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Editor's note

In March, CCRED partnered with the Zimbabwe Competition and Tariff Commission to host the inaugural Annual Competition and Economic Regulation (ACER) week at the magnificent Victoria Falls in Zimbabwe. The 5-day programme included a series of applied core and advanced short learning programmes on competition and regulation, and a two-day conference with contributors and participants from regulators, competition authorities, the legal profession and economists from several countries. The real success of the week was in combining rigorous training led by regional and global experts, with a conference programme that was designed with inputs from authorities in the region to make sure it was topical and directly relevant. As such, the discussions were especially vibrant and the subject matter of particular relevance to solving the challenges of enforcement and growth for agencies. It is worth reflecting on some of these areas.

A contentious issue in the life of regulatory bodies is institutional design and independence. To the extent that competition and economic regulation often deal in sectors with long-standing vested interests of firms and governments, the ability to maintain objectivity and fairness in enforcement is critical. Through the framing of legislation, regulatory bodies are typically designed to be independent with various appellate bodies and tribunals in place to reinforce this and ensure adherence to administrative procedures. However, in practice this does not preclude the public and policymakers from taking an interest in particular matters or advocating for certain views. One view, which is discussed later in this Review, is that agencies deal in very sensitive sectors of a developing economy, and it should be expected that policymakers will take a strong view on competition and regulatory matters, as long as fairness in the adjudicative processes is maintained. This issue ties in with the role of universities and academics in supporting institutions in the region, which was also discussed. In so far as universities have the capacity to conduct research and make public commentary on the areas of work of regulatory bodies, they can play a role in critically assessing the progress and impact of authorities and interventions, and providing inputs to aid their work.

This last point is important. Several of the papers presented dealt with issues related to cartels, penalties and settlement; the implementation of and experience with market inquiries; regulatory and competition issues in mobile money and energy; and the very recent debates on excessive pricing. Each of these areas is complex, and there is a clear need to develop a body of knowledge and literature which originates from the experiences of *countries in the region* rather than an express reliance on international precedent and learnings. One example of this, was the paper which reflected on the poor translation of cartel findings in South Africa, into follow-on investigations and prosecution in neighbouring countries in SACU and SADC, and damage claims based on an assessment of the overcharge to consumers across borders. Our emphasis going forward will be on developing even more African case studies for both training and knowledge-sharing purposes.

These issues are of interest from both an academic and practitioner's perspective, and in terms of regional economic development where countries in the region often face the same challenges of small, concentrated markets where barriers to entry are especially high and where the resources to enforce against anticompetitive conduct are limited. In this Review, we reflect on some of these topics discussed at ACER week, including the issue of penalties, and institutional independence. We also assess the state of affairs in the regional airline industry, and profile ongoing work on retail chains and their role in local supplier capabilities development. We trust that you will find this Review interesting, and relevant to your work.

Thando Vilakazi

Cartel settlements, leniency and penalties in African jurisdictions

Thando Vilakazi

Representatives of competition authorities from various African countries frankly discussed cartel penalties, settlement and leniency programmes at the CCRED Annual Competition and Economic Regulation Week in March 2015 in Zimbabwe.[1] In this discussion, authorities highlighted the challenges of enforcement actions involving complex collusive conduct, the need for deterrent penalties, the lack of local case precedent developed through rigorous contested hearings, and the resource constraints which hamper enforcement actions and deterrence in particular. In this article, we consider the current state of affairs in terms of penalties, settlements and leniency programmes across jurisdictions in the region.

Why does busting cartels matter?

Uncovering cartels, prosecuting offenders and enhancing deterrence is especially topical across various jurisdictions in Africa. Now, more than ever, competition authorities are pursuing ways to enhance their ability to detect and penalise cartel conduct. This trend is linked to the growing body of evidence that cartel conduct is widespread across African countries[2], the fact that competition law enforcement is now well-established in various countries[3], and the fact that some newer authorities are reaching 'maturity' in terms of the resources and institutional capacity that they have to pursue investigations of complex conduct rather than simply, and justifiably focusing on merger control in the early years.

Cartels, as prohibited arrangements between firms in a horizontal relationship to fix prices or quantities in the market, are notoriously difficult to uncover partly because firms have strong incentives to hide the fact that they are jointly benefiting from extracting supra-competitive rents through illegal conduct at the expense of consumers. Cartelists come together to jointly maximise profits in a market through agreeing on key competitive parameters such as price in order to prevent costly price wars that can reduce the profits of all insiders to the arrangement. Cartelists restrict or deal aggressively with entrants that look to come into the market to 'disturb the peace' by undercutting cartel prices. Market outcomes resulting from cartels are therefore akin to monopoly outcomes in the market, which in most cases mean higher prices and reduced demand overall for affected goods and services in an economy. Whereas firms are expected to execute independent, best response strategies in a competitive market related to their individual costs and market conditions, colluding firms agree on mechanisms to monitor one another and punish firms that fall out of line with jointly agreed strategies.

International studies have shown that cartel conduct, including where there are high levels of information exchange, is harmful and cartel mark-ups are generally in the region of 15-25% of the cartel price.[4] Most recently, the EU Court of Justice in its landmark banana importer cartel decision involving Dole Food ruled that communication between competitors which results in price-fixing is *per se* anticompetitive and does not require an analysis of the effects of the conduct on competition in the market.[5] Several South African studies have also found high cartel overcharges, as a measure of how much cartel prices exceed the prices that would prevail under competitive conditions in a market, comparable to and in some cases higher than those found in international studies.[6]

Dealing with cartels: penalties, settlements and leniency

It is therefore interesting to consider the strategies that authorities employ to uncover and punish offenders. Cartel deterrence is about altering the incentives of firms in deciding whether to engage in or continue with collusive conduct. Firms consider the benefits (profitability) of the conduct and weigh these against the likelihood of getting caught and the penalty they expect to receive if they are caught.[7] A credible threat is created by the competition regime when the likely penalties are high.[8] This is especially true for developing jurisdictions where the probability of getting caught is especially low due in part to resource constraints which also affect the ability to conduct ex-ante scoping exercises to find cartels.

Penalties, settlements and leniency work together to create deterrence. Penalties, which are provided for in competition legislation, directly penalise conduct whereas corporate leniency programmes (CLPs) are designed to encourage firms to come forwards and confess collusive conduct in exchange for a substantially reduced penalty – in most cases, a zero penalty for the first firm to come forwards. The latter would typically be on condition that firms provide evidence about the conduct which assists the authority to prosecute remaining cartelists. Settlement lies somewhere in between in the sense that firms may admit to collusion, particularly where they may not have been the first to come forwards and leniency has already been granted to another firm, and reach an agreement with the authority for a reduced penalty in exchange for substantial cooperation in terms of evidence provided.

In this context, settlements and leniency can be viewed as providing incentives for firms to come forwards while penalties, if sufficiently high, play a punitive role. Across several jurisdictions there are significant differences in the penalty frameworks, and leniency programmes are not widely applied as yet (Table 1).

Table 1: CLPs and penalty frameworks[9]		
Country	**CLP in place?**	**Penalty regime applicable to cartels**
Botswana	Draft policy	≤10% of turnover of enterprise during the breach of the prohibition for maximum 3 years
Burundi	-	≤50% of profits, or ≤20% of national turnover in the financial year in which the prohibited practices were implemented
Cameroon	No	≤50% of profits, or ≤20% of annual turnover in Cameroon in the year preceding the year in which the contravention took place
Egypt	Yes	Minimum penalty of EGP100 000 and not exceeding EGP300 million, which limits are doubled for repeat offences, and/or criminal liability for individuals involved
Ghana	No	No competition legislation, sector regulator may take action on competition issues
Kenya	Yes	Penalty of ≤KSh 10 million ($105 671), or imprisonment ≤5 years, or both
Madagascar	No	Penalty between MGA 500 000 ($160) and MGA 10 million ($3215), or imprisonment of 6 months to 5 years
Malawi	No	Penalty of MWK 500 000 ($1136) or equal to financial gain generated by the offence if the gain is greater, or imprisonment of 5 years
Mauritius	Yes	Penalty of ≤10% of the turnover of the enterprise in Mauritius for up to 5 years of the period of the conduct
Mozambique	Yes	Penalty of ≤5% of the turnover for the previous year of each company involved, plus other sanctions e.g. exclusion from participation in public bids for 5 years, or dissolution
Namibia	Draft policy	Penalty of ≤10% of the global turnover of the undertaking during the preceding financial year
Nigeria	No	No specific competition legislation, sector regulators may take action on competition issues including administering penalties
Seychelles	No, under review	Penalty of ≤10% of turnover of the enterprise in Seychelles for up to 5 years of the period of the conduct
South Africa	Yes	≤10% of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year
Swaziland	Yes	Penalty of ≤E250 000 ($21328), or ≤5 years imprisonment; or both
Tanzania	Draft policy	Penalty of between 5% and 10% of the offender's annual turnover
Uganda	No	No specific competition legislation, sector regulators may take action on competition issues
Zambia	Draft policy	Penalty of ≤10% of annual turnover, and ≤5 years imprisonment or personal financial liability
Zimbabwe	No	Fine not exceeding level 14 ($5000), or ≤2 years imprisonment, or both

The range across countries in terms of the penalty regime applied is wide, with some jurisdictions such as Namibia that have scope in the legislation to apply penalties up to a cap of 10% of the *global* turnover (although penalties applied need not be of global turnover) of the enterprise (similar to the European Commission's provisions) and others such as Zimbabwe and Madagascar with very low caps on financial penalties. In some cases, low fines may be accompanied by some form of personal criminal liability including up to five years imprisonment.

The financial amounts that are paid by offending firms are also affected by the extent to which the duration of the conduct is considered. For instance, in Botswana and Mauritius there is a clear limitation on the number of years of the conduct for which a penalty can be applied. While this type of clause may serve to protect firms from extremely large fines that can lead to financial difficulties, it also prevents firms from being penalised fully in cases where the cartel arrangement may have lasted for a very long period of time. Where there is a further cap on the total fine amount relative to turnover which can be levied, firms that have been involved in egregious conduct for a long period, are effectively given an even larger discount on the fine they would have received absent the limit on duration and turnover, which reduces the likely deterrence of future conduct. In South Africa, the authorities have only recently moved to considering more explicitly the duration of conduct in the determination of penalties and settlement through recent decisions of the Tribunal and the draft settlement guidelines of the Competition Commission.[10]

It is clear that a cap on penalties which is too low, especially when applied to a single-product firm or a narrow affected turnover, will not deter. Importantly, this also affects the likely success of a leniency programme or settlements procedure. This is because firms will face less incentive to come forwards and confess to conduct if they could, after paying a small penalty, get away with not admitting to the alleged conduct at all. In exchange for paying a low fine, the firm essentially also gets away with not having to provide the competition authority with any additional information about the cartel. The corollary is that the authority does not benefit from the resource-savings of settling or entering an arrangement with a leniency applicant, nor the savings from not engaging in costly investigation and litigation procedures.

Challenges in developing jurisprudence

The use of settlement and leniency programmes, as well as the interpretation of the penalty framework may come with some difficulties in the initial stages of implementation. For instance, in the absence of case law which tests the various provisions, there can be some doubt regarding the interpretation of the requirement in Botswana's law to show that the firm must have 'negligently' and 'intentionally' engaged in the conduct before a penalty can be levied. In Zambia, the size of the penalty is determined using a formula and fines of over US$20 million determined by the authority against firms in the fertilizer industry in 2013 were appealed by the firms involved, and the matter is still to be heard in higher courts.

In South Africa, the introduction of the CLP in 2004 contributed significantly to the number of cartel cases uncovered since, although it took around three years before firms started coming forwards under this programme.[11] Importantly, in the early years, the authority also applied its discretion in interpreting this policy and in one case awarded leniency to more than one firm where the second firm to come forwards had provided information and evidence relating to further conduct beyond what the leniency applicant had provided.[12]

There are some important lessons here. It is important for authorities to grab the low-hanging fruit in terms of prosecuting cartel conduct. This relates to those cases which can be initiated and finalised on the basis of information from a leniency applicant and/or firms that subsequently come forwards to settle. Successfully prosecuting firms in these cases and publicising this widely, contributes to creating deterrence of future conduct in the economy. However, this relies on the principle that any agreement entered into with a leniency applicant or a settling firm is based on a clear, strong requirement that the firm cooperates meaningfully with the authority. This entails providing evidentiary support which is reliable and accurate to assist in the prosecution of remaining firms.

Importantly, while it could be argued by the public that leniency and penalty discounts allow firms to 'get away' with having committed offences under the competition legislation, it is clear that preventing anticompetitive conduct from continuing to harm consumers well into the future is even more important. Given the contestability of fines in court, as in the case of Zambia, and the wide acknowledgment that penalties generally do not and cannot (given statutory caps) equate to the total damage caused by cartel conduct[13], preventing the conduct from causing continued damage become even more critical. The evidence on cartel mark-ups certainly shows that the harm is significant, and absent a strong culture of follow-on damages claims in countries in the region penalties are unlikely to account for all of the harm caused, including the losses in terms of innovation, quality and variety in the market over time which are extremely difficult to quantify.

On this last point, it is to be expected that authorities do not apply fines that directly match the size of the harm caused (statutory caps aside) because this harm is difficult and resource-intensive to quantify which is perhaps why harm is presumed in many jurisdictions. Furthermore, in the case of settlements, and where the conduct has gone on for so long that it is difficult to define a competitive counterfactual period, it is simply not feasible to go through the exercise of determining the exact extent of harm. This is not a useful application of the authority's resources and time, which is why authorities can benefit from retaining their discretionary powers in the case of settlements.

For authorities with relatively new leniency programmes including those that are under review or in the drafting stages, such as in Tanzania, Botswana, Zambia, Swaziland and Namibia, a similar level of discretion is important to allow the authority to consider the merits of each case and each applicant on a case-by-case basis, whilst providing the desired certainty for firms. One example where this matters is in distinguishing between firms on the basis of the extent of cooperation with the authority which may take on a different form across cases, or differ according to whether the firm was the second or the last to come forwards to settle the matter.

Conclusion

Ultimately, the approach of authorities in terms of penalties, settlement and leniency is best improved through learning-by-doing and in contested cases. However, as was abundantly clear in the discussions between authorities, there is even more to be learnt from the experiences of neighbouring authorities and sharing between authorities. The record is poor in this regard. This may be due, in part, to the differences in the legislation in each country. However, where the common goal is to enhance deterrence through uncovering and penalising cartel conduct, there should be sharing between countries in terms of mechanism for avoiding the challenges that come with successfully penalising firms, and effectively implementing leniency and settlement programmes.

Notes

1. The inaugural CCRED Annual Competition and Regulation (ACER) Week was held at Victoria Falls from 16 to 21 March 2015, hosted through a partnership between the Zimbabwean Competition and Tariff Commission and CCRED. Information on the various short learning training programmes and the conference proceedings are available on the CCRED website.

2. See Roberts, S., Simbanegavi, W., and Vilakazi, T. 'Understanding competition and regional integration as part of an inclusive growth agenda for Africa: key issues, insights and a research agenda', Paper presented at the Competition Commission and Tribunal Annual Conference, Johannesburg, 2014; and Kaira, T. 'A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted into automatic cartel confessions in economically interdependent neighbouring countries?' Paper presented at the Annual Competition and Economic Regulation Week Southern Africa, 16-21 March 2015, Victoria Falls, Zimbabwe.

3. Zengeni, T. 'Update on the COMESA Competition Commission' (April 2014). *CCRED Quarterly Competition Review*.

4. See, for example, Khumalo, J., Mashiane, J. and Roberts, S. (2014) 'Harm and Overcharge in the South African Precast Concrete Products Cartel', *Journal of Competition Law and Economics*; Motta, M. 'On cartel deterrence and fines in the European Union', *European Competition Law Review*, (2008) 29(4) 209; Werden, G. J. 'Sanctioning cartel activity: Let the punishment fit the crime', *European Competition Journal*, (2009), Vol. 5(1), p. 19-36; and Wils, W. 'Optimal antitrust fines: theory and practice', *World Competition*, (2006), Vol. 29(2).

5. European Union Court of Justice. Judgment of the Court (19 March 2015), Case No. C-286/13 P.

6. See Khumalo et al (2014); Mncube, L. 'The South African Wheat Flour Cartel: Overcharges at the Mill', *Journal of Industry, Competition and Trade,* (2013), 13(4); Boshoff, W. 'Illegal overcharges in markets with a legal cartel history: the South African bitumen market', CCRED Working Paper No. 3/2013; and Das Nair, R., Mondliwa, P. and Sylvester, A. (2014), 'Assessment of the long steel cartel: rebar overcharge estimates', Presented at Competition Commission and Tribunal Annual Conference, GIBS, Johannesburg, 4 and 5 September 2014.

7. See Wils (2006); and Edwards, K. and Padilla, A. J. 'Antitrust settlements in the EU: Private incentives and enforcement policy' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (2008).

8. See note 4.

9. Table has been drawn largely from Bowman Gilfillan Competition Law Africa publication and the webpages of the different competition authorities.

10. See Competition Tribunal of South Africa, *Competition Commission v Aveng & others*, Case No. 84/CR/Dec09; and Competition Commission of South Africa, Guidelines for the determination of administrative penalties for prohibited practices (1 May 2015), available online.

11. Muzata, T. G., Roberts, S. and Vilakazi, T. 'An economic review of penalties and settlements for cartels in South Africa'. CCRED Working Paper No. 9/2012.

12. See note 11.

13. See Aguzzoni, L., Langus, G. and Motta, M. 'The effect of EU antitrust investigations and fines on a firm's valuation', *Journal of Industrial Economics*, Vol. 61, Issue 2, June 2013, p. 290-338; and Combe, E. and Monnier, C. (2009). 'Fines against hard core cartels in Europe: The myth of over enforcement', Cahiers de Recherche PRISM-Sorbonne Working Paper.

Muted battle for the region's skies: competition in the airline industry

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The deregulation of the South African airline industry in 1991 paved the way for the entry of a number of low cost carriers (LCCs). However, of the eleven airlines to enter the industry between 1991 and 2012, only one is still in operation.[1] Other privately owned airlines such as Nationwide, Velvet Sky and 1time operating from 1995 to 2008, 2011 to 2012 and 2004 to 2012, respectively, have exited even after remaining in the market for significant periods.[2] The national carrier, South African Airways (SAA), has also suffered losses over the past decade requiring several government bailouts and guarantees, including one in January 2015.[3] This suggests a harsh business environment for airlines in South Africa which does not seem to match the growth in demand and the number of participants in other countries in the region as we discuss below.

Given this history, it is interesting that in the past year two new LCCs, FlySafair and Skywise, have entered the industry in South Africa bringing the number of low cost domestic airlines to four including Comair's Kulula and SAA affiliate Mango Airlines. However, relative to the size of demand and the centrality of South Africa as a regional economic hub, the industry in South Africa appears to be lagging behind countries such as Tanzania and Zimbabwe, particularly in terms of independent LCCs, not part of large multinational groups, operating on intra-regional routes (Table 1).

In terms of LCCs, FlyAfrica and Fastjet have recently entered the market and are competing along regional routes. Fastjet, which is based in Tanzania, initially struggled to launch into the market due to financial losses and disputes between business partners.[4] However, the airline has since managed to grow and expand and it now operates on routes to four other countries including South Africa, Uganda, Zambia and Zimbabwe.[5] FlyAfrica which entered the market in July 2014 has also expanded into Namibia, South Africa and Zambia.[6] Other new airlines in the continent include Precision Air which flies to destinations in Kenya and Tanzania, Fly540 which flies to destinations in Kenya and to Juba in South Sudan as well as Proflight that travels to destinations in Zambia and to Johannesburg (via code share), and most recently Malawi and DRC. This suggests that profit margins and demand in the provision of passenger airline services are sufficient to encourage entry and the experiences of domestic operators in South Africa may not be representative of the market environment which some regional LCCs face.

LCCs are generally seen as being in the same market with full service carriers and face the same exogenous cost factors such as the fuel price.[7] However, the ability of LCCs to survive in a harsh business environment may also have to do with their low-cost nature including minimising the availability of free services such as free in-flight meals, fare flexibility, connecting flights or loyalty programmes and restricting the classes of travel. Furthermore, tickets can only be booked directly through the airline's website and not through travel agents to reduce the cost base.[8]

The benefits of entry

Entry and rivalry regionally in the airline industry is especially important because of current and expected increases in the volumes of air travel between countries in the region. This is likely to be directly linked to growth in mining sectors and increased demand from related service sectors such as finance, construction and engineering stemming from rapid urbanisation and high, sustained levels of economic growth in several countries in the past decade.[9] The International Air Transport Association (IATA) estimates that the airline industry in Africa will grow in passenger numbers at an annual average rate of 4.7% by 2034, faster than regional markets in North America and Europe whose growth is forecast at 3.3% and 2.7%, respectively.[10]

In this context, increased and sustainable entry is important because it leads to reduced prices, higher levels of innovation and thus improved consumer welfare especially when

Table 1: LCC origins and destinations in southern and East Africa*

Airline	Home country	Country destinations	Year of entry
FlySafair	South Africa	South Africa	2014
Skywise	South Africa	South Africa	2015
Precision Air	Tanzania	Kenya, Tanzania	1993
Proflight	Zambia	DRC, Malawi, South Africa, Zambia	1991 (Malawi - 2013, DRC - 2014)
FlyAfrica	Zimbabwe	Namibia, South Africa, Zambia, Zimbabwe	2014
Fly540 (incorporated with Fastjet, 2012)	Kenya	Kenya, South Sudan, Tanzania (formerly in Angola, DRC and Ghana)	2006
Fastjet	Tanzania	South Africa, Uganda, Tanzania, Zambia, Zimbabwe	2012

*Based on company websites and publicly available information

considering that the cost of intra-regional travel in Africa is relatively higher than in other regions such as the European Union.[11] This has certainly been the experience in the South African domestic market following the entry of FlySafair where there has been a decline in prices along each of the ten routes on which the airline has entered although this effect has seemingly been greater on certain routes over others.[12] While it is likely that there may be other factors also underlying this decrease in average rates, considering that fares on four other routes have also decreased marginally on average, we consider that the entry of a rival on those routes where FlySafair now operates would have contributed significantly. This decline in prices is despite the impact of several cost drivers including high fuel and maintenance costs exacerbated by a weakening currency.[13] The entry of Kulula on the Johannesburg-Lusaka route-pairing contributed to a 33-38% decrease in fares and 38% increase in the number of passengers, while Fastjet's entry into the southern African market has contributed to a 20% increase in the size of the market, and an even higher increase in the number of first time flyers in the Tanzanian domestic market.[14]

The marked differential in South African prices from 2014 to 2015 suggests that it is certainly possible for increased rivalry to result in lower prices for consumers in air travel despite the challenges presented by the volatility in key cost drivers such as fuel.[15] This is consistent with the findings in terms of the entry of Fastjet and Kulula along regional routes as well.

Constraints to regional rivalry

Regionally, low levels of rivalry were linked to the existence of bilateral service agreements and high costs. Bilateral service agreements in air transport are effectively contracts between governments that restrict travel. Despite the calls for liberalisation contained in the Yamoussoukro Declaration of 1988 and the Yamoussoukro Decision of 1999, as well as the demonstrable benefits of liberalising air travel markets,[16] a majority of countries still maintain bilateral agreements aimed at protecting their national carriers. For instance, one such agreement between South Africa and Angola allowed for only one carrier from each country to travel to the other for only three flights a week.[17] Around 2007, the route from Johannesburg to Luanda cost three times more than the route from Johannesburg to London although the latter is six times the distance travelled. Similarly, a bilateral agreement between South Africa and Nigeria restricted travel between the countries to three times a week until 2012 when a new agreement was signed increasing the number to twenty a week.[18]

Liberalising air travel markets in Africa has become a popular position of policymakers and incumbent operators,[19] and removing agreements of this nature is an important step towards this. However, this needs to be coupled with efforts to reduce the regulatory barriers in the form of bureaucratic processes involved in entering airlines markets. Fastjet struggled to enter the South African market due to 'red tape' that caused several delays in the launch of the airline. The airline is yet to enter the Kenyan market, Tanzania's neighbouring country for the same reason. The countries that Fastjet found relatively easier to enter were Tanzania and Zambia that, interestingly, do not have a national carrier of their own.

Costs have also been high relative to those in other regions. Airlines in Africa appear to pay particularly higher relative ticket and fuel taxes which significantly increases their expenses. The airlines are charged much higher taxes than established airlines in Europe.[20] Globally, fuel accounts for about 36% of an airline's operational costs however in Africa the range goes up to between 45% and 55%.[21] Passenger taxes in Africa can average up to $66 while the average tax in other major cities is $10.[22] Furthermore, it costs African airlines more to lease planes than airlines in other continents. For instance, while it might cost a European airline $180 000 per month to lease a 5-year old Boeing 737, it apparently costs a Nigerian airline $400 000 for the same plane.[23] This is linked to the continent's poor safety record and delays with regards to dealing with bankruptcies.[24]

Even as LCCs struggle to enter and successfully compete in this context, there are challenges in the form of strategic barriers created by the dominant incumbent national carriers as discussed by the Competition Tribunal of South Africa in *Nationwide vs SAA*.[25] In this case, the national carrier was found guilty of engaging in exclusionary acts by putting in place an incentive scheme that encouraged travel agents to deal with SAA rather than the carrier's rivals.[26] Furthermore, in South Africa as in several other countries the national carrier is backed by state funding which grants the airline certain advantages over the other airlines including financial support and bailouts. This is exacerbated by the presence of airline alliances which are essentially cooperation agreements between airlines that allow them partner with one another on servicing particular routes, thus reducing their costs. They range from basic code sharing to sharing prices and even acquiring minority interest in an airline.[27] While there may be efficiencies derived from being part of these alliances, the structure of the cooperation between airlines is potentially anticompetitive. In South Africa, SAA had to apply for exemptions from the Competition Act which were granted in the past.[28] Cooperation between airlines may be important for achieving scale and improving air transport systems between carriers and country authorities.[29] However, this should not be at the expense of ensuring effective rivalry between the major operators in the region.

Conclusion

To the extent that entry and exit of LCCs has been driven by fair, intense rivalry between airlines, particularly between LCCs and established national carriers, the competitive process will benefit consumers. However, where the entry and exit of rivals and LCCs in Africa's airline industry has been restricted by regulatory and strategic barriers which favour incumbent national carriers, the competitive process has

been undermined. In this context, liberalisation on paper is not likely to improve market outcomes and the prices of air travel in the region are likely to remain well above those in comparators countries and regions. The positive outcomes for consumers linked to the entry of Fastjet and FlyAfrica as well as LCCs in the South African market suggests that there is certainly scope for improved competitive outcomes in the sector. However, this cannot take place where national airlines are protected, and substantive conditions of operation of new airlines are not favourable due to bureaucratic process and a high tax and cost environment.

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Reflections on institutional design in African regulatory agencies

Jonathan Klaaren

A panel at the recent ACER Week Conference in Victoria Falls discussed and give views on a question that is often neglected in discussions of competition law and policy: institutional design. The speakers came from a number of competition authorities and economic regulators from the Southern African region and played prominent – sometimes preeminent – roles in the operation of these bodies.

A key topic discussed was the effectiveness of having a dedicated adjudicative body separate from the competition authority and from the usual court system. Another was the competing models of unitary and multi-member authorities.

In some of the global research on this latter point, the arguments have been put as follows:

"*The multimember board is believed to offer the advantages of diversified expertise, greater resistance to capture, and heightened legitimacy. Multi-member boards are also less subject to abrupt shifts in policy in the wake of an election that results in a change in power. A unitary hierarchy offers its own advantages. Compared to a board whose members may communicate disparate views about what their agency should do, a single executive is better able to create a clear "brand" and define a coherent program for her agency. A single executive is more likely to quickly reach a decision and implement it than a multi-member board. Finally, because decision-making is in the hands of a single individual, it less likely the slot will go to an unqualified political supporter*".[1]

Of course, the point is also made that there are many different variations on these models.

One aspect that was of interest was how the discussion moved quickly from institutional design to the topic of institutional independence. Independence is of course distinct from design, though there are a number of ways in which the two topics are relevant to each other. Indeed, one interesting line of comment at the panel looked at the degree to which a competition authority or an economic regulator could itself have an internal review function.[2]

With the topic of independence, the political temperature in the room rose (as perhaps did the attention levels of some delegates). Independence is usually thought of as a hot button issue and one that you either love or hate – just as an administrative body might either have independence or not. In this light, the remarks made (both by panelists and from the floor) related primarily to independence as the opposite of accepting influence from government. The authorities and regulators were independent and would not take direction from government.

Commissioner Tembinkosi Bonakele of the South African Competition Commission made the important point that while institutions can claim to be independent of political influence (from a legal or design perspective), the reality is that they *are* agencies of government and governments should rightfully take a keen and close interest in their work. In this case, the question would be how much interest by a government in a competition authority is too much? This is then generative of further opportunities to share experiences and learning across the various authorities and regulators in the Southern African region.

What might then be actions to take when the interest is too much or too little? This was an interesting line of investigation opened up by the conversation. Competition authorities of course do need to safeguard independence, but can also work with the government on a number of campaigns. Indeed, the one will usually work well with the other.

Notes

1. Kovacic, W. E. and Hyman, D. A. (2012). 'Competition Agency Design: What's on the Menu?'

2. It seems that the answer is that it can, as is implied by the decision of the South African Constitutional Court in *Islamic Unity Convention v Minister of Telecommunications and Others*, Case No. (CCT 33/07) [2007] ZACC 26; 2008 (3) SA 383 (CC); 2008 (4) BCLR 384 (CC) (7 December 2007). Note that this case and many others from the courts and from adjudicative authorities such as the Competition Tribunal are available at the free website SAFLII.

Regional supermarket value chains: is there a role for local suppliers?

Shingie Dube

The spread of large supermarket groups across the Southern and East African region[1] raises important questions about local supplier capabilities, the ability of local suppliers to access supermarket group value chains, and the competitive landscape that the entry of large multi-national retail groups creates. Over the past two decades, there has been a rapid expansion of South African supermarket chains into Southern Africa.[2] However, recently we have also seen the growth into South Africa and Zimbabwe of Choppies, a supermarket chain from Botswana, which plans to open a further 31 new stores in Botswana, South Africa and Zimbabwe, to list on the Johannesburg Stock Exchange (JSE) by the end of May 2015, and to grow into the Kenyan market by the end of 2015.[3]

In many countries, particularly South Africa and Kenya, the main factors driving the expansion of supermarket groups include increased urbanisation, rising incomes and a growing middle class, more efficient transport systems, and the ability of supermarkets to adapt their format and adopt efficient procurement systems tailored to suit the needs of the poor.[4] Supermarkets are moving away from serving the traditional high-end affluent consumers in urban areas and are successfully penetrating new markets in low income, geographically isolated rural areas.[5]

While the growth of supermarket groups in the region has introduced competitive rivalry and accessibility to a broader range of products and services in the different countries, it can also impose some challenges for local suppliers (specifically small farmers, and food processing and manufacturing firms) in terms of entering the supply chains of supermarkets at different levels. This stems from the fact that retail chains may adopt certain business models, sourcing and procurement strategies and practices that marginalise or exclude small, often indigenous, producers and manufacturers from their supply chains, as we discuss below.

Why does the inclusion of local suppliers matter?

Why does the development of the capabilities of small-scale local suppliers and their inclusion into the supermarkets' supply chains matter? Small-scale suppliers matter for economic development within the context of inclusive growth and participation. These producers typically constitute a large proportion of the total number of agricultural producers in many African countries where agriculture is the economic pillar, and are often key providers of employment especially in the agricultural sector in rural areas.[6] They also employ a significant proportion of informal, unskilled, female and part-time workers.[7]

Light manufacturing industries are also typically labour-intensive and have useful linkages with other sectors of the economy. These industries often allow low income countries to compete by leveraging their low labour costs. It is also important to develop these industries as they allow for the creation of value-added industries leveraging off competitive input industries.[8] Participation of small-scale producers in sophisticated value chains, is likely to grow their capabilities through learning-by-doing, thus enhancing their productivity and innovation in the medium- to long-term. This is especially important for small- to medium-sized farmers and food processing firms that are likely to benefit from the adoption of modern distribution channels and procurement systems that lower transactions costs and encourage market exchanges.[9]

Concerns arising from the expansion of multinational supermarket groups

South African supermarkets trading in southern Africa source the vast majority of their products from their home country.[10] This is mainly due to the proximity of Zambia, Zimbabwe, Botswana and Mozambique to South Africa which makes importing from South Africa economically feasible. Through moving away from spot purchases and adopting specialised procurement agents and preferred suppliers for supplying the region, supermarket groups gain direct influence over quantities, product quality and delivery.[11] This has the adverse effect of shrinking the supply base because only preferred suppliers are included.

Large retail chains are also increasingly using their own centralised distribution centres in supplying a broad range of stores and are shifting away from the traditional store-by-store procurement and supply practice.[12] For instance, Shoprite uses Freshmark as its centralised buying and distribution arm in Africa for fruit and vegetables and has a number of distribution centres in several countries in SADC.[13] Nakumatt has set up regional distribution centres responsible for carrying out the wholesale function for all of their outlets.[14] Centralised procurement through the use of distribution centres saves on transport costs and gives supermarkets stronger bargaining power with suppliers. Supermarket groups make use of preferred suppliers such as specialised dedicated wholesalers who increase efficiency in the supply chain and offer huge discounts on bulk purchases.[15] This has the effect of excluding from supermarket supply chains small-scale producers who cannot match these huge discounts and level of sophistication in supply chains.[16]

Supermarket groups also place stringent demands that small producers find difficult to fulfil including imposing escalating private quality and safety standards on suppliers.[17] Quality standards are important because they are the object of liability laws, product expiry regulations and other regulations that

focus on the conduct of supermarkets towards consumers.[18] Meeting these requirements means suppliers are required to make substantial threshold investments in packing houses, cold chains, and standards and certification processes.[19]

On the other hand, it is important for local suppliers to develop the capabilities to supply retail value chains, which in turn is likely to increase their competitiveness, the quality of their output and the efficiency of their production. As a way of responding to the above issues and maintain competitiveness, policymakers and regulators have developed different frameworks for bridging this gap. For example, when European supermarkets sourcing produce from Zimbabwe were increasingly imposing tighter standards throughout the value chain, local suppliers responded by restructuring their operations, upgrading facilities, processes and logistics handling.[20] The local upgrading processes was made possible through the effective cooperation between government and the local suppliers which was key in designing and implementing appropriate policies targeting local upgrading.[21] Government extended subsidies to local suppliers to enable them to increase production, invested in infrastructure to reduce lead times and set up farmer support schemes to reduce costs.[22]

This suggests that policymakers, in order to facilitate the participation of small-scale producers in the supply chains of supermarket groups, need to encourage and where possible facilitate substantial investments in institutional, as well as public and private, physical and financial infrastructure support systems. This clearly requires substantial involvement of supermarket groups as the main players in the supply chain with insight on the levels of capabilities required and standards necessary to meet customer and regulatory requirements. CCRED's current research on regional value chains, changing supermarket retail patterns and local supplier capabilities will explore the implications of these trends through in-depth country studies conducted by CCRED in South Africa and Botswana, and regional research partners in Zambia, Zimbabwe and Mozambique. In particular, the research will consider the various interventions required to develop more opportunities for the participation of local suppliers in these complex supply chains.

Notes

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4. Weatherspoon, D. and Reardon, T. 'The Rise of Supermarkets in Africa: Implications for Agrifood Systems and the Rural Poor'. Development Policy Review, May 2003, Vol. 21 (3).
5. See note 4.
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7. Dihel, N. (2011). 'Beyond the Nakumatt Generation: Distribution Services in East Africa'. Africa Trade Policy Notes, Note No. 26.
8. Dinh, T. D. (2013). 'Light manufacturing in Zambia. Job creation and prosperity in a resource-based economy'. Washington, DC: World Bank.
9. See note 7.
10. See note 2.
11. Reardon, T. P. Timmer and Berdegue, J. 'The Rapid Rise of Supermarkets in Developing Countries: Induced Organizational, Institutional, and Technological Change in Agrifood Systems'. *E-Journal of Agricultural and Development Economics*, Vol. 1 (2004), No. 2, p. 168-183.
12. Humphrey, J. (2007). 'The supermarket revolution in developing countries: tidal wave or tough competitive struggle?' *Journal of Economic Geography*, Vol. 7 (2007), p. 433-450.
13. Freshmark website.
14. See note 7.
15. Reardon, R. and Hopkins, R. 'The Supermarket Revolution in Developing Countries: Policies to Address Emerging Tensions Among Supermarkets, Suppliers and Traditional Retailers'. *The European Journal of Development Research*, Vol. 18 (2006), No. 4, p. 522-545.
16. See note 15.
17. See note 4.
18. See note 15.
19. See note 15.
20. Kaplinsky, R. and Morris, M. (2001). *A handbook for value chain research*. IDRC.
21. See note 20.
22. See note 20.

Quarterly competition case update - Mergers and acquisitions			
Country	**Target**	**Acquirer**	**Status**
Botswana	Eaglewing Holdings Ltd	Tradehold Collins JV Ltd	Approved
	Belabela Quarries (Pty) Ltd	B&E International (Botswana) (Pty) Ltd	Ongoing
	Continental Outdoor Media Holdings (Pty) Ltd	JCDecaux (Pty) Ltd	Approved
	Bolux Group (Pty) Ltd	Seaboard Botswana Ltd	Approved
	Fluid Systems Botswana (Pty) Ltd	Manuli Fluiconnecto Holding BV	Approved
	Manuli Fluiconnecto Holding BV	Glendal Trading (Pty) Ltd	Approved
	60% shares in BMS (Pty) Ltd, Office Technique (Pty) Ltd and Rangecom (Pty) Ltd	Bidvest Office Holdings	Approved
	100% interest in the issued share capital of Tyre Services (Pty) Ltd	Tyre Corporation Botswana (Pty) Ltd	Approved with conditions
	Springer Science and Business Media G.P. Acquisition SCA	Holtzbrinck Publishing Group	Approved
	74% of the issued shares in Jindal Bvi Ltd	Glendal Trading (Pty) Ltd	Approved
Kenya	60% share in Savannah Cement	Seruji Ltd (Mauritius)	Approved
	Resolution Insurance	Leapfrog Investments	Approved
	Chania Flour Mills	Capwell Industries	Approved
	Exotik Partners LLP	Equity Investment Bank Ltd	Approved
	Central Glass Industries Ltd (East African Breweries)	Consol Glass (South Africa)	Ongoing
Malawi	Sunshine Paints Ltd	Silco Ltd	Approved
	Burco Electronics System Ltd	Telekom Networks Malawi Ltd	Approved
Namibia	Sands Hotels (Pty) Ltd	MHG International Holding (Mauritius)	Approved
	Lolopark (Pty) Ltd	Pointbreak Property Unit Trust	Approved
	Vox Telecom (Pty) Ltd	Paratus Telecommunications (Pty) Ltd	Approved
	Ebank Holdings (Pty) Ltd	Pointbreak Namibia Holdings (Pty) Ltd	Approved
South Africa	Khumo Bathong Strategic Investments No 2 Proprietary Limited and Star Focus 115 (Pty) Ltd	Chlor-Alkali Holdings (Pty) Ltd	Approved
	Certain property owning companies and properties controlled by Investec Property (Pty) Ltd	Investec Property Fund Ltd	Approved
	MB Technologies Investments (Pty) Ltd	Investec Bank Ltd	Approved
	Hyprop Investments Ltd - Stoneridge Shopping Centre	Redefine Properties Ltd	Approved
	Three Divisions of Nampak Products Ltd	Ethos Private Equity Fund VI	Approved
	Acucap Properties Ltd	Growth Point Properties Ltd	Approved
	Fintech Proprietary Ltd	Sasfin Bank Ltd	Approved with conditions
	Dorper Wind Farm (RF) (Pty) Ltd	K2014158670 (Pty) Ltd	Approved
	Pepkor Holdings Proprietary Limited and Newshelf 1093 (Pty) Ltd	Steinhoff International Holdings Ltd	Approved
	Intikon Energy (Pty) Ltd	K2014158795 (Pty) Ltd	Approved
	African Rainbow Minerals' 50% stake in Dwarsrivier Chrome Mine (DCM)	Assore Mine Holding Group	Ongoing
	Everest Platinum Mine	Northam Platinum subsidiary Micawber	Ongoing
	Celrose and Eddels	Edcon Limited	Approved
	Stake in City Deep and Cater Chain	Famous Brands	Approved
Tanzania	Tanga Fresh Limited, a milk processing facility, was fined five per cent of its Tanga Fresh 2009 turnover for failure to notify a merger		

Quarterly competition case update - Mergers and acquisitions continued			
Country	**Target**	**Acquirer**	**Status**
Zambia	Zambian Towers Ltd	IHS Zambia Ltd	Ongoing
	51% shares in Real Meat Company Ltd and the acquisition of 100% in More Beef Ltd	Amatheon Food Gmbh	Approved
	Petrotech Oil Corporation Ltd	Mount Meru Petroleum Zambia Ltd	Approved with conditions
	Zamanita Limited, the soybean crushing and refining subsidiary of Zambeef	Cargill	Ongoing
Zimbabwe	Pannar Zimbabwe	Pioneer Hi-Bred Zimbabwe	Ongoing
	Agriseeds	ZAAD Investment (South Africa)	Approved
COMESA	African Development Corporation and Development Bank of Rwanda	ATMA Co-Nvest (Britain)	Approved (2014)
	Watertech Holdco (South Africa)	Grohe Luxemb (Luxembourg)	Approved (2014)
	Lafarge SA (France)	Holcim (Switzerland)	Approved (2014) (except Mauritius)
	Hytec Holdings (South Africa)	Robert Bosch GmbH (Germany)	Approved (2014)
	Cannon Insurance (Kenya)	Metropolitan (South Africa)	Approved (2015)
	Clariant Southern Africa (South Africa)	Improchem (South Africa)	Approved (2015)
	Khumo Bathong and Star Focus (South Africa)	Chlor-Arkali Holdings (South Africa)	Approved (2015)
	Business Connection Group (South Africa)	Telkom SA SOC (South Africa)	Approved (2015)
	Arysta Life Science (Ireland)	Platform Specialty Corporation (USA)	Approved (2015)
	Zamanita (Zambia)	Cargill Holdings B.V. (Netherlands)	Ongoing
	UAP Holdings	Old Mutual	Ongoing

Quarterly competition case update - Main enforcement cases	
Country	**Case summary**
Botswana	Two food-supplying companies, Creative Business Solutions and the Rabbit Group have been accused of market allocation and price fixing through sharing sensitive information for transactions worth a combined P114 million for the supply of sugar beans to schools
Kenya	CAK fined Association of Kenya Reinsurers over KSh 700 000 for price fixing through jointly setting minimum rates to insurance companies
Namibia	NaCC closed a case against Santam Namibia Ltd. (Santam), Mutual & Federal Insurance Company of Namibia Ltd and Greg Motor Spares, a company in the business of auto glass repairs and replacements, having assessed the allegation that agreements between insurance companies and repair operator Greg Motor Spares discriminated unfairly against repairers outside of the agreement
South Africa	CCSA referred to the Tribunal three cases of collusive tendering involving GVK Siyazama (Pty) Ltd (GVK) in the Western Cape market. The first case is between GVK and Neil Muller Construction (Pty) Ltd (NMC) in respect of the Tygervalley Mall project. The second case is between GVK and NMC in respect of Akila Trading project. The last case is between GVK and Group Five Limited (Group Five) in respect of Cape Gate Medi-Clinic
	CCSA referred to the Tribunal a case of indirect price fixing and market division against Natal Portland Cement Cimpor (Pty) Ltd (NPC), related to the cement cartel investigation against NPC, Lafarge, AfriSam, and PPC for which PPC was granted conditional leniency. AfriSam and Lafarge agreed settlements with CCSA
	CCSA conducted a dawn raid at the premises of Belfa Fire, Cross Fire Management, Fire Control Systems, QD Air, Technological Fire Innovations and Fireco active in the market for the provision of fire control and protection systems, in relation to its ongoing investigation into alleged collusive conduct in bidding for tenders
	The Airport Company of South Africa (ACSA) was fined R2 million for price fixing in relation to arrangements with Bombela to fix rates charged to car rental companies for parking bays at OR Tambo International Airport
Zimbabwe	National Bakers Association of Zimbabwe signed a compliance agreement with the ZCTC to foster competition law compliance in the baking industry

Note: Based on competition authority websites and publicly available sources.

UPDATE ON CCRED RESEARCH PUBLICATIONS

CCRED's core research themes cut across a range of subjects and sectors with a primary focus on competition and barriers to entry, industrial development and regional economic integration. With a view to becoming a centre of excellence in research related to these core themes, CCRED collaborates widely and publishes research in order to enhance the body of knowledge on competition and regulatory issues, and their relation to economic development in South Africa and the region. We invite you to check out the working paper series, conference papers, journal special issues and publications on the CCRED website, or you can follow the links below to access recent additions by CCRED researchers and participants at the recent ACER week conference:

⇒ ACER 2015 Conference Papers

⇒ African Journal of Information and Communication (AJIC)

⇒ Journal of Economic and Financial Sciences (JEFS), Special Issue

⇒ Regional Industrialisation: Mining Capital Equipment Value Chain in South Africa and Zambia

⇒ Towards an understanding of the economy of Johannesburg: Industrial nodes

⇒ The inter-relationships between regulation and competition enforcement in the South African liquid fuels industry - Journal of Energy in Southern Africa

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