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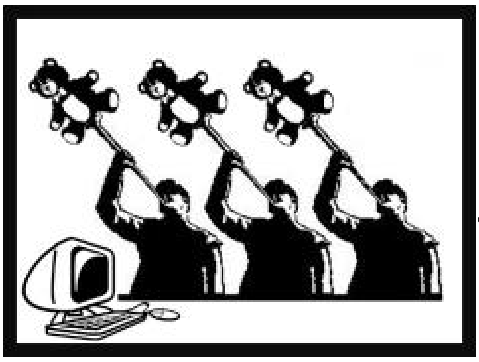
Dealing with Vested Interests that Mar Competition

Good intentions of the government in pushing reforms are often thwarted by vested interests. So, any policy aimed at accelerating growth must also identify the opposition. Globally, economic liberalisation has brought in many policy changes, with reliance on market forces. Alongside, several developing and transition economies, including India, have adopted competition laws as follow-up to their market-oriented reforms. Further, most of these countries have deregulated several sectors and adopted regulatory regimes. The rising interest in competition and regulatory laws in India and elsewhere reflects the big changes that have been taking place in their economic governance systems.

In developing countries, adoption and implementation of competition and regulatory laws are politically charged, as its objective is to constrain concentrated political and economic power while helping diffuse the interests of ordinary, often poor, consumers and producers.



www.data2.blog.de/media

It might not be wrong to say that vested interests, which dominate political power, limit economic growth by curtailing economic opportunities. Competition benefits are often directed to the well-connected and the entrenched. For example, in Mauritius, the competition law states that anti-competitive agreements can be exempted from provisions of the law, if the minister is satisfied that such agreements are beneficial to consumers. In Thailand, competition law has allegedly had very limited impact due to the unholy nexus between politicians and businessmen, and also due to cronyism. The Prime Minister of India also expressed similar concerns.

Competition policy must align with those political forces for change through economic growth while supporting the political stability on which sustainable growth dynamics depend.

It is important to develop and customise our own policy and law, rather than copy it from rich countries. We need a justice promoting system rather than an efficiency enhancing approach.

Competition policy should be judged explicitly against its contribution to tackling the dominance of vested interests for better growth and poverty reduction outcomes. For this, a vibrant civil society and an active public interest law practice are crucial.

The new challenge for fair competition is on how to make governments around the country more capable, more accountable and more responsible to deliver growth and welfare in a fair manner to common people. Therefore, the success of implementing competition law will depend upon how gains are distributed, rather than on growth *per se*.

Competition Scenario in Sweden

To Criminalise or Not?

A recent legislative inquiry has reviewed the penalties and enforcement procedures under the Competition Act. As in other parts of the European Union (EU), one of the issues under scrutiny was whether cartel infringements should be criminalised. The Swedish legislative inquiry did not find sufficient grounds to support criminalisation, but proposed the possibility of imposing disqualification orders. The proposal has received mixed reactions.

www.co.crow-wing.mn-us

Background

In September 2004, the Swedish Government set up a legislative inquiry to investigate a number of issues, including whether infringements of the act should be criminalised. The only penalty under the act – apart for damages – is the imposition of administrative fines on the undertakings involved.

Since criminal penalties for bid rigging and resale price maintenance were abolished in 1993, the issue of criminalisation has been reviewed by a number of legislative inquiries, but none found sufficient grounds to support criminalisation. One stumbling block was that the Swedish legislature opposes the introduction of a crown witness system (i.e., a system whereby criminal immunity may be granted to individuals). Under such circumstances, criminalisation would have an adverse effect on the Swedish immunity/leniency programme, since it would deter individuals from applying for leniency.

Proposal

Like the previous legislative inquiries, the current inquiry did not find sufficient reasons to support the criminalisation of infringements of the act. However, it found that it should be possible to hold individuals personally liable for certain anti-competitive behaviour. Therefore, the inquiry proposed that horizontal price fixing, production limitations, and market-sharing arrangements be penalised by the imposition of a disqualification order on the company officials involved in such behaviour. Disqualification orders are commonly used for economic crimes: the individual is barred from carrying on business for a prescribed period of time. According to the inquiry, such a penalty would deter individuals and undertakings from engaging in anti-competitive behaviour; in contrast, the current system allows only for administrative fines and damages.

Furthermore, the inquiry proposed that the Competition Authority should not seek the imposition of a disqualification order on persons who have provided significant assistance – either personally or in the context of business operations – to facilitate the authority's investigation (i.e., the inquiry proposes the introduction of a type of crown witness system through the 'back door').

Reactions

The proposal has met with mixed reactions from competition law practitioners. Although the general idea seems to be that anti-competitive behaviour should not be criminalised, there are mixed opinions on the proposal to introduce individual penalties in the form of disqualification orders. According to the Authority, a disqualification order would indicate the gravity of the anti-competitive behaviour and have a preventive effect. On the other hand, the Swedish Bar Association highlighted the contradiction of a system where anti-competitive behaviour is not criminalised, but is nevertheless considered as a gross neglect of duty (which is a requirement for issuing a disqualification order).

The Swedish Bar Association also questioned how disqualification orders should be treated within the European Competition Network and how this penalty will be harmonised with others. However, the strongest criticism was that the proposal does not go all the way in any direction (i.e., it supports semi-criminalisation, but tries to circumvent the legal tradition whereby the crown witness system is prohibited).

Comment

A Government bill is expected in Spring 2008. Even though the Government will not adopt the introduction of disqualification orders, extensive modifications to the act are nevertheless expected, especially with regard to the court procedure. Sweden needs a swifter and more effective system to deal with anti-competitive behaviour; whether the Swedish legislature will ignore the concerns regarding the crown witness system and adopt the inquiry's proposal remains to be seen. *(ILO, 14.06.07)*

Several Amendments

In order to boost competition and enhance transparency, the minister for economic and business affairs of Denmark has proposed a bill containing several amendments to the Competition Act.

The Bill sets out a leniency programme designed to deter enterprises from engaging in cartels and to increase the detection rate regarding existing cartels.

The Bill contains a number of instruments intended to improve the detection rate for violations of the Competition Act (e.g., pricing policies and agreements), as well as cartels. Proposed measures include the right to conduct seizures in the private homes of key employees and to search employees' pockets or bags in order to seize memory sticks, mobile phones and other electronic media that may contain information as to violations of the Competition Act.

The Bill is expected to be passed during Spring 2007 without significant amendments and is expected to come into force on July 01, 2007. *(ILO, 12.04.07)*

Competition Law for Kenya

The Competition Act seeks to establish a legal framework that will make it harder for two or more firms to collude in advancing unfair trade practices. The provision should be in the interest of small players who might be targeted for exclusion in the market by dominant players acting together.

For a long time, private companies looking to buy out rivals or use certain pricing structures have had to contend with a highly unpredictable, but powerful department hidden somewhere within Treasury Building – the Office of the Commissioner of Monopolies.

In the corporate world, this department is one of the most powerful offices in the land. It can determine how far a company can go in acquiring its rivals. Though many in the corporate world would confess to having had unpleasant experiences in their dealings with the office, there has been growing concern among consumers that it has failed in performing its key role of protecting them from corporate greed.

And now, an MP has tabled a motion in Parliament seeking to amend the Restrictive Trade Practices, Monopolies and Price Control Act – the law under which the office operates. Gor Sunguh, the Kisumu Town East MP, wants the Act replaced by the Competition Act, to give the office of the Commissioner of Monopolies teeth with which to stop corporations from abusing their dominant positions in the market to the detriment of the consumer, as well as regulate mergers and acquisitions (M&As) with respect to their likely impact on competition.

If the motion is passed, consumers will no longer be forced to buy tied commodities – a situation in which sellers insist on consumers buying two items at a time – during shortages. Refusal to sell goods or services, discriminatory and predatory pricing, tied purchasing, resale price maintenance, and collusive tendering and bidding will be illegal should the new law be enacted.

The Competition Act also seeks to establish a legal framework that will make it harder for two or more firms to collude in advancing unfair trade practices. The provision should be in the interest of small players who might be targeted for exclusion in the market by dominant players acting together.

Though the Restrictive Trade Practices, Monopolies and Price Control Act aims at ensuring competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices, the feeling among many Kenyan is that it has lacked teeth to bite. Apart from preventing collusion among big firms, the MP wants suppliers to be prohibited from selling or supplying more than 33 percent to a particular market.

Whether this type of restriction is applicable in a free market where market share is often a product of successful strategies and organic growth remains to be seen. But perhaps the biggest loser should a new law be crafted, according to Sunguh's wishes, is the M&As market. The MP is seeking to illegalise any merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities or engaged in supplying substantially similar services.

This means, for example, that oil marketer Shell will no longer be able to takeover the assets of its former business partner BP as it recently did when the latter decided to leave Kenya. James Kanyi, a Nairobi based commercial lawyer, reckons that the proposed amendments are likely to ruffle feathers and precipitate a showdown between businesses and the law enforcers.

Kanyi said that issues of pricing, mergers, and trade practices are what drive firms and any attempt at changing the *status quo* is likely to be met with opposition despite the motive of protecting consumers and small firms.

He reckoned that the many loopholes in trade laws is the reason unfair trading practices (UTPs) and monopolies are thriving in a 'liberalised' market.

The Sunguh motion also seeks to demystify what constitutes a wholesale or retail sale, or what is a wholesale or retail quantity; the precise amount of the overcharge invoiced in any transaction and the maximum percentage of profit allowed upon the sale of any percentage fixed goods.

Repeal of the Act is expected to put Kenya's trade practices in line with the East African Community (EAC) Treaty for easy determination of cross-boarder disputes.

(Business Daily, 26.06.07)

Best in Antitrust

The European Commission (EC), Britain's Competition Commission and the US Federal Trade Commission have been crowned the best antitrust enforcement agencies in the world, according to a survey published.

The three regulators were declared the 'elite' among 38 competition agencies examined in the latest edition of an annual survey by the Global Competition Review – a specialist publication.

The results are likely to please the EC, which sometimes finds itself under attack for its aggressive pursuit of dominant companies, such as Microsoft and Intel. *(FT, 10.06.07)*

Defeat in Petrol Price-Fixing Case

The Australia's Competition and Consumer Commission (ACCC) faces millions of dollars in legal bills after losing a price-fixing case against a group of petrol retailers. Announcing the decision, a federal court stated that it was "more probable than not" that none of the price fixing agreements alleged by the Commission existed.

The decision criticises the Commission's handling of the case, even though the watchdog provided several witnesses who admitted to the charges brought.

Further, the court pointed out that not only did the evidence led by the ACCC fail to prove the existence of such arrangements or understandings – particularly the requisite element of commitment – but also the preponderance of the evidence suggests that no such arrangements or understandings existed.

(GCR, 29.05.07)

Ineffective Competition

The UK's Office of Rail Regulation is referring the market for train rolling-stock leasing to the Competition Commission, citing a "lack of effective competition" in the sector.

The news follows a Department for Transport request for the rail regulator to investigate the market. Three major leasing companies have led the sector since it was privatised in 1996: Angels Trains – owned by the Royal Bank of Scotland, HSBC (Rail) UK and Porterbrook Leasing – controlled by Santander bank.

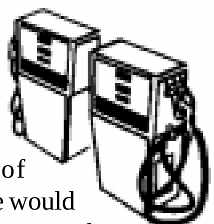
The rail regulator is concerned with the lack of large competitors entering the market, noting that: "excessive profits reinforce our suspicion that competition in the sector is not working well". *(GCR, 26.04.07)*

Ordered to Correct

The business regulatory body has ordered Pizza Hut Korea, the local subsidiary of US-based restaurant chain Pizza Hut Inc., to stop the unfair practice of offering excessive gifts to customers.

As per the Fair Trade Commission, Pizza Hut Korea orderered raffle coupons for free imported automobiles, each worth 33 million Won (US$35,244) for buying products. Only gifts, worth less than five million Won through raffles are allowed by South Korean fair trade laws. *(The Korea Times, 04.04.07)*

Pricing Petrol



Vietnam's Minister of Trade Truong Dinh Tuyen stated that the Minstries of Finance and Trade would hold a meeting to reach a consensus as to how much freedom petrol retailers have to set prices. The meeting would also consider related issues, e.g., the proper level of import tariffs on refined petroleum products.

No adjustment of petrol retail prices would be allowed in the meantime, Tuyen said.

Bui Ngoc Bao, deputy director of Petrolimex, the nation's leading petrol retailer, with a 60 percent market share, said his company and others would never collude to manipulate prices. On the contrary, he said, they expected to cut prices due to increasing competition.

Some experts have argued that allowing petrol stations to freely set prices at the pump may lead to price wars and daily fluctuations that would hurt consumers. Tuyen noted that petrol stations must calculate and project their profit margins a year in advance and are allowed to set pump prices based on market forces.

(VietNam News, 11.04.07)

• FINES & PENALTIES

Penalty Against Coca-Cola

The Mexican Joint Administrative Court of the First Circuit has confirmed a penalty imposed by the Federal Competition Commission. The penalty goes against the Mexican subsidiary of the Coca-Cola Company – the Coca-Cola Export Company – for anti-competitive practices.

In 2000, investigations were conducted into the activities of the Coca-Cola Export and certain Mexican bottling companies. The Commission's action was prompted by information from Pepsi Cola Mexicana, which claimed that its rival had imposed exclusivity arrangements on retailers upon agreement to supply them with soft drinks.

Accordingly, the Commission fined Coca-Cola Export and each of the bottling companies 10.5 million Pesos (over US$960,000), the maximum sum allowed by the Federal Law on Economic Competition, prior to the amendment in the year 2006. All parties appealed.

In addition to resolving a number of procedural questions, the court also found that the Coca-Cola Export and bottling companies had formed a *de facto* economic group and the group had significant market power, apart from the fact that relative monopolistic practices (i.e., abuse of dominance) had taken place, and hence the size of fines imposed was legal. *(ILO, 14.06.07)*

Admission of Guilt

An executive of Samsung Electronics, the world's biggest memory chipmaker, has agreed to plead guilty to an international conspiracy to fix prices of D-RAM chips, the US Justice Department said.

The sixth Samsung executive to plead guilty to price-fixing charges, Kim Il-ung, vice-president of marketing for Samsung's memory division, has agreed to pay a criminal fine of US$250,000 and to serve 14 months in a US prison. The term is the longest for a foreign defendant charged with price fixing in the US. *(FT, 21.04.07)*

Heavy Fine

In Greece, the Competition Commission imposed a fine of €12.7 million (US$17.5mn) on the company trading under the name MAVA SA, the national importer and exclusive distributor of Renault motor vehicles.

The investigation ensued upon a complaint submitted by a company trading under the name EMM PSIPSIKAS & CO (a member of MAVA's distribution network in Greece).

Based on its findings, the Commission initiated proceedings in September 2006. The investigation revealed that between 1996 and 2002, MAVA, through its Greek distribution network, had adopted an intra-brand retail price-fixing policy and had exerted pressure on its dealers to finance cars sold on credit through a specific financial institution.

Considering that both resulted in retail price fixing, the Commission set a common fine for the violations. The Commission considered that no fine should be imposed on members of the distribution network. *(ILO, 07.06.07)*

Brewers to Pay

The EU's top antitrust regulators have ordered three brewers – Heineken, Grolsch and Bavaria – to pay fines totalling €273.8 million (US$371.56mn) for rigging the Dutch beer market, between 1996 and 1999.

InBev, the Belgian brewer, was the fourth member of the cartel that escaped punishment because it turned in its co-conspirators, thus triggering the Commission probe. Else, InBev would have faced a fine of €84.4 million (US$116mn), said the regulator.

According to officials, it is unacceptable that the major beer suppliers colluded to hike up prices and carve up the market among themselves.

The highest management of these companies knew very well that their behaviour was illegal, but they went ahead anyway and tried to cover their tracks. *(FT, 19.04.07)*

• PRICE FIXING

Raid on Retailers

In Belgium, the Competition Authority raided three supermarket chains for alleged price-fixing, swooping on to the offices of Belgian retailers Delhaize and Colruyt and French chain Carrefour. The Authority cited suspected cartel activity in the sectors of perfume, healthcare, and cleaning products. A Brussels-based competition specialist explained that there might be potential arrangements between suppliers and supermarkets, and added that the investigation is unlikely to affect other jurisdictions.

Sources have suggested that other supermarket chains and suppliers, including Procter & Gamble, are also under investigation. Belgium had earlier restructured its competition authority, placing greater emphasis on cartel investigations. *(GCR, 01.05.07)*

Price-fixing in Shoes

Israel's Antitrust Authority is investigating allegations of price-fixing by importers of Crocs shoes.

Crocs is a popular kind of beach shoe, which has been sold in Israel since 2005. Retailing for approximately US$50, that are imported into Israel by New Cinema, which is owned by businessman Amos Horowitz.

But according to reports in the local press, store-owners claim that an illegal minimum retail price has been attached to Crocs shoes, as a condition of sale.

A spokesperson for the Authority stated that imposing a fixed price for merchandise neutralises any possible competition.

The spokesperson also stated that retailers must be able to make independent decisions that will allow them to compete with other suppliers at the most attractive prices.

(GCR, 09.05.07)

• CARTELS

No Evidence of Collusion

Having looked into the structure, operating costs and retail pricing of the local fuel market, there is no clear evidence of collusion by oil companies, the Economic Development & Labour Bureau of Hong Kong stated.

Releasing the Consultancy Study on the Local Auto-fuel Retail Market report, the Bureau said the consultant recommended it consider preventive measures against cartel behaviour, either through general or sector-specific competition laws. It also recommended measures to enhance market competition, such as improving the transparency of the auction process for filling station sites. Commissioned by the bureau on behalf of the Competition Policy Advisory Group, the study examined whether oil companies engaged in anti-competitive conduct.

The Bureau said it will study the recommendations, including legislation and other measures, to ensure market competition. The Competition Policy Review Committee would also take account of the recommendations on the possible introduction of legislative measures in its general review of competition policy.

(www.3.news.government.hk, 13.04.06)

School-building Cartel

France's Competition Council has fined 12 construction companies €47 million (US$63.8mn) for sharing markets in a school-building programme – the maximum amount authorised under competition legislation.

The penalty follows a separate criminal proceeding in which the companies were accused of bid-rigging for building schools in Ile-de France, the administrative region around Paris.

In the criminal case, *le Tribunal de Grande Instance de Paris* concluded that the companies' illegal acts had affected 88 school-building projects between 1989 and 1996. *(GCR, 14.05.07)*

Cartel Fine

Both the UK's Office of Fair Trading and the US Department of Justice are investigating allegations of collusion at British Airways. If found guilty, British Airways could be fined up to 10 percent of its annual turnover and may face criminal proceedings.

British Airways hopes the 350 million Pounds fund will cover legal fees and cartel fines. In fact, British Airways's decision reflected the very significant increase in cartel fines in both the EU and the UK in recent years. In itself, it is not an admission of guilt, but would be amazed if British Airways does not continue to strongly defend its position in the investigation.

British Airways may also face damages actions from customers affected by the illegal behaviour, as successful class actions in the US also represent a significant liability, should it be fined. *(GCR, 18.05.07)*

Microsoft Mess

In March 2004, the European Commission (EC) issued an antitrust ruling against Microsoft, hoping its move would redraw the competitive landscape in a key segment of the global software market.

More than three years later, that hope has given way to frustration. Microsoft's market share for server operating systems – one of the markets in which the group was found guilty of abusing a dominant position – has risen steadily. The group's competitors still complain they are being frozen out of the market.

The Commission believes the failure of its 2004 decision is entirely Microsoft's fault, accusing the group of ignoring key parts of the ruling, and especially an order to license technical information about its Windows system to rival companies.

In July, the Brussels regulator imposed a €280.5 million (US$375mn) fine on the group for failing to supply "complete and accurate" documentation that would allow rivals to design server software that can run smoothly alongside Windows-driven products.

In March 2007, the Commission raised the stakes even further, issuing fresh antitrust charges against Microsoft for demanding excessive royalties for the licences.

According to a copy of the charge sheet, Microsoft's rivals have told the Commission the royalties demanded by the group are "exorbitant" and would not allow them to develop products at a cost that makes economic sense.

The regulator also points to a string of examples where software companies, including Microsoft itself, have licensed so-called interoperability information for free. Coupled with the Commission's conclusion that there is virtually no innovative value in the information, this finding also strongly suggests that Microsoft will be forced to hand out licences for a nominal fee at best.

Although Microsoft claims that many of the protocols are covered by patents, the Commission finds that the majority of patented technologies "merely relates to and solves problems specific to the Windows operating system" – and thus are of no use to potential licensees.

Microsoft insists that its pricing proposal is "reasonable and non-discriminatory", and in line with the wording of the 2004 ruling. The group also points to a study by PricewaterhouseCoopers (PwC) claiming Microsoft's royalties are "at least 30 percent below the market rate for comparable technology".

However, the Commission charge sheet dismisses that claim outright, stating that "the licences examined by PwC are, in fact, not technically and economically comparable" to the Microsoft protocols.

In particular, it points out that some of the licences used for comparison include access to source code and object code, which are considered more

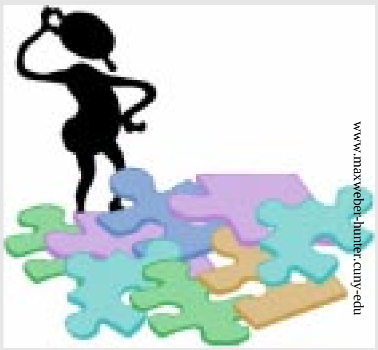
The Commission believes the failure of its 2004 decision is entirely Microsoft's fault, accusing the group of ignoring key parts of the ruling, and especially an order to license technical information about its Windows system to rival companies.

valuable than interoperability information. Microsoft has already clocked up close to €780 million (US$1bn) in fines during its nine-year battle with the Commission. With the regulator threatening fresh fines of up to €3 million (US$4mn) for every day of non-compliance since August 2006, Microsoft's tussle with Brussels is likely to become more expensive still.

(FT, 05.04.07)

EUROPEAN COMMISSION VS MICROSOFT - THE STORY SO FAR

- December 14, 1998
  The EC receives an antitrust complaint from Sun Microsystems, alleging that Microsoft is abusing its dominant market position.
- August 03, 2000
  Brussels files formal charges against Microsoft, accusing it of failing to provide Sun with essential information about the Windows operating system.
- August 30, 2001
  Microsoft receives a fresh set of charges, this time alleging that it has illegally bundled Media Player software into Windows.
- August 06, 2003
  The Commission issues a third set of antitrust charges, outlining possible sanctions.
- March 24, 2004
  The Commission finds Microsoft guilty of abusing its dominant market position, orders the group to change its practices and imposes a record antitrust fine of €497 million ($664m).
- December 22, 2004
  The European Court of First Instance rejects a Microsoft appeal to suspend the sanctions.
- December 22, 2005
  Neelie Kroes, the new EU competition commissioner, issues a fourth set of antitrust charges against Microsoft.



- July 12, 2006
  The Commission fines Microsoft €280.5 million (US$386mn) for failing to comply with the March 2004 ruling, the first time a group has been accused of ignoring a Brussels competition decision.
- March 01, 2007
  Microsoft is accused of sabotaging the ruling by demanding excessive royalties from companies willing to license interoperability information.

(FT, 05.04.07)

New, Restrictive Definition

Based on the opinion of the National Commission for the Defence of Competition, the secretary of domestic trade, Argentina, has rejected the acquisition by YPF SA of a petrol station in Buenos Aires from Destilería Argentina de Petróleo SA, establishing a new and restrictive definition of the relevant geographical market.

Facts

The Commission explained that the targeted petrol station was engaged in the commercialisation of gasoline, diesel gasoline, and compressed natural gas. Each of these products was considered as an individual relevant market.

The Commission argued that the geographical relevant market should be defined according to the influence of the petrol station and considering the distance that consumers were willing to travel in order to obtain the products. Following previous decisions, the Commission considered that the geographical market included petrol stations located within a range of 1,500 metres from the petrol station in question.

The Commission held that, in the cases of gasoline and diesel gasoline, although the increase in YPF's market share would be low, the notified acquisition would amount to the elimination of an effective competitor in the relevant market. In the case of compressed natural gas, the Commission found that the level of concentration that would result from the acquisition was too high from an antitrust point of view.

In order to define compressed natural gas as a unique relevant market, the Commission explained that it is a considerably less expensive alternative to gasoline and diesel gasoline, even considering the cost of adapting a vehicle to use compressed natural gas. The Commission stated that, given the current price of gasoline and diesel gasoline, it would be profitable for a hypothetical monopolist to increase the price of compressed natural gas since such a monopolist would not have to deal with fluctuations in demand for gasoline or diesel gasoline.

The price difference between gasoline, diesel gasoline and compressed natural gas results from the different tax treatment of these products imposed by regulation.

Furthermore, the Commission considered that there were a number of obstacles and high barriers to entry to the compressed natural gas market and it was unlikely that new competitors could enter.

Finally, the Commission explained that the transaction would not achieve foreseeable efficiency gains capable of sufficiently challenging the likely increase in market power and preventing harm to the general economic interest.

Comment

This is the first time that the Commission has rejected an acquisition of a petrol station as a going concern. The rejection was based on: the elimination of a competitor in the market; the strong market power that the acquirer would have in the compressed natural gas market; the high barriers to entry to the compressed natural gas market; and the absence of efficiency profits.

The Commission defined the compressed natural gas market as an individual relevant market on account of price variables.

This decision is surprising as it is the first time the commission has rejected an acquisition in five years. It shows that the secretary and the Commission are following a local trend to narrow the definition of the relevant market, even though there was no economic evidence to support this analysis, with the goal of increasing controls on M&As and imposing a strict price control policy.

(ILO, 24.05.07)

Merger Boom Posing Risks?

Rodrigo de Rato, head of the International Monetary Fund (IMF), has issued a warning to current merger boom the world over. Rato stated that prevalent conditions pose risks to financial stability as rising interest rates increase capital costs.

At the G8 Summit, Rato emphasises the need to 'keep an eye' on developments in financial markets, although prospects for the global economy were good.

Rato said that the IMF was worried that some of the very big and exuberant mergers could pose problems in the future and had already witnessed some complacency in the G8 markets. He added that the IMF saw a risk that some of the leverage could not be sustained over time.

According to the research group, Dealogic, the M&A activity so far in 2007 has been 60 percent higher than in the same period of 2006, with the number of highly-leveraged buyouts – especially private deals – rising sharply.

The main risk, according to Rato, is that rising interest rates will make it more difficult to serve debt. The IMF saw that in the mortgage markets as monetary policy tightened, reference being the recent turbulence in the US market for subprime loans.

Rato clarified that he did not think mergers to be not good. But, he did think that regulators should be careful and strengthen their capacity in an environment of new risk.

The IMF chief indicated that rates would have to rise further in order to contain inflationary pressures, as the long and sustained expansion constitutes an environment in which inflationary dangers should not be overlooked.

In this context, Rato quoted higher food and commodity prices and an acceleration of wage growth in some countries, stating that central banks are right to act in order to rein in inflation. One of the risks involved is loss of credibility. *(BS, 11.06.07)*

Relaxing Restrictions

South Korea's Parliament has passed a bill to ease restrictions on top business groups, allowing them to invest more in their affiliates. The move, which runs contrary to regulators' attempts to curb the power of the chaebol, is expected to fuel criticism that the Government's reform efforts have run out of steam.

The country's chaebol include Samsung, Hyundai Motor, LG, and SK group. Owners hold minority stakes in affiliate companies but use cross-shareholdings to maintain control.

Under current regulations, chaebol affiliates with assets of more than 2,000 billion Wons (US$2.1bn) belonging to groups with assets of more than 6,000 billion (US$6.5bn) Wons are prohibited from holding more than 25 percent of shares in an affiliated company.

But the new legislation will affect only conglomerates with assets of more than 10,000 billion (US$10.8bn) Wons, and will also further relax the cross-shareholding limit to allow companies to hold up to 40 percent in affiliates.

The National Assembly's regulations revisions will see the number of chaebol subject to restrictions on cross-shareholdings fall from 343 companies of 14 chaebol to only 22 companies belonging to six groups. But many big companies including Samsung Electronics and Hyundai Motor will still be subject to the investment ceiling.

The Government said the revision was intended to encourage corporate investment, forecast to slow sharply in 2007 because of economic uncertainties caused by the strong Won and December's presidential election. *(FT, 03.04.07)*

Liable for Investor Losses

Credit rating agencies could be held liable for investor losses on complex securities backed by risky US subprime mortgages and other assets, according to a study.

Any such liability could dramatically change the rating business by upsetting the agencies' traditional position that their ratings are simply opinions covered by constitutional protections for free speech.

That argument has generally proved successful for the agencies in defending lawsuits brought by investors.

But the study, released in draft form last week, contends that, in the huge and growing structured finance market, agencies have become too close to the deals they rate.

The study's authors say rating agencies have deviated from their traditional roles as providers of opinion and instead co-operate closely with investment bankers to help them secure the desired ratings to sell deals to investors.

The big three ratings agencies – Moody's, Fitch and Standard & Poor's – were quick to dismiss this, saying their role was limited to producing a rating opinion and that their rating criteria were publicly available for investment banks to use to structure transactions.

Investors have yet to test this new line of attack in any lawsuit.

(FT, 10.05.07)

Lawsuit Over Failed Deal

South Africa's cornerstone policy of black economic empowerment is embroiled in a groundbreaking lawsuit in which the government and Transnet, the state transport arm, face a multibillion Rand claim from a businessman over a failed deal.

Sandile Zungu, one of South Africa's new black entrepreneurs, said that, three years ago, Transnet broke an agreement to sell to his telecoms business 80 million shares in MTN, the mobile phone company. Transnet denied Zungu's claim and said that no agreement was reached on the purchase price.

The proposed sale was to be one of South Africa's early Black Economic Empowerment (BEE) deals, which pivot on the transfer of stock to fledgling black businesses as part of the government's attempt to redress financial injustices of apartheid. Zungu said that the case was not about empowerment but about the haziness of government tendering processes.

Transnet picked Zungu's Umthunzi Telecoms from 10 other bidders for the MTN shares in April 2004, but as the share price rocketed, the state body backed out of the deal.

Zungu said that he agreed with Transnet for Umthunzi to pay 29.51 Rands a share. Instead, in February last year, Transnet sold the shares on the open market for 65 Rands. If the case goes against Transnet, given the rise in MTN's share price, it would have to spend Rand 8 billion (US$1.1bn) to buy back the shares, losing more than Rand 2 billlion (US$ 0.27bn). *(FT, 13.04.07)*

Insider Trading Crackdown

Chinese regulators fined and reprimanded a construction company for violating stock market disclosure rules following weekend warnings that efforts to clamp down on insider trading and other manipulation would be 'strengthened'.

The China Securities Regulatory Commission (CSRC) said it had fined Zhejiang Hangxiao Steel Structure Yuan 400,000 (US$52,000) over the way it disclosed a contract in Angola that led to a fivefold increase in its share price. Five senior managers were also fined.

The penalties came as some investors have been predicting a crackdown on illegal trading activities.

Official concern is mounting about excessive speculation in the Chinese stock market, which has seen share prices rise fourfold over the past two years.

However, although officials at the CSRC indicated that the investigation into Hangxiao could continue, some analysts said the level of the fine would not dissuade other traders or companies from breaking the rules.

The CSRC statement said the fine was for breaking rules on information disclosure but did not mention more serious abuses. *(FT, 14.05.07)*

Up for Sale

The Swedish Government launched its privatisation programme by putting eight percent of TeliaSonera, the Nordic telecommunications group, on sale to institutional investors.

The announcement dashed market hopes that a strategic investor might be prepared to pay a premium for the state's 45 percent stake and make a compulsory buy-out offer for the rest of the company.

The eight percent stake, with a stock market valuation of Swedish Krona 19.7 billion (US$2.9bn), was sold through an accelerated bookbuilding process. The centre-right government has invited all types of institutional investors, including hedge funds to bid and expects 100 funds to buy shares.

The government plans to sell its shareholdings in six companies including V&S, the drinks group; Nordea, the largest Nordic bank; and OMX, the stock exchange operator and technology company. *(FT, 03.05.07)*

Preference to China

India has lost out to China by a wide margin in terms of its appeal as an attractive market for the wealthy and affluent American investors, who are casting their net beyond the US in search for better returns.

Indicating increased interest of wealthy persons in investing abroad, two of every five affluent households in the US expect to invest or continue investing in overseas markets, according to a new study released yesterday.

While China has emerged as the most appealing overseas destination for the affluent American investors, India can find a place only at the fourth position on their radar.

The affluent households, defined as having more than US$50,000 of investable assets, named India as the fourth most appealing market on their international investment radar, after China, Europe, and Japan.

According to the survey, parking the money in international markets has emerged as a more popular option than some well-known alternative investment avenues like hedge funds, venture capital, private placements and Real Estate Investment Trusts (REITs).

Even India scored over the hedge funds, which got support from just eight percent of the respondents.

(www.tribuneindia.com, 11.05.07)

Sold to Joint Venture

Albania's Government sold 76 percent of its monopoly fixed line operator to a joint venture between Turkey's Calik Group and Turk Telekom for US$161mn.

Economy Ministry spokeswoman Iva Tico said that Calik has entered a partnership with Turk Telekom, and has also agreed to build its own mobile phone network.

The privatisation of Albtelecom took longer than expected. In May 2005, Calik was the only bidder for the company, but the government that came to power in July 2005 refused to ratify the deal, saying Calik had to satisfy the condition of having a partnership with a strategic telecoms operator. Calik then joined forces with Turk Telekom to create a company 80 percent held by Calik and 20 percent by Turk Telekom.

Turk Telekom's majority owner, Oger Telecom, said earlier this year it might bid for a majority stake in Albtelecom through Turk Telekom if Albania annulled the previous tender and started a new privatisation process.

Albtelecom serves 33 percent of Albania's 800,000 households and seven percent of the country's 3.6 million population.

(Intelecon Regulatory News, 19.06.07)

Privatisation in Iran

Iran intends to privatise the government-owned telecom--munications operator by the end of 2007

In February 2007, Supreme Leader Ayatollah Ali Khamenei urged the Government to accelerate its efforts to reduce the state's control of the economy in an attempt to bolster the privatisation programme.

Iran tried to shake up its economy in 2004 by overturning Article 44 of the Constitution which decreed core infrastructure should remain state-run. However, since 2004, private business has shown little interest in investing in privatisations.

In 2006, President Mahmoud Ahmadinejad launched a plan to sell heavily discounted shares in state firms to the poor as part of his promise to spread the state's wealth more evenly. Economists said the so-called 'shares of justice' may change the shareholders but do not lead to the required restructuring.

(Intelecon Regulatory News, 14.06.07)

Nationalisation of Oil

On May Day, Venezuela's military might will be on full display as Hugo Chávez, the country's president and a former paratrooper, celebrates winning back Venezuela's natural resources in the oil-rich Orinoco for the people.

Chávez had said recently that Venezuela's privatisation of oil has come to an end, promising to hoist the national flag over installations in the area that boasts the largest heavy oil deposits in the world.

But in spite of the bombast, this 'nationalisation' is in fact the start of a renegotiation of contractual terms that will more than likely leave PDVSA with a majority stake.

The international oil companies – ConocoPhillips, ExxonMobil, Chevron, Total, BP, and Statoil – are being faced with several key issues: whether they will retain a sufficient stake to make staying worthwhile; how they are to be compensated for their reduced share; and whether they have a hope of exploiting reserves technically owned by Venezuela.

Analysts question PDVSA's own ability to shoulder the industry's investment burden, alone.They say its funds have been directed towards political goals at the expense of exploration and development investment. *(FT, 01.02.07)*

Serving Corporate Interests

www.delledwards.com

A recent study by the Organisation for Economic Co-operation and Development (OECD) pointed out that Mexico continued to have some of the most expensive telecommunications rates in the world.

Mexico's new telecommunications and transport minister has launched a stinging attack on the country's telecommunications regulator, accusing it of playing more to the interests of corporate giants than those of consumers.

The attack is likely to be seen as one of the strongest signs yet that the administration of Felipe Calderón, the centre-right president who took office in December 2006, is intent on reining in the immense power wielded by many of Mexico's largest companies.

Luis Téllez, the telecommunications minister, said one of the barriers to stimulating competition in the telecoms sector had turned out to be Cofetel, the industry regulator, which enjoys considerable independence from central government.

Téllez said that as the regulators have been captured by the regulatees, they do not always respond to the public interest, and accordingly Téllez is facing a huge problem.

The telecommunications sector has long been dominated by *Telmex*, the former state-owned company now controlled by Carlos Slim, Mexico's richest man. The company owns more than 90 percent of the country's fixed lines and América Móvil, its wireless communications spin-off, controls about 80 percent of the cellular market.

Téllez expressed particular concern in two technical areas where he said Cofetel should have moved more quickly. One is interconnection – the mechanism by which other operators gain access to *Telmex*'s fixed-line network.

A handful of smaller telecoms companies have managed to strike deals with *Telmex* but Téllez said progress had been slower than necessary. Without quick and easy access to this 'backbone' other companies would be unable to compete effectively, he said.

The other area of concern is portability – the ability of consumers to switch companies without changing their telephone number. Mexicans have to change their telephone number whenever they change carrier, which experts say stifles competition.

The minister also expressed concern about Cofetel's recent decision to place a cap on the tariffs Telmex is allowed to charge consumers, arguing that the regulator had been too permissive.

A recent study by OECD pointed out that Mexico continued to have some of the most expensive telecommunications rates in the world. *(FT, 04.04.07)*

Price Cap

Consumer advocates fear operators will attempt to offset losses from overseas phone use by charging more for other services.

www.cmca.com

Under a landmark deal agreed upon, Europeans will save up to 70 percent on the cost of using their mobile phones while abroad.

The fees for making and receiving calls while in another EU country will be slashed from mid-August following the vote by the European parliament in Strasbourg. The decision to impose price caps on what the EC described as "exorbitant roaming charges" is a significant intervention by the EU in the market and comes despite fierce opposition from operators such as Vodafone.

Under the agreement, the price of making a call while abroad will be capped at €0.49 (US$0.67) per minute, before Value Added Tax (VAT). While existing roaming charges vary widely, they are generally significantly higher.

A four-minute call home by a French customer in Italy costs €4.72 (US$6.39), while an Austrian phoning home from Malta would pay €9.51(US$13), according to EU data.

The agreement means consumers will be charged a maximum of €0.24 (US$0.33) per minute, before VAT, for an incoming call while abroad.

Beuc, which represents European consumers, welcomed the vote. But it warned that the price caps are still too high and are not linked to the actual costs for operators.

And in a setback for customers, the cuts will not be in place by the start of the holiday season in July, unless operators respond to the legislation by slashing fees immediately.

In addition, consumer advocates fear operators will attempt to offset losses from overseas phone use by charging more for other services.

In particular, campaigners are concerned that the agreement, which came after torturous negotiations between the Parliament and EU countries, does not cover cross-border text messages. *(FT, 24.05.07)*

Universal Service Fund

SeCom, Argentina's telecommunications ministry, issued a resolution ordering operators to start contributing one percent of their revenues to a universal service fund.

Resolution 80/2007, in the country's official gazette, stated that the requirement to contribute to the fund commences in July 2007. Mobile operators, ISPs, and fixed line companies are required to deposit their contributions in Banco Nacion until the universal service fiduciary fund is established.


www.fotosearch.com

The Fondo Fiduciaro Servcio Universal (FFSU) was approved in 2000 as part of the Decree 764/00 (Reglamento General de Servicio Universal). The fund was supposed to be implemented by January 01, 2001. After a long delay, in August 2006, Argentina's ombudsman Eduardo Mondino filed a lawsuit to force the government to create and regulate the fund.

According to resolution 80/2007, SeCom and telecommunications regulator CNC will form a commission that will administer the universal service fund.

(Intelecon Regulatory News, 15.06.07)

Shared Infrastructure

A second beefy blow is in the offing for MTN, Celtel and Uganda Telecom, Uganda's three active national telecommunication providers.

In commitment to their statutory mandate, the industry regulator, the Uganda Communications Commission (UCC) is moving to change a clause in the agreements with the firms that will compel them to share their infrastructure with other service providers by the year's end.

UCC's executive director, Eng. Patrick Masambu, stated in Kampala that they do not want any player to have an unfair competitive edge over others.

Infrastructure, according to experts, could refer to organisations, personnel, procedures, facilities, and networks employed to transmit and receive information by electrical or electronic means.

For Uganda's case, sharing of infrastructure would largely revolve around the sharing of masts, switches, and networks. In essence, involved parties would negotiate a common financial and technical agreement to share this infrastructure.

However, the mathematics of sharing infrastructure is complicated and both the regulator and ministry are cagey to explain. There are also reservations from experts that infrastructure owners would over price and thus force the other players build their own. *(allAfrica, 02.04 07)*

Ordered to Proceed

New Zealand's Commerce Commission has ordered Telecom to proceed with the proposed unbundling of local telephone loops, rejecting the company's request for more time. Incumbent operator Telecom requested the delay in a letter to the Commission stating that Telecom are very concerned about the workloads of the individuals who are involved in preparing Telecom's standard terms proposals.

Commission telecommunications commissioner Douglas Webb has rejected these arguments and said that the prompt delivery to the market of these key services will promote competition in telecommunication markets.

Last year, communications minister David Cunliffe announced the unbundling, as part of a drive to push New Zealand's broadband performance into the top quarter of the OECD countries. *(GCR, 12.06.07)*

Increased Protectionism

Protectionism is likely to rise among industrialised nations as emerging countries become more competitive, according to a report released today.

The latest World Competitiveness Yearbook produced by the IMD business school has revealed that developing economies are quickly catching up in competitiveness in relation to the top-ranking US.


www.istockphoto.com

Singapore and Hong Kong are ranked second and third respectively, with the next six places have been claimed by smaller European countries such as Luxembourg (4) and the Netherlands (8). Canada is 10th, while Germany comes in at 16th, and the UK is 20th. France is in the 28th place.

The IMD, based in Lausanne, Switzerland said 40 economies were maintaining or increasing their competitiveness compared with the US, with a particularly strong improvement seen by fast-developing nations such as China, Russia, and India.

The report noted that the aforemntioned three countries have together accumulated more than US$1,700bn of foreign reserves, while their companies and those of the Gulf states are busy snapping up assets around the globe.

Professor Stéphane Garelli, at the IMD, said that in all likelihood, industrialised nations would find it hard to tolerate such a power shift.

Professor Garelli added that the industrialised nations would not accept the loss of their 'business jewels' without a fight. Hence, we should face a year of rising protectionist measures and, most expectantly, increase in the number of complaints filed at the World Trade Organisation (WTO) for unfair practices.

However, Prof Garelli predicted that any such protectionism wouldl take a more subtle form than in the past. He said that corporate governance, environmental protection, intellectual property, or social rights are the the new key words.

The IMD survey compares the competitiveness of 55 countries using 323 criteria drawn from statistical data and feedback from business executives. The scorecard, which has been published annually since 1989, covers four main areas: government efficiency; business efficiency; economic performance; and infrastructure. *(BS, 10.05.07)*

Innovation in a Competitive Environment:

Jamaica's Endeavour

Introduction

It is a truism that innovation in the science and technology (S&T) sector is a key driving force for economic growth and therefore an important factor in generating sustainable development. One important factor that may be contributing to differential growth across various nations engaged in implementing competition policies is the level of harmonisation across the various statutes and regulations used to support competition policy.

www.westhoughton-high-bolton.sch.uk

Competition Law and Jamaica

The three main pillars of competition law are prohibitions against (i) Conspiracy; (ii) Abuse of a dominant position; and (iii) Mergers.

- Conspiracy refers to agreements among rival firms to limit the intensity of competition;
- Abuse of a dominant position refers to various unilateral actions taken by firms, which enjoy positions of superior economic power in a market and which have the effect of increasing extent of market power and lessening competition substantially; and
- Mergers refer to arrangements wherein at least two hitherto separate legal enterprises become a single entity.

Jamaica's competition law, the Fair Competition Act (FCA), was adopted in 1993 and fits into this general definition with a major difference that mergers cannot be scrutinised.

Intellectual Property Rights[1]

Intellectual property (IP) includes copyrights, patents, registered designs, and trademarks. A registered owner of an IP is granted exclusive rights to use it for commercial gain.

In Jamaica, the rights associated with the various types of IP are set out under various statues that are administered by the Jamaica Intellectual Property Office (JIPO). As owner of such rights, such a person may enter into licensing agreements which allow others to utilise the same for commercial purposes subject to the terms of the relevant agreement.

Accounted for in IP licensing are the following:

(i) Territorial exclusivity gives the licencee the exclusive licence to operate within a predefined region.

(ii) Royalties are specified amounts to be paid by the licencee to the IP owner for the right to use the IP.

(iii) Duration the specified length of time for which the licencee is authorised to use IP.

(iv) Field of use restriction are relevant clause limits the way in which the licensee can use the IP property.

(v) Best endeavour clauses encourage a more intensive use of the IP. Non-competition clauses prohibit the licencee from competing with the patented technology.

(vi) No-challenge prevents the licencee from challenging the legitimacy of the IP.

(vii) Improvements require the licensee to grant back a licence for any IP acquired through the use of the licensed IP.

(viii) IP owners impose standards for the final product relating to quality, promoting, etc.

(ix) Prices, terms and conditions should be set under which the licencee should sell the goods.

Promoting S&T under the FCA

Evidence suggests that Jamaica's competition law subscribes to the school of thought that a greater level of innovation is stimulated in more 'concentrated market structures, which are largely devoid of competitive forces.

Thus Section 17 of the FCA prohibits "agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially, lessening competition in a market", but sub-section (4) allows firms to give effect to such an agreement if the Commission is satisfied that *inter alia,* it:

"(a) contributes to-agreements usually address at least one of the the improvement of production or distribution of goods and services or the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefit".

So, what is the right balance between competition and the recognition of IP rights? The Barbados Fair Competition Act provides a excellent example of how that balance may be struck. Section 16(4) states that "An enterprise should not be treated as abusing a dominant position… © by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered, design or trademark *except where the Commission is satisfied that the exercise of those rights (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology.* [emphasis added]" and it is these words "…except where the Commission is satisfied that the exercise of those rights (i) has the effect of lessening competition substantially in a market; and (ii) impedes the transfer and dissemination of technology…" that make the difference.

The onus is to determine as to how best IP rights law can be harmonised with that of competition law.

(Abridged and edited from an article that appeared in Competition Matters)

1 *This section draws heavily from Whish, Richard (2001), Competition Law (4th Edition), The Bath Press, Great Britain.*

Balancing Competition Enforcement and Regulation

Experience of the Barbados Fair Trading Commission

*DeCourcey Eversley**

Introduction

The challenge of directly regulating the provision of certain services, while simultaneously encouraging and enforcing competitive markets is one that all modern economies have to grapple. Governments must be mindful of the conflicting signals they may send to their respective business communities, as they engage these different approaches towards the overall attainment of improved consumer welfare.

In Barbados, the challenge of regulation and competition enforcement is also present, as the government seeks to openly promote fair competition while directly regulating a number of companies, but here the experience can be even more acutely observed because the two objectives are pursued within the mandate of a single agency.

Since its inception in 2001, the Barbados Fair Trading has been mandated to regulate a number of Utility Service providers including; telecommunications, electricity, and natural gas. As of January 2003, the Commission is required also to promote and enforce fair and healthy competition across all sectors of the economy.

This write-up discusses the challenge of concurrently pursuing these two objectives against the backdrop of the overall Barbadian experience.

Regulation vs Competition Promotion

In administering the two roles, the Commission is challenged with seeking to ensure that internally it applies the principles and rules consistent with either the hand-off enforcement approach or the hands-on regulatory approach in the appropriate

circumstances, and while doing this it must ensure that its directives in one pursuit does not restrict or compromise its objectives in its other pursuit.

Local Experience

At the Commission, these challenges are observed most acutely in the telecommunications market. Though liberalisation in this market was effected in February 2005, competition within the individual services cannot yet be considered effective. In some instances, the incumbent after liberalisation is still effectively the dominant provider of specific services. These services, i.e. the provision of international telecommunication service, and the provision of residential telecommunication service are regulated by the Commission.

When the Commission was required to establish the rules that would govern behaviour of the incumbent under the present price cap regulatory mechanism, the regulated company was required by the Commission.

At the same time, while regulating the telecommunications service provider, the Commission has on a number of occasions been faced with complaints of unfair competition by and against the incumbent, and investigations pursuant to these complaints have sometimes been undertaken.

Managing Challenges

The challenge of successfully managing both pursuits is experienced in most industries in which there is a government owned corporation operating in the private sector directly competing against other privately operated enterprises. In these circumstances, the government run organisation often benefits from particular subsidies, or relaxed laws aimed at ensuring that the publicly owned company remains viable. The Commission has received complaints alleging unfair competition in this regard.

It is necessary that there be a continuous flow of information and education between the direct sector regulator and the promoter of competition to ensure awareness of the implications of each directive. Here the Fair Trading Commission has the advantage of a common entity managing these pursuits, and this allows it to share and communicate information most effectively. This is an important practical advantage. The advantage of the single agency arrangement also reduces the problem of overlapping jurisdiction and turf arguments.

Regional territories Trinidad and Tobago and Guyana have included specific exemptions in their competition legislations requiring the sector regulator rather than the competition authority to manage all aspects of commercial activity relating to their particular utilities, including issues related to the enforcement of competition in the respective market. This certainly allows for a clear demarcation of jurisdiction. Whether such legislative streamlining will better manage the challenge is still to be determined.

(Abridged and edited from an article that appeared in Competition Matters)

**Director of Fair Competition for the Barbados Fair Trading Commission*

Evolution of Antitrust Law and Impact of Political Will

*Karen L Duncan**

In his quest to increase his personal wealth and business dominance through a series of conspiracies, price fixing and other anticompetitive activities,19th Century American "robber baron" and railroad tycoon William Vanderbilt once famously proclaimed "the public be damned!"

Thankfully, the modern businessperson and final consumer are usually better protected than their predecessors were from the excesses of powerful business interests. This was not always the case, however, and it is due to such Vanderbilt-type sentiments, their disastrous effects, and recognition that markets function effectively only if businesses compete fairly, transparently and ethically, that competition law developed.

In order to fully appreciate the role and function of competition law and to embrace its goals, it is vital that we have an understanding of its evolution – with specific focus on its evolution in the US.

The focus on US experience is deliberate. From an information stand point, the US provides example of some of the strongest competition laws and arguably the largest body of related case law.

Another benefit to focusing on the US is that it provides clear examples of the impact of politics and the economy on competition law. An examination of the US experience, therefore, can assist countries that are in the process of developing or refining their competition laws.

Birth of Trust

The bitterly fought American Civil War resulted in tremendous damage to the landscape in a physical, social economic and political sense and led to a great need for reconstruction. This reconstruction period led to rapid industrialisation, which, for many industries, resulted in output exceeding demand. It is in this climate that trusts emerged. These 'trusts' were created to merge and consolidate all the companies in particular industries in order to combat the decreasing profits that many were experiencing. This meant that entire industries were brought under the control of a few powerful people. The trusts would often fix prices at any desired level in order to minimise competition and to increase profit, and would prevent new entrants into the market by selling their goods at a loss until the new entrant, being unable to compete, went out of business.

Sherman Act and Role of Reason

These practices had a negative impact on consumers and potential entrants and led to vociferous demands for reform. It was widely felt that free competition was essential and that Americans should have the opportunity to create businesses without being forced out of the market, or compelled to sell to large powerful companies. Support for this view was forthcoming from a number of politicians including a Senator John Sherman who gave voice to the concerns of the people when he stated "If we will not endure a King as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life". In response to the demands for reform, Congress passed the *Sherman Anti-Trust Act,* in 1890, which outlawed trusts. It was intended that the Act would limit the expansion of monopolies, prevent the restriction of free trade and limit the incidence of price-fixing by industry members.

The *Sherman Anti-Trust Act* was put to the test twenty years later in 1911 in the landmark ruling in *Standard Oil Company of New Jersey* v. *United States*[1] . The Standard Oil Trust was owned by John D Rockefeller whose net worth in 1910 was equal to nearly 2.5 percent of the US economy (US$250bn in today's terms). Farmers, in particular, complained about this trust as they had to pay excessively high prices for oil dependent rail transport to take their produce to the cities. In the 1911 decision, the court broke up the trust into 33 companies that competed with one another. Significantly, it also added the 'rule of reasons' approach, which introduced the idea that not all big companies, and not all monopolies are evil, and it is the courts the will decide. To be deemed harmful, therefore, a trust had to damage the economic environment of its competitors in some way.

Critics attacked the approach out of concern that conservative judges would gut the Act; that there would be a return to lax enforcement; and that in the absence of specific unlawful restraints, the *rule* of *reason* gave courts unbridled freedom to interpret the law subjectively. Despite the good intentions therefore, the Act was viewed as a weak piece of legislation since critical terms such as 'restraint of trade', 'combination' and 'monopolise' were not precisely defined. The Act also failed to establish an independent commission to investigate possible anti-trust cases.

Second Generation of Legislation

In response to the acknowledged inadequacies of the Sherman Anti-Trust Act, Congress passed the *Clayton Act* in 1914, which was considered to be a vastly improved piece of legislation compared to its predecessor. It prohibited specific business conduct, such as price discrimination; tie-in sales; exclusive dealership agreements; and mergers, acquisitions and interlocking corporate directorships where they "substantially lessened competition" or "tend[ed] to create a monopoly". The Act exempted unions from antitrust law as Congress decided that human labour would not be treated as a commodity. At that time, Congress also established the *Federal Trade Commission Act.*

Antitrust enforcement continued to evolve in conjunction with the country's development and changes in administration. World War I and the state of the economy in the 1920s resulted in yet another change in attitude toward antitrust enforcement. The government encouraged business cooperation and the creation of self policing trade associations. Competition was reduced and it has been forcefully argued that these policies, in part, led to the Great Depression. Talk of 'trust-busting' in this era was virtually non-existent.

Effects of Ideological And Economic Changes

By the mid 1930's economic decline led to a resurgence of investigations into monopolies and as such, antitrust enforcement regained some importance. The *Robinson-Patman Act* which was passed in 1936 overtly prohibited forms of price discrimination. In 1940 alone, the government brought more than eighty antitrust suits. The case, *United States* v. *United States Steel Corporation*[2] , marked another important development in competition law. In that case, the court implemented a two-part test for determining illegal monopolisation:

(1) the firm must possess monopoly power in a relevant market, and (2) it must have improperly used exclusionary conduct to gain or protect that power.

During World War II and into the 1950s there was another shift in ideology, which resulted in a return to an acceptance and encouragement of big business.

The early and mid-1960s saw another trend emerging. Two schools of thought held sway at that time. One school regarded markets as fragile and in need of public intervention. Economic efficiency took a backseat to the belief in the ability of the antitrust doctrine to meet social and political goals. The second school saw business rivalry as healthy, distrusted public intervention in markets, and insisted that they would self-correct to erode private restraints and power.

Modern Shifts in Competition Enforcement

By the late 1960s and into the 1970s, the political tides began to change once again. The court was retreating from its position of robust interventionism; starting to abandon its hostility towards efficiency; and returning to the *rule of reason* test to evaluate non-price vertical restraints. Economics analysis would be the main tool in the formulation and application of competition rules although *per se* rules remained important. In one ruling, the court stated that antitrust laws" *....were enacted for the protection of competition, not competitors."*[3] The previous view that the demise of small firms was bad for competition was replaced by the view that large firms can have positive effects on the market, such as reduced cost of production and increased output.

In 1982, there were further far-reaching developments. The *Sherman Act* was used to break up AT&T, one of America's largest companies. AT&T had been the monopoly telephone supplier for virtually every household in America.

More changes took place in the 1990s. The influential 'efficiency model' that was widely accepted for some time was challenged by the idea that a proper analysis of efficiency goals showed that 'efficiency' demanded tighter anti-trust controls, not stubborn non-intervention. This shift was clearly seen in a 1992 Supreme Court case[4] which concerned typing arrangements in the sale and service of photocopying machines. The learned justice issued a warning about the dangers of relying on economic theory as a substitute for what he called, 'actual market realities', such as the harm done to companies who were shut out of the market. Joint guidelines on mergers issued in 1992 by the Federal Trade Commission and the Justice Department reflected this new stance, which looked more closely at competitive effects and tightened requirements.

Evolution of Competition Law in Jamaica

What one can gather from the evolution of competition law in the US is that the letter of the law alone is not sufficient. It is imperative that competition law receive the full backing of the administration. Since the advent of Jamaica's competition legislation in 1993, there has been no change in the country's political administration. As such, we have not, as yet, had the fluctuations in ideology and resultant impact on competition law that is evident in the US. We also have not had the extra push, for better or for worse, which comes with political change.

Competition law, as we have seen, is often an amalgam of legal procedure and political will. In the US Judicial interpretation of the *Sherman Anti-Trust Act* could be said to have departed from what was originally intended by introducing the 'rule of reason' approach, but it is undeniable that this development has made an indelible mark on the canvas of competition jurisprudence in the US and the rest of the world. Indeed, it is judicial interpretation of Jamaica's *Fair Competition Act* that is driving the current efforts to amend the Act to address deficiencies, particularly in relation to the principles of natural justice. No doubt the next wave of political interest will also assist in taking Jamaica's competition law to another level.

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(The article appeared in Competition Matters)

1 221 U.S. 1, 31 S.ct 502, SS L Ed. 619

2 251 U.S. 417, 40 S.Ct. 293, 64 L. Ed. 343 (1920)

3 *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701

4 *Eastman Kodak Co. v. Image Technical Services.* 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265

Distribution and Exclusive Dealing: Is There A Competition Issue?

*Mauro Grinberg**

Business Standard

It is possible to consider an exclusive distributor as the 'long arm' of the manufacturer. If there are no passive sales, there is no competition among exclusive distributors. We can, at this point, use the 'no economic sense' rule. By this rule – which is widespread in the US – if a conduct is exclusionary and makes no economic sense but for the exclusion of competitors, it is, consequently, against free competition.

What indeed are the many roads by which a product can journey through before it reaches the consumer? From manufacturer to dealer to consumer the roads and pathways are many. It could either be through direct sales, distribution (with or without exclusivity), franchising, agency or others. In this paper we would focus on distribution – mainly with the exclusive dealing clause *vis-à-vis* direct sales.

Of course, a manufacturer can sell his/her goods directly to the dealers and there are many who do so. But it is usual to have distributors, who are independent in the sense that they buy from the manufacturer and sell, involving both their own names and risks, to the dealers. The contract between manufacturer and distributor may or may not have an exclusive dealing clause which, at the end of the day, can make a marked difference

This exclusive dealing clause may be related to territory, kind of dealer, size of dealer, or any other situation that distinguishes. Here we want to use the territorial exclusivity just for the sake of being specific, but it is clear that for us any kind of exclusivity, related to specific groups of dealers, may be dealt with in the same terms.

We can work with a specific situation in which manufacturer A competes with manufacturers B and C in a specific market. Manufacturer A sells directly to dealers, manufacturer B sells to distributors with an exclusive dealing arrangement, and manufacturer C sells to distributors without an exclusive dealing arrangement. Manufacturer B sells to distributors B1, B2 and B3, who have their own territories to work and Manufacturer C sells to distributors C1, C2, and C3, who compete with each other across the country.

Trying to define as to who are the real competitors, we realise, at first sight, that B1 competes with A, C1, C2, and C3, as well as B2 and B3. However, we can also say that B1, B2, and B3 are not competitors in the sense that they act for B and thus B is the one who competes with A, C1, C2, and C3. So, facing this partial development, an exclusive dealing clause can define the manufacturer, instead of the distributor, as the real competitor.

A second and more difficult situation is related to the possibility of passive sales by B1, B2, and B3 to dealers located in each other's territory. This means that a distributor, even under an exclusive dealing agreement, cannot refuse sales to any dealer, irrespective of the location of this dealer. This situation includes the possibility of a dealer who, having multiple premises, chooses to buy in B1's territory, even considering that its main premises are in B2's territory. Here we can see that there is competition, to a certain degree, among distributors, even if they have an exclusive dealing clause.

As a general consequence, we can say that distribution is a market to be considered and that distributors are competitors among themselves, having also territorial exclusivity. But, we can ask: What does this all have to do with competition? Having defined who competes with whom, we must now understand whether the exclusive dealing arrangement is also exclusionary or, in other words, how it affects competition.

It is possible to consider an exclusive distributor as the 'long arm' of the manufacturer. If there are no passive sales, there is no competition among exclusive distributors. We can, at this point, use the 'no economic sense' rule. By this rule – which is widespread in the US – if a conduct is exclusionary and makes no economic sense but for the exclusion of competitors, it is, consequently, against free competition. Of course, one can exclude competitors and make economic sense, what calls for the old and reliable rule of law.

Anyway, if the sole goal of the parties is to exclude competitors through the exclusive dealing agreement, this agreement is exclusionary. But this is something that happens seldom, because it is not difficult to demonstrate economic benefits and thus economic sense.

The real questions are then: will the exclusive dealing clause in a distribution agreement reduce outputs? Will it increase costs of rivals? Does it create, preserve or enhance power over prices and outputs? We can easily see that an exclusive dealing arrangement in distribution is not exclusionary, because the answer is a negative to all three questions. In fact, reviewing the same hypothetical, it is clear that the competitors are A, B, and C. Consequently, the market to be investigated is upstream.

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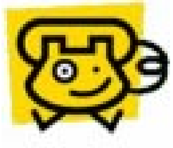


Turkey: Liberalisation Efforts in Telecommunication Market

*Hergüner Bilgen Özeke**

> ***In Turkey, the Telecommunication Authority continues to introduce new authorisations/licences to further liberalise the telecommunication market. In addition to the services listed below, the Authority issued, on its website, a new draft authorisation for public opinion concerning the provision of 'Terrestrial Digital Platform Services', which is defined as the "operation of terrestrial digital platform network/infrastructure and the single/dual communication of any voice, data, image and encrypted/unencrypted radio/television signals over such network through the channels exclusively allocated to broadcast over the said network". Once available, the authorisation will revolutionise the way to access multimedia services and contribute to further convergence of telecommunications and broadcasting services, while enhancing competition in the broadband market.***

Infrastructure Operation Services

The definition of transmission infrastructure remains limited to facilities such as cable, R/L or optic or other physical means to be determined by the Authority, which enables transmission of data that may be converted into signs, symbols, voice, image and electricity signals.

Wireless Internet Services Provision

Annexe-A6 of the Authorisation Regulation regulating Internet Service Providers (ISP) was amended on November 15, 2005, in order to include wireless Internet services as part of ISPs. Unfortunately, certain criticisms have arisen because the operators are required to obtain certain infrastructure from other infrastructure providers and/or to obtain a separate licence to establish such infrastructure themselves. Furthermore, ISPs cannot provide telephony services based on this authorisation.

The operators authorised to provide Internet services under Annexe-A6 before the effectiveness date of the above mentioned amendment, i.e., November 15, 2005, will be deemed authorised to provide all Internet services set forth under the revised Annexe-A6. Accordingly, they will be authorised to provide wireless Internet services without being required to obtain another authorisation.

Service Quality

The draft Regulation on Service Quality in the Telecommunications Sector has entered into force as of March 03, 2005. The regulation aims to bring telecommunication services and telecommunication infrastructure services to national and international service quality standards by determining service quality criteria for connection periods; malfunctions for each access line; correction periods of malfunctions; unsuccessful call rates; establishment periods for calls; responding periods for operation services; responding periods for directory services; payphones and invoice complaints; and leased lines.

Directory of Services

The provision of directory services, which is defined as the provision of information, sometimes further processed, obtained from the number databases of the operators providing telephony services, has also been liberalised as of July 06, 2006. In addition to telephone numbers, information such as fax numbers, e-mail addresses and professional information may also be included in the directories provided that prior authorisation is obtained from the relevant persons.

The authorisation period is 15 years and directory services provided by Türk Telekom and GSM operators will cease within six months as of July 06, 2006. Furthermore, as of the date of the first authorisation for directory services, Türk Telekom, and GSM operators will be obligated, for two years, to announce in their invoices that directory services are being/will be provided by other firms via five digit numbers (i.e. 118**). On the other hand, it is noteworthy that the Council of Ministers has still not determined the fee for the authorisation regarding directory services and that no authorisation can be granted before the relevant fee is announced.

Long Distance Telephony Services

Finally, the procedure and principles for provision of Long Distance Telephony Services (LDTS) have been determined under a communiqué, which entered into force on June 10, 2006. It sets forth the rights and duties of LDTS providers, the liability of Türk Telekom for responding to demands of LDTS providers regarding traffic transfers between networks and also determines the relations between LDTS providers and their agencies.

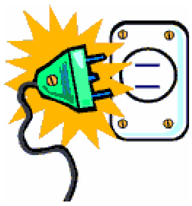
Cable Platform Services

Despite the necessary amendments to the Authorisation Regulation on February 05, 2005 and the grant of long-awaited licences on April 24, 2005, there are still serious obstacles for the provision of cable platform services in Turkey. Such obstacles mostly relate to the availability of the relevant infrastructure by TURKSAT, the company that has executed revenue sharing agreements with cable platform service provider firms.

TURKSAT has filed actions against the cable platform service providers in order to prevent them from using the infrastructure and demanded preliminary injunctions. So far, only one preliminary injunction has been granted out of three demands filed against three firms.

(Abridged and edited from an article that appeared on www.mondaq.com)

**A general practice law firm in Turkey, focusing on all aspects of business law matters. The firm strives to provide legal services at global standards of quality on all aspects of Turkish and international legal and business matters.*



Potential Impact of Electricity Reform on Turkish Households

Catherine Waddams[1] Necmiddin Bagdadioglu[2] Alparslan Basaran[3]

Background

Since 2001, Turkey has been in the process of electricity market reforms and plays an important role in the potential regional energy market of Southeast Europe. Turkey is emerging as hub and transit country between Europe and Asia.

An essential part of the reform programme is the introduction of cost-reflective tariffs, but there is real concern that this will create social hardship among Turkish consumers.

Using six different scenarios, an attempt has been made to identify the affected consumers and the extent of the impact of the reform programme, some of which are based on proposed policies by the sector regulator – the Energy Market Regulatory Authority (EMRA). It should help the government develop programmes which will alleviate the impact.

The country has applied a 'national' system of residential electricity tariffs, with a small discount for priority provinces which are mainly in the South and East and principally rural in nature. Households in priority provinces pay 0.65 percent less for their electricity. They also have, on average, much lower income than non-priority provinces.

Highest technical and non-technical losses are incurred in priority provinces with lowest per capita Gross Domestic Product (GDP).

Methodology

Several scenarios are deemed likely under sector reforms:

- potential impact of EMRA's policy proposal (which has been rejected) to allow tariffs to reflect the current wide regional variation in network losses;
- effect of potential changes in residential tariffs as a result of a national tariff equalisation programme currently being implemented;
- effect of potential efficiency savings from the proposed merger of distribution companies;
- impact of raising the current low ratio of domestic to industrial tariffs to the OECD average;
- effect of reducing taxation levels on households; and
- effect of changing the present flat rate per kilowatt hour to a tariff which reflects more accurately the pattern of consumer-related and consumption-related costs.

Household level data from the Turkish Household Expenditure Survey (THES) have been used to calculate potential welfare changes for different households and income group of the six scenarios.

Key Findings

Changes in Regional Tariffs (Scenarios I, II, & III)

Reflecting losses fully implies large price increases for some households. For example, Mardin, which is almost the poorest province, would face price increases of 170 percent if cost of losses were to be fully reflected, representing a quarter of average household income.

The effect of removing the small discount for priority status provinces in a revenue-neutral way is similar to Scenario I, but is much smaller.

Scenario III proposes lower tariffs in provinces which have the potential to improve their efficiency levels, and is therefore not revenue-neutral, with effects in the opposite direction to scenarios I and II.

Changing Revenue Level (scenarios IV and V)

The price rise from scenario IV and the price fall from scenario V are similar in magnitude, raising or decreasing household expenditure on electricity by 1.5 percent of disposable income on average. The largest effect is on larger families (three or more children) because they have relatively high electricity requirements and relatively low household income.

Restructuring Tariffs (Scenario VI)

The introduction of a revenue-neutral standing charge benefits those who consume more electricity and penalises users of smaller quantities. The more vulnerable who are likely to consume less electricity, i.e. those not registered with social security, or receiving old age pension, face increased expenditure. Single person households would experience the worst effect. Surprisingly, larger families would also pay more, albeit a relatively small amount.

Policy Issues

Restructuring tariffs to recover technical and non-technical losses is likely to have a large, adverse and direct effect on households through increased energy expenditure, compounded by the fact that areas with largest losses are also those with lowest incomes.

The installation of a standing charge would be regressive – benefiting those with high incomes and large consumption profiles but impacting negatively on those who use small quantities of electricity. Privatisation and reorganisation will provide incentives for efficiencies and there is potential for significant cost reductions.

(Abridged and edited from an article that appeared on www.mondaq.com)

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About a Competition Law: Mongolia

The term 'Mongol' was first recorded in the 10th century. At that time, the Uighurs – Turkic people of Central Asia – were dominant. By the 15th century, the area that is modern-day Mongolia had been broken into a number of states, and came under the influence of the new Manchu dynasty in China. On November 26, 1924, the establishment of the Mongolian People's Republic was declared. The large landlocked country situated in the Northern plateau of Central Asia became the second largest communist country in the world.

Economy

Mongolia's economic activity has traditionally been based upon agriculture and livestock breeding. Mongolia also has extensive mineral deposits of copper, coal, molybdenum, tin, tungsten, with gold accounting for a large part of industrial production.

With the dismantlement of the USSR in 1990-91, Soviet assistance, which was as high as one-third of the GDP, disappeared almost overnight. Subsequently, the country plunged into deep recession, prolonged by the Mongolian People's Revolutionary Party's (MPRP) reluctance to undertake serious economic reform.

Led by the Democratic Union Coalition (DUC), however, the country embraced free-market economics; tried to ease price controls; liberalised domestic and international trade; and attempted to restructure the banking system and the energy sector.

The MPRP Government, elected in July 2000, was anxious to improve the investment climate. It also had to deal with a heavy burden of external debt. In early 2000 and 2001, falling prices for Mongolia's mainly primary sector exports, widespread opposition to privatisation, and adverse effects of weather on agriculture restrained GDP growth.

Competition Evolution and Environment

Whilst the legal framework for commercial activities are being gradually built, and competitive principles are taking root, the bureaucracy still retains many Communist-era officials, who do not yet understand their role in a free market system. As such, entrepreneurs are sometimes dogged by informal bureaucratic interference in commercial operations.

A law on Prohibition of Unfair Competition was passed in 1993, which:

- prohibits the government from restricting economic competition;
- prohibits monopolies and other restraints on fair competition;
- establishes guidelines for government intervention to ensure fair competition and to regulate natural monopolies; and
- establishes the role of the courts in determining an entity to be a monopoly and handing down legal remedies.

There is no evidence that insider dealing is a significant hindrance to open competition. Government procurement policies, however, remain complex and opaque.

Competition Law

The main objectives of the competition law in Mongolia include:

- creation of such a mechanism that would challenge the arbitrary acts of the government, or state-controlled business enterprises, which act as hindrance to healthy competition in the market. The main targets of the competition law are the state policies that restrict entry, curb imports, and prefer state-owned firms. The competition law could operate to outweigh the government policies and adopt new statutes, rules and policies for promotion of competition in the market.
- decreasing the role of the Government as the central planner of economic activity in the market to a narrower role of an arbiter and rule maker. Competition law enforcement envisages such a role for the government, but in exceptional cases, the government would be justified to correct market failures.

The fear of Government intervention is visible in the drafting of the Mongolian competition law. The evidence of this lies in Article 1 of the law, which states:

"The purpose of the Law is to prohibit and restrict state control over the competition of economic entities in the market, regulate monopoly and other activities impeding fair competition."

Thus, the main essence of the competition law of Mongolia is to reduce government intervention and keep it as minimal as possible.

There is no special supervisory body set up to administer this law though. Complaints about its breach must be made to Mongolia's National Parliament (Ikh Khural) or to the government, depending on which part of the law is in question. The law, however, gives substantial powers to Mongolian courts to take actions against violations of unfair competition.

Future Scenario

The first and foremost step to be taken by the Mongolian Government for the successful implementation of the statute is to put resources into the same. The second step would be to start the groundwork on building institutions essential for the enforcement of the statute.

A new enforcement centre has to be built, with capable, trained staff; and judges who are going to be assigned anti-trust cases, must be given basic education in legal and economic principles of competition law. The enforcement centre would comprise of members of the Anti-trust Law Drafting Group.

(Extracted from Competition Regimes in the World – A Civil Society Report)

Publications

PolicyWatch


PolicyWatch
Funding Architecture for Infrastructure

The January-March issue of the CUTS C-CIER newsletter PolicyWatch encapsulates the "Funding Architecture for Infrastructure" in its cover story. Special Topics are devoted to certain crucial issues, foremost among them being the poor turning to private educational institutions as direct fallout of the crisis in the country's educational system. Good Practices section looks at contract farming as means of better agricultural productivity since it helps reduce market risk associated with crop cultivation. Other issues in focus are that reforms are imperative regardless of sequencing, the need for transparency in corruption, and the contentious issue of granting regulators more freedom.

To access the newsletter online please click on the following link: www.cuts-international.org/pw-index.htm

CIRCular


circular
"Capacity Building on Competition Policy"
circ

Currently under publication, the July issue of Circular has for its cover story "Capacity Building on Competition Policy" that dwells as to how the 7Up3 project has made way for CIRC to reinstate its motto as an institute devoted to "enhancing knowledge and strengthening capacity".

The special focus article is written by Yoginder G Alagh, former vice-chancellor of Jawaharlal Nehru University, entitiled "New Steel Frame for a New World". The article explains how training for India's higher civil servants are important, including its relevance to governance. The point is that as the youth are essentially idealistic, such training would yield rich benefits.

The "News & Views" section gives a brief account of the happenings during the quarter.

To access the newsletter online please click on the following link: www.circ.in/publication.htm

Forum

We would be grateful if you might be able to send a copy of your new book to our research unit at United Nations Development Programme (UNDP). As always we are eager to draw on the research work of CUTS.

Ronald U Mendoza,
Policy Analyst/Economist, UNDP, New York

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sources

- **BS:** Business Standard
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- **FE:** The Financial Express
- **FT:** Financial Times
- **GCR:** Global Competition Review
- **ILO:** International Law Office
- **TH:** The Hindu

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