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Ex-Post Assessment of Merger Remedies – Contribution from Kenya

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

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Ex-Post Assessment of Merger Remedies

- Contribution from Kenya -

1. Background

1. Merger control is an important part of any competition regime, and effective merger remedies are needed to ensure its efficacy. Remedies are a distinct process within merger control and represent a number of specific challenges that warrant careful consideration, including how remedies are designed as well as how they are implemented. Various Competition Agencies have adopted ex-post evaluation of their competition law enforcement decisions to assess their impacts¹.

2. Ex-post assessments of merger remedies permit competition agencies to reflect on past merger decisions with respect to whether the remedy achieves the intended purpose or otherwise or whether the decision has had an expected impact on the market or sector. Additionally, ex-post evaluations are increasingly being appreciated by competition authorities in assessing the economic impacts of not only merger decisions but also enforcement decisions including coordinated conducts as well as unilateral conducts.

3. Existing evidence on the ex-post assessments undertaken by competition agencies and academicians has focused on the price effect of certain mergers and cartel decisions. Nonetheless, at a macroeconomic level, efforts have majorly been on consumer benefits of competition law enforcement. This notwithstanding, increasing efforts are being witnessed across the competition agencies globally regarding the macro or sector-wide impacts of merger decisions².

4. The Competition Authority of Kenya ('the Authority') has in the past five years conducted ex-post impact assessment on its past decisions in various sectors involving both merger remedies and cartel conducts.

5. This paper highlights the experiences that the Authority has had with ex-post assessments of merger remedies; the benefits of conducting ex-post assessments of merger remedies; how to maximize the benefits of ex-post-merger review, and lessons incorporated into future practices; the ex-post-merger review and how to overcome the challenges; the best practices for conducting ex-post assessment of merger remedies, the basis for selection of the cases for review; the relation of ex-post-merger reviews to on-going cases and the action that could be adopted in instances where merger remedies are not working.

¹ Chang, H. H. (2017). Ex Post Evaluation of Antitrust and Unfair Competition Fines on Firms: Empirical Evidence from Taiwan. *Journal of Competition Law & Economics*, 13(1), 103-124.

² Ilzkovitz, F., & Dierx, A. (2014). *Ex-post economic evaluation of competition policy enforcement: A review of the literature*. Publications Office of the European Union.

2. Experiences of the Competition Authority of Kenya in conducting ex-post-merger evaluations

6. The Authority has conducted various ex-post evaluations of mergers which can be categorized into two: (i) Ex-post-evaluation on a specific sector, and (ii) Ex-post-evaluation assessing the results of a particular merger. These are discussed in detail below.

2.1. Evaluation of mergers in a specific sector

2.1.1. Pharmaceutical Sector

7. The Authority observed several creeping mergers in the pharmaceutical sector with special attention to Goodlife Pharmacy and Mimosa Pharmacy which made several acquisitions within a period of 5 years. The Authority conducted an assessment to evaluate the impact of the acquisitions of the various pharmacies by Goodlife that were approved by the Authority in the past on competition including the effects on price and other competition parameters. It was concluded that the acquisitions had no negative impact on competition since the barriers to entry were low and the market was not price-driven but rather the demand was driven by the doctors' prescriptions. Additionally, the acquisition led to an increase in product and service quality and as well as widened the variety of products and services offered.

2.1.2. Manufacturing Sector

8. The Authority is in the process of carrying out an assessment of the impact of merger decisions it has made in the manufacturing sector within the last ten (10) years starting from 2012.

9. The objective of the impact assessment is to evaluate the effectiveness of merger decisions made in the manufacturing sector in safeguarding competition. The assessment is also aimed at evaluating the impact of mergers in the manufacturing sector on competition and public interest issues including the ability of Small and Medium Enterprises (SMEs) to compete in the market. The preliminary findings of the assessment indicate that most merger decisions positively impacted the firms. Positive impacts were noted by way of improved production capacity, expanded product range adopted innovative production technologies, and expanded markets for firms.

10. The exercise is currently ongoing and is scheduled to be completed by June 2024.

2.2. Evaluation Assessing the Results of a Particular Merger Decision

2.2.1. Brookside Dairy and Buzeki Dairy

11. The transaction involving the acquisition of the business and assets of Buzeki Dairy by Brookside Dairy Limited was notified to the Authority in 2013. Both parties were involved in similar business; that is collection, processing, and distribution/sale of processed milk in Kenya. The objective of the impact assessment was to evaluate the impact of the merger on competition in the milk sub-sector including the choice for farmers and consumers, retail and farm gate prices, value addition of dairy milk, post-harvest losses, substitutability of products in the relevant markets and competitive pressure from milk imports. Mixed methods encompassing quantitative and qualitative methods were adopted.

12. It was concluded that the merger of the two parties expanded the market for processed milk. As a result, consumers have a variety of packed milk brands to choose from. Additionally, as a result of the merger decision, more innovative milk products were

produced by the merged entity. While the overall popular milk brand is from the merged parties, based on the region, there was competition from milk supplied by local cooperatives.

2.2.2. Almasi Beverages Limited by Coca-Cola SABCO (East Africa) Limited

13. The transaction involving the acquisition of 53.95% of the issued shares of Almasi Beverages Limited by Coca-Cola Sabco (EAST AFRICA) Limited (CCSEA) was notified to the Authority in 2019. Both parties were involved in various levels of the value chain in the Non-Alcoholic Ready Drink (NARDs) Beverages market in Kenya. The transaction was approved with various conditions. The assessment mainly focused on the effects of the merger decision on the prices of the goods traded in the NARDs market, and on other variables such as quality, variety, innovation, and entry.

14. It was concluded that the Authority's merger decision in the NARDs sector, did not have glaring consumer price reduction benefits. Nonetheless, consumers benefitted through high-quality and innovative products, expanded product choice, sustained supply of their preferred soda and water brands, and presence of innovative products. Similarly, SMEs were able to enter the market and have their products accessed by consumers. The merger decision had a conditional clause that required that 20% of fridge space be reserved for non-CCBA products. The ex-post assessment indicated that this condition enabled SMEs' products to access the markets and ensured the growth of SMEs in the NARDs manufacturing sector. Key learning from this evaluation entailed the appreciation that impacts of merger decisions may not necessarily be quantitative but consumers may benefit in ways that cannot be measured numerically. Therefore ex-post evaluations must incorporate both quantitative and qualitative benefits.

2.3. Selection Criteria

15. In selecting the merger remedy cases to review, the Authority considered the contribution of the sectors to the national economy, including Gross Domestic Product and employment creation and the Government priorities. For instance, ex-post evaluation in the milk industry was founded on the reasoning that the Government prioritized food security and nutrition of Kenyans. Similarly, the selection of the pharmaceutical sector contributed to the Government's priority on Universal Healthcare as one of its key development pillars. Other factors that the Authority considers in selecting cases for assessment/review include a time period that has elapsed since the merger decision was made, usually two years and above, and the scale of the intervention; where the Authority evaluates a merger decision that addresses a sector considered critical to the economy and is likely to raise market distortions.

16. The methodologies and approaches adopted in conducting ex-post evaluation vary across competition authorities and based on the scope of the assessment to be conducted. The methodologies include difference-in-difference methods, concurrent mixed methods involving quantitative methods and quantitative methods³, theory of change, and quasi-experimental methods among others.

17. The Authority in conducting ex-post assessment of merger remedies has adopted concurrent mixed methods. This entailed the collection and analysis of both qualitative and

³ <https://ieg.worldbankgroup.org/methods-resource/evaluation-international-development>

quantitative data⁴ and information on variables such as price change, production, employment, product innovation, product quality, SME sector growth, consumer savings, and expansion of consumer choices. The choice of methodology is justified on the rationale that both numeric and text information are gathered as the variables of assessment comprise quantitative data and qualitative information.

3. Conclusion

18. Merger control is important because it plays a critical role in maintaining competitive, fair, and efficient markets. Through outcomes of ex-post assessment on merger decisions, the Authority has improved its visibility and gained buy-in from key stakeholders including the Parliament, sector regulators, and market players concerning their appreciation of competition law and policy enforcement. The key learning point of convergence with other competition agencies is the need to consistently conduct ex-post evaluations of not only merger decisions but also cartel enforcement decisions.

19. In addition, through the assessments, the Authority has improved its analysis of merger filings as well as investigation processes to incorporate probable future impacts of the decisions. Of interest and worth noting is that the stakeholders are more interested in the quantitative impacts of merger decisions as opposed to qualitative. To this extent, competition agencies need to carry out advocacy initiatives to stakeholders so that the impact of a decision can be measured on both quantitative and qualitative indicators.

20. Ex-post assessments of merger remedies are essential tools for competition authorities to ensure that mergers do not harm market competition and consumer welfare. They help maintain the integrity of the merger review process and provide a mechanism to correct any competition issues that may arise following the completion of a merger. However, in the event of an external shock in a sector where a merger decision was made, it became limiting in estimating the actual impact of the merger decision in such sectors.

21. Lastly, ex-post assessment of merger remedies in Kenya plays a vital role in ensuring that competition in the marketplace is safeguarded following mergers and acquisitions. By rigorously evaluating the impact of remedies, the Authority can make informed decisions to protect consumer welfare and market competition. Through the three ex-post-merger reviews, the Authority has demonstrated to its stakeholders including the public, development partners, and ex-chequer the benefits of enforcing competition law and policy at both microeconomics and macroeconomics levels.

22. In the foreseeable future, the Authority projects increased collaborative efforts towards ex-post assessment of its merger decisions and cartel enforcement. This notwithstanding national, regional, and international competition agencies need to strengthen their collaborative initiatives by providing technical support, and share learnings to improve the conduct and outcome of ex-post evaluation of competition law enforcement decisions.

⁴ www.ebrd.com/what-we-do/evaluationmethodology.html. In the UK, see evaluations produced by the Competition and Markets Authority