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RECENT IMPORTANT COMPETITION CASES IN DEVELOPING COUNTRIES

Report by the UNCTAD secretariat

Executive summary

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

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INTRODUCTION AND OVERVIEW

1. The present report is the third in a series of reports reviewing cases previously prepared by the UNCTAD secretariat, including a 1995 report on “Restrictive business practices that have an effect in more than one country, in particular, developing and other countries, with overall conclusions regarding the issues raised by these cases” (TD/RBP/CONF.4/6) and a 1998 report “Competition cases involving more than one country” (TD/B/COM.2/CLP/9). This third report has been prepared in line with paragraphs 9 and 12 of the resolution adopted by the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.[1] Paragraph 9 requests the Secretary-General of UNCTAD to “take stock of anticompetitive cases with effects in more than one country, and the problems encountered in investigating the cases, to study the degree of efficiency of cooperation between competition authorities and Governments in solving them,” while paragraph 12 requests the secretariat to continue to publish certain documents on a regular basis and to make them available on the Internet, including “an information note on recent important competition cases, with special reference to competition cases involving more than one country, and taking into account information to be received from member States”.

2. Most of the cases reviewed in this report have been selected from material provided by some member States in response to a request for information sent out by the UNCTAD secretariat;[2] recourse has been had as well to other available material. Twelve cases have been reviewed, which arose in the following countries: Brazil, Kenya, Romania, South Africa, Zambia, Zimbabwe and Venezuela. Thus, unlike the above-mentioned first two reports in this series, the present report does not include cases which occurred in developed countries. Taking into account the above-mentioned terms of the mandate, and the relatively few cases involving developing countries regarding 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 not domiciled in the developing country where the case has been considered; or (c) involving issues or sectors of relevance or importance internationally, particularly for developing countries. Cases on which no final decision on the substance has as yet been taken by the relevant competition authority, or cases which appear to have solely national significance, have not been included.

3. This report has been divided into two sections, dealing respectively with six cases involving anti-competitive practices (such as cartels or abuses of a dominant position) and six cases of merger control. Within the first section, three of the cases (which are dealt with first) relate to horizontal practices, and the other three relate to abuses of dominance and/or vertical restraints. The facts of each case are briefly presented, the action taken by the competition authority concerned is described, and a commentary on the case is then made, discussing and analysing the issues raised and suggesting some implications, including (where appropriate) for international cooperation in this area.

4. The cases reviewed in the present paper show that, in a context of globalization and liberalization, competition law and polices are becoming a key element in some developing

countries' economic policies. However, the relatively small pool of cases and countries (mainly some African and Latin American countries) from which these samples were drawn suggests that more efforts need to be made by more countries to adopt and effectively enforce competition laws and to undertake pedagogical efforts in order to strengthen a competition culture in their markets. This point is reinforced by the fact that there was a disproportionate number of mergers in the pool of cases in developing countries from which the cases reviewed here were drawn. While this may be ascribed to the fact that mergers may be subject to pre-notification or are more likely to be publicly known, that there are usually deadlines to deal with them and that the parties concerned tend to be cooperative in providing information; this disproportionate focus on mergers would still emphasize the need to enhance the powers and resources of competition authorities in developing countries so as to enable them to detect and take action against more anti-competitive practices. Some of the cases reviewed demonstrate how cartels or mergers originating from abroad of developing countries, and how these have been successfully dealt with by the competition authorities concerned. However, by its very nature, the present report tends to deal with the success stories in this respect, and questions might be raised as to the extent to which, and the means by which, most developing countries would be able to control such cartels or mergers.

5. In any event, any national efforts by developing countries to control RBPs or mergers originating from overseas would need to be complemented by international cooperation. There are some examples among the cases reviewed of successful international cooperation in this area, which appears to have been of critical help in resolving these cases. However, again, questions might be raised as to how far the relatively limited nature of the cooperation that was involved in most of these cases might have been useful, or even available, to assist in detecting or obtaining information about many of the RBPs or mergers originating from overseas affecting developing countries, or to enforce orders relating to such RBPs or mergers. It is recalled in this connection that the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides that States should: seek appropriate remedial or preventive measures to prevent and/or control RBPs within their competence when it comes to their attention that such practices adversely affect international trade and development (para. E.4); institute or improve procedures for obtaining information from enterprises, including transnational corporations, necessary for their effective control of RBPs (para. E.6); establish appropriate mechanisms at the regional and subregional levels to promote exchanges of information on RBPs and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of RBPs at the regional and subregional levels (para. E.7); and, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information and, to the extent consistent with their and laws and established public policy, other information necessary for the effective control of RBPs (para. E.9).

I. ANTI-COMPETITIVE PRACTICES

1. Brazil

International vitamins cartel
Roche, BASF and Aventis

Facts

6. In 1999, the Brazilian competition authorities initiated proceedings against the Brazilian subsidiaries of three chemical or pharmaceutical firms (Roche, BASF and Aventis Animal Nutrition, the latter formed through the merger of Rhône-Poulenc and Hoescht) for conspiracy to fix the prices and allocate market shares of bulk vitamins in Brazil as an extension of their participation in an international vitamins cartel which was prosecuted in the United States. In May 1999, the Swiss firm Roche and the German firm BASF agreed to plead guilty in the United States to participation in a worldwide conspiracy to fix prices and allocate market shares of vitamins from 1990 to 1999. The French firm Rhône-Poulenc, which also took part in the same conspiracy, was not charged in the United States because of its cooperation with the investigation by the United States Department of Justice, in line with the Department's corporate leniency policy.

Action

7. The Brazilian authorities carried out extensive investigations that lasted about a year. In the course of these investigations, the Brazilian authorities searched the premises of the Latin American headquarters of Roche and BASF and requested copies of several documents. They also interviewed several of the main executives in the vitamin industry in Latin America. The Brazilian authorities were also assisted by general information received from the United States Department of Justice. The result of these investigations provided strong evidence that, in line with instructions from their global headquarters, the Brazilian subsidiaries of Roche, BASF and Rhône-Poulenc had made co-ordinated efforts to avoid price reductions and to limit the supply of the vitamins A, E and beta-carotene in Brazil and in the rest of the Latin American market and that, for this purpose, their executives responsible for the Latin American vitamin market had held quarterly meetings between 1995 and 1998 to exchange prices and sales information. Appeals against this decision are still proceeding, and no information is as yet available regarding the sanctions that would be levied for these infringements of the competition law.

Commentary

8. Vitamins A, E and beta-carotene are important inputs for the production of foods, medicine, cosmetics and animal feed. The annual turnover of these products in Brazil is estimated to be around US$ 55 million. As the conspiracy affected the Brazilian economy from 1990 to 1999, the total turnover of this market during this period would be over half a billion dollars. Thus, the behaviour of these firms affected all Brazilian citizens, who were prevented from benefiting from the price reductions that would have resulted from a

competitive environment. The Brazilian investigation had positive effects not only for national consumers, but also probably for consumers in the rest of South America. While Brazil was the first country outside North America to bring proceedings against the conspirators who had taken part in the international cartel of vitamins, there is no information available regarding any proceedings brought against the international vitamins cartel by any developing country other than Brazil, even though news of the proceedings in the United States was widely reported. But the fact that the firms concerned had their headquarters for Latin America in Brazil would have enabled the Brazilian authorities to take action which many other developing countries would not have been in a position to take.

9. This case also underlines the importance of strengthening international cooperation through exchange between competition authorities of information relevant to investigations of international cartels. In this connection, it is noteworthy that the immunity from prosecution acquired by Rhône-Poulenc in the United States because of its cooperation with the Justice Department did not prevent the Department from providing enough general information to the Brazilian Competition Commission to facilitate action against Rhône-Poulenc in respect of that part of the international cartel which concerned the Brazilian market. However, taking into account that the instructions to cartelize the Brazilian and Latin American markets were given to the Brazilian subsidiaries from the global headquarters of the firms concerned, it is open to question whether the Brazilian Competition Commission would have become aware of the existence of the international cartel had the cartel not first been prosecuted by one of the United States federal competition agencies for cartelization of the United States market. There is also no indication that there were any consultations between the Brazilian competition authorities and the authorities of any other Latin American country affected by the cartel. Thus, if an international cartel targets only markets of developing countries and/or countries with limited international enforcement capabilities, there is a risk that the cartel may go undetected and unpunished, since competition authorities do not normally take action against practices originating from their territories which have effects upon markets of other countries.

2. Brazil

Steel Cartel:
SDE x Cia. Siderúrgica Nacional – CSN, Cia. Siderurgica Paulista – Cosipa and Usinas Siderurgicas de Minas Gerais – Usiminas

Facts

10. The Brazilian competition authorities initiated an investigation of a cartel formed among three steel manufacturers (CSN, Cosipa and Usiminas) aimed at fixing the sale prices of common flat steel. The authorities had been informed that these firms would agree to fix new prices for their steel at a meeting called on 30 July 1996 by representatives of the industry association Instituto brasileiro de metalurgia (IBS), Cosipa, Usiminas and CSN, with effect from 1 August 1996.

Action

11. On 31 July 1996, the Brazilian authorities warned the firms concerned that the proposed conduct might be considered an infringement of the economic order, within the terms of Brazilian competition law. On 1 August 1996, CSN set new prices for its flat steel. On 5 and 8 August 1996 respectively, Cosipa and Usiminas also set new prices for their flat steel. These decisions to readjust prices had been communicated by letter beforehand to these firms' clients. On 11 June 1997, the Brazilian authorities concluded that this setting of sale prices for common flat steel amounted to a cartel. However, throughout the proceedings, Usiminas and Cosipa systematically denied taking part in the meeting of 30 July 1996. IBS was asked to provide information regarding which firms were present at this meeting, and it confirmed these two firms' participation, naming the employees present. When these two firms were asked to comment on this information, they confirmed the presence of their employees at the meeting, but insisted the employees were present in an unofficial capacity as guests of IBS and with no power to undertake any negotiations. The firms further contended in their defence that the readjustment of their prices resulted from a traditional process of price leadership.

12. The technical opinion prepared for the competition authority found that the characteristics of the Brazilian industry for common flat steel indicated a scheme of collusive price leadership, since it was an oligopoly making homogeneous products, with high market concentration, strong entry barriers, similar costs and inelastic demand. Moreover, there had never been a readjustment of prices which had not been immediately carried out by the whole group of manufacturers. The possibility of a change in market leadership, under very restrictive conditions, which existed in an oligopoly with barometric price leadership could not be expected in an oligopoly with collusive price leadership; changes in price leadership could only occur if there was certainty that the other competitors would be prepared to keep up with the readjustments. The technical opinion worked under the hypothesis that if there were any other economic explanation for the parallelism of conduct other than the practice of cartelization, an infringement of economic order could not be considered to have taken place; however, it concluded that the economic rationality of the price readjustment by the industry in 1996 had not been demonstrated.

13. The Brazilian competition accordingly concluded that the meeting held by the firms in the sector, through their industry association, and the parallel pricing behaviour which had not been satisfactorily explained, amounted to proof of collusion and was an infraction of the economic order. It ordered that:

(a) Each of the firms concerned should pay fines of 10 per cent of the value of their gross turnover before the proceedings (not including taxes), resulting in payment of R$ 22,180,000 by CSN, R$ 16,180,000 by Usiminas and R$ 13,150,000 by Cosipa;

(b) Fines of R$ 3,512,315 by Usiminas and R$ 3,487,890 by Cosipa respectively should be paid for their misleading conduct in trying to deceive the competition authority about the 30 July meeting;

(c) An abstract of the authority's decision should be prominently published, at the expense of the firms concerned, in the largest newspaper of the Brazilian state in which each firm was established;

(d) An official notice should be sent to SDE regarding the initiation of an investigation of the unwillingness of Mallory S.A, which was questioned throughout the proceedings, to provide information.

Commentary

14. Given the size of the firms involved and the fines levied, as well as the importance of the steel sector, this price-fixing cartel case was clearly of importance in the Brazilian context. This case would also be of interest to other developing countries producing steel; several segments of the steel sector are sensitive to economies of scale so there would be room for only a relatively limited number of producers in these market segments and, as this case shows, cartels are easily formed when there are a limited number of players in the market. The case is further of interest in demonstrating the use of an industry association to set up a price-fixing arrangement, in the excuses used by two of the firms concerned to cover up the formation of the cartel, in the use made by the Brazilian competition authority of an expert opinion on the economics of the industry to demonstrate that cartelization could be the only explanation for the behaviour of the firms concerned, and in the levying of fines for misleading conduct.

3. South Africa

Code sharing agreement in the international air industry
South African Airways (SAA) vs. Quantas

Facts

15. In November 2000, South African Airways (SAA) submitted to the South African Competition Commission an application for an exemption for its code-share agreement with Quantas. The code-share agreement would be effective in January 2001. The case was analysed with regard to Section 10 of South African Competition Act, the relevant subsection of which states that:

> "(1) A firm may apply to the Competition Commission to exempt an agreement, or practices, or category of either agreements, or practices, from the application of this Chapter …
>
> (3) The Competition Commission may grant an exemption in terms of subsection …
>
> (b) the agreement, or practice, or category of either agreements, or practices, concerned, contributes to any of the following objectives:
>
> (i) maintenance or promotion of exports; …

(iii) change in productive capacity necessary to stop decline in an industry; …"

Action

16. Given the specificities of the regulation of the international airline industry, the South African Competition Commission conducted its investigations in two stages. In the first stage, the Commission's investigators held discussions with the representatives of South African Airways to make a preliminary review. During the course of the review, it became apparent that more clarification was required in order to fully appreciate the implications of the code-share agreement. The Commission accordingly requested additional information from the airline.

17. In the second stage, the South African Competition Commission contacted the Australian Competition and Consumer Commission (ACCC) to find out if they had reviewed the transaction. Furthermore, the South African Commission consulted with the International Air Services Commission (IASC), which advised that it had approved the code-share agreement for a year, subject to certain conditions. These conditions took into account the concerns that had been raised earlier by the ACCC.

18. Following this, the Commission, taking into consideration the situation in the South African airline industry, as well as other relevant issues, granted SAA and Quantas an exemption for the code-share agreement for the period from February 2001 to June 2002, on the grounds that the code-share agreement would result in increased exports of cargo; the operation of the exemption is monitored on the basis of quarterly compliance reports.

Commentary

19. This case is an illustration of how the procedures and criteria for granting exemptions work in practice and, specifically, how the promotion of exports may be taken into account. The treatment of code-sharing agreements in the airline industry by the Commission may have relevance for competition authorities in other developing countries. The case also illustrates the fact that cooperation and information exchange between competition authorities is possible even in the absence of a formal bilateral cooperation agreement between them, as well as cooperation between a competition authority and an international organization responsible for regulating a specific sector. However, the case also illustrates the limits of such informal cooperation. The conditions imposed by the South African Commission were tailored to take into account those imposed by the ACCC and the IASC. However, it might have been preferable if the South African Commission had been consulted before conditions on the code-sharing arrangement were imposed by these other two bodies, so that the South African Commission's views might have been taken into account and the conditions imposed by these bodies coordinated at an early stage.

4. South Africa

Resale price maintenance in the pharmaceutical industry
Nutri-Health

Facts

20. A South African Competition Commission staff member shopping for personal medication at a pharmacy noticed that a packet of slimming tablets, which had the Nutri-health label on, specified the minimum price for the tablets. This was contrary to the provisions of section 5(2) of the South African Competition Act, which states: "the practice of minimum resale price maintenance is prohibited".

Action

21. The investigations conducted by the Competition Commission found that it was not an isolated case. All the retailers of the product in question had complied with the minimum resale price condition. The manufacturers settled on a consent order with the Commission, which provided that they remove from their label those parts that were anticompetitive and/or misleading to the consumer.

Commentary

22. This case is a good illustration of the pedagogical efforts that need to be made to enforce competition laws in developing countries. It is significant that the infringement of the competition laws was only brought to the attention of the competition authority by one of its staff members, and not by a member of the general public. This demonstrates that, for competition enforcement to be efficient, there is a need to educate the general public and enterprises regarding the competition law, especially in countries where a competition culture is not well developed. The case may also be of interest to developing countries seeking to take action to benefit consumers of pharmaceuticals.

5. Venezuela

Abuse of dominant position in the telecommunications industry
Telefonica CANTV

Facts

23. Complaints were made to the Venezuelan competition authority that Compañia Anonima Nacional de Telefonos de Venezuela (CANTV), which had a monopoly position in the provision of basic telecommunications services, had imposed discriminatory commercial conditions upon other value added services Internet providers, as compared with the conditions granted to its own Internet provider subsidiary CANTV Servicios.

Action

24. The investigations undertaken by the authority found that CANTV's dominant position in the interconnection market made it possible to give particularly advantageous conditions to CANTV Servicios, and that it had in fact done so. CANTV was also found to have refused to give other Internet providers access to its local loop in Venezuelan towns (other than the capital Caracas) at the cost of a local telephone call. On 7 July 2000, the Venezuelan antitrust authority concluded that CANTV had abused its dominant position in a manner falling within the terms of article 13 of the Venezuelan Competition Law. It fined CANTV 1,875,904,275 bolivares, equivalent to 1.3 per cent of the other revenues of this firm in 1999. It also laid down the new conditions that CANTV would have to grant so as to reorganize the relevant market of Internet service providers (ISPs) - CANTV was instructed to offer similar commercial conditions to other Internet service providers, as well as available interconnection numbers enabling them to access local loops at the cost of a local telephone call.

Commentary

25. This case illustrates the role that competition authorities can play in the regulation of the telecommunications sector in general and the ISP segment in particular. Until recently, telecommunications services in most developing countries were in the hands of State-owned monopolies, which have now been privatized in many cases. The introduction of new services such as the Internet has provided an incentive to these firms to commit different forms of abuse, particularly as they usually continue to maintain their dominant positions in the basic telecommunications sector, especially in the local loop. It should be noted that the question of the dominant position of basic telecommunication providers and interconnection with local loops is not as yet resolved in several developed countries, and has created some controversy.

6. Zimbabwe

Predatory practices in beer brewing and distribution
Nesbitt Brewery vs. National Breweries Limited

Facts

26. Nesbitt Brewery (Pvt) Limited, a small brewing company located at Chiredzi, Zimbabwe, lodged a complaint with the Competition Commission that National Breweries Limited was engaged in predatory pricing, having drastically reduced the price of clear beer in Chiredzi to levels which were unprofitable, with the intention of driving Nesbitt Brewery out of the market. Investigations revealed that the clear beer industry in Zimbabwe was highly concentrated, with an HHI index in excess of 8,000. Nesbitt Brewery was a new entrant into the market, challenging the long-standing monopoly position of National Breweries, which held a market, share of 90 per cent. National Breweries has a national distribution network, while Nesbitt Brewery only operates in Chiredzi. Investigations further

revealed that the National Breweries had ran a beer promotion in Chiredzi from May 1999 to April 2000 when the Competition Commission started gathering information on the case. The promotion included free snacks and T-shirts, lucky draw tickets, free beers and substantial price reductions. The promotion was only held in Chiredzi, where Nesbitt Brewery is based and also sells the bulk of its beer. The National Breweries retail prices for its beer in Chiredzi during the promotion period were below its normal landed prices in that town.

Action

27. A full-scale investigation under section 28 of the Competition Act of 1996 was conducted by the Competition Commission. The alleged practices were found to be predatory within the terms of section 2 of the Act. Although National Breweries stopped their promotion activities as soon as they became aware that they were being investigated, the Competition Commission made them sign an undertaking that they would desist from future promotional activities primarily aimed at driving Nesbitt Brewery out of the market.

Commentary

28. Had there been no competition law in Zimbabwe at the time of this case, Nesbitt Brewery could easily have been driven out of the market by National Breweries in the exercise of its monopoly power. This case is particularly relevant to several African countries which have similar market structures in the beer sector, with new firms attempting to enter the market and challenge the position of incumbents. Also of interest is the procedure used. The Zimbabwean competition law allows for negotiations between the Competition Commission and affected parties to ensure the discontinuance of any restrictive practice, and the Commission used this provision to negotiate an undertaking with National Breweries to ensure that, in future, they would not engage in the practices complained of. Most competition laws provide for such administrative procedures for dealing with cases; only at a second stage, if firms refuse to adhere to agreed orders/prohibitions, would sanctions be applied in competition cases. Such procedures would be particularly useful where countries have adopted new competition laws, and the business community is not fully aware of the implications of certain actions in the market place.

II. MERGERS

7. Brazil

Merger in the carbonic gases and gases of air industry
White Martins and Unigases Commercial Ltda

Facts

29. The acquisition in the United States of the United States-based CBI Industries Inc. by Proxair Inc. brought about changes in the structure of the Brazilian carbonic gas and gases of air (oxygen, nitrogen and argon) market. White Martins, a subsidiary of Proxair Inc., took control of all operations performed in South America by Liquid Carbonic, a subsidiary of CBI Industries, through the Brazilian company Unicases Comercial Ltda's. The operation brought about a structural change in the southeast region of the country, with the elimination of competition between White Martins and Liquid Carbonic; White Martins became the sole supplier of carbonic gas in the region. The analysis of market entry conditions carried out by the Brazilian competition authority confirmed the existence of strong barriers against imports of the relevant product, as well as to access to the economically viable sources of raw material in the southeast, which were almost entirely owned by White Martins. By 1999 the incumbent's market share was 73.7 per cent of the total market.

Action

30. Having determined that the relevant market was the southeast region of the country, the Brazilian authority concluded that, even though the operation offered efficiency benefits, it gave White Martins substantial market power in the southeast region. As the lack of raw material was the reason for this market power held by the acquirer, becoming a strong barrier to entry, the Brazilian authorities conditioned the approval of the operation on a series of requirements:

(a) The two firms should abstain, over the following six years, from any bidding process from any new source of carbonic gas subproducts which might arise in the southeast region;

(b) Products should be sold under normal prices to both competitors and distributors;

(c) The limits of the terms of the acquisition should be settled in the supply contracts;

(d) Any preferential conditions or exclusivity in gas supply contracts for clients of the company should be eliminated;

(e) Clients' total freedom to choose FOB (free on board) or CIF (cost including freight) conditions when buying the company's products should be guaranteed;

(f) An annual report should be submitted to the Authority providing information about the evolution of the carbonic gas market.

Commentary

31. This case is important because it shows how a merger operation in a developed country can have effects upon a developing country's economy, and indeed lead to dominant positions on the markets of that country or part of it. In such circumstances, competition authorities in developing countries should be prepared to take appropriate action in respect of such structural operations where these might allow anticompetitive practices at a later stage. In the present case, the Brazilian authorities allowed the operation to proceed subject to certain conditions that might stop the anticompetitive effects deriving from the creation of a dominant position. This does, however, raise the issue of what action might have been taken by the authority if it had determined that the only possible means of preventing anticompetitive effects was to block the merger – would it have been in a position to enforce any order it made prohibiting this international merger from going ahead?

8. Kenya

Merger in the soft drink industry
Take-over of coca cola plants by M/s Coca-Cola South Africa Bottling Company Pty (Coca-Cola SABCO)

Facts

32. Towards the end of September 1997, M/s Coca-Cola SABCO (the Kenyan subsidiary of Coca-Cola International), with the support of M/s Coca-Cola Africa (which had its headquarters in South Africa), submitted an application for the acquisition of M/s Flamingo Bottlers of Nakuru, which bottled Coca-Cola. Investigations revealed that M/s Coca-Cola SABCO had already acquired Nairobi Bottlers (the most important plant bottling Coca-Cola in the country) in 1995. That acquisition had been effected without the approval of the Minister for Finance, as provided under the Kenyan competition law. Coca-Cola had a dominant position in the market for branded carbonated soft drinks in Kenya, and the acquisition of SABCO (as well as the previous acquisition of Nairobi Bottlers) appeared to be part of a strategy for strengthening and sustaining its dominance in the market by taking direct control of production, marketing and supply of inputs in all the Kenyan plants bottling Coca-Cola.

Action

33. To deal with the application for the acquisition of Flamingo Bottlers, a large number of stakeholders in the soft drinks sector, including government agencies, consumers, traders, potential competitors, trade associations and the applicants, were interviewed by competition officials in October and November 1997. The Minister finally approved the application subject to certain conditions on 3 December 1997. One of the conditions laid down was that Coca-Cola would not take over any of the remaining bottling companies in Kenya.

Investigations into the structure, conduct and performance of Kenya's carbonated soft drinks sector have been and still are on going in response to appeals from Coca-Cola SABCO for the Commission to reconsider the conditionality imposed on the company in 1997. The last appeal was received in 2000 at a time when the Commission was investigating several complaints against the practices and conduct of M/s Coca-Cola SABCO, and it was rejected.

Commentary

34. The case above had initially involved a contravention of the competition law by SABCO because it had acquired one of the plants bottling Coca-Cola in Kenya without seeking approval from the Competition Authority. The Kenyan competition authority, while allowing the second acquisition to go ahead, decided that the plan of taking over all the other bottling companies and consolidating them into one entity to be run by SABCO would lead to both horizontal and vertical concentration of market power and the likely abuse of dominance, and accordingly stopped the process from going further. Thus, the Kenyan authority, dealing with a huge global company, applied the competition law to foreclose likely anticompetitive practices in the market. This is a step forward in efforts to uphold competition principles in developing countries. But this case also shows that many mergers may be taking place without the knowledge of competition authorities in developing countries.

9. Romania

Merger in the automobile industry
S.C. Automobile Dacia and Renault

Facts

35. In 1999, the Romanian Competition Council opened an investigation into the acquisition by Renault S.A., a French firm, from the State Ownership Fund (SOF) of the majority stockholding in S.C. Automobile Dacia S.A. Pitesti. To support the Dacia-Renault project, the Romanian Government was prepared to grant state aids. Renault S.A. is part of the Renault Group, which produces cars and industrial vehicles and undertakes financial activities. The motor cars branch of the Renault Group has plants in over 30 locations in France, Europe, Latin America, Africa and Asia. Renault is the first brand in terms of turnover in Western Europe in the private and utility motorcars market. Renault S.A. did not control, either directly or indirectly, any undertaking operating in Romania in the field of car manufacturing or marketing.

36. The main line of business of S.C. Automobile Dacia S.A. Pitesti is the manufacturing and marketing of cars, utility vehicles, vans, pick-up trucks and ambulances, for both the domestic market and exportation. However, the relevant product markets for the merger were smaller medium-class cars and utility motor vehicles, while the relevant geographic markets were Romania (for the following five years while Renault was completing its investment in Dacia) and, in the long term, Romania and the Central and Eastern European countries. Dacia held a dominant position in both product markets in Romania, but its future prospects were

poor because it was highly vertically integrated, with excessive personnel, old and poorly maintained equipment and facilities, low productivity, and poor-quality products failing to meet new Romanian product standards and for which there was declining demand and growing price competition.

Action

37. The Competition Council approved the acquisition, taking into account that in the long run, a normal structure of the two relevant markets would be achieved, there would be a significant improvement in the quality of Dacia motor cars with only a reasonable price increase, and there were long-term prospects for Dacia cars to be sold in the European Union and for its brand to become the second trade mark of the Renault group.

Commentary

38. This case is an illustration of how foreign direct investment can have effects on competition and efficiency within national and international markets. Both countries with economies in transition and developing countries are going through the process of privatizing State-owned monopolies. In this process, national competition authorities should ensure that private monopolies are not created, but they also have not to affect the economic benefits arising from the privatization. In this case, the Romanian Competition Council conducted a careful economic analysis which took into account all relevant factors before concluding that the merger was acceptable. The Council approved the acquisition after it had imposed certain condition to safeguard the level of competition in the automobile market in Romania.

10. South Africa

Economic concentration in the pharmaceutical industry
Glaxo Wellcome PLC and Smithline Becham PLC

Facts

39. In January 2000, Glaxo Wellcome PLC and Smithkline Beecham PLC, two companies operating in the pharmaceutical industry in South Africa, made a pre-notification of their proposed merger to the Competition Commission. The Commission had to determine whether the merger would substantially prevent or lessen competition, as well as to consider certain public interest issues (including employment), in line with section 16 of the South African Competition Act.

Action

40. The Commission initially prohibited the transaction on public interest grounds, as well as on the basis that it substantially prevented or lessened competition in certain specific therapeutic categories. At this point, the Commission was aware that the European Commission also had problems in these categories and was in the process of agreeing upon certain undertakings with the parties. These were subsequently agreed upon and the EU

approved the merger. The Competition Commission also raised similar concerns with the parties in South Africa. In order to apply a consistent approach to these issues, the Commission consulted with relevant EU personnel, who provided useful insights on the issues. They also provided a copy of the agreement between the EU and the merging parties, with confidential information deleted.

41. The Competition Commission then had to consider public interest issues. The parties advised the Commission that only some of the employees at the middle management level would lose jobs as a result of the duplication of responsibilities occasioned by the merger. The Commission was satisfied with the explanation, as this loss in employment did not outweigh the competition considerations that the Commission had agreed upon with the parties. The final agreement provided for a divestiture (out-licensing) by the parties of products in some therapeutic categories where they would have market power. The divestiture related to products in respect of which the intellectual property rights had almost expired, i.e. generics would become soon available on these products. The Commission allowed the parties to retain the products over which the IPRs had not yet expired.

Commentary

42. This case is an example showing how, apart from competition criteria, public interest criteria such as employment may be taken into account in evaluating the impact of a merger. Furthermore, the case illustrates how the application of competition policy may take into account IPRs, resulting in orders for divestiture or licensing out of some IPRs which had almost expired, while no orders were made in respect of other IPRs which still had some time to run. This decision taken by the South African Competition Commission using information obtained from the European Commission illustrates the fact that close cooperation between competition authorities is feasible and can be successful in helping to resolve serious competition cases, despite the lack of a formal cooperation agreement between the competition authorities concerned, and despite the fact that it was not possible to exchange confidential information. However, this does raise the issue of whether the action taken by the South African Commission would have been as successful had they needed confidential information to undertake their deliberations, had the European Commission not considered the case in any depth because it did not raise competition problems in European markets, or had the Commission sought to mandate divestiture of IPRs which still had lengthy terms to run. There is also the issue of whether any other developing countries which may have been affected by the merger but which did not have local subsidiaries of the firms concerned established on their territory would have been able to take any action at all.

11. Zambia

Economic concentration in the dairy industry
Bonnita Zambia and Parmalat

Facts

43. The previously State-owned Dairy Produce Board had been privatized and sold to a South African company called Bonnita. Bonnita Zambia was established to revive the ailing Zambian dairy industry. The industry is of strategic importance to the rural economy where most dairy farmers come from. Bonnita South Africa had been taken over by Parmalat of Italy, and the acquisition also covered Bonnita South Africa's Zambian investments under Bonnita Zambia. The dairy farmers were at first apprehensive about the entry of Parmalat into the picture, as they were concerned about their own investments in Bonnita Zambia, as well as about the future of the support structure that Bonnita Zambia had so well developed in the supply and distribution of dairy products right from the farmers to the consumers.

Action

44. The Commission was concerned about the competitive effects that were likely to emerge if a new player was to come into the market and discontinue the developmental approach that had been taken by Bonnita. It evaluated the effects of the merger in accordance with the provisions of the competition Act, specifically section 8 (on Mergers and Take-overs Notification) read together with section 7 (on whether the object of the transaction is to prevent, restrict or distort competition in the relevant market). The Commission authorized the take-over but, taking into account the farmers' concerns, made it subject to Parmalat continuing the formal contacts established with dairy farmers throughout the country, as well as maintaining the shares that a dairy farmers' consortium had in the company. Parmalat's exclusive distribution arrangement was also authorized subject to removal of price fixing and territorial restraint clauses.

Commentary

45. This is a case, which was prompted by a take-over of Bonnita South Africa by Parmalat of Italy that had spillover effects upon the Zambian Bonnita subsidiary. Such cases are very common worldwide, and their effects on developing countries have been mixed. In this case, the Zambian Competition Commission took into account both the views of the dairy farmers and the competition effects of the take-over. Developing countries' competition authorities may need to take extra care when dealing with such spill-over mergers or take-overs, and may wish to ensure that they do not cause harm to local industries, while also upholding competition principles. In such circumstances, it would be important to have recourse to all relevant provisions in the competition laws to work out solutions which would help to resolve the concerns of all market participants.

12. Zimbabwe

Economic concentration in the tobacco industry
Rothmans of Pall Mall (Zimbabwe) Limited and British American Tobacco Zimbabwe Limited.

Facts

46. In this case, British American Tobacco Plc of the United Kingdom announced the conclusion of an agreement with the shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and Rembrandt Group Limited of South Africa to merge their international tobacco business in January 1999. After the completion of the international merger between British American Tobacco Plc and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited applied to the Zimbabwean Competition Commission for authorization to acquire the entire issued share capital of British American Tobacco (Zimbabwe) Limited. The merging parties also gave as one of the motivations the goal of merging the declining local market for cigarettes; the market was not enough to sustain two manufacturers, and evidence was presented as to the declining performance of British American Tobacco (Zimbabwe) Limited in its financial statement for the year ended 31 December 1998.

Action

47. The case was evaluated as a horizontal merger falling within the terms of section 2 of the Zimbabwe Competition Act of 1996. The examination of the proposed merger was based on information supplied by the merging parties' stakeholders: major customers, input suppliers, other tobacco manufacturers and tobacco associations. A cigarette consumption survey was also conducted in both urban and rural areas, and this was an important information source on product substitutability, brand loyalty, consumption patterns and smoking habits. The Competition Commission of Zimbabwe noted that, although the merger would result in the creation of a monopoly situation, other public interest benefits took precedence. Section 32 (5) of the Competition Act includes as such benefits the creation of greater economies of scale resulting in more efficient use of resources, the generation of foreign currency through exports, and the stabilization of cigarette prices on the local market. The failing firm defence put forward by the merging parties was considered a strong point in this connection. The Competition Commission therefore approved the merger with two conditions relating to the disposal of equipment and no price increases after the merger. Constant surveillance of future price increases was also part of this latter condition, with price rises needing to be justified to the Commission. The merged parties accepted the conditions and also successfully disposed of the surplus equipment to a third party which was interested in entering the cigarette market and which was due to commence production shortly.

Commentary

48. This case provides a reminder that, when applying merger control provisions, some developing countries take into account considerations of a public interest nature which may lead to the approval of mergers that might otherwise be considered anti-competitive. However, in this case, it appears that, even if only ordinary economic analysis had been applied, this would still have led to the approval of the merger, as it appears to have led to efficiency gains, and the failing firm defence may also have been applicable. The careful investigation of the market by the Zimbabwean Competition Commission is noteworthy, as are the conditions imposed for approving the merger, which enabled new market entry and continuing price monitoring by the Commission to ensure that the dominant position of the merged firm was not abused. This case would be of particular relevance to those developing countries which are facing a situation of "disinvestment" by transnational corporations.

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[1] UNCTAD document TD/RBP/CONF.5/15 of 4 October 2000.

[2] Such information was received from the Governments of Kenya, South Africa, Venezuela, Zambia and Zimbabwe.