EXCLUSIVE CONTRACTS AGREEMENTS IN THE MONEY TRANSFER SERVICES IN THE GAMBIA

EXECUTIVE SUMMARY

In The Gambia, money transfer services are provided by a number of internationally-recognized and established financial institutions, namely, Western Union, Money-Gram, RIA and Money Express, through various licensed outlets which include commercial banks and foreign exchange bureaus. These establishments, which act as local representatives, agents or sellers of these renowned enterprises, are bound by an agreement which bars them from serving a competitor in the same outlet, both during and after the termination of the contract, for a long duration, thereafter.

J-Financial Services Ltd., one of the many local service providers, which has been serving as an agent of Money-Gram since 2008, filed a complaint to the Competition Commission in April 2010 expressing its concern over a clause in the agreement which it considers to be un-favorable and stifling to its business. J-Financial services Ltd is therefore seeking the intervention of the Competition Commission for its nullification and expunging from the contract.

The Commission's investigation has confirmed that the agreements between the major providers of money transfer services, Western Union and Money-Gram, and their representatives have an exclusivity clause that is restrictive and anti-competitive in nature, and goes against the provisions of the Competition Act 2007, thus calling for remediation. The existing arrangements with the two dominant agents prohibit local agents from providing other money transfer services in their premises while under contract with them, and even after the termination of the contract, up to180 days thereafter.

The Commission proceeded with an investigation of the matter convinced that the clause in the agreement may have an adverse effect on competition in the money transfer business and made its findings.

The Commission's investigation discloses that –

(i) Western Union and Money-Gram together provide about ninety-six percent of the money transfer services in The Gambia and are, therefore, in a duopolistic situation;

(ii) Western Union and Money-Gram, the leading providers of money transfer services, are exploiting the monopoly situation by having in their respective agreements between them and their representatives an exclusivity clause that is restrictive and anti-competitive in nature. The existing arrangements with the two dominant agents prohibit local agents from providing other money transfer services in their premises while contracted to them.

(iii) Even after the termination or expiration of the respective contracts between Western Union and Money-Gram and their agents, a former agent should not be engaged as an agent for another money transfer service for at least 180 days in the case of Money-Gram; or for one year in the case of Western Union thereafter. This practice distorts competition and constitutes an abuse of the dominant position situation enjoyed by western Union and money-Gram in the Gambian market.

In the light of the provisions of the Act regarding restrictive practices, the Commission:

(i) Directs that the clause in the agreement be removed as it inhibits competition in the money transfer business, and stifles the growth and expansion potential of local Western Union and Money-Gram representatives, on the one hand, and is unfavourable and inconvenient to customers who would like to have a one-stop outlet that provides services of the various money transfer providers.

BACKGROUND

The Concern

International money transfer has become a prominent and vibrant feature in The Gambia's financial services sector with 358 outlets currently providing such services country-wide. The major operators of international money transfer are Western Union, Money-Gram and Money Express, which provide services through authorized agencies or representatives, which are mainly commercial banks. These, in turn, extend such services to the public through licensed foreign exchange bureaus and micro-finance institutions. These money transfer services provide opportunity to individuals and institutions to transfer money to all locations/destinations in and outside the country.

One local money transfer agent, J-Financial Services Ltd. which serves Money-Gram, wrote on 27 April 2010, expressing concern over this provision in the agreement as it sees it as anti-competitive and a violation of the Competition Act 2007. In its complaint letter, J-Financial Services Ltd. contends that this clause in the agreement hinders open and healthy competition among Money Transfer Operators in The Gambia, and poses an added burden and cost on clients living outside the major settlements, to access such services which are concentrated in the urban areas. The complainant, desirous of serving multiple international money transfer providers, had sought guidance from the Central Bank of The Gambia on the feasibility of this, but to no avail.

In an effort to make a solid case for the Competition Commission to expressly review the exclusivity clause with a view to it ordering its omission as a condition for prospective representatives or agents of international money transfer operators to be contracted to provide such services locally, the complainant cites the case of Ghana, where the Bank of Ghana has directed that the exclusivity clause in agreements between money transfer establishments and Ghanaian banks be expunged from such agreements, as such arrangements limit competition in the industry.(**See attached letter from Bank of Ghana**).The argument advanced in support of the expunging of the exclusivity clause in agreements with international money transfer providers is that it will allow operators, big or small, to serve more than one service provider and enhance open and healthy competition among money transfer operators in the country, and will be to the advantage of the growing clientele.

The Procedural Rules 2008 of the Act 2007 provide for complaints of suspected anti-competitive practices to be lodged by enterprises and consumers with the Commission for possible intervention. In this regard, the Executive Secretary is mandated to either reject the complaint if unsubstantiated, and to explain in writing to the complainant why such action has been taken; and if there is any doubt as to whether the subject matter falls within the scope of the Act, to refer the issue to the Commission for its decision.

In this instance, the Commission proceeded with an investigation of the matter convinced that this clause in the agreement may have an adverse effect on competition in the money transfer business.

LEGAL BACKGROUND

Section 15(a)-(f) of the Competition Act clearly provides that one of the functions of the Commission includes the conduct of investigation either on its own initiative or on the receipt of a complaint from a person. The complaint must fall within the provisions of the Act. If after an investigation, the Commissions' finds that a provision of the Act has been breached it must determine the appropriate penalty or remedy to impose.

Part II and III of the Procedural Rules 2008, provide for complaints of suspected anti-competitive practices to be lodged by enterprises and consumers with the Commission for possible intervention.

Section 20 (d) empowers the Executive Secretary to receive complaints about alleged anti-competitive practices and mandates him/her to either reject the complaint if unsubstantiated, and to explain in writing to the complainant why such action; and if there is any doubt as to whether the subject matter falls within the scope of the Act, to refer the issue to the Commission for its decision.

Section 31 (1) (b) of the Act, provides that "a monopoly situation exists in relation to goods or services if seventy-five percent or more of the goods or services are supplied or acquired by three or fewer enterprises."If the percentage of market share enjoyed by the two or either of them is taken into account, then they can be considered as having a monopoly, and, therefore, subject to investigation, provided the Commission believes that the manner in which they conduct their business has the object or effect of preventing, restricting or distorting competition or constitutes exploitation of the monopoly situation.

The clause contained in the respective agreements (Clause 7 Western Union Agreement) and (Clause 3 Money-Gram Agreement) violates the provision of section 31 of the Competition Act, 2007, thus calling for remediation.

Section 31 (2) of The Act provides that in reviewing a monopoly situation the GCC should take into account whether the conduct was or is "likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of The Gambia" or is "likely to be detrimental to the interest of consumers." If the reported complaint is viewed as monopolistic, then it contravenes the provisions of the Competition Act 2007.

Though the Competition Act 2007 does not specifically speak to the issue of exclusivity as stipulated in the agreements between Western Union and Money-Gram and their respective agents in The Gambia, it does prohibit restrictive agreements such as collusions and bidrigging (Section 25). In spite of the fact that the exclusivity clause does not fall under any of the two prohibitions, it has an element of “tie-in”, which is an anti-competitive practice. Section 50 (1) of the Competition Act applies to the matter as the exclusivity clause in the agreements of Western Union and Money-Gram with their agents/representatives has the object or effect of preventing, restricting or distorting competition.

Pursuant to the provisions of Sections 15 and 20 of the Competition Act, and the Procedural Rules 2008, the Executive Secretary, acting on behalf of the Commission, conducted an investigation to determine whether the exclusivity clause in the agreements of Western Union and Money-Gram, respectively, constitutes a breach of the provisions of the Act.

THE INVESTIGATION AND FINDINGS

The focus of the investigation was to determine if the exclusivity clause was anti-competitive and whether it violated the provisions of the Competition Act 2007, and to assess the extent to which it had the object or effect of preventing, restricting or distorting competition among operators in the money transfer business in the country.

The Commission, therefore, in investigating the matter considered whether under (35(2)) the service provider:

i. By having such a clause in the agreement was protecting its market power or reducing the market share of its competitors.

ii. By restricting agents from contract similar services from other providers after the expiry of the current contract was fair and legal.

iii. By having such a clause, customers’ access to multiple services within a single outlet was being denied or hindered.

iv. Has by virtue of the insertion of this clause has acted in contravention of the Act 2007 which seeks to provide a competitive environment for operators of a similar business in the country.

v. The service provider by the referenced exclusionary clause in the money transfer agreement is likely to distort competition in the market, and, therefore, should be subject to review as prescribed by the Competition Act 2007.

The investigation revealed that Western Union and Money-Gram are the dominant providers of money transfer services in the country, which could be attributed to the fact that they operate worldwide and have a long-standing track record in the money transfer business. The former is the pioneer in the transferring of money globally, and the first to establish outlets for providing such services in the country. Western Union and Money-Gram have pretty much become house-hold names in the country as it relates to ‘receiving’ and ‘sending’ money. At the time of the investigation, Western Union had 283 outlets and Money-Gram had 62. Together, they enjoy 96.4% of the market share which clearly indicates a monopoly in this market as per parameters set in the Competition Act section31 (1) (b). Even though this was not the focus of the investigation, we strongly recommend that the activities of Western Union and Money-Gram be closely monitored to ensure that they do not use their dominant position to lessen competition in any way shape or form.

A review of the International Representative Agreement of Western Union and the International Money Transfer Agreement of Money-Gram, respectively, indicated that both service providers prohibit their “representatives” (Western Union) and “sellers” (Money-Gram) from providing services of competing businesses, both during the term of the contract and after termination of the agreement for any reason, for a period of at least 180 days. Both service providers consider this condition as being in the public interest in that it would “protect the general public from confusion and the passing off of other competing services.” Money-Gram believes this to be reasonable.

In response to a letter from the Central Bank of The Gambia (September 13, 2011) to Western Union (4th October 2011) on the issue of the exclusivity clause in the representation agreements, the latter proposed a “freedom of choice model” which will allow present and prospective representatives/agents to chose one of three options of doing business with it.

The three options offered in the “freedom of choice model” are:

1. **Non-Exclusive Option**. This option allows agents to “offer competing money transfer services in the totality of their respective networks, regardless of the distribution channel used for these services. This option is suitable for Agents interested in offering several money transfer services simultaneously.

2. **Semi-Exclusive Option.** This option allows Agents to offer competing money transfer services in one part of their respective networks, and another part exclusively to serving Western Union. This option gives the Agent option to choose which of its outlets will provide Western Union services only, and which will provide services of competitors.

3. **Exclusive Option.** This option is the traditional mode of providing Western Union services, which is more suited to Agents whose preference is for serving Western Union only.

Under this “freedom of choice” model, higher compensation will be paid to agents operating the Exclusive option and lower compensation for the non-exclusive option.

CONCLUSION AND RECOMMENDATION

Having thoroughly reviewed the matter in the light of the provisions of the Act 2007, the Commission is of the opinion that the exclusivity clause in the agreements does infringe on the provisions of the Act, and is a serious impediment to growth and fair competition in the money transfer industry, and, therefore, should be promptly expunged in both existing and future agreements.

The Commission strongly believes that the exclusivity clause in the agreements of Western Union and Money-Gram, respectively, is intended to protect the service provider from its competitors, and to consolidate its predominant position in the Gambian market, which is an anti-competitive practice and a violation of the Act. Requiring prospective representatives or agents to agree to clauses in agreements restricting them to serving only one money transfer operator at a time, and not to serve any other competitor while serving as a representative or agent, or even after the expiration of the contract, is not only a violation of the Competition Act, but also a denial of the individual's right to choose. The exclusivity clause in the agreements between international money transfer providers and local representatives or agencies restricts a service provider from offering multiple services, and does not consider the interest of the consumers. The caveat at page 6 under the so-called freedom of choice model, suggesting different compensation level for exclusivity in operation has the same effect of exclusivity and therefore offends the letter and spirit of the Act.

The expunging of exclusivity clauses in the agreements will not only benefit customers in terms of cost and time, but will also allow Money Transfer Agents to maximize their investments.

Having weighed the advantages and disadvantages of the Western Union's "freedom of choice model", it is believed that its adoption will not address the concern of J-Financial Services Ltd., as it seeks to maintain the status quo through differentiated rates of compensation. The commission cannot allow that either and therefore directs that such provision be also expunged from all agreements. The commission seeks to provide customers a convenient one-stop facility that will not impose added financial burdens on those that would rather have one outlet providing multiple services than just a single service. The aim of the GCC is ensure unfettered competition in this particular market.

Annex I

EXCLUSIVE CLAUSES IN THE AGREEMENTS

(A) Money Gram

3. Competing Services

Seller agrees to only offer the Money Transfer Services and will not offer any competing service. For a period of one hundred and eighty days following termination of this Agreement for any reason, Seller will not offer or sell at any location any Competing Services. Seller agree to procure that no member of the Seller's group shall offer any competing services during the term of agreement and for a period of one hundred and eighty days following termination of the agreement for any reason. Seller acknowledges that its compensation during the term of the agreement is intended to compensate Seller for the post-termination period and that it believes the restriction to be reasonable and in public interest, by protecting the general public from confusion and the passing off of other computing services.

(B) Western Union-Mandatory Sub-Representative Contract Provisions

c. Exclusivity.

Sub-representative shall use its best efforts to develop, promote and increase the Money Transfer Service and to promote and enhance the good will associated therewith and with the trade names, trademarks and service marks of Western Union. Sub-representative therefore agrees that it will not, during the Term of this agreement and for a period of one year following its expiration or termination, acts as agent for or represent, or operate as principal, another money transfer service or any other business or service which would Involve Sub-representative in activities inconsistent with Its obligation to WESTERN UNION and REPRESENTATIVE under this Agreement or would tend to cause public confusion. Sub-Representative agrees that this restriction is reasonable and necessary to protect the reputation of this Money Transfer Service and of Western Union and that the compensation received under this Agreement anticipates the post-terminal restriction period.

7. Competing Services. Representation Not Exclusive

7.1 REPRESENTATIVE agrees that it will not, during the Term and for one year after its expiration or termination, act as an agent for or represent, or operate as principal, another consumer money transfer service, or engage directly or indirectly in any money transfer services other than as a representative for WESTERN UNION. Furthermore, REPRESENTATIVE agrees that its employee, affiliates, subsidiaries officers and directors will not during the Term of this Agreement and for one year after its expiration or termination, act as an agent for or represent, or operate as principal, another consumer money transfer service or engage directly or indirectly in any money transfer other than as a representative for WESTERN UNION.

Annex II

STATISTICS INDICATING MAKET SHAREOF WESTERN UNION & MONEY GRAM AND OTHERS

Identified Money Transfer Outlets:

1.	Foreign Exchange Bureaus	229
2.	Bank	75
3.	Q-net Cafes	13
4.	Micro Finance institutions	41
	TOTAL	**358**

Market Share:

1. Western Union 283 outlets = 79.1%
2. Money Gram 62 outlets = 17.3%
3. Money Express 5 outlets = 1.4%
4. RIA 8 outlets = 2.2 %

Western Union & Money Gram total market share is 96.4%