

Why should Competition Law Enforcement be Important to Trade Unions

As efforts to ensure that a competition culture is inculcated across all stakeholders, it becomes more important for the stakeholders to fully appreciate that competition enforcement can be a useful instrument in promoting and protecting their interests.

While the benefits of competition enforcement to stakeholders such as business, regulatory authorities, other government departments and civil society has often been deliberated upon, a group of stakeholders who appear to have been missed out are trade unions. However, it can equally be demonstrated that trade unions can also use competition enforcement as an input in their quest to promote workers' interest.

This briefing paper outlines how competition enforcement can promote the interest of workers and identifies roles which trade unions can engage in to assist in competition enforcement. It recommends that there is need for competition authorities and trade unions to work out cooperation mechanisms in their duties to harness each other's views and concerns.

Introduction

Economic literature suggests that one of the outcomes of increased competition is higher employment, often combined with higher real wages over time (Amable & Gatti, 2001). A recent study by the OECD (*Going for Growth¹, 2012*) recommends that removing product market regulations that stifle competition can reduce labour income inequality by boosting employment. The ability of specific markets to contribute towards employment has been studied in some developed economies, for example in the US telecom sector. Introduction of competition in the US telecom sector after the introduction of the Telecommunications Act in 1996 resulted in improving the employment scenario in the sector (Phoenix Centre, 2003)². It is evident that one of the ways competition could contribute towards economic prosperity in DCs is by creating jobs.

However, competition and labour laws are often regarded as pursuing conflicting objectives. Labour laws give workers the right to form trade unions and engage in collective bargaining, which result in better wages, working hours and conditions, and competition laws do not apply their legitimate activities even if they appear anti-competitive. Competition laws are intended to promote free competition between suppliers of goods and services, which would apparently result in lower prices, a situation which labour laws are inherently

designed to prevent with respect to labour. In this manner the two could be seen to have conflicting objectives in their respective applications.

Trade unions protect labour from being engaged strictly on an individual basis, which prevent employers from taking advantage of the employees' unevenness of bargaining power and play them against one another to drive down the resultant wages and work conditions. This takes place mostly due to the pressure exerted by unemployment, which allows employers the free rein to easily tap into the cheap labour pool. Unionisation, therefore, accords and amplifies the bargaining power of employees and prevents employers from suboptimal compensation and benefits to workers. Under competition law, this would somehow be tantamount to suppliers of an input being allowed to exercise oligopoly power over the prices of goods and services they sell, effectively killing competition among suppliers. This has often seen trade unions resenting competition laws as they regard it as something contrary to their interests.

In recognition of this potential conflict between labour law and competition law, legislatures across the world have decided to exempt agreements concerning employment conditions from the application of competition laws. This is apparently on the recognition that the social policy objectives pursued by such agreements would be seriously undermined if collective

bargaining, in its quest to seek improved conditions of work and employment, were subject to competition law. However, it can actually be established that the implementation of competition law also brings with it many advantages to labour and trade union interests.

What is a Competition Law?

This comprises of laws, regulations and jurisprudence specifically aimed at creating institutions for preventing anticompetitive business behaviour. It generally focuses on three issues: regulation of anticompetitive mergers and acquisitions, prohibition of abuse of dominance and prohibition of anticompetitive agreements among companies. In many jurisdictions, competition law also encompasses the control of unfair trade practices, i.e. misleading advertising and deceptive claims.

Anticompetitive agreements take place in two forms: horizontal agreements and vertical agreements.

Horizontal agreements are entered into by competing firms (also referred to as cartel agreements) either to increase prices, restrict output, allocate markets amongst themselves or to rig bids.

Anticompetitive vertical agreements occur between firms enjoying a supplier-customer relationship, which become anti-competitive³ when they result in market foreclosure, especially when other companies in similar need of the service are no longer able to have access to the products.

Abuse of dominance occurs when a firm in a dominant position engages in practices that are aimed at stifling the level of competition in the market or force customers to accede to onerous conditions to enable the firm to enjoy supernormal profits.

Anticompetitive mergers take place when firms try to curtail the level of competition in the market by strategically combining with, or acquiring other firms in related businesses to eliminate competition or to acquire substantial market power.

Competition law is a sub-set of competition policy and its objective is to ensure that there is fair competition in the market. This results in firms developing new products, services and technologies at competitive prices to attract consumers, and in turn add to economic growth and welfare. However, as competition may lower profits for firms that are not innovative, they try to seek ways of avoiding it. Firms would try to avoid competition in order to obtain market power, a situation where a firm can have some ability to control the price in a market. This can be achieved either by devising methods to discourage other firms from entering or participating in the market or through engaging in collusive behaviour on prices and output, such as all firms agreeing to sell at an agreed price. Such arrangements thus curtail business development and also thwart opportunities for employment creation.

There is, therefore, a glaring need to regulate the behaviour of firms to ensure that they do not manipulate the market to evade the principles of competition. Such need is the justification for interventions into the market through a competition law.

Many countries have adopted competition laws in the recent past. In 1995, when the World Trade Organisation came into being, there were about 35 countries with a competition law. Today the number exceeds 120 with more in the pipeline. As this paper is focused on Zambia, we take a closer look.

Zambia embraced competition reforms starting from the 1990s after liberalisation through the enactment of the Competition and Fair Trading Act (1994) CAP 417 of the Laws of Zambia. After noticing deficiencies, a new law, the Competition and Consumer Protection Act, 2010 was enacted repealing CAP 417. The new law saw the coming into force of two competition institutions, the CCPC and the Competition and Consumer Protection Tribunal to enforce it. It is, therefore, important that all stakeholders fully appreciate their roles in competition enforcement so that the benefits of competition are fully enjoyed. Among the most important stakeholders are trade unions, which advocate for labour interest.

Benefits of Competition Law to Labour Interest

To establish how the enforcement of competition law can turn out to be in the interest of labour, reference can be made to the key elements of competition law which were discussed in the above section:

Regulating abuse of dominance

As discussed, it is in the interest of all firms to acquire market power, which would enable them to influence the level of prices obtaining in the market. In any economy, there are always firms which are big, and in most cases such big firms end up extending their influence beyond the market in which they operate but also lobby politicians for policies in their interests. However, the quest to get bigger is done at the expense of other smaller firms as well as other potential or near entrants which would be forced to scale down operation or close shop. This is usually done through predatory pricing, where the dominant firm would set its prices at levels that are below production costs at first, and be content with temporary losses while fully aware that once smaller companies have closed shop, they would be able to raise prices to supernormal levels and recoup costs. The dominant firm can also instruct subsidiary companies to refuse to deal with its competitors to starve them of raw materials, especially if it is vertically integrated and has some control over raw materials in the downstream market.

Whatever strategy is employed, the end result is that smaller companies in the same market end up closing shop and laying-off staff, which is the same objective that

Box 1: ZCC Intervenes on Predatory Pricing in the Alcoholic Beverages Market

On June 08, 2001, Zambian Breweries lodged a complaint, with ZCC alleging that MetPress Zambia Limited, t/ a Metro Wholesalers was wholesaling the Zambian Breweries “Mosi” and “Castle” clear beers at prices lower than the manufacturer’s i.e. predatory pricing. This conduct was allegedly pushing members out of business and affecting employment. In addition, the firm was actually taking over such failing businesses in various parts of Lusaka as the local distributors did not have the financial power to compete with such pricing strategies from Metro, which was part of the Metro Cash and Carry, operating in at least 15 countries.

Investigation by ZCC proved that Metro’s selling price was indeed below the purchase price without any objective justification for the conduct. Although Metro was not a dominant player, its pricing strategies had an effect on the smaller distributors, hence the intervention. Since the practices was traced to the favourable credit period awarded to Metro by Zambian Breweries. ZCC ordered it either to be discontinued and or to be extended to all the other distributors to create fair competition. In the process, ZCC saved a lot of companies who were already finding the going tough against Metro.

Source: Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries- Thailand, Lao, Kenya, Zambia, Zimbabwe, UNCTAD, 2005

trade unions seek to prevent. In addition, the action squeezes the profit margins of the rival companies to such levels that they would not be able to pay competitive remuneration, which would also worsen staff working conditions. By descending heavily on abuse of dominance, a competition law would thus be acting in the interest of trade unions and labour. Box 1 gives an example of such intervention from Zambia Competition Commission (ZCC) which proved critical in saving firms which were closing shop due to predatory behaviour, which could have exposed hundreds of employees to unemployment risks.

Mergers and acquisitions

A hot issue in competition enforcement across the world, which has often seen labour movements raising concerns, is when companies are merging. Under most competition law jurisdictions, it is mandatory that merging companies should notify the competition authority of their intention to marry before doing so, and can only go ahead after approval.

One key consideration that has often seen conditional approval of mergers is a labour issue involving the impact the merger would have on employment levels. In any merger situation, there is bound to be duplication of roles following mergers, which create excess labour. The situation becomes worse if the merger involves related business operations, where some units would be consolidated into one unit and create excess employees. Competition laws of many countries, particularly South Africa, have embraced public interest provisions, which has often been used to the defence of employees during merger cases. Competition authorities have thus tried to safeguard such interest by going beyond competition concerns and imposing conditions that guarantee labour interests.

In Zimbabwe, the Competition and Tariff Commission was forced to act after indications from stakeholders had indicated the possibility of a cement company closure following takeover, a situation which would have resulted

Box 2: Competition and Tariff Commission Imposes Conditions in the Interest of Public Interest

In August 2001, Pretoria Portland Cement Company Limited (PPC), a leading cement manufacturer incorporated in the Republic of South Africa, acquired Portland Holdings Limited (Porthold or Unicem), the leading cement manufacturer in Zimbabwe. This was due to the desire by PPC to increase its cement investments in the Southern African region in the face of stiff competition from Lafarge S.A. of France, which had acquired Blue Circle Industries’ cement plants in Zambia, Tanzania, Malawi and Zimbabwe.

Although there were generally no competition concerns with the merger, the Competition and Tariff Commission of Zimbabwe noted that there were public interest concerns arising from the transaction, which include labour interest. It was observed that there was a tendency by multinational cement companies to close down a cement plant after acquiring it so as to supply if from one regional location, to be able to influence prices as well as to minimise operation costs. Such a decision would result in the entire labour force being rendered unemployed, killing off the potential for the plant to be a source for any further employment expansion in the process.

The Commission, therefore, authorised the merger on two conditions: that PPC should honour its commitment to maintain Porthold and continue the production of cement in Zimbabwe; and should PPC in future decide to dispose of Porthold, such disposal should be subject to the condition that Porthold will be maintained and continue producing cement in Zimbabwe.

Source: Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries- Thailand, Lao, Kenya, Zambia, Zimbabwe, UNCTAD, 2005

Box 3: Competition Tribunal Imposes Condition to Accommodate Trade Union Submissions

In May 2011, the Competition Tribunal of South Africa commenced a hearing on the merger between Wal-Mart Stores Inc. and Massmart Holdings Limited. The Tribunal found that the transaction raised no competition concerns (and, in fact, there was widespread recognition that Walmart's entry into South Africa will reduce prices and improve product range) but stakeholders, especially trade unions such as SACCAWU, SACTWU, FAWU, COSATU and NUMSA opposed the merger on the basis of various alleged public interest concerns (which the Tribunal is mandated to consider in terms of section 12 of the Competition Act). The Tribunal was thus forced to impose conditions to take into account concerns raised by trade unions, and the conditions issues included the following:

- the merged entity must ensure there are no retrenchments as a result of the merger for a period of two years from the effective date of the transaction;
- preference must be given to the re-employment of workers who were already retrenched when employment opportunities become available within the merged entity;
- the merged entity must continue to honour existing labour agreements and will not challenge SACCAWU's current position, as the largest representative union within the merged entity, for a period of three years.

Source: *Online news articles*

board. One widely reported merger took place in 2011, which was characterised by strong opposition to the merger by trade unions. The merger was eventually approved with conditions that were designed to take into account the concerns raised by trade unions, which also demonstrates the need for continuous engagement of trade unions in competition matters (Box 3).

Vertical agreements

The purpose of anticompetitive vertical agreements is to ensure that rival firms to both the upstream and downstream firms face a lot of restrictions in accessing key services they depend on. It can be established that firms raising complaints would be starved of raw materials or access to markets to such an extent that they would scale down operations or close shop. By coming to the rescue of such firms, a competition law also ensures that the survival of the firms is assured, which also goes a long way in promoting worker interests. An example includes a case in which ZCC had to intervene in the poultry market to ensure that many companies that had viability challenges after having been foreclosed due to anticompetitive vertical agreements were given a lifeline (Box 4).

Cartels

Cartels are often ignored by trade unions as they are seen as pursuing more profits for the companies, which is expected to translate into more benefits for their employees. However, there is no evidence to show that cartel members are the best paying firms, especially since they would be trying to avoid publicising their profitability for fear of investigations. The prevalence of cartels is actually a tragedy for employees. Studies have demonstrated that cartels target those basic commodities and critical services such as food, drugs, transportation and construction, which have very low demand elasticities. The cartels would raise prices for these

Box 4: ZCC Terminates Exclusive Dealing Arrangements between Hybrid Poultry Farm and Galunia Farms Limited

In 1998, ZCC uncovered restrictive business arrangements involving Hybrid Poultry Farm (a dominant day old chick breeder) and Galunia Holdings Limited (a commercial chicken broiler seller). Hybrid Poultry Farm decided to dispose off part of Mariandale Farm, which specialised in the raising of day old chicks to Galunia Holdings. However, the terms of the agreement were such that Galunia Holdings would only purchase day old chicks from Hybrid Poultry Farm, with Galunia not allowed to raise any type of poultry at the farm, apart from broiler chickens, including the provision not to go into business of a chicken hatchery. The parties also agreed that Galunia Holdings should be accorded the right of first refusal should HPF intend to sell some of its shares. Further, Galunia was also required to consider HPF's right of first refusal should it intend to resell Mariandale Farm.

ZCC noted that the parties to this transaction were the two leading players in the poultry sector, with Hybrid Poultry being dominant in the downstream while Galunia was dominant in the upstream sub sector. This placed companies such as Tamba Chicks (a day old chicks breeder) which was a direct competitor to Hybrid Farm at a disadvantage as it had been foreclosed; the agreement forced Galunia to buy the chicks from Hybrid Farm rather than Tamba Chicks. This had serious implications to the viability of the company and compromised its ability to meet its labour obligations. ZCC thus ordered the termination of the arrangements.

Source: *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries- Thailand, Lao, Kenya, Zambia, Zimbabwe, UNCTAD, 2005*

products or restrict output for the commodities, whose impact would be twofold.

Firstly, the same employees would be forced to part with a higher proportion of their hard earned wages than a situation which would have prevailed sans the cartel, which would put more pressure for wage adjustments as workers find their wages eroded by cartel induced higher prices. An example where ZCC had to act to prevent such an eventuality is one where ZCC had to act in the petroleum sector, which is very sensitive to labour as a price increase will always be followed by widespread price increases due to the multiplier effect. The direct impact of higher petroleum prices would be an increase in transport costs, which would also have an adverse impact on transport allowance adjustments to employees other than the impacts on the whole economy.

Secondly, output restricting cartels would constrain the number of people employed, resulting in fewer employees than a situation without restrictions, which would also be against the interests of trade unions. It is thus in the interest of trade unions to have cartels busted, a task which they should encourage the competition authority to prioritise.

In sum, the enforcement of a competition law is in the interest of trade unions and employees as it provides for an environment more conducive for business to flourish, which would also result in more entry and employment opportunities. It is in this context that trade unions should also seek ways of cooperating with competition authorities in competition enforcement.

Role of Trade Unions in Competition Enforcement

Trade unions can do a lot to ensure that competition enforcement improves.

- First, they can become an important watchdog to monitor the market and trace cases of anticompetitive practices that affect their firms. This would result in documented cases of anticompetitive practices which can be forwarded to CCPC for action.
- Second, trade unions can also play a more pronounced role in ensuring that mergers and acquisition give rise to minimal job losses, an overlapping mandate with competition authorities. Failure to engage trade unions in a merger, which resulted in failure to ensure that merging parties are kept in check by imposing a condition on employment proved disastrous in Zimbabwe, after the parties reneged on their promise on employment and fired many employees immediately after the merger (Box 5).
- Third, they can also ensure that competition issues become part of their agenda and add their voices to growing calls for an inclusive competition enforcement platform where all stakeholders participate.
- Fourth, trade unions can also help by using their organisations in the provinces and other levels where the competition authority's reach faces challenges to

Box 5: Failure to Address Labour Interest is Costly in a Merger Case

In 2000, the Zimbabwean Competition and Tariff Commission concluded the analysis of a merger involving British American Tobacco and Rothmans of Pall Mall (Zimbabwe) Limited. The merger was approved subject to two conditions, one being that the merged entity should dispose excess equipment to a third party at market prices and the second being that prices should not be increased after the merger, and if the parties intended to increase prices, they would seek approval from the Commission.

Although these conditions were critical in the interest of the public, the Commission did not impose any conditions in relation to employees. In their application, the parties had indicated that no employee would lose their jobs as a result of the merger, except a few managerial positions as the merged institution would have to restructure. However, a post impact assessment exercise carried out in 2006 indicated that immediately after the merger, about 115 employees lost their jobs, and the majority of those affected were in non-managerial positions. All these lost their jobs in a period of one year, immediately after the merger. Given that there was a monopoly, the affected employees could not find any alternative employment related to their experience until new players had entered the industry.

Source: Public Interest' Issues in Competition Analysis, Briefing Paper No.8/2008, CUTS CCIER

generate more awareness on competition reforms in Zambia, which is still too low.

- Finally, trade unions can also use their platform for engagement with business to register displeasure at incidences of anticompetitive practices as a way of discouraging the tendency.

Way Forward

The implementation of a competition law in any country is something that is very beneficial to trade unions, especially from labour perspectives, as competition can be used as a tool to promote such interests. In countries where an evaluation exercise was conducted to assess the benefits of competition interventions, it always turns out that many benefits were registered, some of which are of interest to trade unions and labour.

In Zimbabwe for example, such an exercise revealed that the Delta Beverages/Mr Juicy merger which the competition authority approved after analysis directly created between 95 and 130 new jobs. A condition imposed in the Rothmans of Pall Mall/ British American Tobacco merger in Zimbabwe saw the establishment of another company, Cut Rag Processors, which created 294 new jobs.⁴

In Zambia, the abolition of the exclusive dealership agreements in the beverage and soft drinks sector opened the industry to employment in the informal sector. ZCC negotiations also led to a new cement plant in Lusaka with higher production and employment capacities. In addition, ZCC held discussions with government which resulted in lowering entry barriers in the passenger transport business e.g. reduced duties, lifting of restrictions on routes, relaxed licensing system which helped in growth of the sector and created more employment opportunities.⁵

It is, therefore, important for both CCPC and trade unions in Zambia to appreciate their complementary roles in competition enforcement and the need for each of them in the advancement of their mandates. One pertinent need is for the two to sit down and discuss possible means of cooperation in competition enforcement. It would be in the interest of all stakeholders if such cooperation would result in the signing of an MoU between the two to make the relationship more binding and meaningful.

Endnotes

- 1 Forthcoming publication, OECD (2012), *Going for Growth, OECD, Paris*
- 2 See the Phoenix Centre Policy Bulletin (15th Oct, 2003), at: <http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin7Final.pdf>
- 3 Vertical agreements in general are not necessarily anticompetitive as some can have no or positive impacts on competition. Thus, care should be taken to distinguish between those agreements punished by competition law, discussed in this section, and other agreements which may not be prohibited by competition law
- 4 Alexander J. Kububa (2007), 'Criteria for evaluating the effectiveness of competition authorities', paper prepared for the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 17-19, 2007
- 5 G Lipimile, 'Contribution of Competition to Growth and Poverty Reduction', presentation during the 7up4 Project Interim Review Meeting, Banjul, The Gambia, July 29-30, 2009

This Briefing Paper is written by Cornelius Dube and Rijit Sengupta of and for CUTS.

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