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USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES – Contribution from Kenya

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

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Using market studies to tackle emerging competition issues

- Contribution from Kenya –

1. Background

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

2. Section 9 (g) of the Act provides, *inter alia*, for inquiries, studies and research into matters relating to competition and protection of the interests of consumers. Further, Section 18 obligates the Authority to conduct a market inquiry where it considers it necessary or desirable for the purpose of carrying out its functions.

3. Upon conclusion of a market inquiry, the recommendations inform policy consideration on issues that have an adverse effect on competition, inform consumers, and encourage public debate on competition and consumer welfare concerns. Market inquiries may also recommend an investigation to identify violations of the Act and apply appropriate remedies, such as administrative penalties or criminal sanctions or initiate advocacy initiatives.

4. This paper details how a market inquiry carried out by the Authority tackled emerging competition issues in the mobile money market. The mobile money sector was selected and prioritized because it is under-going significant change. Indeed, the Central Bank of **Kenya** (CBK) data shows that **mobile money** transactions stood at KSh. 3.98 trillion (US$38.5 billion) in 2018, having increased by KSh. 346 billion (10%) in 2017. This translates to an average value of KSh. 10.92 billion (US$108 million) **mobile** cash transactions per day. A quantitative selection method was used for the inquiry after aggregation of data pointed out a higher prices of USSD compared to other jurisdictions.

2. Emerging Competition Issues in the Financial Sector

5. Kenya's financial sector is the third-largest in sub-Saharan Africa and it makes a significant contribution to economic growth and job creation. The value of mobile money transactions in 2018 was equivalent to 44% of the GDP, going by the projected economic output of KSh. 9.09 trillion (US$89.6 billion) by the International Monetary fund (IMF). The drivers of this growth are increased adoption of technology; emergence of alternative channels of distribution; increased financial inclusion interventions/levels; and a stable regulatory environment.

6. The emergence of digital platforms has brought tremendous consumer benefits, even though it has not been without regulatory challenges from a competition perspective. The Authority views the emergence of these platforms as an emerging issue requiring development of a new regulatory approach/regime informed by all the stakeholders including the consumers.

7. Indeed, digital credit has significantly impacted financial inclusion and positively altered how credit is accessed in Kenya. Currently, more than 60 lenders have pushed the overall access to formal financial services to 83% in 2019, up from 75% in 2016; with 88% of the adult population having access to a mobile money accounts[1]. One of the ways available for provision of and access to mobile financial services is the Unstructured Supplementary Service Data (USSD).

8. USSD as a mobile communication technology, used to send text between a mobile phone and an application in the network, allows users to interact directly on a menu from their mobile phone. It is text driven, and does not require an internet connection to work, which is what makes it most valuable. This technology is most commonly used by consumers to check available mobile airtime and conduct data or bank balance enquiries. Most banks in Kenya have a USSD number that allows customers check their bank balances at a zero-fee.

9. In most cases, a USSD session is initiated by dialling the relevant short code or USSD code, for example '*100#,' which when dialled presents the customer with a menu of options. When the user makes a selection on the menu, data is sent to the server and the new menu screen is sent back to the user[2].

2.1. Market inquiry in dynamic mobile platforms

10. To understand the competition dynamics posed by these platforms, the Authority carried out a market inquiry in 2016 into the pricing and conditions of the USSD platform access offered by Mobile Network Operators (MNOs) in Kenya. The objective of the market inquiry was to determine whether accessing financial services through the USSD channel led to constraints in competition in financial services and related markets.

11. The study examined three theories of harm that relate to abuse of a dominant position, and more specifically;

i. Excessive pricing by a dominant firm;

ii. Price discrimination by a dominant firm; and

iii. Exclusionary abuse of dominance.

12. First, the harm of excessive pricing is that if prices are not related to costs or earnings, 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).

13. 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 potential rivals.

[1] https://www.centralbank.go.ke/wp-content/uploads/2019/04/2019-FinAcces-Report.pdf

[2] Camner, G., Pulver, C. and Sjöblom, E. (2012). 'What makes a successful mobile money implementation? Learnings from M-Pesa in Kenya and Tanzania'. GSMA

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

2.2. Observations of the market Inquiry

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 higher, and therefore excessive. Similarly, it was 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 by different parties was considered to be discriminatory, and the effect of the higher prices was deemed to be unfair and exploitative. The prices were also 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 rivals 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.

18. 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 raising its rival's costs through charging higher prices for USSD services, which led to the question of whether exclusionary behaviour exists in the market.

19. As guided by the provisions of the Act, the test for abuse of dominance 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 full verification into the degree to which the dominant player was engaging in the conduct among other recommendations.

3. Non-enforcement Tools used to Tackle the Emerging Competition Issues

20. Much as these concerns were established, the Authority sought to use the soft enforcement as opposed to hard enforcement by giving the dominant company an opportunity to address the anti-competitive concerns that were deemed to exist. Compliance checks were then conducted and it has been confirmed that the investigated parties have fully complied with the Authority's decision.

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

4. When Market Studies are Considered Most Effective

22. It should be pointed out there are instances when market studies are considered more effective than other approaches of competition enforcement. In this regard, Market Studies are considered most effective by the Authority in order to;

i. Understand and therefore, remedy competition concerns in a certain sector. For instance, the market inquiry into the USSD sector unearthed various competition concerns such as abuse of dominance;

ii. Carry out advocacy activities; for instance, the USSD study unearthed anti-competitive concerns in the financial sector that were addressed through advocacy, which aims at changing behaviour of the players; and

iii. Support enforcement efforts; the Authority ordered disclosure and enhancement of transparency practices by financial services providers, specifically with regard to financial services availed through the mobile phone technology; i.e. mobile phone loans, person-to-person transfers, bill and merchant payments and banking services offered through mobile phones such as; balance enquiry, airtime top up and mobile money top up, amongst others.

5. Lessons Learnt on the Use of Market Studies to Tackle Emerging Competition Issues

23. **Prioritization** – the Authority has developed a prioritization criteria to guide sectors in which market inquiries should be undertaken, based on various factors, for instance; the potential impact of an enforcement case on consumer welfare, especially on low income consumers, in the market or sector to which the case relates. Further, consumer welfare could include better value for consumers in terms of price, quality, choice, innovation, or service. For example, in the case of USSD, once the inquiry conducted in a prioritized sector was completed, the USSD prices were considerably reduced to the benefit of the consumer and businesses, particularly the growing SMEs in Kenya.

24. **Stakeholder Engagement** – Based on the feedback from this inquiry, the Authority continuously engages stakeholders, including other financial institutions, in order to assess compliance with its decision by the leading MNO. This has helped in deepening consumer welfare and promoting competition in this sector. So far, thirty five (35) digital financial service (DFS) providers have adhered to this order.

6. Concluding Remarks

25. From the evidence detailed above, the market inquiry has improved competition in the USSD market in Kenya. In this regard, the Authority was able to successfully clarify on prices charged by MNOs for USSD services and therefore mitigate against some of the harmful effects of the lack of such competition.

26. The outcome of the Authority's intervention provide a clear testimony that market inquiries can be used as a robust tool to not only identify such distortion of fair competition and achieve policy objective of accessing financial services, but to also inform future regulatory decisions of the Authority premised on the findings of such market inquiries.