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OECD Global Forum on Competition

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I. HOW COMPETITION AUTHORITIES PROMOTE COMPLIANCE WITH COMPETITION LAW

In developing countries, promoting compliance to the competition law is still unattainable task because business is generally reluctant to comply with it, governments ignore it and in some cases do not want to know what it is and the public at large do not understand what it is all about. Most companies only see the need for a competition policy when they suffer personal or direct injury as a result of the behaviour of their competitors.

Promoting compliance with the competition law is made worse when there is an absence of a culture of competition in business. Zambia and many other developing countries are just emerging out of centrally controlled economies where government was the major player in business. In Zambia for instance, the state-owned enterprises accounted for about 80% of the country's economic activity. There was at the time no need for a competition law as the government was the only major player in the economy. There is still an absence of a competition culture despite the privatisation of the economy into the hands of the private sector entrepreneurs. The culture of none compliance extends to almost all business related laws inclusive of the competition laws and this remains a serious obstacle to a fully developed private sector driven economy.

As a result of the unfavourable competitive environment, the Zambia Competition Commission found itself, on its establishment, with a formidable task of creating a "competition culture" within the country. Our efforts to create public awareness and promote compliance have however started to bear fruits.

1. The Commission activities have come highly quoted and reported in the national press. Further, press inquiries on competition matters have been frequent both from the journalists and the public at large.
2. The number of matter being referred to the Commission by both government and non-governmental institutions has continued to increase. The Commission as a result has continued to offer advice and opinion on various economical matters.
3. The Commission has become an integral part of the policy formulation process at the Ministry of Commerce, Trade and Industry and other line ministries.

Despite the meagre resources and the lukewarm support the Commission has received from the government, the Commission is determined to promote and bring about the culture of competition. The Commission among other activities continued to carry out the following promotion strategies:

- The Commission has continued to participate and organise conferences, seminars and workshops in order to promote the understanding of the role of competition in a market economy. Various trade and professional association have continued to invite the Commission to participate and present papers at their events. The Commission has also taken such events as an opportunity for it to circulate its various publications. The Commission has demonstrated and publicised how it makes its decisions at such forums.

- The Commission has made attempts in creating public support for competition enforcement, by demonstrating how consumers and the public benefit from an effective competition policy. The Commission made interventions in the poultry, agro-processing (maize meal processing, fresh vegetables and flowers), oil marketing, beverages, constructions (cement), and alcohol beverages sectors among others. Following the interventions by the Commission, the companies in the sector made various undertakings and signed a compliance programme with the Zambia Competition Commission. In some cases, the dominant firms in these sectors had entered into various restrictive agreements with the weaker parties to ensure that they continue to dominate the relevant markets. In such cases, the Commission nullified the anti-competitive provisions of the agreements and opened up the sectors to more competition by so doing. The compliance programmes agreed with the Commission became the basis for interventions by the Commission whenever hold anti-competitive habits relapse.
- The Commission has on various occasions used institutions outside the Commission to develop competition expertise. The Commission has also used government channels to contribute towards the awareness of the parameters of the Act such as contributions in speeches of senior government officials in their address to the trade and business associations. For example, the speech by the President of the Republic of Zambia at the occasion of opening the 2001 International Trade Fair made competition and competitiveness, the theme of this speech. The Minister of Commerce, Trade and Industry has on many occasions used speeches with much inputs from the Zambia Competition Commission. The use of public officials is very effective for free and maximum media coverage.

Above all, the Commission has continued to publish its enforcement decisions. These are sent to the press, to all interested parties, and are accessible to the public. In addition, summaries of decisions are published in the Commission's Annual Report which is widely circulated. We have continued almost at every event taking place in the country to describe through statements, speeches and articles the government policy approach on competition.

The Commission has continued to develop a better understanding of its procedures. There is greater transparency in the application of the competition principles. We have enhanced transparency and certainty in our procedures by the publication of our guidelines and notices explaining the manner in which we analyse competition matters.

II. THE EFFECTS OF CARTELS

There has been studies carried out on the effect of international cartel activities on developing countries. The conclusions and findings arising from these studies are of important relevance to developing countries.

The important questions to ask are:

4. What are the developing countries doing about it? Do they have a say?
5. Are the developing countries in a position to challenge and contain the cartel activities in their markets?
6. Are developing countries better equipped in terms of resources and logistics to prohibit cartel activities in their markets?

There are some of the important questions which show how vulnerable the markets in developing countries are exposed to. I am really very doubtful whether a developing country at national level or individually can stand up against cartel activity. Developing countries need the assistance and support of developed countries. Why do I say so? I will pose some of the problems faced by developing countries:

- There is still lack of competition legislation in most developing countries. Where there is such legislation, the effective enforcement is still lacking, in some cases non-existence e.g. in the COMESA we have only three out of 22 operational Competition Authorities.

On the other hand, there is also greater doubt whether the existing legislation is adequately framed to deal with cartel investigation, prohibition and prosecution.

- As African countries, we lack information on international cartel activity. It is common to find out that even Competition Authorities will be unaware of the investigations being conducted in Europe. Where you have a trickle in of information, such information is not enough to trigger a meaningful national investigation. This makes it difficult even to know whether the subsidiaries of these companies in developing countries have been involved in international cartels or not.
- Developing countries lack the resources and the experience to deal with the huge complex and often well hidden cartel and other anticompetitive practices of multinationals. We have in our domestic markets cartels which have been active for a long time. Given the oligopolistic nature of our domestic markets, cartels behaviour has been very predominant.

It is now evident that the negative impact of cartelisation has been more on developing countries, especially in those countries still without competition law or without an effective national competition policy. Although the impact of cartelisation on developing countries is difficult to qualify, what we are certain of is that most of the many companies in Europe which have been investigated and prosecuted are well established in Africa and have very strong and long trading ties with governments in developing countries. In some cases, major development contracts have been awarded through bilateral and multilateral agreements with donor agencies to some of these companies. The establishment of institutions like the Global Competition Forum and the International Competition Network offers an opportunity for

developing countries to develop a mechanism where their concerns shall be addressed in international enforcement of antitrust laws.

III. CHALLENGES FOR COMPETITION AUTHORITIES IN TRANSITIONAL ECONOMIES

1. Background

Prior to 1990, economic activity in most developing countries was socialist oriented thus characterised by highly concentrated industries (monopolies, duopolies and oligopolies). Economies and politics were sides of the same coin and socialist policies were fused in both the academia and intelligentsia. However, with the transformation that began in the Soviet Union in the late 1980s, most developing countries embraced market-oriented reforms that culminated in the commercialisation and privatisation of state owned corporations.

2. Transition to a Market Economy

The 1990s witnessed an unprecedented process of economic and social transformation in most developing countries. The central theme of this process was the switch from the system of central planning or control of the economy to the use of market forces as the means to allocate resources. It was anticipated that the "free-play" of supply and demand would, in the long run, determined market prices throughout the economy, allowing productive resources to be allocated in an efficient manner. Structural adjustment programs were adopted that included market oriented reforms notably in the areas of deregulation of prices, including the reduction or elimination of subsidies, administrative allocation of key product inputs, privatisation of public enterprises or state companies, as well as the liberalisation of trade policy and investment regimes. The common aspiration underlying these reforms was the reduction of government's direct involvement or intervention in economic activity would, by providing enterprises with more freedom and stronger incentives, stimulate entrepreneurial activity, business efficiency, productive investment and economic growth well as enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than administrative decision.

There is still no consensus on the ideal competition law which can be used as a model for countries in transition. There is no "one size fits all". However, certain characteristics have started to emerge:

- competition policy needs differ according to levels of economic development of each individual country;
- competition law is just one of the various public policies that impinge on the competitive environment of the economy. Hence, there is need for linkage with other economic policies.

3. Policies and Institutions for Competition

After the transition to market economies, developing countries realised that the benefits of market oriented reforms were likely to be fully realised only if enterprises acted under the spur of competition, so that consumer wishes and opinions were reflected in market performance. It was further recognised that, a country that has undertaken trade liberalisation measures has every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anti-competitive practices by firms. A well functioning market mechanism is essential in this respect. For example, price liberalisation in the market dominated by monopolies in form of parastatal companies, unless specific efforts are made to

ensure the existence of competition, will end up in monopolistic price rises without corresponding competitive price equilibrium.

The private sector consistent complaint is that competition legislation prevents them from achieving economies of scale required to be internationally competitive. This is more pronounced in the competitive assessment of mergers/take-overs or other forms of acquisitions.

In recognition of the major role of competition law and policy in the success of the policy reforms, governments adopted competition policies and enacted competition laws. Competition rules set down minimum standards and allow enterprises to penetrate markets and establish themselves thereby facilitating inter-market trade. The role of Competition Policy was therefore seen to:

- i) enhance market access of new investors;
- ii) protect the competition from restrictive business practices;
- iii) foster economic efficiency and consumer welfare.

However, despite establishing relevant institutions to enforce competition laws, these institutions lack sufficient degree of independence largely due to the fact that governments remain the major financiers and influence major appointments. Other constraints the new institutions have face include:

- i) entrenched business interest that possess significant political power supersede competition concerns;
- ii) decisions by competition authorities are influenced by political expediencies and not sound competition principles;
- iii) lack of funds to participated at various international competition for a;
- iv) non-existence of positive comity among the developing competition authorities.

One may question whether competition law is still necessary in the face of trade liberalisation policy, deregulation and privatisation policies undertaken by countries in transition.

The arguments used are as follows:

- i) Promotion of competition may not always be conducive to industrial growth and international competitiveness;
- ii) liberalisation of international trade is sufficient to promote competition;
- iii) for developing countries, there are added risks of :
 - probability of improper enforcement;
 - misuse of bureaucratic power;
 - high possibilities of regulatory capture.

4. Law Enforcement

Until the enactment of the competition law, there was no formal enforcement of competition rules and policy in most developing countries. The creation of competition authorities in these countries was the first attempt by the respective governments to enforce competition rules. However, enforcement of competition law by these competition authorities has been marred by obstacles such as the following:

- i) the existence of Exceptions and Exemptions from Competition Law is an important factor that can limit their overall effectiveness. This is particularly seen in the taxation system where new investors are given tax incentives that work towards the advancement of a dominant position of market power to the disadvantage of existing or local firms. Competition authorities find themselves unable to correct such unfair incentives that prevent, restrict or distort the effective working of the competitive process. Enforcement has also been negated by the existence of non-application of competition rules to important sectors of national economies. There are also problems associated with confusing jurisdiction problems between competition authorities and Industry specific regulator;
- ii) competition authorities have also been faced with problems with interpretation and application of the law, in view of the different attitudes towards competition rules by the business community. The rich but confusing terminology and perhaps ambiguity of some clauses in the law makes the job of a competition authority strenuous and time consuming. This is coupled by the fact that most of the technical staff are still undergoing appropriate training in requisite rigorous analysis and application of relevant clauses of a particular competition legislation;
- iii) lack of political will and support at top government levels, largely due to ignorance of the competition law and appreciation of its place in economic development. Greater efforts have been placed on privatisation of state owned enterprises and attraction of largely foreign investors without regard to the long-term post privatisation effects on competition;
- iv) Competition laws of developing countries have often been modelled on those of developed countries, without being adopted to the special needs of emerging market economies;
- v) it has been experienced by developing countries that these laws are costly to administer and enforce. Reliance on governments grants has also made suspect the independence of such institutions especially in matters that appear to satisfy government pronouncements or policies;
- vi) most developing economies have immature market systems while at the same time their competition authorities lack technical resources to conduct appropriate economic analysis;
- vii) most developing economies are built around historically national or state owned corporations that are now in private hands. There are a lot of national sentimental concerns tied to such corporations. In case of deciding on a competition matter, competition authorities find themselves caught walking on a tight rope of defending national industrial policy over competition policy;

- viii) competition rules are a new concept to policy makers and the business community. Although legislation is precipitated by a lot of publicity, it has been rightly observed that laws are only understood when offences are committed and then the appropriate law is applied. As has been experienced in Zambia, although the business community and government officials were involved in the enactment of the competition law, enforcement of the provisions of the same law by the competition authority is often met with mixed feelings.
- ix) the challenge of enforcement of the law is also made difficult by the lack of a "culture of competition" among existing firms. Most firms continue to express ignorance to the existence of competition legislation and allude to the fact that all their competitors do not observe the provisions of the competition legislation.

Further to the above, effective enforcement is reduced by:

- weak capacity to review and decide on complaints concerning anti-competitive behaviour;
- weak capacity to investigate predatory mergers and acquisitions;
- weak capacity to co-ordinate regulatory bodies to enhance "competition for the market" in the provision of infrastructure services;
- weak institutional capacity to develop procedures for alternative methods as well as use of courts for solving conflicts arising from anti-competitive behaviour.

5. Powers of Enforcement

Competition authorities in developing countries face a daunting task of applying the law and at the same time explaining their powers to business and community. Although the powers as enshrined in the various competition laws are sufficient for enforcement, problems are encountered in the process due to the following:

- the Court system does not comprehensively understand competition policy, largely due to the fact that competition legislation is new. In addition, court cases are rare and therefore the regular court system is not exposed to making decisions concerning competition issues;
- there are capacity and analytical problems in dealing with transnational mergers and take-overs, as transnational corporations (TNCs) have long operated in the complex global economy and have a wider understanding of the dynamics of global economics. Developing competition authorities therefore find themselves using complex data from TNCs that is not easy to understand;
- Insufficient information on what is happening to parent companies in Europe but affecting subsidiaries in developing countries, which ultimately affect the quality of analysis and final decision;
- total disregard of domestic laws or reluctance to accept domestic laws by international companies, which in many cases has been caused by the nature of investment incentives that were originally negotiated with government officials - sidelining competition aspects.

6. Competition Advocacy

The lack of reliable sources of finance have compounded the problems of competition advocacy to politicians, businesspersons, government officials, parliamentarians, professionals and the general public. This is further impaired by the fact that competition policy is not a priority in many developing countries as compared with Foreign Direct Investment (FDI). The scramble for state owned companies under privatisation led in many instances to a narrow-minded view of economic growth and development, with greater emphasis placed on privatisation and not on the economic efficiencies to be created thereafter. This view appears to have continued in most developing countries and, competition authorities, though established by an act of parliament, have continued to strive for recognition by the major stakeholders in the economic and political spheres.

A competition authority in a developing country therefore faces a major challenge of justifying its relevance to the business community and general public in their every day economic lives. The result normally is to arrive at decisions that re biased towards so-called "public interest" and in this way hope to raise public appreciation to the existence and work of the competition authority.

7. Public Awareness

Developing public awareness to the existence of both the law and the work of an enforcement institution on competition is very crucial to the success of competition policy. Public awareness helps to develop a culture of competition that in turn leads to understanding of competition legislation and appreciation to the work and operations of a competition authority. The lack of resources to undertake nation-wide public campaigns has led to continued ignorance of the public to the existence of competition legislation and work of the competition authority. This scenario has led to continued restrictive business practices and unfair trading practices by the business community. In Zambia, goods have continued to be sold without any warranty or guarantee, with no option for refund or retention of goods when they are discovered to be defective. When confronted, members of the business community retort that "everybody is doing it" and they express ignorance of the existence of competition legislation.

Educating people is an on-going and costly exercise that has continued to elude competition authorities in developing countries. Therefore, despite the legislation, competition authorities have the double and taxing task of enforcing the law while at the same time educating offenders of the existence of competition law.. Although brochures can be made and circulated, very few people have the time and perhaps even the interest of reading about competition law, unless they have once before come into contact with the competition authority. There is therefore need to supplement brochures with seminars, workshops and other interactive forms of education campaigns targeted at political and government leaders, the business community and consumers. This require technical and material resources that are not readily at the disposal of the competition authorities in developing countries.

8. Concluding Remarks

Competition authorities in developing countries need relevant and sustainable assistance from similar authorities in developed countries, as well as that from multilateral organisations such as the World Trade Organisation, UNCTAD, OECD and the European Union. The globalisation of business has stretched further the analytical demands on the competition authorities and they need constant technical support. In addition, the role of a competition authority in ensuring that there is effective competition for the benefit of business and the consumer is the foundation upon which the developed countries have derived their efficiencies. Similarly, a number of developing countries have introduced competition

legislations and they will need as much support as possible in order for them to help bring about efficiencies in the economy of their respective countries.