

Training Workshop on Competition Policy & Law:

Report on the National Training Workshop on Competition Policy and Law in Namibia co-organised by CUTS and NEPRU for the 31st July – 2 August 2007 that took place at Safari Hotel & Conference Centre, Windhoek/Namibia.

1. Background

Since March 2005, the Consumer Unit and Trust Society (CUTS), in partnership with national institutions in the Eastern and Southern African region, has embarked on the implementation of the programme called “*Capacity Building on Competition Policy in Select Seven Countries of the Eastern and Southern Africa (code-named as 7Up3 project)*”. The project is simultaneously implemented in Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia and Uganda. All the seven countries are in the processes of implementing national policies, laws and institutions on competition. Researchers and advocacy partners meet regularly at regional conferences to share experiences and research findings.

In each of the countries, a research institution is selected to spearhead the development of the Country Research Report on Competition and this process is accomplished through the formation of a National Reference Group (NRG) on Competition consisting of stakeholders from different sectors of the economy and at the same time, from Government, private business sector and civil society. The NRG informs deliberations on the competition through holding of various meetings.

After the country reports on competition have been finalised and results presented, CUTS started with deeper national sensitisation on competition by facilitating National Training Workshops on Competition Policy and Law in the seven countries. The plan is to complete this process over the period from July to September 2007. These training workshops target practitioners on competition, Government, the civil society, academicians, sector regulators and others.

2. Opening of the Training Workshop

Two guest speakers were invited and all delivered their speeches. The Minister of Trade and Industry, Honourable Immanuel Ngatjizeko delivered his speech on “*the status of the Namibian Competition Regime*” and opened the event officially. The second speech came from Ms. Tswelopele Moremi, the Executive Secretary of SACU, who presented her speech on the status Articles 40 “*on Competition Policy*” and 41 “*on Unfair Trade Practices*” of the 2002 SACU Agreement.

Hon. Ngatjizeko emphasized the importance of having a comprehensive policy and legislative framework as it does not only protect consumers from anti-competitive practices, but the entire economy, including business. The Minister then put weight on the fact that *“a consumer policy backed by a modern competition law enables the economy to be shielded from anti-competitive practices that negatively influence the purchasing power of the consumer, particularly in vulnerable and less mature developing country markets”*. He continued by clarifying that the Namibia Competition Act (Act No. 2 of 2003) governs competition in Namibia and it cannot be utilised to accord undue protectionism to local enterprises.

The minister referred to imports which he said, are often subjected to distorted pricing by import cartels, compounded by monopolistic behaviours by some Namibian firms, all of which are detrimental to consumer welfare. The minister noted that probably the main prohibition in the Namibia Competition Act is the prohibition against the abuse of dominant position, while some unfavourable horizontal and vertical practices are as well made illegal by the Act.

Finally, the minister gave an update on the progress made towards the implementation of the Competition law and the Competition Commission, whereby he indicated that the Competition Act will be enforced within the next few months, the office for the Competition Commission has been secured; the commissioners have been appointed; and the processes to recruit the Secretary to the commission and the chairperson for the commission are underway.

Ms. T. Moremi, the Executive Secretary of SACU focused on the importance of competition policy on the regional and global arena, stressing the that competition policy has emerged as a major issue on the global and regional trade agenda and should be supportive of increasing trade and development for any economy. She dismissed the notion that competition policy may conflict with industrial policy by making reference to empirical evidence from both developed and developing countries, which shows that competition policy has acted as a driving force for competitiveness and not as a hindrance to economic development.

Within SACU, Ms. Moremi pointed out that South Africa is the only Member State with a functioning competition law and long established competition institutions. Namibia and Botswana are at advanced stages in instituting competition laws and institutions, while the other two members (Lesotho and Swaziland) are at early stages.

Ms. Moremi informed the workshop that Article 40 of the 2002 SACU agreement requires member states to have competition policies as a pre-requisite for a SACU wide cooperation mechanism on competition, while Article 41 of the same agreement requires that mechanisms be put in place to address unfair trade practices between member states and these be annexed to the SACU agreement. The work on the two articles commenced in December 2006 with the adoption of the Roadmap by the SACU council.

She further stressed the need for collaboration on competition within a larger Southern and Eastern African region

3. Participation and Facilitation of the Training

The attendance for the Namibian Training Workshop was good in terms of the number of participants who made it to the workshop especially on the first day of proceedings. Attendance declined after the first day due to other sectoral and regional events that could not be realised in time. However, the impression of the organisers and facilitators is that the quality of interaction was very good throughout the training. The workshop drew participation from Government, the legal fraternity, private business sector, parastatals, economic researchers, consumer protection and from the region, particularly from the Secretariat of the Southern African Customs Union (SACU).

Three international experts on competition facilitated the training:

Dr. S. Chakravarthy from India presented on the Introduction (rationale and objectives); Dominance and Abuse of Dominance; and on Competition Restricting Practices;

Mrs. Vani Chetty, a Competition Lawyer from South Africa introduced the participants to Competition Analyses and further presented on Horizontal Restraints;

Dr. Patrick Krauskopf, the Vice-Director of the Swiss Competition Authority presented on Vertical Restraints and on Competition Policy and Consumer Protection.

All three presenters made use of prepared presentations on PowerPoint and case work materials for illustrations. Brief papers and slide-handouts were distributed to participants.

4. The Summary of Training Presentations

4.1. The Rationale for Competition Policy and Law

Dr. Chakravarthy presented on this topic and has started by explaining an LPG paradigm, which stands for Licensing, Planning and Government in a pre-reform economy or for Liberalisation, Privatisation and Globalisation in a post reform economy. The presentation clarified the links between the LPG components and competition and started from the point that Government is by large incapable of intervening efficiently in the economy and it needs to be rolled back. Determination of trading conditions through market mechanisms is a preferred alternative to Government intervention.

Liberalisation and Globalisation are necessary to ensure wider national and international competition that would enhance economic efficiency by ensuring that national boundaries and ideologies are not serving as constraints to trade, technology transfers and related activities. Dr. Chakravarthy then iterated that competition is not there to protect firms, but it is rather a tool to mount market pressure to penalise laggards and to award the enterprising by stimulating economic rivalry. The presentation cited examples from the European Union where the introduction of competition led trade liberalisation (removal of barriers to trade), increased income, creation of jobs and reduced inflation.

Dr. Chakravarthy went further to provide an interface between competition policy and other national trade policies and cautioned against initiatives that seek to exclude some groups from the premises of competition for unspecified periods of time as this is likely to be costly for the nation. The presentation stressed that (i) effective competition creates a competitive business environment and improves static and dynamic efficiencies; (ii) curbs anti-competitive practices and prevents abuse of market power; (iii) allows for an efficient allocation of resources; and (iv) protect consumer interests in terms of price, quality, choice etc.

The presentation listed the examples of restrictive trade practices, unfair trade practices, and monopolistic trade practices and well as exceptions to anti-competition agreements (e.g. protection of intellectual property rights).

4.2. Introduction to Competition Analysis

Ms. Vani Chetty presented on this topic and started by indicating that the current competition law may have its given jurisdiction, but it needs apply to all private firms, parastatals, utility firms and to Government where it gets engaged in economic activity (there may be areas such as collective bargaining where Government and others may be exempted from competition policy).

Ms. Chetty defined the relevant market, where markets are either defined as product markets or geographical markets all of which can be exposed to demand side or supply side analysis. Elasticities and the Ssnip test, the tools for market analysis were then explained. The third tool is called the Herfindahl-Hirschmann Index (HHI) and is used to measure market concentration.

4.3. Competition Restricting Practices

This presentation was given by Dr. Chakravarthy and started by defining restrictive trade practices, which include refusal to deal, tie-up sales, cartels and others, and pointing out those agreement that have adverse effects on competition, and which are generally outlawed. A distinction between horizontal and vertical agreement was then given with a clear grouping of various agreements into two groups. This was followed by definitions and illustration of welfare effects of cartels, bid-rigging, restriction on production and technology and for the resale price maintenance. The presentation made it clear that horizontal restraints such as cartels, bid-rigging, market sharing and limiting of production, supply and technical development are “*per se*” illegal, while vertical restraints like tie-in arrangements, exclusive supplies, exclusive distribution, refusal to deal and resale price maintenance are judged by “*Rule of Reason*”.

The presentation defined what constitute a cartel, and gave examples of costs (mainly to consumers through higher prices) and also potential benefits of cartels (can enhance efficiency - benevolent). The presentation indicated that most cartels emanate from the developed world and their effects are largely to the detriment of developing countries, but that does not mean developed country consumers benefit. The presentation further defined bid-rigging and agreements limiting technical know-how, with real-life case illustrations for each.

4.4. Dominance and Abuse of Dominance

The third presentation by Dr. Chakravarthy was on dominance and its abuse. Dr. Chakravarthy defined dominance as a position of economic strength enjoyed by an undertaking, enabling that

undertaking to prevent effective competition being maintained on the relevant market (geographical or product market). The presentation defined the relevant geographical and product markets, gave factors underpinning each of the market definition and provided illustrative examples. Dominance may not be a bad thing, but abuse of dominance is of major concern. The presentation provided ways in which dominance is usually abused. These include situations where the dominant firm imposes unfair or discriminatory conditions or price; limits production, technical or scientific development; denies market access; or uses its dominance in one relevant market in order to enter another market. The critical steps are therefore – the market definition; establishing whether there is market dominance; and determining whether there is abuse of dominance.

Examples in form of illustrations are provided in the presentation on unfair pricing, limiting of technical development, discrimination, unfair conditions of sale, tie-in sales and on predatory pricing.

4.5. Horizontal Restraints

The training on horizontal restraints was provided by Ms. V. Chetty. The presentation started by defining what constitutes a horizontal restraint i.e. an agreement between firms operating at the same level of production in the distribution chain. Horizontal agreements are usually justified from the point of enhancing technology and efficiency as well on associated gains in competitiveness, but such agreements work to lessen or prevent competition. Ms. Chetty iterated that horizontal restraints feature amongst the most serious competition violations, with the greatest adverse effects. These are usually in form of cartels, trade and professional associations (Joint Ventures excluded).

The presentation defined the “*per se*” and “*rule of reason*” prohibitions. Agreements that are automatically (*per se*) prohibited include price fixing, market sharing and collusive tendering. For other horizontal restraints that distort, prevent or lessen competition, differences may be permitted (*rule of reason* prohibition). An agreement can be in form of a contract, an arrangement or merely an understanding that is not written down.

Ms. Chetty further provided methods of establishing the presence of a concerted practice in the market. These include paper trail (e.g. e-mails, meeting minutes), records of dairies, price changes and timing and other forms of evidence. The main cautionary point here is that competitors are not allowed by the law to discuss prices and other trading terms that may lead to collusion. This was emphasised through various illustrations. To refrain from competition violations in form of concerted practices, firms need to avoid discussions with competitors and price independently by using company costs, market conditions etc in order to arrive at competitive prices.

4.6. Vertical Restraints

The presentation on vertical restraints was given by Dr. P. Krauskopf. Vertical restraints have been defined as agreements (with or without compulsory force) between economic agents at different levels of the production line. These agreement arise because manufacturers do not usually sell to end consumers directly, there are market agents between the manufacturer and the

end consumer (dealers, wholesalers, retailers), and manufacturers may need to provide guarantees for their products and to reduce transaction costs.

Dr. Krauskopf stated vertical agreements are produced when one firm is capable of behaving independently and to impose resale prices, restrictions concerning territories or consumers, restrictions regarding end consumer sales, restrictions on freedom to contract and so forth. This presentation made a distinction between horizontal (between competitors) and vertical (between firms at different points in distribution chain) agreements.

Competition can take place within a given brand (intra-brand competition) or between various brands (inter-brand competition). Both the *Rule of Reason* and *Per Se Rule* can be used to evaluate vertical restraints following the procedures below: (i) detection of vertical agreement which threatens free competition; (ii) relevant market definition; (iii) verification of restrictive behaviour; (iv) anticompetitive effects > benefits; and (v) whether there is abuse of dominant position.

Dr. Krauskopf concluded that it is not all vertical agreements that are illicit, the Per se rule is usually for serious cases and it is important to be clear about which agreement will be considered anti-competitive and how they will be evaluated. The presentation was followed by a case work to test the understanding of participants.

4.7. Competition Policy and Consumer Protection

This was another presentation given by Dr. Krauskopf. This presentation started by explaining the benefits of competition to the economy as a whole – efficient allocation of resources, better distribution of income, promotion of innovation through better prices, better quality, improved products and better before-and-after sale services.

Better quality, competitive prices and better services mean higher consumer satisfaction. For the firms, competition means a lot of stress and plenty of risks to lose money - therefore firms try to restraint competition through mergers, cartels and other means. These kinds of competition restrictions may lead to monopoly, where output is restricted and prices raised. This reduces competitiveness and consumer welfare. Competition law seeks to avoid these.

5. The Fourth NRG Meeting

5.1. Matters arising from the previous minutes

On 19 July 2007, a point was made at the third NRG meeting that some economic sectors of Namibia have no independence in price-setting, with an example given referring to most commercial banks. Since it was already known that Bank Windhoek has an independent price-setting mechanism, First National Bank Namibia also indicated that it has a formula to arrive at fees and charges for Namibia and does not get prescriptions from South Africa.

5.2. Remaining activities before the end of the 7up3 project in 2008

It was indicated that support for 2 to 3 briefing papers on competition from CUTS is available from now until February 2008 for which the closing conference for the 7up3 project is planned (briefing papers subject to proposal and approval). The writing up of such briefing papers is open to any NRG member(s). NRG members were then urged to propose topics for briefing papers that can even be presented at the February 2008 conference planned for Gaborone.

As it was already recommended that the NRG platform should continue to exist beyond the 7up3 project (19 July 2007), it was further urged that the NRG should consider getting support from Government and for it to have secretariat support. Government support or affiliation is likely to increase the effectiveness, recognition and consequently enhance attendance to NRG proceedings. Examples were cited from the regional countries such as Mozambique where there is a National Advisory Committee on Competition affiliated to Government.

5.3. Possible areas for the briefings on competition

Various sectors were given as examples where anti-competitive behaviours or developments in competition can be explored in briefing papers. These include the following:

- Telecommunications (new competition);
- Second-hand motor vehicle market (suspected price-fixing);
- Construction industry (possible bid-rigging);
- Banking services (determination of inter-bank charges, licenses etc);
- Medical Aid Insurance industry, where operators tend to charge maximum tariffs recommended;
- Medical services – where a medical doctor is entrusted to make decisions whether a foreign competitor should be sought and that only works to prevent competitors from entering the market.
- Electricity distribution, where monopolies (REDs) are due to replace existing monopolies (City Councils), with market allocations;
- Energy (fuel distribution), where four distributors have market shares that have not changed for a long time – concerted agreement or cartel?

5.4. The Competition Toolkit

The Competition Toolkit is the next output to be developed by CUTS under the 7up3 project and inputs are needed from Namibian stakeholders including Government for the development of the toolkit. The framework (content, purpose etc) was presented to the meeting. The competition toolkit for Vietnam has been finalised (not published) and can be circulated to NRG members as a model.