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THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES - Contribution from Kenya

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

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The Promotion of Competitive Neutrality by Competition Authorities

Kenyan Experience

– Contribution from Kenya –

1. Introduction

1. Competition neutrality requires that firms should compete on the merits and should not benefit from undue advantages, for example, due to their ownership or nationality; thus making it a fundamental principle of competition law and policy. Therefore, according to this principle all enterprises (including State Owned Enterprises - SOEs) be provided a level playing field with respect to a state's ownership, regulation or activity in the market[1].

2. Section 5(1) of the Competition Act No. 12 of 2010 ('the Act') states that the provisions of the Act shall apply to all persons including the Government, state corporations and local authorities in so far as they **engage in trade**. It is in this provision of the Act that the principle of competition neutrality is anchored in the Kenyan jurisdiction.

3. This Act further provides for actions that do not constitute trade and thus exempted from the provisions of the Act, including imposing and collection of taxes, licensing and permits and internal transaction within Government, State Corporations and County Governments.

4. Further, the Product Market Regulatory (PMR) Report, "Unlocking Growth Potential in Kenya: Dismantling Regulatory Obstacles to Competition, 2015" opines that, the number of subsectors with a presence of SOEs are nineteen (19) higher than the OECD average of thirteen (13).

5. Indeed Government participation is expected in sectors that require intensive capital investments (such as road infrastructure). These sectors happen to be regulated, and since prices in such sectors are controlled they do not necessarily compete with the private sector. In Kenya, these include the electricity generating, transmission and distribution.

6. This paper seeks to elucidate how competitive neutrality is promoted in Kenya, by using a case study from Kenya and lessons thereof.

2. How the Authority is promoting competitive neutrality

7. Reinsurance sector in Kenya is regulated under the Insurance Act (Chapter 487) (Insurance Act). There are three locally incorporated reinsurers in Kenya; namely, Kenya Reinsurance Corporation, East Africa Reinsurance Company and Continental Reinsurance. There are also two regional reinsurers, that is; Africa Reinsurance Corporation and PTA Reinsurance (Zep Re).

[1] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462.

8. The Government has shareholding in Zep Re (PTA Reinsurance Company), the Kenya Reinsurance Corporation and Africa Reinsurance Company, and these three (3) are all members of the Association of Kenya Reinsurers.

9. Therefore, as per the provisions of the Act, the Competition Authority of Kenya ('the Authority') has jurisdiction to investigate contraventions by players in this sector or the Association, as was presented through a complaint lodged in November, 2013. The next section elucidates this case further (**Box 1**).

Box 1. Complaint against Association of Kenya Re-insurers

The Authority in 2013 received a complaint that the Association of Kenya Re-insurers (AKR) was recommending the minimum applicable rate of premium to insurance companies willing to supply their services to a certain organization. This action by AKR, not only undermined the objects and purposes of the Public Procurement and Disposal Act, 2015 but it also encouraged restrictive trade practices, thus contravening the Act.

The Authority investigated the following contraventions;

(a) Section 21 (a) and (c) of the Act - setting of the premium rate and the request to all the insurance companies tendering for Group life cover for the period 2013/2014 to charge the fixed rate amounts; and (b) Section 22(1) (b) of the Act regarding recommendation of the minimum premium rate of Ksh. 15 per mille to insurance companies.

It is worth noting that the members of the Association included: Kenya Reinsurance Corporation Limited, African Reinsurance Corporation, East Africa Reinsurance Company, Zep-Re (PTA Reinsurance Company), Continental Reinsurance Limited Kenya. The Government has shareholding in three of the Reinsurance companies namely; Zep Re (PTA Reinsurance Company), Africa Reinsurance Company and Kenya reinsurance Corporation Ltd.

Investigations, inter alia, revealed that the price recommendation was in violation of section 22(1) (h) of the Act, and resulted in collusion that contravenes section 21 (1)(3)(a) and (c) of. This in effect would have negatively impacted the insurance sector, both upstream and downstream.

The Authority, therefore, required the Association to withdraw the notice to prevent harm to the consumer. Although these findings constitute a criminal penalty, the Authority settled for an administrative penalty. The Association was, therefore, fined USD 7,217 (Ksh. 721,715.00), and ordered to desist from any anti-competitive conduct in the future.

3. Steps taken by the Authority

10. In its intervention, the Authority took the following actions:

- Defining the Market – this enabled the Authority clearly focus on the affected market and also apply the remedies to the appropriate segment, in this case the re-insurance business and not the insurance companies downstream;

- Issuing cease and desist orders requiring the withdrawal of the circular by the Association with immediate effect. This ensured that the harm that was intended was stopped; and,
- Commitment Orders - Requiring the players to undertake that they will desist from any anti-competitive conduct in the future. This ensured that the Association and its members did not visit this harm on other consumers without express permission from the Authority.

4. Lessons in promoting competitive neutrality

11. In dealing with this competition neutrality case the following lessons were learnt:

- The Authority had to clearly delineate the market to ensure that its actions only affected the relevant (the re-insurance) market. As stated above, SOEs are Government owned and therefore, penalizing them could detriment the Government. However, the Authority based its decision on the facts that there was no value for money in the proposed pricing, as the affected consumer in this case was relying on the taxpayers' money to procure this service. Further, the contraventions were clearly outlined in the Act, and the provisions were applied as it would have to the private sector;
- The consumer would have suffered a 4% overcharge due to this collusive conduct. This harms the consumer in that there was neither a corresponding increase in value nor quality of service offered;
- It is important to impose both financial penalties and non-financial remedies to increase deterrence. The fine imposed by the Authority was to the Association, but since the members would have benefitted from the said business, they were required to give an undertaking that they would desist from any RTPs in future. They therefore, became individually liable to any future contraventions;
- The Authority acted with speed in order to stop the harm that this conduct would have caused. The complaint was received in November 2013, and by February 2014, the Authority had concluded investigation. Where investigations take long, the harm caused may take a long time to correct, which may affect a large group of consumers. In this case, while the price recommendation was targeted to the then consumer (NIS) the Association was likely to have effected the same to other groups of consumers; and
- Competition advocacy cannot be underscored. Competition agencies must ensure that they actively engage the state players and support them in reviewing their practices and procedures and to make the necessary changes to comply with that competition law.