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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Zambia

-- Session II --

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EVIDENCE GATHERING AND COOPERATION ISSUES IN HARD CORE CARTEL INVESTIGATIONS

1. Introduction

1. In recent years, there has been heightened discussions, research and literature on hardcore cartels. While the average person in the street may not understand why a cartel is wrong and meriting criminal sanctions, the anti-cartel enforcer knows that “hardcore cartels are the equivalent of theft” and should be met with unequivocal public condemnation. In Zambia, cartels in the fertiliser, grain and oil procurement and marketing, are projected to cost hundreds of millions of US \$ annually. However, due to a low level of the competition culture, these matters have not received the attention they deserve to warrant public expenditure on investigations and prosecution of individuals. However, there have been several instances reported in the national press alleging collusive tendering in the oil procurement, grain and fertilizer procurement. These activities, hitherto unquantified, have had a telling effect on the State treasury and on the competitiveness of industries dependent on these products in Zambia. Unfortunately, the Competition and Fair Trading Act of Zambia does not apply to activities where the Government of the Republic of Zambia is a party.

2. While about five (5) cartels have been investigated by the Zambia Competition Commission in Zambia between 1998 and 2004, it is estimated that in only 20 cartel cases investigated in the United States in the 1990s, the annual worldwide turnover in the affected products exceeded US \$30 billion.¹ In as far back as 1997, the World Trade Organisation (WTO) also highlighted the growing significance of international cartels for policy makers, noting that these cartels undermine international integration and decrease the benefits of liberalisation to consumers.² It is undoubted that aggressive prosecution of cartels should be enhanced, but the sustainability of such a fight is possible only where there are effective means to gather evidence and put a stop to hardcore cartel activity.

3. While Zambia’s cartel provisions under Section 7 and Section 9 of the Competition and Fair Trading Act prohibit cartels outright and prefer criminal sanctions of imprisonment, the enforcement of the provisions have been ineffective due to various reasons that shall be explained later in this paper. Section 9 of the Act specifically addresses the following practices and declares them prohibited offences:

- Price Fixing.
- Collusive tendering.
- Market or customer allocation agreements.
- Sales and production quotas.
- Collective action to enforce arrangements.
- Concerted refusals to supply goods and services to potential purchasers; or
- Collective denials of access to an arrangement or association which is crucial to competition.

4. Due to lack of a precedent prosecution, there is no sufficient deterrent effect to cartel activity in Zambia. The word “cartel” in Zambia, like in many developing countries, does not usually connote any

punishable offence to the reasonable person. This makes the Competition Authority in such countries to be the lone voice in cartel investigation and prosecution. While cartels are “theft” and distort both domestic and international trade and create market power for a few companies and their agents, it yet remains to be proven as to how much Court sympathy that cartel cases would receive.

5. To experts, students and victims of cartels, cartels bring about waste and inefficiency in industries whose markets would otherwise be competitive without the cartels, such as the aforesaid grain, fertiliser and oil sectors in Zambia. Great attention to cartels in Zambia has otherwise been connected to the public transport system where public outcry has largely been towards the concerted price increases under the now disbanded United Transport and Taxis Association (UTTA) – a notorious organisation for road passenger operators. Similar outcries have been heard in recent years in the oil sector. In 2001, the Zambia Competition Commission and the Energy Regulation Board (ERB)¹ agreed to jointly prosecute Oil Marketing Companies for price fixing. Details of the case are explained later in this paper.

6. While cartel activity continues to be sophisticated, complex and perhaps undetectable, the problem with the matter would also be eluded to the high resources and man hours required to fully investigate a so called “hardcore cartel”, especially by developing and under developed competition authorities. At international level, there is a recognised difficult in getting evidence, interviewing and even extraditing defendants. This calls for international cooperation with allied anti-cartel enforcement agencies. While at global competition enforcement level evidence gathering is more successfully conducted by more resourceful regulators, such regulators do not and cannot operate in a global vacuum and need the assistance of other regulators.

7. Cartels naturally operate secretly and gathering of evidence is a critical process in establishing such conduct. Evidence gathering is a primary function of any law enforcement agency, and its scope and usefulness is relative to the powers of the law enforcer. Evidence gathering in cartel cases includes any relevant documents, statements, other electronic or non-electronic records, eyewitness accounts and whistle-blower confessions. The complexity of hardcore cartel cases entails that where prosecution is planned, the Courts would likewise require hardcore evidence, in the case of Zambia, beyond reasonable doubt. This is because cartel activity is an offence attracting criminal sanctions. While some countries have legislations regarding evidence e.g. the UK and Ireland, some countries would rely on common law principles of evidence e.g. most Commonwealth Countries, including Zambia, Zimbabwe, Canada and Australia.

2. Obtaining evidence

8. The Commission is given wide ranging powers under Section 14 of the Competition and Fair Trading Act to obtain evidence. These include (after obtaining a Court warrant): authority to enter any premises; and access to, or production of, any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any such books, accounts or other documents: Provided that any books, accounts or other documents produced shall be returned forthwith if they are found to be irrelevant.

9. In the exercise of the above powers, the Commission officers may be accompanied or assisted by any such police officers as are necessary to assist in entering into or upon any premises.

10. Further, under Section 16 of the Competition and Fair Trading Act, it is a criminal offence to fail to comply with any provisions of the Act or any regulations made under it, or any directive or order lawfully given, or any requirement lawfully imposed under this Act or any regulations made under it. Therefore, to refuse or omit to furnish or produce any information or documents when required by the

Commission to do so; or to knowingly furnish any false information to the Commission attracts a fine of **US\$2,000 or imprisonment for a term not exceeding five years or to both.**

11. Under Section 6 of the Act, the Commission can commence investigations on its own initiative or upon receiving a complaint. It is clear that the Commission has sufficient mandate and powers to institute investigations and obtain evidence.

12. However, whether evidence obtained is relevant to the prosecution of a cartel is another thing. The fact that prices in a relevant market are the same and that they increase almost at the same time, is not enough to establish the existence of an agreement, or even coordination of prices through some practice such as leadership. This has largely been the case in oil procurement and marketing in Zambia. Similar price increments may be attributed to firms having the same monopoly or oligopolistic suppliers of key raw materials upstream. In Zambia, the sole State Owned importer and refiner of crude petroleum, from whom all the oil marketing companies source their supplies, pegs the wholesale price in conjunction with the Energy Regulation Board². It is likely then, that the retail price is going to be substantially similar, especially in view of the oligopolistic nature of the industry. To obtain cartel evidence would entail going beyond the monitoring of prices.

13. Generally, evidence gathering in critical anti-trust cases has to go many steps further, to include any evidence that two or more sellers of a particular product have agreed to price their products in a certain way, to produce or sell only certain amounts of their products, or to sell only in certain areas or to certain customers; large price changes by a number of sellers of very similar products, particularly if the price changes are of similar amount and occur at about the same time; and a statement by a firm that it cannot sell to you because of an agreement with another firm that only the latter can supply you.

14. In *grain procurement and marketing* in Zambia, the Commission observed the seemingly concerted price movements of maize-meal during the months of March to June 2004. The major maize milling companies appeared to increase prices at the same time. Their defence was that the price of the raw commodity, maize, was increased by the main buyer, Food Reserve Agency (a Government agency which manages the strategic food reserves). Further, a seemingly understandable defence was advanced that the price of petroleum had increased, hence increasing the logistical costs because the main procurement sources were in the rural towns and villages. Therefore, while analysis of price movements over time may be useful in detecting and establishing a prima-facie case of price-fixing, it would not stand in the Zambian courts where the evidence has to be beyond reasonable doubt. Such evidence will have to include a written agreement or at least a confession from one of the parties so involved.

15. While presently a number of Competition Authorities appear to follow the whistle-blower leniency program direction in the enforcement of cartels, the effective use of such programs would depend on the level of competition culture in a particular country. It has been noted that in February 2002, the European Commission published revised leniency guidelines and plans to expand its enforcement tools by strengthening its information gathering powers. The new powers include searching company executives' homes in the process of evidence gathering³. The UK government also announced ground breaking set of reforms to combat cartels. As eluded above, the Zambian Act confers powers to search premises or conduct a "dawn raid". These powers have not been used as yet.

16. In Zambia, we have a procedure similar to a leniency program. The Constitution of Zambia empowers the Director of Public Prosecutions to turn an accused person into a State witness with a promise to spare him from prosecution, if he cooperated fully by providing vital evidence to the prosecution. As stated earlier, the Courts in Zambia for instance are yet to be tested as to their consideration of a cartel offence. Section 16 of the Competition and Fair Trading Act prescribes penalties applicable "... upon conviction to a fine not exceeding ten million Kwacha or imprisonment for a term not exceeding five years

or to both". The financial penalty (about US\$2,000!) and jail term of not more than five years may only be awarded concurrently at the Judge's discretion. It is likely that the parties to a cartel may escape with a fine of a maximum of US\$ 2,000 and a "stern warning" and suspended jail term. In this regard, the criminal sanction remains an effective deterrent compared to a fine.

17. The Law provides for relatively strong sanctions against hardcore cartels which include a fine and a criminal sanction of imprisonment. The fine has proved to be very low to achieve deterrence against future activity of that kind. The law provides for sanctions against persons for their participation in the conspiracy. The prospect of individual liability can add an important level of deterrence, and individual sanctions also have another beneficial effect – they create an incentive for culpable individual store defect from the cartel and cooperate with investigations, in order to avoid punishment. In this regard, **Section 16 of the Act** is directed against company officials.

3. Cartel investigation in the Oil Marketing Sector in Zambia

18. In Zambia, the Commission investigated a cartel in the oil marketing sector, principally involving BP, Caltex and Total. Following the fire incident at Indeni Petroleum Refinery (Zambia's principal oil refinery) in May 1999, the Government issued a Statutory Instrument (S.I.) No.119 of 1999 that reduced the customs duty on imported and finished petroleum products from 25% to 5%. This was a temporal measure to allow for private companies to import petroleum products and thus mitigate the envisaged shortages.

19. Consequently, Energy Regulation Board (ERB) issued import licences for petroleum products to nine (9) Oil Marketing Companies (OMCs), namely BP, Caltex, Mobil, Agip, Total, Jovenna, Engen, Ody's and Agro-fuel. Upon resumption of production at Indeni, the Government issued SI No. 54 of 2001 that reinstated the 25% import duty on all petroleum products effective 18th May, 2001.

20. On 29th May 2001, the ERB received a joint written complaint from the OMCs about the effects of the S.I No. 54 on their operations. ERB brought the complaint by OMCs to the attention of Government through the Ministry of Energy and Water Development, who promised to consider the matter. However, while Government was in the process of holding consultations with all stakeholders, the OMCs concertedly increased the prices of petroleum products on 30th May 2001.

21. On 31st May 2001, ERB wrote to all OMCs individually directing them to revert to the old prices. With Caltex acting as a secretariat, the OMCs responded by asking for a meeting with ERB on 1st June 2001. After the meeting with ERB, the OMCs responded (through a joint letter to ERB) that new prices would remain in effect for four to six weeks, thereby continuing to defy the directive given by the ERB. The ERB then responded to the joint letter individually stating that the directive remained in force. The ERB Board Chairman further reiterated this during a press conference on 1st June 2002, at which he warned the OMCs that they risked having their licenses revoked or suspended if they continued to defy the ERB directive of reducing fuel prices. By Monday 4th June 2001 none of the OMCs had complied with the ERB order. In order to address this act of defiance from the OMCs, the ERB held consultations with ZCC.

22. Upon reviewing the conduct by OMCs, it was proposed that the conduct by OMCs was in breach of Section 7 of the Competition and Fair Trading Act. Further, Section 6(1)(c) of the Energy Regulation Act provides for concurrent jurisdiction in the energy sector with ZCC: "*In conjunction with the Zambia Competition Commission established by the Competition and Fair Trading Act, monitor the levels and structures of competition within the energy sector with a view to promoting competition and accessibility to any company or individual who meets the basic requirements for operating as a business in Zambia*"

3.1 Evidence gathering in the case

23. The Commission was assisted by evidence of price-fixing, which was received from the disgruntled ex-workers of the OMCs. This led to the discovery of various incriminating correspondence between the OMCs and the ERB. Both the companies and the ERB did not realise that an offence was being made in the competition legislation. There were further interviews with the Chief Executive Officers and senior officers of the oil marketing companies, who cooperated with the verification of the incriminating correspondence.

24. While the ZCC under Section 14 has powers to conduct searches on premises, in this case the Commission did not exercise this power as sufficient evidence was already obtained from the ERB and the OMCs themselves.

4. Conclusions

25. Investigations established, prima facie, that:

- There was an agreement on price increases by OMCs;
- There was an agreement on a standard formula according to which prices were to be computed;
- There was an agreement to adhere to published prices;
- There was an agreement to use a uniform price as a starting point for negotiations;
- There was an agreement not to sell unless agreed-on price terms were met; and
- The conduct of the OMCs appeared to be in contravention of Sections 7 and 9 of the Competition and Fair Trading Act as their joint conduct had the object of preventing price competition to an appreciable extent in Zambia.

4.1 The Commission decision

26. On the basis of the foregoing, the Board of Commissioners of the Zambia Competition Commission determined that all the OMCs, in particular BP, Caltex and Total, should be prosecuted under the Competition and Fair Trading Act for price fixing. The Board also resolved that the OMC trade association, serviced by Caltex, should be abolished as it was providing a forum for cartel activities.

4.2 Succeeding events

27. Despite the overwhelming evidence against the OMCs and the evident breach against Section 7 and Section 9 of the Competition and Fair Trading Act, the prosecution did not take off. There were seemingly some legal technicalities more especially the role of Government in the procurement of fuel and the pricing of the commodity. It was observed that the Government was equally at fault and hence, provided a strong defence to the oil marketing companies if the Commission had opted to prosecute. Further, at the time, there was serious lack of financial and human resource at the Commission to carry out the prosecution. It was considered that the best way forward would be to intensify advocacy activities in the sector and suspend the prosecution.

28. The Commission considered that an administrative action be taken as follows:

- A stern warning be issued to the OMCs;
- A report was made to Government
- Negotiations are instituted with OMCs to ensure that they did not engage in conduct that prevents, restricts or distorts competition. To this effect, undertakings from the OMCs were to be sought;
- The Commission should review the mandate of OMCs and formulate the new mandate for the association.

4.3 Lessons for Zambia Competition Commission

29. It was evident during the investigations that the parent companies of the OMCs were not forthcoming in cooperating in the investigations. Although the Commission managed to establish a prima facie case, it was doubtful whether the evidence located abroad could be easily made available.

30. While cooperation in cartel investigation is resounded at international fora and levels, the Commission's experience shows that cooperation with various allied and interested institutions at the national level is also cardinal to a successful anti-cartel drive. Where key institutions do not and are perhaps not even obliged to cooperate, as in the case of ERB, it would render anti-cartel enforcement ineffective.

31. In view of the above, it would appear a competition specific leniency programme may not necessarily be the panacea to effective cartel investigation and prosecution in the Zambian setting and perhaps, other countries at this level of development.

4.4 Modalities for Cooperation

32. The exchange of information and assistance rendered between competition authorities is an important feature of deepening cooperation. In our COMESA region, cooperation in cartel investigations is increasingly growing. In most cases, this takes the form of informal cooperation among heads of the competition authorities and/or case handlers. This is a result of regional seminars by UNCTAD, which have exposed case handlers in the region to develop close working relationships overtime.

33. Zambia has also established through the Joint Trade Protocol a formal cooperation agreement with its neighbour, Zimbabwe for the exchange of information in competition cases. As a result, there has been substantial 'case-specific' cooperation through exchange of information involving specific cases or investigations. Further, the incidence of cross-border mergers in the COMESA region has increased informal and formal cooperation. This was the case in the assessment of mergers/takeovers involving Cadbury Schweppes and Coca-Cola, Lafarge in the cement industry, British American Tobacco and Rothmans of Pall Mall, etc.

34. As regards institutional cooperation, Zambia and the other countries in the region have benefited from UNCTAD, OECD and the WTO in building working relationships among competition enforcement officials and between national competition agencies. We have also benefited in building consensus on best practices in competition law enforcement. A growing phenomenon in regional cooperation in competition law enforcement is the proposed enactment of the regional COMESA Competition Law and Policy, and the establishment of the Southern and Eastern Africa Competition Authorities Forum. The organisation

provides for exchange of information, for coordination and investigations and proceedings, for positive comity and for consultations.

35. It is possible that at international level, countries with different approaches to cartel enforcement may find it difficult to cooperate successfully. In South Africa for example, most of the information is under the cover of confidentiality and a foreign authority requesting for credible information to combat similar cartel activities in its territory may receive information that is inherently not useful to the cause, despite convergence of the laws. Countries with differing levels of development may also have difficulties in cooperation. While a developed country may have the resources to locate and collect credible evidential information, a less developed country may not reciprocate with similar information due to resource and expertise constraints.

36. Notwithstanding the above, cooperation in combating cartel activity is a relevant starting point to effective enforcement as cartels become more secretive and complex. It is incumbent upon developed competition authorities and multilateral organisations to assist developing competition authorities with appropriate technical expertise and other means for them to effectively attend to the cartel problem both domestically and in the context of international cartel cooperation.

NOTES

1. Simon J. Evenett (the World Bank), Margaret C. Levenstein (University of Massachusetts), and Valerie Y. Suslow (University of Michigan Business School) *International Cartel Enforcement: Lessons from the 1990s*,
2. World Trade Organisation, 1997 Annual Report
3. Anthony Rosen (McDermont, Will & Emery, London), Enhanced Cartel Enforcement Rules Target Executives' Homes, Spring 2003,