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DOES COMPETITION KILL OR CREATE JOBS?

Contribution from Kenya

-- Session I ---

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DOES COMPETITION KILL OR CREATE JOBS?

-- Kenya --

1. Introduction

1. Kenya's economy is market-based, with a liberalized external trade system. The country has a population of approximately 44 million people of which approximately 47.5 percent constitute the working population. The economy has heavy dependence on agriculture and the tourism sector, which leaves it vulnerable to cycles of boom and bust considering that the agricultural sector employs approximately 75 percent of the country's population.

2. Kenya aspires to become a globally competitive country offering high quality of life to all her citizens by the year 2030. Attainment of this aspiration hinges on the extent to which the country is able to create and nurture a competitive industrializing and globalizing economy. The economic, social and political pillars of the Government's overall economic Agenda as articulated in the Vision 2030 and the Medium Term Plan 11 are anchored on existence of a skillful, productive, competitive and adaptive human resource base. Therefore creation of productive, decent and sustainable employment opportunities is, therefore, at the core of achieving the country's Vision.

3. The Kenya government has continuously articulated the need to create sufficient employment opportunities to absorb the country's growing labour force, however, unemployment, underemployment and the working poor continue to be Kenya's persistent challenges, compounded by rapid population growth, low and unsustained economic growth, growing youth population and structural rigidities.

4. An approach to employment creation based on economics may suggest that increasing competition may be a way to create jobs, however, practically this may not always be the case considering at times increased levels of competition and dynamics in markets may sometimes lead to unemployment. For example, in the case of a merger review, where firms merge with multinationals, who only need to employ a small number of people since they are able to rely on other aspects such as automation.

5. In spite of the job losses in some situations, it is notable that Competition improves the performance of markets, generating better outcomes including lower prices, greater productivity and competitiveness leading to industrial growth and job creations, and better access to services.

2. The Kenyan Competition Act and public interest issues

6. The Competition policy and law in Kenya is cognizant of the fact that competition can be a driver to job creation as seen in control of mergers. The Competition Act No. 12 of 2010 (the Act), specifically provides under the merger regime, section 46 (2) (e) of the Act that the Authority may base its

determination of a proposed merger on any criteria which it considers relevant to the circumstances involved, including the extent to which the proposed merger would be likely to affect employment.

7. The Act also takes cognizance of other public interest concerns that may affect employment considering the need to enhance and sustain employment, of both human and capital resources. Towards this, the Authority has developed guidelines that will ensure no substantial job losses occur as a result of mergers; that failing and dormant firms will be salvaged, and; will encourage mergers that will support youth employment.

8. In its determination of mergers, the Authority takes account both the Substantial Lessening of Competition and Public interest criteria. The latter basically focusses on the extent to which a merger would affect: - employment; ability of Small and Medium Enterprises (SMEs) to gain access or to be competitive in any market; ability of national industries to compete in international markets and a particular industrial sector, and; salvaging of failing firm. SMEs mergers are an initiative to enhance their capacity to penetrate certain markets in order to offer credible competition and enhance employment. The Act also encourages the export market, which facilitate expansion of Kenya's foreign exchange earnings, by making the local firms more competitive in the international market, hence creating jobs.

9. The Authority's determination in regard to public interest is determined on a case-by-case basis. It is notable that parties to the merger are expected to provide a definitive analysis of the impact of the merger on employment. In order to satisfy the Authority, the parties must show the rationale for the number of jobs to be lost and that public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognizable under the Act. The fact that markets are quite dynamic, at times aspects of retrenchments may pause a challenge to the Authority hence raising issues around public interest considerations.

10. The Authority also considers efficiency arguments for substantial job losses. These must be justified on the ground that is public in nature to counter the public interest in preserving jobs. Therefore, although a party may be able to demonstrate that employment loss is rationally connected to an efficiency claim this would on its own not be sufficient if the efficiency gain is private one. The Authority's position is that a gain to shareholders is purely private. Nonetheless, the Authority balances the merger efficiencies and the impact of the retrenchments on the public interest.

3. Case Examples

11. Highlights of recent cases handled by the Authority that illustrates the linkage between competition and job creation**.**

- **The Proposed Acquisition of 99% Shareholding in Real Insurance Company Limited by British–American Investments Company (Kenya) Limited.**

12. This was a horizontal merger between British American Investments Company (Kenya) Limited (Britam) and the Real Insurance company Limited (REAL). Britam, the acquiring undertaking, is a limited liability company incorporated in Kenya and quoted on the Nairobi Securities Exchange. The undertaking is involved in the business of non-life and life insurance and has two local subsidiaries; British-American Insurance Company (Kenya) Limited and British-American Asset Managers Limited. It also has operations through its subsidiaries in Uganda and South Sudan.

13. REAL Insurance Company Limited (REAL), the target undertaking, formerly known as Royal Insurance Company East Africa Ltd, is incorporated in Kenya. It is involved in the business of provision of non-life insurance and has subsidiaries in Kenya, Tanzania, Malawi and Mozambique.

14. The activities of Britam and REAL were found to overlap in respect of non-life insurance in Kenya. The market was further segmented according to classes of non-life insurance. These classes of insurance are engineering, fire, Liability, marine, motor, personal accident, workman's compensation, medical and miscellaneous. Each class of insurance was considered to constitute a relevant product market. Analysis found that in all these markets, post-merger market share of Britam would be less than 10% save for engineering, personal accident and marine where the market would be 14.7%, 16.95 and 12.4% respectively. The post-merger non-life insurance market share of Britam would be 7.47%.

15. The competition test showed that the merger would not lead to lessening or prevention of competition in non-life insurance market. However, the merger was found to raise public interest issues, specifically loss of jobs. This raised concern because it was noted that according to REAL financial statements, the company had been growing in terms of balance sheets and employees. In order to mitigate against job losses, cognizant also of the fact that post-merger would inevitably lead to duplication of some positions and hence the need for restructuring. The merger was approved on condition that Britam would retain at least 85% of the staff of REAL. Since the merger would also confer the merged entity the ability to compete in regional and international markets, this would facilitate creation of more jobs.

- **Proposed Acquisition of 7 Coffee Shops of Dormans Coffee Limited By Art-Caff'e Coffee and Bakery Limited**

16. This is a horizontal merger between between Art-Caffè Coffee and Bakery Ltd and Dormans Coffee Limited**.** Art-Caffè Coffee and Bakery Ltd, is the acquiring firm incorporated in Kenya. It operated four (4) caffè restaurants located in Village Market, Gigiri Branch; Junction Mall; Galleria Shopping Centre, Karen Branch, and; Thika Road Mall, Thika branch. The firm is involved in the business of offering food and beverages, specifically coffee, snacks and a variety of food items.

17. Dorman's Coffee Limited, the target undertaking, is incorporated in Kenya as a wholly owned shareholding of C. Dorman Ltd. It operates six (6) Coffee shops involved in selling food and beverages in Crossroads Mall, Karen; Junction Mall; Village Market, Gigiri; Air Kenya, Wilson Airport; Yaya Center; and Jubilee Insurance Exchange and Mama Ngina Street.

18. The activities of Art-Caffè coffee and Bakery Ltd and Dorman coffee Limited had overlaps in respect of selling food and beverages. However, the clientele who visit these restaurants are different with those frequenting the restaurants (students) located in the city centre, while those visiting the ones in Nairobi upmarket areas/ suburbs are middle to upper income Kenyans and families.

19. The analysis showed that the major participants in the food services sector are the cafes, quick service restaurants, formal and non-formal dining establishments and that the parties to the transaction are in the formal dining establishment. In Nairobi alone, there are over 200 formal establishments, in addition to numerous informal establishments and supermarkets which offer food and beverage services. It was also noted that most of these participants have more than one branch and these establishments operate alongside one another in the respective city suburbs. Additionally, Art-Caffè Coffee and Bakery Ltd and Dorman Coffee Ltd, compared to their competitors, are small in size, hence post-merger the undertaking will have minimal effect on competition in the relevant market.

20. With regard to public interest, Dormans Coffee limited had been making losses and therefore the acquisition would salvage a failing firm, which would in turn create efficiency gains and preserve jobs.

21. Two years post-merger**, t**he Authority pursuant to section 47 of the Competition Act initiated a post-merger compliance exercise to determine whether the merged parties complied with the commitment that more jobs would be created (as indicated in the merger notification form). The exercise showed that there was an increase in the number of employees of the acquiring entity in the post-merger period. The increase was from 309 to 321 workers; All the employees were retained under Art-Caffe, and no employee lost his/her job; and, that the entity is planning to open 8 more outlets, 4 under the brand of Dormans and 4 under the brand of Art-Caffe in various parts of Nairobi. The latter will not only create employment but contribute to the growth of the Kenyan economy.