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Global Forum on Competition

THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Papua New Guinea

-- Session IV --

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INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

-- Papua New Guinea --^(*)

1. Competition and Consumer Protection- Papua New Guinea goes its own way

1. PNG has been an independent nation since 1975. For many years it was thought that the economy had not developed enough to warrant competition law. There was some limited consumer protection law and price control. Furthermore with most utilities being provided by the national Government time was not ripe for competition law.

2. However, with the move to privatisation of some utilities and the development of the PNG economy, competition law was introduced. That process commenced in 1996.

3. In 2002 the PNG Parliament enacted *the Independent Consumer and Competition Act 2002*. It created the Independent Consumer and Competition Commission (ICCC). The ICCC, the consumer protection provisions and the regulatory provisions came into effect on 16 May 2002. The competition provisions did not come into effect until 16 May 2003.

4. The PNG Act is similar to the Australian Trade Practices Act 1974 and the NZ Commerce Act 1986. It has some provisions from both. The institution, the ICCC, has substantial similarity to the Australian Competition and Consumer Commission.

5. However there are some important differences between PNG law and Australian and NZ law.

6. The law is tailored to meet PNG needs. In particular there are extensive provisions on regulatory contracts that are to be entered into by PNG monopoly utilities. There is also the provision of price control.

7. In effect the ICCC Act has an overall competition and consumer protection mix. In addition the Act has extensive and some unique provisions relating to essential utilities which affect the bulk of PNG consumers.

2. Competition Provisions of ICCC Act

8. The competition provisions cover the following;

- price fixing- such conduct is per se prohibited.
- any other contract, arrangement or understanding that substantially lessens competition.
- resale price maintenance

^(*) This paper was prepared by Thomas Abe, Commissioner/CEO, Independent Consumer and Competition Commission, Papua New Guinea.

- contracts containing exclusionary provisions -, namely primary boycotts by competitors; but it does not apply if it does not substantially lessen competition.
- the Act does not specifically pick up exclusive dealing but the provision on anti- competitive arrangements is broad enough to pick up such conduct. It is not limited to conduct between competitors, it simply applies to all contracts, arrangements and understandings.
- misuse of market power- there is a prohibition on the taking advantage of market power to damage or eliminate competitors.
- business acquisitions which lead to a likely substantial lessening of competition.

9. These prohibitions can be enforced by the ICCC as regulator, or by private legal action by an affected party.

3. Clearance and authorisation

10. The Act provides for both clearance and authorisation in relation to mergers and has some set time limits for both. In relation to merger clearances the ICCC has 20 days from date of application to make a decision; in relation to merger authorisations it has 72 days. If the ICCC does not make a decision within the required time frame, the clearance or authorisation is deemed to be granted. Clearance is where the ICCC is requested to declare whether or not a merger may result in a substantial lessening of competition. Authorisation is available where a merger which may be in breach of the law can be allowed to proceed on public benefit grounds.

11. Authorisation is also available for all other anti-competitive conduct, except taking advantage of market power. The 72 day time limit does not apply to non merger applications.

12. To date the ICCC has had a number of merger clearance/authorisation applications The ICC has allowed most such applications to proceed, however one merger has been blocked and others allowed subject to conditions. A small number of authorisation applications for anti-competitive arrangements have also been adjudicated. However, to date there have been no legal proceedings instituted in the Courts in relation to these competition provisions.

13. In a small non trade exposed economy such as PNG there is a very high likelihood that most mergers will substantially lessen competition. Further, conduct such as resale price maintenance, price fixing between competitors and exclusive arrangements that have no doubt been prevalent in PNG for many years are now either clearly unlawful or potentially unlawful.

4. Consumer protection provisions of the ICCC Act

14. The ICCC Act has important consumer protection functions, these are:

- Promoting and protecting the bona fide interests of the consumers and businesses in relation to the acquisition and supply of goods and services;
- Making available any information in relation to matters affecting the interest of consumers and businesses, including information with respect to the rights and obligations of persons under Papua New Guinea laws that are designed to protect the interest of consumers;

- Investigating complaints concerning matters affecting or likely to affect the bona fide interests of consumers and businesses in relation to the acquisition of goods and services and to enforce compliance with laws relating to such matters;
- Strong provisions relating to product safety and recalls;
- The ICCC Act sets out a number of consumer rights, but (except in the case of product safety and recalls) it does not provide any legal redress through the Courts for breach of these rights.

15. Furthermore the ICCC administers national trade measurement and packaging laws.

5. Regulatory and price control provisions of the ICCC Act

16. The ICCC Act has extensive regulatory and price control roles. This is seen as a critical area of consumer protection in PNG.

17. PNG regulatory contracts relate primarily to utilities and amount to a contract between the utilities and PNG community. For example such contracts exist in relation to power, ports, telecommunications and postal service

18. The Regulatory contracts are developed and enforced and reviewed by the ICCC. The contracts relate to pricing, service standards, capital expenditure, innovation and increased efficiencies.

19. Price control has been rolled back in recent years, and price monitoring has been introduced as an alternative to price control. While the number of goods and services covered by price controls has been much reduced, it still applies to some basic commodities used by PNG citizens. For example price control or price monitoring exists in relation to fuel, passenger transport services, rice and flour.

20. In addition to the regulatory contracts, the ICCC conducts regular reviews of sectors of PNG industry and advises the Government on possible changes to regulation or policies generally. Recent reviews include petroleum, energy, coastal shipping, water and sewage, airlines, and general insurance, amongst others.

6. The ICCC

21. The ICCC is the only national regulatory body that acts as a consumer and business watchdog. The provisions of the ICCC Act apply to all businesses in Papua New Guinea including government enterprises. The ICCC Act also applies to conduct outside PNG which affects the PNG market.

22. The Commission consists of a full time Commissioner and two part time Associate Commissioners. One such Associate position is allocated to an overseas competition/regulatory expert.

23. Thomas Abe is currently the Commissioner as well as the Chief Executive Officer and has also been the ICCC General Manager since its inception in 2003.

24. In fulfilling this primary role, the ICCC performs a number of functions, in addition to those mentioned in paragraph 14 above, they include;

- Functions relating to price regulation, regulatory contracts, industry regulation and other matters as conferred on the ICCC by or under the ICCC Act or any other Act, including issuing, administering and enforcing regulatory contracts under the Act. This includes licensing and other

regulatory functions under industry specific utilities legislation such as the Telecommunications Act and the Electricity Industry Act;

- Promoting and protecting competition in the market and enforcing compliance with laws relating to anti - competitive behaviour in Papua New Guinea in accordance with Part VI of the ICCA Act;
- Monitoring the operation of, and review from time to time, the codes and rules relating to the conduct or operation of regulated entities;
- Advising and making recommendations to the Minister in relation to any matter referred to the ICCA by the Minister; and to advise and make recommendations to the Minister with respect to any matter connected with the ICCA Act or with respect to any matter connected to any other Act which confers functions on the ICCA; and

25. In performing its functions and exercising its powers under the ICCA Act, the ICCA will have regard to the following primary objectives:

- Enhance the welfare of people through the promotion of competition and fair trade and the protection of consumers' interests;
- Promote economic efficiency in industry structure, investment and conduct; and
- Protect the long term interests of people with regards to the price, quality and reliability of significant goods and services.

26. Three **priority** areas for ICCA are;

- First, informing all stakeholders about the ICCA Act and the roles and functions of ICCA. This is important because the work of ICCA is new and there are a large number of people across the country who has yet to become aware of the ICCA and the ICCA Act.
- The second priority area is to achieve compliance with the ICCA Act. Many small and medium businesses are still ignorant of the ICCA legislation. Hence strict enforcement of the Act has not yet been applied. This also applies to some of the compliance requirements that are placed on regulated entities.
- The third priority is to mobilise ICCA resources efficiently and effectively to achieve desired outcomes. This includes human resource capacity strengthening and having the correct IT capacity in place to enhance our core functions.

7. Interaction between the ICCA's competition, consumer protection and regulatory roles

27. While bearing in mind that the ultimate goal of competition is to enhance consumer welfare, it is clear that another part of the story is consumer protection. In fact, the view of the ICCA is that consumer protection issues are an integral part of competition policy.

28. The ultimate objective of both competition policy and consumer protection is to enhance consumer welfare by ensuring that consumers have greater choice in terms of price, quality and service. In this goal the ICCA sees its regulatory roles as essentially consumer protection goals and then competition

goals. PNG is a small economy and competition is not always possible but consumer protection is essential.

29. The competitiveness of a market affects the level of consumer protection required. In PNG we strive for competitive and informed markets but that is not always possible, hence the reliance on regulatory involvement and, in some limited cases, price controls.

30. In circumstances where there is little or no competition in the market (e.g. in a natural monopoly situation such as a telephone or electricity utility, **and particularly in small economies that tend to have less competitive markets**) there may be greater justification for intervention to ensure that consumer welfare is maintained because consumers are not driving the market.

31. In short, the amount and type of consumer protection regulation there should be depends on the competitiveness of markets. In highly contested markets, regulation should be only introduced with great care, while in markets where there is little or no contestability, some form of regulation may be more readily justified.

32. Given the high degree of interaction between the two policies, it is not possible to determine competition law policies and consumer protection policies in isolation. It is not only possible, but necessary, to administer these laws in harmony to achieve the ultimate goal of consumer welfare.

8. Importance of competition policy to a small economy

33. Competition policy, which is appropriately designed and effectively enforced, can be more important in small economies than in larger ones.

34. Small economies can support only one or two competitors in many industries, because of the small size of the markets. Openness to trade is a good solution to many of the problems of small size, because it enlarges the market. But competition policy also plays a crucial role in regulating market activity:

- it helps trade by reducing barriers to both foreign importer entry and domestic product exports;
- it plays a critical role where exposure to international trade is not sufficient to solve a small economy's efficiency problems, including markets for services rather than goods; and
- where artificial trade barriers (such as tariffs) are not reduced, competition policy is an alternative for regulating 'closed' small markets.

35. However, since competition policy is adopted to address various failures of the market, the policy should be carefully designed to deal effectively with the unique obstacles to competition that are present because of the small size of the economy.

36. The main goal of competition policy in small economies should be to promote efficiency. But when considering competition policy for small economies you are faced with a dilemma.

37. On the one hand, large firm or plant size may be required in order to achieve efficient scales of production, so it may be that only one or two firms can operate in an industry in order to achieve efficiency.

38. But on the other hand, the high level of concentration, or even monopoly control, of a market that results can lead to certain types of industry behaviour that is very damaging to efficiency. It is such

situations that may require greater intervention by the regulator than would be needed in larger economies where larger scale production can be undertaken in a competitive domestic market.

9. Dual system v Single agency

39. PNG has chosen a single agency model, where the agency operates largely independently of government direction or political influence.

40. To some extent this is because of what it observes in Australia and New Zealand and Asian counterparts.

41. However a critical reason is the belief that competition law, consumer law and regulatory control are all part of the same goal - the protection of consumers.

42. Furthermore PNG is a small economy and does not have the financial resources or skills to have a dual or multiple agency model.

43. The Single Agency model suits PNG both for policy and practical reasons.

10. Competition in the market and No frills version of products

44. PNG does not have any specific laws aimed at the encouragement of no frills products.

45. However, as a developing economy, the market itself calls for such products, which is encouraged by the ICCC. But the range of no frills products available in PNG is still small.

46. In its regulatory role the ICCC is very much aware of the need to have products that the PNG consumers can understand and that PNG businesses can promote.

11. Convergence of global competition and consumer policies

47. PNG would welcome such a move and points to its role in regulation in interests of the consumer. Competition agencies often criticise such a role but it is suggested that more thought be given to the impact of concentrated or non competitive markets and how consumers are protected in such cases. Competition will not do it in such environments.

48. PNG as a member of the East Asia and Pacific Regulatory Forum is continuing to advocate a better understanding of such issues (Thomas Abe, the Commissioner/CEO of ICCC has been the EAPRF pioneer Chairman since the formal inception of the organisation in 2003.)

12. International cooperation between competition authorities and consumer representatives

49. The ICCC is very open to international cooperation. It is a member of the East Asia and Pacific Infrastructure Regulatory Forum, it has a cooperation agreement with the ACCC and has the observer status on the Australia/New Zealand Consumer Products Advisory Committee.

50. It is keen to be part of any global or regional dialogue with consumer representatives and is receptive to learning from consumer groups of how best to administer competition law in the interests of consumers.

51. In PNG consumer representative bodies are in their infancy and hence inputs from consumer representatives in other developing countries and OECD members would help.

13. Conclusion

52. PNG is a newcomer to the global competition and consumer agency community.

53. Its law is modelled on well known models but its administration has a PNG bias.

54. Competition law aims to assist consumers but if the market does not foster competition, other instruments must be used to assist the consumer. In PNG that includes regulation of monopolies, including price control.

55. Such regulation is regularly reviewed to keep up with market changes. It is basically seen as a prelude to competition but in PNG we are not prepared to wait for competition to help the consumer. We see the need for other measures in the meantime.