National Training workshop on Competition Policy and Law

17-19th July 2007, Mozambique

Organised by Consumer Protection Association of Mozambique (DECOM) and Consumer Unity and Trust Society-CUTS International

Acknowledgement

The National Training workshop is an initiative of Consumer Unity and Trust Society-Centre for Competition, Investment & Economic Regulation (CUTS-C-CIER). This National Training workshop has been organised by DECOM under the CUTS-7UP Project. We would like to thank the Department for International Development (DFID) and the Norwegian Agency for Development Cooperation (NORAD) for supporting the 7UP 3 project. We are extremely grateful to Ms. Kasturi Moodaliyar, Ms. Jennifer Skillbeck and Dr. S Chakravarthy for valued papers and presenations at the traning workshop. Lastly but not least we would like to thank all partcipants for thier valued partcipation.

Opening Session

Opening and Welcome Address

The representative of DECOM Mauzinho Nicol's, welcomed participants and highlighted the objectives of the workshop. He acknowledged the presence of a representative from the Ministry of Trade and the resource persons from India, South Africa and the United Kingdom, and latter on acknowledged the representative of CUTS-International from Zambia. He then called upon the representative from the Ministry of Trade of Mozambique to deliver the remarks.

Opening address

The workshop was officially opened by Mr. Armando Lifaniga, From the Ministry of Trade of Mozambique. In his remarks he thanked DECOM and CUTS for their initiative which he said were very relevant with the timing and discussion on competition policy in Mozambique. He thanked DECOM and CUTS for the initiative and urged stakeholders to make use of the knowledge acquired under the workshop.

Introduction to Outline of the Workshop and its Purpose

Representing CUTS-International Vladimir Chilinya acknowledged the presence of the representative from the Ministry of Trade of Mozambique and the respective resource persons and latter on welcomed participants to the workshop. He thanked DECOM for their partnership under the 7UP3 project. And latter gave a brief background to CUTS and the 7UP3 project, and thanked DFID and NORAD for their support to the project.

Session One

1.1 Introduction to Competition Policy and Law – Rationale & Objectives, Kasturi Moodaliyar

The presentation highlighted the following issues; definition of Competition Policy and how is it different from Competition Law, objectives and Scope of Competition Policy and Law, Anti-competitive Practices and how do they affect consumers?

Definition Competition Policy

The term "competition policy" is sometimes used to describe an array of government policy measures that influence competition in domestic markets. On that broad definition, policies regarding tariff protection, deregulation and direct foreign investment, for example, would come within the ambit of competition policy. (UNCTAD 2004)

What is competition policy and competition law

Competition law is intended to eliminate or curtail restrictive business practices, which hinder or prevent firms from competing freely with one another in domestic markets. The law recognises that, in some circumstances, the benefits to the community from a particular anti-competitive agreement or anti-competitive conduct will be greater than the detrimental effects that it causes.

Why do we need a competition Policy?

We need competition policy because if firms are unmonitored, they may resort to actions that increase their profits but harm society.

How do we analyse competition policy?

Competition policy requires both legal an economic analysis. Legal- being the interpretation and application of the Competition Act and Economic analysis provides valuable insights into market structures and business practices.

Response from participants

The following were some of the key issues which were brought out by participants during the session;

- Recognizing that there is need to implement a sound competition regime, however, there are still a number of other issues which need to be considered such as public interest issues,
- The definition between competition policy and law is not very clear as most participants did not understand, the difference hence requested for more clarification
- In Mozambique there are a number of cases involving the formation of curtails and this has serious implication on the ordinary citizens. Citizens need to be protected against such business practices.
- Since Mozambique does not have a law in place yet, participants requested for more details on models which have been effective in dealing with issues of competition and consumer protection.

- A lot of concerns were raised at the regional integration process, which has taken off without a competition model or framework as a result the benefits have been uneven.

Presenters Response

- Regarding the model of a law, the presenter indicated that there are a number of models which have been used by different countries among them, the Australian Model, the United Kingdom model etc. However, the effectiveness of any model depends on the national environment, and priorities. In some cases some competition policies are separate with consumer policies while in other cases the competition policy and consumer policy is enshrined in one document.
- At the regional level both SADC and COMESA are in the process of coming up with Competition frameworks, which will serve in regulating business practices

1.2 Dominance and Abuse of Dominance, Dr. S. Chakravarthy, India

The presentation highlighted the following issues;

Dominance

An useful definition that would anticipate the objective of competition law and policy as provided by the European Court of Justice is that dominance is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers" (Case Law, 1978). This definition carries 2 elements, one an ability to prevent effective competition and the other, an ability to behave independently of 3 sets of market players, namely, competitors, customers and consumers.

"Dominant position" has been appropriately defined in many competition legislations, for example in the new Indian competition law, namely, Competition Act, 2002 in terms of the "position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favour". This definition as well as that of the European Court of Justice (ECJ) may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by an efficient and effective competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape (like in the first example above) or result in unnecessary litigation (like in the second example above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" may, perhaps, be an aberration. With the aforesaid broad definition of the ECJ, the regulatory Authority will have the freedom to fix errant undertakings and encourage competitive

market practices, even if there is a large player around. Abuse of dominance is critical for competition law, in so far as dominant enterprises are concerned.

Determining whether a firm has a dominant position is done with reference to a defined market. In other words a firm's dominant position has to be in relation to its power with respect to a market. When the expression 'market' is used, it is always the 'relevant market', when identification of dominance is involved. Relevant market is discussed below. Before doing so, it is important to note that only when dominance is clearly established, can abuse of dominance be alleged.

Response from Participants

- Concerns were raised at the failure by Mozambique to put in place a policy despite being a market economy for over 17 years.
- There were concerns by participants over the objectivity of some institutions to effectively address competition issues, due to commercial interest
- It was discussed that some of the companies engaged in anticompetitive practices include, MCell, Vodacom, Telecomunicacoes de Mocambique (TDM) and Aguas de Mocambique, Electricidade deMocambique and MBS Group.

Presenters Response

- It is difficult to implement a sound competition environment, and promote a competition culture without restructuring the market. Since there has not been a policy in place for a long time, therefore the need to ensure that market trends are in conformity with the requirements of a sound competition framework,
- Stakeholders were urged to come up with an indigenous policy which will be in conformity with the economic and social needs in Mozambique, and not to copy any policy.

Session Two

2.1 Dealing with Unfair Trade Practices (UTPs) Dr. S. Chakravarthy, India

The presentation highlighted the following issues;

- Agreements that cause an appreciable adverse effect on competition are generally outlawed. This applies to written agreements, oral agreements, understandings and concerted practices. Agreement includes any arrangement or understanding or action in concert, and these agreements don't need to be formal or in writing and agreement need not be enforceable by legal proceedings
- For Example in a case involving a Siem reap in Cambodia - popular tourist town, housing the famous angkor vat temples. There are three means of transportation from phnom penh, capital of cambodia to siem reap – boat, road and air. There are Eight boat companies - the price for one-way travel is 40,000 riels (about us $ 10). Because of competition prices plummeted to as low as 20,000 riels, a level below profitable level**.** The boaters entered into an understanding to fix prices at 40,000 riels. They further agreed that they would not compete with each other and would share their departure schedules**.**
- There was no written agreement but only an understanding, and the understanding constitutes a cartel agreement. Two type's agreements are of two types horizontal agreements between enterprises competing in the same market (often *per se*) 2. vertical agreements between enterprises at different stages of production/ distribution process (rule of reason)
- Bid rigging; bid rigging is a horizontal agreement and *per se* illegal. Bid rigging means any agreement between persons or enterprises, engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

2.2 Competition Policy and Consumer Protection Dr. S. Chakravarthy, India,

One cannot but note the spate of legislation that is coming into force or has come into force all over the world to protect the consumer. Recent years have seen a rapid increase in the volume of legislation. It is essentially designed to afford protection to consumers against fraud and dishonesty in commercial dealings and also against oppressive bargains and dangerous products. This can be called public interest consumerism. Increasingly, there is considerable interest and concern in "consumerism" relevant to the formulation of consumer policies.

Commercial litigation tends to be concerned primarily with dispute between business concerns or between service rendering concerns. There is a growing school of thought which holds that consumer protection law is at best only distantly related to commercial law and that it is legitimate and imperative as a separate exercise to focus on transactions between suppliers and the ultimate consumer. Consumer protection law has thus its own *raison de etre*.

Competition policy/law and consumer protection law have objectives at once overlapping and distinct. Consumer law protects the interests of consumers, individually and severally. Competition law, on the other hand, protects not only consumers but also

protects competition in the market. While both have concern for consumers, competition law/policy has the larger objective of ensuring freedom of trade carried on by other participants (implying other than consumers) in the market. Put in another way, consumer law seeks to ensure fair play while competition law seeks fair and free play in the market.

Consumer

Who is a consumer? One who purchases or hire-purchases goods for private use or consumption is a consumer. Equally, a consumer of services will also fall under the definition. Consumer can be regarded as a member of that broad of class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection and other trade practices for which consumer protection laws exist. A consumer needs to be distinguished from a manufacturer who produces goods and wholesaler and retailer who sells goods. Over the years, the definition of a consumer has been broadened to include anyone who consumes goods or services at the end of the chain of production, thus catching the otherwise excluded plaintiff in Donoghue vs. Stevenson. In that case, a person and his friend went to a café where the friend bought ginger beer in a bottle made of dark opaque glass. After the former consumed some of the ginger beer, the friend poured out the remainder of the bottle revealing a decomposed snail. The former suffered shock and gastroenteritis as a result of the impure ginger beer. The person who consumed the beer being not the purchaser could not sue the café proprietor in contract. Lord Atkin in his judgment observed as follows:-

Why Protect the Consumer?

For many centuries, the society has thought it appropriate to protect the consumer against fraudulent and dangerous trade practices. This reflects a more and even a religious ethic and is an appropriate function of the criminal law. Senator Murphy[1], the Australian Attorney General introducing the Trade Practices Bill of the Commonwealth of Australia in the Senate justified the same in the following words:-

> "In consumer transactions unfair trade practices are widespread. The existing law is still founded on the principle known as caveat emptor meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection."

A dimension in consumer protection relevant to the question as to why a consumer should be protected is the problem of claiming compensation against the large producer where the goods or services are defective. Litigation is disproportionately costly and troublesome to the small consumer. Consumer policy, therefore, particularly in the

[1] Quoted in John Goldring - 'Consumer Protection and the Trade Practices Act, 1974-5', 6 Federal L Rev, p.288.

developed countries has encouraged producers to adopt codes of practice whereunder legitimate complaints are promptly dealt with on the one hand and has also encouraged small claims and arbitration procedures to solve actual disputes expeditiously, cheaply and relatively informally on the other.

Response from Participants

- Discussions on the subject hinged on the model to effectively protect the consumers, while addressing issues of competition. Since Mozambique is in the process of drafting the law/policy participants acknowledged the need to protect consumers, and wondered as to what models would effectively meet this objective

Presenter's response

- In response he presenter highlighted that; the issue of consumer protection has been difficult to deal with. Because in most registration consumers are not strongly covered, and this has created difficulties. For instance it becomes expensive for consumers to take up some cases in the court of laws due to delays and time frame in dealing with matters. Therefore the issue is to design a model which will address the issues comprehensively

2.3 Competition Restricting Practices, Dr. S Chakravarthy, India,

Introduction

This paper addresses competition–restricting practices like Anti-competition Agreements. Even though, another main area, namely, Abuse of Dominance is also anti-competition in nature, it is excluded from coverage in this paper, as a separate paper on the subject has been circulated. Treatment given to the above captioned subject is general in content and character and not related to any particular competition law of any country. Anti – Competition Agreements and Practices

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between "horizontal" and "vertical" agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, *prima facie,* horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser – seller relationship.

Horizontal agreements

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or

products. But the market for the product(s) is critical to the question, if the agreement trenches the law. If parties to the agreement are both producers or retailers (or wholesalers), they will be deemed to be at the same stage of the production chain.

PER SE ILLEGAL AGREEMENTS

Generally, many competition laws declare that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services have an appreciable adverse effect on competition :

- Agreements fixing prices. These include all agreements that directly or indirectly fix the purchase or sale price. These are known as cartels.
- Agreements limiting technical development or controlling production, supply, markets, investment or provision of services.
- Agreements rigging bids (collusive bidding or bid rigging). These include tenders submitted as a result of any joint activity or agreement.
- Agreements sharing markets. These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way.

AGREEMENTS FIXING PRICES - CARTELS

Cartels constitute one of the most pernicious forms of objectionable and restrictive trade practices. Cartels are defined differently in and for different contexts. For instance, the definition of a cartel typically employed in economic analysis is different from the one employed in international accords. But, for the purposes of this paper, the following definition would generally suffice.

2.4 Introduction to Competition Analysis, Jennipher Skillbeck,

The presentation highlighted the following issues;

- Advice on competition policy will normally be provided by national regulatory authorities, and further assistance may be obtained from the websites of other competition authorities' which will have broadly similar provisions.
- Competition law apply to, business, charities, utilities– gas, electricity, water, telecoms, airlines, nationalized industries, State purchasers, e.g. defence, health
- It is a policy decision, in some jurisdictions competition laws apply to "undertakings" "engaged in an economic activity" regardless of their legal or regulatory status
- In others only to "enterprises" "carrying on a business for gain or reward" Market definition the law: a relevant market comprises products and services that are interchangeable in terms of: characteristics, use and prices."

- Definition of relevant market? (1) Dominance “Dominance” is only a meaningful concept in relation to the goods and services with respect to which a firm is “dominant”
- Agreements, an agreement can only be anti-competitive with respect to other actual or potential goods and services, and they represent the market we are seeking to define
- Market definition: general, it will vary according to the investigation, a market is defined in terms of (Product or service; and Geographic scope) is also cover the demand side; and the supply side.

Session Three

3.1 Horizontal Restraints, Jennifer Skilbeck

The presentation highlighted the following issues;

- A horizontal agreements can be defined as Horizontal: operating in the same market at the same level of production/sales, e.g. an agreement between two retailers to sell televisions at the same price.
- Under the Vertical agreement: manufacturer agrees to sell televisions through one wholesaler only- *different* level of production/sales
- The usual legal provision, agreements between enterprises are unlawful if they restrict, distort or prevent competition
- Some restrictions are more anti-competitive than others
- "Agreements": a wide definition; parties may play limited part; may not be fully committed; may have been under pressure from others to join cartel;
- Geographic reach 1 the unlawful effect is usually only unlawful within national boundaries (including any free trade areas)
- Geographic reach 2 US Foreign Trade Antitrust Improvements Act 1982: foreign nationals cannot use US law against US firms for acts that lessen competition abroad
- US Export Trading Company Act of 1982: procedure for US exporters to establish cartels if no effect on competition in US "per se" restrictions (always unlawful)
- Pricing fixing – directly or indirectly (e.g. not departing from price lists; agreeing percentage price increases; agreeing permitted discounts)
- Sharing markets e.g. by territory or type of customer

Response from Participants

- It was leant that Mozambique restrict the importation of sugar, as a way of protecting the sugar industry, to a larger extent this has a negative effect on consumer choices. However, this practice was identified as anticompetitive as industries need to be protected only for a certain period of time.
- The first draft on competition law for Mozambique was submitted to parliament in 1996, and the second draft was has not been submitted yet to parliament
- Mozambique does not discourage the formation of associations, and these associations especially in the motor vehicle industries have been working as curtails
- There were concerns at how the regional laws on competition would be operational, considering the dual membership among SADC and COMESA member states

3.2 Regional Competition Legislations (Recent developments), COMESA, SADC, Kasturi Moodaliyar

The presentation highlighted the following issues;

- COMESA - a regional trade and investment integration grouping comprising 19 countries in Eastern and Southern Africa; Established in 1994 as successor to PTA for E & S Africa;

- Proposal for a competition framework was only accepted only accepted in 2001 after effects of FTA were felt and need for safeguards and regulation of competition became obvious. Formulation of regional law (regulations) took place pretty quickly (in 6 months) from April to September 2002 but adoption took much longer (2 years);
- In SADC Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe have adopted competition laws while Angola, Botswana, DRC Congo, Lesotho, Madagascar and Mozambique have yet to adopt national competition laws.

Response from participants

- To appeal to the Mozambican Government to approve as quickly as possible the Law and Policy on Competition this is already on the table.
- To promote dissemination campaigns on the importance of these instruments within the business community, academia and the general public.
- There is a need to continue a strong advocacy campaign within the region in order to have all SADC member states with similar instruments in their legal framework and that such instruments are flexible enough to foster an easier regional integration.
- For any economic system to evolve and be successful it is necessary that the main players, namely, producers, suppliers of goods and services, intermediaries act in line with the legal framework. Thus for a sound and competitive business environment it is extremely important to have in place a functional legal framework capable of making the Competition Law and Policy an instrument to achieve economic efficiency and the long awaited social welfare.

4. Conclusion,

In conclusion the representative of DECOM, Mauzinho Nicloe's thanked the resource persons for their contributions to the success of the workshop and called upon the representative of the Ministry of Trade to close the workshop. Mr. Armando Lifaniga, representing the Ministry of Trade urged participants to utilize the knowledge gained from the training workshop. He indicated that he had personally gained a lot from the workshop and thanked CUTS and DECOM for the initiative.