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RECENT COMPETITION CASES*

Executive summary

This report reviews recent important competition cases involving anticompetitive practices and mergers in developed and developing countries, including cases involving other countries or foreign firms. It appears from these cases that competition law enforcement in some developing countries is becoming stronger, as is cooperation between competition authorities from some developed and developing countries or regions. However, some of these cases also suggest that further national efforts and more advanced international cooperation are required to take effective action against anticompetitive practices affecting international trade and economic development.

* This document was submitted on the above date owing to the need to incorporate as many submissions as possible.

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Contents

Introduction and overview

1. This report is part of a series of reports prepared by the UNCTAD secretariat reviewing competition cases.[1] This report has been prepared in accordance with paragraphs 9 and 12 of the resolution adopted by the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF.5/15). Paragraph 9 requests the UNCTAD secretariat to "take stock of anticompetitive cases with effects in more than one country, and the problems encountered in investigating the cases, to study the degree of efficiency of cooperation between competition authorities and Governments in solving them", while paragraph 12 requests the secretariat to continue to publish certain documents on a regular basis and to make them available on the Internet, including "an information note on recent important competition cases, with special reference to competition cases involving more than one country, and taking into account information received from member States". Furthermore, paragraph 7(c) of the agreed conclusions adopted by the last Intergovernmental Group of Experts (IGE) at its closing plenary meeting on 5 July 2002 requested the UNCTAD secretariat to prepare for consideration by the next session of the IGE "an information note on recent important cases, with special reference to competition cases involving more than one country, taking into account information to be received from member States no later than 31 January 2003".

2. In accordance with the mandate, the cases reviewed in this report have been selected from material provided by member States in response to a request for information sent out by the UNCTAD secretariat and from other publicly available materials. Taking into account the above-mentioned terms of the mandate, and the relatively few cases involving developing countries for which it was possible to obtain information, a broad range of cases was selected for review, including those (a) affecting the markets of more than one country, including a developing country; (b) involving enterprises not domiciled in the developing country where the case was considered; or (c) from developed or developing countries and involving issues or sectors relevant internationally, particularly for developing countries.

3. The cases reviewed here show that, in a context of globalization and liberalization, competition law and policies are becoming a key element in some developing countries' economic policies. However, the relatively small pool of cases and countries from which these samples were drawn suggests that more efforts need to be made by more countries to adopt and effectively enforce competition laws and to create or strengthen a competition culture in their markets. Some of the cases reviewed demonstrate that anticompetitive practices such as collusion, abuse of dominant position, and cartels occur in a variety of sectors and that in many instances anticompetitive practices involve a mixture of vertical and horizontal illegal actions, with an international impact. Similarly, competition authorities are increasingly called to assess the potential anticompetitive effects of mergers and acquisitions, which often have an international dimension.

4. As the present report tends to deal with the success stories in this respect, questions might be raised as to the extent to which, and the means by which, countries with newly established competition authorities, particularly developing countries and economies in transition, would be able to control such practices and assess the effects of such global mergers. National efforts by developing countries to control anticompetitive practices or mergers originating from overseas would need to be complemented by international cooperation. Despite close scrutiny of a large number of cases having an international dimension, only a few examples among the cases

[1] See the 1995 report on "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these countries" (TD/RBP/CONF.4/6) and the 1998 report on "Competition cases involving more than one country" (TD/B/COM.2/CLP/9).

reviewed contain explicit information about successful international cooperation in this area that appeared to have been a critical element in resolving these cases. Most of the anticompetitive cases or merger and acquisition review processes with an international dimension reviewed seemed to make no or very limited use of the available instruments for international cooperation in this field. Given the inherent difficulties of investigating cross-border anticompetitive cases and mergers and acquisitions, it is open to discussion whether a higher degree of international cooperation has been deemed unnecessary or, on the contrary, international cooperation has been hampered by the inexistence of effective instruments of international cooperation in the field of competition policy.

5. The UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides that States should seek appropriate remedial or preventive measures to prevent and/or control anticompetitive practices within their competence when it comes to their attention that such practices adversely affect international trade and development (para. E.4); institute or improve procedures for obtaining information from enterprises, including transnational corporations, necessary for their effective control of anticompetitive practices (para. E.6); establish appropriate mechanisms at the regional and subregional levels to promote exchanges of information on anticompetitive practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of anticompetitive practices at the regional and subregional levels (para. E.7); and, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information and, to the extent consistent with their laws and established public policy, other information necessary for the effective control of anticompetitive practices (para. E.9).

1. Anticompetitive practices

1.1 South Africa: Abuse of dominant position in the telecom sector[2]

6. After an investigation by the Commission into complaints lodged in 2002 against Telkom by the South African Value Added Network Services Association (SAVA), Omnilink and others, the South African Competition Commission has found Telkom's conduct against value-added network service (VANS) providers to be anticompetitive and has referred the matter to the Competition Tribunal for determination.

7. A VANS is essentially a telecommunication service provided to a customer over a telecommunication facility (including any wire or cable that may be used for telecommunication) during which value is added for the benefit of the customer. VANS include e-mail, electronic data interchange and Internet service provision.

8. Telkom is the de facto monopoly provider of telecom facilities required by VANS providers to enable them to provide services to their customers. In addition, Telkom competes with the VANS providers in the market for value-added services. According to the findings of the Competition Commission, Telkom abused its dominant position as the monopoly provider of telecom facilities by engaging in a number of anticompetitive practices (tied selling, refusal to deal and discriminatory pricing) in the market for value-added network services.

Commentary

9. In many developing countries, the telecommunications sector has undergone gradual liberalization, including *inter alia* the markets for domestic mobile services, data services and

[2] Based on material available on the South African Competition Commission's website.

Internet service provision. Telecommunications is a key part of the information technology revolution, which many governments are trying to introduce in their development strategies for e-commerce, education, training and job creation. The case suggests that incumbent companies enjoying a monopoly over an essential facility may favour their in-house Internet provider over competitors through a variety of practices (cross-subsidization, price and non-price discrimination, etc.). The Telkom case therefore reflects the importance of ensuring that the market for value-added network services is not affected by anticompetitive practices.

1.2 Brazil: Alleged bid-rigging in civil contracting services[3]

10. On 16 July 2003, the first dawn raid in the history of Brazil was carried out by the Secretariat of Economic Law of the Ministry of Justice (SDE). Targeted were the premises of the State of São Paulo Crushed Rock Mining Industries Association (Sindipedras) in pursuit of hard evidence of alleged cartel behaviour among competitors in the market for crushed rock (one of the most essential raw materials in the civil construction industry). The mining companies concerned accounted for 70 per cent of the crushed rock produced in São Paulo, and the alleged cartel had purportedly been in operation for over two years, increasing prices to the detriment of the civil construction industry, including public works.

11. During this raid, documents, reports, tapes, textbooks, transparencies, software to monitor the alleged cartel, receipts and notices of invitations were seized. According to the SDE, an initial examination of the documents seized indicated that (a) price quotes were fed by the companies into a computer program, and such data were kept on a central file at Sindipedras; (b) the alleged cartel decisions were made at meetings known as “course” meetings held on the association’s premises; (c) software carried information on the daily sales figures of 17 companies and was designed to monitor the activities of the alleged cartel; (d) a fine was levied on whoever failed to comply with decisions made by the group; (e) the cartel members divided up customers, and each company was given a certain sales quota, including with regard to bids to be tendered in public competitive bidding processes; and (f) each company’s list of customers was saved on a file known as the “Bible”, and a cartel member could only sell to another cartel member's customers at a premium (generally R$2.00 over the price charged by the respective member).

Commentary

12. This case shows the importance of having an appropriate framework in place to investigate cartel activities such as price fixing, market segmentation, production restriction and bid rigging in developing countries. The Brazilian competition law was amended in 2000 to allow the competition authorities to search premises without warning. The Sindipedras case was the first instance in which these new prerogatives were used, and it demonstrated the usefulness of such investigative procedures to gather evidence of anticompetitive behaviour. The case also shows the good cooperation between various institutions involved in the raid: SDE, the Federal Police, the Federal and State Attorney’s Office and court officials. Another important tool available to the Brazilian authorities is cooperation with other competition agencies in foreign jurisdictions on cases with an international dimension. Cartel investigations are evolving into cross-border operations to cope with the increasingly global presence of investigated firms, the effect of whose trade practices may be felt (and proven) in different countries simultaneously. It is worth mentioning that subsequently more than 10 dawn raids have been carried out, which has been changing the way Brazilian competition authorities are acting in cartel investigations.

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[3] Based on information gathered by the UNCTAD secretariat from various sources.

1.3 Taiwan Province of China: Alleged abuse of market power by Microsoft Taiwan Corporation[4]

13. During April and May of 2002, the Fair Trade Commission (FTC) established the Software Market Monopoly Task Force to initiate an investigation into whether Microsoft Taiwan Corporation (Microsoft Taiwan) had taken advantage of its exclusive position in the software market to set unreasonable prices and engage in improper tying of products in its Office software packages. Following almost six months of investigation, Microsoft Taiwan issued a letter to the FTC on 3 October 2002 requesting an administrative settlement. As the FTC was still unable to confirm the relevant facts and legal relationships in this case, and in order to effectively solve the case, the FTC agreed in principle to Microsoft Taiwan's request and began the negotiation process. After intensive negotiations and several proposals by Microsoft Taiwan, the FTC approved a settlement offer in February 2003. The FTC found the offer to be in the public interest, ensuring a fair trade order, protecting the interests of consumers and promoting development of the information industry.

Commentary

14. The contents of Microsoft Taiwan's administrative settlement offer included the following distinguishing features: (a) the setting of software prices for consumers and educational users; (b) promotion of consumer interests; (c) promotion of intra-brand competition; (d) provision of after-sales service for software products; (e) allowance for reasonable access to source codes; (f) implementation in the Taiwan market of Microsoft's US settlement agreement; and (g) provision of mechanisms for consultation. The case demonstrates the considerable staffing and material resources needed to deal with complex cases against big corporations. The FTC established a special interdepartmental task force and engaged in comprehensive research into related issues, not only hearing from domestic stakeholders but also taking into consideration the latest trends and developments with respect to Microsoft's international status in order to provide a firm foundation for negotiations on the issues.

1.4 Peru: Price fixing in the traffic accident insurance (SOAT) sector[5]

15. The National Institute for the Defence of Competition and Protection of Intellectual Property Rights (INDECOPI) ruled against nine Peruvian insurance companies and their association after an investigation regarding the pricing of Mandatory Traffic Accident Insurance (SOAT). The first ruling by the Free Competition Commission was made on 11 December 2002. The INDECOPI investigation was begun to assess whether insurance companies colluded to exchange information about prices (which include risk premiums, administrative costs and mark-ups) for SOAT. In its conclusion, the Commission states that, during the period under investigation (July 2001 to April 2002), the insurance companies were involved in price-fixing practices, and it sanctioned the association and all the companies involved in the procedure. The sanctions applied were equal to about US$514,575, distributed among nine insurance companies and their association.

16. Subsequently, the insurance companies appealed to the second administrative instance, the Defence of Competition and Intellectual Property Tribunal (Second chamber). The Tribunal ruled that eight out of the 10 initial insurance companies had infringed Articles 3 and 6 of the Peruvian Competition Law (Legislative Decree 701) by fixing SOAT prices during the period December 2001–April 2002. However, it has reduced the fines imposed on the infringing companies.

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[4] Based on material available on the FTC's website.
[5] Based on information provided by INDECOPI, Peru.

Commentary

17. Similar cases regarding anticompetitive practices by insurance companies have been recently handled by other developing countries. The insurance sector is treated differently in many jurisdictions. In some countries the sector is monitored by sectoral regulators; in others it is subject to various exemptions from standard competition law.

18. This case also reflects the approach taken by the Peruvian authorities in their resolution with regard to the linkages between the methodology used to assess whether or not an alleged anticompetitive practice falls under the rules of the Competition Law and the damage that anticompetitive practice may create. During the appeal, the INDECOPI Tribunal changed the criteria of evaluation of the proofs in the case of horizontal agreements from per se rule to "rule of reason" and introduced new jurisprudence regarding procedural issues in order to guarantee due process and transparency in the context of antitrust investigations.

1.5 Germany: Abuse of market power by Lufthansa[6]

19. After a careful examination, the Bundeskartellamt has decided not to initiate prohibition proceedings against Deutsche Lufthansa AG for cancelling the basic commission it pays to travel agencies. According to the Bundeskartellamt's findings, Lufthansa has not violated the prohibition of the abuse of power under competition law. As the leading provider of air travel services in Germany, Lufthansa is subject to abuse control, particularly as regards the dependence of the IATA travel agencies on sales of Lufthansa flights. In its decision to cancel basic commissions, Lufthansa took into account the dependence of small and medium-sized companies on commissions by allowing reorganization periods. Furthermore, by imposing a surcharge for its direct sales, Lufthansa has set a price range within which its travel agency partners can charge for the sales services they provide to their customers.

Commentary

20. Restructuring in the air transport sector and its impact on travel agents have been at the core of many allegations of anticompetitive practices (see, for instance, the Air France case in Senegal – reported in UNCTAD document TD/B/COM.2/CLP/38 – or the Aer Lingus decision by the Irish Competition Commission). One interesting argument considered by the Bundeskartellamt was that, although the decision taken by Lufthansa would undoubtedly negatively affect the economic conditions in the travel agency sector, it was important that Lufthansa allowed the travel agencies an adequate readjustment period and that the travel agencies would have the chance to charge their customers directly for their services. Moreover, the fact that service charges will in the future be paid directly by customers will result in more transparency and more price competition among travel agencies.

1.6 Mexico: Measures affecting telecommunications services[7]

21. On 10 November 2000, the United States requested the WTO Dispute Settlement Body (the "DSB") to establish a panel, in accordance with Articles 4 and 6 of the WTO Dispute Settlement Understanding, in order to examine Mexico's measures with respect to trade in basic and value-added telecommunications services. *Inter alia,* the United States claimed that Mexico had failed to maintain measures to prevent Telmex, a major telecom supplier in Mexico, from engaging in anticompetitive practices and that this was inconsistent with Mexico's obligations under Section 1.1 of the WTO Reference Paper on Telecommunications and other obligations undertaken under

[6] Based on material available on the Bundeskartellamt's website.
[7] Based on WTO document WT/DS204/R (2 April 2004).

WTO agreements. In particular, the United States argued that Mexico's International Long-Distance (ILD) Rules (specifically Rule 13 along with Rules 3, 6, 10, 22 and 23) empowered Telmex to operate a cartel dominated by itself to fix rates for international interconnection and restrict the supply of scheduled basic telecommunications services.

22. The WTO panel has ruled that Mexico has not met its GATS commitments under Section 1.1 of its Reference Paper to maintain "appropriate measures" to prevent anticompetitive practices, since it maintains measures that require anticompetitive practices among competing suppliers which, alone or together, are a major supplier of the services at issue. The panel recommended that the WTO Dispute Settlement Body request Mexico to bring its measures into conformity with its obligations under the GATS.

Commentary

23. This case reflects the interplay between competition provisions at the international and national levels, in particular several implications of WTO agreements for competition policy and domestic regulations. First, the case illustrates that international commitments made under the GATS "for the purpose of preventing suppliers ... from engaging in or continuing anticompetitive practices" have the ability to limit the regulatory powers of WTO Members, in this particular case the applicability of specific ILD rules that allegedly restricted competition in the telecom market. The WTO panel concluded that practices required under Mexico's law could be "anticompetitive practices" within the meaning of Section 1 of Mexico's Reference Paper and therefore contravened the WTO rules.

24. The panel also emphasized that, in its findings, due account was given to GATS provisions on differential and more favourable treatment for developing countries. The panel concluded that its ruling did not prevent Mexico from actively pursuing the development objectives referred to in these provisions by extending telecommunications networks and services at affordable prices in a manner consistent with its GATS commitments.

25. Third, the Panel noted that Article 19 of the DSU provided that "[w]here a panel … concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". Unlike some other WTO agreements (e.g. GATT Article XXIII:1 in connection with Article 3.8 of the DSU), the GATS does not require that, in the case of a violation complaint (GATS Article XXIII:1), "nullification or impairment" of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel. Whereas Article XXIII:1 of the GATT specifically conditions access to WTO dispute settlement procedures on an allegation that a "benefit" or the "attainment of an objective" under that agreement is being "nullified or impaired", the corresponding provision in the GATS (Article XXIII:1) permits access to dispute settlement procedures if a Member "fails to carry out its obligations or specific commitments" under the GATS, which is similar to a *per se* rule in antitrust enforcement.

1.7 Republic of Korea: group boycott by cement manufacturing companies[8]

26. In September 2003, the Korea Fair Trade Commission (KFTC) decided to impose surcharges of US$22 million on seven cement manufacturing companies for their conspiracy and participation in group boycotts to prevent emerging competitors from entering the cement market. Seven cement companies – Ssangyong, Dongyang, Sungsin, Lapaz Halla, Hyunday, Hanil and Asia – were alleged to have agreed twice in 2002 to reduce the amount of cement selling to Aju Industry Co. (Aju) and Yoojin Remicon Co. (Yoojin), which are manufacturers of ready-mixed concrete (remicon). Cement is the main raw material used in producing remicon.

[8] Based on information provided by the KFTC.

27. Aju and Yoojin, manufacturers of remicon, had purchased cement from the seven cement manufacturers. Yoojin, whose main business area is remixed concrete (remicon), had also produced slag powder, which can be a substitute for cement in producing remicon. Aju had planned to build a plant to produce slag powder for other purposes than producing remicon. Slag powder can be produced by grinding slag (remnants retrieved from the furnace after the production of iron). Those seven cement makers worried about Yoojin and Aju, for cement markets would be threatened by slag powder when the two remicon makers produced large amounts of slag powder later. Therefore, the seven cement companies had colluded to decrease the amount of cement sold to Yoojin and Aju so that the two remicon makers would give up producing slag powder.

28. While investigating this cement cartel, the KFTC came to the conclusion that, although slag powder was different from cement, the two remicon makers could become competitors against seven cement makers, because slag powder can be substituted for cement-producing remicon to a certain degree. The KFTC also found out that the Korea Cement Manufacturing Association (KOCMA) was deeply involved in the cement cartel, with a leading role played by one senior executive member of KOCMA. The KFTC imposed surcharges of US$428,000 on KOCMA. In addition to surcharges, the KFTC filed complaints for criminal sentences with the Public Prosecutors' Office against those seven cement companies and KOCMA.

Commentary

29. This case is significant in being the first case in which individuals actively involved in the cartel were prosecuted. The KFTC filed complaints for criminal sentences with the Public Prosecutors' Office against the vice chairman of KOCMA for his aggressive involvement in illegal practices along with cement manufacturers. In response to this, the Public Prosecutors' Office detained and held the vice chairman for his role in cartel activities. The KFTC has steadily increased the level of surcharges in order to curb cartels. However, this is the first time the Public Prosecutors' Office has imposed criminal punishment on individuals engaged in cartel activities.

30. In the Republic of Korea, seven cement manufacturers, which are now subject to punishment, command more than 90 per cent of the relevant market. In addition, they have maintained the same market share with little change for the past several years. Under such market circumstances, the recent decisions by the KFTC and the Public Prosecutors' Office are very significant because, by bringing the cartel to light, they help to create an environment in which cheaper and high-quality alternatives can compete with existing players in the cement market. Cement is a key construction material.

2. Mergers and acquisitions

2.1 Brazil: AmBev/Interbrew merger[9]

31. The Secretariat of Economic Law of the Ministry of Justice (SDE) has recommended that the merger of Brazilian drinks company Companhia de Bebidas das Américas (AmBev) and Belgium's Interbrew be approved. The US$11 billion deal was agreed earlier this year and will create the world's largest brewing group by volume. The new company, InterbrewAmBev, will have about 14 per cent of the global beer market and will produce more than 190 million hectolitres of beer per year. The deal has already been approved by the Secretaria de Acompanhamento Econômico (SEAE). The decision by CADE, the third Brazilian competition authority, is still pending. Rival Brazilian brewery Schinkariol has challenged the deal based on a

[9] Based on information gathered by the UNCTAD secretariat from various sources.

number of potential anticompetitive practices, but both SDE and SEAE have approved the merger unconditionally, as Interbrew had an irrelevant share in the Brazilian market and thus there was no evidence that the merger would lead to anticompetitive effects. The merger is subject to antitrust investigations in several other countries (Canada, Germany and Mexico).

Commentary

32. The case shows how important it is for developing countries to be equipped with effective merger control provisions. The beer market has proven particularly dynamic in the last decade, with continuous changes in company ownership, newcomers entering the different national markets and others exiting, structural changes through mergers and acquisitions, strategic alliances and so forth. Virtually all Latin American competition authorities have encountered one or more cases related to the beer industry. Mergers in the beer industry permit enhancement of portfolios of leading brands and may lead to synergies and cost savings. At the same time, however, in the beer sector mergers may reduce the number of brands competing with each other and may create conditions for collective dominance or tacit collusion. Furthermore, a concentrated market structure in the beer sector may lead to increased non-price competition (in the areas of advertising and marketing), raising barriers to entry and growth by small rivals. Strong portfolios and single deliveries may lead to line forcing at the retail stage.

33. From a procedural perspective, the case represents the first instance in which SDE and SEAE have made use of provisions for joint merger analyses assessment, adopted on 28 January 2004.

2.2 Venezuela: Daewoo/GM acquisition[10]

34. Venezuela's Superintendancy for the Promotion and Protection of Free Competition (Procompetencia) has ruled in favour of Daewoo Motor de Venezuela SA (DMV), Daewoo Motor Corporation Ltd. (DMC), General Motor de Venezuela SA (GMV) and General Motors Corporation (GMC) in a recent case concerning alleged economic concentration. The decision was given on 4 November 2003.

35. An investigation was launched into the companies in August 2002, after a complaint was filed on 19 June by Avecon-Daewoo and Caribe Motor CA, two members of the network of Daewoo dealers in Venezuela. The complaint concerned the repercussions of an asset sale in the Republic of Korea. In 2002, DMC, as part of its bankruptcy proceedings, had sold two assembly plants and other assets to GM Daewoo Auto and Technology, a joint venture between General Motors and some of Daewoo's creditors. The transaction had been approved by the relevant authorities in the Republic of Korea. Despite the fact that no assets were sold in Venezuela, the plaintiffs alleged that the transaction had had negative effects on the local market, and that Daewoo had abused its dominant position. Procompetencia concluded that Daewoo Motor de Venezuela and Daewoo Motor Corporation had not engaged in exclusionary practices or economic concentration operations, nor had they abused a dominant position. According to Procompetencia, the asset sale did not generate a large increase in the level of concentration in the relevant markets. The Superintendency ruled that, as it found no intention on the part of Daewoo Motor de Venezuela, the company could not be said to have engaged in the practices established by Article 6 of the law. Procompetencia's final decision cleared the transaction on all counts and without reservation.

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[10] Based on information gathered by the UNCTAD secretariat from various sources.

Commentary

36. Foreign-to-foreign transactions have become an important aspect of merger analysis, and such provisions have increasingly been incorporated into the competition laws of developing countries. Unlike cases when foreign-to-foreign mergers are notified and subject to approval in various jurisdictions, the importance of this case lies primarily in the fact that, even though the merger apparently has not been notified in Venezuela, the competition authority has fully taken into account the impact of the merger on the alleged anticompetitive practices.

2.3 Zimbabwe: Acquisition of St. Anne's Hospital by CAPS Holdings Limited[11]

37. In May 2004, the Competition Commission received notification in terms of section 34A of the Competition Act, 1996 (as amended by the Competition Amendment Act, 2001) of a proposed merger involving the acquisition of St. Anne's Hospital by CAPS Holdings Limited. CAPS Holdings is a listed company quoted on the Zimbabwe Stock Exchange that has a number of subsidiary companies in various pharmaceutical business segments (manufacture, wholesale, distribution and retail of pharmaceutical products). St. Anne's Hospital operates a single hospital in Harare.

38. The Commission identified as the broad relevant service market the provision of health care, with two submarkets being the provision of hospital services and the manufacture and distribution of pharmaceutical products. The relevant geographic market was identified as the whole of Zimbabwe in the case of pharmaceutical products, and Harare and its environs in the case of hospital services. CAPS Holdings Limited held a 40 per cent share of the pharmaceutical products market, which is highly concentrated, with an HHI (Herfindahl-Hirschman Index) of 2580 and a CR4 (four-firm concentration ratio) of 90 per cent. St. Anne's Hospital held a 6 per cent share of the hospital services market in Greater Harare. That market was also highly concentrated, with an HHI of 3024 and a CR4 of 88 per cent.

39. The information used in the examination of the transaction was largely submitted by the merging parties in their merger notification form. Evidence was also gathered from interviews held with other stakeholders, such as competing firms in the relevant markets, relevant professional associations and the Ministry of Health and Child Welfare.

40. It was found that the merging parties have a vertical relationship in that CAPS Holdings supplies pharmaceutical products to St. Anne's Hospital. In the preceding financial year, however, St. Anne's Hospital's drug purchases from CAPS Holdings had amounted to only 0.6 per cent of CAPS Holdings' total turnover, while St. Anne's Hospital had procured about 91 per cent of its drug requirements from other local drug suppliers. The Commission therefore found unrealistic and unfounded the fears expressed by competing drug manufacturers that CAPS Holdings might prevent St. Anne's Hospital from purchasing pharmaceutical drugs produced by other manufacturers. The Commission's conclusion was supported by the fact that CAPS Holdings' drug wholesaling and retailing subsidiaries (Geddes (Pvt) Limited and QV Pharmacies respectively) handle more of other drug manufacturers' products than those produced by the parent company. It was also noted that St. Anne's Hospital's share of the relevant market was not significant enough to seriously affect the businesses of other drug manufacturers even if that hospital diverted all its drug purchases from CAPS Holdings.

41. The Commission therefore approved without any conditions the proposed acquisition of St. Anne's Hospital by CAPS Holdings Limited on the grounds that the merger was not likely to substantially prevent or lessen competition in Zimbabwe or any part of Zimbabwe.

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[11] Based on information provided by the Competition Commission, Zimbabwe.

Commentary

42. Mergers and other forms of acquisition have accounted for more than 80 per cent of direct foreign investment in the Southern African states. Cross-border business transactions, including investment and business concentrations and alliances, are now becoming the norm in the region, thereby justifying merger control at the national level. In developing countries, mergers, if not properly monitored, can sometimes produce highly concentrated market structures, making it easier for a firm or group of firms to abuse a dominant position or collude. Therefore, merger control provisions have a crucial impact on market structure and enterprise development in developing countries. Such merger cases suggest that by not having a merger control system, a country might deprive itself of the legal powers to challenge foreign and domestic mergers, which might have an adverse effect on its territory and thus undermine both the national and global competitiveness of its export-oriented companies. When reviewed properly by a competition authority, a merger can provide a better environment for FDI and privatization programmes, with beneficial impacts on the overall economy.

2.4 Zambia: Takeover of Cadbury Schweppes by Zambia Bottlers Ltd.[12]

43. The Coca Cola Company (TCCC) and Cadbury Schweppes (CS) Plc signed an agreement for the purchase by TCCC of the CS commercial beverages brands and the trademarks outside the United States, continental Western Europe and a few other countries. In Zambia, TCCC lodged a notification under Section 8 of the Act to acquire Cadbury Schweppes Zambia (CSZ) Limited. TCCC produces carbonated soft drinks in Zambia, while Cadbury Schweppes produced both carbonated and non-carbonated drinks, as well as clear beer (whisky black). TCCC had a 92 per cent market share in carbonated soft drinks in Zambia, while CSZ had 8 per cent. Their products are almost perfect substitutes. Imports of competing products are negligible and are mainly done by Kazuma Enterprises on a niche-market basis, including Pepsi products from Namibia. The takeover of Cadbury Schweppes brands in Zambia by TCCC was to effectively eliminate competition and any possible entry into the carbonated soft drinks market in Zambia, especially since ownership and/or authorized use of patents and know-how is key to success in the sector. Third-party concerns were raised regarding the concentration of economic power in TCCC in Zambia as well as the future of Goldspot in Ndola, which is an SME with a TCCC franchise for secondary brands.

44. The Commission found that entry barriers existed in the carbonated soft drinks market in Zambia even before the notification of this transaction. In Zambia, the transaction entailed elimination of a vigorous competitor by TCCC and consolidation of TCCC's market power and likely abuse of the same in relation to distributors and retailers. However, Cadbury Schweppes Plc had not made substantial investments in Zambia and had only awarded the Zambian operation a franchise to use its trademark and beverage brands. The Zambian operation needed recapitalization. The parties submitted that TCCC would inject its expertise into the beverage sector and help CSZ to achieve efficiencies. CS had already sold the brands to TCCC, and CSZ did not have the franchise to produce the brands. Moreover, the closure of CSZ would have had worse effects on social and economic conditions in the country.

45. The transaction was authorized with conditions, which included the following:

- TCCC was to cease operation of any exclusive dealing and territorial restraint arrangements in Zambia.
- TCCC would not fix prices or excessively advertise the recommended price.
- TCCC and cooperating bottlers in Zambia would continue to comply with the provisions of the Competition and Fair Trading Act.

[12] Based on information provided by Zambia's Competition Commission.

Commentary

46. The global Coca Cola/Cadbury Schweppes merger was reviewed in the COMESA region by the competition authorities of Zambia and Zimbabwe. The merger was notified to, and reviewed by, the two competition authorities separately even though its effect was regional in view of the almost free trade between COMESA member States. In the case of Zimbabwe, the merger was approved with certain conditions, which included partial divestiture and undertakings on the part of the merging parties to develop local beverage brands. In Zambia, the merger was also conditionally approved, but with different undertakings "aimed at enhancing competition, including the obligation on TCCC (The Coca Cola Company) to notify its exclusive dealing arrangements, restrictive territorial allocation agreements and stop price fixing arrangements". In doing so, the competition authorities tried to ensure that the merger did not negatively affect enterprise development.

47. It should, however, also be noted that, while the merger affected other COMESA countries such as Uganda and Malawi, the absence of merger control provisions in those countries prevented it from being notified and reviewed by the affected countries. Therefore, the countries could not obtain countervailing concessions on the merger's consummation as Zambia and Zimbabwe did. Enterprises in Uganda and Malawi could not be protected against potential negative effects of the merger. It is interesting to note that the same transaction, which was global in nature, was also assessed by the Zambia Competition Commission. It is important to note that both Zimbabwe and Zambia, in their respective assessments of the transaction, had authorized the transaction on condition that the relevant market was not foreclosed by restrictive business practices by the merged firm. Zimbabwe also required that the merged firm undertake to promote and develop Zimbabwean suppliers in the supply of the raw materials necessary to produce the finished products.

48. It is evident that the competition authorities in their respective countries were addressing the need to promote enterprise development and linkages with SMEs. This case provides a reminder that, when applying merger control provisions, some developing countries may take into account "failing firm" considerations that may lead to the approval of mergers that might otherwise be considered anticompetitive. It is usually argued that mergers involving failing firms will often enhance general welfare by increasing the efficiency of existing capacity, redeploying that capacity to socially more valued uses, or preserving jobs and having other socially beneficial impacts. The relative balance between efficiency and anticompetitive effects must be carefully evaluated, and there is no simple test to ensure that the former will prevail over the latter as a result of a merger.

2.5 Republic of Korea: PointNix/UBCARE merger[13]

49. The Electronic Medical Record (EMR) is a computerized system to control the process of admission, medical treatment and diagnosis in hospitals and clinics through a computer programme and network. UBCARE and PointNix are the first and second leading companies in the EMR market, with 56.6 and 10.9 per cent of market share respectively.

50. PointNix became the largest shareholder by taking over 24.55 per cent of shares in UBCARE in June 2004 through a hostile merger and acquisition. The companies concerned were not required to notify this transaction prior to completion because this stock acquisition did not meet the threshold of premerger notification. Notwithstanding, the KFTC reviewed this transaction after UBCARE complained about its anticompetitive effects on the relevant market.

[13] Based on material in the KFTC's *Monthly News,* May 2004.

51. The KFTC concluded that this transaction would lead to the creation of a dominant position in the EMR market by merging the largest rival companies, so that remaining or potential competitors would not be able to constrain the possible abuse of market dominance. On the other hand, the KFTC noticed that the acquisition could lead to efficiency gains in other markets where the two companies had complementary operations. Taking these anti and procompetitive effects into account, the KFTC has decided not to block the already completed transaction. After reviewing the corrective measure offered by PointNix, the KFTC ordered PointNix to sell off its EMR business and related intellectual property rights to third parties within six months.

Commentary

52. A merger frequently involves two firms that operate in many different markets. The merging parties may compete with each other in some markets while not competing with each other in others. Almost all the mergers may lead to anticompetitive effects and the likelihood of tacit or explicit collusion and monopolization, but also economic efficiencies such as economies of scale, better integration of production facilities, plant specialization, and reduced marketing and distribution costs.

53. For the sake of consumers and merging parties, the best way to approach the trade-offs of a merger is to apply the “fix it first” rule. The competition agency may approve the merger provided that the firm divests itself of certain assets in the market segment involving overlaps. For effective compliance by the merging firm with the final decision and to avoid unnecessary trial and error, the consent or cooperation of the firm is indispensable for the process of conditional approval of a merger. In addition, whether a merger is friendly or hostile does not matter in reviewing the case, since any kind of merger has both anticompetitive effects and economic efficiencies. The important thing is to balance both effects without prejudice regardless of whether a merger is friendly or hostile.