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RECENT IMPORTANT CASES INVOLVING MORE THAN ONE COUNTRY

Report by the UNCTAD secretariat

Executive summary

The present report reviews a number of recent cases involving restrictive business practices and mergers in developed and developing countries and economies in transition. Some of the cases have cross-border aspects to the extent that they involve foreign countries with operations in the country in question. This report illustrates the fact that enforcement of competition law in developing countries has improved over time, through greater effort and support both nationally and through cooperation with other competition authorities. Cooperation between competition authorities from both developed and developing countries at bilateral and regional level has enhanced case handling capabilities in developing countries. Some developing countries have also continued to review implementation methodologies by adopting conventional means such as the introduction of leniency programmes in cartel and other investigations. Another area where developing countries are seeking to improve competition law enforcement is voluntary peer review. However, these countries continue to face new challenges as efforts to tackle cases effectively are stepped up. Some challenges result from structural weaknesses of competition legislations, and others from policy conflicts between competition and other government policies for example those governing sector regulators, which may or may not have concurrent jurisdiction with the competition authority on competition matters.

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INTRODUCTION AND OVERVIEW

1. The current report is part of a continuous series prepared by the UNCTAD secretariat reviewing competition cases with special focus on developing countries. The report looks at some cases with specific lessons regarding the implementation of competition laws. Paragraph 6 (c) of agreed conclusions of the 2004 IGE meeting on Competition Law and Policy on its sixth session 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".[1]

2. Accordingly, the cases reviewed in this report have been selected from information 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 relatively few cases involving developing countries for which it was possible to obtain information, a range of cases were 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 country where the case was considered; or (c) cases from developed and developing countries involving issues or sectors which are relevant internationally, particularly for developing countries.

3. The cases reviewed in the current report show that, in a context of globalization and liberalization, competition law and policy are becoming a key element in some developing countries' economic policies. More and more countries are enforcing competition laws more rigorously and also adopting tactics such as the introduction of leniency programmes and dawn raids. The importance of information sharing between competition authorities is also an aspect which comes out of this report. However, the relatively small pool of cases and countries from which these samples were drawn suggests that although many developing countries are adopting, or have recently adopted, competition laws, more efforts need to be made by these countries to effectively enforce the competition laws and to create or strengthen a competition culture in their markets. Some of the cases reviewed demonstrate that anti-competitive practices such as collusion and abuse of dominance occur in a variety of sectors and that in many instances anti-competitive practices involve a mixture of vertical and horizontal anti-competitive practices. Similarly, competition authorities are increasingly called upon to assess the potential anti-competitive effects of mergers and acquisitions, that have either a domestic or an international dimension. The present report deals with implementation successes, conflicts of or coordination of various policies, and also challenges. However, there is still much room for improvement of enforcement techniques and also coordination between newly established competition authorities in developing countries and economies in transition with the competition authorities of developed countries.

[1] See UNCTAD document TD/B/COM.2/CLP/48 of 22 December 2004.

I. Anti-competitive practices

1. Argentina: Cartel in the medical oxygen supply market

Brief description

4. The Competition Commission issued a judgement in July 2005[2] in which four foreign companies active in Argentina as suppliers of medical oxygen to public and private hospitals were fined 70.3 million pesos (US$ 24 million) for operating a price cartel for medical oxygen. The companies are the local affiliates of Air Liquide (France), Praxair (United States), AGA (Germany) and Indura (Chile).

5. The investigation was initiated in 1997 and concluded that the offending companies agreed to distribute customers amongst themselves while also participating in collusive tendering (bid rigging). In the course of its investigation, the Commission conducted four dawn raids, which resulted in the discovery of key documents showing the exchange of information about customers, bids, prices and the mechanism to allocate customers by means of agreeing which company would win each bid. As a result of the cartel, hospitals and consumers were charged high prices for the medical oxygen and the cartel members enjoyed illegally acquired high profits.

Commentary

6. In particular, the existence of cartels in the medical industry has especially harmful effects in developing countries, where these vital goods and services are scarce. Collusion between private firms is a significant source of foreign anti-competitive behaviour increasingly resulting in price and market rigging of cartels across developing countries that stifle competition in the markets of both developed and developing countries. Without strong enforcement of competition laws, these cartels will continue to cause great harm to consumers in the developing world and this, in turn, has a detrimental effect on development. The successful detection, investigation and prosecution of this cartel is a clear indication of the progress made by competition agencies in developing countries in eradicating these harmful cartels.

2. South Africa: Minimum resale price maintenance in the motor vehicle industry[3]

Brief description

7. The South African Competition Commission was alerted by a member of the public who discovered while in the process of negotiating the purchase of a new Toyota Corolla that a number of Toyota dealerships offered the same discounts on the new Toyota Corolla range. In addition, he reported that salespersons had advised him that failure to implement these discount structures would expose them to a stipulated fine. This complaint came at an opportune time, when the Commission was still

[2] Based on information received from Argentina Competition Commission.
[3] Based on material available on the South African Competition Commission's website, www.compcom.co.za

considering the public outcry about high car prices, and an investigation was immediately launched. Various dealerships were contacted during the investigation and in the process the Commission obtained a copy of the pricing and discount structure document of Toyota South Africa Motors (Pty) Ltd. This document was circulated to all Toyota dealerships and was possible proof of resale price maintenance.

8. The Commission's preliminary investigation into dealerships, major motor vehicle manufacturers and importers of new motor vehicles throughout the country suggested that the practice of minimum resale price maintenance was widespread within the car industry. Minimum resale price maintenance occurs when a manufacturer imposes a minimum resale price on a dealer, thereby limiting or even excluding a dealer's ability to offer discounts. Such a practice rightly prohibited outright by section 5(2) of the Competition Act.

9. The Commission decided to summon five Toyota dealer principals to appear before the Commission for hearings and to submit copies of all documentation relating to the determination of resale prices. The evidence found indicated that a contravention of the Act was taking place, which meant that the matter should be referred to the Tribunal for Toyota SA to be prosecuted. However, before the case against Toyota could be referred to the Tribunal, the parties entered into negotiations with the Commission to settle the case without referring. A consent agreement was therefore concluded with Toyota, under the terms of which Toyota agreed to discontinue the practice and pay an administrative penalty of R12 million. The penalty against Toyota sends a clear message that the Commission is determined to pursue any violations of the Competition Act.

Commentary

10. This case illustrates the importance of public awareness campaigns in the detection of anti-competitive conduct in developing countries and the beneficial effects that action by competition authorities may have in favour of consumers. Through these campaigns, competition authorities stimulate a culture of competition and make the public realize how harmful anti-competitive practices are. In addition, they encourage the public to blow the whistle on any company that still continues to breach the competition laws. This also exemplifies a situation where competition offenders can choose to cooperate with competition authorities to resolve cases without having to undergo rigorous court procedures. The effectiveness of such alternatives largely depends on the provisions provided by the law and the willingness of the parties concerned to take up the alternatives available.

3. Zambia: Anti-competitive restrictions on exports of cement[4]

Brief description

11. The cement market in Zambia is virtually 100 per cent controlled by the monopoly undertaking Chilanga Cement, which is part of the Lafarge Group. At the regional level, Lafarge has controlling cement interests in countries such as Zimbabwe, South Africa, Mozambique, Malawi, the United Republic of Tanzania and Kenya. Between 2002 and 2003, Chilanga Cement engaged in activities that appeared to be preventing, restricting and distorting the production and marketing of cement from Zambia to the traditional export markets for Zambian cement, which it now controlled in the Democratic Republic of the Congo (DRC), Burundi and Rwanda (the Great Lakes Region). Chilanga Cement appeared to be engaged in production and pricing strategies that made Zambian export cement less competitive compared with the cement from its plant in Mbeya, (United Republic of Tanzania).

12. The Commission's investigation pointed to the fact that Chilanga Cement wanted to divide the regional market (market allocation and territorial restrictions), whereby Zambian exports would be targeted to the DRC, while the Burundi and Rwandese markets were to be supplied from its Tanzanian plant. Such conduct was likely to make the Zambian plant less competitive by restricting its production capacity. The export pricing also appeared to make the landed price of Zambian cement higher. It was further alleged that Chilanga Cement had been suppressing the local supply of cement in order to raise prices. Further investigations also revealed a likely cartel of distributors who were alleged to be hoarding the product and thus creating an artificial shortage in the marketplace, leading to higher prices. This was also compounded by higher unofficial exports of cement to Malawi and the DRC (including smuggling).

13. The Commission advocated increased imports of cement, notably from Zimbabwe (owing to lower logistical costs compared with South Africa), in order to curb this likely abuse of market power by Chilanga Cement. Furthermore, it was decided that further investigations to test the recommended retail price regime were necessary in order to ensure that realistic market prices prevailed in the market in Zambia. The Commission also advocated that the Government revisit the tariff structure of cement in order to make the landed price of imported cement from Zimbabwe more competitive than it was at the time.

Commentary

14. This case shows that in the absence of adequate evidence to prosecute anti-competitive practices, developing countries may sometimes use other government policies to tackle a competition case. In the present case, government policies in Zambia in the area of exports, imports and tariffs were brought into play. This brings in the critical issue of government policy coordination granting the competition agency an alternative avenue for dealing with competition issues. In this regard, it is important for competition authorities to establish networking systems with other

[4] Based on information gathered by the UNCTAD secretariat from the Zambian Competition Commission.

government bodies as part of their advocacy programmes, and to ensure that these bodies duly understand the benefits of their actions.

4. Czech Republic: Collusion in the fuel distribution industry[5]

Brief description

15. Within a thirty-four hour period in May 2001, six fuel distributors considerably increased their sale prices of fuel by almost the same amount within the whole national network of petrol stations. The six fuel distributors maintained the high fuel prices until November 2001 despite the continuing trend of substantial decreases in their fuel purchase prices. The Office for the Protection of Competition (the Office) found that there was no objective justification for this rise in prices other than a mutual agreement as a result of the distributors' contact with each other through the Czech Association of Petrol Industry and Trade. The Office conducted a dawn raid on the parties' premises, which led to the discovery of evidence in the form of e-mail correspondence and other electronic documents.

16. The collusive behaviour distorted competition in the fuel market to the detriment of the end customer who bought fuel from filling stations. The Office prohibited the anti-competitive behaviour and imposed a fine of CZK 313 million (approximately US$ 10.6 million). This constituted the highest total fine imposed in a single proceeding in the history of the Office. The parties took the matter to appeal and the Chairman of the Office confirmed the first instance decision in May 2004.

Commentary

17. Collusion in the oil industry has been suspected in many developing countries, but lack of evidence to prosecute has been a common scenario. This is a success story in the fight against cartels that can be used by developing countries and also shows that it is possible to successfully detect and prosecute cartels. A dawn raid is one method, which was used in this case, of finding evidence. Successful dawn raids require sufficient resources and also coordination with other government arms, such as the police forces. However, to enhance coordination, the police and other players need to realize the harm that cartel activity does to an economy. This can be done through advocacy programmes designed and implemented by competition authorities.

5. Jamaica: Refusal of access to port facilities[6]

Brief description

18. In February 2002, the Fair Trade Commission (FTC) received a complaint from a stevedoring company (SSL Ltd) against another stevedoring company (KWL LTD), which owns berths in Port Kingston. It was alleged that KWL had denied

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[5] Based on information gathered by the UNCTAD secretariat from the Czech Republic Office for the Protection of Competition.
[6] Based on information gathered by the UNCTAD secretariat from the Jamaican Fair Trade Commission.

independent stevedoring companies access to the port facilities, which SSL deemed to be necessary for carrying out its business. Given that KWL handled all the non-containerized cargo in the port of Kingston, the existence of high barriers to entry (due to a lack of suitable port locations) and the absence of countervailing buyer power, KWL was considered to be a dominant player in the market for the supply of access to cargo freight infrastructure. The decision of KWL, as a dominant port operator, to bar independent stevedores from using its port facility was seen as an anti-competitive practice aimed at driving out its existing or potential competitors in ancillary markets such as the stevedoring and towage markets.

19. The FTC held the view that KWL was entitled to advance its own commercial interests, but such behaviour was not acceptable under section 20 of the Fair Competition Act if its actual purpose was to strengthen and abuse its dominant position. According to KWL, its actions were aimed at improving the efficiency of port operations. The FTC felt that this objective could be attained through less restrictive means.

20. The Supreme Court issued an interim injunction in which it ordered KWL not to take any steps calculated to prevent, hinder or deter the plaintiff from engaging in stevedoring business, shipping agency business and/or ancillary operations in or with respect to the relevant berths. The interim injunction, which allowed for the maintenance of competition in the market for the provision of stevedoring services, is still in effect as the Supreme Court is yet to issue a final decision.

Commentary

21. Abuse of dominance by firms operating in small markets where there is insufficient room for many firms to operate is common in developing countries. In the current case, the denial of access to port facilities by the dominant player has negative anti-competitive effects in Jamaica. Such a case can easily be resolved through administrative procedures if the concerned parties so choose. Otherwise, court procedures may take a long time to resolve a case, and in this example it has taken quite a lengthy period. Various jurisdictions have opted for specialized courts and tribunals to handle competition cases to avoid such delays. However, the good thing about this case is that the interim order by the Supreme Court has sought to maintain competition in the market until the case has been determined.

6. Hungary: Cartel in the fertilizer industry[7]

Brief description

22. In June 2005 the Competition Council of the Hungarian Competition Authority (GVH - Gazdasági Versenyhivatal) found evidence that Finland's Kemira Graw Haow, Europe's second largest fertilizer producer, and Belgium's Tessanderlo had been colluding in the Hungarian fertilizer market. The infringement, carried out as part of an international cartel, was the longest-operating cartel in Hungary, lasting from 1991 until 2003. The cartel agreement concerned market sharing and price

[7] Based on material available on the Hungarian Competition Authority's website: www.gvh.ionlab.net

fixing in the production and distribution of fodder phosphate, which is mainly used by producers of fodder for animals and by large meat producers, both of which produce fodder.

23. Members of the cartel exchanged information about, inter alia, the amounts of fertilizer sold, selling prices and evaluations of market demand. They also shared quotas and, when the agreed quotas had been exceeded, a compensation mechanism was established.

24. The GVH has applied its leniency policy to the matter. Under that policy, the GVH may waive fully or partially the fine to be imposed on those undertakings that cooperate in the detection of secret cartels and in the destabilization of functioning collusions. Therefore, Kemira, which reported itself to the authority, will be exempt from paying any fines, which would have been above 1billionHUF. Tessanderlo, on the other hand will have to pay a fine of approximately 131millionHUF. The fine has to be paid within 30 days from the date of delivery of the decision of the Competition Council.

Commentary

25. This case is a good example of the use of a leniency programme when dealing with cartel cases. In the last decade, the introduction and application of such programmes have increased the detection of prosecution levels of cartel activity in both developed and developing countries. Countries with provisions dealing with any form of cartelization should consider introducing leniency programmes as part of their regulations, while those in the process of drafting competition laws may consider developing a programme with initial implementation regulations.

7. Costa Rica: Resale price maintenance, and exclusive contracts in the market for carbonated non-alcoholic beverages and bottled fruit juice.[8]

Brief description

26. After a number of complaints from the market, the Costa Rican Commission for the Promotion of Competition initiated an investigation into the alleged anti-competitive behaviour of the Coca Cola Company, the Coca Cola Interamerican Corporation and Panamco Tica S.A (Panamco Tica). Panamco Tica purchases the syrup from Coca Cola and uses it to manufacture the final product. It is primarily a company that manufactures, bottles and resells the finished product to wholesalers and retailers in Costa Rica. The main practices investigated were resale price maintenance, tied sales and exclusive contracts. The Commission reached its final decision on the matter in May 2004.

27. During the investigation, it was discovered that Panamco Tica had included restrictive clauses in its contracts with retailers, binding them to resell the products at prices specified by Panamco Tica in regularly distributed price lists. This was

[8] Based on information gathered by the UNCTAD secretariat from the Commission for the Promotion of Competition of Costa Rica.

evidence of resale price maintenance, which affects *intrabrand* competition and limits the right of the retailer to apply his own sale prices. The Commission sanctioned Panamco Tica by imposing a fine of ¢34,028,360 and compelled it to amend the relevant clauses in the contracts to specify that the price lists are merely recommended, and not compulsory, and that the price to be applied for resale is to be determined by the retailer.

28. Further, the Commission's investigation established that Panamco Tica was lending refrigerators to retailers and attaching exclusivity clauses to the contracts, which required retailers to use the refrigerator for Coca Cola products exclusively. The Commission was of the view that as Coca Cola products were among the markets leaders, and given the importance of selling a cold product to the consumer, this practice had a direct effect on small retailers, which had no space to install a second refrigerator. In the context of a market with a high number of small retailers this practice can be seen as a barrier to entry. The Commission sanctioned Panamco Tica by banning it from agreeing, imposing or including any exclusivity clause in contracts with customers with regard to the use of refrigeration equipment in places where there is no space to install a second refrigerator. The Coca Cola Company was not investigated in this case, as it is not based in Costa Rica. However, the Commission is currently investigating its subsidiary, the Coca Cola Interamerican Corporation.

Commentary

29. This case shows the effects that resale price maintenance can have in developing countries. In a small market scenario much as in Costa Rica, small businesses are very important as an engine of growth. While large market economies are moving towards making resale price maintenance a rule-of-reason issue, rather than a *per se illegal* practice, such practices harm small economies like Costa Rica. Therefore, competition authorities have to evaluate critically the effects of these practices, and this is easier when the law provides for a *per se illegal* situation. Panamco Tica as a dominant player in the Costa Rica market was also able to restrict interbrand competition by entering into exclusive contracts with retailers concerning the cold storage facility provided to them. This creates barriers to entry for small firms and also limits consumer choices.

II. Mergers and acquisitions

8. South Africa: Merger in the health care services market prohibited

Brief description

30. On 30 June 2005, the Competition Commission recommended to the Competition Tribunal that a proposed merger involving Medicross Healthcare Group (Pty) Ltd and Prime Cure Holdings (Pty) Ltd be prohibited on the ground that it raises serious competition and public interest concerns.

31. Both Medicross and Prime Cure are active in the area of managed health care services, which include the full spectrum of primary health care services, for example day-to-day GP services, dentistry, optometry, radiology and pathology. Both have medical centres throughout the country and have extended networks of health-care service practitioners through which they provide their managed care products and services to members of medical schemes. Medicross and Prime Cure have, however, targeted different types of end consumers, with Prime Cure focusing mainly on low-income consumers and Medicross on middle-to-high-income consumers.

32. Apart from Medicross and Prime Cure, there is only one other market participant of significant size active in this area, namely Carecross. Carecross, like Prime Cure, focuses on low-income consumers. The Commission held the view that the market for managed care services provided on a national scale is highly concentrated. It was also of the view that the barriers to entry into this market are high, as a result of which future entry is unlikely. The future growth of the South African primary health care industry is expected to come from the millions of South Africans who currently are employed, but do not have any health insurance. The Government and the industry face the challenge of creating affordable medical aid products for these citizens, generally referred to in the industry as the emerging market.

33. The Commission found that Prime Cure is well positioned to service the bottom segment of the market, since it already targets low-income consumers and that Medicross is a potential competitor for Prime Cure in servicing those consumers. Therefore, the proposed deal is likely to result in the removal of a potential competitor in the bottom segment of the managed care services market in South Africa and reduce the number of potential players in this industry to the detriment of consumers and competition in general.

34. From a public interest perspective, the proposed merger is likely to negatively affect the ability of small firms and firms controlled by historically disadvantaged persons to become competitive in this market. Furthermore, it is likely to have a negative impact on the broader health-care industry in restricting the transfer of individuals from public health-care facilities to private health-care facilities. A further issue of concern relates to the already vertically integrated structure of Netcare, which would be further strengthened by the proposed merger. The Commission therefore concluded that the proposed merger is likely to substantially prevent or lessen competition and would have a negative impact on public interests, and therefore recommended that the Tribunal prohibit the merger.

Commentary

35. From its inception in 1999 to date the South African Competition Commission has reviewed in excess of 1,000 mergers. Of all these, the Commission and the Competition Tribunal have on average rejected no more than 2 per cent, which indicates that the merger regulation environment in South Africa is one that is very permissive. This should bring a great deal of comfort to business. Merger analysis has been tackled well over the past five years and the challenge remains to continue this approach consistently, with firms and foreign investors being provided with a level of certainty that they are able to factor in whenever they have to make decisions on investment in the South African economy. At the same time, it is important to give new entrants and smaller players reassurance that they too can enter and function profitably in markets that were previously difficult to enter because of anti-competitive practices.

9. Republic of Korea: Corrective measures imposed on merger between conglomerates[9]

Brief description

36. After deliberating on Hite Brewery Co.'s bid for Jinro Ltd., the Korean Fair Trade Commission (KFTC) decided in July 2005 that it would impose corrective measures in the event of Hite's formal notification of the takeover on the ground that the conglomerate merger between the Republic of Korea's largest beer maker and its top soju producer might substantially harm competition.[10] Soju is an alcoholic beverage that originates in Korea. The main ingredient is rice, almost always in combination with others such as wheat, barley or sweet potatoes. As to market definition, the KFTC defined the soju market and the beer market as separate markets, taking into consideration various aspects. For example, the two types of liquor are different in terms of taste, percentage of alcohol and consumption pattern. In addition, the SSNIP Test results showed there is no substitute relationship between soju and beer.

37. The KFTC, however, decided that there are great concerns about competition restriction through control over the distribution network because the beer and soju markets use the same distribution channel (liquor wholesalers). First, after the merger, the combined company might abuse its strengthened market dominance to raise prices of its beer and soju products, directly reducing consumer benefits. Second, the merger is expected to give the combined company more distribution power to engage in unfair practices such as bundling. This may ultimately lead to exclusion of existing competitors from competition in the two liquor markets. Third,

[9] Based on information gathered by the UNCTAD secretariat from the Korean Fair Trade Commission.
[10] Hite Brewery Co. voluntarily applied for a pre-merger review, before signing a contract, to see whether its share acquisition of Jinro Ltd. might restrict competition. After the decision made by the full commission on 20July, the KFTC is expected to notify Hite that corrective measures will be imposed if Hite Brewery Co. signs a contract of share acquisition as stated in its pre-merger review application form.

as the combined company secured a strong distribution channel, new liquor makers would find it more difficult to enter the two markets.

38. The decision came after Hite applied for a pre-merger review on acquiring shares in Jinro. The KFTC's corrective measures are as follows:

- The combined company should not raise prices of alcoholic beverages by more than the average inflation rate for the next five years, and if it wants to, it must have prior consultation with the KFTC.
- The combined company should submit, and receive KFTC's approval for, detailed measures to keep it from unfairly coercing/inducing liquor wholesalers to transact with it and making a transaction with them by unfairly taking advantage of its position in the business area, and should comply with the measures for five years.
- The combined company should manage its sales workforce and corporate structure separately over the next five years.
- The combined company should report to the KFTC all its records of transactions with liquor wholesalers.

Commentary

39. The KFTC's decision acknowledged that a conglomerate merger can have anti-competitive effects on the market and can be evaluated in order to impose *ex-ante* and *ex-post* monitoring measures at the same time, so that the adverse effect of competition restriction can be corrected appropriately while the positive effect of enhanced efficiency can be maximized. However, it is important to note that *ex-post* monitoring can be very expensive, with competition authorities with limited resources being prevented, from handling new cases or ending up not following up on the undertakings entered into by the parties. It is therefore important to balance the factors that come into play in a particular case.

10. Zimbabwe: Joint venture business operations in the furniture industry[11]

Brief description

40. The Zimbabwe Competition and Tariff Commission in July 2004 received notification of the proposed joint venture business operations between Tedco Industries Limited, a company involved in the manufacturing and retailing of furniture products, appliances and clothing, and Steinhoff Africa Limited of South Africa, a company involved in furniture manufacturing and distribution. The proposed transaction entailed the formation in Zimbabwe of two joint venture companies involved in the manufacture and distribution of furniture.

41. Examination of the proposed merger was largely based on information submitted by the merging parties in the merger application form. Additional information was obtained from other major stakeholders, which included suppliers, competitors and customers of the merging parties, as well as the relevant industry

[11] Based on information gathered by the UNCTAD secretariat from the Zimbabwean Competition and Tariff Commission.

association in Zimbabwe. The Competition Commission of South Africa was also consulted on Steinhoff Africa Limited and its market in South Africa.

42. The transaction was considered to be largely a horizontal merger with some vertical elements between the merging parties' furniture manufacturing and retailing operations. The relevant product market was identified as the manufacturing and distribution of (a) bedding; (b) case goods; (c) upholstered lounge suites; and (d) furniture products, while the relevant geographical market was identified as the whole of Zimbabwe since that is the market on which the merger would have a significant impact. Tedco Industries' pre-merger share of the relevant product markets was. (i) 65 per cent of the bedding market; (ii) 36 per cent of the furniture products market; (iii) 24 per cent of the case goods market; and (iv) 11 per cent of the upholstered lounge suites market

43. The Commission noted that the transaction would not result in a reduction in the number of players, and therefore competition, in the relevant market. The transaction would in fact result in the creation of two new furniture-manufacturing companies. It was also noted that the transaction had a number of public interest benefits, such as (i) foreign direct investment; (ii) foreign currency generation through exports; (iii) additional employment creation; and (iv) technology improvement in the local Zimbabwean furniture industry.

44. Some stakeholders had expressed concerns about the transaction, including the following:

- The exporting arm of the joint venture would deprive the local Zimbabwean market of furniture items.
- The joint venture would acquire firms in the upstream market, thereby foreclosing access to raw materials by competing furniture manufacturers.
- If the joint venture imports completely-knocked-down (CKD) furniture kits, it would out-compete other manufacturers as it would produce more furniture at less cost than the other manufacturers.
- Steinhoff is dominant in the neighbouring South African market and might abuse that position dominance in the Zimbabwean market by undercutting prices or becoming a price leader.

45. The Commission nevertheless found these concerns to be more a fear of competition than of actual anti-competitive practices. The merger was approved on the ground that it raised no serious competition concerns through the substantial lessening of competition in Zimbabwe or the creation of a monopoly situation. It was however, agreed that in view of the stakeholder concerns expressed about the transaction, the operation of the joint venture should be closely monitored against the possibility of any future anti-competitive behaviour.

Commentary

46. This case exemplifies cooperation and exchange of information between competition authorities. The analysis of the case shows that the benefits of the merger outweigh the concerns of the stakeholders. However, the competition authority kept an open window to monitor the activities of the joint venture in view of the stakeholders' submissions. For developing countries to be able to have competition

law enforcement credibility, resources both financial and human should be available for undertaking compliance follow-up.

11. Norway: Intervention in merger between American drilling equipment companies[12]

Brief description

47. The Norwegian Competition Authority has intervened against the merger between two American drilling equipment companies, National Oilwell Inc. and Varco International Inc. National. The two companies merged in March 2005, and Varco shareholders received National Oilwell shares in exchange for Varco shares. Both National Oilwell and Varco have subsidiaries in Norway, and were well established in the supply of drilling equipment and services for the Norwegian Continental Shelf before the merger. They were the leading companies globally in providing systems and equipment for oil and gas drilling. The merged company would have had a very strong position in the drilling equipment market.

48. The Authority warned that the merger would restrict competition in the markets for equipment and components used in oil and gas drilling and production, and thus the merged company has to divest itself of National Oilwell's Norwegian subsidiaries active in drilling equipment sales and service. Accordingly, the Norwegian Competition Authority ordered the sale of National Oilwell's Norwegian subsidiaries active in drilling equipment sales and services on 22 June 2005.

Commentary

49. This case is an example of cross-border anti-competitive mergers' spillover effects emanating from other jurisdictions. Effective enforcement of competition law can prevent the likely adverse effects by prohibiting such mergers, allowing them with conditions or issuing divest orders, as may be provided by the relevant competition law provisions. Mergers of subsidiaries of companies originating from other jurisdictions usually affect developing countries, when presented with the argument that the parent companies have already merged elsewhere. The current case illustrates that competition authorities should evaluate the effects of mergers on their markets and resolve cases on the basis of that analysis. The Norwegian Competition Authority successfully used this procedure to ensure that the market remained competitive.

12. Argentina: Conditional approval of telecommunications merger

Brief description

50 In November 2004, the National Competition Commission of Argentina recommended conditional approval of the transaction between Bellsouth Corporation

[12] Based on material available on the Norwegian Competition Authority's website: www.konkurransetilsynet.no/

(an American company) and Telefónica Móviles (a subsidiary of the Spanish group Telefonica). Telefónica Móviles had notified the Commission of its intention to acquire the assets of Bellsouth Corporation's Latin American operations. The Commission's analysis found that the acquisition would have both horizontal and vertical implications, as both parties were involved in a number of overlapping markets, including mobile telecommunications, fixed local telephony, long-distance fixed telephony, Internet access services, data transmission services and, public telephone services. An analysis of the horizontal implications revealed that the transaction raised no serious competition concerns as the market for the provision of these services was highly competitive and the merged entity would not enjoy a large market share. However, the Commission found that the merged entity would have a combined spectrum of 85mghz, which is above the maximum of 50mghz allowed by law. The Commission required the merged entity to reduce its concentration of spectrum from 85mghz to 50mghz in a reasonable period of time, which was to be determined by the telecommunications regulator. The Commission also held that since the mobile interconnection rate would be regulated in future, the merged entity would not be able to abuse its position in that market; however as an interim measure, the Commission approved the transaction on condition that the merged entity did not charge interconnection fees on a discriminatory basis. The Commission also required the merged entity to continue providing public phone line contracts to providers of public telephony on a non-discriminatory basis.

Commentary

52. The telecommunications industry worldwide is experiencing technological and regulatory changes leading to new products and services not only in telecommunications, but also in industries that use telecommunications products as inputs, such as computers and data retrieval. Of late, the world has seen a growing number of significant mergers and acquisitions in telecommunications. While such transactions may be a legitimate response to economic needs, they may, in other instances, threaten competition and the rights of consumers. In developing countries in particular, an alert merger policy is important so that these transactions do not result in unilateral or collusive anti-competitive effects, which would hinder the development process.