

# REGU LETTER



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## Microsoft Twisting Diplomatic Arms

Microsoft, with its near monopoly in personal computer operating systems (OS), has been seeing troubled times for over a decade and a half now. But, it has become apparent that it takes more than mundane troubled times to make a company as large, influential, and almost indispensable to technological development, as MS, see the red. Even if MS has really been in trouble for long, it has surely made a lot of its competitors – competition authorities and courts – fight for dear life. It has spent tens of billions of dollars on out of court settlements and hefty fines in the countries where it had been charged for monopolistic practices, but has ended up none the poorer.

The US District Court had ruled that MS had committed monopolisation by bundling Internet Explorer with its Windows OS. But the DC Circuit Court of Appeals nullified that ruling. Simultaneously, the Department of Justice, after it came under the administration of the US President George W. Bush, made public that it no longer wanted to break up MS. It did not require MS to change any of its codes, nor prevent it from tying other software with Windows in the future.

MS was not as lucky in the European Union (EU). It was fined US\$600mn in March 2004. The remedies suggested were for MS to offer two versions of Windows, one with and the other without the media player software, and to licence the information required by rivals. There were stringent conditions imposed on MS for compliance and it would have to face daily fines of US\$5mn if it did not comply soon. All this was topped with MS officials made to look like inconsistent fools by the prosecution judges.

It would be safe to say that the US and the EU together form the seat of power and dictate technology. Though,

MS saw the remedial measures in the EU as debilitating for the company and a disincentive for technological development in general, it attempted to comply with them to the satisfaction of the Court. A complete sway over these two markets would have given it the power of life and death on OS, media players, Internet browsers, and related software. It was apparent that MS was willing to go to any lengths to keep its skin in these domains.

Beyond these shores, though, the story changes – significantly.

In Brazil, MS had to defend itself in two cases. Paiva Piovesan, a Brazilian company that makes financial software, accused MS of impeding competition by selling its Microsoft Money 2004 along with its Office suite of applications. But, the Administrative Council of Economic Defence (CADE) threw out the complaint. The Brazilian government is the biggest public sector user of Linux in South America that has a significant use in the financial sector. An important point to ponder is that in spite of having an open source software on a large enough scale in the country, CADE still acquitted MS on charges of bundling.

In another case, CADE held that MS restricted the distribution of its software by authorising only one firm, TBA, to be the distributor for all federal agencies (including those located outside Brasilia). It objected to the ‘double monopoly’ that MS caused to exist, and precluded the bidding process that was required for federal contracts. MS had engineered the



http://home.planet.nl

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## >>COVER STORY

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selection criteria for resellers such that only TBA would qualify, and fined MS 10 percent of revenues – a high amount in itself, but a small price to pay to keep itself in a market growing as fast as Brazil.

The Japan Fair Trade Commission found that certain provisions in license agreements between MS and Japanese PC vendors violated Japan's anti-monopoly code. The JFTC did not spell out any potential fines that might be imposed on MS for violating rules. MS disagreed with the recommendations and sought a review. MS Japan made public that even if MS were asked to suspend operations in the country temporarily, the damage would be limited.

The case in South Korea is particularly telling. Daum Communications lodged a complaint against MS with the Korean Fair Trade Commission (KFTC) for bundling its instant messenger software, MSN, with Windows, thus nudging Daum's software, Touch, out of the market. RealNetwork joined the wrangling by crying foul at MS's linking of Media Player with Windows and threatening the market share of RealNetwork's RealPlayer. As soon as a preliminary report suggested that the verdict was likely to be against MS, it threatened to pull out of South Korea altogether. But the KFTC was not deterred; it imposed a fine of US\$30mn and ordered MS to offer two versions of Windows, one with neither the instant messenger nor the media player, and the other with both, but also with links to Internet pages that allow users to download competing software products.

What were the stakes for MS? Many in South Korea probably knew full well that MS could not take such a drastic step just to escape the fine of a few million dollars. There are about 10 million Windows users in Korea; MS could not just pull out so easily. Also, the Korean government is pulling out all stops to encourage the open source alternative to the Windows OS, Linux. It has been

co-operating with China and Japan to standardise Linux in the three countries. If MS knew this, it would surely not want to hammer a nail into its own coffin by leaving Korea.

This was the first antitrust suit it was facing in Asia, one with the potential to start an avalanche of such suits from other Asian countries. If Europe and Korea have been able to grab their shares of the generous payouts that MS is anyway making to maintain its monopolistic position, why not other countries too? Seeing this as a serious possibility and threat to growth prospects in emerging markets, MS subverted the potential danger by threatening to pull Windows out of Korea. It was probably simultaneously hoping to receive a favourable verdict from KFTC and sent out warning signals to other countries that may wish to get their hands on MS.

In a way, the MS case in Korea was only a dummy. Corporates in the US have a very strong sway on political decisions, though to say that this was actually a war between Korea and the US would be going too far. Throughout modern history, the two countries have had a very comfortable (for the US) relationship. Korea, being very strategically positioned between Japan and China, and to the south of communist North Korea, was always an important country from the US military perspective. It would be hard to imagine a very fierce battle in the courtroom. Nothing could have possibly gone very wrong for either country.

The moot question now is, what would have happened if it were a country that was not as large (economically) and influential (politically and economically) as Korea, say Bangladesh, or any other country that is still not privileged enough to even be called developing? If we assume that Bangladesh had mustered enough courage to charge MS with monopolising the domestic markets for OS, would MS not have made good of its threat and pulled out of Bangladeshi markets without a second thought?

## >>PERSPECTIVE

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### Regulatory Capacity Building in Developing Economies

The role of independent regulatory agencies is increasingly gaining importance the world over. These agencies are supposed to make decisions in a participatory manner, and perform a desired balance amongst conflicting priorities of various stakeholders.

The experiences with such regimes has so far not been encouraging, particularly in the context of developing economies. In many cases, regulatory institutions are struggling to match the expectations of governments and other stakeholders and attain the stated objectives.

An institution could be as effective as the people who man it, and in most cases limited capacities of the regulator, their staff and of stakeholders, including

consumer representatives, have been considered a major constraint. Further, regulatory decision-making being a participatory process, the quality and effectiveness of representation from stakeholders would have a considerable bearing on regulatory efficacy.

The other perceived reason for the under-performance of regulatory institutions is the adoption of approaches that are alien in the context of developing economies, howsoever successful they may be in the developed world. Many of the challenges that governments and regulatory institutions in developing economies encounter are peculiar to their specific context. Addressing these challenges would require the formulation of localised solutions.

This discussion holds in the context of competition authorities as well.

Presently, the developing world lacks in a credible institutional base to impart training on the stated subjects. Realising this felt need, CUTS International is in the process of setting up the CUTS Institute for Regulation and Competition (CIRC) at Jaipur, in India.

CIRC will follow a multi-stakeholder approach and emphasise on skill and experience transfer amongst developing countries. Training and educational courses would be offered in the areas of Economic Regulation, Competition Policy & Law, and Commercial Diplomacy. The establishment of CIRC would contribute towards filling the stated vacuum.

*(for further details, please visit [www.circ.in](http://www.circ.in))*

## New Rules for Norway

In Norway, in August 2005, a regulation had been issued, setting out the principles for calculating fines and the conditions for obtaining leniency.

The Competition Authority has been empowered by the regulation to impose administrative fines of up to 10 percent of the global turnover of the undertaking for various competition related violations. For certain violations of lesser gravity, the maximum fine is one percent of the global turnover.

As regards leniency, the new Norwegian leniency programme is based on the principle that the first undertaking to come forward can receive a 100 percent reduction in the fine that would otherwise be imposed, while the first runner-up can hope only for a 50 percent reduction.

However, this applies only to administrative fines and not criminal ones. The risk of criminal investigations may reduce the effectiveness of the leniency programme. *(ILO, 14.10.05)*

## Abuses to Hit Record High

The head of the Federal Anti-Monopoly Service (FAS) of Russia, Igor Artemyev said that violations of the anti-monopoly law are expected to hit record levels this year with 1985 cases – an increase of around 500 percent from a decade ago.

Economists said that the rise could possibly be attributed to increased effectiveness of the regulator.

Artemyev contended that the number of violations by state entities had increased more rapidly than those by the private sector. The FAS expects to bring in RUB 224.5 m (US\$7.8mn) in fines this year. *(SPT, 05.10.05)*

## Officially Opining

The Advisory Panel on Efficiencies has opined that Canada should retain the efficiencies defence for mergers, except when the merger would create a monopoly. Sources say that the distinction would be hard to administer.

The report issued by the panel says that Canada should be unafraid to diverge from international practice where necessary, that efficiencies should be considered twice in the

review process – at the effects stage and later as a defence, and that, the criterion for using the defence needs more clarity.

The report is silent on what types of efficiencies should count towards allowing a merger, placing the burden on the Parliament to evolve a relevant standard. *(GCR, 03.11.05)*

## Bouquets for Brazil

The Organisation for Economic Co-operation and Development (OECD), in a recently released report, praised Brazil's competition enforcement agencies for having made substantial headway towards implementing a sound competition policy, for reducing the backlog of cases, and for developing a wider competition culture in Brazil. The report was based on an evaluation through peer review.



There are a number of recommendations offered by OECD for further improvement, which includes fusing elements of the current regime into a single institution and focusing more on investigating cartels than mergers. The report also recommended extending the tenure of agency commissioners.

*(www.latinlawyer.com, 16.10.05)*

## Singapore's CAB

The Ministry of Trade and Industry in Singapore has recently set up the Competition Appeal Board (CAB). It will have powers similar to a District Court on the hearing of an action and will hear appeals relating to decisions made by the Competition Commission.

Further appeals from the CAB may be made to the High Court and ultimately the Court of Appeal, on points of law or amount of a financial penalty.

The provisions under the Competition Act on anti-competitive matters will come into force in January 2006. *(www.channelnewsasia.com, 08.09.05)*

## For Conditional Mergers

The Latvian Competition Council (LCC) has recently adopted a number of decisions that reflects its enhanced scrutiny of merger notifications and continues the state's declared war against cartels.

Merger participants must file a report to the LCC if their total sales in the preceding year were not less than Lats25mn (US\$43.6mn), or if their total market share in the particular market exceeds 40 percent.

After evaluating the merger notification and opinions of other market players, and analysing the market in detail, the LCC may prohibit the merger only if it arrives at a conclusion that dominance may arise or be reinforced consequent to the merger, or if competition is to be reduced in any of the relevant markets owing to the same. *(ILO, 04.11.05)*

## Boon for India Inc.

India Inc. seems to have benefited from the spate of mergers and acquisitions (M&As) that have taken place in the last ten years.

M&As have boosted sales and profits of merged entities. While pharmaceutical and cement sectors have been able to immediately capture synergies, the auto ancillary sector delivered good results after two-three years. Metal, mining and the textile sectors have offered a mixed bag of results, while the FMCG sector have seen a spate of acquisitions without significant sales gains.

Instances of mergers that top the list of sales synergies are Sunderam Fasteners and Autolec, Matrix Labs and Mediacorp Technologies, while examples of the major flop shows would be the merger of Lumax and Laser Lamp, and Geoffrey Manners' amalgamation with Wyeth. The slow integration of the two entities has been a major reason. *(ET, 25.10.05)*

### New Polish Watchdog

For a reduction in regulatory duplication, Poland's prime minister has stated that regulators overseeing telecom, post and television will be welded as one with the competition agency. The new agency will probably be called the *Urząd Antymonopolowy* (literally, Antimonopoly Office).

The motivation is being questioned on the grounds that there is not much duplication between the bodies in question. As per speculation, the real reason might be a desire to remove certain officials from jobs.

One side of the debate feels that adding new responsibilities to the workload of a competition agency may cause a dilution of its character and a weakening of its antitrust enforcement ability, while others feel that there should be little disturbance to normal business. *(GCR, 17.11.05)*

### Samurai Guard

Japanese business organisation, Keidanren, has formulated a proposal for new rules, which makes it impossible for foreign companies to conduct all-share mergers with Japanese companies – their justification being that this would protect the native companies from hostile takeovers by foreign firms.

The Ministry of Justice (MoJ) has postponed adopting these rules alleging that they are flawed and the Ministry of Economy, Trade and Industry agrees.

The debate over cross-border transactions in Japan is between those

who want the market to decide the ownership of native companies and those who believe they should be protected. MoJ's decision in this case is of consequence as it indicates that Keidanren is increasingly isolated in their protectionist stance. *(FT, 2.12.05)*

### Synergy on Competition Law

The Canadian and Japanese governments have signed the Agreement Concerning Co-operation on Anticompetitive Activities, which entered into effect on October 6, 2005. This is the first enforcement agreement between Canada and Japan with respect to competition laws.

Canadian firms and businesses should be aware of the potential risks that may now be presented from bilateral and broader competition law enforcement co-operation among Canada, the European Union (EU), Japan and the US.

This may prove particularly important as Japan continues to strengthen its own competition law enforcement tools with the introduction of leniency and search warrant rules in 2006. *(ILO, 03.11.05)*

### Restraint on Regulatory Costs

The Bush administration has stemmed the rising cost of regulation on US businesses and claimed a 70 percent reduction in the growth rate of regulatory expenses. It is estimated that regulation adds around US\$1,100bn a year to the costs of American businesses.

Business groups have confirmed the administration's assertion of reigning in regulation costs, saying that this has been achieved without compromising environment and safety standards.

The Office of Management and Budget (OMB), the fiscal wing of the White House emphasised that this is not a campaign of deregulation, but rather a move towards smarter regulation.

The administration has calculated that regulations in recent years have been yielding greater net benefits, in terms of lives saved by new rules and pollution prevented. *(FT, 09.12.05)*

### Stepping up Redrafting

China is stepping up efforts to create a new anti-monopoly law, which has been in the drafting stage for more than 10 years now. It was listed on the agenda of the 10<sup>th</sup> National People's Congress, to be held in 2007.

A format anti-monopoly law could be a double-edged sword for multinationals doing business on the mainland. Such a law may assist foreign investors by providing uniform and comprehensive guidelines on competing in China. But multinationals are concerned that it may restrict their business practices or even subject them to harsh penalties.

The law would require companies seeking M&As to notify Chinese authorities if one or more of the parties involved have 1.5bn *yuan* (US\$184mn) of business in China. These new operations are beginning to affect transactional deals. *(FT, 26.10.05)*

## Slow and Sure

The modernisation of the European Commission (EC) Policy is a slow process. Still, the Commissioner, Neelie Kroes's 'preliminary thoughts' on reviewing the EU's limits on the powers of dominant companies should be welcomed.



There are a number of reasons why a review of Article 82 – the relevant clause of the EU treaty, is long overdue. The EC, together with the European Court of Justice has applied the rules too rigidly and aggressively in the past. The US, on the other hand, has been less interventionist. A sharply different application of competition rules on different sides of the Atlantic can only contribute to uncertainty at the corporate level.

Modernisation of the way the EC applies rules on cartels and price-fixing and on mergers has led to Brussels taking more account of consumer welfare, thus making the application of Article 82 inconsistent. *(FT, 27.09.05)*

### Mexican Leniencies

The Mexican antitrust authority, the Federal Competition Commission (CFC), is planning to introduce leniency programmes for detecting cartels. This initiative takes place after being recommended by the OECD in 2004 and has been justified by the difficulty of finding conclusive evidence in cartel cases.

Members of the CFC have highlighted that the application of leniency programmes has proven effective where it has been adopted, such as USA and some EU member states. Presently, the proposed measure forms part of a package of reforms prepared for discussion in Parliament. *(GAW, 22-28.10.05)*

## Portugal's Prohibition

Portugal's Competition Authority has put a definite stop the plans of two transport companies, Arriva and Barraqueiro, to merge into a third, ATMS. The two have indispensable roles in that they move commuters between the cities of Lisbon and Setubal.

A single bridge connects Lisbon and Setubal across the river Targus. While Barraqueiro runs trains over the bridge, Arriva is the main bus operator in Setubal. A merger of the two, the agency says would create a 'quasi-monopoly scenario' with an 86 market share.

The Authority feels that the remedies put forward by the companies are inadequate and late. The two companies can appeal against the decision, if they wish. The two are ruminating the option. (GCR, 08.12.05)

## CADE Castigates

The Administrative Council of Economic Defence (CADE) has fined large multinational pharmaceutical laboratories in Brazil, for a cartel that allegedly attempted to boycott the entry of new generic medicines.

A regional administrative department censured groups like Roche, Schering Plough, Aventis, Bayer, Akzo, GlaxoWellcome, and AstraZeneca, after they held meetings in 1999. The focus of the meetings was to establish collective action to develop an information campaign against generics, in the process disseminating what was termed 'distorted information'.

All the companies barring Jensen-Cilag Pharmaceutica were fined one percent of their respective turnovers for the year 1998. Jensen Cilag invited a two percent fine owing to its leading role in the meetings (GAW, 8-14.10.05)

## Case Calls for Warner Split

Steve Case, founder of America Online stated in an article in the Washington Post that Time Warner Inc. should be split into several different companies. "It's now my view that it would be best to 'undo' the merger by splitting Time Warner into several independent companies and allowing AOL to set off on its own path", Case wrote in the *Post*, echoing recent calls for a split, by billionaire Carl Icahn.

"Given that Time Warner failed to capitalise on AOL's potential during a period when it owned 100 percent of AOL, it seems doubtful that a scenario in which it has a lesser, but still controlling stake, will work better", he wrote.

He said in the article that he proposed to the board in July that the company is split into four entities – Time Warner Cable, Time Warner Entertainment, Time Inc and AOL. (BL, 13.12.05)

## No Flow for Illegal Water Firms

France has fined the Lyonnaise des Eaux and Syndicat des eaux d'Ile de France €400,000 and €100,000 (US\$491,000 and US\$123,000) respectively. Both players were responsible for providing water to communities and stood accused of anti-competitive conduct in trying to prevent customers from switching to alternative suppliers.

Anne Le Strate, director of another supplier, the Eau de Paris, welcomed the decision saying that it was time that action was taken against the market-sharing agreements in the industry.



(GAW, 19.11.05)

## Peugeot Pinned Down

The European Commission (EC) has fined the French carmaker Automobiles Peugeot €9.5mn (US\$60.9mn) for breaking EC rules. DG Comp has stated that the company had blocked the cross-border sale of new cars from the Netherlands to other member states.

The initial complaint was made by the European automobile association – the Le Syndicat des Professionnels Europeens de L'Automobile.

Peugeot had conceived a two-part strategy – between January 1997 and September 2003 – to hinder Dutch car dealers from selling to people elsewhere in the European Union (EU). It first ensured that the remuneration of Dutch car dealers was dependent upon the final destination of the car and refused to pay them performance bonuses if they sold cars to foreign citizens. The company also threatened a reduction in the number of cars it supplied to dealers who had considerable export activity.

(GCR, 15.10.05)

## Swiss Ruling Turns to Slush

Ticketcorner, the company who was accused of an abuse of dominance in

2002 by Switzerland's competition authority, has reversed that ruling when the Appeals Commission for Competition Matters stated that the decree was flawed by technical and procedural errors.

Among the mistakes identified were that the Commission amended its decision in a 'material way' without giving Ticketcorner a right to respond. The Commission also defined the relevant market in a way that was 'unclear and contradictory'.

Astrid Waser, a competition law specialist, said: "This case is a landmark decision on rights of defence. The Competition Commission will be obliged to change its practice regarding the decision making process now. In particular it will have to give the parties a right to comment on the final draft decisions". (GCR, 07.11.05)

## A Giant of a Cartel

On October 12, 2005, Italy's antitrust authority stated emphatically that seven baby milk producers were operating a cartel and worked in parallel between 2000 and 2004 to set prices at levels that exceeded those in other European countries.

The seven companies have been fined a total of €9.7mn (US\$11.9mn). Nestle Italiana and Heinz's Piada were fined more than €5mn each. Humana Italia was fined €1.377mn.

Four other companies – the Heinz Italia, Humana's Milte Italia, Numico's Milupa and Nutricia SPA were fined less than €1mn. Six other companies – Star Mellin, Chiesi Farmaceutici, Bristol Myers Squibb, Abbott, SyrioPharma and Dicofarm have been exonerated.

(GCR, 02.01.06)

## Up in Smoke

The EC has fined €56mn (US\$69mn) on four Italian tobacco processors – Deltafina, Dimon (now called Mindo), Transcatlab and Romana Tabacchi – for colluding over a period of over six years on the prices paid to growers and other intermediaries and on the allocation of suppliers.



Commissioner Neelie Kroes said: “Cartel culture must be eradicated from all sectors and agriculture is no exception”. In 2004, the Commission had fined five processors on Spain’s tobacco market. The decision to fine the four Italian processors is of particular significance, as the country happens to be the largest producer of raw tobacco in Europe.

In another development, fines for Mindo and Transcatlab were reduced under the terms of the 2002 Commission Leniency Notice – by 50 percent and 30 percent respectively. (GAW, 15-21.10.05)

### Samsung Sued

The Korean Fair Trade Commission (KFTC) sued Samsung Electronics a total of 60 million *won* for manipulating company documents prior to their regulatory investigation into the company.

The antitrust agency said that two managers of Samsung Electronics made up a purchase contract with semiconductor production equipment subsidiary SEMES, formerly Korea DNS, to cover up its unfair business dealings.

It has been alleged by KFTC that since 2000, Samsung Electronics has been providing its sister firms and subsidiaries with instructions to their business partners to scrap all hardcopies and also to delete electronic files that contain facts of its unfair, sneaky business practices, plus work schedule records. (times.hankooki.com, 08.11.05)

### Firm Stand on Fee-fixing

On November 9, 2005, the Office of Fair Trading (OFT) found, by way of investigation, that 50 of the top schools in the UK had exchanged information on planned fee increases and fee levels for boarding and day pupils in the three academic years of 2001 and 2003.

OFT issued a statement of objections, which stated provisionally that the arrangement infringed the Competition Act 1998.

The schools may make written and oral representations on the statement of objections until March 2006. It is only then that OFT shall state decisively

whether the exchange of information truly transgressed the prohibition in the Act and, if so, whether fines should be imposed on the schools. (ILO, 16.12.05)

### Eyes Shut on Offence?

New Zealand’s Commerce Commission has fined a group of eye-surgeons for price fixing who were apparently unaware that the conduct in question was unethical.

The Commission has fined the four surgeons US\$54,000.

Paula Peibstock, the chair of the Commission said that the case “sends a clear message that the health sector is not exempt from the Commerce Act”. She added that the Commission would plan to scrutinise other health care providers with equal caution. (GCR, 10.11.05)

### Costa Rican Probe

The Comision para Promover la Competencia, (CPC), Competition Commission for Costa Rica, has opened an investigation into alleged anti-competitive practices carried out by Fabrica Nacional de Licores (Fanal), a major producer of spirits in the country.

The inquiry will focus upon commercial practices that Fanal has been implementing with wholesalers since November 2004, particularly the granting of conditional discounts on wholesalers refusing to sell spirits of competing brands.

If the CPC finds a violation to the Competition Act, Fanal could face a fine equivalent to 10 percent of its turnover

or even up to 10 percent of the value of its assets. (GCR, 26.11.05 – 02.12.05)

### Brazil Breaks Steel Cartel

CADE, Brazil’s competition enforcer, has found three steel makers in the market guilty of cartel activity. The companies were producing steel rods for construction.

Investigations were initiated in 2000 after two construction unions accused Belgo-Mineira, Barra-Mansa and Gerdau of price-fixing and market division. Customers who tried changing supplies between the firms would be uniformly offered a price, 11 percent higher than their current deal.

CADE’s commissioners voted four-to-one against the companies, fining them seven percent of their gross revenues besides instructing them to issue advertisements in popular newspapers informing the public of their unlawful activities.

The three companies taken together are dominant players, both in the Americas and on the world market.

(latinlawyer.com, 16.10.05)

### A Clog for Coke

The competition authority of Mexico has imposed upon Coca-Cola the biggest ever fine for anti-competitive conduct. The authority initiated the action after a shopkeeper complained about Coke’s sales tactics.

Although a formal announcement is awaited after a mandatory appeal period ends, the country’s antitrust authorities have affirmed that Coca-Cola was fined US\$68mn for preventing customers from buying other brands.

Mexico has the highest per-capita soft drink consumption in the world and consequently, the stakes are high.

Coke on its part denied it had undertaken monopolistic practices. “We respect the...decisions”, a spokeswoman said. “However, we have used the appeal processes open to us to present arguments that our business practices comply with Mexican competition laws, and to demonstrate that our commercial practices are fair”.

(GCR, 14.12.05 & FT, 16.11.05)

## Conditionally Endorsed

Thirteen months after being notified, the Agencia Nacional de Telecomunicaciones (Anatel) has approved the merger between Sky and DirecTV subject to several conditions.

The conditions suggested by Anatel for the approval of the transaction mainly refer to the opening of exclusive contents, the imposition of uniform prices throughout the Brazilian territory, and the maintenance of a minimum number of Brazilian channels on the resulting platform.

It is now up to the CADE, Brazil's antitrust authority, to make the final decision.

The merger has an international dimension and had already been approved in other Latin American countries such as Mexico, Chile, and Columbia. (GAW, 19-25.11.05)

## Space Sharing and More

The Grand Alliance and the New World Alliance, two of the world's largest container shipping alliances have agreed to share space in the other's services in Asia-Europe and in the Asia-Mediterranean and will launch a new joint service *via* the Panama Canal between Asia and the US East Coast.

The deal, which will certainly benefit customers with a wider range of destinations at higher frequencies, comprises of APL, owned by Singapore's Neptune Orient Lines, Korea's Hyundai Merchant Marine and Japan's Mitsui OSK Line under the New World Alliance, and Japan's NYK, Hong Kong's OOCL, Germany's Hapag-Lloyd and Malaysia's MISC in the Grand Alliance. (FT, 07.10.05)

## On High Heat

As recently as six years ago, while investors were still in thrall to a dotcom bubble that had yet to burst, steel was derided as one of the last bastions of the old economy. Globalisation had left this industry behind.

But a series of changes have swept through the business with Arcelor making a hostile bid for Dofasco, Canada's leading steel firm. German and American steel makers are also competing for Dofasco. This is said to

be a reprieve to Mittal's purchase of Ukraine's former state-owned steel firm, Kryvorizhstal. Both Arcelor and Mittal had earlier lost out on a slice of Erdemir, a Turkish state-owned steel firm. There have been a host of small purchases in the industry in 2005.

The wave of mergers, acquisitions and asset sales has helped to revive the fortunes of the world's steel makers by reducing the chronic overcapacity that had troubled the industry for decades. But the most important factor behind this revival is China's booming economy.

(www.economist.com, 26.11.05)

## Defining Demergers

After a season of mergers, the trend has shifted to demergers. They allow for splitting of businesses within a company or separating investments out of the core business.

Investment bankers agree that the trend has gained momentum as several of the businesses of companies have become bigger and their true asset value is not reflected in the stock price of the companies. Changes in the I-T Act in 1999 made demergers tax neutral and prompted companies to go for it.

Some of the companies that either announced or demerged are Great Eastern Shipping, Eveready Industries, auto ancillary company Rane Madras, Vardhman Spinning, and Morarjee Realities. (BL, 27.11.05)

## Not Quite, Sir

The EU Court has upheld the EC's ban on General Electric buying Honeywell International, but has also

stated that the Commission made 'some errors'.

Nevertheless, the Court of First Instance said that the combination would have created a dominant position in markets for jet engines for large regional aircraft, for the corporate jet aircraft and for small marine gas turbines.

Although the US anti-trust authorities had approved the deal – in 2001 – the EU's competition agency had rejected GE's proposed US\$42bn purchase of Honeywell.

This in itself reveals the agency's power to kill anti-competitive mergers between large companies that do a lot of business in the 25-member EU. (ET, 15.12.05)

## Tentacles Spread Wide

Telenor, Norwegian telecoms group, in a surge of expansion, has taken a control of Thailand's second-largest mobile phone operator, Total Access Communications (TAC).

Telenor has paid US\$225mn for a 40 percent stake in United Communications Industry (UCOM), a Thai-listed holding company, and owns 42 percent of Singapore-listed TAC. The transaction also triggered mandatory tender offers from Telenor for the remaining shares in both UCOM and TAC.

These dealings have also led to concerns over the prospects for the Thai mobile phone market.

Besides, Telenor has expanded aggressively in the overseas market such as Ukraine, Hungary, and Bangladesh. (FT, 22.10.05)

## Colossus on the Waves

P&O, the ports and ferries group and incidentally, the world's fourth largest has agreed to a US\$5.7bn take-over bid by Gulf-state backed Dubai Ports World, the latter being a merger of two state-owned entities – Dubai Ports Authority and Dubai Ports International.

The deal creates one of the world's largest shipping companies.

P&O stated that Dubai Ports had offered 443 pence per share in cash for the 165-year-old British company. The offer was at the top end of market expectations. The deal follows a string of recent take-overs of British companies and a wave of consolidation by European port operators. (ET & FT, 30.11.05)



## Investor Activism Raises Panic

An unprecedented wave of investor activism in the Netherlands, which had forced changes in leading companies including VNU, Unilever, CSM, Laurus, and Royal Dutch Shell, caused panic among senior supervisory board members in the country.

Paul de Vries, Director of the Dutch Shareholders Association, VEB, stated that the older supervisory board members are utterly confused with the present situation. VEB itself has chalked up several significant victories for shareholder rights in the Netherlands in recent years.



Developments on this front have escalated by recent events at VNU, the business information company, which was forced to scrap its US\$7bn acquisition of IMS Health, the US market researcher, and announce the resignation of its chief executive Rob van den Bergh.

Observers, however, welcomed the rise of shareholder activism, which, according to de Vries, had introduced a badly needed system of checks and balances. (FT, 05.12.05)

### Mexican Assent to Reforms

Mexico's senate has given unanimous backing to the long-awaited reforms aimed at improving corporate governance and protection of minority shareholders in the country.

The reforms, which suffered years of delay, are designed to modernise Mexico's securities practices. The legislation will tackle governance concerns by requiring oversight by independent board members, as well as heighten transparency through stricter disclosure and compliance rules.

This new legislation would also introduce an investment promotion vehicle called *Sapi*, which is aimed at making it easier for smaller companies to get listed in the stock market. *Sapis* are also expected to encourage private entity and venture capital investors, who have a limited presence in Mexico, due to the abuse of political and economic power by some big companies in the country. (FT, 10.12.05)

### Guilty of Forced Labour

The French oil group Total has agreed to pay €2mn (US\$6.1mn) worth of fines to settle charges in a Paris court against its usage of forced labour to build a natural gas pipeline in Burma.

Lawyers said that the settlement, one of the first of its kind in Europe, could set a precedent for similar lawsuits by victims of human rights violations against European companies operating in developing countries.

Total will pay eight Burmese citizens €0,000 (US\$12,300) each and will establish funds worth €2mn to compensate the victims and to support operating humanitarian groups in Burma.

The eight plaintiffs against Total said that the Burmese army forced them, in the early 1990s, to work on the Yadana gas pipeline, which ran from a gas facility in the Andaman Sea, off the coast of Burma to a power station in neighbouring Thailand. (FT, 30.11.05)

### US Leap in Lay-offs!

Job cuts in the US auto industry may surpass an earlier record set in 2001, as General Motors Corp (GM) and Ford Motor Company announce more lay-offs.

Given GM's announcement to cut 30,000 jobs combined with Ford's announcement to lay off 4,000 personnel, the US auto industry could meet or possibly bypass the 2001 record figure of 1,33,686 job cuts in one year, stated observers.

The US auto industry, which includes car manufacturers, suppliers, and auto dealers, announced 89,016 job cuts through October 2005, a figure 123 percent higher than the previous year. Auto part suppliers and manufacturers, who rely upon the automakers, would be the hardest hit in the process.

(FE, 22.11.05 & BL, 23.11.05)

### AGM Attendance Rewards

The German government is considering legislation to reward investors who attend and vote at annual shareholder meetings. Companies in Germany, as in other countries, have witnessed a progressive decrease in attendance in their Annual General Meetings (AGM).

The move comes to allay fears that activist investors could overturn company strategies. Many companies are concerned that they could be exposed to shareholders' pressure, of using low overall attendance in the AGM to push through their agendas.

Top corporate governance experts welcomed the idea of the 'reward', which would comprise of a 10 or 20 percent premium on dividends paid to voting shareholders. The proposal has also won favour in political circles, and is set to remain on the political agenda.

(FT, 05.10.05)

### Bhopal: The Battle Goes on

Twenty-one years after the Bhopal gas tragedy claimed over 2,260 lives and affected about 200,000 people, survivors are still battling it out in US courts for compensation and the removal of hazardous waste from factories of the Union Carbide Corporation (UCC), closed since December 3, 1984.

In the latest move, survivors have filed an appeal in the Second Circuit Court, New York, against a District Court order, which rejected their suit for damages against Dow Chemicals, the present owner of UCC. After a six-year battle in the American lower court, Justice John F Keenan rejected the suit, observing "The court will not grant relief where it happens to be impossible and impractical".

H Rajan Sharma, the survivors' attorney urged the Indian government to extend support to the survivors' struggle, saying a little co-operation from the country's authorities could go a long way in getting them relief.

The struggle against the US corporate giant is now acquiring the status of a global fight against corporate accountability with various international NGOs and even US citizens expressing their solidarity.

(HT, 03.12.05 & Indiainfo.com, 12.12.05)

## SEC Rules Ease Exits

The Securities and Exchanges Commission (SEC) plans to make it easier for foreign companies to end their reporting duties with the chief US financial regulator.

Under the new plans of the SEC, a big foreign company would be able to terminate its registration with the regulator, as well as all associated reporting obligations, if trading in its shares in the US was low, and if American investors held no more than 10 percent of its stocks.

The action is in response to complaints by European businesses about costs arising from the stipulations of the US Sarbanes-Oxley Act in matters of accounting and corporate governance.

Todd Malan, President of the Organisation for International Investments, the representative of US subsidiaries of Asian and European companies, welcomed the move as 'a step in the right direction', and 'a serious effort to listen to foreign companies'. *(BS, 16.12.05)*

## Rise in Corporate Frauds

A recently released report by PricewaterhouseCoopers (PwC) found that senior-level managers of companies are involved with a quarter of corporate frauds, worldwide. The report analyses are from a survey conducted between May-September 2005 of more than 3,500 companies from across 34 countries.

Interpretation of survey results suggests a further increase of 71 percent in corruption and bribery cases since 2003, while cases of money laundering jumped to 133 percent and frauds involving financial

misinterpretation shot up by 140 percent. The retail and consumer sectors reported the highest incidence of frauds, globally, followed by the financial services sector. The 'reported' cases of fraud have resulted in a loss of over US\$2bn to the corporate world.

According to PwC, respect for a company's pedigree and a fear of sophisticated control systems proved to be a stronger deterrent to fraudulent behaviour than the threat of severe penalties.

*(FE, 30.11.05 & BS, 07.12.05)*

## Asia Corporate Governance Tigers

Singapore, followed closely by Hong Kong, topped the list in the annual corporate governance survey of emerging Asian markets by brokerage house CLSA Asia-Pacific Markets and the Asian Corporate Governance Association.

India is placed third in the report entitled 'The Holy Grail,' followed by Malaysia, Taiwan, Korea and Thailand. The Philippines, China and Indonesia occupy the bottom slots.

Rank-determining scores are based on rules and regulations, enforcement, the political and regulatory environment, international accounting and auditing standards, and corporate governance culture.

The report added that financial reporting standards and practices, and disclosure of price sensitive information had improved considerably in the region. Among the common weaknesses listed were poor quality of quarterly reporting and the limited independence of audit committees.

*(BL, 22.11.05 & FT, 23.11.05)*

## SNIPPETS



### No Nestling Against Nestle

The Italian police have seized around 30 million litres of baby milk produced by Nestle, after tests confirmed it contained traces of 'ink'. The chief executive of the world's largest food company announced that the affair had been blown out of proportion, and that the milk did not pose any health risks. Yet, the company has recalled its infant food products from Italy, Spain, Portugal, and France and maintained that this would not affect its global sales. *(FE, 25.11.05)*

### Ahold Settles Lawsuit

Ahold, the Dutch supermarket chain, recently settled a class action claim for US\$1.1bn, nearly three years after an accounting scandal took the world's fourth largest food retailer to the brink of bankruptcy. Observers say that this is the largest US class action settlement ever entered into by a European company, and the fifth largest on record behind cases such as Enron and WorldCom.

*(FT, 29.11.05 & The 10B-5 Daily, 30.11.05)*

### Samsung Summoned

Lee Kun-Hee, Chairperson of the Samsung Group, has been summoned by the Korean Parliament (National Assembly) Finance and Economy Committee for the group's controversial corporate governance record. Lee would have to answer questions over debts left unpaid by the group's bankrupt Samsung Motors. *(FE, 29.09.05)*

## American Proxy Activism?

Going by the recent submissions of various activists in New York, American boardrooms are filled to the brim with greedy, self-serving executives whose incompetence is threatening national welfare.

Shareholder activists asserted that concerted activism is needed to stave off an onslaught of foreign competition from low-cost overseas manufacturers. According to billionaire investor and activist, Carl Icahn, "If we don't clean up corporate America, social security is going to be a major problem in the future".

A handful of these activists were thought to share a common bond among themselves in that they are all involved in proxy campaigns to challenge management in companies they hold.

*(FE, 03.12.05)*



### Portugal Ups on Privatisations

Portugal is returning to privatisations. It has an ambitious programme of sell-offs at hand, focused on energy utilities, which aims to raise €bn. The socialist government is striving to raise €1.6bn from privatisations in 2006, or 1.1 percent of the GDP, up from the 0.3 percent in 2005.

The country has raised more than €4bn from state sell offs since 1995, in what the Organisation of Economic Co-operation and Development (OECD) describes as one of the most extensive privatisation programmes in the world. But the heady days of what a previous government called 'people's capitalism', when massively oversubscribed offerings of some big companies turned hundreds of thousands of small savers into shareowners, have faded amid a sharp economic downturn.

The current government hopes to revive the programme as it struggles to cut a spiraling budget deficit, which, at 6.2 percent of GDP, is the highest in the EU. (FT, 21.10.05)

### Saudis Seek Investments

Saudi oil officials were in London recently to promote investments in the kingdom's petrochemical industries, and put forward the message that "no major player can afford not to invest in the region".

The government has launched an investment drive to raise petrochemical production and stimulate the development of downstream industries that will boost employment in the kingdom.

PetroRabigh, a refinery and petrochemical complex at Rabigh on the Red Sea, is being developed with Sumitomo Chemicals at an estimated capital cost of US\$8bn. But the kingdom needs more foreign investment to achieve its ambition of increasing its share of the global petrochemicals output from seven to 13 percent over the next five years. (FT, 04.10.05)

### A Chinese Cook Up?

There's a new twist to the debate over China's awesome foreign direct

investment (FDI) figures. A recent United Nations Conference on Trade & Development (UNCTAD) report has said that the numbers far exceed those reported by investors.

According to UNCTAD's World Investment Report 2005, China claimed that it got US\$5.42bn FDI from the US in 2002, but the latter said it had invested a meagre US\$924mn during the period.

Interestingly enough, an OECD report points out that FDI flow into China from OECD countries was US\$39.3bn during 1995-2000, while the Chinese commerce ministry shows US\$77 bn.

(BS, 03.10.05 & www.unctad.org, 07.10.05)

### Indonesia Gets into the Act

Officials have said that Indonesia's government is working on a deregulation package intended to boost FDI in the country.

The government aims to release a policy package early next year. The ministers have been asked to identify unnecessary regulations and find alternate routes to simplify bureaucracy. The initial focus has been stated to be on areas such as customs, licensing, and tax.

There is dual aim in demonstrating tangible progress to investors, while reducing the influence of a powerful Suharto-era civil service, which has proved a barrier to reforms.

Cited as an example is a recent package that included reduced tariffs on imported sugar for the food and beverage industry and a halving of the number of weigh stations on Indonesian highways to reduce informal tolls on trucking companies.

Questions however remain about Indonesia's capacity to deliver such a package. (FE, 21.10.05)

### Kazakh Calls Checkmate

Kazakhstan, the Central Asian oil giant is all set to introduce a law that will allow the state to intervene in the sale of foreign-held stakes in oil firms, a move that may hinder China National Petroleum Corporation's (CNPC's) bid for PetroKazakhstan. This also puts to rest ONGC Mittal Energy's deliberations over a rebid possibility.

The idea behind the new law is to stall handing over complete control of oil and gas assets to foreign firms. The Kazakh government is likely to ask for a stake in the operations. India's OME could then piggy ride and come in as a partner.

The climax of the drama still remains to be played out, as all will depend on whether the Kazakh government manages to notify the new law and stall the sale before it gets the final seal of approval. (ET, 17.10.05)

### China Calls a Halt...

Beijing has halted plans to allow foreign newspapers to print in China because of concerns raised by recent 'colour revolutions' against authoritarian governments in Georgia, Ukraine and Kyrgyzstan, according to a senior media regulator.

Shi Zongyuan, head of the General Administration of Press and Publication, said the role of the international media in such popular revolts prompted the suspension of what had been a cautious, but significant easing of China's curbs on foreign news publications.



Foreign newspapers are currently flown into mainland China from print sites in Hong Kong and elsewhere, and distribution is limited to places where foreigners are numerous.

The press administration had planned to allow local publications to print foreign newspapers on a contract basis, while retaining restrictions on distribution. (FT, 17.11.05)

## Appropriating Agribusiness

Venezuela is accelerating its expropriation of local agribusinesses and extending state control over foreign oil and mining industries, fulfilling President Hugo Chavez's 'revolutionary' agenda.

Hugo de los Reyes Chavez, governor of the province of Barinas and the president's father, issued a decree expropriating a flour milling plant belonging to Polar, Venezuela's largest food company. The expropriation of some of Polar's assets, thus far apparently without the prospect of compensation, heralds a new, more integrated phase in the government's land redistribution programme.

Rafael Ramirez, the energy minister, said that the government might take over oilfields operated by multinationals if the companies failed to comply with a new legal framework. The likelihood of greater state control is also surfacing in the mining sector.

(ET, 29.09.05)

## The Second Favourite

After China, it is India, which is the most attractive country in the world FDI – according to an annual survey of global investor confidence by management consultants A. T. Kearney.

While China has held the top spot since 2002, an increase in interest in India is a more recent development that coincides with a renewed push by reformers in New Delhi to offer a warmer welcome to FDI as a source of capital, technology and know-how. "India is on the cusp of an FDI take-off", the report said, while warning that the country needed to overcome narrow business interests and infrastructural, logistical, and regulatory barriers to take advantage of surging investor confidence.

(FT, 09.12.05)

## Chugging Ahead?

China is preparing to list parts of its rail network on domestic and international stock exchanges and offer foreign investors minority stakes in national lines and, majority or full ownership of local railways. The initial

public offerings are part of a broad effort to find funding for the US\$248bn in railways investment Beijing plans to make between 2006 and 2020.

Transport bottlenecks have become a serious economic problem and officials are increasingly aware of the challenge of raising funds to build a planned new 25,000 km of line over the next 15 years.

But, investment bankers and potential foreign investors have expressed doubts over the financial viability of buying into China's railways.

They have argued that the industry's regulatory framework, particularly its ticket and tariff structure, would have to be overhauled and clarified to appeal to foreign investors.

(FT, 10.11.05)

## Nippon Nods Assent

Japan's upper house of parliament approved the privatisation of the country's post office, handing Prime Minister Koizumi the most significant victory of his administration and sending out a message that his programme of reforms is to continue.

The privatisation of Japan Post, which has funds of over US\$3tn in people's savings and life insurance money, will now be completed by September 30, 2017.

This privatisation is part of a broader plan being implemented by Koizumi and his political allies to reduce the role of the government in Japan and replace it with a system that allows the private sector to take priority.

(FT, 15.10.05)

## A Standstill

Deutsche Bahn (DB), Europe's largest train operator, remains on track for privatisation despite Germany's inconclusive general elections, but not before 2007, says its chief executive.

Hartmut Mehdorn said that the stake sold to private investors would initially be no more than 40-45 percent. The state will retain a majority stake because of legal provisions that declare its infrastructure state property.

Critics however argue that DB uses its control of the infrastructure to favour its own trains over competitors. Private companies claim there are numerous other cases and have alleged that DB's continued vertical integration prevents their getting fair access to the German rail network.

(FT, 08.10.05)

## Salvaging a Deal

Pakistan's privatisation minister has been holding last-ditch talks in Dubai to try to salvage the government's planned US\$2.6bn sale of Pakistan Telecommunication Company Ltd (PTCL) to Emirates Telecommunications (Etisalat).

The cancellation, in which Etisalat had agreed to buy a 26 percent stake in PTCL in return for management rights followed the former's failure to meet a second deadline for paying the US\$2.34bn still outstanding on the deal.

The Pakistani government had earlier celebrated the PTCL sale as the country's largest privatisation and a major boost to its economic reform plans.

(FT, 01.11.05)

## No Closed Doors

A day after US Treasury Secretary John Snow pressed for the opening up of India's financial sector, the government has decided to permit FDI up to 49 percent in Asset Reconstruction Companies (ARCs) which buy out non-performing assets of banks now pegged at over Rs 60,000 crore.

The move to allow FDI in ARCs paves the way for entry of foreign banks and asset reconstruction companies, who are keenly waiting to enter the Indian market.

The policy would be reviewed after two years.

(HT, 09.11.05)



## Airlines Agreement

Virgin Atlantic, the UK long haul airline controlled by Sir Richard Branson, agreed a deal with United Airlines of US on a five-year lease of a pair of take-off and landing slots at London Heathrow, one of the world's most congested airports.



The agreement is the latest in a series of so-called 'grey market' deals for Heathrow slots that are regarded as illegal by the EC but are accepted by the UK government, and which undermine claims from some US carriers that it is virtually impossible to acquire slots at Heathrow.

United refused to confirm its latest slot deal with Virgin but said: "We have leased, exchanged and transferred slots from time to time that were surplus to our short-term or long-term needs".

(FT, 07.11.05)

### Consolidation Call

Taiwan's top financial regulator has stated that it plans to consolidate the island's dense banking industry in an effort to create two to three banks that have control over 10 percent each of the market's assets by the end of 2005. This will help them achieve economies of scale.

The Financial Supervisory Commission did not identify the banks it wants to merge, but said that the government would offer incentives to encourage consolidation. For instance, banks with over 10 percent of market assets will be given priority in applications to set up branches overseas, or to merge with foreign financial institutions.

(FE, 19.10.05)

### Sued for Margin Squeeze

Sweden's competition authority has filed a suit against the largest Nordic telecom operator, TeliaSonera, alleging that the operator is guilty of an abuse of dominance.

It is said that TeliaSonera offered preferential terms to customers who had cancelled their fixed-line contracts and switched to a competitor. According to the authority, the aim was to attract these customers back to TeliaSonera's network by offering them better terms than the company offered its other customers.

TeliaSonera's actions have been termed as margin squeeze, in which the difference between the wholesale price and the retail price was not great enough to cover the company's costs. It is in this that the operator has been

termed guilty of exploiting its dominant position to drive other players out of the market.

The watchdog is thus, insisting on a fine of €6.6mn (US\$5.6mn), adding to a fine of €5mn (US\$18.4mn) it had earlier imposed on the operator for yet another case of dominance abuse.

(GCR, 12-18.11.05)

### Channel Bundling Upheld

The French court of appeal has confirmed the right of Canal+ to offer its subscribers bundled contracts, combining its own content with the range of satellite channels from CanalSatellite.

The appeals court upheld a decision of the *Conseil de la Concurrence*, which had been triggered by a complaint from TPS – a competitor of CanalSatellite.

The court's decision was based on the premise that the dominance of Canal+ for pay TV was not prevention *per se* in offering subscriptions bundling, inasmuch as Canal+ was not pursuing a predatory strategy against its competitors.

(GCR, 17.11.05)

### Making a Break

Taiwan is to set up a media regulator independent from the government, freeing the island of one of the leftovers from the era of authoritarian rule that ended more than a decade ago.

Under the legislation passed by parliament, responsibility for media policy and media regulation is to be transferred from the Government

Information Office, a cabinet-level body also in charge of promoting the government's policies, to a new National Communication Commission.

The reform could help to improve regulation of one of Taiwan's most chaotic industries. The Commission's 13 members are to be chosen through a complex three-stage process, which tips the balance in favour of parliament.

(FT, 26.10.05)

### Auditing Offence

US regulators have criticised the audit work of KPMG, the accounting firm fighting to restore its reputation after admitting to selling fraudulent tax avoidance schemes. The Public Company Accounting Oversight Board (PCAOB) found significant deficiencies in one-fourth of the audit engagements it reviewed at KPMG's US business.

The PCAOB report said: "In some cases, the deficiencies identified were of such significance that it appeared to the inspection team that (KPMG) had not, at the time it issued its audit report, obtained sufficient competent evidential material to support its opinion on the financial statements".

The inspection led some companies to change their disclosure practices.

(FT, 31.09.05)

### Can't See Eye to Eye

The incoming German government was in strong disagreement with the EC, even before assuming office. The reason for the contention was the former's pledge to exempt from regulation a fibre-optic broadband network, planned by Deutsche Telekom (DT).

The logic being offered is that DT, Europe's largest telecoms operator will not invest aggressively unless it knows rivals will not be able to use its new infrastructure, at least for a limited time. The unspoken threat is that if DT does not get this special treatment, it might lay off even more workers and invest elsewhere instead.

The German move is a challenge to half-built European single market in telecommunications and may encourage other governments to bend their rules to favour national incumbents.

(FT, 15.11.05 & 08.01.06)

**Overturn Appeal**

The Bulgarian power distribution companies owned by Czech utility CEZ has asked the Supreme Administrative Court to overturn limits on power price hikes imposed by the Bulgarian energy regulator.

They claim that the restrictions are damaging their short-term investment plans. Power prices for low-voltage consumers in the corporate sector in Bulgaria rose by up to 16 percent from October 1, 2005, although prices for households remained largely unchanged.

The power distribution companies were seeking steeper price hikes. *(GER, 13.10.05)*

**Still Sulking**

Needless to say, the chemicals industry was never going to be happy with a set of regulations that could coerce it to spend more than €6bn (US\$5.9bn) over the next 11 years testing products that it has so contentedly produced for years.

But despite a plethora of concessions that have diluted the proposals, the industry has continued to argue that the new European chemicals regulations were a step too far – one that could result in the relocation of jobs to Asia.

While the industry has been lamenting the possible effects on its future competitiveness, there were some observers arguing that the changes would speed up what some see as the much-needed consolidation in the sector. *(FT, 15.11.05)*

**Mammoth Fine for Mobile Cos.**

France's three dominant mobile telephone operators – Orange France, SFR, and Bouygues Telecom – were fined a record €34m (US\$632mn) for five years of market collusion.

According to the Competition Council, which investigates anti-competitive behaviour in France, the three mobile operators struck a secret deal not to compete too aggressively for market share between 2000 and 2002. The trio were also found to have regularly exchanged detailed and confidential information on the volumes of new customers and cancellations between 1997 and 2003.

Although this did not directly affect pricing strategies – the operators were not accused of price-fixing – the contact was “likely to distort competition”, the council said.

*(FT, 02.12.05)*

**Searching Probe**

Japanese anti-trust regulators are investigating the Sumitomo Mitsui Financial Group (SMFG), the country's third-biggest bank, for using unfair tactics to sell financial products to borrowers.

The watchdog, Fair Trade Commission (FTC) found that Sumitomo Mitsui forced some small-business clients to buy the swaps as a condition for extending loans and was preparing to issue a formal reprimand against the bank. The FTC determined that Sumitomo Mitsui's sales tactics violated Japan's antimonopoly law, which forbids lenders from using their leverage over borrowers to sell other products or services.

Sumitomo Mitsui and other Japanese banks, faced with weak demand for mainstay corporate loans, are seeking to increase revenues from fees and commissions to make up for falling interest income. *(ET, 29.11.05)*

**A Case of 'Weak' Regulation**

Hong Kong's regulatory environment for the capital market has been criticised as weak and lenient, wherein investment banks and brokers resist stricter controls.

Paul Chow, chief executive of Hong Kong Exchanges and Clearing said that the exchange, which oversees the everyday market operations, was often a 'scapegoat' for corporate governance scandals and other malpractice by market participants.

Chow, however, said that the problem was that of a lack of strong regulatory enforcement, particularly against investment banks and brokers. The island's regulation of market intermediaries was weak. *(FT, 18.11.05)*

**Tackling Discontent**

China would cut the prices of 400 medicines by up to 40 percent as the government tries to deal with mounting discontent over the rising cost and poor quality of public healthcare. The National Development and Reform Commission announced it would cap the prices on 22 different categories of drugs.

The cuts follow a period of unusually strong public criticism of the health system and the market-based reforms of the last decade that have meant patients now have to pay for some of their treatment.

The price cuts are likely to affect local companies, which account for 85 percent of total sales. However, western drugs companies complain that the continual pressure on prices makes it harder for them to introduce new drugs they consider to be an improvement over older treatments.

*(FT, 29.09.05)*

**Up in Action**

**F**our merchant groups have filed an antitrust lawsuit against Visa US, MasterCard and dozens of major banks, saying they colluded to set excessive credit card fees. The plaintiffs estimate damages will range in tens of billions of dollars.

Bank of America, Citigroup and JPMorgan

Chase, the largest US credit card issuers, are among the more than 40 defendants. The case involves interchange fees, which retail merchants pay to issuing banks to receive payments for transactions involving the banks' cards.

“Actual and potential competition in the general purpose and debit card network services markets was substantially excluded, suppressed, and effectively foreclosed”, the complaint said.

*(BL & ET, 28.09.05)*



Business Standard

# Competition In Agricultural Products Sector In Zambia - *The Case of the Cotton Industry\**

## Introduction

Zambia is well endowed with surface and ground water resources – with nearly 45 percent of the water resources of Sub-Saharan Africa. The Water Rights Survey (1994) indicated that the existent 53,020ha of irrigated area is only 11.8 percent of that which can be exploited.

The agriculture sector is the largest employer at 2.8 million<sup>1</sup> and the largest contributor to non-traditional export earnings, at 23 percent. Agro food processing is the largest sub-sector in the manufacturing sector in the numbers of registered enterprises, and people employed. Competitiveness is stunted by the fact that the country's key agricultural sectors are driven around small holders, most of whom are subsistence farmers relying heavily on rainfall. Zambia's government has attempted to insulate the farmers by offering subsidies on fertiliser and reducing the duty on imported equipment. However, they do not get export subsidies or *per se* cash subsidies.

## Development of the Cotton Industry

From 1977 to 1994, Lint Company of Zambia (LINTCO), the state-owned cotton company, purchased cottonseed from farmers at a fixed price, while simultaneously giving them certified seeds, pesticides, sprayers, bags and extension advice – all on behalf of the government. LINTCO had a near monopsony in buying cottonseed and a monopoly in distributing cotton inputs on credit.

The cotton sector's performance under LINTCO can be inferred from the only available data from a part of that period, i.e., from the annual crop forecast surveys conducted by the government's Central Statistical Unit. From 1987 till 1995, the overall production fluctuated greatly, though there was a declining trend. According to the Zambia Privatisation Agency (ZPA), LINTCO was mired in a serious financial crisis, having amassed substantial unpaid debts. ZPA was responsible for LINTCO's eventual sale.

## Post-Liberalisation Market Development

In 1994, as part of a concerted and broad-based effort by the new government then to restructure Zambia's economy, LINTCO was sold to Lonrho Cotton and Clark Cotton. But following a succession of low yields, Lonrho had to exit the market *via* an acquisition by Dunavant.

Between 1995 and 1996, there was minimal competition in cotton buying and ginning as the two firms operated in different areas of the country. This lack of competition meant that credit repayment was not a problem, and made it possible for firms to promote the crops aggressively. Very high international prices also facilitated this expansion. These prices – rising at the time of liberalisation, peaked in 1995, and remained at remunerative (though much lower) levels into the 1998/99 growing season.

Since the initiation of such major agricultural reforms, Zambian cotton production and processing have grown rapidly and now rank as among the most important sources

of crop income among small farmers and agribusiness firms in the key agricultural production regions<sup>2</sup>. The subsequent report by the Food Security Research Project under the Ministry of Agriculture Food and Fisheries revealed that Zambia's cotton production has doubled since the dismantling of the cotton parastatal monopoly LINCTO and the introduction of out-grower programmes supported by private agribusiness firms in the mid 1990s. In spite of these achievements, the cotton sector is faced with the following key challenges:

- How can Zambia's cotton sector sustain and build upon its success story and remain competitive in the face of a projected long-term decline in world cotton prices and shorter price cycles?
- How can cotton pricing be made more transparent and less uncertain for farmers?
- How can agribusiness firms supply inputs and extension support to smallholder farmers to achieve productivity growth while addressing ginners' and other firms' problems with farmer loan repayment?
- How can the cotton industry finance investments in agricultural research and extension systems needed to achieve long-run productivity growth in an environment where, the public sector is not likely to provide these investments?

## Status of Competition in the Cotton industry

### Market Structure

The cotton industry is divided into growers, merchants, ginners, spinners and the edible oil industry. Cotton growers largely constitute the small-scale holders, who account for 90 percent of the output and are mostly in the out-grower scheme financed by the merchants. Smallholder exploitation is rife under this scheme and the government has tried to intervene through legislations like the Competition and Fair Trading Act of Zambia.

These out-growers are strategic partners to the merchants for two reasons. Large-scale commercial farms do not necessarily have all the land they need to meet market demand in the rainy season. Neither do they need large areas of fallow land in seasons when market demand is low. Therefore, it is more economical to meet the expansion/contraction requirements by utilising the services of small and medium scale farmers, who have the ability to change crops quickly.

Dunavant has also instituted a distribution system for its 1,400 out-growers, who are not regarded as the company's employees. The system receives inputs and makes its own decisions as to how many farmers to work with. These farmers are obliged to live in the area and grow cotton themselves. Remuneration is tied to the level of credit recovery (as the out-growers are not on salary). The merchant market is a duopoly comprising Dunavant and Clark Cotton and the two enjoy a 90 percent market concentration ratio. These two enterprises are allied to international cotton merchants,

who buy the cotton and sell it to the spinners. Market share figures of 2004 show the following structure<sup>3</sup>:

| <i>Player</i>      | <i>Market Share</i> |
|--------------------|---------------------|
| ● Dunavant         | 66%                 |
| ● Clark            | 24%                 |
| ● China Mulungushi | 4.6%                |
| ● Continental      | 5.2%                |
| ● Others           | <1%                 |

Under the Competition and Fair Trading Act<sup>4</sup>, Dunavant is classified as a monopoly undertaking, which is, in effect, a monopsony buyer of cotton in Zambia. Both Dunavant and Clark Cotton dominate the ginning industry.

### **Barriers to Entry**

In the cotton industry, entry is self-prohibitive at the merchant level because of the duopoly dominance that controls the out-grower schemes of the small holders. Potential entry is likely to be frustrated through predatory conduct by the duopoly. Further, the international merchant market is also dominated by Dunavant.

Zambia's landlocked position significantly raises logistical costs, as the most viable port of exit is South Africa's Durban. The port of Windhoek in Namibia has been floated as a potential exit to the Western European markets and the Americas.

Transportation is mostly by road, as the railways are not very reliable. There are other inherent constraints, but elaborating them out is beyond the scope of this article. Yet, Zambia is a net exporter of cotton with a sizeable portion of the world's market within its grasp. In the prevailing milieu, import competition is negligible given the tilt towards global exports.

### **Pricing of Cotton**

There are no price controls of any sort, although predatory pricing and anti-competitive discrimination in price, terms and other conditions are subject to regulatory oversight by the Zambia Competition Commission.

The government has not wielded active influence in setting prices *per se*, although prices may, to a large extent, be influenced by duties on imported chemicals and various other inputs including, fuel prices and the levies charged by the many local authorities on the routes employed by trucks transporting cotton.

### **Collusion**

Economic theory would presume the prevalence of a high propensity for one or the other form of collusion in a duopoly. While anti-cartel provisions exist in the Competition and Fair Trading Act, the evidence to be contained for a successful conviction has to prove the case 'beyond reasonable doubt' because of its criminal categorisation. In a market where there is a trendsetter, notably a price leader, there would appear to be a thin line between collusion and 'price following'.

The domination of the merchant segment by two multinational companies is a recipe for collusion in the industry. The firms in the duopoly finance the crop and provide technical assistance to the small holders in the outgrower schemes they manage. Once the crop is harvested the two largely determine the price at which the crop is sold, and which kind of crop they would buy. With the stock of cotton in their warehouses, they are able to affect the efficiency of the spinning and ginning industry, as they have done in the past.

### **Industry Co-ordination**

The main role of industry co-ordination has been agronomic research through the Cotton Development Trust that came into being in November 1999 with the following objectives:

- (i) to conduct, encourage, assist or support agricultural development in Zambia or elsewhere into aspects of agriculture not limited to cotton
- (ii) to promote and develop cotton including research, extension, farmer training and seed production
- (iii) to undertake cotton programmes, which the government or other sector bodies may be unable to initiate, continue or complete, or to complete and complement
- (iv) to supplement the agricultural research, extension and seed production activities of the Government of the Republic of Zambia or other bodies

### **Conclusion**

Zambia needs put its house in order. Issues of quality assurance and management, relevant legislation pertaining to enhancement of the growth and development of the cotton industry, effective crop marketing strategies, progression of the small holders to medium scale farmers, technical education, etc., are vital for regional and international competitiveness of the industry. Public-private partnership is a pre-requisite for any meaningful and sustainable success in this strategic sector.

#### **Dunavant Sinks Super Oil**

*In 2000/2001, Super Oil almost went into liquidation after Dunavant refused to supply it with the cottonseed that it is an essential requirement for edible oil production. Dunavant claimed that the seed was for use in the out-grower scheme, for the succeeding planting season, and could not sell it to Super Oil. Further, Dunavant claimed that Super Oil was not a credit worthy buyer, as they had defaulted on payments before. Super Oil had then to use soya beans in order to survive in the industry.*

\* Thula G Kaira, Director, Mergers & Acquisitions, Zambia Competition Commission

1 Commonwealth Secretariat, Export & Industrial Development Department (EIDD), "Enhancing the Competitiveness of the Agri-food Processing Sub-Sector – Review, Recommendations and Plan for Action" August 2000

2 Key Challenges and Options Confronting Smallholder, Agribusiness and Government Leaders in Zambia's Cotton Sector, Food Security Research Project (FSRP) Team 2000

3 Regional Cotton Stakeholders Workshop – Zambia Country Report: Presented at Regional Stakeholders' Workshop on Evolving Cotton Production and Marketing Systems [Financed by British Department for International Development], 1 & 2 February, 2005, Lusaka

4 CAP 417 of the Laws of Zambia.

# Convergence Between Consumer and Competition Policies

— Mosadeq Sahebodin\*

The main objective of competition policy and law is to preserve and promote competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, at the lowest possible prices and adequate supplies to consumers.

Ensuring competition is just a means to achieve the above-stated objectives. Obviously, maximising consumer welfare becomes a predominant concern. Competition policy has a dual objective in that it makes markets work and simultaneously, protects consumers from deception.

Yet, competition policy is more proactive than, *inter alia*, attempts to promote consumer interest in the marketplace, whereas the consumer protection policy puts forward mainly a reactive agenda to protect consumer interests, and provides access to redress against abuses. This is not to say that the consumer protection policy is without proactive elements. In this, the two policies complement each other.

## Consumer Welfare – Different Perspectives

Consumer welfare means different things to different people. Those who are relatively rich and can afford all comforts of life are more concerned about their range of choice in goods and services. For those finding it difficult to make both ends meet, the immediate concern is not about choice, but rather access to goods and services. Such dimensions of consumer welfare need to be kept in view while examining the link between the two policies. From a developing country perspective, the role that the two policies play in promoting development and poverty reduction becomes the focal point in understanding the linkage between the two.

*Governments should not undermine the convergence between the objectives of consumer protection policy and competition policy. The interaction between the two may be complex, but there is a strong case for bringing them under an integral framework.*

## Consumer Protection, Competition, Competitiveness and Development

Competition policy promotes efficient allocation and utilisation of resources, which are usually scarce in developing countries. This also means more output, lower prices, and consumer welfare. Consequently, more output is likely to lead to more employment in the economy.

A good competition policy and law lowers entry barriers in the market and makes the environment conducive for promoting businesses and the growth of small and medium enterprises (SMEs). This has positive developmental implications as the SMEs promote employment growth. The lack of gainful employment is considered to be one of the major causes for poverty in developing countries.

There are two approaches to development. The first is concerned with fulfilling the minimum basic needs of the people, removing the sources of poverty and marginalisation, focusing on problems like unemployment,

basic health services, etc. The second is concerned with the latest technologies, exports, industrialisation and more competition for a better choice, etc. The crux lies the enhancement and maintenance of competitiveness.

Consumer protection policy is part of the strategy that emanates from the first approach, while competition policy is an integral part of the second, though there are significant overlaps. However, it may be noted here that the approaches do not mean two alternatives, but rather two instruments that must be used simultaneously.

## Competition Policy for Competitiveness and Growth

As enshrined in the UN Guidelines on Consumer Protection as well as the Charter of Consumers International, a crucial element of consumer protection policy is the right to basic needs. Adopting a policy framework on the government's part to ensure the basic needs at affordable costs is also essential to eradicate poverty.

Consumers International (CI) advocates the adoption of a comprehensive approach to competition policy with consumer protection at its core. Sectoral regulatory policies also play a major role in ensuring the right to basic needs, for example, by mandating universal service obligation on the service providers so that even at a loss, they will have to supply services to the poor and the disadvantaged at reasonable prices. Here again, CI draws attention to the limitations of the universal, one-size-fits-all competition policy.

As per Edwards's statement we should pay careful attention to the details of individual economies, acknowledging the social consequences of economic transition, and, most importantly, the need to give priority to, and regulate for, social objectives (such as universal access) in essential services, rather than competition.

## Conclusion

Thus, the interaction between competition policy and consumer protection policy may often be complex. Nevertheless, there is a strong case for bringing the two policies under an integrated framework. Such attempts have been made in some countries, most notably in Australia.

A similar approach can be found even in the US where the Federal Trade Commission deals with both these issues. This of course, does not necessarily mean that these two issues have to be dealt with by a single agency, but there has to be sufficient co-ordination and congruence.

But, countries should not ignore that a competition policy or law will remain incomplete in its impact and outcome in the absence of an effective consumer protection regime.

\* Mosadeq Sahebodin in the National Co-ordinator of the Institute for Consumer Protection (ICP), Mauritius.

## What Competition Law Standards are Most Appropriate for Efficient Economic Development?

*Eleanor M. Fox\**

It is often said that the competition law of developing countries should be specifically tailored to their needs; that it should not be imported wholesale from the US or the European Union (EU). Yet, what those differences should be is seldom articulated. It is important to understand as to how a competition law fit for efficient economic development differs from the competition law that best serves developed countries.

This is particularly appropriate at this time in view of developments in the US and the EU – the two jurisdictions that set the standard for antitrust rules and principles. There is now no third competing standard, and there is no standard tailored for developing countries. The US has a very noninterventionist version of competition law. EU law is often cited as an alternative, but is moving in the direction of the US.

Abuse of dominance or monopolisation is a good focal point (but not the only one) for considering what developing countries need. The European Competition Directorate has issued a Discussion Paper attempting to define the abuse of dominance standard for the EU. In the US, a Modernisation Commission is sitting, and one of its charges is to consider whether any change should be made in monopolisation law. Changes in both jurisdictions, if any are made, are expected in the direction of less intervention. The assumption that single firm action (as opposed to cartels) is virtually always good for consumers is the microeconomic counterpart to the Washington Consensus. In matters of macroeconomics, it has been recognised (by some, not all) that the Washington Consensus assumptions are not friendly to developing countries.

Developing countries need to engage in the ongoing world debate on rules and standards for abuse of dominance. Developing countries need to consider and respond to the persistent American challenge: Are you protecting competition or protecting competitors? They need to respond not defensively but with an affirmative case.

There is a ‘new economic learning’ that informs US, and now more fully, EU, competition law. Policy makers in developing countries are not all fully conversant with this literature, which is heavily microeconomic. It would be helpful for developing countries to take on board the ‘new economic learning’ that informs the US and now the EU, to consider what is relevant to and should be adopted by developing countries, to identify assumptions that are inappropriately applied to developing countries in view of their market context, and to propose (if warranted) specific differentiated rules and standards formulated to promote efficient economic development and serve consumers in developing countries.

Specific inquiries will include: What is the best predatory pricing rule for developing countries? What is the relevance of failures in capital markets available to developing countries and of the much greater difficulty of re-entry into developing countries’ markets? Is there, and why is there, a role for fairness in developing countries’ antitrust rules even if there is not in the US; and where can fairness be considered without harming the interests of consumers? Why is the West sceptical of antitrust rules against tying and resale price maintenance, and is that scepticism warranted or not in developing countries? Why might leveraging (using power to get advantages in an adjacent market without monopolising the second market) be a violation in

developing countries even if not in the West?

Is any rule that prohibits conduct (e.g., efficient conduct by multinationals) warranted, and if so, exactly when? Should the law *allow* price fixing in occupations where entrepreneurs are barely at subsistence level and where price competition would probably drive them below the poverty line? And if so, where should the line of illegality be drawn? For mergers, should mergers to efficiency and/or international competitiveness be allowed even though they create market power at home? Should efficient mergers ever be disallowed because they create leveraging power or because they will wipe out local industry? How should the principle or rule of law be formulated so that it is sufficiently clear, gives guidance to business, does not give too much discretion to the agency, and is likely to advance the interests it intends to advance and not to backfire, harming consumers, efficiency, competitiveness, and the economy?

The industrialised countries are placing a high value on convergence of the law of the numerous antitrust jurisdictions, on the theory that convergence tends to eliminate conflicts. The conversation is largely between the US and the EU. If, there is an appropriate developing countries’ perspective, it is going by default.

There is a lesson to be drawn from US antitrust, 1970s to 1980s. What we sometimes call Chicago School called major attention to the ignored efficiencies, and presented a clear paradigm and clear rules and standards. It spoke with one voice, papering over differences in market philosophies. Chicago School won the debate. If there are special, differentiating principles that should define competition law for developing countries, the affirmative case should be made now.

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## Competition Would Overthrow the Tyranny of Vested Interests

— Martin Wolf

Why are some countries rich and many so poor? Why has it proved so difficult for those mired in poverty to catch up with the prosperous? These are the most important questions in economics. Adam Smith addressed them. Many have followed in his footsteps. Few, however, have recently done so with more insight than William Lewis, founding director of the McKinsey Global Institute\*. His answer would have pleased the author of *The Wealth of Nations*: remorseless, pervasive, fair and open competition.

Knowledge of how to run economic activities productively is no mystery. The world's most successful businesses know how to do this in every imaginable sector. Investors are also desperately seeking opportunities for profitable investment across the globe. Yet, they cannot find them in many countries where existing producers are grotesquely inefficient.

How can this be? The answer is that the people with power combine to oppose the competition that would force uncomfortable economic changes. Anti-market intellectuals also laud this recalcitrance. The result is a pervasive bias against competition.

Lewis and his colleagues were able to demonstrate the significance of competition – and its absence – by devoting their resources to the detailed study of individual industries and companies. By linking microeconomics to the overall macroeconomic outcomes in this way they have enriched our understanding of the roots of productivity, which is itself just another word for prosperity.

So, what are the chief conclusions?

Taken as a whole, the development effort of the last half-century has largely failed. Second, two and only two successful routes to development have been discovered: the high productivity, low input-intensity path of the US and the low productivity, high input-intensity path of Japan and South Korea.

Third, huge numbers of workers produce services or work in construction, even in developing countries.

Fourth, neither education nor lack of capital is a binding constraint on productivity. Illiterate Mexican workers reach world-class productivity levels in building houses in Houston. If a business is potentially profitable, capital will also become available. Direct investment by top-class

international companies can readily overcome all such obstacles, if it is allowed to do so.

Finally, undistorted competition in product markets is the most important long-run determinant of productivity and so, prosperity. In the UK, however, retail competition is distorted by planning controls; in Japan, it is thwarted by a host of protections for small-scale retailers.

It is in developing countries, however, that competition is most systematically thwarted. Just read the chapters on

Brazil, Russia and India, and weep. In many developing countries, for example, legitimate companies compete with businesses that pay no taxes, ignore regulations and steal intellectual property. In Brazil the burden of taxation on legitimate businesses is consequently crippling and the proportion of urban employment they provide has been falling. But it is India that has raised the business of distorting competition to a fine art. Big government, which is also almost always interfering and corrupt in poor countries, is a curse.

What is to be done? For the rich countries of Western Europe and Japan, the lessons are two: competition matters, and distorting competition is a damaging route to cherished distributional goals. It is for the developing countries, however, that the implications are both most valuable and least palatable. One needed revolution is intellectual. Policymakers need to understand that the aim of policy must be to promote the interests of consumers and so, competition.

What is required is also a revolt against the conspiracy of predatory vested interests. But this is always hard to achieve. In a democracy with well-entrenched interest-group

politics, it is almost impossible. India is a superb example of this malaise. The result is not disarmament, but mutually assured economic destruction.

Free and fair competition sounds simple to achieve. Nothing is further from the truth. Competition benefits an often-despised outsider against those who are well connected and entrenched. It also requires the courts and government to work honestly. The surprise may rather be that some countries became rich than that so many are poor.

(FT, 18.01.06 & 20.01.06)

### Reaction

*This is dangerously one-eyed. The export sectors of Japan, South Korea, and Taiwan became super-competitive not simply because they were exposed to competition in foreign markets. Many of the higher-tech, higher capital-intensive sectors benefited from intensive and sustained public support in the earlier stages, so that they could ramp up production to the point where their economies of scale matched those of established producers elsewhere.*

*Equally, these governments co-ordinated investments so as to create agglomeration economies, whereby the presence of one company of industry conferred unpriced benefits on linked domestic companies or industries. For some time, domestic consumers had to pay higher prices for domestic substitutes for imports as the condition of the producers getting established in export markets.*

*Competition is indeed an important part of the mix, and may even be sufficient in some sectors. But in the general case, relying on competition alone is like relying on one blade of the scissors to do the cutting.*

**Robert Hunter Wade,**

Professor of Political Economy,  
London School of Economics,

\**The Power of Productivity: Wealth, Poverty and the Threat to Global Stability* (University of Chicago Press, 2004)

## Competition Law in Botswana

**B**otswana, formerly the British protectorate of Bechuanaland, adopted its new name upon Independence in 1966. Four decades of uninterrupted civilian leadership, progressive social policies, and significant capital investment have made Botswana one of the most dynamic economies in Africa.

At the time of Independence, the country was dependent mainly upon agriculture for its livelihood. Beef production was the mainstay of the economy in terms of output and export earnings. Prospects for rapid economic development seemed bleak, and the government was dependent upon foreign aid for all sorts of expenditure.

However, with the discovery of diamonds in the early 1970s, the country recorded a remarkable social and economic transformation, whereupon government revenues came from minerals, investment of foreign exchange reserves and non-mineral income tax, and more recently, Value Added Tax. Consequently, the economy has grown at an average rate of about nine percent during the past two decades.

### Competition Law and Institutions

Botswana does not have a competition policy or law in place, though the need for the same has long been acknowledged. Nonetheless, a competition policy is at the final phases of development, as the Cabinet is now considering it for approval. This will then be succeeded by the development of a competition law.

The Economic Mapping Study, the key informant in the development of Botswana's competition policy, identified some laws that regulate entry into particular business sectors within the country. The stated laws, which obviously have a direct impact on the limits to competition in the market, are as follows:

1. The Companies Act: *This Act provides rules and regulations on the formation, registration, management and administration and dissolution of various types of companies.*
2. The Industrial Development Act: *This Act regulates entry into manufacturing businesses that are not otherwise regulated by specific pieces of legislation.*
3. The Trade and Liquor Act: *This Act regulates entry into businesses for the supply of goods and services, mostly to end-users.*
4. Public Procurement and Asset Disposal Act: *This Act is concerned with the procurement of works, supplies services for the government and disposal of public assets.*
5. Telecommunications Act: *This Act regulates the provisions of telecommunications services*
6. Consumer Protection Act: *This Act establishes an office that investigates 'unfair business practices'.*

The decision to formulate the competition policy came about as a result of, *inter alia*, the government's concerns about the likelihood of private anti-competitive practices emerging, which would perhaps undermine the government's reform objectives.

The competition policy aims to provide a coherent framework that integrates privatisation, deregulation, and liberalisation of trade and investment, thereby promoting a dynamic market led economy. In addition, the new South African Customs Union (SACU) Agreement (2002) states that the SACU Council established under the agreement indicate that: 'Member States agree to competition policies in each Member State' and that: 'Member States shall co-operate in the enforcement of competition laws and regulations'. It is, therefore, imperative that Botswana enacts a competition law.

The Draft Competition Policy provides a framework for preventing anti-competitive practices and conducts by firms, creates a business friendly environment that encourages competition and efficient resource allocation, complements

other government policies and laws, creates certainty and supports development objectives such as citizen's economic empowerment and access to essential services.

The succeeding step is the effective implementation of the competition policy in Botswana and that requires the establishment of a sound regulatory and institutional infrastructure that will formulate and enforce a competition law and establish the credibility of its enforcement powers. The proposed competition authority is envisaged to have the following features:

- Independence and insulation from external interference;
- Transparency and well-designed administrative mechanisms and regulations;
- Clear separation of investigations of anti-competitive behaviour from the application of the competition law, prosecutions and adjudicative functions;
- Checks and balances with rights of appeal, reviews of decisions, and access to information on legal and economic interpretations;
- Expeditious and transparent proceedings that safeguard sensitive business information;
- Provisions for imposing significant penalties; and
- Advocacy that functions in a proactive manner.

Botswana is a Common Law country; hence, a private right of action is available under the Constitution. Competition law will provide for a right of private action for firms or persons who consider the conduct of their competitors unfair, illegal or detrimental to them.

### Future Scenario

Since the Draft Competition Policy was presented to Parliament in August 2005, debates have been going on in various circles, but the draft is awaiting approval. The competition law is expected to, among others, guard against:

- Anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts, with a *per se* ban on price fixing and boycotts;
- Misuse of market power for the purpose of eliminating or damaging a competitor, preventing entry or deterring, or preventing competition;
- Exclusive dealing, which substantially lessens competition;
- Resale price maintenance for goods; and
- Mergers and acquisitions, which lessen substantially the competition in the relevant market.

The relevance of the Policy cannot be questioned, because while further research is still required, preliminary findings indicate anti-competitive practices in the Botswana market, particularly within sectors such as mining and beef export.

## From Our Readers



It is not our normal policy to promote books, etc, but I was very interested to read your press release on the Competition Policy Almanac, and also thought the UN conference was worth mentioning, and so made an exception in this single instance. You will see from this week's (Issue 362) newsletter that we included (under Turkey, since that was the host country for the conference) a brief reference to the conference together with a reference and a link to your press release.

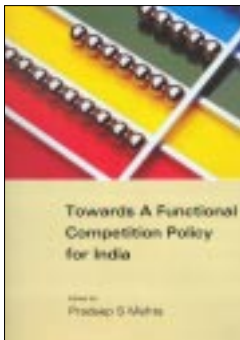
**Katie Cartwright,**  
Consultant & Editor, *Global Antitrust Weekly*  
*NERA Economic Consulting*

The CCZ has set up a resource centre, designed to be a one-stop shop for all kinds of consumer information and research.

We would like to thank you for the publications you send us every month; they have helped us to start up our resource centre. We believe that with your continued assistance we can make the resource centre more valuable.

**Consumer Council of Zimbabwe**

## Publications



### Towards a Functional Competition Policy for India

This book comes at a time when India is poised to implement a new Competition Law. While there is a lack of understanding of the nature, scope of anti-competitive practices, this study helps in getting a better understanding of the competition and economic regulation scenario in India. Contrary to popular perception, the study does not treat Competition Policy as just adoption and implementation of a competition law, but looks at it as a broader policy framework where competition is encouraged as a market process to generate competitive outcomes. Accordingly, the report is comprised of 22 chapters, giving comprehensive treatment to competition policy in India, covering both systemic as well as sectoral issues.

([www.cuts-international.org/funcomp.html](http://www.cuts-international.org/funcomp.html))

## Policy Watch

The latest issue of Policy Watch undertakes a critical analysis of the much talked about foreign investment in retail that is being contemplated by the Indian government. If there are ten arguments in favour of it, there are also ten against. The balance is very delicate and lot is at stake. The government needs to take into account many different interest groups before taking the plunge.

The special sections deal with other hot topics like the National Rural Employment Guarantee Scheme and regulation of private educational institutions in India.

The Good Practices section highlights the extensive use of solar energy in the eastern state of West Bengal.



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1. Content
2. Number of pages devoted to short news stories
3. Number of special articles
4. Use as an information base
5. Readability (colour, illustrations, layout)

Please e-mail your comments and suggestions to [c-cier@cuts.org](mailto:c-cier@cuts.org). Eagerly waiting to hear from you!

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FT: Financial Times

GAW: Global Antitrust Weekly

GCR: Global Competition Review

GER: Global Energy Regulation

HT: Hindusthan Times

ILO: International Law Office

SPT: The Saint Petersburg Times

WDR: World Development Report

The news/stories in this Newsletter are compressed from several newspapers. The sources given are to be used as a reference for further information and do not indicate the literal transcript of a particular news/story.