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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Kenya

- Session II -

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Economic analysis and evidence in abuse cases

Kenyan Experience

- Contribution from Kenya –

1. Introduction

1. This paper provides a comprehensive response regarding Economic Analysis and Evidence in Abuse Cases in Kenya. The paper presents the approach used by the Competition of Authority Kenya in handling abuse of dominance/monopolisation cases in Kenya and also how these cases are prioritized. It attempts to answer the following questions: How does the Authority assess market power in the context of abuse of dominance, and the application of the economic principles or tools to this assessment? What is the role of economists when collecting evidence for abuse of dominance cases and how they are managed as well as what role they play in selecting sanctions and undertaking remedy negotiations with the defendants in abuse of dominance/monopolisation cases? Whether the Authority has undertaken any ex-post assessments of its abuse of dominance/monopolisation cases? If so, what were the results?

2. This paper is structured as follows: Part B presents Abuse of Dominance and the Analytical Techniques Employed when Assessing Effects in Abuse of Dominance Cases. Part C focuses on the role of economists when collecting evidence for abuse of dominance cases. Part D is on prioritization of cases, and Part E highlights the application of the abuse of dominance provisions. Finally, Part F presents ex-post assessments of abuse of dominance cases.

2. Analytical techniques used to assess effects in abuse of dominance cases¹

3. As per the Competition Act of 2010, an undertaking is considered to have a dominant position in a market if it controls not less than one-half of the total goods or services of any description supplied or rendered or any substantial part thereof. The Act prohibits abuse of a dominant position by an undertaking in a market for goods or services. Four conditions must be met for consideration for an infringement of an abuse of dominance case: (i) the entity at issue must qualify as an "undertaking"; (ii) the undertaking must hold a dominant position on a relevant market; (iii) the undertaking's conduct must qualify as an abuse; and (iv) abusive conduct must be within a market in Kenya or substantial part of Kenya.

4. For an abuse of dominance practice, the Authority among others considers whether the business operates within Kenya, say establishing direct sales of the relevant products to purchasers established in Kenya, irrespective of the location of the sources of supply and the production plant, and of where the agreement was formed; is established within Kenya; or targets or the intended target are customers in Kenya.

¹ (CAK/enforcement-and-compliance, 2021).

2.1. Dominance: Market Power Test, Market Power and Market Share

5. In Kenya, an undertaking is deemed to be dominant if it has market share of 50% or more; or controls at least 40% but not more than 50% of the market share unless it can show that it does not have market power; or controls less than forty percent of the market but has market power.

6. Where an undertaking has a market share of below 50%, the Authority considers, barriers to entry; countervailing power; imports; product differentiation; the stability of market shares; and the ability of the undertaking to act independent of its customers and competitors, in order to establish whether an undertaking has a market power. It further assesses whether an undertaking has the ability to act unconstrained by, or to an appreciable extent, independently of its customers, competitors and suppliers, and the ability of an undertaking to control prices, profitably sustain prices above competitive levels or restrict output or quality below competitive levels.

7. Pursuant to the provisions of the Act, a market share of at least 50% is evidence that a firm is dominant. In instances where an undertaking has less than 50% market share, the Authority considers market power or the ability of an undertaking to exercise market power. Another consideration is whether the undertaking can set prices, outputs or trading terms without being effectively constrained by its customers, competitors or suppliers in the relevant market. The Authority opines that market share levels assessed against the market concentration levels, possible likelihood of entry, any entry barriers, and countervailing buyer power may yield a better mapping of whether an undertaking has market power.

8. In analysis of abuse of dominance, the Authority considers several factors in assessing whether an undertaking meet or otherwise the market share dominance threshold, but has market power.

- i. **Actual Competition:** The Authority uses the market shares of existing competitors on the market in its assessment of any constraints that are imposed on the undertaking subject of the infringement;
- ii. **Potential Competition and Barriers to Entry:** The Authority considers that if a market lacks easy entry, then the ability of a potential entrant to constrain a dominant firm may be too remote to consider. Therefore, where there is no threat of entry an undertaking that controls a substantial market share exercises market power over a long and sustained period of time. Where entry is easy, new undertakings enter the market and compete with the incumbent thereby reverting prices and services to competitive levels. In terms of barrier to entry, the Authority considers; (i) **Structural barriers to entry**, including, regulatory barriers, sunk costs, economies of scale, access to key natural resources, network effects; and (ii) **Behavioral barriers to entry**, including, predatory pricing, margin squeeze, an undertaking holding on to a big proportion of industry's excess capacity, product differentiation and advertising, vertical relationships between incumbents, collusive behavior between incumbents.
- iii. **Product Differentiation:** In terms of the impact of product differentiation on a market, the Authority assesses whether product differentiation exist based on function or kinds of buyers can impact the undertaking's market power.
- iv. **Ability of the Undertaking to Sustain a Price Increase over Time:** Here, the Authority assesses how sensitive the undertakings sales are to increases in prices. The Authority seeks evidence to demonstrate that the market is contestable and sustained price increase is not profitable and sustainable.

- v. **The Degree to which Countervailing Power Impacts the Undertaking's Ability to Exercise its Power in a Market:** The Authority assesses if there are effective mechanisms or any credible tactics that would be applied by customers to counter the ability of the undertaking to exercise market power. For example, whether customers will sponsor entry or have in the past taken similar actions.
- vi. **The Degree to which Customer Perception, Innovation, and Import Competition Drives Competition in the Market:** The Authority seeks evidence to demonstrate that customers are not brand loyal and would easily switch to alternative products or sources of supply. Therefore, the prevalence and penetration of innovation on the ability of the undertaking to exercise market power over a sustained period of time become important. Additionally, the Authority assesses the role of imports in the market as to whether there are no barriers to imports and if imports constrain the ability of the undertaking to exercise market power.

2.2. Assessment of Abuse of Dominance

9. The Authority assesses whether the undertaking subject of the infringement proceeding is dominant. If the undertaking is dominant, the Authority then assesses whether the undertaking is abusing its position of dominance. In assessing this, the Authority focusses on the impact of the conduct on the market, i.e. is it likely to restrict or harm competition in the market. Here, definition of relevant market is applied to assess; whether an undertaking has market power and can harm competition and to ascertain who the market players with an aim of establishing the effect of the conduct on the competitive process as a whole. The first step in analyzing any abuse of dominance case is, then, to define the relevant market. However, any assessment of the effects of the abuse on the market does not necessarily require a definition of the relevant market.

10. The Authority also considers that abuse of dominance may be manifested by the use of practices that allow an undertaking to preserve, entrench or enhance its market power. The Authority studies the specific practice in question and the state of competition in the market with and without the presence of the alleged abuse, noting that abuse of dominance conduct can manifest itself through:

- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- Limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- Applying dissimilar conditions to equivalent transactions with other trading parties;
- Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; and
- Abuse of an intellectual property right.

11. Normally, we also assess whether the conduct results in foreclosure or exclusion of rivals or results in exploitation of consumers, or even whether the conduct strengthens barriers to entry.

2.3. Categories of Abuse of Dominance

12. Abuse of dominance is generally categorized into two:
- **Exploitative Abuses** - conduct by a dominant undertaking that exploit customers or suppliers without necessarily affecting the competition process. The Authority mainly considers the abusive conduct relative to consumers, and assess whether the conduct results in excessive profits owing to the setting of exploitative prices, and
 - **Exclusionary Abuses** - conduct by a dominant undertaking that leads to the removal of an actual or potential competitor or the suppression or weakening of competition in a market. Such conduct may include; predatory pricing or certain discount schemes or raising the costs of entry which are intended to foreclose a market from competition. The Authority mainly considers anticompetitive conduct relative to competitors and potential entrants and assess whether the conduct prevents equally efficient competitors from competing.

3. Collecting evidence for abuse of dominance cases

13. The Authority's investigation of dominance cases involve several processes as per provisions of the Act. The Authority engages its economists as the leads in the investigation of the cases from the initial receipt of complaints to the resolving of the cases. After receiving a complaint, it carries out economic analysis to better understand the market in order to approach the complaint from an informed position. This entails desk research and market assessment to establish the market structure of the target market for presence of any competition issues.

14. Economists are also involved in **Market screening**, including gathering intelligence on the target market. A team may be sent to the market to collect information about the particular conduct, with guided questions, to understand the state of play in the market. The screening helps to corroborate the collected information with the actual state of play in the market.

15. **Market Analysis and case reports** are done by economists. The Authority analyzes the data gathered during market screening and come up with analysis reports which inform whether there is a contravention of the law or not. The economists who are the investigators of the cases, carry out the analysis and provide conclusions and recommendations on the way forward.

16. Economists also help in **liaising with the parties** in the cases and are further involved in liaising with all the parties involved in the case proceedings, including the complainants, the defendants and other market players. We may also engage other regulators in the cases where the defendants are regulated by other sector regulators. We have active MoUs with several sector regulators to smoothen the engagement process in cases where their input is needed.

3.1. Evidence Collected in Abuse of dominance cases

3.1.1. Market Share Information

17. The Authority considers that market shares can, non-exhaustively, be assessed in terms of revenues (measured by monetary sales), demand units (unit sales), output, potential capacity (to produce or sell) or, in certain natural resource industries, reserves as evidenced in data provided by undertakings in the relevant market, including sales data and estimates of the market shares of their competitors; documents produced by trade associations; external market research reports and internal market inquiry reports; and independent and verifiable market reviews.

18. The parameters used to calculate market share depend on the availability of data and the factors that may be relevant for effective competition in a market.

3.1.2. Pricing Information

19. The Authority may seek the following evidence from market players in considering the trading conditions in the target: prices charged to various customers and suppliers (including affiliated companies); the structure of costs of production of goods or services; actual costs of production of goods or services; prices and costs in a competitive market or comparable market; the profitability of the dominant undertaking; and Information on discount, allowances, rebates or credit given or allowed in relation to the supply of goods or services.

3.1.3. Complainant Evidence

20. When the Authority receives a complaint from the public or other undertakings, the complainant may submit some information and/or produce evidence to support their complaint. This information acts as the baseline of the investigations, and such evidence is crucial in market screening and analysis.

4. Prioritization of cases

21. The Authority embraces prioritization of cases to direct resources, time, and energy to those activities that are deemed most relevant to achieving the Authority's strategic plan and operational guidelines. The priorities are set considering Kenya's national economic development agenda insofar as it relates to competition issues and from an assessment of where the greatest impact can be made.

22. The prioritization of the cases are based on different criteria like **issues of national significance** - Consideration of sectors and economic issues earmarked by the government under the national development policy. For instance, the likelihood of anti-competitive arrangements and conduct, which may include levels of concentration, the presence of an entrenched dominant firm, and barriers to entry.

23. We also consider **significant public interest or concerns** with regard to the potential impact of an enforcement case on consumer welfare (e.g. better value for consumers in terms of price, quality, choice, innovation, or service), especially on low income consumers, in the market or sector to which the case relates. In addition, the **likely indirect effect on consumer welfare** which captures deterrence and improved awareness for consumers, business community and government bodies is another consideration.

24. The Authority also considers emerging areas where little or no information is available, but have a great impact on the economy and the consumer and the size of the market concerned. For example, in terms of the number of consumers or the geographic area affected, and the volume of commerce affected by the conduct/transaction are also noticeably important; and whether a formal complaint has been filed.

25. Further, the Authority may review the priority of its enforcement activities to ascertain whether they warrant the continued commitment of resources. This may be motivated by reasons such as National economic/political changes that may lead to changes in priorities or new approaches to particular sectors. The macro-economic scenario, new evidence gathered during a case investigation can suggest that the likelihood of finding an infringement is much smaller than at the beginning of the case, or vice versa, are key to prioritization of cases. A change in the behavior of the undertakings being investigated may make enforcement action less urgent as well as a change in the budget, receipt of new and more important cases leading to a revision of the priority status of ongoing cases.

5. Application of the abuse of dominance provisions

26. The Act gives the Authority powers to receive and investigate complaints in the economy regarding any conduct or proposed conduct that is alleged to constitute or may constitute a practice that restrict businesses. The Authority may also initiate investigations upon receipt of a complaint or on its own motion. Below is a specific-case of the Authority's investigation into unstructured supplementary service data (USSD) pricing, and lessons from this particular case.

Box 1. Investigations into the USSD Pricing: Price Discrimination, Excessive Pricing, Exclusionary Conduct

To understand the competition dynamics posed by mobile money platforms, pursuant to Section 18 of the Act, the Authority conducted 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 inquiry was to determine whether accessing financial services through the USSD channel led to constraints in competition in financial services and related markets. The study examined three theories of harm that relate to abuse of a dominant position; that is; Excessive pricing by a dominant firm; Price discrimination by a dominant firm; and Exclusionary abuse of dominance.

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).

Second, 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.

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.

Observations of the market Inquiry

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. 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. Further, 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. Further, the inquiry found out that there is lack of interoperability between mobile wallets which intensify network effects that lead to high prices for bank transfers, and lack of transparency in charges to customers for USSD sessions for mobile financial services. The customers are not aware of the charges that apply to transfers to other mobile wallets, payment to utilities and businesses.

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.

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. The investigation revealed that the dominant player was abusing their position and therefore, the Authority issued orders that resulted in commitment decisions summarized below;

- Dominant MNO publish on its website and maintain it updated its standard offered prices for USSD services for mobile financial services;
- Review the USSD pricing and conditions for access to ensure fair pricing, and similar conditions to equivalent conditions, among others.
- Lower the cost of USSD up to Ksh. 1 per session.
- Negotiate interoperability of the M-Pesa mobile wallet with other mobile money providers to enable transfer to and from M-Pesa accounts to and from other mobile providers

The Authority further conducted compliance checks to ensure that all commitments have been adhered to, and indeed all Authority's recommendations was complied with. The Impact of these interventions are that the USSD prices decreased to Ksh. 1 per session therefore, making them affordable and more convenient to consumers; interoperability promoted access to bank and mobile money by consumers and the published USSD prices ensured that price transparency was promoted across network transactions.

27. The Competition law aims at preventing creation and exercise of market power that would undermine effective competition. This entails Abuse of Dominant (AoD) position by an undertaking or anti-competitive agreements between firms. This is usually deployed in non-contestable market/s and prior to ex post intervention, and the Authority applies the Three-Criteria-Test which satisfies the following conditions:

- The relevant market must demonstrate high and non-transitory barriers to entry;
- Market structures do not tend towards effective competition in a relevant time horizon; and
- Application of competition law alone does not adequately address the market failure.

28. These criteria has no hierarchy, but has to be adopted together and cumulatively, meaning that if any criteria cannot be met, ex-ante regulation is generally not warranted. Additionally, the Three-Criteria-Test, ex-ante regulation, can only be visited on one or more operators if they possess Significant Market Power (SMP) on the respective market. Consequently, it is clear that the competition, the Central Bank and the Communications Authority Laws should be enforced harmoniously and concurrently.

6. Ex-post assessments of abuse of dominance/monopolization cases

29. The Authority conducts ex-post assessment of some of its major decisions in various sectors of the economy. With the objective to assess the economic benefits accrued in terms of consumer savings, increases in incomes of farmers, better access to goods and services, greater product variety, and investment into the economy following Authority's intervention in the sectors. This requires careful selection of cases from previous years, elapse of at least two (2) years, in order to allow sufficient time so as to observe impacts.

Box 2. Ex post Assessment of the Safaricom Limited and Airtel Limited – Exclusive Agreement

The Authority initiated investigations in 2014 into complaints lodged by Airtel Networks Kenya Limited (Airtel) and others against Safaricom Limited (Safaricom) relating to Safaricom's restrictive agreements with its Mobile Money Transfer agents (M-Pesa agents). The allegations included the following:

- Safaricom requires its M-Pesa agents not to offer money transfer service of competing providers;
- The M-Pesa agents are threatened with termination of contract if they enter into contract with competing money transfer service providers; and
- Safaricom was breaching section 21 of the Act by entering into an exclusive agreement with its agents which restrict them from offering financial services to other mobile commerce service providers or banks.

The Authority commenced investigations against Safaricom for contravention of:

- Section 24(2)(d) prohibiting abuse of dominance by making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; and

- Section 21(3)(g) that prohibits engaging into restrictive trade practice by making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts.

30. The investigations established that the restrictive clauses in Safaricom's Money Transfer Agreements with its M-Pesa Agents contravened the provisions of the Act to the extent that they prohibit the Agents from transacting the mobile money transfer business of Safaricom's competitors. Safaricom opted for a settlement which was executed on 18th, July 2014, by the Authority and Safaricom.

Subsequently, pursuant to Section 38 of the Act, the Authority and Safaricom entered into a Settlement Agreement on 18th July, 2014 to resolve the matter. The terms of the agreement included:

- All restrictive clauses in the agreement between Safaricom and its M-Pesa agents be immediately expunged;
- M-Pesa agents shall be at liberty to transact the Mobile Money Transfer Businesses of any other mobile money transfer service providers;
- Safaricom's oversight shall be thereafter limited to its business with the Agents; and
- Each Mobile Money Transfer Service Provider shall be responsible for ensuring compliance with Central Bank of Kenya (CBK) regulations.

In this matter, it was in the Authority's interest to focus on arriving at terms which facilitate speedy resolution of the anti-competitive conduct to the benefit of consumers. In this regard, Safaricom committed to expediently expunge the contentious clauses which had the effect of expediently realizing more competitive outcomes in the mobile money transfer market segment in Kenya. This intervention resulted in increase in number of agents to 301,457 in 2021 up from 88,466 in 2013.

References

Information from Authority's internal records:

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