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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Kenya

- Session II -

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More documentation related to this discussion can be found at: oe.cd/dmkt.

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Abuse of dominance in digital markets

- Contribution by Kenya -

1. Background

1. The mandate of Competition Authority of Kenya ('the Authority') is to promote and protect effective competition in the markets, and also to prevent unfair and misleading market conduct in all sectors of the economy. The Authority is enabled by the Competition Act No. 12 of 2010 ('the Act') to perform its mandate through regulation of market conduct and market structure.

2. In the recent past, competition in the digital space has become one of the most challenging problems. The internet has revolutionized the way businesses are conducted, but competition law has not kept pace with the competition challenges posed by emerging digital platforms, especially in the developing countries and Kenya in particular.

3. This submission reports on three cases handled by the Authority which are representative of and demonstrate dynamic digital markets of the economy. Specific aspects of abuse of dominance were tested in these cases include: enforcement of recommendations of the USSD market inquiry; alleged predatory pricing in the app-based taxi industry, and alleged abuse of dominance by platforms in the food retail sector.

4. Under the Kenyan Competition Act, an undertaking is deemed to be dominant if it has a market share of 50% or more; or controls at least 40% but more than 50% of the market share unless it can show that it does not have market power; or controls less than 40% of the market but has market power.

5. The Act presumes that a market shares of at least 50% is evidence that a firm is dominant. Where an undertaking has less than 50% market share, the Authority considers whether the undertaking has market power or the ability to exercise market power. In this regard, we consider whether an undertaking can set prices, limit outputs or trading terms without being effectively constrained by its customers, competitors or suppliers in the relevant market.

6. The next sections describe these three cases.

2. Enforcement of the USSD Market Inquiry Recommendations

7. Kenya has been hailed to be the Silicon Savannah of Africa, mainly because of the embracement of technology by the Kenyan populace. The Safaricom M-Pesa innovation is perhaps the country's most recognized example of technological proliferation even in Africa. The technology landscape has transitioned the population from the traditional banking set-up to the digital space through the establishment of powerful multifaceted platform. Increasingly, Kenya is becoming a hub for technological penetration.

8. While the emergence of digital platform has brought with it tremendous consumer benefits for the Kenyan consumer it has also brought regulatory challenges from a competition perspective.

9. To understand the competition dynamics posed by the digital platforms, the Authority in 2016 carried out a market inquiry into the pricing and conditions of

Unstructured Supplementary Service Data (USSD) platform access offered by Mobile Network Operators (MNOs) in Kenya. The objective of the market inquiry was to determine whether the accessing of financial services through USSD channel led to constraints in competition in financial services and related markets.

10. The study examined three theories of harm that relate to abuse of dominance position, which specifically are: (i) excessive pricing by a dominant firm; (ii) price discrimination by a dominant firm, and (iii) exclusionary abuse of dominance.

11. First, the harm of excessive pricing is that if prices are not related to costs or earning, the dominant firm's margins may be considered to be unfair or unjustified in that they are not a reasonable reward on investment and innovation made, but are simply earned as a result of market power. The prices may have an exclusionary effect in undermining rivals who require the service as an input (USSD-Study Report).

12. Second, and similarly, discriminatory pricing and terms was examined to explore the possibility of dominant firms reaching agreements with some customers and not others, in ways which might tie-up a significant part of the downstream market and undermine rivals.

13. Third, exclusionary abuse of dominance causes economic harm by excluding rivals, undermining competition and reducing choices to consumers. The dominant firm can thereby protect and/or extend its position of influence and thereby maintain high prices to the detriment of consumers.

14. In order to evaluate the above, the study segmented the various submarkets as below:-

i. In the market for various traditional retail mobile telecommunications services such as voice telephony, data and SMS, it was established that dominant firm`s market share exceeds 50% in the relevant market, regardless of how it is measured and is therefore a "dominant undertaking". The dominant firm's high market share, the inability of rivals to expand in the market, together with high barriers to entry, meant that in economic terms, it was clearly a "dominant undertaking"

ii. In the wholesale provision of USSD and STK access by MNOs and MVNOs (mobile virtual network operator) to mobile financial service providers, the dominant firm market share exceeds 50% in the relevant market. The dominance in this market is reinforced by the lack of countervailing bargaining power that exists when a mobile financial services provider procures USSD from the dominant firm. It was averred that it is difficult to offer mobile financial services to the majority of the Kenyan market that does not go through the dominant firm`s USSD access. Hence the dominance of the MNO in the market for USSD and STK for the purposes of mobile financial services.

iii. In the market for retail money transfer and payments service, the inquiry found that the said MNO is also overwhelmingly dominant in the mobile transfers and payments market segment, which is downstream from the USSD and STK market. The dominant MNO has a market share in excess of 70% of all mobile money subscribers, and has more than 60% of agents. Additionally, the MNO has (and has had for a number of years) an almost a 100% share of deposits to mobile money wallets among its MNO rivals and mobile money aggregators. It was also found that a number of local Banks have had considerable growth as a result of partnering with the dominant MNO.

iv. Other Structural Competition Concerns included **high sunk** costs largely arising out of high financial, technical and regulatory barriers to entry and economies of scale and scope. Establishing a mobile network also involves substantial fixed sunk costs, including civil works, towers, base stations, electronic equipment, IT systems and other infrastructure, on a national basis. Technical factors, such as limitations on the amount of suitable radio spectrum that can be used over available technologies, also limit market entry. As a result, there are currently as a result only **three MNO'S** in Kenya**.** MNOs and MVNOs serve as both upstream suppliers of this USSD and STK access as well as competitors in the downstream market. Because MNOs and MVNOs serve these dual roles, and because the upstream market is already necessarily relatively concentrated, they may have an incentive and the ability to deny or limit access to USSD and STK to constrain competition in the downstream market.

15. The observations of the study supported a conclusion that the dominant MNO prices for USSD services were unfairly high and in prior years were even more excessive as compared to other MNOs with similar service provision in the region. It was similarly observed that other non-dominant MNOs pricing were above cost which was attributed to the high pricing shelter provided by the dominant MNOs.

16. The differential pricing applied to different parties was considered to be discriminatory, and the effect of the higher prices was deemed to be unfair in being exploitative. The prices were deemed to undermine competition to the extent that they were likely to harm the ability of downstream firms, such as mobile money services providers and banks, to offer a competitive service as their margins are squeezed as a result.

17. It was observed that the dominant MNO undermined actual and potential rivals. Specifically it was noted that the strongest rival appeared to have been charged the highest prices for USSD which is consistent with an anticompetitive conduct given that those higher prices were not related with volumes or the cost of providing the service. Further it was noted that for competing mobile money transfer rivals the dominant MNO attempted to impose prices that would exclude the rival entirely or by outright refusal to access its network, or by rising its rival costs through the charging of higher prices for USSD services, which led to the question of exclusionary behaviour.

18. In the Act, the test for abuse of dominance relating to exclusionary behaviour is whether the transactions are equivalent. An investigation was therefore recommended to make an informed decision under the Act. Further it was recommended that an investigation be conducted into the USSD pricing to allow fuller verification into the degree in which the dominant player was engaging in the conduct among other recommendations.

19. Much as these concerns were established, the Authority sought to use the soft enforcement, as opposed to hard enforcement, by giving the dominant telco company an opportunity to address the anti-competitive concerns that were deemed to exist.

20. Specifically, the Authority engaged the dominant firm and compelled it to commit to lower its USSD costs and be applying them uniformly to all players (entered into in Lieu of investigations). In addition, the MNO was compelled to publish and maintain updated schedule on its website of its standard offered prices for USSD services to ensure the customers were aware of the costs of its products.

21. On the issue of Account to Account Interoperability, the Authority engaged the Central Bank of Kenya (i.e. financial sector regular) and the MNO's and this resulted in interoperability between the various MNOs which allowed transfer of money across networks seamlessly and usage of one account for deposits.

3. Investigations on Allegations of Predatory Pricing in the App-based Taxis in Kenya

22. Similarly, and like other countries in the European Union, Kenyan was faced with the Uber Paradox. The introduction of Uber, app-based taxi service in the Kenyan market was met by hostile pushback from incumbent traditional taxi operators' allegations that has resulted in loss of business and property.

23. Consequently, the traditional taxis (yellow lines) complaints against the App-Based Taxis (then Uber) relating to predatory pricing (low pricing) by Uber, and; discrimination regarding the different regulatory regimes facing the two taxi modes were filed at the Authority and with other agencies and regulators.

24. In the market definition, Uber was considered as a technology company and not a taxi company. Therefore, their pricing regime could not stand the predatory pricing test under the tenets of any modern competition law, the Kenyan competition law included. The Authority's investigations, regarding predatory pricing allegation revealed that Uber was not a dominant firm in the segment of that market.

25. In regard to the regulatory regime, including branding and licensing, the Authority's position was that although the regime is skewed, the relevant regulators should review the existing regimes governing the traditional taxis and conduct a regulatory impact assessment regarding their effectiveness in developing the taxi-transport sector in Kenya. This exercise should be actualized prior to adoption of any or extra regulations to govern the industry.

26. It was the Authority's view that the proliferation of digital app-based taxis enhanced the competition in the market to the ultimate benefit of consumers. Customers continue to benefit from lower costs either in terms of base charge, per KM or per minute charges by the app based taxis, as opposed to the traditional taxis.

27. In response to the increasing popularity of app-based taxi services (including Uber) and the widespread and often hostile pushback from incumbent traditional taxi operators, an inter-agency committee was formed consisting of representatives from The Competition Authority of Kenya (Lead), Kenya Revenue Authority, The Nairobi County Government, The National Transport and Safety Authority, and Kenya Investment Authority.

28. The committee was charged with modernizing the regulatory regime of taxi operators for the benefit of consumers. In addition, the committee was made aware that a key deliverable of the deliberations of the committee was the development of a framework to guide counties and government stakeholders on how to regulate a rapidly changing taxi industry.

29. The Committee was specifically tasked with achieving the following objectives, to:

i. Ensure that the process of competition is protected in the taxi-services sector and a level playing field is cultivated and maintained;

ii. Ensure that the welfare of consumers in this sector is enhanced and maintained by promoting standards and quality of service; and

iii. Informing all reactionary regulation to the entrance of Uber and any other regulation in the sector in accordance to the Act;

30. In its submission to the Committee, the Authority posited that any regulatory interventions in any market should be aimed at increasing consumer welfare. In addition, consumer's safety and health should be of paramount importance. The Authority's views were that the current arrangement, between the Platforms and the Partners, are not explicit

on who covers the contractual obligations if and when a consumer is exposed to any related risks.

31. The Authority advised against any interventions that may deter forces of supply and demand signalling market rates in this sector. Instead, and as mentioned earlier, regulations aimed at deepening safety standards and quality of service standards were advocated for.

32. Indeed, the Authority view has been towards employing a cautious approach with regard to competition regulation of the dynamic digital platforms. Picking lessons from a previous USSD study in Kenya, soft enforcement, as opposed to hard enforcement, should be given an opportunity to address any perceived anti-competitive concerns in the developing economies markets related to disruptive technologies. A case-by-case analysis is preferred.

33. Finally, the need for cross border cooperation and prosecuting anticompetitive practices through the regional bodies cannot be over emphasized.

4. Investigations on Alleged Abuse of Dominance by Platforms in the Food Retail Sector

34. The Authority also interrogated an allegation of abuse of dominance by platforms in the food retail sector. Part of the claim was that Glovo App LLC, was signing exclusive agreements with third party vendors that imposed restrictions on the vendor's ability to develop or market applications that are in direct competition with Glovo App during the term of the contractual relationship.

35. However, upon interrogating the relevant market, specifically on the volume of business, number of transactions completed and the number of third party outlets subscribed with the different players, it was established that Glovo App was not a dominant player by market share. Further, the relevant market was found to be characterized by low barriers to entry and exit with a wide range of substitutes, hence Glovo App did not have market power.

36. The foregoing notwithstanding, Glovo App was advised to expunge the said clause from their contract for reasons that they tended to limit their third party vendors' access to other competing platforms which is prohibited under the Act. Specifically, section 21 (3) (e) of the Act prohibits undertaking from engaging in practices which tend to limit or control production, market outlets or access, technical development or investment to the prejudice of consumers.

37. Glovo App complied with this guidance and

- Reviewed their third party vendor contracts to remove the clause that limited their vendors' ability to develop or market applications that are in direct competition with Glovo App; and,
- Submitted evidence that the clause did not prohibit vendors from listing their products on other online instant delivery service platforms or delivering their products directly, which is in direct competition with Glovo App.

38. Despite the lack of finding of direct violation in this matter, the above compliance by the App is evidence that there was indeed a risk of creation and abuse of dominance in the digital markets. The Authority is committed and continues to remaining vigilant in order to identify and remedy any competition concerns that may arise from these markets.

5. Market Definition Guidelines

39. In furtherance of this commitment, the Authority has revised its Market Definition Guidelines to include multi-sided markets, non-price markets, digital markets and temporal dimensions in defining markets. These guidelines have been instrumental in the investigations that the Authority has and is undertaking in digital markets.

40. Further, the Authority is reviewing its Consolidated Restrictive Trade Practices Guidelines which will also incorporate principles that the Authority considers in handling competition concerned in the digital space. This includes clarifications on aspects of finding of dominance and market power in the digital markets.