

Intergovernmental Group of Experts on Competition Law and Policy

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**"Tripartite Peer Review of Competition Law and Policy in the
United Republic of Tanzania, Zambia and Zimbabwe"**

Written contribution by

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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

**TRIPARTITE PEER REVIEW OF COMPETITION LAW AND POLICY IN
TANZANIA, ZAMBIA and ZIMBABWE**

III. Question by the Competition Authorities

Question 20 (to be addressed to the EU)

Zambia: *Please describe the investigatory and adjudicative process within the European Commission*

Proposed response:

(a) Investigative and adjudicative process within the European Commission

Antitrust

Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹ ("Regulation 1/2003"; [EUR-Lex - 32003R0001 - EN](#)) introduced a system of shared competences between the European Commission ("Commission") and the National Competition Authorities of the Member States ("NCAs") to implement EU antitrust provisions (excluding merger control) throughout the European Union ("EU"). Regulation 1/2003 therefore describes the possible powers of investigation and decision of the Commission, and the relationship to the NCAs and the national courts. In our response, the Commission will however limit itself to its own powers.

Under Regulation 1/2003, the Commission can either adopt a **"prohibition decision" ordering the termination of the infringement** (with possible fines) (Article 7 of Regulation 1/2003) or consider to settle the infringement by adopting a **"commitment decision"**(Article 9 of Regulation 1/2003).

- Article 7 decisions (prohibition decisions)

Where the Commission, acting on a complaint² or on its own initiative, finds that there is an infringement of Articles 101 and/or 102 of the TFEU, it may by decision require the undertakings and associations of undertakings concerned to bring such an infringement to an end. For this purpose it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

Pursuant to Article 23, paragraph 2 of Regulation 1/2003, the Commission may impose an administrative fine against the infringing undertaking. This fine may not exceed 10% of the undertaking's worldwide annual turnover. The regulation

¹ Since the entry into force of the Lisbon Treaty on 1 December 2009, Articles 81 and 82 EC Treaty have been respectively renumbered into Articles 101 and 102 of the TFEU.

² Those entitled to lodge a complaint are natural or legal persons who can show a legitimate interest as well as Member States.

does not authorise fines against individuals. Commission guidelines explain the considerations applied in setting fines for infringements of Articles 101 and 102 of the TFEU ([EUR-Lex - 52006XC0901\(01\) - EN](#)).

- **Article 9 decisions (commitment decisions)**

Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding upon the undertakings. Such a decision may be adopted for a specific period and shall conclude that there are no longer grounds for action by the Commission.

Contrary to prohibition decisions, commitment decisions do not constitute decisions in substance and therefore do not find the infringement in a legally binding way.

The Commission may, upon request or on its own initiative, reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Regulation 1/2003 makes clear that the Commission can, where it accepts binding commitments to correct infringements, impose a fine for failure to comply with these commitments.

The same provisions on fines apply as for Article 7 decisions (see above). However, commitments are not to be accepted in cases where the Commission intended to impose a fine in the first place.

In order to carry out its tasks, the Commission's **investigative powers** allow it to:

- (i) conduct an inquiry into a particular sector of the economy or into a particular type of agreements across various sectors (so-called "sector inquiry");
- (ii) send out requests for information;
- (iii) carry out interviews of any natural or legal person who consent;
- (iv) request competition authorities of Member States to carry out an inspection;
- (v) conduct all necessary inspections at the business premises of the undertakings concerned itself and;
- (iv) conduct such inspections, in specific circumstances, in other premises³.

³ Articles 17-22 Council Regulation 1/2003, OJ (2003) L1 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT>).

Mergers

The Commission has also been given the competence to review mergers which have a Community dimension⁴. All concentrations falling within the scope of Regulation 139/2004 (article 1) need to be notified to the Commission prior to their implementation.

Where the Commission finds that the thus notified concentration raises serious doubts as to its compatibility with the common market, the Commission shall initiate proceedings which may lead to either a decision declaring the concentration compatible with the common market (as the case may be, following modifications to the notified transaction by means of commitments offered by the notifying parties) or prohibit the concentration to be implemented. Commitments may be structural (e.g., divestiture) or behavioural (e.g. obligation to grant access to certain infrastructure or intellectual property rights).

Where undertakings are found to have breached the above obligations (by failing to notify a concentration prior to its implementation or by implementing a concentration which has been found to be incompatible with the common market or in breach with the commitments agreed), the Commission can require the undertakings to dissolve the concentration and take any appropriate measure to ensure that the concentration is dissolved or the previous competition situation restored. The Commission can in such case also impose fines on the undertakings concerned not exceeding 10% of the aggregate turnover of the undertakings concerned.

In order to carry out its duties, the Commission's **investigative powers** allow it to:

- (i) send out requests for information;
- (ii) request the competition authorities of the Member States to carry out inspections;
- (iii) carry out all necessary inspections itself⁵.

State aid

EU competition legislation includes a system of State aid control whereby State aid which distorts or threatens to distort competition is prohibited in so far as it affects trade between Member states (Article 107 (1) TFEU).

As a general principle, before implementing any state aid, prior notification is required by the European Commission.

In practice, the Commission's assessment is focused on large State aid cases only coming with a high risk of competition and trade distortions. Aid amounts below 200,000 EUR over three years to a single undertaking are for instance not considered to be

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24 ([EUR-Lex - 32004R0139 - EN](#)) Since the entry into force of the Lisbon Treaty on 1 December 2009, Community dimension should read as European Union dimension.

⁵ Articles 11-13 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24 ([EUR-Lex - 32004R0139 - EN](#)).

State aid and thus need no authorisation by the European Commission⁶. Furthermore a lot of individual aid measures can be implemented under aid schemes: Once the terms and conditions of an aid scheme are approved by the Commission, individual aid measures falling under this scheme do not have to be notified any longer.

When a negative decision is taken in cases of unlawful State aid, the Commission shall decide that the Member State must take all necessary measures to recover the aid from the beneficiary. Recovery of unlawful and incompatible State aid is not regarded as a "penalty". The purpose of recovery is to restore the situation that existed prior to the granting of the illegal and unlawful aid and to restore the level playing field for all the competitors on the market.

In order to carry out its duties, the **Commission's investigative powers** enable it to:

- (i) request all necessary additional information to Member States to complete a notification; or
- (ii) in case of unlawful aid, request Member States to provide all necessary information regarding within a set deadline ("so-called information injunction")⁷.

(b) The rights of defendants in Commission competition procedures

The Commission must comply with general principles of EU law, which include *inter alia* the respect of the rights of defence, during its administrative proceedings⁸. More specifically, the European courts have consistently held that the right to be heard is an essential component of the rights of defence⁹. The right to be heard, as a consequence drawn from its fundamental nature, must be guaranteed even in the absence of any specific legislation.

In competition proceedings the right to be heard involves two main dimensions: first, an obligation on the Commission to make its case known to the defendants (i.e., by means of adopting a Statement of Objections); secondly, an obligation to grant the defendants an opportunity to submit their comments on the Commission's objections. In addition, the parties are involved throughout the decision-making process (after opening of formal proceedings; once the investigation is at a sufficiently advanced stage; after issuing statement of objections).

Before a defendant can submit its comments, it must have access to the Commission's case file, other than business secrets, other confidential information and internal documents. Regarding the second dimension of the right to be heard, i.e., the possibility for the defendant to make known its own views on the Commission's objections, the law has imposed on the Commission a formal duty to hear the defendants first in writing and

⁶ Regulation N.1998/2006 of 15 December 2006 on the application of Article 87 and 88 of the Treaty to de minimis aid, OJ L 379 of 28.12.2006

⁷ Council Regulation No 659/1999 of 22 March 1999 laying down [detailed rules for the application of Article 93 \(now Art.88\)](#) of the EC Treaty, Official Journal L 83/1, 27.03.1999, p. 1-9, see in particular articles 5 and 10.

⁸ Cases 100 – 103/80 *Musique Diffusion Française*, [1983] ECR 1825, point 8 and 9, among many others

⁹ The European courts have stated that the rights of defence include, in particular (i) the right to be heard, (ii) the right of access to file and (iii) the principle of good and sound administration. See Cases T-191/98 and T-212 to 214/98 *Atlantic Container Line v. Commission* [2003] ECR II-3275.

then orally, if they so request. Defendants are not obliged to have an oral hearing, and sometimes do not request such a hearing.

An oral hearing, run by a Hearing Officer, is usually held in the presence of the case team, the responsible Director, a member (at least) of the Commission's Legal Service, members of other associated Commission services and a number of representatives of National Competition Authorities from EU countries. An oral hearing is however not a public event.

While it is very rare for the Commission to abandon a case following an oral hearing, oral hearings often lead the Commission to adjust some particular points of importance to the defendants, or to drop certain of the objections. Oral hearings have also helped to establish correctly the duration of the infringement in antitrust cases, to modify the scope of the infringements found, or to appreciate in a more correct manner the role that aggravating or mitigating circumstances should play in the subsequent stage in determining the level of fines. They have also had an important impact on the Commission perception as to the sufficiency of commitments proposed by the notifying parties in merger proceedings.

(c) Judicial Review: General Court and the Court of Justice

All Commission decisions (both investigative and adjudicative) are subject to oversight by the General Court and the Court of Justice (Article 263 TFEU). Subject to certain conditions, the parties can bring an action in the General Court to annul Commission decisions in an infringement matter (whether to terminate the violation or pay a fine) on grounds of fact or law¹⁰. The Court of Justice can review judgments of the General Court, but only on matters of law.

Filing the court action does not in itself suspend the application of the decision. The parties can request that the General Court suspend application pending the appeal. For fines, the Commission's practice is to agree to suspend pending appeal, on condition of providing a bank guarantee for the fine plus interest.

The grounds for judicial review are lack of competence, infringement of an essential procedural requirement, the Treaty itself or a rule of law related to its application and misuse of power (article 263 TFEU). Despite this apparently narrow scope, the General Court and the Court of Justice have also overturned Commission decisions for inadequacy of evidence or error of fact. The courts have devised a category of "comprehensive review," and when applying it the General Court will control the accuracy and quality of the Commission's reasoning about economic and market analysis. The court rules provide for commissioning independent expert reports and these have been relied upon to overturn the Commission's findings and conclusions.

The review by the EU Courts involves review of both the law and the facts and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of the fine. The power of the courts to review the amount and appropriateness of a fine is unlimited. The courts do not require the Commission to follow a prescribed formula, recognising that an element of discretion is needed to tune sanctions to effective deterrence. But in law, the courts can reach their own decisions about the reasonableness of fines. Because of how fines are determined, this means

¹⁰ Article 263 of the TFEU

the courts could effectively substitute their own opinions for the Commission's about the gravity and duration of the infringement.

The Commission merger decisions are subject as well to review by the Courts of the European Union. As in the case of antitrust, the Courts of the European Union fully review the findings of facts (i.e., their accuracy) and the Commission's application of the law (i.e., the absence of an error in law), but do recognize a margin of appreciation to the Commission with regard to complex economic assessments¹¹.

The above described legal system of the European Union has been found to be fully compatible with the requirements of the European Convention of Human Rights (hereafter "ECHR") and with fundamental rights, as common constitutional principles of the Member States¹².

Question 23 (to be addressed to South Africa/ Namibia/ EU)

Zimbabwe: In the absence of cooperation agreements between the competition authority and sector regulators, should the competition authority leave it to the sector regulator to handle those competition cases that only involve players in the regulated sector? In all other cases, whose determination should take precedence – the competition authority's or those of the sector regulators? What challenges, if any, are being faced in the implementation of concurrent jurisdiction agreements with sector regulators?

Proposed response:

There may indeed be situations where the competition agency and sectoral regulators have concurring jurisdiction if the conduct of a given company is also caught by specific regulation (energy, telecoms,...). Hence, the same behavior can constitute a breach of both the specific sectoral regulation and the competition rules. This situation is to be distinguished from the situation whereby the sector regulator would have exclusive competence to apply competition rules in a given sector (i.e., where there would be no concurring competence with the competition agency).

Contrary to competition authorities who address "ex post" abusive behavior (such as refusals to deal), regulators usually fix access conditions "ex ante" without waiting for possible disputes. Where regulators impose access obligations or "cost oriented" tariffs, they should make sure to preclude possible "ex ante" anti-competitive behavior like refusals to deal, discrimination, excessive prices or margin squeezes. In this regard, regulators must also "promote" competition.

Concurrent jurisdictions can however lead to conflicts such as in the following instances:

¹¹ See in that regard Article 21(2) of the EC Merger Regulation; see e.g., case T-87/05 *Energias de Portugal (EDP) v Commission*, ECR [2005] II-3745, paragraph 151.

¹² See Judgment of the Court of First Instance of 8 July 2008, *Lafarge SA v Commission*, Case T-54/03, [2008] ECR p. II-120 pts. 36 to 47; See also Judgment of the Court of First Instance of 11 March 1999, *Aristrain v Commission*, Case T-154/94 [1999] ECR p. II-645, points 30 to 41; See also judgments of December 2011 by the European Court of Justice in *Chalkor* and *KME* (not yet published).

- Firstly, where the regulator fixes access conditions on the basis of methodologies which do not fully take into consideration the competitive situation in all relevant markets. For example, a regulator may mandate cost oriented wholesale prices without regard to the prices charged in the retail market. This may lead to margin squeezes.
- Secondly, where the regulator bases its pricing decisions on past factual data which is outdated by the time the prices are applied, as can happen in quickly evolving industries (such as telecoms/ broadband). This may also lead to margin squeezes.
- Thirdly, the incumbent may disregard regulatory access obligations (timing, pricing, quality, non-discrimination, etc..). In such case, affected entrants will have to choose which recourses they want to initiate against the anti-competitive behaviour concerned (complaint before competition agency or sector regulator). The rights of complainants (rejection of complaint, access to file) as well as the speed of the procedure may differ significantly depending on the procedure chosen.

It is important however to ensure that the situation of concurrent competences never leads to the competition agency being deprived of its power to enforce competition law in regulated sectors, i.e., start an enforcement action against any conduct that could be characterized as a violation of competition law, or raise core competition issues (such as mergers). The competence of the regulator should in this respect not have any consequences for the competition authority.

In the EU context for instance, this was confirmed by the General Court of the European Union in its judgements of 29 March 2012 in cases T-336/07 and T-398-07 where the Court rejected claims that the principle of legal certainty prevented to alter *ex post* (by means of a competition decision) an *ex ante* regulatory framework. The Court emphasised that sectoral legislation had no effect on the competence of the European Commission [to enforce competition laws], the latter supplementing the "*ex ante*" regulation¹³.

¹³ Judgements of the Gneral Court of the European Union of 29 March 2012 in case T-336/07 Telefonica SA and Telefonica de España SA v European Commission and Case T-398/07 Kingdom of Spain v European Commission, (not yet published); See also judgment of the General Court of 14 October 2010 in case C-280/08 , Deutsche Telekom AG v European Commission (not yet published). Specific to the EU situation moreover is that the application of EU competition rules has primacy over national laws.