REGULETTER

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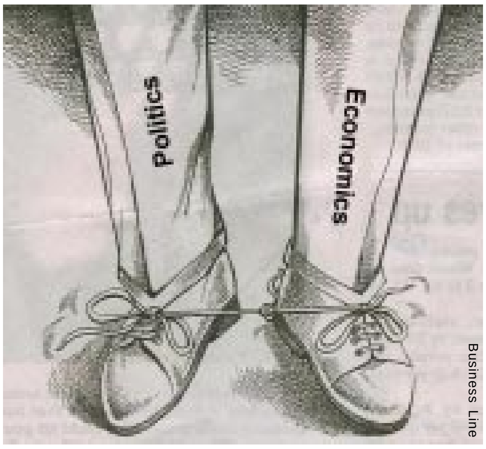
Politics Trumps Economics

In the past, most developing economies were characterised by significant government involvement marked by dominance of large state-owned enterprises (SOEs). Since the economic liberalisation started during 1980s and 1990s, there have been considerable policy changes, with increased reliance on market forces. Along with policy changes, several developing and transition economies have adopted competition laws as a follow up to their market oriented economic reforms. Additionally, most of these countries have adopted regulatory laws in several sectors, opened up for private players, which were hitherto reserved for public sector only. This upsurge in interest in competition and regulatory laws in developing economies reflects the substantial changes that have been taking place in their economic governance system.



But, how important has this new form of economic governance been for growth and other developmental objectives? The answer to this question is unfortunately patchy. China, for instance, approved a competition law in June 2006, almost 30 years after it began economic reforms, yet the country has moved at extraordinary speed from low to middle-income status. Neither of the two major success stories on growth about Botswana and Mauritius, had a formal competition law until the latter passed its Competition Act in April 2003. By comparison, Kenya passed the Restrictive Trade Practice, Monopolies and Price Control Act in 1989 but has been nowhere near the same economic success.

Existing evidence suggests that other dimensions of governance, such as government's commitment to growth as a political objective and overall political climate in a country, may matter much more.

'Political will' turns out to be a key factor that determines successful adoption and effective implementation of competition and regulatory laws. In Malawi, although the government claimed to support competition, the enactment of relevant laws was not followed with the establishment of institutions. It took the country eight years to establish the Competition Commission! Worse, in Bangladesh, the Monopolies and Restrictive Trade Practices Ordinance remains on the legislative books, but neither the government nor the private sector has apparently attempted in earnest to invoke this law.

In Zambia, the political will to get rid of the financially drained SOEs overshadowed other economic priorities. The focus appeared uni-dimensional as the government appeared to be in a hurry in privatising the SOEs without bothering to put in place concurrent laws, required to monitor, control and prohibit anti-competitive practices. Though the Competition and Fair Trading Act was passed in May 1994 following donor insistence, the competition authority itself was operationalised only in May 1997. In contrast, it took only a few months to draft and enact the Privatisation Act, as well as to establish the Zambia Privatisation Agency!

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Functioning of regulatory regimes in telecom and banking sectors in Vietnam provides an interesting insight. In banking, the functioning of central bank has been constrained by government intervention in various ways. In contrast, functioning of the Ministry of Posts and Telematics (MPT, also the telecom sector regulator) has done wonders. In telecom, government objectives are clearly laid down in various government documents, which have provided necessary guidance for MPT to facilitate orderly growth of telecom services. However, in banking, there are conflicts in policy objectives – objectives of government are at variance from the goals set for the State Bank of Vietnam.

Political will to create a strong regulatory agency from the outset is crucial for future success, as a strong regulator will be able to balance the demands of various interest groups, among other challenges. Unfortunately, in most cases, the state may try to further its interests by creating a weak regulatory institution over which it can continue to exert control.

Since regulatory reforms are largely concentrated in public utilities where there is a strong public interest factor, and therefore political sensitivity to both policy reforms and to regulatory practice, it is difficult to envisage how regulatory reforms would be insulated from overriding political considerations. It appears to be a matter of 'Common Practice' that a regulator is made to consider public interest in its decision making process. The inherent conflict between the objectives of economic efficiency and public interest often leads to situations of trade-off, which are politically quite sensitive.

In South Africa, competition law explicitly includes public interest objectives alongside efficiency objectives. Anyhow, the number of cases where public interest considerations have made a material difference is small. Interestingly, the most important issue is that explicit inclusion of public interest objectives has raised the profile of these policy imperatives, which seek to ensure policy coherence across diverse policy areas. In addition their inclusion has put these issues on the agenda of firms.

Nonetheless, governance challenges are likely to arise when competition authorities assess explicit non-competition criteria without transparent processes for doing so. In such cases, administrative discretion in interpreting concepts such as 'fair' competition is often the starting point for corruption in developing countries.

One needs to acknowledge and appreciate that a democratic set up requires politicians and their parties to win elections to reach to policy-making positions. Therefore, they must satisfy aspirations of their electorates whom they have to go back, at intervals, to seek a fresh mandate. Reasons for politicians not allowing implementation of competition principles are well known (e.g. fear of losing certain powers, which they had been using to satisfy certain vested interests). However, little efforts have been made to identify potential gains for politicians out of promoting competition measures i.e. how competition regime outcomes could help them retain/enhance their public image/support-base.

Implementation of competition and regulatory laws also faces roadblocks in the form of opposition from various constituencies. Even those who are expected to benefit from open markets and competition, in particular consumers and new businesses are reluctant towards reforms.

Civil servants are closely defensive of their acquired rights and consider competition/regulatory law as an attempt to reduce their existing prerogatives. They usually oppose, or extend lukewarm response towards market-oriented economic reforms. Moreover, bureaucracy tends to perpetuate itself in regulatory roles, for which it may not have the necessary acumen.

Business and their associations generally oppose competition regimes as they feel that it would reduce their market share and hence business profits. Hence, adoption and implementation of competition regime may easily be captured or sidelined by powerful vested interests.

Rampant political capture is another principal obstacle to the creation of effective competition and regulatory regimes in developing countries. Competition law may covertly protect politically well-connected companies from 'fair' competitive forces, guaranteeing monopoly rents without efforts to innovate. Garnering support from such players is essential to ensure effectiveness of regulatory reforms. A government that is committed to competition law, and any regulator that is entrusted with the task of enforcing that law, must not only direct advocacy efforts towards consumers, but also towards the influential industry participants.

In most developing countries, competition and regulatory laws are entirely new concepts. In several cases, such laws have been adopted due to external pressure (e.g. Zambia Competition Act). Consequently, very few officials in the public service and political establishment appear to have understood what the new regime means and what it takes to have a well functioning regulator.

Implementing economic reforms in developing countries becomes quite a challenging task due to lack of rule of law and property rights, weak judicial institutions, and ineffective or non-existent commercial codes and bankruptcy laws.

At present, most developing countries have passed the stage of contemplating whether they would want to have a competition or regulatory law or not, and have reached the stage where the debate is on how to structure their laws, and how best to implement an effective enforcement regime within given constraints. The CUTS Competition, Regulation and Development Research Forum (CDRF) is an initiative in this direction to stimulate research and deliberations on such issues and identify better solutions, suitable to the requirements of developing countries.

(*For more please visit:* **www.circ.in/cdrfsymp.htm**)

Bill to Punish Monopolies

A bill seeking to punish trade monopolies to protect consumers from price manipulation has been filed in the Filipino Senate.

The bill proposes to penalise attempts to monopolise an industry or line of commerce, manipulation of prices of commodities, asset acquisition and interlocking corporate bodies and price discrimination among consumers.

The Senate notes that the people have long been victims of big business and the state should regulate or prohibit monopolies when the public interest so requires.

The Senate emphasised the need to pass a new and sophisticated law to effectively address "the increased deviousness and complexity of schemes in perpetuating monopolies in the free market landscape".

(The Manila Times, 20.12.06)

Regulator Seeks More Power

The Korea Fair Trade Commission (KFTC) has demanded for permanent rights to seek financial and other information from companies under suspicion, especially conglomerates.

The Commission stated that it has completed negotiations with other government agencies for this purpose and will ask the Assembly to revise the laws on regulating monopolies and fair trade.

The draft bill would increase the agency's legislated investigative authority and extend its existing authority indefinitely.

If the bill were approved, the committee would also be able to seal data or storage areas containing information it believes it needs. A company that refused or hindered an investigation would be fined. The Commission has further demanded for powers to lower penalties on companies that turn themselves in for violations.

(JoongAng Daily, 17.12.06)

Check on Overseas Monopolies

The National Development and Reform Commission (NDRC) of China has highlighted the need to combat overseas-controlled monopolies that could threaten 'national economic security'.

The warning reflects concerns among Chinese officials that foreign companies are gaining economic influence in excess.

Beijing views outside investment as vital to introduce advanced technology and modern management practices to the economy but NDRC opines that local government have failed to focus on the quality of foreign funding.

NDRC says that in some industries, increasing numbers of leading enterprises are being acquired by foreign investment: in some sectors there are foreign-invested monopolies or signs of the rapid creation of the monopolies, which may pose threat to national economic security, particularly industrial security *(BS, 13.11.06)*

Regulation for Fair Prices

Argentina had changed the way it dealt with countries with non-market economies in dumping investigations.

In non-market economy, prices do not respond directly to supply and demand and can be subject to the intervention of the government.

Accordingly, a new regulation came into force in September 2006, to assess the fair value of a product exported from a non-market economy. The mechanism explains when prices from a third country will be used to caliberate a 'fair price'.

Under the new regulation, a fair price for goods exported from a non-market economy would be determined in three ways: first, to sell price in that country; second, the price charged by that third country to other countries; and third, the reconstructed price in third country.

If none of these are possible, a reasonable price should be calculated using the price paid in Argentina for a similar product.

(www.latinlawyer.com, 05.10.06)

Reigning in Media

The Ministry of Information and Broadcasting in India is considering the need to enact new legislation to regulate the operation of broadcasting services in the country. For this purpose, the Ministry has proposed a draft Broadcasting Services Regulation Bill.

Among other proposals, the Bill provides for the regulation of broadcasting services in a fair, objective and competitive manner. It further proposes to establish an independent authority – the Broadcast Regulatory Authority of India – to regulate and facilitate the development of broadcasting services in India.

Under the Bill, the central government shall be authorised to prescribe eligibility conditions and restrictions with regard to the accumulation of interests in the print and broadcast sections to prevent monopolies across different segments of the media in order to ensure diversity of news and views. *(ILO, 30.11.06)*

Superintendency Competition

The new Competition Law of El Salvador prompts for the creation of a new public entity called the Competition Superintendency to increase economic efficiency, consumer welfare and commercial stability.

The proposed competition regulator would be an independent authority, exercising its powers to promote, protect and guarantee free competition by preventing and eliminating practices, which limit or restrict competitive commercial activity or impede an economic agent's access to the Salvadoran market.

www.google.com

The introduction and effective enforcement of the Law is expected to improve commercial conditions in El Salvador, by offering greater guarantees for foreign investors and ensuring the benefits of competition.

(ILO, 26.10.06)

Economic Nationalism/Populism


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Traditionally, energy sector has been concentrated under the government's control. This could be mainly attributed to the importance of the sector for any country's economic, political and social development. However, over the past few years, rising trend towards market-based structures and demand for competition has necessitated deregulation and liberalisation of its market across the globe.

Instead of opening markets, economies have been observed to indulge in erecting barriers to cross-border mergers and acquisitions (M&As) thus violating market liberalisation commitments. The most prominent instances of resurgent economic nationalism have been observed in Europe where the EU member states have continued to ring-fence their national energy companies despite supporting, in principle, plans to liberalise and deregulate its energy market fully by 2010. New anti-takeover laws, politically engineered corporate mergers of domestic firms, and populist appeals to national security or economic patriotism have severely undermined the efforts to form a single, competitive and well functioning European energy market.

In this context, Suez-GDF alliance has been quite revealing. The French Government reportedly orchestrated a quick merger of Suez and state-controlled Gaz de France (GDF) just to fend off a potential takeover of state-owned utility, GDF by Enel of Italy. It also passed a new decree giving the government the right to veto or impose conditions on foreign takeovers in 11 "sensitive" sectors. In another instance, Spain has been attempting to prevent a hostile takeover of its gas utility Endesa SA by the German electricity and gas utility Eon from quite some time now. It went on to state that Madrid will do everything in its power to ensure that Spain's energy companies remain Spanish. Likewise, Russian state owned gas utility, Gazprom's resistance to liberalise access to gas pipelines to other countries and independent producers posed another major hurdle in the implementation of EU's liberalisation plans.

Going west, in Latin America, there has been a growing opposition to privatisation and adoption of populist policies like those in Europe. Consequently, there has been an increase in instances of re-nationalisation of Latin American oil and gas utilities. In Argentina, for example, the government has adopted populist policies in the energy sector since the 2001 economic crisis and even created a new state energy company – Energía Argentina SA (Enarsa). Venezuela also increased its grip on the oil industry and confiscated oil field operations of Eni and Total. At the same time, Ecuador too had changed its oil contracts. Of late, in a move that stirred the region, Bolivia decided to bring its energy production under state control.

Although liberalisation is taking place, more than implementation of legislation, permanent structural changes, stronger regulators, enhanced co-ordination and increased transparency are required to achieve liberalisation at the fullest. On one hand, EU is struggling to cope up with implementation of its liberalisation plans, Latin American countries have been embarking on a path leading to re-nationalisation of the continent's energy resources, on the other thus taking control of large gas reserves from multinational energy corporations. What emerges is the need to seek right balance between the companies' (business) interest and the country's interest. An imbalance in either case, would lead to an ultimate loss for the latter.

Information in this article has been collated from a host of websites and news papers.

Yearly Digest

Revisiting Competition Laws

Of late, an increasing number of countries have started realising that anti-monopoly law is an important legislation aimed at protecting fair competition, preventing and checking monopolistic behaviour, and maintaining an orderly marketplace.

The year 2006 witnessed enactment of new competition laws in several countries. Among the prominent ones include Russia, which passed a new competition law providing the country's antitrust authority sharper weapons against monopolies. Next in line was China, which discussed and approved, in principle, a draft of anti-monopoly law that provides for banning monopoly-oriented agreement, forbidding abuse of dominance in the market, as well as ensuring investigation and prosecution of monopolistic practices.

Going by the global trend, a law, which will curb unfair business practices and promote growth and competitiveness of local companies, is expected to be tabled soon in the Malaysian Parliament this year (2007). Likewise, a new Cartel Act came into force in Austria, which provides for not only punishing members of a cartel with high fines, but also rewarding those members of a cartel who 'blow the whistle' before the authorities know about the cartel.

Source: ReguLetter Issues: March, June & September 2006,
To access the above issues, please visit: ***www.cuts-international.org/Reguletter-index.htm***

Cartel Probe

Mexico's Federal Competition Commission has launched a cartel investigation against railroad companies – Ferrosur and Ferromex.

The cartel probe comes at a juncture when the Mexican Congress approved significant amendments to the Competition Law on mergers, administrative procedures, leniency and monopolistic practices.

The amendments include a provision to increase cartel fines up to 400 percent. If found guilty, the new rule would imply that the companies face fines totalling US$62mn.

Earlier, the antitrust watchdog had blocked the US$300bn merger, stating that the intended merger would create a company in control of over half of Mexico's rail market.

The Commission found that alternative forms of transport, such as trucking would provide insufficient competition to the combined company.

(GCR, 11.10.06)

Salt Cartel Fined

The Portugal Competition Authority imposed a fine of US$1.18mn on four undertakings – Vatel, Salexpor, Vitasal and Salmex – for their alleged involvement in a cartel in the salt sector, deemed to have been active for eight years from 1997-2005.

The collusive agreement entered into by four firms established that regardless of the changes in the salt market, they would not alter their respective market shares.

It also specified that if a member of the cartel exceeded its agreed market share, it would be required to compensate other members. This compensation is either by payment or by means of orders placed by the undertaking, thus re-establishing the market shares originally agreed.

In order to maintain market share freeze, the cartel members exchanged information on sales volumes on a monthly basis, allowing them to monitor each other's compliance with the agreement. *(ILO, 19.10.06)*

Unfair Business Practices

A complaint alleging unfair business practices has been filed against the Singapore's *Temasek* Holdings at the Indonesian Business Competition Supervisory Commission.

Temasek has been alleged for fixing unreasonably high phone rates in Indonesia's telecommunications sector and blocking a new entrant, Bakrie Telecom.

Temasek owns a combined 76 percent share of PT Telkomsel and Indosat – two main cellular phone operators – which dominate 80 percent of the GSM cellular phone market in Indonesia.

Experts opine that the consumers were being denied access to inexpensive telephone tariffs because of the 'unfair business practices' of *Temasek*.

(www.asiamedia.ucla.edu, 20.10.06)

Investigating Price Rigging

The Energy Regulatory Commission (ERC) in Philippines has formed a committee to investigate the alleged price rigging at the Wholesale Electricity Spot Market (WESM), run by the Philippine Electricity Market Corporation (PEMC).

In this context, ERC has ordered the PEMC to submit documents and information relevant to the alleged price fixing by state-run Power Sector Assets and Liabilities Management Corporation.

The investigating committee is expected to pass a resolution on the WESM controversy by January 2007.

Besides, ERC would soon convene a tripartite committee, which includes PEMC and the Department of Energy, to discuss additional safeguards to avert market manipulation.

(The Manila Times, 13.12.06)

Fixing Price Fixers

Regulators in South Korea, Japan and US have launched an investigation amid allegations of price fixing by world's leading manufacturers of Liquid Crsytal Display (LCD) panels – Samsung Electronics, LG Philips and AU Optronics for 'possible anti-competitive conduct'.

The purpose of this investigation is to asceratin whether there is evidence of a cartel agreement concerning price-fixing for these products.

According to analysts, the investigation could hamper LCD makers' efforts to cut output and ease oversupply. The probe comes as a fresh blow to an industry already struggling to cope up with falling prices and oversupply. *(FT, 13.12.06)*

Petrochemical Cartel Unveiled

Pursuant to a probe into petrochemical companies, KFTC has discovered that about 10 petrochemical companies have colluded to rig prices and turn profits unfairly for more than two decades.

The probe also unearthed that the companies have rigged prices of synthetic resin products, including polyethylene since the late 1970s. The companies have been accused of driving up the prices of petrochemical products during times when the international prices of oil have spiked, but refraining from lowering the prices when the oil prices fell.

Also, the petrochemical firms are charged with adjusting the amount of their supply to manipulate prices.

(JoongAng Daily, 19.11.06)

Penalty for Tacit Agreement

The Competition Council of Latvia has busted a cartel by two energy sector companies who exchanged information. The financial proposal of one applicant was found to be available to the other applicant. The Council busted the cartel when the duo submitted identical proposals against a tender announced by Latvenergo, a state-owned electricity company.

The Council concluded that the competitor companies had coordinated their tender offers with the purpose of participating in the bidding and that the aim of the applicants' tacit agreement was to create conditions that did not correspond to normal market practices.

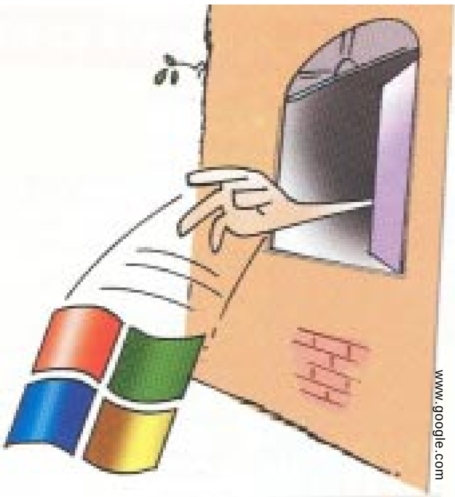
After finding the competitors' activities, the Council imposed a fine of one percent of each company's net sales for 2005 as penalty. *(ILO, 23.11.06)*

Microsoft: Much to Deal With

Enjoying monopoly in PC operating systems, Microsoft has been seeing troubled times for quite sometime. Over last one and a half decade, Microsoft has been involved in lawsuits by several governments for unlawful monopolistic practices and has spent billions of dollars on out of court settlements in countries where it had been charged for such practices.

Despite the decade long entanglement, not much seems to be moving in the right direction in developing world, albeit countries in the region, especially India and China constitute a large market for Microsoft. In Brazil, apart from the two cases there has not been any major antitrust complaint against the software giant. However, in Peru and India, Microsoft has been accused of edging out competition via political connections and use of donations to secure a dominant place in the market.

The moot questions are: would the complaints receive similar attention or compliance by Microsoft if they were raised in a country that is not large, resourceful and influential? Could such a country muster enough courage to charge Microsoft with monopolistic behaviour in the domestic markets?



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The experience of South Korea is quite revealing in this regard. When the KFTC was considering a bundling case against Microsoft, the software giant threatened to withdraw its Operating System (OS) completely from the country. However, the move was not initiated, as it would have been a greater loss to Microsoft itself. But a similar move might have been possible if the country in question did not wield as much economic power as South Korea.

To combat such anti-competitive threats, an increased use of open-source software instead of proprietary software like MS Windows is being recommended these days, particularly in developing economies. , For example, collaboration is being worked out between countries like China, Japan and South Korea to encourage Linux, which is an open source software. Likewise, Kerala (India) has taken to Open Source/Free Software for some of its e-education and e-government projects.

Busting Cartels

Cartels could be defined as groups of producers, who get together to decide the price at which they would sell their product or decide the market share and production quota of each participant. Such clandestine decision on production quota and price decision are different from those, which are determined by the market forces of demand and supply.

In principle, cartel formation has been one of the main sources of reducing competition in the market: it affects both consumers and producers. The producers are affected because their entry into the international markets gets restricted through practices like imposition of tariffs or quotas or patent pooling, while the increased price and lower product choice due to lesser competition affects the consumers.

In developed countries, rigorous efforts are being made to combat cartel formation through strict imposition of laws aided with severe fines. Besides, special provisions in the form of leniency have been introduced to protect and promote whistle-blowers, the members of the cartel who opt for disclosing the internal information of the cartel. As cartels form and operate in secret environs it is difficult to identify and penalise them.

Also, cartels have been found to exist in a variety of markets i.e. not only the high-end product markets like energy, fuel and steel, but also in basic foods and services industry like salt, trucks and cement.

In developing countries, initiatives to bust cartels are lacking despite their serious effects – both at the level of the government as well as citizens. Recent events in the Indian cement industry may be a case in point. Pursuant to the increasing cement price, which had gone up by more than 50 percent with an increase of only 15 percent in the input prices coupled with a steadily rising demand, several requests were made to the government to bust a possible cement cartel in operation in the country. The cartel was supposed to exist among the 5-7 main cement producers. Responding to these demands, the government asked the cement companies to reduce their prices. In response, the companies offered a reduced price to the cement supply of the central government leaving the market prices unaffected.

Instances like these abound in developing countries because the absence of competition regulations allows anti-competitive practices flourish unhindered. As remedial measure, countries should increase awareness as well as research activities on cartels. For example, when the US Department of Justice penalised the Lysine Cartel, the Mexican Government took action against the same cartel after identification of anti-competitive behaviour.

Many cases in US and EU had come to fore due to petitions by the consumers. An increased awareness with supportive legal institutions would give an impetus to similar movements in the developing countries as well.

Mini Gupta, CUTS CCIER Intern

Wal-Mart's Big Deal

Retail behemoth Wal-Mart Stores is all set to buy a Chinese hypermarket group against US$1bn in a deal that would make it the leading chain in China.

According to sources, the US giant agreed to purchase the Chinese hypermarkets of Taiwanese-owned group Trust-Mart with 100 super centres in China.

If approved, the acquisition would make Wal-Mart the largest foreign retailer in China, giving it more access to China's 1.3 billion consumers and an opportunity to expand into more than 20 Chinese provinces.

Presently, no other market is as enticing as China, where booming consumer spending is led by a growing middle class, which account for one-third of the country's economic growth.

Given this, Wal-Mart is keen for a bigger slice of Chinese market as it battles sluggish sales growth at home, lawsuits over its labour practices and an image for brutal cost-cutting at the expense of employees and suppliers. *(ET, 18.10..06)*

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Biggest Offshore Operator

Norway's two national oil companies – Statoil and Hydro – are all set to merge into a new entity in a deal that is being seen as a response to the problems of rising costs and political instability faced by international oil companies.

The deal is expected to be the third biggest merger in the oil and gas sector this decade and would create the world's biggest offshore operator.

Official sources believe that the deal would start a new era by creating a global energy company that would strengthen Norway's oil and gas industry.

Further, the merger would create a more forceful and competitive company that is being seen by the Norwegian Government as industrially and strategically well founded.

Industry experts opine that the merged company would be able to pursue opportunities in growth areas such as the deepwater Gulf of Mexico and offshore Angola in a better way.

(FT, 19.12.06)

Banking Consolidation

Two of the largest cooperative banks in Italy – *Banca Popolare Italiana* and *Banco Popolare di Verona e Novara* – have agreed to team up in a US$10bn deal. The deal is considered to be a major step towards the consolidation of Italy's fragmented bank sector.

The merger of the two banks will make the resulting institution, Italy's largest and eurozone's (EU member states which have adopted Euro) fourth largest bank.

Italian banking circles suggest that this could be the start of a major reshuffle in the country's banking sector. Experts also opine that this could lead to the beginning of a consolidation wave in the European banking sector as well.

The merger comes after certain Italian banks were taken over by European giants, raising the competitive pressures in the country's bank sector. Italy is one of the eurozone's most lucrative banking markets. *(FT, 06.10.06)*

Palm Oil Tie up

In a bid to bolster output of palm oil, Malaysian Government plans to combine the plantation assets of Sime Darby, Kumpulan Guthrie and Golden Hope Plantations Bhd, creating the world's biggest listed palm oil producer.

The combined assets would be part of *Permodalan Nasional Bhd*, Malaysia's state-run asset manager. According to official sources, the objective of the proposed merger is to consolidate activities under one group.

The enlarged group would benefit from cost savings and economies of scale. The new company will pass Malaysia's IOI Corp as the top listed maker of the commodity. *(BL, 25.11.06)*

Cementing Concrete Merger

Mexican cement manufacturer, Cemex, proposes to acquire Rinker, the Australian building material company in a deal worth US$12.8bn.

This deal is considered to be the largest acquisition in the building material industry. The acquisition of Rinker is the latest move in Cemex's strategy to expand through international acquisition, which is already having presence over 50 countries.

If approved, the Cemex-Rinker combination would create the world's largest supplier of aggregate for concrete construction. The deal would also be the biggest takeover in Australian corporate history.

The deal is expected to increase Cemex's dominance in US cement as 80 percent of Rinker's earnings come from US. It opens the door in Australia and gives it a foothold in China, where Rinker has four plants.

(ET, 28.08.06)

Google Goes for Enormous Deal

In an enormous deal Google, world's largest user generated website has acquired YouTube, world's largest video advertising network for US$1.65bn in stocks. This is the highest price ever paid for a consumer generated media site.

The two companies will however continue to operate independently. By joining forces with Google, YouTube hopes to benefit from Google's global reach and technology leadership to deliver a more comprehensive entertainment experience for users.

(ET, 11.08.06)

Consolidation 2006: A Dramatic Upturn

A raft of hostile bids made 2006 the biggest year for M&As, with approximately 355 deals worth US$3,900bn. The key drivers fuelling M&A activities during 2006 were cheap debt, ambitious chief executives, hunger for growth, entry by new players into markets, establishment of leadership positions by existing players, extension of domain knowledge by acquisition of know-how and the potential to enter the fast, liberalising markets across the globe etc. Growing competitive pressure acted upon as another key catalyst for a surge in the M&A activities. This article highlights the key M&A developments in 2006 marking the pharmaceuticals, telecommunications, mining and retailing sectors.

A Prescription That Works Well

In 2006, corporates across the globe have looked outside home markets for deals, thus pushing cross-border acquisitions to higher altitudes. The pharma sector, in particular, has witnessed an unprecedented rise in cross-border deals, primarily in the generics space with EU being a preferred market. The growth is attributable to loss of patent protection to a host of drugs over the past few years, which has intensified the consolidation efforts in the sector with plethora of companies opting for M&As. Actavis and Pliva, earlier rivals from Iceland and Croatia respectively, finalised a deal to form the third largest company in the generics business sector. Zydus Cadila and Ranbaxy Laboratories Ltd also entered into important contracts with companies in France and Belgium.

Altered Telecom Landscape

In the telecommunication sector, a high level consolidation activity marked 2006 as well with significant mergers taking place throughout the year. Alcatel (France) and Lucent Technologies (US) merged to create global telecommunications giant. Approval was also granted to the merger between AT&T and BellSouth. The new company would be US' largest phone company, cell-phone carrier as well as the largest provider of broadband Internet service. In acquisitions, Africa's biggest mobile phone operator MTN Group agreed to buy Investcom (Dubai) significantly expanding the company's hold in Middle East and Africa which offers massive growth potential due to low mobile penetration and high demand with little competition from fixed-line

operators.

In Venezuela, Digitel merged with Digicel, Infonet and Digitel Cellular. The move is expected to increase competition in Venezuela and reduce interconnection and roaming costs. The transportation sector in Brazil hopes to make a shift to a modern railroad system with America Latina Logistica acquiring two railroad companies in the country thereby creating the largest logistics company in Latin America.

Mining M&A Bonanza

The mining industry that was anaemic just three years ago saw a stunning turnaround during the year 2006. The total value of M&As in the mining sector exceeded a record US$100bn during the year. The Freeport-McMoRan takeover of Phelps Dodge, Xstratas takeover of Falconbridge, CVRD's purchase of Inco, and Goldcorp's takeover of Glamis Gold have been among the largest deals this year in the sector. Soaring base and precious metals prices have been the main drivers of the activity. In addition, prices have been pushed up by a combination of strong demand from China and India, and supply constraints within the mining industry. Companies have found it easier to acquire assets rather than build new mines from scratch. The sector has in particular witnessed rising level of merger activity among the smaller exploration and medium-sized mining companies.

Retail Consolidation

The year 2006 was also marked with a surge in M&A activity in the retail sector. This has been attributed to strong economic expansion, rapidly increasing middle class consumers, sluggish and mature home markets etc. In December 2006, the Home Depot announced its acquisition of the Home Way, the Chinese home improvement retailer. The acquisition gave Home Depot an immediate presence in China, with 12 stores in six cities. Russian retailers Pyaterochka and Perekryostok merged to form the country's biggest supermarket chain. The deal marked the emergence of the Russian retail sector as an arena for M&A activities, which were previously dominated by oil, gas and telecommunications. In US, Albertson took over Supervalu, a discount food retailer and wholesaler company. The transaction would triple the size of Albertson and make it the second largest in the country after Kroger Company. Interestingly, all these companies acquired existing outlets instead of building their own stores, as this may risk overpaying for assets.

Conclusion

Year 2006, has seen record levels of M&A activities with strategic buyers continuing to drive industry consolidation and broadening their geographical and commodity horizons. In 2007, the trend seems to continue and significant M&A activities are expected in auto ancillaries, domestic retail, real estate, hospitality, oil and gas and the financial services segments.

(Sources: The Financial Times, December 2006 and ReguLetter Issues: March, June & September 2006
To access the above issues, please visit: http://www.cuts-international.org/Reguletter-index.htm)

Corporate Bribe Payers

According to the EU's anti-fraud arm, companies from France, Italy and Germany have been fined US$5.6mn for paying bribes to win contracts in a dam project in Lesotho.

Details of the case were published amid new evidence that some western companies are among the worst bribe payers in developing countries. This is likely to increase pressure on multinationals to introduce global policies banning illicit payments.

The Bribe Payers Index (BPI) of 30 leading export nations, published by Transparency International also pointed to French and Italian companies as having severe double standards.

The worst bribe payers were companies from the emerging markets of India, China and Russia, according to BPI, based on the perceptions of 11,000 business people interviewed in 125 countries. *(FT, 06.10.06)*

Simplified CSR Guidelines

In an attempt to encourage companies to report on their environmental and social impacts, guidelines considered as benchmark for corporate social responsibility (CSR) are being simplified as reported by the Global Reporting Initiative (GRI).

According to sources, the framework included for the first time an "entry-level" option, that provided businesses to choose to report on a limited number of issues, rather than all aspects of sustainable policy.

This follows concern that interest in non-financial reporting could otherwise be limited to a handful of multinationals.

The approach will benefit small and medium-sized enterprises (SMEs) that have cited the complexity of existing guidelines as a barrier to non-financial reporting. *(FT, 06.12.06)*

The Forbidden Call

General Electric's Japanese consumer finance unit is facing possible penalties after being accused of breaching strict rules on debt collection.

GE Consumer Finance (GECF) is the first foreign consumer finance group in Japan to be penalised by Japan's Financial Services Agency (FSA) as part of a crackdown on consumer finance groups.

The FSA has told GECF that the company breached Japan's money lending law by calling a borrower at his workplace. Japanese law forbids debt collectors from calling people either at their workplace or late at night if the borrowers have made it clear they object.

GECF has acknowledged the breach, saying it was due to a failure of internal communications.

The company faces penalties ranging from a few days' suspension of business at the offending branch office to a wider suspension involving offices throughout Japan. *(FT, 19.10.06)*

Degree of Engagement

According to the International Corporate Governance Network (ICGN), an important difference between the regulatory reforms process in US and UK is the degree of engagement with the shareholders in the two countries.

The reason UK regulators can use a 'comply or explain' approach to corporate governance is that shareholders are in a position to do something about explanations they do not like. Whereas US shareholers' resolutions are advisory only and apart from their rights to sue or sell, they are not in a position to protect their interests.

ICGN holds that UK shareholders have a formidable set of powers and they are in a position to remove directors, put forward candidates, present potentially binding resolutions and even convene meetings of the company.

The debate on US regulatory reform asks to include those shareholders calling for the rights to protect themselves directly, through holding directors accountable, rather than simply relying on more costly, time consuming and uncertain process of litigation. *(FT, 24.10.06)*

Coke to Counter Criticism

For years, Coke has faced a growing drumbeat of criticism over alleged mistreatment of its workers in Colombia, indiscriminate exploitation of water in arid parts of India and its role in the childhood obesity epidemic sweeping the developed world.

Though Coke boycotts in university campuses throughout North America and parts of Europe have had little impact on its sales, the barrage of negative headlines threatened to tarnish the soft drink giant's most valuable asset: its brand.

Coke had a reputation for obstinacy in the face of criticism. Examples included the Belgian contamination fiasco in 1999, when the company took a week to accept responsibility for a wave of sickness.

Now the company has initiated efforts to bring greater transparency to its global operations to identify and tackle social and environmental risks, including a more constructive relationship with critics. *(FT, 21.10.06)*

How Coke is Tackling Reputation Risk

Allegation:	Turned a blind eye to anti-union violence in Colombia
Action:	Recruited a UN agency to inspect its Colombian operations and set up a business forum to solve the underlying problem.
Allegation:	Worsened water shortages around bottling plants in arid parts of India
Action:	Audited water usage at all its plants around the world to asses environmental and social impact
Allegation:	Contributes to childhood obesity
Action:	Agreed voluntary restriction on sales in schools
Allegations:	Prefers to shut down criticism rather than address issues
Action:	Engaged with NGOs and hired respected figures from labour and environmental fields to improve its performance on CSR issues

Whip on Corruption

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Rampant corruption has continued to plague developing countries and thus hampering the economic reform process. Weak corporate governance is considered to be the root cause of corruption.

As the remedial measure, several international agencies have come out with unique set of terms to curb the growing corruption. Of these, the new Organisation for Economic Cooperation and Development (OECD) guidelines and the World Bank's amnesty programme were the prominent ones in the year 2006. .

In a bid to crackdown on corruption by big companies operating in the developing world, the OECD has issued new rules, which prescribe that companies seeking export guarantees from rich country governments must in future declare whether any of their staff has been charged with or convicted of bribing foreign officials. For a consistent international approach to tackling overseas bribery, the OECD announcement came out amid growing criticism by anti-corruption campaigners and business people. Likewise, the World Bank has come up with a programme to offer conditional amnesty to companies that voluntarily admit to corrupt dealings on bank-funded projects. Under the terms of the new Voluntary Disclosure Programme, the Bank will not take any action against companies that come forward with information about past wrongdoings and will allow them to continue to take part in projects.

The companies that fail to come clean voluntarily but are caught after the investigations will be debarred from participating in future projects of the World Bank.

Double Environmental Standards

It is generally observed that transnational corporations (TNCs) maintain different environmental standards in their home and host countries.

Year 2006 has witnessed a number of such instances where TNCs were made to pay heavily for such double standards and for exercising flexibility to escape the environmental rules of the country wherein they operated.

In Nigeria, Europe's second largest oil company Royal Dutch Shell Plc was slapped a fine of US$1.5bn for causing damages to the Nigerian community by way of spreading pollution through its oil extraction activities in the country.

Likewise, Bolivia expelled Brazilian steel maker EBX from the country on the pretext that the company failed to secure environmental permission to build a US$148mn pig iron plant in Puerto Suarez.

Amidst allegations of causing severe environmental damages, Newmont, the US-based largest gold producer agreed to pay US$30mn as compensation to fund development activities for communities adversely affected by the company's mining works in Sulawesi, Indonesia.

Corporate Governance – Ups & Downs

With the growing realisation that a firm's corporate governance affects its economic performance considerably, corporate governance issues are receiving greater attention in both developed and developing countries

Numerous high-profile cases of corporate governance failures have attracted the attention of governments, companies and general public worldwide. Companies are under pressure to improve transparency in their corporate structures and business operations.

In fact, governments all over the world have been responding to the growing cause to strengthen corporate governance. In 2006, Columbia, China and Abu Dhabi initiated efforts to improve corporate governance standards as a means towards encouraging foreign investment, bringing in greater transparency and strengthening investor's trust.

Nigeria, for example, witnessed new codes of corporate governance for the country's banks, which dealt with the structure of the banks' board. Given the role of board in dealing with various business issues and challenges, the new norms assume significant bearing.

In another interesting instance, the Norwegian Government asked companies listed on Norway's stock exchange to ensure that women hold 40 percent seats in their board, else face closure.

Poor state of corporate governance, on the other hand, was reported in Korean *'chaebols'* when a series of corruption scandals surfaced.

Gang of Big Fours

Often referred to as the Big Four – PwC, Deloitte, KPMG and Ernst & Young – a group of international accountancy and professional services firms that handle a vast majority of audits for publicly traded companies as well as many private companies have come under severe pressure to divest some of their clients to small accounting firms.

The Association of British Insurers (ABI), which represents some of the UK's largest investors, stirred a controversy by proposing that the Big Four should shed clients, if they grow too big.

The Big Four in UK verify the accounts of 98 percent of the country's 350 largest companies. Regulators are aware of the stranglehold of the big four.

The ABI has called for heightened vigilance from competition authorities in the UK and the EU in this context

Implications of such vigilance are potentially profound as auditors play a critical role in verifying the information that companies feed to investors.

A possible destruction of either of these through a criminal indictment or negligence lawsuit may freeze the flow of data to the markets.

(Source: ReguLetter Issues: March, June and September 2006. To access the above issues, please visit: http://www.cuts-international.org/Reguletter-index.htm)

Indonesia Woos Investors

Indonesia is opening up 110 infrastructure projects valued at US$16.5bn to investors in an attempt to invigorate its sluggish economic recovery after years of crisis and poor management that triggered a collapse in investment.

Vested interests in the bureaucracy, rampant corruption, failure to create a more investment friendly climate by amending labour and tax laws, a messy decentralisation process and lack of legal certainty have been the main reasons for the prolonged inertia.

Indonesia has set three main strands to woo investors: first is to identify 120 regulations needed to ensure legal certainty and boost investor confidence; second focuses on 10 "model" projects valued at US$4.5bn; and third is to hold conference of the ministers every day for replying investors' queries.

(FT, 01.10.06)

Negotiating Flight

After a lengthy process by government to ensure successful private sector participation in Air Botswana the Cabinet of Botswana has given the Ministry of Works and Transport the go-ahead nod to begin negotiations with South Africa-based regional airline SA Airlink. For privatisation of Air Botswana, SA Airlink had submitted three formal bids.

The Public Enterprises Evaluation and Privatisation Agency (PEEPA), which has the authority to privatise Air Botswana on behalf of the Ministry, can examine SA Airlink's proposals, to see if a positive outcome of the negotiations can be reached.

The outcome of the negotiations will be submitted to Botswana Government in 2007, and if the talks are concluded favourably, and government approves the resulting recommendations, privatisation bid will be concluded by March 30, 2007.

(AllAfrica, 12.19.06)

Partial Privatisation

Viettel Mobile, Vietnam's mobile phone company – a subsidiary of the nation's military – is all set for a partial privatisation.

According to sources, it has received a licence to offer mobile telephone services in neighbouring Cambodia.

With a 30-year licence signed by the Cambodian Posts and Telecommunications Ministry, Viettel is allowed to provide voice, fax, data transfer, Internet, international phone and Wireless Application Protocol (WAP) services in addition to services using GSM technology in Cambodia.

Viettel Mobile, now the third-largest mobile phone provider in Vietnam, said that it would partially privatise its mobile phone activities with the military maintaining a 51 percent controlling stake.

(Manila Times, 06.12.06)

Selling Stakes

In order to rescue the ailing airline, the Italian Government will sell about half of its controlling stake in flag carrier Alitalia as part of its efforts to open it up to new owners. The government intends to keep some shares in the airline, but not the "golden" share.

The decision confirms Italy's intention to cede control over the unprofitable airline, which it believes had failed to adapt to the increasingly competitive European market due to its "Italianness".

The move is expected to help airline to infuse fresh capital and re-launch itself.

Alitalia on the other hand has blamed wildcat strikes, high oil prices, deregulation and competition from low-cost carriers, etc., for its various woes.

(ET. 02.12.06)

Bidding in Troubled Waters

The Philippine unit of investment group First Pacific and local construction group DMCI have won the bidding for Maynilad Water Services against US$503mn for 84 percent of the troubled water company.

For the first time, a privatised water venture, reacquired by the government after running into trouble, has been resold to private investors in such a short period of time.

Maynilad, a joint venture set up by the Philippine conglomerate Benpres Holdings and French utility group Suez in 1997, took over the water distribution system in the western part of Manila from the government

Unfortunately, the financial difficulties prevented Maynilad from performing its obligations consequent to which it came under state control again in June 2006.

However, the problem of Maynilad was with its finances, which needs new funding so that it can serve the consumers.

Bulk of the winning bidder's offer, which is payable over a period of 3 years, will be used to fund capital expenditure in upgrading distribution and pay off debts.

(FT, 06.12.06)

EU Opens the Post

The EU has come up with a proposal to open the postal market by 2009. The plan to abolish the monopolies in the EU's US$113bn market for postal services is considered as 'litmus test' for the region's commitment to open markets.

The proposal will end the monopoly of Germany's Deutsche Post and France's La Post in the co-called "reserved area" – the market for delivering mail weighing less than 50 gms, which was left intact in earlier liberalisation rounds.

Now the mail groups must offer postal services even in remote and thinly populated regions where it is hard to operate profitably. The proposal would give "more flexibility" to the EU Governments keen to allow new market entrants to operate directly or indirectly.

Postal groups in France have however opposed the plan, as they fear that full liberalisation would undermine their business and cost job.

(FT, 19.10.06)

Privatisation is no Panacea

Conflicting Political-Economy

Though privatisation has been a successful process in many developed nations, in the case of developing countries it has not brought as many benefits as it was expected to. The failure of privatisation policies has been blamed on several institutional failures, namely poor choice of industry/ enterprise and mode of privatisation, inappropriate selection of candidates due to patronage, and inadequate regulatory framework. The ability of the government to ensure successful privatisation programmes has by and large been argued to be circumscribed by the political context, specifically the available entrepreneurial capacity, social cost of bankruptcy and national importance of the enterprise. In fact, governments instead of being motivated by productive efficiency, make choices based on the their own interests. For example, in a right-wing setting, a vote bank driven government could sell shares to private citizens to gain more votes,while a private profit maximising government could disinvest to gain profits for itself. The choice of privatisation strategy has also been observed to be more important than privatisation itself.

From the modest beginnings in Margaret Thatcher's Britain and Augusto Pinochet's Chile a quarter of a century ago, privatisation has spread to several countries and sectors. Studies have found that, at least where competitive markets exist, privatisation improves productivity. It has been observed that of the three "generations" of privatisation i.e. privatisation of ordinary businesses, privatisation of utilities and privatisation of social services, privatising ordinary businesses has been relatively easier. But privatising the last two categories has been observed to be much more complicated. This could be attributed to the fact that privatisation of the latter two involves strong public interest factor, thus making it difficult to envisage how they might be insulated from overriding political considerations.

Privatisation: Going Badly Wrong

Over the time, economies have realised that privatisation may not always guarantee the same degree of success to each country. However it is not correct to blame privatisation *per se* for not being able to achieve better results. Critics often forget how bad services were before privatisation (for instance, in Argentina) or how difficult the circumstances were (for instance, in Russia). Nonetheless, experiments in various countries have suggested that the political environment in which privatisation is brought about decide to a large extent whether it would be successful or not. For instance, a strategy like voucher privatisation that worked well in Czechoslovakia did not suit Russia that was trying to avoid a return to communism after the fall of the Soviet Union.

Many privatisation processes were marred by political corruption. One of the worst sufferers being Mexico, which is still struggling to redeem some of its previously privatised sectors. The tailor made privatisation drive coupled with an absence of transparency allowed the bureaucracy to transfer the company to its favourite businessmen. The kind of regulatory framework the economy was able to provide to the reform process tarnished several other privatisation programmes. The Bangalore (India) Greenfield Airport project, for example has been delayed for more than seven years. Likewise, in Argentina, a lot was left to be resolved by market forces without providing any regulation, and the government is now facing pressure from citizens to renationalise public services.

Sometimes, countries while drawing lessons from privatisation experiences of other countries suffer setbacks. Taking Russia's lesson to heart, China decided to keep majority stakes in big businesses while it built market institutions and introduced market competition. But with ownership of assets unclear, strong incentive for asset-stripping, and controversy over acquisition of shares by management tended to surface, thus threatening the health of the entire economy.

Learning Lessons

In Russia and Argentina - two of the most enthusiastic privatisers of the 1990s - privatisation is now a dirty word. Mexico and the Czech Republic too view their privatisations as deeply flawed. Even developed countries are not immune to the negative repercussions of privatisation programmes. The UK has taken its railway network back into quasi-public ownership. Nonetheless, two broad lessons surface: firstly, there is always a risk of the gains of privatisation being captured by insiders: secondly, privatisation improves efficiency if reasonable competition and regulatory policies are in place.

Simply privatising an incumbent monopolist, as Mexico did with Telmex, only brings high prices and high profits. Roger Noll, an economist from the Stanford University argues that governments must decide whether they want to maximise privatisation receipts or improve economic efficiency. Governments privatising with minimum regulations may be able to make a lot of money, but if the objective is to enhance efficiency, then a regulatory apparatus should be created first and then privatisation should take place.

(The write-up has been developed based on information collated from FT Series: Lessons of Privatisation that appeared in the Financial Times, May 2005)

Law to Annul Exemption

Airline companies in Israel, long exempted from the country's competition law, may soon lose their safe haven. The possible annulment of the airlines' exemption comes in the form of the Budget Law for 2007.

If the new law is accepted, Israel's airlines will neither be able to enter freely into code-share agreements, nor will they be able to coordinate flight capacity, timetables or fares.

When Israeli antitrust policy was introduced in 1959, two markets enjoyed exemption from the law: domestic agriculture and international aviation and marine transport. In 1988, agriculture lost its exemption. But every attempt to annul the exemption failed, which experts attribute to lobbying by the airline industry. Annulling the exemption, however, will allow the enforcement agency to monitor arrangements in the market, which would increase competition.

(GCR, 21.12.06)

Sweeping Telecom Reforms

The National Communications Commission (NCC) of Taiwan announced to overhaul the entire communications regime to meet annual policy goals.

The reforms aim to encourage fair competition, strengthen communication users' rights, deregulate non-public telecommunications regulations and invite communications operators to share resources etc.

In all, 16 individual laws and regulations will be amended by a consolidation bill which will soon be reviewed by the Executive Yuan (the Cabinet) and then submitted to the Legislative Yuan (the Congress). The first phase of legislation will relax regulation further, albeit the existing frameworks for these rules will remain unchanged.

Incidentally, many existing telecommunications rules are either obsolete or full of loopholes.

(ILO, 01.11.06)

Rules to Safeguard Competition

Fiji's Commerce Commission has drafted amendments to national competition rules, clarifying its role in the country's telecom industry.

In a draft bill, the Commission has proposed to take responsibility for identifying the circumstances in which telecoms licencees acquire substantial market power.

The Commission intends to impose conditions, such as licence requirements on companies that do have substantial market power to safeguard competition.

Also, the Commission aims to check that telecoms networks are interconnected, allowing customers to call clients of rival operators.

Should the draft bill become a law, the customers will be able to access services from competing service providers, either on permanent terms or by making a call-by-call selection.

(GCR, 15.11.06)

Banks as Insurers?

The China Banking Regulatory Commission (CBRC) is deliberating the feasibility and prospect of allowing commercial banks to establish insurance companies.

For this, a regular communication mechanism has been established between the CHRC and the China Insurance Regulatory Commission, the country's insurance industry watchdog.

The banking regulator has warned against allowing the country's commercial banks to set up insurance companies, as combination of the two being a rare phenomenon.

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The CBRC has repeatedly expressed wariness about letting banks take on the role of insurers, as the business models of lenders and insurers are too different to be successful hybrids. *(HT, 24.12.06)*

Call for Transport Reforms

Turkey's bus companies have called for reforms in the national transportation rules and have sought the enforcement agency's help.

The bus operators blame anti-competitive legislation, which prevents them from offering large discounts to customers.

The call for reforms came after the bus operators tried to introduce a one Turkish Lira (US$0.00000071) fare to compete with an identical offer from the country's airline operators, to which it was informed that sectoral regulations limit discounts to a maximum of 20 percent.

The bus companies have accused the Turkish Bus Federation of supporting the restrictions on promotions and blame it for their inability to compete. *(ILO, 19.10.06)*

Twist in Tata's Tale

The South African Government is likely to deal a blow to the Tatas' telecom operations in the country.

It seeks to alter the licence conditions of Neotel, in which Tata is the largest shareholder with a 51 percent stake, and wants the company to share its infrastructure with other telcos in South Africa.

The Tatas had acquired a 26 percent stake in InfraCo, a newly-formed company that had bought the telecom fibres of public sector companies for making these networks exclusively available for Neotel.

However, the proposed change in Neotel's licence conditions will mean that InfraCo's infrastructure will be shared by all telecom operators, which is a set back for the Tatas.

(ET, 03.11.06)

Unusual Power Allocation

Germany's Federal Cartel Office will soon have the power to regulate the country's electricity market.

The new law will give the Office a scope for encouraging competition. For example, it will provide easier access to the electricity grid for new market entrants.

With the new legislation, the Office would be able to scrutinise prices on an unusually strict benchmark and cost-based approach, unlike the recent trend of abolishing sector-specific rules.

The German association of power producers has however rejected the proposals, saying that they are "a violation of the principles of competition.

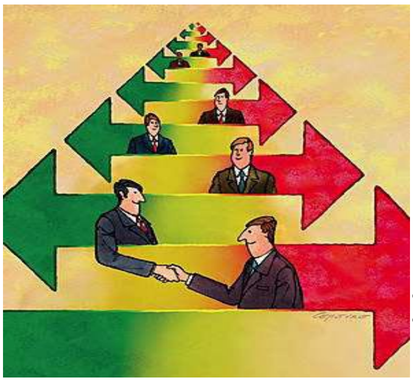
(GCR, 04.12.06)

The Key to Successful Regulatory Reform

A shift towards market-oriented economy does not always mean that the 'invisible hand' will work on its own to allocate resources efficiently and produce competitive outcomes. Potential benefits often tend to be thwarted by market-distortionary practices such as restrictive trade practices, mergers, provisions to deal with abuse of dominance, cartels etc. To check such anti-market behaviours, many developing economies adopted competition and regulatory laws. But when it comes to effective enforcement of competition and regulatory laws, developing countries often confront transcendental challenges that relate to regulatory objectives, independence, accountability, interface with competition authority, decision making process, selection and staffing. It has been observed that developing country governments have established or are establishing regulatory agencies, which are mostly inspired by industrial countries model rather than their specific national context.

Framing Regulatory Policies

Separation of policy-making, regulation and operation functions is an important aspect of regulatory reform: the three functions are often interlinked and separation of the three is seldom effected in true sense. The most prominent being cases where an independent regulator has been set up, but is made to report to a line ministry, which also manages SOEs. Another case arises where regulatory body has been set up within line ministry that also manages SOEs. These raise conflict of interest issues. In this context, the regulatory framework of Zambia presents a good example, where responsibility for water supply and sanitation service provision is under the Ministry of Local Government and Housing. In order to follow the principle of separating policy making



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and regulation functions, the regulator, i.e. National Water Supply and Sanitation Council is made to report to Government through the Ministry of Energy and Water Development, which is water sector's "line" ministry.

The practice followed by Electricity Authority of Cambodia (EAC) is worth considering when it comes to ambiguity over clear-cut distinction between policy and regulation matter. The standard arrangement post-regulatory reform is to leave the development of policy framework in the hands of Ministry, whilst implementation becomes the function of regulatory agency. Confusion, however, prevails over distinction between policy matter and regulation matter, and government departments seek to deal with typical regulatory issues under the garb of 'policy' matters. This severely undermines the ability of a regulator to function independently. The enabling Act of Cambodia, in this context, specifies clear separation of EAC's function as regulator from that of the ministry concerned.

With regard to the degree of freedom, regulatory institutions need to enjoy, it must be ensured that autonomy should not come at the price of less co-ordination or conflict between policymaker and regulator. The concept of 'independent' agency model has by and large been favoured by western advisors, who draw from the experience of regulation in UK and US. But, even in these systems political executives retain fundamental control. For instance, in US, regulatory agencies are not completely free from political pressures, and their information and staff expertise are often inadequate. If we apply this more politically sensitive analysis to developing countries we simply cannot expect creation of arms-length agencies. The key for regulatory reforms to succeed is commitment on the part of government, clear and consistent policy objectives and well defined relationship between Ministry and regulator.

Another important requirement of good regulation is to have the right people on board. This requires having in place proper mechanisms to ensure appointment of experts as regulators. Such practices would ensure transparency in selection and would keep discretionary elements at bay. Parliament needs to play a decisive role in ratifying candidates by some unique measures to ensure appointment of right people as regulators.

Conclusion

In nutshell, it can be summarised that while developing countries have taken measures to establish regulatory bodies, not much effort has gone to imbibe the principles of regulation in regulatory process.

It would make more sense if regulatory reforms recognised political-economy realities that exist in a country and incorporate them into agency models rather than designed on the basis of international best practices. For a regulatory framework to be effective, instances of micro-management by ministers when it comes to regulating state-owned incumbent should be done away with, as this would render independent regulators being ineffective or powerless. Further, both financial and human resources at the disposal of a regulator should be efficiently utilised for effective implementation of its mandate.

Autonomy should be accompanied by appropriate mechanisms to make independent regulatory agencies accountable. In conclusion, what is crucial is strong political will to create a strong regulatory agency from the outset.

(Based on a research study undertaken by CUTS entitled "Regulators is not the end, Key is Regulatory Process" accessible at www.cuts-international.org/pdf/RegFrame-report.pdf)

Competition Law & its Benefits

– A Walkthrough of Country Experiences

For developing countries, need for competition law becomes paramount when they adopt economic reforms, as it has been strongly realised that despite economic reforms being introduced, there is lack of competition domestically. At the same time, it is also observed that the industries are not competitive internationally. The full benefits of economic reforms are, therefore, felt to be better realised under the conditions of fair competition, which could stimulate consumer satisfaction, and reward those firms that are more efficient, whilst punishing those that perform poorly.

Broadly speaking, need for a competition law arises to:

(i) take care of the anticompetitive practices designed to restrict the free play of competition in the market;

(ii) take care of unfair means adopted by firms against the consumers in order to extract the maximum possible consumers' surplus, and/or producers' surplus; and

(iii) maintain and promote the competitive spirit in the market.

Whilst it is expected that the economic reforms introduced in different countries would enhance competition in various sectors of the economy through the lowering of both political and economic entry barriers, eliminating existing restrictive and unfair trade practices, there is no watchdog body to explicitly promote competition. Governments realised that market forces alone might not be able to address all the problems in the market place, especially in situations of market failure, caused by market power and its abuse.

Several countries, which went through the phase of privatisation and deregulation, began to experience that many SOEs affected by the policies of privatisation and deregulation tended to enjoy monopoly in the market. These policies simply acted to transfer monopoly from the public to the private sector thereby thwarting the interests of consumers, especially the poor. In such a situation the absence of a competition policy and an adequate regulatory mechanism is strongly felt which could set things right.

The need for conceiving competition policy also arises to ensure and promote good governance in the corporate sector as well as in government, which could be achieved by reducing the opportunities for rent-seeking behaviour and the corruption that often accompanies it. Competition law and regulatory tools invoked usually take care of firm's behaviour and market failures. Governments often intervene when markets fail but in the absence of clearly defined competition policy and regulatory mechanisms, the intervention can be arbitrary and serve vested interests rather than the poor.

The protection of small and developing countries from international anti-competitive practices also necessitates the availability of effective competition laws. Evidence suggests that international cartels of private firms that engage in restrictive practices designed to limit competition in international trade do exist.

These arrangements can be quite durable and detrimental to economic development (Levenstein and Suslow 2001). Cross-border M&As that lead to market dominance and the restrictive practices that some MNCs engage in further necessitate the need for an effective competition legislation.

With the above background, as to the need for adopting a competition law and its benefits the Theme Section proceeds further, throwing light on the experiences of Canada and Peru.

The Recent Canadian Experience

– Derek Ireland, CUTS CCIER Research Fellow, Canada

In 1986, Canada significantly reformed and modernised its competition law. The Canadian Competition Act, and the many substantive amendments to it made since then to: (i) promote greater efficiency, innovation and productivity in the Canadian economy to the benefit of both consumers and industry; (ii) establish a modern merger review system that would facilitate the completion of efficiency enhancing transactions and would prevent or restructure merger transactions that would hurt competition and consumers; (iii) modernise the provisions on abuse of dominance, vertical restraints and other restrictive business practices in line with the new thinking in industrial organisation economics and recent reforms in other competition law jurisdictions in the OECD; (iv) respond to the challenges of globalisation through facilitating cooperation with other competition law jurisdictions in investigating cross-border cartels, mergers, abuse of dominant positions, telemarketing and Internet frauds, and other anti-competitive practices and arrangements that hurt competition and consumers in Canada as well as other countries; and (v) increase effectiveness of the consumer education and advocacy efforts of the Canadian Competition Bureau (CCB) and its partners among other government departments and agencies, the business community and consumer and other non-government groups.

These objectives have been achieved over the past two decades to a major degree through business education that encouraged voluntary compliance with the new competition act, and by investigating and addressing high profile, well-researched

The Canadian Competition Act is designed to promote greater efficiency, innovation and productivity; respond to the challenges of globalisation through facilitating cooperation with other competition law jurisdictions; and increase effectiveness of the consumer education and advocacy efforts of the Canadian Competition Bureau (CCB).

and prosecuted cases in the areas of merger, abuse of dominance, refusal to deal, international cartels, national and international telemarketing and Internet frauds. While promoting voluntary compliance and education, the CCB provided a strong signal to all market participants that the new law has real teeth.

During the first ten years after passage of the 1986 Act, several major high profile merger and abuse of dominance cases had been investigated by the CCB and then adjudicated by Canada's new specialised competition court, called the Competition Tribunal. The resulting investigative and competition analysis experience and case law were then used to prepare enforcement guidelines on mergers, abuse of dominant position, intellectual property rights (IPRs), strategic alliances and other competition issues and business practices.

These guidelines were first prepared in draft form and consulted on extensively with the business, legal, non-government organisations (NGOs), academic and government communities. The final guidelines were then distributed widely and placed on the CCB's website to be used by businesses and their legal councils in structuring business transactions, strategies and other business practices. These guidelines and other publications of the CCB are also being used to train current and new CCB officials, and in the Bureau's competition policy advocacy and education programmes within government.

The Canadian Competition Act has been providing support to a comprehensive pro-competition policy regime established by successive Canadian Governments since 1986. These pro-competition policies include: (i) trade liberalisation and significantly lower trade and foreign investment barriers through the WTO, the North American Free Trade Agreement (NAFTA) with the US and Mexico, and bilateral trade agreements with many countries; (ii) an inter-provincial trade agreement to reduce trade barriers between provinces; (iii) privatisation of some major crown corporations and regulatory reforms to establish more competitive markets and provide greater product choice to consumers in many previously regulated sectors such as transportation, telecommunications, energy, and financial services; (iv) government support for science, technology and innovation in such areas as information technology/the information highway and biotechnology designed to generate product and process innovations; and (v) smaller and more targeted governments and reduced government deficits and debts in order to provide more room for private investment and markets to allocate resources and generate wealth.

Since early 1990s, Canada has had an unprecedented period of strong and uninterrupted economic growth with very little inflation. Canadian retailers and service providers now supply the Canadian consumer with a wide range of high quality goods and services at competitive prices from producers in every part of the globe. Canada may be the best bargain for the domestic consumer of any OECD country. Besides, Canada has benefited from a rapidly expanding, dynamic and highly entrepreneurial small business sector, and the creation and application of more advanced technology and innovation across a wide range of economic activities, including the high technology sectors.

The Competition Act 1986 and CCB provided important statutory support and education and advocacy assistance to departments and ministries responsible for the broader competition policy regime.

These initiatives helped to ensure that these broader competition policies in the areas of trade, industry, innovation, regulatory reform and inter-provincial trade were as pro-competitive and pro-consumer as possible. The result is that Canada now has one of the most competitive domestic markets in the global economy and has a strong and growing competition culture in favour of inter-firm rivalry and the consumer interest.

Competition Law and Policy in Peru[1]

– Santiago Roca,[2] CUTS CCIER Research Fellow, Peru

The competition law in Peru intends to "eliminate monopolistic practices, controls and restrictions of free competition in the production of goods and services... for the benefits of users and consumers".

It bans all conduct that constitutes an abuse of dominance or that restraints free competition. Dominance, abuse of dominance and anticompetitive practices (agreements and other) are described in the law, which does not have provisions that require notification of neither mergers nor acquisitions ex-ante. The free Competition Commission (CLC) and the Defence of Competition Chamber (SDC) are the first and second administrative instances in charge of handling cases. Both units are independent bodies of the National Institute for the Defence of Competition and the Protection of Intellectual Property[3] (INDECOPI) created in 1992. Members of the SDC are appointed by the President of the Republic from a three-some nominated by INDECOPI's Board of Directors. Commissioners of CLC are appointed directly by INDECOPI's Board of Directors.

Peruvian competition law promotes and protects the competition process (not individual competitors) for the greatest consumer welfare, placing emphasis on enhancing economic efficiency. It does not embrace however the elimination of competition distorting aspects of all existing and future laws, regulations, administrative practices and other institutional measures in the economy.

It does not comprise legislation to rule the access of private investment in monopolistic sectors along with a regulatory policy as well as to deal with anti-competition government regulations, except in the case of bureaucratic barriers to market access[4]. There is not an explicit mandate in the Peruvian Competition Law for a competition advocacy function to promote understanding of the benefits of competition throughout the economy, this depending more on the vision of INDECOPIS's President of the Board of Directors.

Neither there is neutrality between public and private sector ventures, nor public enterprises play a subsidiary role in the economy.

The competition authority in Peru has shown autonomy and technical competence regarding the handling of cases for the enforcement of the competition law.

Furthermore, the CLC is independent of the SDC in handling its cases but it must follow its procedural guidelines and mandatory precedents, which are absolutely transparent. Autonomy and independence of both (CLC and SDC) from political interference are however potentially threatened because of removal without cause of commissioners and chamber's members (as is currently happening in INDECOPI).

The competition law in Peru intends to "eliminate monopolistic practices, controls and restrictions of free competition in the production of goods and services... for the benefits of users and consumers".

Except for the telecommunications regulator, none of the other regulators (energy, transportation and infrastructure, sanitation, etc.) exercise competition law enforcement. They however play a role in promoting competition advocacy in their sectors but theirs views in competition are scarcely taken into account by other governmental bodies, e.g. ministries and the office in charge of investment promotion and privatisation. INDECOPI's intervention in competition matters is also sometimes questioned in practice by other governmental inter-sectoral institutions.

Current competition law in Peru contains a conventional list of hardcore cartel behaviours regarded as practices that restraint free competition, namely arrangements by competitors to fix prices, rig bids, output restrictions or quotas, and market division.

The competition law also includes a list of practices that are defined as an abuse of dominant position. Most of the complaints that the CLC has handled are related to cases of abuse of dominance, while ex-officio cases have focused on hard core cartels in the form of horizontal agreements. The competition law allows also to impose strict pecuniary sanctions for violators. Eventually, the competition authority can make a criminal complaint against the violator and if necessary it may notify the case to the Public Prosecutor.

The competition law also comprises leniency provisions to obtain strong evidence of cartel conduct in order to sanction it and deter it from occurring in the future. The authority is allowed by law to negotiate the terms on which the exemption of responsibility is offered to the information provider.

Due process is fully respected: firms and individuals have the right to be notified and provide evidence timely, and to be notified of reasons supporting the authority's decision. Direct access to the judicial system is allowed afterward.

The fact that only 13 percent of appeals resolved by INDECOPI's second instance were filed to the judicial system, and only less than six percent of these cases (0.07 percent of total appeals resolved) were reversed with respect to the decision of INDECOPI, gives an idea of the credibility that INDECOPI's resolutions deserve.

INDECOPI's conventional provisions against abuse of dominance and hardcore cartel conduct and respecting due process are widely fulfilled by the current law. Reforms are needed for the absence of ex ante merger control provisions, the need of strengthening competition advocacy, and the extent to which public/private competitive neutrality, decision making independence and transparency, and mandated coordination with regulators and other institutions are explicitly stated in the competition law and policy.

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1 This article uses extensively the institutional paper written by a group of INDECOPI's functionaries lead by Gerardo Gonzales under the title "Assessment of Competition Law and Policy in Peru", September 2005.

2 Profesor Principal Economia Universidad ESAN, Past President of INDECOPI 2004-2006.

3 INDECOPI's overall mandate includes not only the surveillance of free competition but also of consumer protection, acredditation and standards, metrology, market access, unfair competition, antidumping and safeguards, and market exit and restructuring.

4 INDECOPI's Market Access Commission, CAM, is in charge of identifying and abolishing bureaucratic barriers.

Credit Watchdog in South Africa

Credit on one side provides easy access to products that are not budgeted for a particular month, while it increases the liability to payments at a later time, on the other. Moreover, unfair credit and credit-marketing practices mislead the consumers and lead them into unaffordable credit contracts. The National Credit Regulator (NCR) has come into existence as a measure towards consumer protection.

The role of credit has long been recognised in South Africa. However, credit cannot be seen as a universal basic service to which access should be extended in the same way as access to water, health care and electricity. There is a greater need to balance access to credit with protection of consumers, especially the vulnerable lots.

Whilst credit allows access to products or services that cannot be acquired out of a single month's income, it can also be a dangerous instrument that can lead to high levels of debt and over-indebtedness. The availability of credit is sometimes the main factor that contributes to low levels of saving. This in South Africa has proven to be the case. Less than 0.05 percent of disposable household income is saved and the saving levels keep dropping each year.

There is a considerable imbalance of power between consumers and credit providers in concluding credit transactions. Consumer education levels are not sufficient, and consumers do not always exercise their rights, as they relate to consumer credit and most of them are not aware of those rights, as well as places where they can go for help. Commission-driven agents, deceptive marketing practices and weak disclosure easily cause consumers to enter into unaffordable credit contracts.

The National Credit Act No. 34 of 2005 (NCA) and the National Credit Regulator (NCR) came into operation on June 01, 2006, with the purpose of NCA to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry in order to protect consumers. The enactment of NCA is a victory for consumers and should be welcomed as an effort by government to advance consumer protection and create an efficient and sustainable credit market.

This may be seriously undermined when credit providers do not exercise their responsibility to assess consumers' ability to afford credit products and services prior to entering into credit contracts.

The NCR takes the mandate seriously and is committed to effective implementation of the Act.

When enacted, the Act was implemented in phases, starting with the registration of credit providers and credit bureau. The second implementation phase, which pertains to some parts of credit bureau information, became effective in September 2006. The compliance sections of the Act will become effective on June 01, 2006, and once implemented the Act will:

- prohibit certain unfair credit and credit-marketing practices;
- promote responsible credit granting and use and for that purpose to prohibit reckless credit granting;
- provide for debt re-organisation in cases of over-indebtedness;
- regulate credit information;
- provide for registration of credit bureau, credit providers and debt counselling services;
- establish national norms and standards relating to consumer credit;
- promote a consistent enforcement framework relating to consumer credit;
- repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and
- provide for related incidental matters.

The industry in South Africa is currently experiencing a growing trend of credit extension by credit providers, including banks, retailers and other institutions. It is during this time that consumer debt levels are at their highest. Until June 01, 2006, loans under R10 000 (US$1,402) will still fall under the Usury Act Exemption Notice, which allows the credit providers the right to determine what interest rate they will charge.

In a country where consumer education is still lacking, it is crucial to step up the efforts of NCR and create an environment of education. This will ensure that consumers make informed decisions and choices regarding their credit needs.

Key features of NCA

- Language in credit agreements must be simple and understandable.
- Quotes must be given on all credit agreements, with a binding for five days.
- Advertising and marketing must contain prescribed information on the cost of credit.
- Credit sales at a person's home or work are strictly limited.
- Reasons must be provided if a credit application is declined.
- Automatic increases in credit limits are regulated.
- Reckless lending is prohibited.
- Interest and fees are regulated on all agreements, including micro-loans. Credit bureau is regulated and consumers have the right to a free credit bureau record once a year.
- Debt counselling is introduced, to enable restructuring of debts for over-indebted consumers.

NCR believes that rights cannot exist without responsibility and that these two, coupled together, will go a long way in ensuring that consumer rights' protection is a national effort.

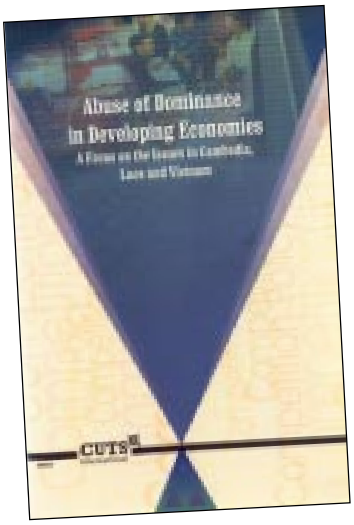
Bongiwe Gambu, National Credit Regulator, South Africa

MONOGRAPHS

Why India Adopted A New Competition Law?

This monograph throws light on the developments in the Indian competition regime since its inception. It dwells on the economic scenario that existed before and after the 1991 reforms including the extant competition law i.e. MRTP Act; the motivations that lead to evolution of the new competition law i.e. the Competition Act, 2002; comparison between the old and the new law and the improvements that have taken place and the problems that persist; and performance of competition agencies within their jurisdictions and the future course of action.

This monograph can be viewed at:
http://www.cuts-international.org/pdf/wiancl.pdf



Abuse of Dominance in Developing Economies: A Focus on the Issues in Cambodia, Laos and Vietnam

This monograph provides a general overview of issues relating to abuses of dominant positions with an emphasis on issues cropping up in developing economies. It also reviews specific issues related to Cambodia, Laos and Vietnam and identifies some guidelines that may assist developing economies in implementing their competition regimes and controlling abuse of market power.

This monograph can be viewed at:
http://www.cuts-international.org/7up2/abusedominance.pdf

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This Briefing Paper discusses the background of the dispute, the allegations on *Telmex,* the findings of the panel on key issues, the WTO ruling and the possible implications.
www.cuts-international.org/pdf/Telmex-1-2006.pdf

Competition Scenario in the Telecom Sector in Cambodia, Laos and Vietnam *(No.2/2006)*

This Briefing Paper attempts to give a snapshot of the competition scenario in the telecom sector in Cambodia, Laos and Vietnam.
www.cuts-international.org/pdf/comp_scenario2-2006.pdf

Competition Law and Property Rights in Vietnam
(No.3/2006)

This Paper highlights the relationship between competition and intellectual property rights (IPRs) and investigates the relevant rules on competition and IPRs in Vietnam. It proposes some initial solutions that Vietnam could adopt to control IPRs-related anticompetitive practices.
www.cuts-international.org/pdf/comp_law3-2006.pdf

Extraterritorial Application of Competition Laws in the US and the European Union
(No.4/2006)

The aim of this paper is to analyse and compare the scope of US and EU jurisdiction regarding anticompetitive conduct abroad.
www.cuts-international.org/pdf/Extraterritorial_4-2006.pdf

Private International Cartels – An Overview
(No. 5/2006)

This Briefing Paper is a concise overview of the definitional aspect of international cartels (a particular type of cartel), the harm they cause, the existing legal and regulatory framework, and options for reform.
www.cuts-international.org/pdf/PIC-5-2006.pdf

Evolution of Competition Policy and Law
(No. 6/2006)

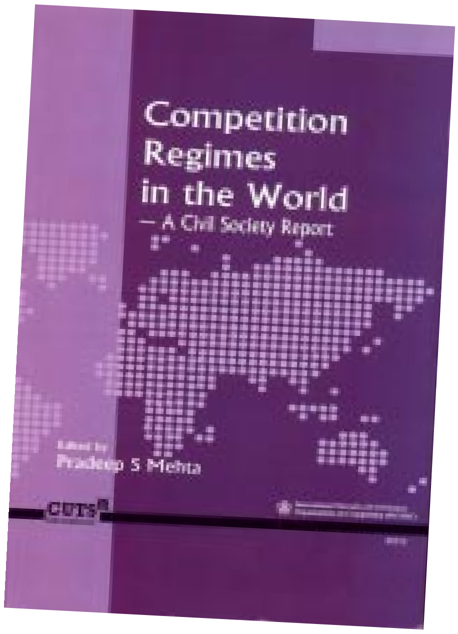
This Briefing Paper seeks to trace the evolution of competition policy and law and also examines the driving forces acting behind the adoption and implementation of competition laws and policies by countries across the globe.
www.cuts-international.org/pdf/ECPL-6-2006.pdf

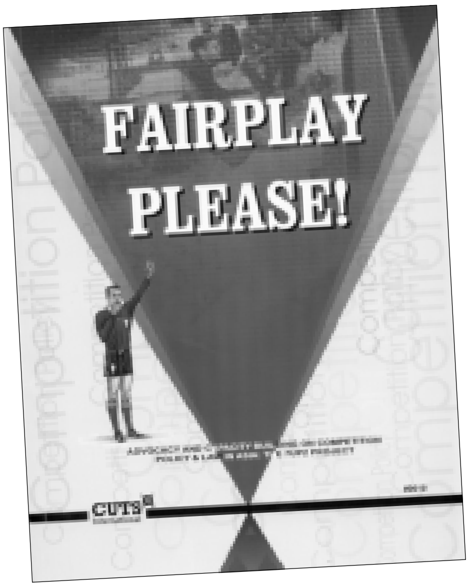
PATHBREAKING RESEARCH REPORT

Competition Regimes in the World
– A Civil Society Report

The report is a huge almanac detailing the competition policy & law/regulatory/consumer protection scenario of 120 countries around the globe, which is a ready reference for all groups of stakeholders, including policy-makers, academia, civil society, and the business community. Most of the countries covered in this volume have competition legislation, while some are in the process of adopting one. The report carries a brief description of the regulatory regime and the consumer protection framework of each country. The publication is primarily based on voluntary contributions of various International Network of Civil Society Organisations on Competition (INCSOC) members and other experts and practitioners.

This book can be accessed at:
www.competitionregimes.com





PROJECT RESEARCH REPORT

Fairplay Please!

The research volume is the second in the 7Up series, first being: Pulling Up Our Socks. The present volume is a compendium of the synthesis report and six country chapters prepared within the framework of 7Up2 project. Fairplay Please! This motto hopefully will ring the bells in a manner forceful enough, to call for goodwill and cooperation, warn wrongdoers, and move the champions and the opinion leaders among the society, so that laws are adopted and mechanisms set to work towards effective market for growth and development with equity around the world.

To read the report, please access the following link:
www.cuts-international.org/7up2/7Up2_Synthesis_Report.pdf

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SOURCES

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