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RECENT IMPORTANT CASES INVOLVING MORE THAN ONE COUNTRY

Report by the UNCTAD secretariat[*]

Executive summary

This report reviews a number of recent cases involving restrictive business practices including mergers/acquisitions in developed and developing countries and economies in transition. Some of the cases have cross border aspects to the extent that they involve other countries or firms that are foreign and have operations in the country in focus. This report exemplifies the fact that enforcement of competition law in developing countries has been improving over time and greater effort and supports both nationally and through cooperation from other competition authorities. Cooperation between competition authorities from both developed and developing countries at bilateral and regional level has enhanced case handling capabilities in developing countries. Developing countries have also continued to review implementation methodologies by adopting conventional means for example the introduction of leniency programs in cartel investigations. Developing countries continue to face new challenges as efforts to effectively tackle cases are stepped up. Some challenges emanate from structural weaknesses of competition legislations, others from policy conflicts between competition and other government policies for example those governing sector regulators, which may or may not have concurrent jurisdiction with competition authority on competition maters. Expanded coverage of competition enforcement to areas, which were exclusively exempted in the past, for example public utilities, and activities of professional associations, is an additional challenge to competition enforcement.

[*] This document was submitted on the above-mentioned date as a result of processing delays.

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INTRODUCTION AND OVERVIEW

1. The current report is part of a continuous series reviewing competition cases prepared by UNCTAD secretariat with special focus to developing countries competition law enforcement progress. However, the report looks at some cases from developed countries with specific lessons on the implementation of competition laws. This case report is in line with paragraph 9 and 12 of the resolution adopted at the 4th United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.[†] 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 in account information received from member States."

2. Furthermore, subsequent Intergovernmental Group of Experts (IGE) meetings between 2001 to 2003 requested UNCTAD Secretariat to prepare for consideration by the following 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" and not later than 31 January of every preceding year. Paragraph 6 (c) of the 2004 IGE meeting report requested UNCTAD secretariat to prepare for consideration by the Fifth United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, "an information note on recent important cases, with special reference to competition cases involving more than one country, and taking into account information to be received from member States no later than 31 January 2005"[‡]. The Fifth United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (November 2005) ratified the request for a report cases to be reviewed by the following session of the IGE"…., taking into account information to be received from member States"[§]

3. In accordance with the mandate, the cases reviewed in this report have been selected from materials provided by some 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) having effects upon the markets of more than one country, including a developing country; (b) involving enterprises having their headquarters outside of the country where the case has been considered; or (c) cases from developed and developing countries involving issues or sectors which are relevant internationally, particularly for developing countries.

[†] UNCTAD document TD/RBP/CONF.5/15 of 4 October 2000.
[‡] See UNCTAD document TD/B/COM.2/CLP/48 of 22 December 2004.
[§] UNCTAD document TD/B/COM.2/CLP/53.

4. The cases reviewed in this report show that, in the context of globalization and liberalization, competition law and polices are becoming a key element in some developing countries' economic policies. It also shows that competition enforcement in many countries assist in addressing anti-competitive practices which are prevalent in markets of developed, developing, least developed countries, and economies in transition. 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 and/or strengthen a competition culture in their markets. Some of the cases reviewed demonstrate that anti-competitive practices such as collusion, abuse of dominant position, occur in a variety of sectors and that in many instances anti-competitive practices involve a mixture of vertical and horizontal illegal actions. Similarly, competition authorities are increasingly called to assess the, potential anti-competitive effects of mergers and acquisitions, either having a domestic or international dimension. The present report deals with implementation successes, conflict or coordination of various policies and also challenges. However, there is a still a lot of room for improvement of enforcement techniques and also coordination between countries with newly established competition authorities, particularly in developing countries and economies in transition with those of developed countries.

I. ANTICOMPETITIVE PRACTICES

1. Lithuania: Abuse of dominance in the petroleum industry[**]

Brief description

5. The Competition Council of Lithuania initiated investigations in July 2004 to establish whether the actions of *AB Mažeikių nafta* in the period between 2002 and 2004 could have caused gasoline and diesel fuel prices in Lithuania to be higher than those in other Baltic States, and to determine whether the differences in fuel prices in Lithuania, Latvia and Estonia could have resulted from restrictive actions by the company.

6. The investigation established that fuel prices in Lithuania were higher than in Latvia and Estonia and that this was partly due to different conditions in different territories of the Baltic States market, such as excise conversion differences, the fuel reserve accumulation requirement effective in Lithuania, etc. In addition, abuse of the dominant position by *AB Mažeikių nafta* in the market also caused the price differentials. As the only producer and the main supplier of oil products on the Lithuanian, Latvian and Estonian markets in 2002-2004 *AB Mažeikių nafta* dominated the Baltic States gasoline and diesel fuel markets and was able to make unilateral decisions, while concluding contracts and selling oil products. The company did not make operational any clear-cut and transparent pricing system or a uniform discount system applicable for identical fuel purchases in Lithuania, Latvia and Estonia. This affected fuel purchasers in the three Baltic States who were placed in different competitive conditions. The trade between member States was affected because *AB Mažeikių nafta* was marketing the major part of its production in the Baltic States. Hence, Lithuanian purchasers would acquire fuels at higher prices than Latvian and Estonian buyers. Since the fuel was marketed in Lithuania at higher prices, Lithuanian oil products consumers were disadvantaged compared to those of Latvia and Estonia.

7. A range of actions restricting trade performed by *AB Mažeikių nafta* was also recognized as evidence of abuse of dominance. Those included restricted possibilities of the buyers to freely choose amounts of purchases and discounts, and efforts were made to protect the gasoline and diesel fuel markets from import and potential importers, by granting some inadequate rebates to *UAB Lukoil Baltija*, *UAB Lietuva Statoil* and *UAB Neste Lietuva*, thus eventually discriminating other minor purchasers-wholesalers. *AB Mažeikių nafta* was operating an economically ungrounded rebate system under which minor wholesalers found it unsound to purchase oil products from *AB Mažeikių nafta*, since they could acquire the same products at a lower cost from *Lukoil*, *Statoil* and *Neste*.

8. The Competition Council concluded that *AB Mažeikių nafta* was abusing its dominant position by discriminating against Lithuanian, Estonian and Latvian purchasers on a territorial basis. *AB Mažeikių nafta* could also affect trade between member States by forcing those enterprises operating in the Lithuanian, Latvian and Estonian markets to conclude contracts covering the purchase of the amount of oil products meeting the major demand of undertakings in oil products.

[**] Based on information received from the Competition Council of Lithuania.

9. On 22 December 2005 the Competition Council adopted a resolution following the completion of the investigation on the compliance of actions of *AB Mažeikių nafta* with the requirements of the Law on Competition of the Republic of Lithuania and Article 82 of the EC Treaty. Having examined the facts and circumstances established in the course of the investigation the Competition Council recognized that *AB Mažeikių nafta* had violated Article 9 of the Law on Competition on the prohibition to abuse a dominant position. The Competition Council also concluded the infringement of Article 82 of the EC Treaty. This is the first ever case after the accession of Lithuania to the EU in May 2004 and the enforcement therein of the European competition rules, that a Lithuanian company has been acknowledged to abuse its dominant position in a part of the common market of the EU and by its actions affected trade between Member States. *AB Mažeikių nafta* was obligated to discontinue the restrictive practices. In view of the established infringements and acting according to the Rules concerning the setting of the amount of a fine, the Competition Council imposed upon *AB Mažeikių nafta* a fine of LTL 32 million.

Commentary

10. This case exemplifies that regional competition laws and in this case the EU Treaty can assist competition authorities effectively tackle anticompetitive practices in their own jurisdictions. In this case Lithuania invoked the provisions of both domestic competition law and Community competition law. In cases of abuse of dominance, which are sometimes difficult to prove, regional law can enhance the capability to deal with such cases. It also opens the case to examination of the effects of trade between member States. In the absence of such regional cooperation and statutes to deal with cross-border anticompetitive practices, such cases may go unresolved in many of the countries which are distorting the operations of free and competitive markets.

2. Italy: Cartel in the baby milk market[††]

Brief description

11. The Italian Competition Authority received complaints from consumers and consumer associations concerning a suspected cartel in the Italian baby milk market. The complaints indicated that prices for baby milk in Italy were higher compared to those in other European countries. At the same time, in May 2004, the Italian Health Minister announced that after the invitation of the Minister, baby milk suppliers had agreed to reduce retail prices by 10 per cent. As a consequence, the Competition Authority initiated an investigation in order to assess whether the high prices and the subsequent reductions constituted a restrictive agreement as stipulated in Article 81 of EC Law.

12. In the absence of parallel imports to create competition in the market the Competition Authority suspected that there might be anticompetitive behaviour between national affiliates of the companies (which happened to be multinationals) involved aimed at impeding the price arbitrage. Invoking EC Regulation 172003, the Italian Competition Authority requested the French, German and Spanish Competition Authorities to inspect the premises of some of the firms against whom the proceedings had been initiated, in order to share the relevant information and documents concerning the case. The corresponding authorities were very efficient in the inspection activities requested by the Italian Competition

[††] Based on information received by the UNCTAD secretariat from the Italian Competition Authority.

Authority and the delivery of the documents seized (this was the first case of cooperation among the authorities mentioned).

13. After careful analyses of the materials received, no documentary proof was found of the existence of a general agreement to impede parallel imports. Consequently, the absence of parallel imports from other EU Member States could not be attributed to a cross-border collusion strategy among baby milk producers.

14. However, the Competition Authority considered the act of direct contacts among producers in the case of Health Minister's invitation to reduce prices and the fact that they agreed not to reduce prices with more than 10 per cent was a direct proof of collusion. The fact that the milk producers in the meeting with the Health Minister referred to the notion of market disruption also strengthened the Authority's conviction that the wide availability of retail prices information on the web was an important coordination instrument. The parties defended themselves by characterizing the Italian market as having low demand, high costs of distribution, and high promotional costs among others. Nevertheless, they were not able to explain the relatively high profits they had gained in the Italian market. At the end of the investigations, the Italian Competition Authority fined Heinz Italy, Plada, Nestlè Italy, Nutricia, Milupa, Humana Italy and Mille Italy for anticompetitive arrangements according to the Italian Competition Law.

Commentary

15. This case is an example of exchange of information between competition authorities in the process of case investigations. It also shows that actions of other branches of the government can either assist or block competition authorities from resolving competition cases. In this case the Italian Health Minister gave the competition authority alternative grounds to pursue the collusion case after it was found that there was insufficient proof with regard to parallel imports. This brings in the importance of coordination and cooperation between government agents and in this case the Health Ministry and the Competition Authority.

3. Serbia: Abuse of dominance by a public company[‡‡]

Brief description

16. The Antimonopoly Commission of Serbia initiated an investigation into the activities of a public company ‘Aerodrom Beograd’ (hereinafter: Aerodrom Beograd) which is engaged in rendering the following airport services: use of central infrastructure and ground handling, as well as the use of air bridges and landing (landing and lightening) by domestic and foreign airline companies. When charging for these services, Aerodrom Beograd applied different tariffs to domestic and foreign airlines in international traffic, although it rendered identical services to these two categories.

17. The Board of Airlines Representatives (BAR) in Serbia and Montenegro submitted a notification to the Antimonopoly Department within the Ministry of Trade, Tourism and Services of the Republic of Serbia claiming that Aerodrom Beograd has been applying different tariff to domestic and foreign airline companies when charging identical services,

[‡‡] Based on information received by the UNCTAD secretariat from the Competition Authority of Serbia.

i.e. that it charged foreign airlines a significantly higher price, as much as double the amount compared to the price charged to domestic airline companies. BAR also provided a document listing the different tariffs that were applied, i.e. one tariff for airport services charged to domestic airline company in international traffic and another for airport services charged to foreign airline companies.

18. The Antimonopoly Commission initiated and conducted administrative procedure in order to gather data, check statements contained in the notifications and take statements from person in charge in order to establish facts and evidence as to whether the abuse of monopolistic position existed.

19. On the basis of analysis of all available and collected data, as well as evidence established within the procedure conducted by the Commission, the procedure was finalized by the resolution issued by the Ministry of Trade, Tourism and Services establishing that Aerodrom Beograd abused its monopolistic position because it charged services in international traffic at discriminatory prices between domestic and foreign airlines, thus creating unequal conditions for foreign airlines. Aerodrom Beograd was ordered to apply identical conditions in rendering airport services in international traffic, i.e. to charge identical prices for airport services for both domestic and foreign airlines, and to prepare a new tariff structure and submit it to domestic and foreign airline companies.

20. Aerodrom Beograd lodged an appeal against the resolution to the second instance authority – the Administrative Commission of the Government, which dismissed the appeal as unfounded, i.e. confirmed the first instance resolution issued by the Ministry of Trade, Tourism and Services.

21. The Antimonopoly Department received a letter from Aerodrom Beograd containing information that it had acted pursuant to the resolution, i.e. a uniform tariff for complete international services in international air traffic has been adopted. The said tariff structure was distributed to all airline companies using the services of Aerodrom Beograd, with the effective date of coming into force, as 1 December 2005.

22. This case was handled within the framework of the Antimonopoly Law of 1996. Serbia has since adopted a new Law on Protection of Competition in September 2005.

Commentary

23. This case is an example of a public enterprise engaging in anti-competitive practices. By their nature, many public enterprises are monopolies or oligopolies and the abuse of their dominant position can jeopardize the development of free competitive markets. In the case in point, the use of discriminative tariffs between domestic and foreign airline companies was in itself an interference of the market by creating an undue advantage for the locals. The resolution of this case allowed the local and international airline companies to compete fairly on price. For public companies to understand their obligations under the competition law, specific awareness programmes geared towards their operations need to develop by competition authorities.

4. Portugal: Setting of prices by professional associations in the health sector (animal and human)[§§]

Brief description

Portuguese Veterinarians Association

24. The Portuguese Competition Authority investigated the Veterinarians Association's deontological code of conduct in an attempt to find out whether there are inherent anticompetitive practices. The Authority found out that the code concerning fees charged for services in independent practice by a veterinarian were set on the basis of regulation by their association. The National Veterinarians' Association recommended the tables of charges applicable in each region. The Portuguese Competition Law and the EC Treaty prohibit decisions by associations of undertakings that seek to directly or indirectly fix the purchase or sale price (of goods and services). The two legal frameworks also prohibit any interference in the setting of prices by market forces, either causing them to fall or rise artificially.

25. The Portuguese Competition Authority imposed a fine on the Portuguese Veterinarians' Association of approximately 76,000 Euros on the grounds of the imposition of minimum charges for veterinary services.

26. This was the Portuguese Competition Authority's first decision involving an infringement of the competition rules set out in the EC treaty issued under the new decentralized system for applying Community Competition Rules approved by EC Regulation 17/2003.

Portuguese Dental Association

27. In another investigation in the provision of professional services, the Portuguese Competition Commission found that the Portuguese Dental Association had approved a deontological code on dental fees. The code specified the criteria and indications relating to minimum and maximum fees for dentistry carried out by independent dentists, i.e. as a liberal profession. For the purposes of Portuguese and Community rules, a professional organization is considered an association of undertakings when it regulates the economic behaviour of all members of a certain liberal profession.

28. The Portuguese Competition Authority found that the imposition by the Dental Association of minimum and maximum fees for dental services interfered with free market forces. Therefore, the Authority ruled that some provisions of the Deontological Code infringed national and European competition law. A fine of 160,000 Euros was imposed on the Portuguese Dental Association.

Commentary

29. The activities of professional associations are increasingly becoming a focus of competition enforcement agencies. In many instances, activities of professional associations are exempted from the provisions of competition law. However, the exemption is usually explicit on activities "which relate to the development and enforcement of professional

[§§] Based on information received by the UNCTAD secretariat from the Portuguese Competition Authority.

standards of competence for the protection of the public".[***] Most competition laws prohibit price fixing agreements under the illegal *per se* rule and competition authorities believe that certain actions taken by professional associations when setting their prices cannot be in the interest of the public. This realization has led to more cases touching on the activities of professional associations being handled by competition authorities.

5. Brazil: Dawn raid cartel case in the crushed rock market[†††]

Brief description

30. The first antitrust "dawn raid" in the history of Brazil was conducted by Secretariat of Economic Law (SDE) in July 2003 to investigate a possible cartel in the market of crushed rock, an essential raw material in the civil construction industry.

31. The investigation set out through an anonymous complaint, which had described the cartel's procedure and organization. These facts, concerted with others investigation results, permitted the SDE to request that the Federal Attorney obtain a judicial warrant to execute unannounced search warrants (dawn raid) - investigative proceeding which is stated in Brazilian Competition Law (Lei 8884/94) at the article 35-A. The raid was performed in the offices of the State of São Paulo Flintstone Industries Association (Sindipedras), which congregates 21 companies accounted for 70 per cent of the crushed rock produced in São Paulo, and had allegedly been operating a cartel for the previous two years. An analysis of the materials seized in the dawn raid led SDE to initiate an administrative proceeding to investigate price fixing, market segmentation, production restriction, and bid rigging, illegal practices provided in Articles 20, I, II, III e IV and 21, I, III, VIII, X, XI, XII, XIII e XIV, Law 8884/94.

32. In November 2004, after a short period of investigation, SDE completed its investigation and recommended that CADE find unlawful collusion by Sindipedras and 18 of the 21 member companies. SDE based its recommendation on evidence that the companies: (a) maintained pricing data and daily sales figures in a central computer file at Sindipedras; (b) met on the association's premises to set cartel policies; (c) levied fines for failure to comply with group decisions; (d) divided customers and allocated sales quotas (including sales arising from bids tendered in public competitions); and (e) required a surcharge on sales made to customers assigned to other companies.

33. CADE issued its decision in July 2005, agreeing with SDE's analysis and fining the defendant companies amounts ranging from 15 to 20 per cent of their 2001 gross revenues (which was the biggest fine ever imposed by CADE), depending on the degree of their involvement in the cartels' administration. SDE also provided the evidence it had seized to the criminal enforcement authorities (cartel is also a crime according to Law 8137/90, the Brazil's economic crimes law), which resulted in the first criminal indictment for cartel in Brazil against 14 participants. In this criminal action, most of participants agreed with the criminal prosecutors' proposition (case's suspension and other fines). Therefore, the criminal action was suspended against these participants.

[***] Section 3 (g) of the Malawi Competition and Fair Trading Act.
[†††] Based on information received by UNCTAD secretariat from the Brazilian Competition Authority.

Commentary

34. Collusion in heavy investment industries in particular in ones that feed the construction industries has been suspected to be prevalent in many developing countries. In many cases, the evidence to prosecute collusion incidences is usually lacking. This case can therefore be seen as a success story of fighting cartels using the "dawn raid" method. Since dawn raids require resources and coordination between different agents, this case is a good example of how competition regulation institutions can work together in collaboration with other law enforcers to burst cartels.

6. Republic of Korea: Cartel in the telecommunications sector[‡‡‡]

Brief description

35. The Korea Fair Trade Commission (KFTC) was alerted of an alleged collusive agreement between two competing companies in the Republic of Korea’s telecommunication market in early January 2005. It was alleged that Korea Telecom (KT) and Hanaro Telecom had met several times between April and June 2003 in order to fix prices. At these meetings, KT requested that Hanaro raise its rates for inner-city calls to a level matching or similar to those of KT. In return, KT offered to concede 1 per cent of its market share per year to Hanaro for the following 5 years. At that time, Hanaro's rates for the services were about half those of KT. Hanaro demanded that KT give up 2 per cent market share each year. They finally agreed on 1.2 per cent concession of market share per year in return for reducing the difference of the price to a 10 per cent.

36. KFTC initiated preliminary investigation into this case and was able to gather some useful evidence towards proving the cartel to be illegal under Korean Competition Law, the Monopoly Regulation and Fair Trade Act. Nevertheless, the acquired indirect and/or circumstantial evidence was not sufficient to bring the case before the full commission. Fortunately, KFTC acquired some direct evidence to prove this price-fixing cartel with the help of Hanaro Telecom (one of the cartel members) during the full-fledged investigation. Hanaro actively cooperated with the FTC until the end of the investigation and provided substantial evidence.

37. In its defence, KT asserted that the price fixing was aided, and somewhat fine-tuned and overseen, by the Ministry of Information and Communication (MIC) in order to keep latecomer Hanaro Telecom viable in the market. KT, thus, argued that the respondents should be exonerated from any violation according to the rule of "state-aided cartel", corresponding to "state-action doctrine" established by the U.S. Supreme Court and accepted by almost, but not all, jurisdictions. During the investigation and hearing, MIC admitted that it presided the meeting to avert cut-throat competition, but strongly denied its involvement in the formulation of price-fixing cartel. The KFTC concluded that the cartel had not met the requirements for qualifying the doctrine and therefore the respondents could not be exempted from the violation.

38. On 25 May 2005, the KFTC announced that it had imposed record high surcharge, equivalent to administrative fine, against these two major fixed-line telecom operators for colluding on the rates for fixed-line local call service. KT and Hanaro Telecom were fined a

[‡‡‡] Base on information obtained from the Korea Federal Trade Commission website (http://www.ftc.gov).

total of 120 billion Won, tantamount to 120 million U.S. Dollars. KT, the Republic of Korea's largest fixed-line telecom's company was fined a total of 116 billion Won, which is the largest administrative fine ever imposed on a single company by the Korean Competition Agency.

Commentary

39. This case exemplifies the use of leniency programme when dealing with cartel cases. The revision of competition law provisions in the last decade has been characterized with the introduction of leniency programmes among other emerging issues in competition enforcement. The introduction of such programmes has increased cartel detection and prosecution in both developed and developing countries. It is a good direction to move for countries with cartel provisions, either by way of regulations or inclusion in the competition law. For countries in the process of drafting or revising competition laws, they may consider developing cartel provisions and also a leniency programme with the initial implementation regulations.

II. MERGERS AND ACQUISITIONS

7. South Africa: Merger in the shipping industry approved with conditions[§§§]

Brief description

40. The South African Competition Commission analysed a merger proposal between AP Moller-Maersk ("Maersk") and Royal P&O Nedlloyd N.V. ("PONL"), who are both in the shipping industry. The two sought to enter into a merger protocol whereby Maersk undertook to make a public offer for the entire ordinary share capital of PONL. Subsequent to the transaction, Maersk would acquire sole control of PONL.

41. The Commission's investigation established that there are barriers to entry in the market caused in part by the agreements on trading conditions in the industry and the cost of entering the market. However, in the past three years there had been entrants into the market in the South Africa/Middle East trade route, e.g. Global Container Line and MIA, and in the South Africa/ Far East trade routes, e.g. Maruba. In the South Africa/Europe trade route there had been no new entrants due to port constraints in South African ports. South African ports are relatively small and cannot accommodate certain types of large vessels.

42. The South African Competition Commission recommended a conditional approval of the proposed merger between Maersk and PONL. In view of the above and other information, the transaction was approved subject to certain actions. The conditions entailed the divestiture of PONL's assets, rights and obligations to its liner shipping activities on the South Africa/Europe and South Africa/North America routes, which will rectify the market structure to the pre-merger situation.

43. The transaction was notified to competition authorities in the European Union, the USA, Australia, Brazil, Bulgaria, Israel, New Zealand, Romania, Republic of Korea and Turkey. The South African Competition Commission and the European Commission were in

[§§§] Based on information received by UNCTAD secretariat from the South African Competition Commission.

contact during the investigation and shared information, with the parties' consent. The European Commission cleared the merger with conditions whilst the US antitrust authorities cleared the merger without conditions.

Commentary

44. This case shows the importance of sharing information when analysing merger applications. It also exemplifies the use of pre-merger notification criteria, which allows competition authorities to analyse the possible effects of a merger before it is consummated and design corrective measures in areas where competition is foreseen to be compromised. This ensures that the market will remain competitive after the merger is consummated by foreclosing abuse of dominance situations and other anti-competitive practices.

8. Zambia: International takeover in the telecommunications sector[****]

Brief description

45. On 15 June 2005 the Zambia Competition Commission received a formal notification from Telecel Zambia Limited by the MTN Group Limited of South Africa (MTN) The Board of the Zambia Competition Commission took note that on 15 June 2005, the MTN Group Limited of South Africa (MTN) made a formal notification to the Zambia Competition Commission for the takeover of 100 per cent shareholding in Telecel Zambia Limited. The Board also took cognisance to the fact that after preliminary market inquiries showed no substantive adverse effects in the relevant market, an Interim Authorisation was granted to the parties by Commission on 22 June 2005.

46. The Board of Commissioners considered that Telecel's acquisition of MTN was more likely to escalate into pro-competitive benefits for the mobile telecommunication market as MTN would be required to invest a substantial amount of their market capitalization in MTN Zambia for it to be competitive. MTN's expertise in the mobile sector in terms telecommunication technology, management and brand marketing was likely to enhance Telecel's competitiveness and image on the Zambian market. Furthermore, the planned expansion programme would likely lead to increased employment and the retraining of staff at Telecel would enhance the technical competencies to add to the competitiveness of the Zambian telecommunications industry.

47. The Board deliberated over the application and determined to grant final authorization for the transaction to take effect in Zambia, subject to the signing of a memorandum of undertakings, as follows:

(a) Ten per cent of the shares acquired by MTN must be warehoused in a Special Purpose Vehicle (SPV) for the beneficial ownership of the Zambian public.

(b) After the Board of the Communications Authority of Zambia gives approval of the transaction, the disposal of the 10 per cent stake for the benefit of the Zambian public must be executed within 15-18 months.

(c) MTN shall develop and establish an effective mechanism aimed at facilitating the ownership of the said 10 per cent of shares to the broader Zambian public.

[****] Based on information received by UNCTAD Secretariat from Zambia Competition Commission.

(d) MTN shall, within six months after taking over Telecel, identify a senior management official to be a Trade Practices Compliance Officer, and the officer shall be in constant touch with the Commission as regards implementation of the undertakings and compliance with the provisions of the Competition and Fair Trading Act, CAP 417 of the Laws of Zambia.

Commentary

48. In many developed and developing countries the telecommunications sector was under government control before the onset of liberalization and privatization programmes. The importance of telecommunication services in the development of any country cannot be over-emphasized. In addition, this sector is today experiencing tremendous changes in technological growth and also regulation. Introduction of new products and services is taking place at a very high late and is affecting all other sectors, which input on telecommunications. On the other hand, mergers and acquisitions are now very frequent in this fast growing sector, hence the importance of merger analysis to ensure that the competitive process is protected.

9. Brazil: Merger in the Brazilian iron ore market[††††]

Brief description

49. In January 2005, the Secretariat of Economic Law (SDE) concluded the analysis of one of the most important set of acquisitions ever examined by Brazilian Antitrust Authorities. This case involved the leading Brazilian mining corporation CVRD (Companhia Vale do Rio Doce) and consisted of the acquisition of four mining companies along with the two main railways in south-eastern Brazil, as well as the divestiture of cross-equity holding CVRD and one of the major Brazilian steel producers, *Companhia Siderurgica Nacional*.

50. In Brazil, according to Law 8884/94 (Article 54 onwards), mergers and acquisitions are submitted to the SDE, a division of the Ministry of Justice, who sends the cases to the Secretariat of Economic Monitoring (SEAE), in the Ministry of Finance, and after the latter's analysis theses cases are sent to Administrative Council for Economic Defence (CADE) to be judged. In general, these cases are usually analysed by the Antitrust Authorities *ex post*, following a Structure-Conduct-Performance (SCP) framework close to the Merger Guidelines applied in the USA. However, this framework was unable to address this set of acquisitions by CVRD, a newly privatized national champion. Therefore, SDE undertook a tough econometric exercise to reinforce the definition of the relevant geographic market and to test for a structural break in the price series.

51. In this case, it was observed that CVRD dominated the iron ore market by acquiring its main competitors and the railway and port logistics involved. Prices analysed by SDE showed clearly that pricing of iron ore in the domestic market changed significantly some time after the acquisitions.

52. SEAE and SDE concluded that the acquisitions significantly raised CVRD's market-share in three types of iron ore, as well as in railways and ports through which the products are transported and that, as a result, it would allow CVRD to exercise market power in the iron ore segments, as well as restrain access to the infrastructure. Based on these findings and

[††††] Based on information received by UNCTAD secretariat from the Brazilian Competition Authority.

with the purpose to guarantee a certain degree of competition in these markets, the Secretariats suggested some remedies as conditions for the approval of the acquisitions.

53. Both Secretariats also suggested that CADE approved the divestiture of the cross-equity holding between CVRD and CSN, with the recommendation to prohibit the preferential agreement that allowed CVRD to buy all the iron ore produced by CSN at the "Casa de Pedra" mine. It is interesting to note that SEAE's and SDE's recommendations regarding the mining companies' acquisition were different. In essence, SEAE blocked one of the deals and suggested the divestiture of additional mines in order to address anticompetitive concerns in iron ore and infrastructure altogether. SDE's recommendations, otherwise, focused on divestiture in infrastructure and considered that the prohibition of the preferential agreement that allowed CVRD to buy all the iron ore produced by CSN at Casa de Pedra mine would be enough to guarantee competition in the iron ore segment as well.

54. In January 2005, the case was sent to CADE to be ruled, and the judgment occurred in July 2005. CADE, agreeing with SDE's analysis, imposed these structural remedies: (i) Exclusion of the "Clause of Preference" of the "Casa de Pedra" signed agreement (cross-divestiture CVRD-CSN) and to sell Ferteco or (ii) Consolidation of the MBR and Ferteco's stakes in the MRS railway into a single stake, voided any veto power and CVRD must notify BAS of any acquisition of iron ore reserves, and Ministry of Justice shall investigate any mergers and acquisitions involving CVRD in the last 5 years. Besides, ANTT (the regulatory agency in charge of land transportation) approved new accounting plan for CVRD's own railway to better identify attempts to discriminate users. After the CADE judgment, the defendants appealed to the judicial courts in order to suspend CADE's decision. The case is pending judgment in the judiciary.

Commentary

55. In sectors where heavy investments are required, very few players are attracted to such markets. The possibility of monopolistic situations with the likelihood of abuse of dominance can be expected in such markets. The current case shows that competition authorities can use the provisions of the law to institute structural remedies in form of undertakings or conditions for merger/acquisition approval. This forecloses possible anti-competitive practices, which may result from a merger.

10. Malawi: Merger in the petroleum sector

Brief description

56. On 13 October 2005, Total Malawi Limited lodged an application for authorization of a takeover of Mobil Malawi Limited (Malawi) by Total Malawi Limited (Total) with the Malawi Fair Trading Commission. Total and Mobil are subsidiaries of Total Outre-mer S.A and Mobil Holdings (Europe and Africa) Limited, respectively. This is an international merger, of which the two parties to the transaction each have a subsidiary in Malawi. At international level, the merger has already been consummated. The parties were seeking a similar arrangement to be authorized for consummation in Malawi.

57. The Malawi Fair Trading Commission evaluated the merger application and also conducted its own investigations. The relevant market was defined as the importation, supply and distribution of petroleum products in Malawi. The combined final market share of the

merged entity of Total and Mobil in Malawi would be 32 per cent, taking into account the equilibrium shareholding rule in Petroleum Importers Limited (PIL). This would result into a market concentration ratio for the top three players (CR3) in the relevant market of more than 70 per cent. However, the Total-Mobil merger accounts for 32 per cent of this concentration, thus leaving about 68 per cent of the market to be in the control of competitors. This market concentration is still open to more competition and thus the resultant concentration is not likely to, in and of itself, alter competition in the relevant market.

58. Since there is no oil refinery in Malawi, all petroleum products are imported into the country, mainly through PIL; however, other operators with no shareholding in PIL, are allowed to import their petroleum products separately. Neither merged entity of Total-Mobil (32 per cent) nor the market leader BP (39 per cent) command a market share that can be considered as dominant, therefore, the merged market share of Total and Mobil would not act as a barrier to entry into the market for other operators as evidenced by the entry of Niot, Injena and Energem over the past two years. However, the form of barriers to entry in the relevant market worldwide exist in terms of high initial capital investment in storage facilities and distribution facilities including exorbitant trade licence fees for new entrants.

59. The Board of the Malawi Competition Commission authorized, on economic efficiency grounds, the takeover of Mobil Malawi Limited by Total Malawi Limited subject to the conditions stipulated here under. Consequently, in accordance with section 39 (2) of the Competition and Fair Trading Act, Total should provide written undertakings aimed at satisfying section 38 of the Act, namely that:

(a) the Takeover shall not in any way negatively affect employment levels of the parties to the transaction vis-à-vis the merged entity;

(b) there shall be no redundancies whatsoever as a result of the takeover;

(c) that Total should notify and obtain authorization from the Commission for any dealership agreements entered into with any dealer or distributor of its products in Malawi. This shall include all current agreements and any future agreements and any changes to the said agreements from time to time;

(d) in the event that Total decides to import its fuel products outside the PIL facility, such a decision should be notified for authorization to the Commission.

Commentary

60. This case illustrates the importance of enforcing competition law in least developed countries. This is an international merger with effects in Malawi. However, without the enforcement of the competition law, Malawi would not have been able to analyse the effects of this merger on the domestic market. In this case, the conditions attributed to the approval of the merger enabled the competition authority to monitor the activities of the merged enterprise.

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