry is mobile money. This service enables mobile phone users to send and receive money anywhere by facilitating transactions through their mobile phones. This is important particularly in Africa, where infrastructure is poor and the majority of people do not have bank accounts. In Kenya for example, only about 23% of the population had bank accounts in 2009.[2] However, in March 2012, a reported 93% of Kenyans had mobile phones of which 73% make use of mobile money services, 23% of them at least once a day.[3] In Uganda, between 2011 and 2012, mobile money subscribers tripled from 2.9 million to 8.9 million, far surpassing the number of bank account holders at 4.9 million.[4] In fact, according to the 2013 GSMA report nine countries including Kenya, Uganda, Tanzania, Cameroon, Madagascar, Gabon, the Democratic Republic of Congo, Zambia and Zimbabwe had more mobile money subscribers than bank account holders by the end of 2013.[5]

This makes mobile money services and the telecommunications industry one of the biggest rivals to commercial banks and the financial sector. Moreover, mobile companies can now offer loans and insurance services. Kenya's Safaricom has also introduced M-Shwari and Linda Jamii that provide loans and health insurance, respectively.[6]

The introduction of mobile money has been beneficial for competition. It has provided banks and other financial institutions with viable competition and presents customers with a cheaper alternative to banks. It is also accessible to a wider network than banks. All these benefits serve the public in terms of accessibility, price and choice. However, most of these telecoms companies have established positions of significant market power which raises a concern in terms of potential abuse of dominance. This suggests that competition authorities and regulators should monitor the sector.

### *Network externalities*

There have been a number of documented effects of network externalities on competition especially in the mobile money industry. Katz and Shapiro define externalities as "products for which the utility that a user derives from consumption of the good increases with the number of other agents consuming the good".[7] Joining a network with more consumers, in this case the dominant firm, increases the consumers' utility and benefits of using the particular telecom service. This increases the incentive for more consumers to join the dominant network rather than that of a rival and, while it is possible for fierce competition to ensue in the form of introductory pricing or price wars, these often result in efficiency losses.[8] The wider network of customers makes it extremely difficult for other telecom companies to compete, let alone banks that do not have as wide an access to consumers as the telecom company. At the same time, network externalities often reduce incentives for the dominant firm to offer better deals or to innovate knowing that they already have a large consumer base that is difficult to penetrate.

In network industries and telecoms in particular, dominant incumbents have a track record of competition law violations. Telkom in South Africa has been accused of excessive pricing and exclusionary conduct against downstream rivals.[9] Safaricom, with 70% of the market share in Kenya, has also been accused of abuse of dominance (exclusionary practices) by Airtel, the firm's rival.[10] The alleged contraventions include charging unregistered users of Safaricom's M-Pesa hefty fees and threatening M-Pesa agents who offer rival products.

Similarly, Zimbabwe's Econet Wireless has refused banks access to EcoCash, their mobile money service. In retaliation, several banks refused to allow Econet Wireless access to their own mobile banking platform, ZimSwitch. In January this year, Econet eventually allowed banks access to EcoCash using Unstructured Supplementary Service Data (USSD). However, Econet charges subscribers 30 cents for use of the USSD while other transactions such as the purchase of airtime only cost 5 cents. Furthermore, other telecoms companies do not charge for the use of the USSD function.[11] Econet with over 70% market share may be using restrictive practices to not only foreclose other telecom companies but competing banks as well. These practices may ultimately affect consumers.

### *Effect of inter-country transfers and concentration*

Due to the multinational nature of most telecom companies in Africa, it is possible for money transactions to take place internationally and therefore it is also important to think about competitive dynamics in a regional sense. Cross-country transfers offer consumers, especially immigrants who often have little access to formal methods of money transfer, an alternative and cheaper means to transfer money. Table 1 shows some of the telecom networks and the countries with which cross-border transactions can take place.

There has been a rising trend in mergers and bi-lateral agreements in the industry as well as a rapid consolidation of firms across different countries, leaving a handful of firms with strong market shares and possible market power. For example, in December 2013 Orange East Africa bought up 21.4% of Telkom Kenya making its ownership in the compa-

| Table 1: Mobile money applications in Africa and cross-border money transfers[12] | | |
|---|---|---|
| **Application** | **Countries covered in Africa** | **Cross-border transfers** |
| Airtel Money | Uganda, Kenya, Tanzania and 14 others | All 17 countries using HomeSend hub |
| M-PESA (Vodafone) | Kenya, Tanzania and South Africa | Kenya and Uganda. Kenyan customers can receive but not send money to the UK |
| MTN Mobile Money | Uganda, Ghana, Cameroon, Ivory Coast, Rwanda and Benin. | Rwanda, Cote d'Ivoire, Benin, Cameroon and Ghana |
| Orange Money | Uganda, Kenya, Mali, Senegal, Cote d'Ivoire and 8 others | Between Mali, Senegal and Cote d'Ivoire |
| Tigo Tanzania | Rwanda and Tanzania | Rwanda and Tanzania |

ny 70%. Orange is a French multinational company with a presence in a number of countries all over the world. Liquid Telecom, a subsidiary of Econet Wireless, with a presence in 13 African countries, acquired 80% of Kenya Data Networks (KDN).[13] In February 2014, Tigo Tanzania, the country's third largest Telecom company launched a cross-border service that allows dual currency mobile money transfers between Tanzania and Rwanda.[14] While in many cases these mergers and agreements help to facilitate cross-border transfers of money between different countries, they may also serve to dampen competition between firms across borders which would help to discipline the market behaviour of dominant incumbents.

With regards to inter-country regulation, of these transactions regional competition authorities such as the COMESA Competition Commission can assist in the evaluation of transaction and practices that can have effects in more than one country. However, COMESA for instance, is only made up of 19 countries and therefore may not be of benefit to many countries. Furthermore different competition authorities may choose to adopt different approaches to mergers, bi-lateral agreements, and restrictive practices in so far as they have an effect on their own jurisdictions, which may lead to inconsistency between jurisdictions in dealing with practices that may take place in one market but have far-reaching effects in another.

*Cross-country regulatory issues*

There is also ambiguity about the appropriate domestic jurisdiction in which competition concerns should be addressed, both within countries and between them. Traditionally, telecoms fall under the regulatory jurisdiction of a communications board or regulator. The ambit of these regulatory authorities is typically related to communications, postal/ couriers and broadcasting, including radio. However, mobile money is provided by telecommunication companies but deals with the transfer of money. Matters relating to money, its transfer, loans and insurance would typically fall under the central bank or other related regulatory institutions.

In South Africa for example, financial services are regulated by the South African Reserve Bank (SARB), Financial Services Board (FSB) and National Credit Regulator (NCR) while in Kenya they would fall under the Central Bank of Kenya (CBK) and the Capital Markets Authority (CMA). In South Africa, telecom companies that provide mobile money services would be considered banks. Therefore, these companies have chosen to partner with banks to provide these services such as the partnership between Vodacom and Nedbank to provide Vodacom M-Pesa. In Kenya where there is limited regulation in this regard, Safaricom has categorically stated that it is not a bank and can therefore not fall under the jurisdiction of the CBK or be held to the same expectations as traditional banks.[15] This means that they do not have to acquiesce to regulations such as the reserve requirement that central banks expect banks to maintain in order to carry out their business. However, an environment where mobile money providers are completely unregulated from a prudential perspective is obviously also undesirable. In this case regulation is required that serves an intermediary role between the two industries.

*Effect of strong lobby groups*

Lastly, competition can be affected by the influence of strong lobby groups in the banking space. Recognising the (socially beneficial) competitive threat that telecoms companies provide, banks could influence policy makers and regulators to put in place restrictive regulations. In Zimbabwe recently, the Bankers Association of Zimbabwe approached the Reserve Bank of Zimbabwe as well as the legislature concerning an increase of regulation for telecom companies. The lobbying resulted in the imposition of a 5% tax on the fees charged to effect mobile money transactions.[16]

South Africa's regulation has also been one of the barriers to the growth of mobile money in the country.[17] In 2013, while M-Pesa had 17.1 million users in Kenya and 5 million in Tanzania, in South Africa there were only 1.2 million users and an even smaller number were using the service regularly.[18] Furthermore, central banks seem to prefer having banks operating mobile money rather than telecoms companies, and this increases their motivation to maintain strict regulation.[19] Banks are preferred because they have a better understanding of regulations and manage funds better. For this reason as well as the risk involved, regulators in some countries have prohibited non-banks from providing mobile money services.[20] This is despite evidence showing that the most successful mobile money services belonged to non-bank companies and that it is possible for non-banks to provide mobile services rapidly and securely. All of this negatively affects competition in the industry.

### *Conclusions*

Mobile money is clearly good for competition in the banking space. Any concerns arising in the mobile money industry come down to the lack of a formal regulatory framework specific to the industry. There is a need for clear regulation that harmonises the overlap between competition law and regulation. Regulators, particularly those in developing economies serve the function of developing guidelines and monitoring the activities of dominant companies. However, increasingly regulators will need to realign their roles to regulate *for* competition. In this way competition law and economic regulation are entwined. In as much as mobile banking is contributing to development, in order for the above challenges to be overcome, legislation that overtly accounts for competition principles needs to be in place. Other regulatory concerns to be considered include financial regulation, privacy and data protection, consumer protection, and e-commerce regulation.

Regulation should not stifle innovation, but should still be clear and sufficiently comprehensive to protect consumers. As far as possible regulation should cover competition concerns such that competition continues to be stimulated by the growth in mobile money services. It should not be used as a way of further sustaining or increasing network effects and barriers to entry. Regional economic communities can aid in harmonising these policies at a regional level.

## Notes

1. Smith, J. (2014). 'Telecommunications'. *KPMG.*
2. Allen, F., Carletti, E., Cull, R., Qian, J., Senbet, L. & Valenzuela, P. (2013). 'Improving Access to Banking: Evidence from Kenya' in *Policy Research* Working Paper No. 6593.
3. Demombynes, G. & Thegey, A. (2012). 'Kenya's Mobile Revolution and the Promise of Mobile Savings' in *Policy Research* Working Paper No. 5988.
4. Oketch, M. L. 'Uganda Mobile Money Users hit 9m' (4 May 2013). *The East African*.
5. Aginam, E. 'Nigeria: Active Mobile Money Customers Hit 61 Million in 2013, GSMA Report' (28 February 2014). GSMA Report. *Vanguard*.
6. See Kamau, M. 'Safaricom wades into Insurance to Boost Revenues' (23 January 2014). *Standard Digital*; and ,'Lainisha Maisha na M-Shwari' (2014). *Commercial Bank of Africa* website.
7. Katz, M. L. & Shapiro, C. (1985). 'Network Externalities, Competition, and Compatibility' in *American Economic Review,* 75(3) 424-440.
8. Farrell, J. & Klemperer, P. (2007). 'Coordination and Lock-In: Competition with Switching Costs and Network Effects' in *Handbook of Industrial Organization*, Volume 3:1970-1994. Edited by Armstrong, M & Porter, R. North -Holland: Elsevier B.V.
9. Roberts, S. (2012). 'Administrability and Business Certainty in Abuse of Dominance Enforcement: An Economist's Review of the South African Record' in *World Competition, 35(2):273-300.*
10. Juma, V. 'Safaricom calls M-Pesa war truce with rival Airtel' (20 November 2013). *Business Daily*.
11. Mupaso, T. (2014). 'Banks, Econet & Net Neutrality: Econet asking more for mobile money traffic'. *TechZim*.
12. See 'Tigo launches Cross-border Money Transfer Service in Africa' (25 February 2014), *TeleGeography*; 'Orange launches the first offer for mobile-to-mobile money transfers between three different African countries' (11 July 2013), *Orange* website; 'HomeSend and Airtel Africa to boost International Mobile Money Transfers' (15 November 2012), *EserveGlobal*; 'M-PESA International Money Transfer Service, Safaricom' (2008), International Labour Organization; and, 'MTN introduces MTNMMO.COM International Money Transfer' (nd), *MTN Mobile Money Online* website.
13. Mark, O. (12 September 2013). 'KDN changes to Liquid Telecoms after sale of stake'. *Business Daily*.
14. See note 12, *TeleGeography*.
15. Jack, W. & Suri, T. (2011). 'Mobile Money: The Economics of M-PESA' in *National Bureau of Economic Research* Working Paper, No. 16721.
16. Nyakudzambara, E. 'Zimbabwe: RBZ to Guide Growth in Mobile Banking' (20 March 2014). *The Herald.*
17. Lawack, V. (2013). 'Mobile Money, Financial Inclusion and Financial Integrity: The South African Case' in *Washington Journal of Law, Technology & Arts*, 8 (3):318-344.
18. Spillane, C. 'Standard Bank and Vodacom race for Township Cash' (3 June 2013), *Mail and Guardian*.
19. Lavergne, I. 'Mobile Payment Regulation - The Regulator's Role' (20 August 2012). *Payback: The GFG Blog*.
20. Di Castri, S. 'Mobile Money: Enabling Regulatory Solutions' (February 2013). *GSMA*.

# Reading between the aisles: the bigger picture on leases in grocery retail

Lebogang Nleya

The grocery retail industry has over the years seen extensive growth of the major South African retail groups into the rest of the continent. Shoprite has over 1500 stores in 16 African countries, of which 153 are supermarkets outside of South Africa.[1] Pick n Pay operates in seven African countries outside of South Africa, with 937 outlets in South Africa and 104 stores in other countries.[2] Woolworths Holdings Ltd has 365 Woolworths Food Stores in South Africa and neighbouring countries.[3] Massmart Holdings Ltd has a combination of wholesale and retail chains with 335 stores in South Africa and 39 stores in other countries in sub-Saharan Africa.[4]

Both the Competition Authority of Botswana and the Competition Commission of South Africa have recently concluded their investigations into exclusive lease agreements between retail grocery anchors (usually the large chains mentioned above) and landlords. Both complaints related to the fact that the lease agreements contained restrictive clauses which prohibited landlords from introducing part-line stores such as liquor stores, butcheries and fruit and vegetable stores, as well as other full-line grocery stores, into their malls. This was alleged to raise the costs of rivals in entering malls in order to compete with anchor tenants, foreclosing them from attractive retail space and ultimately preventing consumers from enjoying the benefits of increased choice and quality, and price competition between retailers.

The investigations in Botswana reached the conclusion that barriers to entry were significantly heightened by exclusive lease agreements. The Authority was able to reach an agreement with the major retail group at the centre where the complaint arose that they would remove the offending clauses from the lease.[5] The Authority also advised that it would launch a market inquiry into what it considered to be an industry-wide practice.

In South Africa on the other hand, the Commission found that there was insufficient evidence to refer the matter to the Competition Tribunal as a practice with demonstrable anti-competitive effects.[6] The Commission has therefore adopted an advocacy strategy in which landlords and grocery retail groups will be approached to consider removing offending clauses from long-term lease agreements. The authority also noted that it would advocate against the use of these agreements unless they are justified by the investments made by the supermarket in the particular centre and that the length of the agreements should be related to the length of financing agreements or the period required to recoup the initial investment. Lastly, the Banking Association of South Africa confirmed that the major banks no longer require an exclusive agreement between developers and anchor tenants.

*So what does this all mean?*

Exclusive dealing cases in the grocery retail market are generally difficult to prosecute. The experience in the UK and Australia has shown that there is value in trying to resolve these cases by means other than prosecution. In both cases the authorities pursued advocacy-led approaches, coupled with the use of statutory powers to issue guidelines to the market on exclusive lease agreements. Although statutory powers may differ across jurisdictions, taking action against exclusive leases becoming “the norm” is important in order to prevent established large firms from unfairly raising barriers to entry and reducing competition. This is particularly important in an African context, given the policy objectives of increasing economic participation and inclusive growth. Interventions of this nature fulfil several roles in this regard.

Firstly, they open up the space for new entrant firms into the grocery retail market. Following the resolution of the matter in Botswana the authority has reported evidence of new, independent entry into the affected shopping centre. This reflects a demand for access to the best retail space as a critical input to grocery retail. It also reflects the fact that independent retailers, especially part-line stores, have previously been unable to on their own overcome the barrier to entry imposed by exclusive lease agreements. Although some entrant retailers can overcome this constraint by seeking out alternative ‘second best’ retail spaces, this will often be at a significant cost to those retailers. In this way, rivals’ costs are raised by exclusive dealing. In the case of Botswana, the fact that a number of foreign (South African) firms were involved in imposing these restrictive clauses means that the entry of independent, indigenous rivals may already have been stifled over time.

Secondly, having access to the economy also speaks to the ability of consumers to access goods and services from competitive markets at competitive prices. In the case of retail markets, these goods invariably include essential food items where it is widely accepted that poor consumers will tend to spend the largest proportion of their incomes. Shoprite’s CEO recently argued that the Group does not depend on competition from other retailers to lower its prices and its prices are the same in all Shoprite stores with or without exclusive lease agreements.[7] What this fails to account for is that market power or dominance is defined in exactly this way: as the ability of a firm to behave independently of (and make decisions that are relatively insensitive to) the reactions of consumers, customers, and competitors.[8] The expectation is that with more entry and in the presence of competitive discipline from independent rivals, the market behaviour of firms with high levels of market power (such as that granted by an ex-

*Source: www.pic2fly.com*

clusive lease agreement in a particular local market) may result in even lower prices and even greater competition on quality and choice.

Thirdly, strategic barriers to entry such as exclusive lease agreements have an impact on local economic development and the establishment of local value chains. Large retail groups largely source from known large-scale suppliers and will often import goods into the new market in which they operate. This is precisely the concern globally, including in South Africa for instance, regarding the entry of Walmart into developing countries. As governments around the continent seek to develop rural and peri-urban markets, and as new retail nodes develop in underdeveloped areas, there may be a role for competition authorities and policy makers in pre-emptively making sure that these markets remain open for independent, new, local entrants to these value chains. This will depend on the specific provisions regarding public interest issues in each country.

In the case of grocery retail, the problem in South Africa has been that exclusive lease agreements are legacy arrangements unreasonably maintained even beyond the duration for which they could still be justified by arguments around investment risk. In some cases these agreements last for up to forty years when investments in a supermarket can be paid off in a fraction of the time. Authorities have a role to play in monitoring the industry and advocating with landlords and retail groups for removing these provisions in lease agreements. Government policy makers may also have a role to play in issuing directives or guidelines on these issues in partnership with industry stakeholders. In this way, authorities can avoid fighting drawn-out, expensive cases in court a few years down the line.

This last point is important with regards to proactive competition policy enforcement. Both the cases in Botswana and South Africa have shown that exclusive lease cases are difficult to prosecute ex-post, even if they can be shown to raise barriers to entry and stifle the ability of competing retail chains to grow and compete with the major groups.

## *Conclusion*

Exclusive lease cases in grocery retail need to be seen in the context of inclusive growth and the broader debate around (localised) economic development. Although anti-competitive effects can be difficult for competition authorities to prove ex-post, it is clear that independent, local entrants to retail value chains cannot hope to enter and expand as effective competitors if they cannot access the best retail space. While there may be efficiency justifications for exclusive leases, consumers are within their rights to demand cheaper prices and better choice and quality.

As large retail groups expand their footprint into the continent, it will be important to make sure that markets will remain open for access by indigenous, independent retailers. While this may not be achieved through the findings of the courts in a contested enforcement case, it could be achieved through cooperation and advocacy involving key agents such as banking industry associations, groupings of property developers, and government policy makers, as demonstrated in Botswana, and to a lesser extent South Africa. This may also

## Notes

1. Shoprite Holdings Limited Integrated Annual Report 2013, and company website.
2. Pick n Pay Holdings Limited Annual Report 2013.
3. Woolworths Holdings Limited Integrated Annual Report 2013.
4. Massmart Holdings Limited Integrated Annual Report 2013, and company website.
5. Competition Authority of Botswana Media Statement (24 January 2014), titled 'Anti-competitive lease agreements in shopping malls'. Competition Authority – Botswana Facebook Page.
6. Competition Commission of South Africa Media Release. 'Commission non-refers supermarkets investigation' (24 January 2014).
7. Hedley, N. 'Shoprite granted interdict to stop Massmart's food offering' (23 October 2013).
8. Judgment of the European Court of Justice (14 February 1978). *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*. Case No. 27/76.

# Taxing competition: the effect of tax havens on competitive outcomes

Lauralyn Kaziboni

Tax avoidance and evasion and ultimately the tax regulatory framework influence the financial system and the financing of development.[1] Tax evasion, which can be illegal, occurs when an individual or company takes an action to reduce their tax bill. Tax compliance on the other hand refers to when an individual or a company complies with all tax laws of the jurisdiction in which they operate, avails all the information necessary for tax claims, and aims to pay the due tax amount at the right time and place. Somewhere in between lies tax avoidance, which occurs when companies and individuals are willing 1) to pay less tax than stipulated by the tax laws; 2) to pay tax in other countries other than where the profit was earned; and 3) to pay tax at a later time period than when the profit was earned.[2] Unlike some forms of tax evasion, tax avoidance is considered legal. The legality of tax avoidance is substantiated by the fact that there is no global tax law and the complexity of sovereign country tax legislation leaves room for arbitrage in the form of so-called “tax havens”.[3]

Tax haven refers to jurisdictions where the tax legislation assists nonresident companies and individuals to avoid regulatory obligations in their home countries.[4] Interestingly, tax havens explicitly design their tax regimes to attract companies to invest, largely because these countries lack the scale and human capacity to compete on a global scale. This, of course, often occurs at the expense of the country where the tax revenue is ‘supposed’ to be paid.

Tax havens are increasingly influencing the direction of investments and revenue flows. Some of the well-known examples include Switzerland, The Bahamas, Cayman Islands, Channel Islands, Isle of Man, Netherlands and Mauritius.[5]


*Source: www.rgbstock.com*

Mauritius is an interesting African case study. An increasing volume of investment into Africa and other emerging markets is being channeled through Mauritius. The country is viewed as an attractive destination for corporations and private equity funds. Between 2004 and 2014, 38 private equity funds have been approved in Mauritius. The scale of investments channeled through Mauritian-based firms is startling. For instance, 30% to 40% of investments from different countries into India have come through Mauritius for tax reasons, including some from Indian firms.[6]

The private equity funds have been set up through Global Business Companies (GBCs). GBCs are companies that do business elsewhere but are incorporated into Mauritius, regulated under the country’s Financial Services Act 2007. The companies are then incorporated as 1) a company limited by shares, 2) a company limited by guarantee, 3) a company limited by shares and guarantee, 4) an unlimited liability company, or 5) a limited life company. Thereafter, the companies can be licensed as Category 1 (“GBC1”) or Category 2 (“GBC2”) companies. The significant differences between these categories are that GBC1s have access to double taxation agreements and they have a maximum corporate tax of 3% on net income. On the other hand GBC2s have no access to double taxation agreements and do not have to pay corporate tax.[7]

### *Tax havens, firm behaviour and market structure*

Tax havens allow companies and individuals (especially multinational companies) to maximize profit through lower operational costs by evading their home country’s high tax rates. For instance, the total tax rates in Europe account for about 50% of profit, while for the past decade in Mauritius they average 26.3%.[8] These provisions have played a part in the establishment of over 28 000 GBCs and 600 global funds setting up in the country between 1992 and 2010.[9]

Multinational companies from China, India and Africa are also establishing regional headquarters in Mauritius in support of their African and Asian group operations through GBC1s. For example in Africa, ActionAid argued that SAB Miller and Illovo Group are avoiding tax payments by setting up in Mauritius.[10] It is evident that not only are millions of dollars being channeled away from home governments to multinational companies’ coffers; these firms are able to also gain competitive advantage over their (smaller, domestic) rivals.

Unfair competition in the area of tax may result in inefficient allocation of resources (mostly financial capital) and reduced competitiveness. The flow of funds into and through tax havens can distort the normal processes of cross-border competition. It can also have negative effects on the efficient allocation of resources.[11] In some ways tax benefits of this nature are similar to the assessment of special cost advantages in abuse of dominance cases wherein some firms benefit from special incentives and allowances, while others do not.

On the face of it, these arrangements seem to only benefit large multinational corporations. For instance, there has been a series of bank buyouts by multinational banks and funds 'based' in Mauritius. This can lead to consolidation which is conducive to collusion. This is enhanced by the high barriers to entry in banking, and multi-market contacts between major banking conglomerates. Recent experience in Europe has shown that the banking industry is certainly not immune to cartel conduct despite its apparent sophistication and what *seems* to be a high level of competition.

Investments made via tax havens into Africa are also likely to have an impact on merger evaluations. For instance, a merger in which a shelf company or equity fund incorporated in Mauritius seeks to acquire a domestic firm in another African country is unlikely to be prohibited if that shelf company is shown not to have been involved in that line of business in that country before. This requires the authority to disentangle the web of partial ownerships and subsidiaries that the acquirer may have in other companies in order to assess whether there is in fact an overlap in the activities of the merging parties. In most cases the merger will be approved without accounting for the fact that the transaction may also be approved in another market within the region and the effects this will have on cross-border competition and trade. For instance, a firm that acquires two subsidiaries in the same line of business in two adjacent countries will not have the incentive to have those firms continue to compete across borders with each other. This is where regional competition authorities can add significant value.

Akin to the creeping merger phenomenon, a single acquisition by a large international bank or fund might not make much of a difference in a market in the short term, however, over time this could lead to highly concentrated and uncompetitive markets in the region.

## Notes


1. Cobham, A. (2005). 'Tax Evasion, Tax Avoidance and Development Finance' in *Queen Elizabeth House* Working Paper No. 129.
2. See note 1.
3. Gravelle, J. G. (2009). 'Tax Havens: International Tax Avoidance and Evasion' in *National Tax Journal*, 727-753.
4. Henn, M. (2013). Tax Havens and the Taxation of Transnational Corporations. *International Policy Analysis*.
5. See note 4.
6. See note 4.
7. Conyers Dill and Pearman. (2013). Mauritius Global Business Companies Publication.
8. World Bank Total Tax Indicator. Total tax rate measures the amount of taxes and mandatory contributions payable by businesses after accounting for allowable deductions and exemptions as a share of commercial profits. Taxes withheld (such as personal income tax) or collected and remitted to tax authorities (such as value added taxes, sales taxes or goods and service taxes) are excluded.
9. HSBC Bank (Mauritius) Limited and Kemp Chatteris Deloitte. (2010). Mauritius: A Guide to Global Business.
10. Lewis, M. (2013). 'Sweet Nothings: The human cost of a British sugar giant avoiding taxes in southern Africa'. *ActionAid*.
11. Eden, L., and Kudrle, R. T. (2005). Tax Havens: Renegade States in the International Tax Regime? in *Law and Policy*, 27(1):100-127.


## African Competition Forum Update

The African Competition Forum (ACF) recently published research papers from its pilot, six-country research project.

This important initiative involved collaboration from competition authorities in Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia. The papers assess competition and markets on a cross-country, regional basis, for critical economic sectors, namely, sugar, commercial poultry, and cement.

This exciting work brings together the key areas of competition, trade, regional integration, reducing barriers to entry, and economic development.

You can access the research reports on the ACF website!

# Update on the COMESA competition commission

Tatenda Zengeni

The Common Market for Eastern and Southern Africa (COMESA) Competition Commission ("Commission") opened its doors in January 2013. It is responsible for enforcing the COMESA Competition Regulations of 2004. The establishment of the regional competition authority was necessitated by the fact that national competition laws have a limited role in dealing with anti-competitive practices originating from other countries.[1] The main functions of the Commission are to: monitor and investigate anti-competitive practices of undertakings within the Common Market; mediate disputes between Member States concerning anti-competitive conduct; review regional competition policy with a view of improving the effectiveness of the Regulations; and, help Member States promote national competition laws and institutions. The ultimate objective is to harmonise national laws with regional laws in order to achieve uniformity of interpretation and application of competition law and policy within the Common Market.[2]

In order to achieve these objectives, the COMESA Competition Regulation provides for the establishment of two separate autonomous bodies, namely the Commission and a Board of Commissioners. The COMESA Competition Commission is responsible for investigating any activities that restrain competition in the region. The Board of Commissioners is the adjudicative body that makes arbitrations and rulings on competition cases and hears appeals. This institutional setting is driven by the need for transparency and fairness in addressing competition issues. Within its first year of operation up to December 2013 the Commission had received eleven merger cases, of which ten have been approved, and is yet to receive any case on restrictive business practices.

### *Benefits of a regional competition authority*

The establishment of regional competition authorities such as COMESA has advantages to the member states which are part of the regional grouping. Regional competition authorities reduce resource constraints faced by national competition authorities, by pooling together resources that enable the regional body to reach economies of scale in the enforcement of competition law.[4] Moreover regional competition authorities provide a platform where member states can pool together financial resources that can be used for investigations and undertaking competition advocacy programmes

**Table 1: List of COMESA countries with and without competition law regimes[3]**

| Country | Competition law? | Investigating authority |
|---|---|---|
| Burundi | Yes | Commission de la Concurrence |
| Comoros | Yes | |
| DRC | No | No |
| Djibouti | No | No |
| Egypt | Yes | Competition Authority |
| Eritrea | No | No |
| Ethiopia | Yes | Competition Authority |
| Kenya | Yes | Competition Authority |
| Libya | No | No |
| Madagascar | Yes | Conseil de la Concurrence |
| Malawi | Yes | Competition and Fair Trading Commission |
| Mauritius | Yes | Competition Commission |
| Rwanda | Yes | Ministry of Trade and Industry |
| Seychelles | Yes | Fair Trading Commission |
| Sudan | Yes | |
| Swaziland | Yes | Competition Commission |
| Uganda | No | No |
| Zambia | Yes | Competition and Consumer Protection Commission |
| Zimbabwe | Yes | Competition and Tariff Commission |

which can be difficult if conducted by individual countries. In the same vein a regional competition body becomes very important for those member states that do not have competition laws in place. Regional authorities can also assist in the detection and prosecution of anti-competitive conduct that transcends borders.

Five COMESA members do not have competition law in place (Table 1), namely, Democratic Republic of Congo, Djibouti, Eritrea, Libya and Uganda. The establishment of the Commission will benefit these countries by allowing the 19 Member States to pool resources towards competition enforcement and greater regional integration.

Furthermore, regional competition authorities help to reduce public choice limitations; that is, political pressures from interest groups.[5] In developing countries political power is at times concentrated in a few individuals who can negatively influence the enforcement of national competition laws. This form of interference is altered by regional bodies and will reduce the pressures that come from these powerful political groups.

*Analysis and developments under COMESA*

In 2013, the Commission assessed ten merger cases which were each approved without conditions (Table 2).[6]

Nine out of the ten mergers involved firms from non-COMESA countries acquiring firms operating in COMESA. The only exception is the Total Egypt merger which involved firms from COMESA countries. The petroleum and insurance sectors recorded two mergers each and were related to the same companies.

The investigation of these merger cases has brought to the fore the challenges around the interpretation and application of the law. One such issue relates to the area of jurisdiction of the regional body. The issue arises from the fact that COMESA competition law regulations supersede the jurisdiction of national competition authorities, for example on transactions that involve two or more Member States. This has created friction between the COMESA Commission and national competition authorities. The Kenya Competition Authority has publicly expressed its view that merging parties must continue to notify mergers locally regardless of whether the transaction has been notified with the COMESA Commission.[8] This situation creates uncertainty for investors as they are not sure of the proper notification procedure and this can even prove to be costly if they are compelled to notify with both regulators since failure to notify will result in high penalties.

The other challenge relates to the fact that there is no merger threshold within the COMESA regulation.[9] All companies seeking to acquire businesses operating in COMESA are required to pay notification fees. The implication is that small business which could benefit from merging could end up failing to pay the notification fees. The second issue concerns

**Table 2: COMESA merger activity 2013**[7]

| Merger | Sector | Country of acquiring firm |
|---|---|---|
| Koninklijke Philips Electronics N.V. (Philips) and Funai Electric Company Limited | Electronics | Japan |
| Cipla Medpro and Cipla India | Pharmaceutical | India |
| Total Outre Mer S.A and Shell Marketing Egypt and Shell Compressed Natural Gas Egypt Company | Petroleum | South Africa |
| Cooper Tire & Rubber Company and Apollo Tyres Limited | Rubber products Tyres | India |
| PPC International and CIMERWA | Cement | South Africa |
| Oceanic Insurance Company Limited and Old Mutual (Africa) Holdings Proprietary Limited | Insurance | South Africa |
| Provident Life Assurance Company Limited and Old Mutual (Africa) Holdings Proprietary Limited | Insurance | South Africa |
| Eurasian Resource Group B.V. of the Entire Issued and Eurasian Natural Resources Corporation PLC | Mining and transport | Luxembourg |
| Roots Group Arabia and Ideal Standard MENA | Construction | Saudi Arabia |
| Total Egypt LLC and Chevron Egypt SAE from Chevron Global Energy Inc, Chevron (Overseas) Holdings Limited and Total Egypt by Beltone Capital Holdings for Financial Investments SAE. | Petroleum | Egypt |

the high notification fees. The rules explicitly set the filing fees at 0.5% of the parties' combined turnover or assets in the COMESA region with a cap of COM$500 000 (which is equivalent to US$500 000). This significantly increases the costs for companies that seek to acquire companies operating in COMESA.

Despite the challenges that have been faced to date, it is premature to critically assess the progress made by the Commission. Moreover, COMESA has shown the willingness to correct and improve on some of the anomalies related to enforcement of its competition law. For instance, in August 2013 the Commission called for proposals for consultancy services on revising competition law so as to meet international best practices. The project was expected to start at the end of October 2013, some of the deliverables of which include the need to revise the zero notification thresholds and the time periods for the evaluation of transactions.

## Notes

1. Cronje, J. B. 'COMESA Competition Commission merger approval regime' (4 September 2013). *Trade Law Centre* website.
2. COMESA Competition Commission website.
3. Global Competition Review (2014). 'The African and Middle Eastern Antitrust Review 2014'.
4. Fox, E. M. (2012). 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries' in *Law & Economics Research Paper Series* Working Paper No. 11-04.
5. See note 4.
6. Four additional merger notices have been issued in 2014: Acquisition of Supaswift by FedEx Corporation, AFGRI Limited by AgriGroupe Holdings, Adcock Ingram Holdings by CFR Inversiones SPA, and OFD Holdings Inc. by Yara International ASA.
7. See note 2.
8. Mumo, M. 'Authority criticises Comesa arm over rollout of competition rules' (17 March 2013).
9. See note 1.

# South African Economic Regulators Conference

Economic regulators fulfil a critical function in the economy including with regard to infrastructure, pricing, access and provision. These entities are thus central to the nature and pace of economic growth. The 2nd South African Economic Regulators Conference (SAERC) was intended to contribute to the improvement of economic regulators and their work.

The 2nd SAERC was hosted by the Centre for Competition, Regulation and Economic Development (CCRED) in partnership with the National Energy Regulator of South Africa (NERSA) on 18 and 19 March 2014 in Johannesburg, South Africa. This followed the success of the first SAERC hosted by NERSA in 2012. The purpose of the 2nd SAERC was to establish and advance an intellectual discourse in economic regulation and share knowledge and best practice among economic regulators. The conference provided an opportunity for dialogue between practitioners in economic regulation, researchers, policy-makers and other stakeholders around economic regulation issues.

A total of 35 papers were presented by practitioners, academics and consultants covering issues such as regulation and investment in infrastructure; regulation of prices and measuring return on capital; structural changes, unbundling and review of regulatory frameworks; operation of regulators; competition policy and sector development; and the impact of regulation and competition. CCRED researchers and associates contributed 10 of the 35 papers. Mr. Francisco Salazar of the Ibero-American Energy Regulators Association and Dr Edmund Amann of Manchester University, the guest speakers, shared lessons for developing economies on infrastructure, regulation and development from Mexico and Brazil, respectively.

In pursuit of CCRED's commitment to record, publish and disseminate the content for wider accessibility the conference proceedings will be published electronically and selected papers will be published in journals. See our website for further information.

# Constructing competition

Tatenda Zengeni

In 2013, the Competition Commission of South Africa ("Commission") reached settlements with 15 construction firms involved in collusive tendering. This was done in terms of the Construction Fast Track Settlement Process which incentivised firms to come forwards and make full disclosure of bid rigging in return for lowered penalties.[1] The penalties agreed with each of the firms that chose to settle the case through this process totalled R1.46 billion.

The 15 firms settling were: Aveng, Basil Read, Esorfranki, G Liviero, Giuricich, Haw & Inglis, Hochtief, Murray & Roberts, Norvo, Raubex, Rumdel, Stefanutti, Tubular, Vlaming, and WBHO.

The Commission revealed that 21 firms responded to the offer of the fast track settlement exposing bid rigging in over 300 'instances', although the settlements reached only dealt with projects that were concluded after September 2006.[2] The extent of the conduct and the number of projects affected is interesting in so far as some of the conduct affected countries other than South Africa. Information available in the settlements confirmed by the Competition Tribunal shows that the conduct certainly affected construction projects in Botswana, Zimbabwe, Malawi and Burkina Faso.

### *Botswana*

In Botswana, two construction projects were affected by the conduct. The first case was for the construction of a refinery mine (Tati Activox Area 1 and 2 project) in which the client was Botswana Metal Refinery.[3] Grinaker-LTA a subsidiary of Aveng Africa and Stefanutti engaged in a joint venture and agreed with Stefanutti, Murray & Roberts and Basil Read on cover pricing which enabled the Grinaker-Stefanutti joint venture to win the project.

The second project, which involved the same firms, was for the construction of DMS civil works at Tati for the Tati Mining Company near Francistown.[4] The Grinaker-Stefanutti joint venture agreed to give a cover price to Murray & Roberts and Basil Read such that Murray & Roberts was awarded the project.

### *Zimbabwe*

In 2007, Stefanutti reached an agreement on cover pricing with Concor, a subsidiary of Murray & Roberts, on a project which involved the construction of concrete infrastructure for a platinum concentrating facility for Zimplats.[5] Concor provided a cover price to Stefanutti which allowed Stefanutti to win the project.

### *Malawi*

In 2007, Wade Walker, a subsidiary of Murray & Roberts, reached an agreement with Group Five regarding a project for the electrification of the uranium processing plant at Keyalekera Mine, in Malawi.[6] Wade Walker agreed to submit a higher price for the project to enable Group Five to win the project. Group Five went on to win the project and the project was completed in 2010.

### *Burkina Faso*

In this case, Wade Walker and Group Five Energy agreed that Group Five would submit a high bid for the project in order to enable Wade Walker to win the project. The project was for the construction of a zinc processing plant for AIM Resources at Perkoa Mine in Burkina Faso in 2007.[7] However, the project was cancelled by the client shortly after its commencement.

### *Implications for competition in the region*

The construction sector in Africa has been able to grow in recent years on the back of rapid urbanisation, strong economic growth, a rising middle class, and regional integration throughout the continent.[8] Unfortunately, there is a growing body of evidence which shows that firms in key sectors have colluded on the outcomes of important infrastructure projects. For instance, the cement industry in South Africa was investigated for cartel conduct in 2008. PPC, Afrisam, Lafarge and NPC were implicated in conduct which affected the entire Southern African Customs Union (SACU) region, i.e. Botswana, Namibia, Lesotho and Swaziland.[9]

*Source: www.constructiongear.com*

Collusive conduct on important, large-scale projects directly undermines the developmental path of countries by making projects more expensive, especially for government projects, in an environment where financial resources are scarce. Buyers of construction services (which include taxpayers in some cases) are denied the benefits of competition on price, quality and choice between construction firms which could make sure that important infrastructure projects completed in a manner that is cheap and efficient.

In this regard, the recent findings in the construction industry in South Africa raise some important issues for competition authorities throughout the continent to consider. Although the firms implicated are headquartered in South Africa, the projects named above show that the conduct definitely affected jurisdictions other than South Africa. Importantly, the fact that conduct which took place before 2006 was not included in the settlements suggests that are further projects throughout the continent that were affected by the collusive tendering. A search of the publicly available information on the firms implicated in the South African case confirms that these companies have a wide presence in Africa. Given the widespread extent of collusion in South Africa it is likely that this also characterised their conduct in other countries in the continent, especially where they are the main market participants.

In this context, competition authorities need to continue to be vigilant in terms of monitoring the behaviour of construction firms with regards to bid rigging. Authorities may also benefit from sharing information with and learning from one another regarding the mechanisms by which this conduct operated. This will aid authorities in detecting and prosecuting similar conduct in construction and other markets in a less costly and lengthy manner. Finally, there is a role for competition authorities, government agencies and industry regulators in ensuring that licensing and procurement practices are designed to enhance competition in the sector and not protect incumbents.[10]

## Notes

1. South Africa Competition Commission media release (24 June 2013) titled 'Construction firms settle collusive tendering with R1.5 billion in penalties'.
2. See note 1.
3. Competition Tribunal of South Africa Consent Agreement. 'The Competition Commission and Aveng (Africa) Limited'. Competition Commission case no. 2009Feb4279/2009Sept4641.
4. See note 3.
5. Competition Tribunal of South Africa Consent Agreement. 'The Competition Commission and Murray & Roberts Limited'. Competition Commission case no. 2009Feb4279/2009Sept4641.
6. See note 5.
7. See note 5.
8. See 'The Changing Face of the African Construction Industry' (31 January 2014). *Engineering News;* and, Deloitte (2013) 'African Construction Trends Report 2013'.
9. Competition Tribunal South Africa Case No. 93/CR/Nov11.

# Competition Economics Winter School (11-13 June 2014)
## Principles & Tests in Competition Economics

The 2014 Winter School, targeted mainly at competition and regulatory authorities' employees and practitioners, will cover key principles in competition economics drawing from selected decisions of the Competition Tribunal of South Africa.

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**Day 3** will provide a platform for participants to share their research and experiences in competition-related matters from South Africa and other jurisdictions.

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