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RECENT IMPORTANT COMPETITION 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 and concentrations 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 question. This report exemplifies the fact that enforcement of competition law in developing countries has been improving over time through cooperation from other competition authorities. Cooperation between competition authorities from both developed and developing countries at the bilateral and regional level has enhanced case-handling capabilities in developing countries. Developing countries have also continued to review approaches to including the introduction of leniency programs in cartel investigations. Some challenges facing developing countries emanate from structural weaknesses of competition legislations while others stem from policy conflicts between competition and other government policies, for example, concurrent jurisdiction of sector regulators and competition authorities on competition matters. The current report includes examples of cooperation in case initiation, resolution and investigations between competition authorities, sector-specific regulators and other government agencies**.**

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INTRODUCTION AND OVERVIEW

1**.** The current report is part of a continuous series reviewing competition cases prepared by the UNCTAD secretariat with a special focus on developing countries' progress in enforcing competition law. The report also 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 Fourth United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.[1] 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 publishing 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 and 2003 requested the UNCTAD secretariat to prepare for consideration at 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" no later than 31 January of every preceding year. Paragraph 6 (c) of the 2004 IGE meeting report requested the 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"[2]. 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] The agreed conclusions of the 2006 IGE, paragraph 10(c), requested the UNCTAD secretariat to publish a further information note on cases, taking into account information received from member States by 31 January 2007.[4]

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 small number of 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 with their headquarters **or** other operations outside of the country where the case has been considered; or (c)

[1] TD/RBP/CONF.5/15 of 4 October 2000.
[2] See TD/B/COM.2/CLP/48 of 22 December 2004.
[3] TD/B/COM.2/CLP/53
[4] TD/B/COM.2/CLP/L.10

originating in developed and developing countries and involving issues or sectors that are relevant internationally, particularly for developing countries.

4 The cases reviewed in this report show that, in a context of globalization and liberalization, competition law and polices are becoming a key element in some developing countries' economic policies. They also reveal that competition enforcement in many countries assists in addressing the anticompetitive practices that are prevalent in markets of developed and developing countries, including LDCs and transition countries. However, the relatively small pool of cases and countries from which these samples were drawn suggests that more countries need to step up their efforts 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 anticompetitive practices such as collusion and abuse of dominant position occur in a variety of sectors and that in many instances such practices involve a mixture of vertical and horizontal illegal actions. Similarly, competition authorities are increasingly called to assess the potential anticompetitive effects of mergers, acquisitions and concentrations with either a domestic or an international dimension. The present report deals with implementation successes, conflict or coordination of various policies and challenges. Yet there is still much room for improvement of enforcement techniques and coordination between countries with newly established competition authorities, particularly in developing and transition countries, and those of developed countries.

A. Anticompetitive Practices

1. Republic of Korea: Microsoft's abuse of market dominance[5]

Brief description

5. The Korea Fair Trade Commission (KFTC) reported to UNCTAD that, in the year 2000, Microsoft had tied its Windows Media Service (WMS) to the Personal Computers (PC) Server Operating System (OS). The Window Media Player (WMP) was first tied to the PC Operating System Windows 98 Second Edition in 1999, and since then, WMP has been tied to the succeeding PC Operating Systems. Additionally, the company combined MSN Messenger with Windows ME in 2000 and Windows Messenger with Widows XP in 2001. Under the South Korean Monopoly Regulation and Fair Trade Act (MRFTA), Microsoft has a dominant position in the market. Its market share of the PC Operating System was 99 per cent in terms of domestic sales, as compared with a 50 per cent threshold stipulated in the Act.

6 The investigation and analysis of the case brought out three factors. Firstly, the tie-in sales constituted obstruction of competitors' business, which is part of abuse of market dominance. The tie-in sales deprived companies of the opportunity to purchase PC OS without WMS, WMP, and Windows Messenger attached, even when they did not wish to purchase them. Moreover, the tie-in sales had the effect of driving competitors out of business by restricting competition in the market. The market shares of other players in the market, for example RealNetworks, Daum Messenger, Nate-On Messenger and others, continued to decline as Microsoft’s market share continued to rise in all aspects of its business.

7. Secondly, it was feared that the tie-in sales would significantly undermine consumer interest. Using dominance, Microsoft virtually forced consumers to purchase WMS, WMP, and Windows Messenger, including when they did not wish to do so. This is an infringement of consumers' right to choice. Lastly, in the tied product markets, Microsoft's tie-sales constituted unfair business practices, as they restricted competition from competitors and consequently forced consumers to purchase the PC OS bundled with WMS, WMP or Windows Messenger.

8. The Korea Fair Trade Commission (KFTC) concluded that the company's tie-in-sales were in violation of Articles 3-2 and 23 of the Monopoly Regulation and Fair Trade Act ban on abuse of market dominance and unfair business practices that work against consumers’ interests and restrict or hinder competition in related markets.

9. On 7 December 2005, KFTC imposed a series of corrective measures: (i) a surcharge of 33 billion Won (US$ 31 million); (ii) with regard to the tie-in of WMS, KFTC ordered the company to strip WMS from the PC Server OS within 180 days from the date when the corrective order was imposed; (iii) for the bundling of WMP and Windows Messenger, the company was ordered to provide two different versions of the PC OS, whereby one version would have WMS and the Messenger programme

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[5] Based on information received by the UNCTAD secretariat from the Korea Fair Trade Commission and the annual report 2005 on the website http://ftc.go.kr/eng.

removed from the PC OS while the other would keep WMP and Windows Messenger and allow customers to download competitors' products; and (iv) to ensure compliance with the decision of this case, KFTC was to appoint a Supervisory Board composed of members nominated by KFTC, the Minister of Information and Communication and Microsoft. The board was to be tasked with the responsibility of determining the specifics of the remedies and overseeing their implementation, while Microsoft was to bear all costs associated with the running of the Supervisory Board.

Commentary

10 This is an important case for the Republic of Korea and a good example of how developing countries can deal with cases of abuse of dominance. It makes the Korea Fair Trade Commission the first competition authority to impose corrective measures against Microsoft tie-in sales on WMS and Windows Messenger and the second after the EU to issue corrective measures against the bundling of WMP. It took four years for KFTC to conclude this case, mainly because the respondent's main office was located outside the case jurisdiction even though Microsoft had a local nexus in the Republic of Korea. Unlike investigation and proceedings concerning domestic firms, in the case of multinational firms, competition authorities may face various difficulties, such as the time required to complete the case, interpretation of documents submitted, on-spot investigation if required, the hearing process and so on. Conducting on-site investigation in the subsidiary offices and interrogating the officers are complicated undertakings because arguments of company policy and clarifications from the head office come into play. In this instance, KFTC took a long time to finalize this case due to the fact that, although Microsoft Korea was operating in South Korea, almost all decisions were taken at the US head office.

11. One possible option to address such inhibitions is cooperation between competition authorities in case handling, especially when a multi-jurisdictional dimension is involved. Regardless of whether cooperation is formal or informal, it is becoming increasingly necessary for competition authorities to work together and exchange information on specific cases or sectors where competition law enforcement is required.

2. Chile: Concerted practices in the market of medical liquid and gas oxygen for public hospitals[6]

12 The Chilean National Economic Prosecutor (CNEP), the Investigative Unit of the Chilean Competition Authority, reported to UNCTAD that it had lodged an allegation against four oxygen providers, Air Liquid Chile SA, Indura SA, Aga SA and Praxair Chile Ltda, arguing that they engaged in concerted actions aimed at restricting competition and dividing up the market, particularly in public hospitals (as per art. 3, Decree Law No. 211 of Chile). These allegations were subsequently laid before the Chilean Competition Tribunal.

13. The background of the case on which the allegations were based is as follows: (i) the said enterprises are the only ones producing, distributing and marketing liquid and gas oxygen, particularly for medical and industrial usage; (ii) the relevant product market was defined as highly purified, liquid and gas oxygen and the geographic market was defined as nationwide; (iii) the enterprises handled the total supply of

[6] Based on information received from the Chilean Competition Authority.

oxygen to the Public Health System; (iv) the CNEP did not recognize any entry barriers on the supply side, except for investments in plant and equipment that must be located near the clients; (v) however, as regards the building of stocks of liquid oxygen, some barriers to entry for competitors were envisaged.

14. The following anticompetitive conducts were identified: (a) market allocation among the four enterprises; (ii) price differentials between their hospital clients and other clients; and (iii) concerted actions to eliminate or restrict free competition in the procurement process (collusive tendering) conducted by the National Public Health Procurement Office (CENABAST) on the provision on liquid oxygen to the Public Health System in 2004.

15. The Chilean Competition Tribunal, after considering the allegations and the arguments and exchange of information based on a similar case in Argentina, partially accepted the application made by the CNEP. As regards the third allegation on collusive tendering, the Tribunal found that the four enterprises had interfered with the procurement process conducted by CENABAST to provide liquid oxygen to public hospitals in 2004. The collusive tendering action by the four enterprises was construed to eliminate competition from the procurement process. The Tribunal ruled that the oxygen providers − AGA S.A., Air Liquid, INDURA S.A. and Praxair Chile LTD − should pay the following fines in US dollar equivalents: INDURA SA – US$ 936,000; AGA SA – US$ 792,000; Air Liquid – US$ 432,000; and Praxair Chile – US$ 144,000.

16. As for the first and second allegations, the Tribunal further argued that the other two types of anticompetitive conduct presented by the CNEP, namely concerted practice aimed at dividing up the national market and affecting the provision of medical liquid oxygen to public hospitals as well as excessive prices for the public hospitals' oxygen supplies, were not supported by conclusive evidence. The charges were therefore dropped from the list of allegations.

17 Both the defendants in this case and the CNEP filed an appeal with the Supreme Court, arguing that they did not engage in collusive behaviour, as charged by the Competition Tribunal, and asking to be relieved from the fines imposed. On 22 January 2007, the Supreme Court revoked the decision of the Chilean Tribunal and granted the four enterprises relief from the fines imposed. The Supreme Court found the evidence presented for this allegation to be circumstantial because it was derived from the behaviour of the enterprises and the structure of the industry.

Commentary

18 This case shows that evidence gathering is an important element when dealing with competition cases, especially when cartels are concerned. It shows that the standard of proof in this case was partially attained at the Tribunal but that the Supreme Court required a higher degree of conviction, including tangible evidence. In many cartel cases, leniency programmes have been instrumental in securing evidence from cartel participants. Cartels are secretive in nature and therefore evidence is not easy to come by. Dawn raids can also be used to gather information and obtain documents, which can be used as evidence in a court of law. It is therefore important to develop such programmes and have them enacted as part of competition law. However, a point to note in this case is the need to strike a balance between rulings from ex officio investigations and leniency programmes application. Indeed, such a

balance is an important means of sending economic actors the message that competition authorities can undertake investigations and identify anticompetitive practices in the market with or without a leniency programme.

3. Slovakia: Abuse of dominance in the railway transport sector[7]

Brief description

19. The Antimonopoly Office (hereinafter the Office) of Slovakia reported to UNCTAD that in 2004, it had investigated a case of abuse of dominant position in the railway transport sector by a company named Železničná spoločnosť, now known as Cargo Slovakia a.s (hereinafter Cargo Slovakia). The Office discovered that Cargo Slovakia had terminated its trading agreement on trading terms including prices for the year 2004 with Holcim (Slovakia) a.s (hereinafter Holcim). Cargo Slovakia issued a termination notice of its contract with Holcim (Slovakia) without giving any objective reason in accordance with its contractual obligations.

20. The Office found out from the information gathered from materials obtained during the administrative proceedings that Cargo Slovakia had acted in such a way because Holcim had signed a contract with a company known as LTE s.r.o. (hereinafter LTE) to transport cement on the track Rohožník – Devínska Nová Ves state border. Although LTE runs its business in Slovakia, its parent company is in Austria. The Office concluded that the conduct of Cargo Slovakia was aimed at excluding the transporter, LTE, from the market of providing railway cargo transport. Cargo Slovakia had also issued an additional threat of a price increase for services offered by Holcim, which had resulted in termination of the use of LTE's transport services. Once Holcim was left as the sole provider of railway cargo transport services, Cargo Slovakia's contractual status was reinstated.

21. On 3 July 2006, the Office issued a decision in which the company, Cargo Slovakia, was found to have abused its dominant position in the relevant market pursuant to article 8, par. 2 of Act No. 136/2001 on Protection of Competition. It was also found to be in violation of Article 82 of the EC Treaty. The Office imposed a fine of SKK 75,000,000 on the defendant, Cargo Slovakia. The Council of the Antimonopoly Office of the Slovak Republic confirmed the first-instance decision by the Office. The decision came into force on 2 January 2007, and cannot be appealed since the Council's decision is final.

Commentary

22. In traditional public utilities sectors, in this case the railways; competition has not been in existence for long. The railway sector is characterized by heavy investment requirements and Governments usually own some of its sections, for example railway lines, while other sections such as the operation of transport services can be privatized and hence operated by the private sector. However, this sector is still controlled by the State in many countries, both developed and developing. This case is a good example of how competition authorities can use competition provisions to address anticompetitive practices in public utility sectors as States move towards unbundling their competitive segments from the anticompetitive ones.

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[7] Based on information received from the Antimonopoly office of the Slovak Republic.

4. Russian Federation: Abuse of dominance in the heating supply services sector[8]

23. The Federal Antimonopoly Service (FAS) of Russian Federation reported to UNCTAD that, through the initiative of the Office of the Moscow City Military Prosecutor, it had initiated investigations into the likelihood of abuse of dominance by a heating service provider. As explained by the Prosecutor's Office, the State Organization of Public Utility Units in the Public Utilities Division of the Department for Apartments Management (hereinafter SO PUU PUD DAM of Moscow) is responsible for the administrative and operative management of the Fund for Housing and Unoccupied Land in Moscow. It is also responsible for regular engineering activities and public utility installations.

24 In order to secure a supply of heating from the State-owned housing fund, SO PUU PUD DAM of Moscow and a company called Mosenergo signed heating supply contracts. The Moscow Regional Energy Commission approves different tariff rates for different consumer groups. However, Mosenergo supplied heating services for the fund in accordance with the terms of the contracts between 2003 and 2005 but applied erroneous tariffs to the following groups of consumers: (i) housing organizations in 2003 and 2004; (ii) organizations financed by city and federal budgets; and (iii) other consumers, including garage cooperatives, creative studios and budget organizations in 2005. These groups paid rates different from the one charged by Mosenergo.

25. Mosenergo holds a dominant position in the market of heating supply services within the associated heating network in the territory of Moscow. This is why SO PUU PUD DAM of Moscow did not have an opportunity to enter into a contract with any other enterprise to supply heating. According to the Moscow Regional Energy Commission's explanations, Mosenergo illegally issued invoices with respect to SO PUU PUD DAM of Moscow for the heating supply services, using tariffs for other consumer groups.

26. Having considered the materials presented, reasons and objections on eight counts, Moscow and the FAS Regional Office for Moscow acknowledged that the company had infringed the interests of SO PUU PUD DAM of Moscow by violating the legally set order of pricing as well as by groundlessly imposing a contractor on heating supply conditions that were unprofitable to it. In addition, by charging a rate intended for other categories of consumers, namely housing organizations in 2003 and 2004; organizations financed by city and federal budgets, and other consumers, including garage cooperatives, creative studios, budget organizations in 2005, the company reaped illegal profits.

27. Moscow and the FAS Regional Office for Moscow found Mosenergo to be in violation of Article 5(1) of the Law on Competition and Limitation of Monopolistic Activity in Commodity Markets**.** The case evaluation revealed that the company had earned a total of 50 million roubles of illegal profits in violation of antimonopoly legislation from 2003 to 2005. The company was ordered to stop the activities, which contravened the law, and to transfer to the federal budget the income received from the violation of antimonopoly legislation.

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[8] Based on information received from the Federal Antimonopoly Service (FAS) of the Russian Federation.

28. Mosenergo applied to the Moscow Court of Arbitration for the nullification of the order of the antimonopoly authority. The Court, after considering written statements by the company citing reasons for the rejection of claims in the mentioned cases, decided to terminate the proceedings on three counts. The Decisions and Prescriptions of Moscow and the FAS Regional Office for Moscow have come into legal force.

Commentary

29. This case further exemplifies how enterprises in a dominant position can abuse their market power, but also shows how government bodies can work together to resolve competition cases. This can be done through information sharing, the provision of evidence on specific cases or case initiation. All these methods can facilitate competition authorities' job in identifying a competition problem in the market, information and evidence gathering as well as case resolution. Advocacy and public awareness programmes tailor-made for specific stakeholders are important tools for enhancing such a relationship and a worthwhile investment for any competition authority.

5. Turkey: Credit card clearing commission rate fixing by Interbank Card Centre (BKM)[9]

30. The Turkish Competition Authority (TCA) reported to UNCTAD that in 2005, it had received a complaint from the Turkish Union of Employers of Gasoline Dealers and Gas Companies (TABGİS) against Interbank Card Centre (BKM). The allegation was that BKM was fixing the clearing commission rate charged by banks. TCA initiated an investigation to determine whether there had been an infringement of the Competition Law. During the investigation process, BKM requested an *exemption* for its practice of fixing a common clearing commission rate, as a result of which the assessment for exemption is included in the case decision. The relevant market for fixing the clearing commission rate was determined as the “market for paying services by credit cards”.

31. BKM is a joint stock company that performs clearing transactions between banks in the card payment system. With card transactions, BKM’s Board of Directors determines the clearing commission rate paid by the acquiring bank to the issuing bank. *Issuing banks* are those that publish credit cards and distribute them to customers, while *acquiring banks* are those that provide point-of-sale (POS) terminals for member stores via the signing of agreements with these stores in exchange for a certain commission fee (member store commission).

32. The clearing commission obtained by issuing banks from acquiring banks is reflected by acquiring banks as a cost, which is then passed on to member stores in the form of the member store commission. The clearing commission rate is applied equally among all of the banks. Essentially, the clearing commission is a service cost reflected first by the issuing bank to the acquiring bank and then by the acquiring bank to the member store within the member store commission, and can therefore be equated with a price.

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[9] Based on information received from the Turkish Competition Authority.

33. BKM argued that fixing clearing commission rates was not contrary to the Competition Act No. 4054 and that an exemption should be granted for fixing a common clearing commission rate. In addition, it claimed that each of the items contained in the fixed clearing commission rate was viewed as a cost element by the issuing bank. Within this framework, the point was made that BKM needed a centralized clearing commission rate since the payment guarantee provided by the issuing bank included such risks as fraud in the card market and thus constituted a high-cost item. Moreover, the funding costs resulting from the period between the purchase date and the payment date were a burden on issuing banks.

34. TCA found that BKM fixed some of the costs and the income of issuing and acquiring banks. The determination of a common clearing commission rate among banks affects competition at the issuing and acquiring levels. However, issuing banks cannot pursue an individual pricing policy for the services they provide for acquiring banks. Lastly, the clearing commission, the minimum price for the member store commission, also constitutes an important cost element from the member store's perspective. In this regard, the fixing of clearing commission rates by BKM is considered as "a decision of an association of undertaking" according to Article 4 (prohibiting restrictive agreements) of Competition Act No. 4054, which is contrary to the law.

35 Because of this anticompetitive conduct, TCA imposed a minimum administrative fine on BKM, ruling that the fixing of a clearing commission rate could, due to the peculiar conditions of the card payment systems market, be granted an exemption if certain conditions[10] were met.

Commentary

36. The operations of the credit card market are not clear to many card users. Some of the charges associated with the use of credit cards as a form of payment are not at all understood and the likelihood of customers losing money in the end is high. Especially in cases where payments are made online, credit card users rely on trust that the person with whom they are dealing will honour his part of the bargain. In many instances, the consumer has no redress if the transaction is not finalized. Competition authorities are increasingly dealing with cases originating from the credit card sector and, as one can see from this case, exemptions provisions can be used to resolve cases. However, exemption provisions requiring justification allow competition authorities to evaluate the situation and to spell out the conditions to be met before the exemption is granted. This case outlines such a procedure.

B. Mergers and Acquisitions/Concentrations

6. Japan: Acquisition of the stock of Guidant Corporation by Boston Scientific Corporation[11]

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[10] According to TCA, an individual exemption might be granted upon the fulfilment of the following condition: the overnight interest rate determined by the Turkish Central Bank would be taken as a basis in the formula applied by BKM for the calculation of funding costs and sunk costs but not taken into consideration in the operational costs item. The period of exemption is set at two years following the fulfillment of the necessary requirements. The reason for the minimum administrative fine arises from the provisions foreseen for individual exemptions.

[11] Based on information received from the Japanese Fair Trade Commission.

37 The Japan Fair Trade Commission (hereinafter referred to as “JFTC”) reported to UNCTAD that in May 2006, it had received a request regarding an acquisition proposal in the medical devices sector. JFTC reviewed the acquisition of the stocks of Guidant Corporation (based in the United States; hereinafter referred to as “Guidant”), which manufactures and distributes medical devices, by Boston Scientific Corporation (based in the United States; hereinafter referred to as "Boston"), which also manufactures and distributes medical devices. After conducting a review, the JFTC considered that the proposed business combinations might not substantially restrain competition in any relevant market of medical devices in Japan.

38. The following are the factors that led to this conclusion:

(i) Both Boston and Guidant distribute medical devices all over the world, and they also distribute their products in Japan through their Japanese affiliates or entrepreneurs, which manufacture and distribute medical devices.

(ii) Guidant is competing with Boston in the fields of the medical devices which are used for percutaneous transluminal coronary angioplasty (hereinafter referred to as “PTCA”) and the medical devices which are used for percutaneous transluminal angioplasty (hereinafter referred to as “PTA”) out of Guidant’s main businesses. Boston plans to sell Guidant’s worldwide businesses of PTCA and PTA to Abbott Laboratories (based in the United States; hereinafter referred to as “Abbott”), which manufactures and distributes medical devices. Abbott is competing with Guidant in only a small part of the businesses that Boston was to transfer to Abbott.

(iii) As for the PTCA drug Eluting Stent (hereinafter referred to as “DES”) which Guidant is now developing in its PTCA business, even after the business is transferred to Abbott, Boston will reserve the right to be provided by Abbott with a license concerning technology for manufacturing which Guidant has developed before the transfer of business and to be supplied by Abbott with the products made using the technology for a certain period.

39. In this case, it was necessary to examine the competitive effects of the proposed stock acquisition of Guidant by Boston as well as the proposed transfer of Guidant’s business to Abbott. Boston, Guidant and Abbott currently or potentially compete with each other in the following five product fields in Japan: PTCA balloon catheters, PTA balloon catheters, PTA stents, biliary stents and DES. The effects of the proposed business combinations on competition in each relevant market were as follows:

(a) PTCA balloon catheters: Both Guidant’s and Abbott’s products are distributed in Japan and compete with each other.

(b) PTA balloon catheters: PTA stents and biliary stents, Abbott’s products are distributed in Japan while Guidant’s products are not.

(c) DES: There is only one company distributing DES in Japan, and Boston, Guidant and Abbott are now competitively applying for approval or conducting trials in order to enter the Japanese DES market.

(d) With the transfer of Guidant's PTCA devices business including DES to Abbott, Abbott will acquire the product that Guidant is now developing as well as one that Abbott itself is developing.

(e) Boston will have access to the licence from Abbott concerning DES technology, which Guidant possesses, and to the supply of Abbott's products, which are made using the technology.

40. However, considering that one company supplies DES products in Japan and that these products are still highly valued by physicians, the incumbent is likely to maintain a high market share even when the other manufacturers expected to enter into the Japanese market finally come in. As the incoming manufacturers are expected to compete vigorously in Japan, the proposed business combinations may not substantially restrain competition in the DES market in Japan.

Commentary

41. This case shows that competition law enforcers sometimes have to consider other important aspects of the market while at the same time applying the competition test. In this case, the Japanese Fair Trade Commission considered the gains in research and development that this acquisition would promote once the two companies joined forces. The medical field is research-based and dynamic. Therefore, the producers of medical devices must keep up with developments in order to provide up-to-date and efficient equipment for various medical needs. The acquisition of stocks of Guidant by Boston in this case would create synergies in the area of research and development, and since there are no barriers to entry, manufacturers entering the Japanese market would compete and consumers would have a wider choice of medical devices.

7. Spain: Proposed takeover of ENDESA by Gas Natural SDG SA[12]

Brief description

42. The Spanish Office for the Defence of Competition reported to UNCTAD that on 12 September 2005, it had received a notification from GAS Natural SDG S.A. for the mandatory clearance of a non-hostile takeover of ENDESA S.A. via a public offer bid. The French, Portuguese and Italian competition authorities were also notified of the takeover bid. The Italian and Portuguese authorities requested that the file be dealt with at the level of the European Commission in accordance to article 2 of regulation 139/2004 but the Spanish competition authorities were not in favour of this request. The European Commission denied the request by the Italian and Portuguese authorities because the concentration did not have a community dimension, as stipulated in article 1 of regulation 139/2004.

43. The Spanish Competition Law allows the Spanish Competition Tribunal to issue an opinion on competition matters in the energy sector, while the National Energy Commission (Spanish energy regulatory body) carries out the wider responsibility of dealing with energy matters. However, the decision-making body in the energy sector is the Council of Ministers.

[12] Based on information gathered from the Spanish Office for the Defence of Competition website at www.dgdc.meh.es

44. On 5 January 2006, the Competition Tribunal issued an opinion stating that the notified takeover was not cleared. The grounds for this opinion were that the takeover would substantially alter the competitive dynamics of gas and electricity markets, which were in the throes of liberalization and technological change. The argument put forward was that both Gas Natural and ENDESA were dominant players in the gas and electricity markets respectively, and that their concentration would result in a dominant firm in both products. The likelihood of such an entity abusing its market dominance in both gas and electricity markets was foreseen. In particular, the Spanish Office for the Defence of Competition referred to the restriction of potential competition in gas and electricity markets between two asymmetric conglomerates that were part of that non-hostile takeover.

45. In addition, the National Commission for Energy, in its analysis of the case, came up with a different remedy. On 20 December 2005, it issued a non-binding report stipulating that the takeover could be authorized under certain conditions. The report pointed out that the two parties to the takeover should enter into certain undertakings, spelling out some conditions in accordance with Spanish regulations. The conditions targeted specific segments of the markets for gas and electricity with recommendations concerning adjustments to the transportation of gas and its generation and to the supply and distribution of electricity.

46. On 3 February 2006, after discussions and deliberations based on the two opinions (one from the competition authority and the other from the energy regulatory institution), the Council of Ministers agreed to authorize the takeover subject to thirteen substantive conditions and seven procedural conditions. The substantive conditions consisted of the obligation to launch programmes to provide gas and not invest in electric capacity generation, distribution and supply; guarantees to separate regulated and non-regulated activities, as well as the elimination of any linkages with competitors.

Commentary

47. This case shows that the views of sector-specific regulators and competition authorities can differ with regard to the effects of a competition case in the market. While competition authorities may examine a case based on the lessening of competition due to a reduction in the number of players, sector regulators, who have technical information about the sector, may apply other criteria, resulting in a different resolution for the case. In this case, the Council of Ministers had the last say, a factor that facilitated the case resolution process by establishing a middle ground between the opinions presented by the two regulators.

8. Serbia: Conditional approval of concentration (acquisition) of chain stores[13]

48. The Commission for the Protection of Competition reported to UNCTAD that in 2006, it had received an application pertaining to concentration (acquisition) in the food retail market. The acquisition proposal was from Business System Merkator (hereinafter Merkator) from Slovenia, which wanted to purchase 100 per cent of the shares of the Rodić M&B store (hereinafter Rodić) from the Republic of Serbia, thereby becoming the sole owner of the enterprise.

[13] Based on information received from the Commission for the Protection of Competition, Republic of Serbia.

49. The Commission defined, as a relevant product market, the retail sale of food in non-specialized stores based on the fact that (i) the predominant activity of the applicant was food retailing, mostly in non-specialized stores; (ii) the other party involved in concentration was engaged in the same activity; and (iii) all other large store chains indicated by the applicant as the key competitors were registered to render exactly the same service. The relevant geographic market was defined as the territories of the cities of Belgrade and Novi Sad. The Commission reached this position by considering the fact that both Merkator and Rodić would be present in those two cities after the construction of the Merkator Hypermarket in Novi Sad.

50. It was established that the participants involved in this concentration would have more than half of the joint market share in the territory of the city of Novi Sad upon completion of the construction of the Merkator Hypermarket in that city. Before that time, Rodić had been a dominant merchant in the territory of Novi Sad. It was also established that the parties involved in this concentration in Belgrade currently had a market share of some 10 per cent, which by itself was below the threshold requiring obligatory measures. However, the fact that the Merkator stores in the territory of Belgrade were located in just two municipalities significantly increased the market share in the territory of those municipalities in relation to the share for Belgrade as a whole. For that reason, the required measure referred only to restriction of further expansion of parties involved in concentration in the territory of the municipalities in question.

51. Taking into consideration information on the market shares of the parties involved in concentration, the fact that Rodić already wielded significant market power in Novi Sad and that upon the completion of the construction and the start of operations of Merkator Hypermarket in that city its market position would be further strengthened, a decision was made to approve the concentration subject to certain conditions.
The conditions for approval were as follows:

- The Commission issued an order prohibiting Merkator from building new food retail stores in the non-specialized stores category in the territory of two municipalities in the city of Belgrade and the territory of the city of Novi Sad. The only exception to this condition was for stores at which preparatory construction work had already begun, for example the Merkator Hypermarket in Novi Sad.

- Merkator was barred from purchasing, renting or acquiring any premises for establishing a retail business in the stated territory on the grounds of any legal activities within the period of one year upon the acquisition of a majority share in Rodić.

Commentary

52. One important aspect of the mergers and acquisitions/concentration review is the opportunity for competition authorities to analyse the effects of the proposed transaction on the market. This analysis of a pre-merger/acquisition/concentration application prevents the creation of dominant enterprises that may abuse their dominant position. Conditional approval is an important tool for correcting anticipated anticompetitive effects on the resultant enterprise on the market. The definition of

both the product and the geographic market is important in this type of market analysis, and this case is an example of how market definition is central to case resolution.

9. Poland: Anticompetitive agreements in the yeast sector[14]

53. The Office of Competition and Consumer Protection (OCCP) reported to UNCTAD that in September 2005, it had initiated legal proceedings against Lesaffre Bio-Corporation (thereafter Lesaffre), one of the largest yeast producers in Poland. Lesaffre, a French company, had entered into agreements with 45 wholesale firms obliging them to stock yeast exclusively from Lesaffre. This practice lasted for over three years and affected in particular Lesaffre's competitors, which had limited access to market agents.

54. Under the terms of the agreements, Lesaffre reserved the exclusive right to supply the agents with yeast in contravention of the Antimonopoly Law of Poland. Investigations revealed that if the parties to such an agreement purchased yeast from competing companies (even those owned by relatives, associates or shareholders of the market agents), the agreement prescribed a penalty amounting to a few thousand PLN (Polish currency). Additionally, Lesaffre reserved the right to claim additional compensation in case of infringement of the above clause. On the other hand, loyalty to the producer was rewarded with a percentage amount of rebates based on the total amount of products ordered during the year.

55. In December 2006, the Director of the OCCP fined Lesaffre, as the initiator and main beneficiary of the agreement, with a penalty amounting to 3.1 million PLN. At the same time, the right to financial sanctions against other members of the agreement was abandoned. This was mainly due to the fact that most of the agents were small family companies with relatively low revenues from yeast sales.

Commentary

56. Foreclosure of distribution systems and vertical integration by manufacturers is a common practice among businesses. From the business point of view, this practice may be considered as a normal business practice in their marketing strategic plans. However when such actions are carried out through agreements that create market entry barriers, they become a competition problem. The case shows that such practices can go unnoticed for years, with consumers continuing to suffer welfare losses due to the significantly higher prices caused by such barriers. In many cases, small traders are not aware that they have recourse under competition law provisions.

One way to tackle the lack of information of small agents is for competition authorities to design tailor-made advocacy programmes for both manufacturers and small and medium-sized enterprises. This would help them become familiar with their rights and obligations under competition laws.

10. Zambia: Merger of Dimon Incorporated and Standard Commercial Corporation to form Alliance One[15]

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[14] Based on information received from the Office of Competition and Consumer Protection of Poland.
[15] Based on information received from the Zambia Competition Commission.

57. The Zambia Competition Commission reported to UNCTAD that on 30 May 2005, Messrs Christopher, Russell Cook & Co., acting on behalf of their clients, Dimon Incorporated (Dimon) and Standard Commercial Corporation (Stancom), had lodged an application for authorization of a merger between the two companies with the Commission. Dimon and Stancom are both subsidiaries of two US-based multinational leaf tobacco merchant companies, whose merger as at 13 May 2005 was effected in the US and elsewhere. The new merged firm is known as Alliance One. The parties were seeking a similar arrangement for the authorization of consummation in Zambia. Section 8(1) of the Competition and Fair Trading Act requires prior notification for authorization by the Commission of all mergers or takeovers between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or in providing substantially similar services

58. Stancom is the third largest independent leaf tobacco merchant in the world. The tobacco company was founded and incorporated in the State of North Carolina (USA) in 1910. Stancom has developed an international network through which it purchases, stores, sells and ships tobacco grown in over 30 countries, servicing cigarette manufacturers from 22 processing facilities located strategically across the world. Stancom established itself in Zambia in 1999 but recently resolved to expand its presence in the country by offering services to both local small-scale outgrower farmers and commercial farmers.

59. Dimon is the world's second largest leaf tobacco dealer with operations in over 30 countries. The company is based in the State of Virginia, USA, where it is incorporated, and reportedly has an estimated market share of about one-third of world trade in internationally traded leaf tobacco. Dimon entered the Zambian tobacco market in 1996 and has mainly concentrated on financing small-scale tobacco farmers through its outgrower schemes in the Lusaka and Eastern provinces. Dimon has subcontracted Tombwe Processing Limited to process a small volume of flue-cured tobacco that is bought from farmers in the Central Province of Zambia.

60. The analysis of the case revealed that the combined market share of Dimon and Stancom is 55 per cent, resulting in a market concentration ratio for the top three players (CR3) in the relevant market of less than 70 per cent. However, the Dimon-Stancom merger accounts for 55 per cent of this concentration, leaving some 45 per cent fragmented into different players in various provinces. It was noted that, even though the merged entity would command a monopoly market share of 55 per cent, this would not act as a market entry barrier for other leaf tobacco merchants. That was because the prevailing high growth rate situation in the tobacco market provided an opportunity for new leaf tobacco and incumbent merchants to enter into outgrower or other arrangements with peasant farmers, most of whom were unable to access capital from commercial banks to support their expanding enterprises. The only structural barrier to market entry was the substantial amount of capital investment in outgrower schemes and tobacco processing facilities. However, leaf tobacco dealers entering the market would encounter low barriers if they wished to start processing leaf tobacco in Zambia for export.

61. The merger between Stancom and Dimon would definitely result in the removal of a vigorous competitor from the market. Small to medium-sized leaf tobacco dealers were not likely to provide the merged entity with effective competition. There was no import competition for leaf tobacco in Zambia because of oversupply in the local market. Leaf tobacco demand by BAT, the only local cigarette

manufacturer, was met internally from the reported production of 36.7 million kilogrammes in 2004. Consequently, the merger of the two big market players would result in the reduction of effective competition in the relevant market because the merged entity would not have effective competition. Moreover, the eventuality that the merged big player might abuse its market power over outgrower farmers, possibly by setting high tobacco prices, could not be ruled out.

62. On the other hand, the merger would create a strategic business unit likely to result in efficiencies with regard to leaf tobacco processing and marketing. Such efficiencies might include information technology advancement, new product development and global agronomic programmes. On the basis of these criteria, the merger passed the efficiency gains test. Moreover, the merger would result in the incorporation of internal expertise from Stancom and Dimon that would enable Alliance One to implement an extensive integration planning process. The plan would take into account the optimization of leaf tobacco processing capacity and the elimination of duplicative regional and corporate overheads, probably resulting in some potential annual pre-tax cost savings for Alliance One.

63. Despite efficiency gains in the leaf tobacco industry, the transaction also raised public interest concerns with regard to the selection of leaf tobacco transporters. In the past, Stancom had been accused of selecting a certain transporter at the expense of others to handle the transportation of all of its leaf tobacco in the Eastern Province. The merger was likely to lead to further lessening of competition in the leaf tobacco transportation sector. Alliance One (the merged entity) would probably select a single transporter, preferably the Stancom one, to handle all leaf tobacco transportation in the province, a practice that could well be applied in the other tobacco belts in the Central and Southern provinces. Employee retention would probably also be affected in that the merger emphasized the reduction of pre-tax costs, a factor which implied that Alliance One in Zambia would lay off some of the employees of Stancom and Dimon as one way of achieving its goal.

64. After considering all the relevant information and the relevant tests under the Zambian Competition Law, the Board of Commissioners authorized, in the public interest, the effecting in Zambia of the merger between Dimon and Stancom subject to the undertakings given by Alliance One (the merged entity), as follows: (i) Alliance One would continue to use multiple transportation providers and would not engage in exclusive dealing in the relevant market without seeking the express authorization of the Zambia Competition Commission; (ii)Alliance One would continue to promote and develop better tobacco farmers through the outgrower scheme and encourage local entrepreneurs; and (iii) after the merger approval, Alliance One would identify a suitable senior officer who would act as a Fair Trade Compliance Officer and work with the Commission on competition and fair trading matters.

Commentary

65. Worldwide mergers of multinational corporations have been the order of the day when it comes to doing business in the modern world. Competition authorities in developing countries have to deal with these types of mergers all the time. While the merging entities always put forward the argument that the parent companies have

merged and have no choice but to combine their operations, competition authorities have an opportunity to apply the national competition laws to assess the impact of such a merger on the domestic market. This allows them to scrutinize all aspects of the merger and to apply the relevant tests stipulated by law. In this case, the balancing of the competition test, efficiency gains and public interest considerations led to the approval of the merger with certain undertakings, enabling the Zambia Competition Commission to monitor the sector and ensure compliance with the agreed undertakings.