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CASE STUDIES ON CO-OPERATION AND CROSS-BORDER ENFORCEMENT BETWEEN SMALL NEIGHBOURING COUNTRIES AND LARGER DOMINANT ECONOMIES

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INTRODUCTION: THE NEED FOR COOPERATION IN INVESTIGATION OF CROSS-BORDER CASES

One of the important factors which determine the effectiveness of enforcement of competition law, especially when it comes to cross-border anti-competitive activities is cooperation.¹ International cooperation, which refers to activities of collaboration, knowledge and resource sharing, enables the creation of mutual synergies between competition agencies, thereby substantially aiding the enforcement of respective competition rules in a particular region.² Moreover, the lack of international cooperation to check the increasingly transnational nature of anti-competitive activities, (for instance cross-border cartels which are commonly cited³) can be immensely harmful to the respective host economies.

Notably, the need and importance for international cooperation has been recognised and widely deliberated in international fora such as UNCTAD⁴, OECD⁵ and ICN⁶. However, it still remains an area fraught with challenges. Bearing in mind the objective of fostering international cooperation to tackle transnational anti-competitive activities, it is important to start at the bottom of the pyramid i.e. focusing on how existent competition regimes can be geared to cooperate and collaborate with (or even provide assistance to) emerging regimes to tackle cross-border or extra-territorial activities which harm competition.

In this context, it is pertinent to highlight two types of situations which might be able to help to bring together important pieces in the jigsaw puzzle of “international cooperation”:

¹ Note by UNCTAD secretariat, *Informal cooperation among competition agencies in specific cases*, 2 (2014)

² Id.

³ OECD, *Improving International Co-operation in Cartel Investigations*, (2012), available at <http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf>

⁴ http://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf

⁵ <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>

⁶ <http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf>

- 1) Wherein cooperation between authorities of dominant economies and relatively small neighbouring economies has helped (or may have helped) in safeguarding competition principles in the transnational dimension.
- 2) Wherein a relatively mature competition authority has successfully adjudicated a complaint about extra-territorial conduct, positively affecting competition in the neighbouring or adjoining country, and or another country which is a member of the customs union or regional economic agreement.

These instances are expounded below through detailed case studies:

THE CASE OF COOPERATION THAT COULD HAVE BEEN: BHUTAN AND INDIA

To highlight the need for cooperation, an instance of how a small landlocked country had to make persistent efforts to tackle exclusive practices of a neighbouring Transnational National Corporation (TNC) deserves mention here.⁷ The case is of Bhutan, which borders India and relies hugely on imported goods from India (over 80 percent goods come from India).⁸ Indian companies which wish to operate in Bhutan, generally do so through local wholesale distributors who are licensed by the Bhutanese government to operate as such.⁹

It was in 1994 that the Ministry of Trade and Industry (MTI) was asked by the Bhutanese King to demonopolise the wholesale distribution chain, thus, regulating the functioning of Indian dealerships.¹⁰ As per the order, no single firm was allowed to operate as the sole selling agent of a company which had operations in Bhutan.¹¹ One such dealership in Bhutan was the Tashi Business Group, which was *inter alia* the sole distributor of the India based company, Hindustan Lever Ltd (HLL, an Indian subsidiary of Unilever).¹² When MTI acted to liberalise competition in the Bhutanese market by asking HLL to appoint a second wholesaler, HLL refused stating that the market is too small. Only after the MTI sent an ultimatum of cancellation of license of Tashi Business Group to deal exclusively with any particular product line because it had no jurisdiction over HLL in India, did HLL appoint the Food Corporation of Bhutan as its second wholesaler. Notably, this opened up the vertical chain to more competition through new outlets which benefited HLL's business in Bhutan significantly.¹³

This is a clear example where a small neighbouring country had to unilaterally use innovative methods to tackle a potential anti-competitive practice having a base outside its jurisdiction. The fact that Bhutan lacked the backing of a competition law framework made it much more difficult for the Bhutanese government to discipline an import distributor. Moreover, the fact that both trading countries are set to benefit from eradicating potential anti-competitive problems or policy led

⁷ Dopfu Tshering, *Anti-competitive Practices and Dispute Settlement at the Regional Level in South Asia: Perspectives from Bhutan*, 5 (2006), available at http://unctad.org/sections/wcmu/docs/c2clp_ige7p7_en.pdf

⁸ More import related details available at <https://tradingeconomics.com/bhutan/imports>

⁹ Mehta, Pradeep S. (2001)

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

distortions¹⁴ strengthens the case for international cooperation. The case for cooperation between dominant economies such as India and smaller neighbouring economies like Bhutan is especially relevant as cross-border anti-competitive practices can adversely affect both countries by inhibiting growth, economic development and free trade.

CASE FOR CROSS-BORDER ENFORCEMENT: BOTASH AND COMPETITION COMMISSION OF SOUTH AFRICA

In October 1999, Botash, a Botswana based producer of Soda Ash along with its South African distributor, Chemsolve approached the Competition Commission of South Africa and launched an application for interim relief against American Natural Soda Ash Corporation (Ansac), an association of five US soda ash producers. Botash alleged *inter alia* that Ansac had entered into anti-competitive price-fixing agreements¹⁵ and had engaged in anti-competitive market allocation in South Africa.¹⁶

The Commission finalised its investigation in 2000 and referred the complaint to the Competition Tribunal (“the Tribunal”) for adjudication. One of the primary issues which arose in this case was whether price fixing was a *per-se* offence or did it attract a *rule of reason* approach.¹⁷ During the stage of pre-hearing, the Tribunal asked the parties to present their respective opinions on the interpretation of s. 4(1)(b) and then tried to determine whether price fixing allegations allowed for an efficiency defence.¹⁸ The Tribunal found that Ansac had contravened the provisions of the Competition Act, following which Ansac appealed to the Competition Appeal Court (CAC).¹⁹

The CAC upheld the Tribunal’s decision and Ansac lost the appeal. However, Ansac then brought its case to the Supreme Court of Appeal of South Africa (SCA), wherein *per se* standard was upheld. But a caveat to this was introduced and the SCA mentioned that by engaging in, for example, ‘per se’ illegal price fixing, the Competition Tribunal must admit evidence relating to the nature, purpose and effect of the horizontal agreement or practice in question.²⁰

But, one may ask how was Botash, (being primarily a Botswanan firm) allowed to enforce the Competition Act of South Africa and levy allegations of price fixing (and succeed in doing so) against an American association conducting business in SA? In order to answer this fundamental query which hits at the heart of cross border competition enforcement, it is important to highlight how Botash’s *locus standi* was established in the present case. Notably, Botash’s *locus standi* in this case was challenged by Ansac as follows:

¹⁴ These are distortions to competition which emanate from policies of the government and need to be tackled ex-ante through tools such as [Competition Impact Assessment](#) and [Regulatory Impact Assessment](#). CUTS has consistently tracked policy led distortions to competition in India through a quarterly Dossier. For a full list, kindly visit http://www.cuts-ccier.org/Competition_Distortions_India.htm

¹⁵ Contravention of section 4(1)(b)(i) of the South African Competition Act

¹⁶ Contravention of Section (4)(1)(b)(ii) of the South African Competition Act

¹⁷ This issue arose when ANSAC argued that in order to sustain a charge under Section 4(1)(b) it was incumbent upon the complainant to prove that the horizontal agreement that forms the basis of the charge generated anti-competitive effects. Through this, Ansac introduced an argument in favour of the rule of reason approach.

¹⁸ Kasturi Moodaliyar & Keith Weeks, Characterising Price Fixing: A Journey Through the Looking Glass with Ansac, SAJEMS NS 11, p.338 (2008) No 3, available at <http://www.scielo.org.za/pdf/sajems/v11n3/08.pdf>

¹⁹ Id.

²⁰ Ibid., at p.337

“Anzac state that in order to be able to claim the type of relief it seeks Botash must allege and prove that it was adversely affected by Anzac's conduct. This is premised on the fact that at common law an applicant seeking relief by way of an interdict for the breach of a statutory duty must allege and prove it has suffered special damages unless the applicant falls within a class of persons for whom the statutory duty was specifically intended. Since no such allegation is made, Botash has not established its locus standi and accordingly the pleadings are excipiable.”²¹

It is interesting to note Botash’s counterargument in this regard which was upheld by the Tribunal. Botash’s principal argument establishing its *locus standi* arose from the statutory provisions of the South African Competition Act itself. The argument relied principally on Rule number 46(1) of the Tribunal’s Rules, which states:

*46(1) At any time after an initiating document is filed with the Tribunal, **any person who has a material interest in the relevant matter** may apply to intervene in the Tribunal proceedings by filing a Notice of Motion in Form CT 6, which must –*

(a) include a concise statement of the nature of the person’s interest in the proceedings, and the matters in respect of which the person will make representations;

Notably, the requirement of the Rule is *material interest in the relevant matter* and as noted by the Tribunal, the same intention also came out from Section 53 of the Act.²² In furtherance of this, the Tribunal stated that *“Botash has demonstrated that it has a material interest. It is a competitor of Anzac and has a substantial share of the market in which the alleged restrictive practice is being perpetrated.”*

From this instance, it follows that statutory provisions of competition law can allow for a wide range of enforcement challenges, including those which affect companies across borders, provided they compete within the relevant market and have a material interest therein. Moreover, from the present case, there emerges a possibility where a mature competition regime can address a neighbouring nation’s interests by utilising its competition law provisions. Such cases present a novel context towards collaborative competition enforcement and set forth unique opportunities which need to be explored by agencies and competition authorities through cross-linkages and indulging in cross-learning.

EXPERIENCE OF COMPETITION COMMISSION OF SINGAPORE

The Competition Commission of Singapore (CCS) is perhaps one competition authority which has shown consistent pro-activeness in coordination with other competition agencies. Moreover, CCS has in several instances pro-actively checked possible competition concerns arising out of cross-border mergers and strategic alliances, as a result of which other countries have indirectly benefitted. There are instances ranging from enforcement actions to assessment of combinations wherein CCS has made

²¹ <http://www.saflii.org/za/cases/ZACT/2001/46.html>

²² 53(1) *The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:*

*(iv) **any other person who has a material interest in the hearing**, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant’s interest to be adequately represented*

use of formal and informal methods of cross-border cooperation mechanisms.²³ These have been briefly elucidated below:

²³ Presentation by Toh Han Li, CCS, available at <http://www.mycc.gov.my/sites/default/files/2-2%28Mr.Han%20Li%20Toh%29%20CCS.pdf>

1. Cooperation to analyse cross-border strategic alliances

The CCS in 2013 assessed a proposed Alliance entered into between Emirates and Qantas Airways Limited.²⁴ The proposal between the parties included coordination of networks, scheduling, pricing, marketing, purchasing, customer service, frequent flyer programs and resourcing decisions in their passenger and freight operations globally for an initial term of ten years.²⁵ After considering the possible competitive effects of the Alliance, the Commission was of the view that it would appreciably restrict competition, particularly on the Singapore-Melbourne and Singapore-Brisbane routes, owing to price and capacity coordination between both airlines.²⁶ In order to address these concerns raised by CCS, the airlines provided a voluntary undertaking and promised a combined total of 8,246 seats weekly on each of the Singapore-Melbourne and Singapore-Brisbane routes.

The CCS reached out to its Australian counterpart, the Australian Competition and Consumer Commission (ACCC) to confirm uniformity of the voluntary capacity commitments. The commitments made to the CCS turned out to be similar to the ones offered to the ACCC, and thus, the CCS approved the proposed alliance and found that it would result in net economic benefit to Singapore.²⁷

2. Cooperation in cartel enforcement

One prominent example of informal cooperation in an enforcement action of CCS is the “Chicken cartel case”. In this case, the Commission issued a Proposed Infringement Decision (“PID”) against 13 fresh chicken distributors for engaging in anti-competitive agreements to coordinate the amount and timing of price increases, and agreeing not to compete for each other’s customers in the market for the supply of fresh chicken products in Singapore.²⁸

Notably, CCS coordinated with the Malaysian Competition Commission (MYCC) at a preliminary stage to gather information regarding the broiler market considering the MYCC had conducted a market study into the Malaysian broiler market.²⁹ This information was essential because the general market practice of distributors was to import fresh chicken from Malaysian farms, which were then slaughtered and sold in Singapore. This cross-border dimension made it important for CCS to understand the Malaysian broiler market and also learn from MYCC’s market study of the broiler market. This cooperative exchange was helpful in terms of providing background market information

²⁴ CCS Media Release, *CCS Clears the Emirates-Qantas Alliance with Undertaking by Parties on Seat Capacity*, (2013), available at <https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-clears-the-emiratesqantas-alliance-with-undertaking-by-parties-on-seat-capacity>

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ CCS Media Release, *CCS Issues Proposed Infringement Decision against 13 Fresh Chicken Distributors for Price Fixing and Market Sharing*, (2016), available at <https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-issues-pid-against-13-fresh-chicken-distributors-for-price-fixing-and-market-sharing>

²⁹ Supra 23

for CCS and also assisted in making headway in information gathering which significantly reduced the investigation timeline.³⁰

3. Missed opportunities for cooperation

In 2014, CCS was notified of a proposed acquisition of the online recruitment platform and related businesses of JobStreet Corporation Berhad (“Jobstreet”) by SEEK Asia Investment Pte. Ltd. (“SEEK Asia”).³¹ Both companies offered recruitment services in Singapore through online platforms and the proposed acquisition brought together the top two online recruitment advertising service providers in Singapore.³² As per assessment of CCS, both online platforms were each other’s closest competitors and there were chances that their merger might lead to reduction in competition resulting in increase in prices and/or exclusive contracts which could harm customers.³³ To address these concerns highlighted by CCS, SEEK offered certain commitments to the Commission which were accepted and the merger was, ultimately, cleared with structural and behavioural commitments.³⁴

However, it was observed that JobStreet had entities located in other countries like Malaysia, Philippines, Indonesia and Vietnam apart from Singapore and their respective competition agencies were not notified of the acquisition.³⁵ Moreover, it was probable that these jurisdictions would have been affected by the acquisition making a regional acquisition (Association of Southeast Asian Nations).³⁶

This seemed to be a clear opportunity for regional cooperation between competition authorities but unfortunately the same was missed (for reasons best known to the authorities). Furthermore, missed opportunities like these make a case in favour of efficient implementation of formal cooperation mechanisms like Memoranda for Understanding (MoUs).

Moldova’s learning experience

Another example of a small country’s competition regime benefitting from its surrounding mature jurisdictions is the Moldovan competition authority. Notably, the Republic of Moldova has observer status within the Eurasian Economic Community (EurAsEC)³⁷ and the Competition Council of Moldova is a part of Interstate Council for Antimonopoly Policy (ICAP) and the Central European

³⁰ Id.

³¹ CCS Submission for the Global Forum on Competition, *The Impact of Disruptive Innovations on Competition Law Enforcement*, 3 (2015)

³² CCS Media Release, *CCS’s Reasons for Conditionally Approving the Proposed Acquisition of JobStreet Singapore by SEEK Asia Investments Pte. Ltd.*, available at <https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-publishes-reasons-for-conditionally-approving-the-proposed-acquisition-of-jobstreet-singapore-by-seek-asia-investments-pte-ltd>

³³ Id.

³⁴ Details about the behavioural commitments of the acquisition are available at <https://www.ccs.gov.sg/~media/custom/ccs/files/public%20register%20and%20consultation/public%20consultation%20items/proposed%20acquisition%20by%20seek%20asia%20investments%20pte/seekgrou ndsofdecisionpublicversion31october2014.ashx>

³⁵ <http://www.conventuslaw.com/archive/singapore-seek-ltd-and-seek-asia-investments-pte-ltd-offer-commitments-to-allow-their-merger-to-go-through/>

³⁶ Id.

³⁷ http://www.eurasian-ec.com/index.php?option=com_content&task=view&id=2&Itemid=7

Free Trade Agreement.³⁸ Its close cooperation with the ICAP allowed the authority to initiate common market investigations in several industries such as retail food, petrol and pharmaceuticals.³⁹

Moreover, the Moldovan Competition Authority was reportedly involved in a case-specific informal cooperation arrangement in a case related to Car Insurance.⁴⁰ The Moldovan authority had requested expertise of the Austrian competition authority and received important inputs from the same.⁴¹ Another example of cooperation was when the Moldovan authority worked together with the Federal Antimonopoly Service of the Russian Federation (FAS) to tackle an alleged violation of the midstream and downstream petrol market.⁴² In another instance, the Moldovan competition authority requested and received reliable information from its Romanian counterpart on the alleged abuse of a dominant position of a Moldovan enterprise.⁴³ The officials of the Competition Council of Moldova have also undergone training on visits to the FAS which have helped build their capacities vis-à-vis competition enforcement tools, economics of competition and competition advocacy.⁴⁴

These instances of informal cooperation have aided the Competition Council of the Republic of Moldova to effectively deal with competition cases and build internal capacities with help from its neighbouring big-brother jurisdictions.

CONCLUSION

From the abovementioned select cases studies, a plausible inference follows i.e. the scope for international cooperation in competition matters is not limited to the domains of established competition authorities and developed competition regimes of the world. Many already have agreements of cooperation. These cases further provide credence to the idea that international cooperation and *just* enforcement of competition law and policy (beyond a nation's borders) can act as important elements (especially for smaller emerging economies) in a country's/region's endeavour to (a) realise development goals and achieve consumer welfare; (b) efficiently tackle cross-border anti-competitive practices; (c) accurately predict potential effects of cross-border combinations; and (d) build organisational capacities and robust competition culture.

Hence, recognising these instances and indulging in cross-learning can help build a strong foundation for a uniform implementable strategy for international cooperation. Knowledge sharing and coordination can simultaneously provide fillip to the growth of emerging competition agencies which currently lack robust mechanisms to protect competition.

³⁸ UNCTAD, *Informal cooperation among competition agencies in specific cases*, 10 (2014) http://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ <http://en.fas.gov.ru/press-center/news/detail.html?id=43577>