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SLP: FINANCIAL ANALYSIS FOR ECONOMIC REGULATION AND COMPETITION

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This Short Learning Programme (SLP) will provide a strong theoretical and practical foundation for understanding and applying key issues in finance for competition and regulation. It is targeted at staff employed at competition authorities, economic regulators, departments within government and regulated enterprises, private practitioners and students. Taught through a combination of theoretical teaching and practical case studies drawn from actual regulator decisions, the Programme will be facilitated by leading practitioners and academics in the field including:

⇒ **Dr Stephen Labson**, an international expert on regulation and finance and a Senior Research Fellow at CCRED whose experience includes advising Eskom holdings on multi-year tariff applications; designing financial value models for power generation technologies for Toshiba Power International, drafting tariff applications for the Airports Company South Africa (ACSA), and developing a pricing framework for the Australian Essential Services Commission Victoria.

⇒ **Thabiso Madiba**, a qualified chartered accountant and academic at the University of Johannesburg who has provided professional training and advice to institutions across Southern Africa and whose previous work included with Ernst & Young New York. Major clients have included AngloGold, AfriSam, Assore and Tanzania Breweries, and he is also a non-executive director of the Peermont Group.

⇒ **Professor Simon Roberts**, a competition economics expert who previously worked as chief economist at the South African Competition Commission and has also consulted extensively on competition matters over the past 15 years, including acting as an expert witness in a number of major cases, and advising competition authorities across the African continent.

Please visit our website to access the detailed course outline or for further information regarding the SLP.

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ACF & World Bank Report: Boosting competition in African markets

Lauralyn Kaziboni and Maria Nkhonjera

The African Competition Forum and World Bank Group (ACF-WB) Competition Policy Report reviews cross-cutting issues in competition enforcement in Africa, providing key insights on constraints and key areas for intervention, which we consider below.[1]

Competition policy is fundamental in driving economic growth and household welfare as it impacts inequality, poverty and unemployment. Increased competition can drive local firms to be more productive, increase exports and generate more value for the economy overall. However, the Global Competitiveness Report (2015) indicates that 78% of African countries are in the bottom half of the intensity of local competition index. The prevalence of cartel agreements and abuse of dominance lessens competitiveness thereby limiting economic growth and transformation. Government involvement through burdensome regulatory requirements, protecting monopolies and increasing operational costs among other factors has had the effect of further lessening competitiveness.

While some authorities, such as in Kenya, have increased the number of cases handled, others have only just gone through draft legislation for competition law (e.g. Uganda, Republic of Congo). There remain challenges for authorities in general which need to be addressed, including: inadequate human capacity, lack of awareness on the benefits of competition, limited funding, lack of political will, and non-existence of competition curriculum in schools.

Strategic industries

The ACF-WB report identified priority sectors that are pertinent to ensuring competitiveness, economic growth and welfare development based on their linkages to the rest of the economy. These sectors include cement, fertiliser and telecommunications. Cement is a key input in construction and links to housing and infrastructure. Fertiliser is a key component in agricultural productivity. Telecommunications is essential in the rapidly globalising world and influences connectivity with other countries. These industries are prone to anti-competitive practices such that opening up the markets could bring significant benefits in the continent at a regional and country level.

There are cross-cutting and industry-specific factors that shape the competitive dynamics of these sectors. These common features include small economies which can support few players; realising economies of scale which sometimes requires that firms have operations or sell into more than one country; high capital investment outlay; high sunk costs; and restricted access to essential inputs. In the cement, fertiliser and telecommunications industries there is a role for sector regulators and competition authorities to play in encouraging competition.

Cement

In at least 18 African countries, one supplier holds more than 50% of the market while the rest of the market is divided among the small players.[2] Dangote Cement has become one of nine pan-regional players, which largely comprise large European producers and some smaller entrants, as discussed previously in this Review.[3] The nine players produce an average of 18.9 million tons per annum (mta) across the region compared to 3mta produced by the smaller players. The competition dynamics in this industry are influenced by supply chain organisation which consists of limestone production; production or import of clinker; and production or import of cement (blended or ordinary). At the same time, import restrictions and antidumping tariffs protect the incumbents in producing countries allowing them to determine price and supply. Among the 22 countries and regional bodies with readily available information, 45% prohibit cement imports. This limits consumer choice and enables the entrenched incumbents to charge higher prices.

Vertical integration in the cement industry can create efficiencies where firms can invest in distribution networks avoiding free rider concerns or solve the hold-up problem by investing in clinker production capacity. However, vertical foreclosure may be a concern in instances where a vertically integrated clinker producer may have the incentive to foreclose downstream grinders. State policies on limestone exclusivity awarded to firms, for example, may reinforce dominance or make it challenging for potential entrants to the market. Non-standard application of rules on obtaining licences for exploration, production or import also have the effect of undermining rivalry. Market sharing, excess capacity, high concentration of firms and information exchange via industry associations seem to encourage collusive behaviour. In the past, cartel cases have been uncovered in SACU, Egypt and Tanzania.

Fertiliser

The African market is highly dependent on imports with only 28% of African countries having the capacity to produce their own fertiliser. In addition, 58% of countries have a single supplier that holds over half the market. This in effect shapes the supply of the commodity in African markets, affecting competitive outcomes. Global fertiliser markets are dominated by a small group of players from large producing countries. Given the concentrated nature of the global market, importers of fertiliser are largely price-takers in the global market unless otherwise vertically integrated in the production chain. Dominant players have a tendency towards maintaining high prices by limiting supply below competitive levels. This is confirmed in a CCRED study which analysed the state of competition in fertiliser trading in the SADC region.[4] Global export cartels raise the final prices of some fertilisers by 29%, with African retail prices being well above prices in the Black Sea and Middle East regions. The weak competitive landscape globally thus directly affects African economies.

Anticompetitive behaviour in the sector can also be facilitated by governments' involvement in the fertiliser supply chain and more specifically direct state participation in the importation or production of fertiliser. Various state regulations or rules reinforcing dominance have been shown to play a critical role in shaping competitive dynamics in the sector and more often than not, hindering competition. Examples range from restrictions on the number of import licenses granted and distortionary import taxes to state monopolies on natural resources.

Telecommunications

In Africa's telecommunications sector, 47% of mobile and wireless markets have a player with more than 50% market share. Sub-Saharan African countries pay the highest prices globally for mobile and broadband services. Key segments of Africa's telecommunication services continue to exhibit monopolistic structures and specific features of this industry make it prone to market concentration and anticompetitive practices. There are 11 existing monopolies in international gateway services and 6 in internet wireless services. The largest telecommunications groups are MTN, Vodafone, Bharti Airtel, Orange and Etisalat. In 88% of African countries where two or more of the 5 largest telecommunications groups are present, these companies jointly control over 70% of the market.

The state's direct participation in the telecommunications market, high mobile termination rates and limited availability of spectrum are also identified as factors that constrain competition in this market. These findings are consistent with findings by CCRED which identified access to spectrum as a key barrier to entry adding that while existing market players have access to spectrum, new spectrum is not regularly allocated to new entrants.[5] Opening up mobile, wireless and international calling markets to competition can significantly increase growth and competitiveness in the region. Previous studies referred to in the report show that entry of an additional mobile operator in a sample of 40 African countries led to a 57% increase in mobile subscriptions, while opening up international calling services to competition was found to have reduced prices by 90%.

Implications

Evidence suggests that there is progress in the adoption and implementation of competition policy in the region. Despite this, in some areas such as cartel enforcement outcomes remain poor as cartel fines are too low in many jurisdictions. The benefits of rivalry and entry are also being eroded by several other factors according to the report. In the cement and fertiliser industries for example, government's involvement appears to be suppressing competition through exclusive arrangements, bans on entry and cumbersome registration procedures, among other factors. Governments need to implement proactive and flexible regulatory policies to correct market failures, promote innovation, and incentivise firms to compete.

Given the significant resource constraints of authorities in the region, sector prioritisation is important for more effective outcomes. Sector regulators can focus on the design of a regulatory framework while competition authorities provide expertise on competition fundamentals and ex-post enforcement. These arrangements are usually facilitated by memorandums of understanding. In Tanzania for example the water and energy, transport, civil aviation and communication regulators deal with sector-related competition issues even though competition law applies to all sectors. Rigorous analysis of competition issues in specific sectors through market enquiries may provide insights into markets without exhausting authority resources.

Notes

1. Based on World Bank Group and African Competition Forum. (2016). 'Boosting Competition in African Markets'.
2. In North Africa there is a significant presence of Lafarge Holcim with plants in Algeria and Egypt. Dangote's Obajana plant stands out in West Africa. PPC and Lafarge Holcim are the most prevalent in South East Africa.
3. See Mondliwa, P. and Zengeni, T. (2015). 'Consolidation and entry: Changing dynamics in the regional cement'. CCRED Quarterly Competition Review.
4. Ncube, P., Roberts, S. and Vilakazi, T. (2015). Study of Competition in the road freight sector in the SADC region: Case study of fertilizer transport and trading in Zambia, Tanzania and Malawi. CCRED Working Paper No. 2015/3.
5. Hawthorne, R., Mondliwa, P., Paremoer, T. and Robb, G. (2016). Competition, barriers to entry and inclusive growth: Telecommunications Sector Study. CCRED Working Paper 2016/2.

Emerging rivalry in the ride-sharing economy: Kenya and South Africa

Shingie Chisoro Dube

Entry of the mobile technology ride-sharing service, Uber, into passenger transport markets across the world has brought disruptive competition with substantial benefits to consumers. Uber has rapidly grown its footprint in Africa with operations in eight countries including Egypt, Ghana, Kenya, Morocco, Nigeria, South Africa, Uganda and Tanzania.[1] Building on a previous article in this Review[2], this article looks at the growth of Uber and the performance of direct rivals to Uber following entry of new app-based ride-sharing services and adoption of similar technology platforms by existing incumbent metered taxis.

Mobile technology ride-sharing services are two-sided digital platforms that enable two different sets of users, drivers and passengers to interact through the same platform.[3] Ride-sharing platforms actively connect drivers with customers facilitated by a cashless payment system through the use of credit cards or mobile money. Successful platforms attract both drivers and customers concurrently in order for the platform to create value for participants.[4] Passengers are attracted to a mobile application with many drivers and drivers are attracted to a platform with many potential passengers.[5] Ride-sharing easily matches demand and supply with the effect of reducing market transaction costs.[6]

In South Africa, Taxify entered the market in 2015 and recently re-launched its brand in April 2016 in an effort to access a wider market.[7] In 2016, Zebra Cabs, an incumbent metered taxi company adopted the electronic taxi hailing technology to launch the Zebra Cabs app, a direct rival to Uber.[8]

However, the above rivals to Uber have made very little progress in drawing in new demand and facilitating customer switching. Taxify has struggled to penetrate the market since entry in 2015 forcing it to re-launch its brand in 2016.[9] In South Africa, Uber has established a strong brand among local customers having entered the market in 2013. Uber enjoys first mover advantages in the ride-sharing digital platform which has rapidly grown to attract more drivers and passengers in South Africa's main cities. In order for new players to become effective competitors in the ride-sharing economy, it is important that they develop frictionless platforms that are able to attract both drivers and customers at the same time. Government's efforts to regulate for mobile ride-sharing services in 2016, have had little effect on the ability of rivals to compete with Uber.[10] Interestingly, Uber has grown despite the absence of specific regulation and the associated regulatory challenges that have arisen.

In Kenya, Safaricom which is the largest telecommunications operator in partnership with Craft Silicon, a local software firm, launched an app-based ride-sharing service called Little Cabs in July 2016. Little Cabs introduced free Wi-Fi to passengers in addition to the option to process payments using M-Pesa, the mobile-phone based financial service.[11] M-Pesa is the most widely used mobile money service developed by Safaricom with 70% market share out of 14.2 million active mobile money users in Kenya.[12]

Unlike the position of rivals in South Africa, Little Cab promises to be an effective competitor to Uber in Kenya's ride-sharing economy. Little Cabs' competitive advantage lies in Safaricom's ability to leverage its market power in the mobile money industry into the ride-sharing business given the similar network effects in the ride-sharing business. Safaricom developed and controls the ubiquitous mobile money transfer service, M-Pesa, placing it in a good position to deploy the payment solution into the mobile ride-sharing business, an advantage which rivals including Uber cannot readily match in Kenya.

It is currently not clear whether Uber can use the M-Pesa payment solution. Most people in Kenya do not make use of credit cards which is the primary means of payment in the Uber system in South Africa, for example. In 2015, only 34.7% of the population in Kenya had credit cards whilst the majority, 58.4%, had mobile money accounts.[13] This is different from the South African market where 54.9% of the population had credit cards in 2015 and 14.4% held mobile money accounts.[14] South Africa's developed banking system could be a key factor behind Uber's growth in South Africa, and specifically the presence of a large banked population. In Kenya, M-Pesa's attractiveness to both markets - ride-sharing users and mobile platform users – could mean that rivalry will develop based on how well Safaricom is able to leverage its presence in mobile financial services, and its large mobile money subscriber base in competing with Uber. Specifically, it would have to ensure that along with its strong presence in mobile services, there will also be sufficient demand on both sides of the two-sided rise-sharing platform. In this context, Uber already has significant first mover advantages in terms of its brand and established relationships with drivers as well.

Notes

1. Agbugah, F. 'Ghana becomes the first African country to sign an SOU with Uber' (17 June 2016). *VenturesAfrica*.
2. Chisoro Dube, S. 'Uber: a game-changer in passenger transport in South Africa' (November 2015). *CCRED Quarterly Competition Review.*
3. Rysman, M. (2009). The Economics of Two-Sided Markets. *Journal of Economic Perspectives*, 23(3): 125-143.
4. Evans, D. and Pirchio, A. (2015). An empirical Examination of Why Mobile Money Schemes Ignite in Some Developing Countries but Flounder in Most. Coasse-Sandor Institute for Law and Economics Working Paper, 723.
5. See note 4.
6. PricewaterhouseCoopers (PwC). 'The sharing economy' (December 2014). *PricewaterhouseCoopers (PwC).*
7. Writer, S. 'Taxify relaunched in South Africa to take on Uber and metered taxis' (25 April 2016). *Mybroadband*.
8. Ziady, H. 'Transaction Capital plans to dominate SA's metered taxi industry' (11 May 2016). *Moneyweb.*
9. See note 7, and SA Taxi. 'New Zebra Cabs service constitutes fresh investment in metered taxi industry, taking it into new terrain' (10 May 2016). Press Releases SA Taxi website.
10. See note 7.
11. Gauteng Province Roads and Transport. 'Media Speech by Gauteng MEC for roads and Transport, Ismail Vadi, on the licensing of Uber partners' (16 May 2016). Gauteng Province Roads and Transport.
12. Okunola, F. 'Safaricom launches its weapon of choice on the on-demand taxi market in Kenya' (06 July 2016). *Pulse.ng*.
13. Robb, G. and Vilakazi, T. (2015). Mobile payments markets in Kenya, Tanzania and Zimbabwe: a comparative study of contestability and outcomes. CCRED Working Paper No. 8/2015.
14. World Bank. (2015). The Little Data Book on Financial Inclusion 2015. Washington, DC: World Bank.
15. See note 14.

Econet's proposed acquisition of Neotel - a game changer?

Anthea Paelo and Ulungile Magubane

In June this year, Liquid Telecom, a subsidiary of Zimbabwean telecommunications company Econet Wireless Group, announced its intentions to purchase Neotel, a network operator in South Africa. The deal is in partnership with Royal Bafokeng Holdings and is worth a reported R6.5 billion (US$ 430 million).[1] The acquisition has the potential to disrupt the concentrated telecommunications sector in South Africa by introducing a new multinational player. It is worth considering the current competitive environment in South Africa and key considerations for the authorities in light of the failed Vodacom/Neotel transaction in 2015.

Econet Zimbabwe is currently the largest mobile service provider in Zimbabwe holding a market share of 52.5% in terms of mobile subscribers, but as much as 70.2% of the market share in terms of revenues as of the fourth quarter of 2015.[2] The company is a subsidiary of Econet Wireless Group that includes; Econet Wireless International, Econet Wireless Africa, Econet Wireless Global, Econet Enterprises and the Liquid Telecom Group. Econet Wireless Global has operations, and business interests in more than 17 countries around the world and is one of Africa's largest multinational companies.

Neotel is a network operator in South Africa providing fixed voice, data and IP services with majority ownership by Tata Communications Ltd of India. The company has an extensive fibre optic network stretching across major cities in South Africa and spanning about 15000 km making it the second largest fixed-line operator after state-owned Telkom and a significant competitor in the segment.[3] Since its entry in 2006, Neotel has made some progress in taking market share from the country's largest fixed-line operator, Telkom. In 2014, Neotel had a market share of 10% in revenues in the fixed-line market[4] and was on target to have a share of between 14% and 16% by 2017 (Table 1).[5]

Neotel's sluggish growth

Despite Neotel's apparent growth in the sector, the process has been slow largely due to significant barriers including a lack of access to capital to speed up the rollout of fibre, lack of access to wayleaves or right of ways, and the slow pace of regulatory processes.[7]

Furthermore, Telkom has a history of anti-competitive conduct having been fined R449 million in 2013 for abuse of dominance between 1999 and 2004.[8] Telkom was found to have used its upstream monopoly position in the market to advantage its own subsidiary and cause harm to competitors and consumers. Telkom has for instance denied Neotel access to its ducts and the infrastructure necessary to roll out its fibre.

Neotel has also found difficulty in accessing rights of way or wayleave approvals. Different municipalities have varying processes for obtaining these approvals increasing the complexity and uncertainty of the procedure. The process of obtaining approvals is also a lengthy one with some fixed line operators waiting up to eight years from the date of their application.[9]

In addition, regulation appears to be responding slowly to the needs in the industry. For instance Local Loop Unbundling (LLU) regulation which would provide multiple providers with access to the last mile infrastructure has been on the table since 2007 but is yet to be enacted. As the last mile is the most expensive network layer, lack of access is restricting growth, innovation and competition in the provision of broadband services.

Proposed Vodacom/Neotel merger

Rolling out fibre requires a significant amount of capital. Neotel's move to merge with another service provider follows its need to access more resources to speed up its rollout of fibre and improve the quality of its services. Neotel's previous attempt at a merger involved Vodacom. The deal however fell through in March 2016 following what the parties described as a complicated approval process.

Vodacom and Neotel's main arguments for the merger were that it would give Vodacom the ability to provide a strong rival to Telkom in the fixed-line market. Vodacom's access to Ne-

Table 1: Fixed operator market shares, revenue, 2014[6]

Operator	Revenue (R billion)	Market share
Telkom	33	87%
Neotel	3.9	10%
DFA	0.9	2%
Broadband Infraco	0.3	1%

otel's spectrum would also enable the company to accelerate its plans to roll-out its long-term evolution mobile network which would provide significant consumer benefits.[10]

While there were many reasons for and against the merger, the main point of contention was the distribution of spectrum. The Competition Commission found that spectrum is an essential input for the production of mobile services and possession of extra spectrum would give a network operator significant advantage over its rivals.[11] Vodacom's purchase of Neotel would have given Vodacom access to double the amount of spectrum holdings in the 1800MHz band held by other network operators. In addition Vodacom would have possessed spectrum in both the 800MHz and 3500MHz bands. Due to current spectrum constraints in the industry, the other network operators would only be able to achieve the same level of capacity by adding new sites which would have been more costly and time consuming than accessing additional spectrum. Vodacom's access to this spectrum would entrench its already dominant position in the retail markets. Vodacom and MTN jointly held 86% market share in retail services in terms of revenue between 2010 and 2013.[12]

The Competition Commission approved the merger with a number of conditions including a restriction on Vodacom's use of Neotel's additional spectrum for a period of two years. The decision, however, was still met with resistance from the other network operators and was due to be heard before the Competition Tribunal although Vodacom and Neotel ultimately abandoned the deal due to regulatory issues.[13]

The proposed merger

Econet's potential acquisition of Neotel promises a lot in terms of injecting much needed investment into the Neotel business. In contrast with the Vodacom/Neotel transaction, the proposed acquisition could grant spectrum assets to a 'new' player (instead of concentrating access to spectrum) that appears to have the financial capital and experience in other markets in the region to use them to become an effective rival in SA. To the extent that Econet is able to bring in new investment and rivalry to existing mobile and fixed-line players, the transaction may be considered favourably by the competition authorities although limited information is available publically on the specific strategies envisaged by the merger entities. It is clear however that the acquisition would result in the formation of the largest, cross-border and independent fibre network and business telecoms provider on the African continent with its connectivity spanning 12 African countries including South Africa, Burundi, the Democratic Republic of Congo, Kenya, Rwanda, Tanzania, Uganda, Zambia and Zimbabwe.[14]

Notes

1. Creamer Media. 'Liquid Telecom, Royal Bafokeng Holdings to buy Neotel in R6.55bn deal' (28 June 2016). *Creamer Media.*
2. POTRAZ. Postal and Telecommunications Sector Performance Report, Fourth Quarter 2015.
3. Mwanza, K. 'M&A Africa: Liquid-Neotel deal to create Africa's largest broadband company' (30 June 2016). *AFKInsider.*
4. Hawthorne, R., Mondliwa, P., Paremoer, T. and Robb, G. (2016). Competition, barriers to entry and inclusive growth: Telecommunications sector study. CCRED Working Paper, No. 2/2016.
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6. Telkom. 'Integrated Report 2015'.
7. See note 4.
8. Gedye, L. 'Telkom the 'bully' fined R449-million' (7 August 2012). *Mail & Guardian* and The Competition Commission vs Telkom SA Ltd, Case No. 11/CR/Feb04 (003855).
9. See note 4.
10. Competition Commission, Mergers and Acquisitions Report, Case No. 2014Jul0382.
11. See note 9.
12. See note 9.
13. See note 9.
14. See note 1.

Key aspects of South Africa's new public interest guidelines

Teboho Bosiu

According to the South African Competition Act, the competition authorities are obliged to consider public interest grounds in merger analysis.[1] The guidelines which were recently finalised by the Competition Commission of South Africa, and gazetted in 2 June 2016, seek to provide guidance on how the Commission will evaluate public interest considerations when evaluating mergers.[2]

An important aspect of the guidelines is the clarification therein that the Commission may approve the merger without conditions, with public interest conditions, or prohibit the merger on public interest grounds.

There are two possible outcomes to a competition enquiry that could inform the public interest enquiry. In the event of a negative competition finding, the Commission must determine whether there are any substantial positive public interest grounds that could justify the approval of the anti-competitive merger. The other possibility is in the event that there are no competition issues, in which case the Commission is required to consider whether the merger raises any substantial negative public interest effects.

In terms of section 12A(3) of the Act, the following public interest provisions should be considered when determining whether a merger can or cannot be justified on public interest grounds:

- Effect on a particular industrial sector or region;
- Effect on employment;
- Effect on the ability of small businesses (SMEs), or firms controlled or owned by historically disadvantaged persons (HDIs), to become competitive; and
- Effect on the ability of national industries to compete in international markets. The guidelines will assist in determining whether this will result in significant positive/ negative externalities that flow back to the domestic economy, i.e., improved technologies, better products/ services, productive capacity, etc.

Previously, the Commission considered these provisions without clearly outlined guidelines which lead to some uncertainty for firms, as demonstrated in the Walmart/Massmart merger. More recently, cases which involved substantial public interest issues include the SABMiller/Coca-Cola, and the SABMiller/AB InBev mergers. These mergers were approved with conditions.

In the former, the Commission found several public interest issues.[3] Firstly, the merged entity would have increased bargaining power which would potentially have negative effects on the local packaging and raw material industries. In this regard, the merging parties agreed to a condition wherein the entity would maintain or improve its level of local production and procurement of inputs made in South Africa. Secondly, the Commission found that the merger would have a negative impact on employment. The parties agreed to the condition that they would maintain the number of employees at the level pertaining at the approval date for a period of not less than three years. Thirdly, the Commission identified that a lack of access to coolers and fridge space would prevent SMEs from competing effectively with the merged entity. In this regard the merging parties agreed to provide 10% of fridge space to SMEs, a landmark condition in the South African context given constraints rival players face in getting their products to be made available in prime fridge space at retail outlets.

In the SABMiller/AB InBev transaction, the Commission also raised public interest concerns.[4] Firstly, the merged entity was likely to foreclose its competitors by refusing them access to input materials. The parties agreed to the condition that they should continue supplying necessary inputs to the third parties for a period of five years, and not to enter into any exclusive agreement not to supply third parties. Secondly, as in the previous case, lack of access to coolers and fridge space was also raised. This issue was addressed in a similar manner as in the SABMiller/Coca-Cola, with the merging parties agreeing to free up 10% of fridge space to SMEs. Thirdly, the merger would result in loss of employment, to which the merging parties undertook not to retrench any employee in South Africa as a result of the merger.

The public interest issues raised in these cases highlight the need for greater certainty on the part of firms when embarking on global, high-value transactions which affect South Africa, and the importance of not deterring firms from investing in the country. However, the cases also demonstrate the importance of the authorities retaining some level of discretion in interpreting the provisions of the Act and agreeing terms with firms on a case-by-case basis as emphasised in the guidelines.

General approach to assessing public interest

In general, the Commission will be guided by the following steps when analysing each of the public interest provisions:

1. Determine the likely effect of the merger on the listed public interest grounds;
2. Determine whether such effect is merger specific;
3. Determine whether such effect is substantial;
4. If the merger is anti-competitive, consider any likely positive public interest effects to justify the approval of the merger; or
5. if the merger is not anti-competitive, determine whether any negative public-interest effects can be justified which may result in the approval of the merger, with or without

conditions; and

6. Consider possible remedies to address any substantial negative public interest effect.

Regarding the effect on employment, the competition authorities require that merging parties declare all potential retrenchments or job creations that are being considered irrespective of whether these are due to the merger or due to operational reasons. The authorities will then analyse whether such impacts on employment are due to duplications, cost-cutting measures, cancellation of supply/distribution arrangements, and/or relocation of offices, plants and facilities.

Regarding the effect on the ability of SMEs and HDIs to become competitive, the competition authorities would consider, for instance, entry conditions or expansion opportunities. However the guidelines are not explicit in this regard, particularly given that entry and expansion are already considered in section 12 of the Act. The guidelines will also consider whether the merger prevents or grants access to key inputs and suppliers, and consider pricing and supply conditions with respect to volume, discounts, quality, and services. Moreover, they will consider whether the merger prevents or allows skills development in the industry, and access to funding for business development and growth.

Measuring 'substantiality'

The term substantial can be open to interpretation in competition law cases and there may be questions about measurability. The guidelines propose a case-by-case approach, taking into consideration the following aspects:

On a particular industrial sector or region

Generally, the Commission will consider as substantial the public interest effect of a merger if;

- The merger's impacts are far reaching and flow beyond that market and sector;
- The merger impedes or contributes towards public policy goals that would have far reaching consequences for the sector as a whole;
- The effect threatens or allows for that region's continued livelihood and sustainability;
- The sector is one where the goods or services traded involve or influence constitutionally entrenched rights;
- The effect is of such magnitude and scale that if allowed, it would be irreversible and cannot be undone.

On employment

Regarding the impact of a merger on employment, substantiality is generally measured based on the following factors;

- The number of employees that are likely to be affected relative to the affected workforce;
- The affected employees' skill levels, qualification, experience, job grade, job description and position;
- The likelihood of the employees being able to obtain alternative employment in the short term considering various factors;
- Whether the sector employs largely unskilled employees, the unemployment rate in the sector;
- Whether the sector is experiencing a trend of retrenchments;
- Whether the sector is a mature or declining sector; and
- Whether the sector is an emerging sector which would suggest future employment opportunities.

On SMEs and HDIs

Lastly, regarding this provision, the Commission will consider whether;

- The affected SMEs or HDIs are impeded from or allowed to compete in the relevant market such that their impediment restricts or participation promotes dynamic competition, innovation and growth in the market;
- Such impediment limits the growth and expansion of SMEs and HDIs and their participation in the relevant market or adjacent markets;
- Their ability to compete allows them to expand in the relevant market or adjacent markets; and
- Any effect on SMEs or HDIs has a secondary effect on other public interest factors such as employment and the industry or region.

Despite the additional clarity provided in the guidelines, there are clearly potentially contentious issues when considering 'substantiality'. For instance, as in the case of the abuse of dominance provisions where substantiality is difficult to demonstrate for smaller firms, it is not clear whether a single SME firm being impeded as a result of a merger is sufficient grounds to restrict the transaction on public interest grounds. It could be argued that in the South African developmental context where there is an increased emphasis on supporting new black industrialists in particular, even a small set of SMEs being adversely affected by a transaction should be cause for concern. The effect on SMEs also needs to be considered in detail given the constraints they face together with the high barriers to entry in some industries. However, the authorities are also required to prevent over-enforcement which could arise from prohibiting every transaction where a small firm is adversely affected.

Notes

1. South Africa Competition Act (No. 89 of 1998).
2. Competition Commission of South Africa. Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (May 2016).
3. Competition Tribunal. Reasons for Decision: Coca-Cola Beverages Africa Limited and Various Coca-Cola and Related Bottling Operations, Case No. LM243Mar15.
4. Competition Tribunal. Merger conditions: Anheuser-Busch InBev SA/NV and SABMiller Plc, Case No. LM211Jan16.

Exclusive contracts in Kenya's beer distribution

Nicholas Nhundu

Efficient distribution is central to competitiveness in the beer industry. In several cases around the world, the proliferation of entrant firms in beer has been obstructed by hurdles in getting products to consumers through the distribution system.[1] Generally incumbents have better access to distribution networks for their own products and may control these networks which effectively crowds out new players in the industry. Recently in Kenya beer distributors are accusing the largest beer producer East African Brewers Limited (EABL) of closing the market for competitors through exclusive distribution contracts.[2] This article discusses the exclusive contracts in the Kenyan beer industry and draws on lessons from recent cases.

EABL and the distributors' dispute

EABL is alleged to have issued three year contracts to its distributors that prevent them from selling products of rival firms. The contracts required the distributors to submit an oral or written notification should they wish to distribute a competitor's products or operate outside designated territories.[3] After more than a week of negotiations most of the distributors eventually signed the contracts. However, five distributors that collectively control about 30% of EABL's distribution persisted with the protest and refused to sign the contracts. Bia Tosha, which is the single largest distributor, approached the courts claiming that EABL has threatened to terminate its distribution contracts for 22 routes.[4] Bia Tosha claimed that EABL is threatening its organisation and other local distributors to coerce them to exclude rival manufacturers. EABL maintains that its contracts are non-exclusive and that the requirement that distributors notify the company prior to entering into working relationships with other firms (or selling outside their assigned zones) is not anticompetitive.[5]

Recently the Kenyan beer distributors also sought to jointly set the final prices of beverage products within the industry. This move was rejected by the competition authority citing it as an "uncompetitive endeavour that is tantamount to price fixing".[6] The competition authority also argued that the proposal was detrimental to consumers because any inefficiencies along the distribution chain would be passed on to the consumer in the form of higher prices.[7] The distributors are allowed to add a mark-up of up to 4% which they sought to increase to between 8% and 12%, the same mark-up applied by their Ugandan counterparts. However, Ugandan distributors are allowed to add a higher mark-up because they incur transport and other distribution costs not incurred by operators in Kenya.[8]

Understanding exclusive contracts in distribution

Exclusive distribution contracts are a concern if they can be used by a firm with market power to foreclose the market to rivals. Market foreclosure occurs when a firm that has market power in one market uses its market power to restrict output or access in another market.[9] Although exclusive contracts can be efficiency enhancing, there are instances where they significantly harm competition in a sector.[10] For example, in some cases an input is produced or controlled by the dominant firm and is indispensable and cannot be readily sourced from alternative suppliers or replicated.[11] In the case of beer distribution in Kenya, if a critical proportion of available distributors is tied up by EABL, rival brewers may be harmed. Furthermore exclusive contracts can also have a significant impact on competition where the decrease in demand of victim firms' products is large enough to deter them from entering or remaining in the market. This effectively prevents new firms from entering while crowding out the ones which are active in a sector.

The potential anticompetitive impact of the terms of exclusive agreements needs to be assessed in detail before a contract is considered unlawful, given the fact that exclusive arrangements may also induce certain transaction and administrative cost-savings.[12] Competition authorities will typically assess the share of the total relevant market which is foreclosed - if it is a relatively small share, a substantial anticompetitive effect is unlikely.[13] Contract duration is also important in this regard - if distributors are frequently released from their contractual obligations they can thus be offered contracts by entrants.[14]

The Kenyan Competition Act

The Kenyan Competition Act (2010) addresses exclusive contracts under section 21 "restrictive trade practices" and section 24 "abuse of a dominant position".[15] Section 21 prohibits any agreements which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya.

Section 24(2)b outlaws the abuse of a dominant position through limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices. A dominant firm is defined in the act as a firm that controls not less than one half of the market share - currently EABL controls 90% of the market in Kenya.[16]

If EABL brands are a must have for distributors in Kenya, it puts EABL in a strong bargaining position in terms of enforcing the agreements. Even where the clause in the contracts is not explicitly restrictive, as argued by EABL, its overall effect may be anticompetitive, which is an important aspect that the authorities will have to consider.

Remedies

Remedies for exclusive distribution contracts normally reduce the incentive to exclude or impede the impact of exclusive contracts while posing minimal side-effects. For example, some competition authorities across the world have imposed a percentage of rival products that a distributor may hold at a time. This percentage could be increased on a yearly basis to allow existing companies time to adjust while also matching the demand of small firms products which are expected to increase with time.[17]

In Mexico, SABMiller complained to the competition authority that Heineken and AB InBev had locked up many of the country's sales opportunities through exclusive contracts.[18] During that time Heineken and AB InBev jointly controlled 98% of the market share in Mexico.[19] Although the competition authority noted that these contracts were anticompetitive, it stopped short of prohibiting the contracts, noting that they can make Mexican retailing more efficient by, for example, supplying financing for improvements and expansion.[20] The authority therefore limited the exclusivity agreements to 25% of their total points of sale, gradually reducing that to 20% by 2018.[21]

In South Africa independent distributors brought a case against SABMiller, although it was dismissed by the Competition Tribunal.[22] The Tribunal found that the case concerned only 10% of SAB's distribution system which would have made any possible intervention have little or no effect on intra-brand competition in the market as a whole.

In the recent AB InBev/SABMiller merger, which involved similar arrangements in the beer industry, the parties agreed to a condition in South Africa which opened access of up to 20% of fridge space to rivals in line with findings in previous European cases.[23] In the United States, the same merger was approved with a number of conditions that also sought to prevent vertical foreclosure.[24] The first condition prevented AB InBev from running incentive programmes that encourage independent distributors to not sell imports or craft beers made by competitors.[25] AB InBev was also required to seek the Department of Justice's review of any future acquisitions of beer distributors or craft beer brands.[26] Lastly AB InBev was required to sell its SABMiller's USA business; this had an effect of allowing other players to sell beers such as Miller Lite and Miller High Life in the USA.[27] The considerations in these transactions are particularly relevant to the issues in Kenyan distribution and suggest possible alternative remedies which may be considered.

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Quarterly competition case update - Mergers and acquisitions			
Country	**Target**	**Acquirer**	**Status**
Botswana	100% issued shares and claims in Pattihis Ch. Holdings Ltd	Kadent Ltd	Approved
	44.4% issued shares and claims in Remedica Holdings Ltd	Kadent Ltd	Approved
	16% shareholding in Minor Hotel Group	MHG International Holdings	Approved
	51% shareholding in Afena Capital Botswana	Management from Afena Capital	Approved
	31.8% share in Chlor-Alkali Holdings (Pty) Ltd	Rosewild Trade Invest (Pty) Ltd	Approved
	Entire issued share capital in Prefsure (Botswana)	Liberty Holdings Botswana (Pty) Ltd	Approved
	75.39% of the issued share equity in Metal Fabricators of Zambia PLC	Reunert Ltd	Approved
Kenya	30 Yu masts from Safaricom	Kenya Towers	Approved
	51% of the Governors' Camp group of companies in Kenya and Rwanda	Wilderness Holdings	Approved
	74% stake in Law Africa Publishing	Longhorn	Ongoing
	70% stake in Telkom Kenya	France Telecom	Approved
	Old Mutual's subsidiaries: Faulu Kenya, Old Mutual Securities, OM Asset managers, OM Investment services, OM Properties, OM Capital and OM Life Assurance	UAP Holding	Ongoing
	Giro Commercial Bank	I&M Bank	Approved
South Africa	Opportunity International Group	MyBucks	Ongoing
	Agrico (Pty) Ltd	AFGRI Equipment (Pty) Ltd	Approved
	Glen Aire Butchery Businesses	Fruit and Veg City (Pty) Ltd (FVC)	Approved
	Vukile Property Fund Ltd (Vukile) in respect of the enterprises conducted on various properties in Pretoria and Bloemfontein	Mendo Properties (Pty) Ltd	Approved
	Caveo Fund Solutions (Pty) Ltd	Investment Solutions Holdings Ltd (ISH)	Approved
	Revertex South Africa (Pty) Ltd	Ferro South Africa (Pty) Ltd	Approved with conditions
	Laritza Investments No 183 (Pty) Ltd	Accelerate Property Fund Ltd	Approved
	Aptronics (Pty) Ltd	EOH Mthombo (Pty) Ltd	Approved
	Protea Glen Shopping Centre (Pty) Ltd	Vukile Property Fund Ltd (Vukile), Diecel Trade & Invest (Pty) Ltd (DTI)	Approved
	AerCap Holdings N.V.	KKR DVB Aviation Capital Ltd	Approved
	Dynamic Commodities (Pty) Ltd	Invenfin (Pty) Ltd	Approved
	R&R Ice Cream Public Ltd Company	Nestlé S.A.	Approved
	Certain motor vehicle dealerships in the Western Cape owned and operated by Sandown Motor Holdings (Pty) Ltd and Erven 6253 and 6254, Montague Gardens	Super Group Trading (Pty) Ltd (SGT)	Approved
	ABSA Insurance Company Ltd (AIC) Commercial Lines Business	Santam Ltd	Approved
	Trans African Concessions (Pty) Ltd	Liberty Group Ltd and the Public Investment Corporation SOC Ltd	Approved

Quarterly competition case update - Mergers and acquisitions cont.			
Country	**Target**	**Acquirer**	**Status**
South Africa cont.	MMI Group LTD (MMI Group)in respect of the property letting enterprises situated at 2 and 4 Merchant Place and the related parking bays	FirstRand Bank Limited (FirstRand Bank)	Approved
	Atterbury Property Holdings (Pty) Ltd	RMB Holdings Limited	Approved
	SABMiller	AB InBev	Approved with conditions
Tanzania	51% stake in Oriental Commercial Bank Ltd	Bank M of Tanzania	Approved
Zambia	100% stake in Hair Credentials Zambia	Godrej Consumer Products	Ongoing
Zimbabwe	SABMiller	AB InBev	Approved with conditions
	SABMiller AB InBev transaction now approved (with conditions in some cases) in several countries in the region including Botswana, Kenya, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.		

Quarterly competition case update - Main enforcement cases	
Country	**Case summary**
Botswana	The Competition Authority granted Choppies Distribution Centre (Pty) Ltd, Payless Supermarket (Pty) Ltd and Woodblock (Pty) Ltd an exemption in terms of the Competition Act to belong to the same buying group. The Authority found that employment benefits from the buying group offset the negative competition effects.
Egypt	A reconciliation request made by Telecom Egypt was accepted by the Egyptian Competition Authority (ECA) for its violation of Article 8 of the law on the Protection of Competition and Prohibition of Monopolistic Practices. Telecom Egypt had partly disconnected internet companies from the internet supply line whilst replacing copper cables with optical fibre and imposed unfamiliar conditions on providing internet services between September 2013 and October 2015. The ECA accepted the reconciliation request submitted.
Kenya	The Competition Authority of Kenya fined the Kenyan subsidiary of SABMiller, Crown Beverages, Sh2.4 million in settlement of a case regarding restrictive trade practices in setting minimum prices for its products.
	A case brought against Kenya Airways' low cost carrier Jambojet was dismissed by the competition authority due to lack of evidence.
South Africa	The Competition Tribunal has fined Isipani Construction R21.78 million for engaging in cover pricing for construction projects in Stellenbosch.
	The Competition Commission has launched an investigation against Transnet Ltd for excessive pricing in the provision of port services.
	The Competition Commission referred a case against Caxton and CTP Publishers and Printers Ltd and Natal Witness Printing and Publishing Company for market division in the provision of community newspapers in the Howick area, KZN.
	A case of collusion against Plasser Railway Machinery, Railway Mechanised Maintenance Company and Lennings Dec Rail Services for collusive bids submitted in tendering for various Transnet rail projects was referred to the Tribunal. The conduct covered the period 1997 to 2013.
	A case against Seardel Group Trading T/A Berg River Textiles and Eye Way Trading was referred to the Tribunal. The firms colluded in submitting bids for two tenders issued by the National Treasury for the supply of fabric used to manufacture uniforms for various government departments.
	The Commission has referred a case of customer allocation against Hudaco Trading and Fermel in the market for supplying Casappa branded gear pumps for customers in the after sales market.
	The Commission referred a case against Global Coffee Exports and Secret River Trading Cc T/A Caffeluxe for colluding through fixing prices in the sale of coffee capsules to retailers.
	A case of collusive tendering in the bidding for tenders issued by the Council for Geoscience for security services was referred to the Tribunal. The firms implicated in the matter are Today's Destiny Trading and Project & Raite Security Services and Consulting.

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

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Contact us:

CCRED
CENTRE FOR COMPETITION
REGULATION AND ECONOMIC DEVELOPMENT

Physical address

2nd Floor
5 Sturdee Avenue
Rosebank
Johannesburg

Postal address

P.O. Box 524
Auckland Park
2006

Telephone: +27 (0)11 559 1725
Email: infoccred@uj.ac.za
Website: www.competition.org.za