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Contribution from Papua New Guinea

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Judicial Perspectives on Competition Law

-- Papua New Guinea --

The ICCC and the PNG Judiciary Collecting Evidence in Competition Cases

1. Introduction

1. Independent Consumer and Competition Commission (ICCC) was established through an Act or Parliament (Independent Consumer and Competition Commission Act of 2002 (ICCC Act) by the Government of Papua New Guinea (PNG) in 2002. The ICCC's primary objective is to enhance the welfare of the people of Papua New Guinea through:

1. promoting competition and fair trade in markets by monitoring and assessing potential anti-competitive businesses mergers and acquisition and investigating alleged anti-competitive conducts and arrangement to ensure these do not impede competition or breach the competition provisions of the ICCC Act;
 2. protecting consumers' interests through monitoring and enforcement of ICCC's regulatory decisions concerning price controlled goods and services such as fuel, PMV and Taxi fares; including seeking redress on behalf of aggrieved consumers and educating and informing consumers about product safety issues and their rights; and
 3. Regulating and ensuring compliance of the price path and the minimum service delivery standards of services provided by regulated State Owned Entities.
2. The Competitive Markets and Fair Trade Division of the ICCC deals with all competition matters.

2. OECD Themes

3. In terms of the request for competition agencies to provide contributions on the three OECD themes, unfortunately the ICCC has yet to successfully prosecute a competition case. The only experiences that we have had so far with the judiciary on competition matters involves a case which requires a judicial review of a decision we made on a business acquisition authorization, and another on judicial review of our power to with-hold information from a potential defendant.

4. In regards to these matters, the ICCC filed a case in 2009 and although this has not progressed to trial, this case will be discussed for purposes of making a contribution. It is our hope that other competition agencies that may have faced similar challenges as we have in investigating and collating evidence will offer some practical advice on how this pending case may be handled.

3. Background

5. In 2009, the ICCC filed proceedings against one of the biggest and oldest companies operating in PNG. This case was important for the ICCC because it was the first competition case pursued since the ICCC's inception in 2002. We filed proceedings for an alleged breach of the ICCC's market conduct rules; the Independent Consumer and Competition Commission vs PNG Mainport Liner Services, Steamships Trading Company Limited, Steamships Limited, Kambang Holdings Limited and Consort Express Lines Limited (the case).

6. In this contribution, we will not be focusing on the court proceedings, we will instead be focusing on the challenges the ICCC faced as a young competition agency trying to pursue its very first case of potential substantial lessening of competition (SLC) in a market. The reason for this is because the matter is still before the courts for deliberation on an interlocutory application and also because the ICCC has no case precedence prior to this case being filed.

7. On 12th November, 2009, PNG Mainport Liner Services (Mainport) entered into an acquisition agreement with Kambang Holdings Limited (Kambang) to acquire 17.6% of the total shares issued in and forming the issued capital of Consort Express Lines Limited (CEL).

8. Prior to the acquisition, Kambang held 33.3% shares in CEL, Steamships Trading Company Limited (Steamships) held 33.3% shares in CEL and Anton Lee Transport Limited held the remaining 33.3% shares, comprising the total shares issued in and forming the issued capital of CEL.

9. On 31st August, 2009 before Mainport acquired the 17.6% shares that Kambang held in CEL, Mainport was amalgamated into Steamships and legally ceased to exist. This raised questions on the validity of the acquisition agreement itself given that the acquirer at the time of the acquisition was "non-existent" but for the purposes of this contribution, we will not discuss that aspect as it is a matter of company law and not competition law.

3.1. Challenges

10. On 10th November, 2011, the ICCC filed proceedings¹ against Mainport, Steamships, Kambang and CEL for entering into an acquisition agreement that would have or would be likely to have the effect of substantially lessening competition in a market.

11. In filing the proceeding the ICCC faced two main challenges:

1. Identifying the relevant markets; and
2. Conducting research on the markets identified.

¹ Proceedings were filed pursuant to Section 69(1) of the ICCC Act.

3.2. Identifying the relevant markets

12. The ICCC conducted an investigation that spanned 6 months to establish possible contravention of Section 69 of the ICCC Act². Although the acquisition took place on 12th November, 2009, the ICCC did not know about it until 18 months later when a newspaper article was published by the local newspaper on 11th May, 2011. Investigations ensued leaving the Commission a period of less than 18 months to investigate, collect evidence and file proceedings before the matter became time barred to seek court orders for pecuniary penalties, damages and divestiture of assets³.

13. Through the investigation a total of three key markets were identified and a further thirty six smaller markets were noted to be affected by the acquisition. The three key markets were:

- coastal shipping services market,
- stevedoring and handling services market, and
- wharfage market.

14. In order to establish SLC, the ICCC needed to know the companies involved and their line of business/s. It is known business practice for companies to assess profit trends, predict expected returns on proposed investments and then assess those expected returns against the risks (which include the “competition” in the market) before acquiring. The ICCC needed to know which companies were involved and connected to these markets.

15. The ICCC found that Steamships, a company that has been operating in PNG since 1918⁴ initially started business as a single vessel operating between Australian ports and Port Moresby. Over the last 99 years, Steamships has managed to expand their business tremendously, venturing into conglomerate status by having a hand in the hotel, real estate and property management industry and other joint ventures in the likes of Colgate-Palm Olive⁵. Although Steamships has moved into other areas of business, it still maintains its original line of business in transport and port services through East West Transport and JV Stevedoring.

² Section 69 provides that a person shall not acquire assets of a business or shares, if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

³ Sections 95(5) action for pecuniary penalties, Section 97(2) action for damages and Section 98(2) of the ICCC Act respectively, impose a statutory time limit of 3 years (for penalties and damages claim) and 2 years (for an order for divestiture of assets) from the date of the alleged contravention to bring proceedings for damages. The ICCC found that Steamships, a company that has been operating in PNG since 1918⁴ initially started business as a single vessel operating between Australian ports and Port Moresby. Over the last 99 years, Steamships has managed to expand their business tremendously, venturing into conglomerate status by having a hand in the hotel, real estate and property management industry and other joint ventures in the likes of Colgate-Palm Olive.⁵ Although Steamships has moved into other areas of business, it still maintains its original line of business in transport and port services through East West Transport and JV Stevedoring.

⁴ <http://www.steamships.com.pg/about-us/our-company/company-history/>.

⁵ <http://www.steamships.com.pg/about-us/our-company>.

16. The ICCC found that Kambang was the business arm of the Evangelical Lutheran Church of PNG (ELC) and is 100% owned by ELC. Kambang was also trading in the shipping industry as Lutheran Shipping, which at the time of the acquisition was providing coastal shipping services between the northern ports of PNG. Kambang is currently in liquidation with debts totalling over K28 million⁶ and the Board and management had known for several years before the acquisition that it had incurred massive debt that it could not pay back.

17. In terms of CEL, the ICCC found that at the time of the acquisition, CEL was the largest coastal shipping company in PNG. CEL had a large shipping fleet transporting cargo between all of PNG's 17 coastal ports. CEL also provided stevedoring and handling services and storage facilities for its clients and has been operating in PNG since 1978 with a vast number of local clients. Of all 17 ports, the Port Moresby Port in the nation's capital and the Lae Port (PNG's second largest city) were the highest income earning ports. In the Lae Port, CEL owned 50% shares in Riback Stevedores Limited (Riback).

18. By acquiring the 17.6% shares from Kambang (through its subsidiary Mainport) Steamships had the majority shareholding interest in CEL at 50.9% and indirect shareholding interest in Riback. Steamships had effectively gained control over its largest competitor CEL, across both the PNG coastal shipping services and the PNG stevedoring and handling services industry. Consistent with its mandate, the ICCC felt the need to investigate this acquisition further.

3.3. Conducting enquiries into the markets identified

19. There were important questions that needed to be answered. Being a young competition agency, the ICCC lacked extensive experience and expertise which could have enabled it to progress these faster. These include questions such as:

- Was CEL a competitive threat to Steamships?
- Why did Steamships consider it essential to acquire 50.9% interest in CEL?
- Why did Kambang sell its shares to Mainport (or Steamships for that matter)?
- If the acquisition created SLC, how can this be proven?
- What kind of evidence is needed to prove SLC?
- How do we gather the evidence relevant, to prove to the court, beyond reasonable doubt that a breach of Section 69 had occurred? ,
- If the case was awarded in the ICCC's favour, what were the follow up action/s that need to be taken?
- Should nothing be done, how will the acquisition affect the country in the future?

20. These were some questions that the ICCC encountered when dealing with the Steamships case.

21. The exercise of collecting evidence from the market was very challenging. Players in the market were either unwilling to provide information, make official statements on record about the acquisition or in some cases, had already left the country.

⁶ <http://postcourier.com.pg/over-k28m-debts-incurred-by-kambang-holdings/>.

22. The ICCC interviewed anyone and everyone in or connected to the shipping industry and the stevedoring and handling services industry. The ICCC also conducted extensive research into all the shipping and stevedoring companies registered in PNG through the PNG Investment Promotion Authority. From this research, the ICCC was able to map all the companies in the entire shipping industry and identify how Steamships had control over these companies.

23. It was found that all these companies were somehow related, if not through direct shareholding interest, then through indirect shareholding interest through the majority shareholding interest in CEL. This made Steamships the dominant player with little to no competition.

4. Conclusion

24. The key lessons for the ICCC in this case were upskilling ICCC competition analysts to be able to identify the relevant markets and how to conduct investigations to obtain the right evidence to prosecute in a timely manner. Since filing this case, the ICCC has significantly increased the number of staff it has in its Competitive Market and Fair Trade Division; and took a keen interest in participating in OECD training opportunities.

25. Proceedings against Steamships are still in progress. The ICCC hopes to conclude these very soon and will of course share with the Global Forum on Competition through OECD the lessons learnt post prosecution. Until such time the court deliberates on this case and arrives at a decision, the ICCC can only hope that the material submitted in evidence are sufficient to prove SLC.