EFFECTIVENESS OF COMPETITION POLICY IN REGARD TO MERGERS: REVIEW OF BROOKSIDE-BUZEKI MERGER (by E. MACHARIA & R.MOSOTI)

Introduction

The Kenya dairy sector plays a critical role in the livelihood of many Kenyans and contributes 4.5% of total country's GDP, making Kenya one of the largest producers of milk in Africa.[1] In 2013, there was a merger approved between Brookside Dairy Limited (hereinafter referred to as "Brookside") and Buzeki Dairy limited (hereinafter referred to as "Buzeki") and this paper seeks to review the Kenyan merger regime vis a vis the considerations made in approving the above merger and a review of whether the considerations are effective in market structure regulation through merger control.

3. Kenyan Merger Regime

Mergers are regulated by Part IV (Section 41 to 47) of the Competition Act, Act No.12 of 2010 (hereinafter referred to as the Act). The Act[2] states that:

> *"…a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking." Section 41(2) states that a merger, as defined in Section 41(1), may be achieved by:*
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> i. *"the purchase or lease of shares, acquisition of an interest or purchase of assets of the other undertaking in question;*
> ii. *the acquisition of a controlling interest in a section of the business of an undertaking capable of being operated independently whether or not the business in question is carried on by a company;*
> iii. *the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;*
> iv. *acquiring by whatever means the controlling interests in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;*
> v. *in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;*
> vi. *vertical integration;*
> vii. *exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or*
> viii. *amalgamation, takeover or any other combination with the other undertaking."*

In addition to illustrating how a merger occurs, the Act[3] has defined the term control since it appears in the definition of the term merger as follows:

> *"A person controls an undertaking if that person:*
>
> (a) *beneficially owns more than one half of the issued share capital of the undertaking;*
> (b) *is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;*
> (c) *is able to appoint, or to veto the appointment, of a majority of the directors of the undertaking;*

[1] Milk Production and Marketing in Kenya: A preliminary Survey 2013 Report (2014) http://www.kdb.co.ke/press/publications/reports/15-report-survey-on-milk-production-and-marketing-2013/file, retrieved on 27th July 2016.
[2] Section 41(1) of the Competition Act 2012
[3] Section 41 (3) of the Competition Act

(d) *is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act;*
(e) *in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*
(f) *in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or*
(g) *has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."*

The Competition Authority of Kenya must approve proposed mergers.[4] If a merger is approved with conditions, the conditions must be fulfilled. Failure to comply with conditions given may lead to revocation of a merger, however, the implementation of a revocation is not practical as in most instances the target company ceases to exist after the merger is approved.

A transaction constitutes a notifiable merger when it falls within the merger definition set out in Section 41. However, the Authority may declare, by notice in the Kenya Gazette that any proposed merger (as defined in Section 41) is excluded from the provisions of the Act. The Authority has published guidelines, which set the threshold for a merger that may be excluded. According to the guidelines, an exclusion may be granted where the combined turnover of the parties is below Kenya Shillings One Billion (Kshs. 1,000,000,000).

The Act expressly prohibits implementation of a merger prior to receipt of approval from the Authority and even then, only in accordance with the conditions of such approval. Implementation of a merger without notifying the Authority or in contravention of any conditions for approval invalidates the merger, with the effect that no rights or obligations that the parties have in terms of the merger agreement are enforceable.[5]

In making a determination in relation to a proposed merger, the Authority may either: give approval for the implementation of the merger; decline to give approval for the implementation of the merger; or give approval for the implementation of the merger with conditions.[6]

The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including:

a. The extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
b. The extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market;
c. The extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market;
d. The extent to which the proposed merger would be likely to affect a particular industrial sector or region;

[4] Section 42 (2) of the Competition Act.
[5] Ibid
[6] Section 46(1) of the Competition Act

e. The extent to which the proposed merger would be likely to affect employment;
f. The extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market
g. The extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
h. Any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.[7]

4. ACQUISITION OF BUZEKI LIMITED BY BROOKSIDE DAIRY LIMITED

Brookside was acquiring Buzeki. Brookside is a private limited company incorporated in 1993 and Buzeki is a private limited company incorporated 2008.

Both Companies were involved in the purchase of raw milk from dairy farmers for purposes of processing the same after which they sell the processed milk to retailers and consumers. Hence, Brookside and Buzeki are competitors in buying of raw milk for purposes of processing it before selling it to consumers and in selling of the processed milk and milk products to consumers. Brookside acquired all the business and assets of Buzeki, which vested control of Buzeki to Brookside. According to Section 41 of the Act, the merger meets all the elements of a merger.

The following factors were considered:

4.1 Relevant Market

4.1.1 Product Market

The merger was between the largest and the fifth largest milk processors in the country (at the time). Both parties in terms of products were involved in: buying raw milk from farmers, processing the same into fresh milk, and production of Ultra-High temperature Processing/ultra-heat treatment (UHT) milk, yogurt/fermented milk, butter and ghee.
Raw milk sold via informal channels was considered to be a substitute to formal processed milk. However, the only data utilized to make this conclusion was that upon the introduction of VAT at 16% on processed milk in September 2013 by the government, data obtained from Nakumatt Supermarket, for milk sales for the months of July, August and September indicated that all processors' sales declined for fresh and long life milk. Fresh milk sales declined by an average of 14.6% for all processors whereas for Brookside it was 18.1% and Buzeki was 8.05%. Sales for long life declined by average of 1.36%. It was presumed that the decline in sales implied that consumers substituted these to other products and particularly to raw milk. In particular, it was presumed that the decline in sales of fresh milk by more than the price increase suggests that milk marketed through other informal channels is a good substitute to which consumers turned.

Formal channels are made of licensed operators such as: mini dairies, cottage industries, milk bars, milk processors and co-operative societies. The informal channel is the sale of raw milk directly to the consumer. The time of the merger, the Kenya Dairy Board had licensed 32 formal milk processors, 80 mini-dairies, 50-60 cottages industries, 1034 milk bars and 443 producers.

The conclusion that raw milk is a substitute for the processed milk seems to be misinformed. It is important to note that all formal channels (licensed players) must pasteurize their milk before sale. However, the processing undertaken by milk processors such as Brookside, New Kenya Cooperative Creameries ("KCC"), ("hereinafter collectively "Large Processors")) and the alike may incur more costs than the processing/pasteurization conducted by the milk bars and mini-diaries.

[7] Section 46 (2) of the Competition Act 2012

The Large Processors have bigger plants, incur more overhead costs, have more employees, package and distribute the processed fresh milk. All these expenses are factored in the price they sell their fresh milk to the retailers. While the mini dairies and milk bar have simpler pasteurization processes, less overhead costs, no packaging, no distribution costs and sell directly to the consumers.

Fresh milk from such milk dairies and milk bars will cost less than the fresh milk from the Large Processors. A litre of fresh milk from the milk bar at Naivas Supermarket goes for approximately Kshs. 65-70. While processed milk from Large Processors goes approximately Kshs. 45/--50 for half a litre depending with the brand with the Brookside brand being the most expensive.

Further, the survey from Nakumatt did not indicate that the Large Processors delivered less processed milk, there is no data indicating the milk delivered to the formal processors was less than the amount usually delivered to them due to an increase in the demand of raw milk by consumers. If indeed consumers substituted the fresh milk for raw milk, the dairy farmers would have delivered less raw milk to the Large Processors and other formal channels.
If consumers turned to raw milk as a substitute and the formal processors also purchase the raw milk for purposes of processing, there would have been a deficit in the quantity of raw milk collected by the formal processors for processing since the consumers would have utilized some of the raw milk delivered to such formal processors. No such evidence or averment was made by the Authority.

Hence, the presumption that consumers substituted the processed milk from formal processors with raw milk is a presumption that is not based on any fact. Moreover, a consumer who had no access to raw milk will not magically obtain access to raw milk.

It was never considered that consumers simply cut out milk in their budget, or reduced the amount of milk used in their households, or that consumers' purchased processed milk from other retailers who may have been cheaper than Nakumatt.

It is more likely that consumer turned to mini-bars and mini-diaries because the cost of their milk is less than that of milk processors.

We opine that raw milk does not qualify as a substitute for the following reasons.

a) Sale of raw milk to consumers is illegal in Kenya[8]
b) Given that the same is illegal and not recorded anywhere, it extremely difficult to establish its market share.
c) The same is not available everywhere, especially in towns
d) If consumers substituted the fresh milk for raw milk, there should have been a deficit in the raw milk collected by the formal milk processors.

Mini-dairies, milk bars and cooperative societies were correctly considered to be competitors of Large Processors but raw milk traders should not have been considered to be competitors. However, should they have been considered as competitors, a thorough market research should have been obtained to obtain accurate data on raw milk traders. Milk bars, mini diaries and cooperative dairies are registered and the milk is pasteurised, recorded data can be collected from the same on the amount of milk sold, thus these are formal traders of processed milk and not informal traders. It is not clear whether the Authority considered this traders as formal traders or informal traders. It appears, as if they were categorized as informal traders which would also be an error since they are formal traders with formal trading licences.

[8] the Public Health Act specifically criminalizes the selling of milk through informal channels

For raw milk, the same is not pasteurised and is illegal, there is no data on the same and a survey would have to be conducted to establish the amount of raw milk sold to consumers for the same to be considered as a substitute. No such survey was conducted.

It was implied that Kenyans have a preference for raw milk and over 70% of milk in Kenya is consumed raw. On the completion of the merger, The Director General of the Authority was quoted on the market share of the informal channel as follows[9] “informal players account for 88.8 per cent of the milk market.”[10]

There doesn’t seem to be a consistent figure on the market shares of the informal channel because data on the same is difficult to obtain.

There is lack of accurate and timely dairy information, which is a key impediment in planning and decision making by the industry stakeholders. For example, the last comprehensive livestock census was carried out in 1969 and there are variations in the milk production data as reported by various organizations.[11]The available information lacks consistency, is not regularly updated and is sometimes collected using non-objective techniques.[12]

Milk production and marketing data in Kenya is collected by three major stakeholders, namely the Ministry of Agriculture, Livestock and Fisheries (MoALF), the Kenya Dairy Board (KDB) and the Kenya National Bureau of Statistics (KNBS). Other sources of information on milk production and marketing include researchers, research institutions as well as NGO’s who publish their information. International information on milk production in Kenya as documented by the Food and Agriculture Organization (FAO) and other organizations is obtained from the Kenya Government as reported by the above three major agencies (MoALF, KDB and KNBS).[13]

The data collected by the KDB is from all licensed premises that are primary producers, cooling plants, milk bars, cottage industries, mini dairies and processors on prescribed form (called the form of return), which is used as the instrument to collect the data. The form is completed and sent to KDB offices by the 10th of every month giving information on the milk collected in the preceding month. The form also contains a provision to submit data on the value added products manufactured within the month reported.[14]

The collected data is used to quantify and report on the milk marketed in the formal sector and also for calculating cess and levies payable by producers and processors respectively. This is relatively good data that captures the formal sector processors and dairies who receive milk from the producers or resellers. Although the data collected by KDB is good as it is in regard to licensed marketers, it has various limitations.[15]

The instrument does not include the informal milk trade sector and it thus does not capture information pertaining to it.[16] There are no verification methods used by KDB in ascertaining the completeness and reliability of the data. Thus the truthfulness of the submitted data is not always guaranteed due to the financial constraints. It is also difficult to come up with

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[9] By the business daily
[10] David Herbling and Gerald Andae, Brookside closes Sh1.1bn Buzeki takeover deal, Posted November 4 2013 <http://www.businessdailyafrica.com/Corporate-News/Brookside-completes-Molo-Milk-takeover-for-Sh1-billion/539550-2060308-item-1-ne0cejz/index.html>, retrieved on 26th July 2016.
[11] Ibid note 1
[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid
[16] Ibid

complete marketed data at county level due to cross-border trade in milk. The data obtained by KDB has no sampling aspect that establishes the accuracy levels.[17]

The question raised in the relevant market in this merger analysis is how was the market share for sale of raw milk to consumers established by CAK? And how can a market with viable data be compared with a market with non-reliable data or no data at all?

4.1.2 Geographic Market.
Brookside purchased its raw milk from framers based in Central and Rift Valley Regions. While Buzeki purchased its' raw milk from the Rift Valley and Coastal regions. Brookside distributed its products throughout Kenya while Buzeki distributed its products in Rift Valley, Nairobi and Coastal Regions. The geographical market was considered to be that of Nairobi, Coastal regions and Rift Valley (that is, the inlands regions and the Coastal region).

It was concluded that, while the merger would lead to an increase in concentration, especially in the coastal region, in raw milk and in fresh milk, there was effective competition rivalry on the part of informal traders and other processors, who collectively outweigh the large formal processors. This seems to be a misconception. A cursory look at the processed milk in the supermarkets indicated that Brookside is the manufacture of the commonly known and purchased brands of milk such as: Molo Milk, Ilara, Tuzo, and Brookside.

It was also considered that the market share of the merging parties is much lower upon the consideration of the informal sector. It was averred that in terms of processed fresh milk, processors face stiff competition from other players who sell liquid milk: mini-dairies, milk bars, cottages, producers, 343 cooperative and informal traders who command between them about 77% of the marketed milk in the country. If the informal sector controls 70 per cent of the market, this would been that the mini-dairies, milk bars, cottages, producers, 343 cooperative only control 7% of the market which is clearly not correct.

Factors to be considered as provided by section 46(2) of the Act.

a. **the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;**

Before the Buzeki merger, Brookside had a market share of approximately 37%. New KCC had an approximate market share of 20%, Githunguri farmers has an approximate market share of 16%, Sameer Africa had an approximated market share of 5%, Buzeki had an approximated market share of 7% the other competitors had a market share of less than 2% each.

With 37% Brookside already had a competitive edge and power to control the market especially because the next player in line had 17% less than it.
After the merger Brookside got 46% of the market share. While it was estimated that New KCC would have 21% of the market share. 46% versus 21% still places Brookside at a powerful position which it can control the market. It was presumed that the competitors would have 54% of the market hence these amounts to enough market share for the competitors in the Dairy industry to continue thriving. For the competitors to effectively provide 54% of the market so as not to provide Brookside with the opportunity to substantially lessen competition. The Competitors must have more power than Brookside which can only be obtained by them working together which is prohibited by Part III of the Act.

[17] Ibid

b. the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market;

Buzeki's is fourth in a series of takeovers that Brookside has completed in the past six years starting with Ilara in 2007, Delamere and SpinKnit (makers of Tuzo milk brand). Brookside, has also cast its eyes beyond the Kenyan borders with the announcement in September 2013 of plans to acquire a 20 per cent stake in Ethiopia's Elemtu Dairy.[18] The said acquisitions have tightening its grip of the sector with a series of acquisitions in the past five years.[19]

The CAK approved the merger saying Brookside was yet to reach a dominant position in the dairy sector and that informal player's account for 88.8 per cent of the milk market.[20] The percentage allocated to the informal sector keep changing which cast doubts on the analysis conducted by the regulator.

"The informal sector offers a competitive push to the milk processors making it impossible to dictate prices," said, director-general of CAK.[21]
"Most processors are county monopolies so there is need to have nationwide players to enhance competition." [22]The problem with this statement is that, before the merger Brookside already had a strong national wide presence in additional to a regional presence (East Africa). Thus, such a claim is misleading. Given that Brookside was already a national player before the merger, would only have strengthened its position and given it a competitive edge over its competitors.

Further, it is ill advised for the regulator to assist a competitor in becoming a national monopoly. We acknowledge that according to the Act, it is not illegal for a company to have dominance but it is wrong for it to abuse the said dominance.

However, according to section 46(2) (a) that Authority may consider whether a proposed merger would result in any party in the same market acquiring dominance in the market. Before the Buzeki merger, Brookside had acquired 4 other companies, three of which had strong brands in the market. The Buzeki merger was another merger that gave a fourth strong brand to the Brookside. If such a trend does not worry the regulator, clearly the merger regime is not been very effective.

From section 46(2) (b) of the Act, it is clear that dominance of a player whether or not there is abuse of the said dominance is a factor that may be considered by the Authority.
Section 2 of the Act states that

> "*dominant position in a market" has the meaning assigned in section 4 and "dominance" shall be construed accordingly;*

Section 4 (2) of the Act states that:
"*In defining markets, assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, in addition to other relevant matters, shall be taken into account!*

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[18] Ibid note 10
[19] Victor Juma, Investors plan to pour billions into dairy industry Posted Monday, February 23 2015 http://www.businessdailyafrica.com/Corporate-News/Investors-plan-to-pour-billions-into-dairy-industry/539550-2632030-item-2-lmdod4/index.html, retrieved on 25th July 2016
[20] Ibid note 18
[21] Ibid.
[22] Ibid.

a) *the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and*
b) *the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.*

3) *A person has a dominant position in a market if the person:*

a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or
With 37% Brookside and with the next player having 20% Brookside already controlled a substantial part of the production, supply and distribution of processed milk in Kenya. After the merger Brookside obtained 46% of the market share, this increased and strengthened its capability to substantially control part of the production, supply and distribution of processed milk in Kenya.[23]

Especially because it also inherited the contracts with the farmers that supplied raw milk to Buzeki. [24]

c. **The extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market;**

d. **The extent to which the proposed merger would be likely to affect a particular industrial sector or region.**
Especially because the Buzeki merger was the fifth acquisition by Brookside, the said merger was much more likely to affect the dairy milk industry. A look at the packaging of all the brands that are currently processed by Brookside indicate that the milk is processed at their Ruiru plant and package at the same plant.

What happened to the employees who were in the plants of the brands that were acquired by Brookside?

The farmers who used to provide the raw milk to all the acquired entities including Buzeki now have limited choices in terms of whom to supply their raw milk to. The same applies to processed milk consumers, whether they purchase Tuzo, Ilara, Molo Milk, Delamare or Brookside all the said products are from Brookside. The other common brands are Fresha and Daima brands.

e. **The extent to which the proposed merger would be likely to affect employment.**
In its analysis, the Authority did not take into consideration how the merger would affect employment in Kenya. Buzeki was the fourth acquisition by Brookside, this would mean, if it were to retain all its employees all the employees and managers of the four companies it acquired were retained. This would create a replication of

[23] Ibid
[24] Ibid

roles. Further, did all of the employees of the acquired companies relocate closer to Ruiru, because all its brands read that they are processed and packaged at Ruiru?

f. The extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market.

By acquiring five other milk processors, Brookside was going to have contracts with majority of the raw milk farmers. This would make it difficult for any new entrant to source raw milk from farmers, unless the said farmers terminate their contracts with Brookside.

g. The extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and

At the time of the merger, Brookside already had presence in other African countries or was on the processing of establishing some presence in some African countries. Hence, the merger has not assisted or enabled Brookside to compete outside Africa. It just strengthened its position in the market.

The Abraaj Group, an investor in Brookside states that "Now the largest dairy in East Africa, Brookside is serving markets in Kenya, Uganda, and Tanzania, in addition to exporting its products throughout the Middle East and North Africa."[25] The said statement was published in 2013.

This shows that Brookside did not need any assistance in trading in East Africa or other regions as they have also acquired shares in Ethiopia's dairy company

By allowing Brookside to acquire its competitors, the Authority in essence is disempowering the remaining competitors of Brookside and placing them at competitive disadvantage, Even the New KCC which was once ahead of Brookside is currently not at the same competition level with Brookside.

The Buzeki merger not only affects other companies in the milk industry from competing locally but it also quashes any dreams of such companies to compete internationally or regionally. It would be difficult for other companies to acquire the same contracts with farmers and distributors independently without undergoing a similar acquisition rampage like Brookside.

h. Any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.[26]

The Parties did not aver that any of the above benefits would have been derived from the merger. Neither did the regulator.

[25] Abraaj Group Ltd Brookside Dairy Ltd, 2013 <http://www.abraaj.com/images/uploads/davos_files/Brookside_Dairy_Ltd.pdf, retrieved on 26th July 2016

[26] Section 46 (2) of the Competition Act

Countervailing Power
It was averred that the large supermarket chains like Nakumatt, Uchumi, and Tuskys among others have countervailing power and it would be unlikely that they would be manipulated by Brookside post-merger. In addition it was considered that these supermarkets are already selling some products under their own brand names, at the time of the merger, none of the supermarket chains were selling processed milk in under their own brand names, and some like Naivas had mini- bars but not processed milk.

The said supermarket chains are retailers and not consumers, if they incur extra costs or purchase processed milk at a higher price, they pass the extra cost to the consumers who have no countervailing power.

Efficiencies
It was opined that the merger would give Brookside an opportunity to realize efficiencies through the economies of scale and scope. It was also opined that the merger was likely to enhance Brookside's ability to export to COMESA, SADC, Middle East and West Africa among other regions, as is the trend among the major milk producers.

It was averred that in terms of best practise, a cursory look at the global milk processing industry also indicates that the world is becoming more concentrated. For example, Arla Foods, Europe's largest dairy group is owned cooperatively by Danish and Swedish milk producers. Similarly in countries such as Uruguay, Israel and New Zealand, processing is dominated by a few firms.

We opine that it not economically safe to make decisions just because other countries have done the same. It is much better to consider how the farmers and the consumers would have benefited from the merger while considering the law applicable to mergers in Kenya.
The above mentioned countries considered factors that were appropriate to their countries circumstances which might not be similar to our country bearing in mind that the said countries are more developed than our country.

Barriers to Entry
It as averred that there were relatively low barriers to entry as evidenced by the growth of rivals in the market. The growth of rivals was not elaborated or expounded.

For a new entrant to establish a milk processing plant, they must have a plant. The cost of establishing a plant for new entrants was not considered in order to show whether there are any barriers to entry in terms of establishment costs.

Any new entrant must have the capability to purchase and collect, raw milk from farmers, they must have, the capabilities to employ employees and transport its processed milk to supermarkets, shops and other retailers.

Further any new entrant would have to deal with the challenges facing the dairy industry such as: high cost of milk production, low quality of raw milk delivered at the factory gate, fragmentation of supply chains and seasonality of milk supply as well as expensive farm inputs, poor animal husbandry, cattle diseases as well as poor management of dairy marketing systems.[27]

It was viewed that there are low barriers to entry because in the past five years (at the time of the merger) there had been 5 new entrants in the markets. Kinangop Dairy, Buzeki Diary, Sameer A & L, Pamside Dairy and Aspendos Dairy.

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[27] Ibid note 18

However, 10 players existed the market within the said period. SpinKnit was purchased by Brookside in 2010, Limuru Milk Processors (leased by Buzeki) in 2013, Adarsh Developers was bought by Sameer A & L IN 2009, Kilifi Plantations was bought by Buzeki Dairy in 2010, Molo Milk was bought by Buzeki in 2009, Mariakani Milk Plant exited in 2012, Lari Dairy Alliance exited in 2010, East Africa Dairies and Delamere Dairies were bought by Brookside in 2008. This should have raised a concern to the Authority since it indicates that it is difficult for a player to remain in the market.

It also indicates that that the market is very volatile especially because before Brookside acquired Buzeki; Buzeki seems to have been on an acquisition spree too.

Conclusion

It appears that Brookside has been on an acquisition spree of its competition. In 2008, Brookside acquired Delamere Dairies and East Africa Dairies. In 2010 it acquired SpinKnit Dairy Limited (which used to produce Tuzo, Lea and Ever fresh milk brands.[28]Before Buzeki was acquired by Brookside, it was also on an acquisition spree of other Dairies. In 2009 Buzeki acquired Molo Dairy. In 2010 Buzeki acquired Kilifi Plantations and in 2013 it leased Limuru Milk Processors.

Brookside has also acquired Ugandan dairy company Sameer Agriculture and Livestock (SALL), a unit of Kenyan conglomerate Sameer Group. Under the terms of the deal, Brookside will take over the SALL's management of contracted farmers and assets which include fresh dairy products in Uganda.[29]The said company manufactures, the processed milk and milk products under the name Daima.

Concentration of the milk market in the hands of one player is seen as detrimental to the farmers' interests — especially in the pricing of milk at the farm-gate. "Brookside has absorbed Ilara, Tuzo and Delamere and any additional acquisitions could only tighten its grip on the market and drive it towards monopolistic tendencies," said Peter Lelei, the vice-chairman of Kenya Dairy Producers Association (before the Authority approved the merger.[30]

In conclusion, it is our opinion that the merger control regime is not effective as considerations factored by the regulator are not known in law and are not supported by credible research based facts. Consequently, the regulator approves the creation of monopolies by players in various industries such as the Dairy Industry.

As a way to foster public faith in effectiveness of merger regulation there is need for transparency and participation of stakeholders in a market where there is a proposed merger as the people who suffer the brunt of an ineffective merger control are the final consumers.

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[28] Zeddy Sambu, Brookside and Spin Knit complete merger, business daily, Posted Friday, February 19 2010,http://www.businessdailyafrica.com/-/539552/864676/-/view/printVersion/-/sewyulz/-/index.html, retrieved on 27th July 2016.

[29] DBR Staff Writer, Reported Kenya's Standard Newspaper, Published 02 June 2015.

[30] Gerald Andae, Brookside targets rival for larger share of milk market, Posted Wednesday, August 21 2013 http://www.businessdailyafrica.com/Corporate-News/Brookside-targets-rival-for-larger-share-of-milk-market/-/539550/1962934/-/6d2eal/-/index.html retrieved on 27th July, 2016.

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