

REGU LETTER

A Quarterly Newsletter of the CUTS Centre for International Trade, Economics & Environment covering developments relating to competition policy and economic regulations.

कट्स ✕ CUTS

Globalising Cartels, and Tackling Them

Although government barriers to trade are evaporating fast, private barriers are replacing them. Cartels, though illegal in most countries, is one of the ways to raise such private barriers, which are proliferating at a high speed, somewhat at the same pace as that of the globalisation process.

According to a World Bank study, around 40 different international cartels have been operating at some time or the other during the 1990s and the majority of them had a clear effect on markets worldwide. Price-fixing and market allocation conspiracies for bulk vitamins, citric acid and graphite electrodes are just a few examples. Though the harm caused to developing countries by these cartels is difficult to quantify, the same study estimates that in 1997, developing countries imported goods worth US\$81.1bn from industrial sectors which had seen a price-fixing conspiracy during the 1990s.

International cartels are particularly dangerous for developing countries, as most of them do not have enough resources to detect them. More so, even if they come to know about the existence of such a cartel, they do not have the capacity to assess its adverse impact, or even catch the conspirators.

International cartels have both direct and indirect negative impacts. Direct effects are higher prices, reduced supply and reduced choice for consumers. Indirectly, cartels can maintain their position with high barriers to entry for other producers, which again is a serious cause for concern for developing country producers who are, in general, new to international trading.

Unlike rich countries, developing countries have been passive even where the existence of a cartel has been demonstrated. For instance, the infamous Vitamins, Inc (vitamin cartel) that continued for almost the whole of the 90s, was dealt with in various developed countries like, the US, the EU, Canada, Japan, Australia etc. But apart from Brazil perhaps no developing country has tried to initiate proceedings against it. And not that they were ignorant about it.

To detect, control, break and punish international cartels, merely having a jurisdiction in competition law is not enough. Countries have to cooperate with each other.

This cooperation could take place under a formal arrangement between governments or on an *ad hoc*, case by case basis.

Brazil and the US have a formal cooperation agreement, which helped the former in obtaining information with respect to the vitamin cartel. But, with vitamins, as is usual in cartel cases, most of the information is non-confidential and hence could be obtained by requesting the relevant authorities, whether or not any cooperation agreement is in place. Also developing countries can free ride on the results of investigations conducted by rich countries.

Secondly, to give fillip to the whole process, a 'carrot & stick' approach is necessary. This means high penalties and personal criminal liability for the offenders, coupled with protection to whistleblowers and a leniency programme for firms cooperating with the investigation. This approach was crucial for most of the international cartels that have been broken successfully. For example, in the vitamin cartel, cracked by the US antitrust agency, Rhone-Poulenc, one of the carteling members, supplied much of the evidence and escaped punishment while the other conspirators had to pay huge fines and some of the executives involved had to serve prison terms. The firms also paid moneys into charities as a compensation for the consumer losses, which could not be determined individually.

Countries that have not taken these anti-competitive practices seriously till now, need a wake up call. First, they should reorient their competition laws to meet international challenges. Secondly, the countries should start making efforts to develop cooperation agreements with countries that are likely to host the epicentre of anti-competitive practices affecting the former. Last, but not the least, competition authorities of developing countries have to be more proactive as well as develop an international perspective both in terms of identifying anti-competitive behaviour, and in dealing with it. Else they will not be doing what they are required to do, and that will be bad for both them and the people they are supposed to protect.

Pradeep S. Mehta

Pradeep S Mehta, Editor

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The CUTS Centre for International Trade, Economics & Environment (CUTS-CITEE) is implementing a two-year research project entitled "The 7-Up Project". This project involves a comparative study of the competition regimes of seven developing countries in the Commonwealth with the aim of strengthening their competition laws. It is being supported by the Department For International Development, UK. The countries selected for the project are: India, Pakistan, Sri Lanka, Kenya, South Africa, Tanzania and Zambia. The project was launched on September 1, 2000 and has progressed considerably since then. "Shaping Competition Culture in Developing Countries" has been defined as the mission statement, while the vision statement reads as: "Towards a Healthy Global Competition Culture".

Major Developments

The period from June to August 2001 was the last quarter of Phase- I of the Project and its most crucial period. This was the period when one of the most important activities of the Project was completed - organising of NRG meetings. Phase-I country reports were also revised during this quarter and a synthesis of these reports was prepared by the core researcher of the Project. The first phase of the project came to an end in September and with the Phase-I culmination meeting of the project.

NRG Meetings

The formation of National Reference Group (NRG) comprising of various stakeholders of the Project and organising their meeting was one of the most important activities of the first phase of the project. NRGs were formed in the project countries and the NRG meetings were organised during this period. These meetings were also attended by representatives from CUTS.

The draft phase-I country reports were presented and discussed at the NRG meetings. The report was based on the field survey that was done by the country researchers during the last quarter. The field survey involved filling up of a questionnaire by the competition authority of the country. The questionnaire mainly focused at the institutional framework for enforcing competition law in these countries.

The comments and suggestions that emerged at the meeting were then incorporated for revising the Phase-I Country Reports.

Interestingly, the deliberations in these meetings were not limited to the country reports. The participants discussed all the issues that they thought important to instill a healthy competition culture in the economy. A detailed analysis of the reports of these NRG meetings is carried later in this issue.

Synthesis of Country Reports

The core researcher of the Project who compiled and collated the draft phase-I country reports and prepared the Draft

Phase-I Report. Given the differences across countries and the three general issues raised above, this synthesis report pools together the analysis/information contained in the seven phase-I country reports to gain insights into the links between economic development and competition policy. In order to do that it focuses on two questions:

- How the structural and policy differences affect competition policy requirements?
- Given these requirements, what are the emerging substantive and administrative needs of competition law?

The rest of the paper is divided into six sections. The next section summarises the socio-economic profile of the 7-Up countries to provide a developmental context to the subsequent discussions. The public policies adopted in the project countries are discussed in Section 3. Given the development needs and public policies,

Section 4 attempts a broad-brush evaluation of competition policy related requirements in the project countries. Some inadequacies relating to the scope of competition law are summarized in Section 5. Issues relating to capabilities of the competition authority and the associated administrative framework are discussed in Section 6. The final section makes some brief concluding observations.

The comparisons attempted in the paper are quite tentative. It is difficult to derive the various nuances of the 'context' of competition policy in each project country. The report was presented at the Phase-I culmination meeting of the project and the gaps pointed out by the participants would now be filled up by the core researcher in coordination with CUTS project team and with some additional information from the country researchers.



PHASE-I CULMINATION MEETING

During this period, preparations for the Phase I culmination meeting of the project held on 7-8th September in Goa, India, constituted a major share of activities under the project. The meeting involved:

- sharing phase-I country report of each project country;

- discussion on the compiled and comparative analysis of all these reports;
- lowlights and highlights of the Phase-I;
- brainstorm on shaping the Phase-II; and
- workshop on understanding cross-border competition concerns

(Report follows)

Highlights of Culmination Meeting

International experts from various organisations such as the UNCTAD, WTO, OECD, European Commission, World Bank, Consumers International, International Development Research Centre also participated as resource persons, besides partners and researchers, to take stock of the progress of the project and share their experiences about the subject. Following are the brief highlights of the meeting.

The Meeting presented the results of the first year of the Project which examined and compared the domestic competition regimes of India, Pakistan, Sri Lanka, South Africa, Kenya, Zambia and Tanzania. The study focused on how the differences in economic structure and policies of these countries affect their competition policy requirements. The project revealed the importance of a vibrant consumer movement for the meaningful enforcement of competition law. However, most of the project countries lack consumer awareness of these issues.

“What emerged as a very crucial recommendation, is that the consumer movements in developing countries must be strengthened if competition policy is to be implemented effectively” noted Mr Pradeep S Mehta, secretary general of CUTS. “Consumer awareness of competition issues is vital to create a vibrant national competition culture that will stimulate equitable growth”.

The Meeting launched the second phase of the project which will examine cross-border competition concerns such as international cartels and the effects of cross-border mergers and acquisitions in developing country markets. The second phase is expected to generate valuable insight into developing country interests in relation to multilateral discussions on these issues.

“India would be the first country to support a multilateral competition arrangement that made the UNCTAD Competition Rules and Principles a binding agreement,” said Dr V S Seshadri, Joint Secretary, Ministry of Commerce, at one of the sessions on the international scenario on competition policy. However, he opposed the EU’s thrust for multilateral competition policy at the WTO, saying it would not be in the interest of developing countries. The discussion of new issues at the WTO could only come after progress was made on implementation issues. Before negotiating multilateral competition policy at the WTO, he said that developing countries needed to have enough experience

with competition policy at the domestic level to understand its pros and cons.

Reacting to this, Stefan Amarasingha of European Commission observed that European Union has learnt from Uruguay Round experience and hence, is proposing ‘flexibility’ and ‘progressivity’ as two elements that are not reflected in the traditional set of special and differential treatment. Furthermore, it is not proposing harmonisation of competition laws.

Frederic Jenny, Chairman of the WTO Working Group on Trade & Competition Policy, said that the Project would facilitate much needed communication between competition authorities and trade officials on competition abuses which affect trade and vice versa. Jenny emphasised the unique role of CUTS in bridging the gap between competition officials and other stakeholders.

Emphasising the main objective of UNCTAD of a more efficient and more equitable world economy through a competition-rules-based globalisation process, Philippe Brusick, Head of Competition and Consumer Policy Branch, UNCTAD, commended the achievements and future role of the project in strengthening the competition culture in all the project countries.

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This opportunity was also utilised to have two fringe meetings in the context of the 7-Up Project. One was a meeting of the partners, researchers and the consultants on the 6th September. It was a full day meeting, one half of which was devoted to take stock of the problems faced during the implementation of the first phase of the Project and the possible solutions in order to avoid them in the second phase.

The second half of the meeting on 6th September focused on Phase II of the Project. Further, to have a closer look at Phase II, another meeting of the same group (partners, researchers and advisers) was organised after lunch on 8th September. On the basis of these meetings, an action plan for Phase II was drafted and has been sent to the consultants for their comments. It would be sent to partners and researchers as soon as it is finalised.

A meeting with the Project Advisory Committee was organised in the evening of the 8th September. The purpose of this

meeting was to discuss the substantial issues that had emerged during the Phase-I culmination meeting and to clear the way forward. It was a brief meeting and some important issues were discussed and resolved.

Plan for the Next Quarter

The fifth quarter in which the project has entered now is the first quarter of Phase II and hence is very crucial. Most of the preliminary activities for Phase II would be completed during this period. Some foundation, for structuring Phase II, was laid at the Phase-I culmination meeting.

Questionnaires: The most important activity to be completed during this period is finalisation of questionnaires for the field survey to be done in Phase II. The questionnaire would essentially be for an awareness survey among the stakeholders and some in depth survey of the Competition Authority. Preliminary discussion on this questionnaire was done at the Phase-I culmination meeting. The questionnaire is in the process of being finalised and would be sent to the researchers and partners very soon.

Phase-I country reports and their synthesis: During the next quarter, additional information required from Phase-I questionnaires and Phase-I country reports would be collected and incorporated in the individual reports as well as in the Synthesis report.

2nd NRG Meeting: Phase-II would also involve organising of national meetings in the project countries during the first week of November. At this meeting, the revised Phase-I country reports would be discussed and the questionnaire of Phase-II would be deliberated upon. These meetings would also be attended by CUTS representatives. A particular format for preparing the reports of this meeting would be sent to partners and researchers for ensuring uniformity in the reports.

Mid-term Review Meeting: In order to take stock of the progress made by the researchers on Phase-II questionnaires, a mid term review meeting would be organised in the second week of October in Geneva. This meeting would be attended by Country researchers/partners and also the members of Advisory Consultants’ Team (ACT) as well as a representative of DFID. Another such review meeting will be held at Jaipur in December, to be attended by the partners/researchers and the core researcher of the project.

**What the Stakeholders Think on Competition Issues:
Reflections from Meetings in 7-Up Countries**

One of the important components of the 7-Up project is the formation of a National Reference Group (NRG) in each of the project countries. NRGs have been formed to deliberate on the inputs prepared in each country and create a base that would be used for launching advocacy for a healthy competition culture. The NRGs comprise of representatives of the following categories of organisations/persons:

- Consumer organisations and other civil society organisations with demonstrated interest in economic issues
- Research institutions, academia, experts (economists and lawyers)
- Chambers of Commerce
- Competition & Regulatory Authorities
- Government (External Trade, Internal Trade and/or Consumer Affairs Departments)
- Politicians and/or Parliamentarians
- Media

NRGs in all the project countries met in the month of June mainly to discuss the draft country reports for first phase of the project. However, the deliberations in these meetings were not limited to the draft country reports. The participants discussed all the issues that they thought important to instill a healthy competition culture in the economy. A brief synthesis of what came out of discussions in these meetings is presented below:

The Competition Law

Out of the seven countries, in three, the competition laws are relatively new, two countries are in the process of adopting a new law while two others are considering adopting a new law. In the countries with a new law (Tanzania, Zambia and South Africa), the NRG meetings deliberated mainly on the issues of enforcement and the interface between the competition authority and the regulatory authorities. In the countries that are in the process of adopting a new law (India and Sri Lanka), the NRG attempted to evaluate the existing competition regime and on the basis of that came out with some suggestions regarding the proposed competition law to make it more effective. In the other two countries (Kenya and Pakistan) the NRG members were almost unanimous in feeling the need for a new competition law or at least a thorough review of the existing law in the changed economic scenario both at home and outside.

This shows that there is an overwhelming consensus regarding the need for an appropriate competition law in all countries. However, the general feel that has been reflected in these meetings is that the effectiveness of the law depends on the following factors:

- The way the law is drafted;
- The way the law is enforced;
- The degree of autonomy enjoyed by the competition authority including the way it is funded;
- Continuous monitoring of market situations; and
- Policy environment in the country

There was a strong recommendation from many of the NRGs that the competition law should explicitly deal with the abuse of intellectual property rights (IPRs). The national competition authority is the ideal body to weigh up the anti-competitive effects

of a licensing agreement. Even TRIPs has provisions to allow the national governments to deal with this.

In most of the 7-Up countries, there is no comprehensive consumer protection law. The NRGs in these countries strongly felt the need for such a law to complement the competition law. Code of conduct for advertising is another issue that came up in discussions. Advertising is important, as it is the channel through which business provides information to the consumers. Thus misleading information can cause serious harm to consumer interest.

Objectives, Scope & Public Policy Context

There is some agreement over the basic objectives that a competition law or policy would try to achieve. These are:

- Consumer welfare
- Economic efficiency
- Checking undue concentration

However, individual countries, although recognise these objectives in their competition law, they usually combine these with other objectives to make them in line with the overall policy and goals of the government.

That being the case, the NRGs naturally were interested in discussing the issue of objectives of the competition law. The issue was a major point of discussion in South Africa. There was a feeling among a section of NRG members that the objective of promoting employment and advancing socio-economic welfare for all South Africans may be in conflict with other main objectives, namely, to promote efficiency, adaptability and development of the economy and to provide consumers with competitive prices and product choices.

The issue also came for discussion in the Indian NRG meeting. Some also expressed concern that the new competition law may be used to harass private business.

Protection of domestic industries was another concern that repeatedly came in the discussions in these meetings. In all these countries NRGs were of the opinion that the competition law should be able to address their development concerns and protect their national champions from unfair competition from the mighty Trans-National Corporations (TNCs). Particularly because even the largest enterprises in these nations are quite small compared to the TNCs.

This concern was more pronounced in the African countries. Particularly in Zambia, it raised a stormy debate where Chilanga Cement was taken over by Lafarge. The Zambia Competition Commission allowed it with the condition that Lafarge will not close down the factory. However, there is a general feeling that the primary motive behind the takeover was to close the factory and eventually serve the Zambian market from outside. They fear, in due course, Lafarge will find some excuse to close down the factory.

In South Africa also this was a major point of discussion and section of the NRG viewed that the competition regime cannot ignore the racial dimension of the economic structure in the country. Hence taking employment out of the equation could be potentially dangerous. It was suggested that even while looking at mergers, the competition authority should look at the potential job loss side by side with the impact on the consumers.

Enforcement Mechanisms

This was another area of concern for all the NRG members. In the majority of 7-Up countries, the existing competition authority does not enjoy adequate autonomy, which everybody agreed is a must for an effective competition regime. A competition authority essentially arbitrates between business, the consumer and the government, especially when government retains a significant stake in providing many goods and services to consumers.

This is particularly true in the cases of Kenya and Tanzania. In both of them, the competition authorities come under a government ministry. Another concern that the groups expressed in these countries is that competition authorities there are a "one person commission" and not a multi-member body. It was pointed out that in a situation where one person is vested with massive authority there is a tendency to misuse the power.

The issue came up for discussion even in Pakistan where people felt that the Monopoly Control Authority needs more functional and financial autonomy. But this will need substantial changes in the existing competition law or new legislation. In India the existing competition authority enjoys substantial autonomy and even the proposed new Act envisages an autonomous competition authority. However, concerns were expressed, that certain provisions in the proposed Act have the potential of curbing its autonomy.

One peculiar but important issue that was raised in the Indian NRG was related to the age of the Members and Chairperson in the proposed commission. The participants felt that it was too high especially in case of Chairperson who can serve till 70 years of age. The past experience in India has shown that these bodies get filled up by retired bureaucrats and judges and as a result the commission becomes over-bureaucratized.

One important aspect of enforcement is the kind of punishment given to the offenders under the competition law. Penalties imposed on the offenders are relatively low. In some cases the authorities have power only to issue cease and desist orders. In such a situation, the imposed penalties cannot work as a deterrent. A business can indulge in anti-competitive practices under the assumption that it will stop such activities once it comes under the scrutiny of the competition authority until then it is well and good.

In the area of enforcement it was observed that the most difficult issue to handle was cartel cases. There were number of complaints on cartels, especially in India. However, they could not be proved both due to definitional problems as well as lack of clinching evidence even though prima facie there were sufficient grounds to suspect existence of cartels. In this regard it was suggested that high fines with criminal liability combined with whistleblower protection and leniency programmes can help.

It was also suggested in one of the NRG meetings that the competition authority should monitor the prices on a regular basis so that it is in a better position to detect anti-competitive practices and take appropriate measures.

They were equally concerned about the effectiveness of domestic competition law to take care of anti-competitive practices in the globalising environment. However, they stopped short of recommending a multilateral competition framework as they were not very sure of the implications of such a framework.

Interface with Regulatory Bodies

A concern was expressed in several of the NRG meetings that the competition policy is made complicated by the fact that there are various sectoral regulators who also manage competition

separately from the competition authorities. In Kenya it was suggested that the competition authority should take the ultimate responsibility for competition in a broad range of economic activities and to achieve this it is absolutely necessary to create a firm working relationship between the competition authority and all sectoral regulatory authorities.

The issue was discussed in Indian NRG meeting as well. It was observed that even in the new competition Bill, no attempt has been made to sort the overlapping area of functioning of other utility regulators and the competition authority. The house was of the opinion that the competition authority should take precedence over the regulators when some competition issue is involved. In fact the competition authority should be the apex coordinating agency and the watchdog to ensure fair competition in all sectors of the economy.

Exceptions & Exemptions

This is an important area that the participants discussed at length in some of the NRG meetings especially where state enterprises are exempted from the competition law provisions. For example in Kenya, the law explicitly precludes action or investigation against state owned enterprises and professional bodies that are governed by separate statutes. The members felt that this seriously harms consumer interest since state owned enterprises are major cause of lack of competition in many sectors in Kenya. The participants also opined that many of the service/utility providers still under state control should be privatised with proper regulatory mechanisms put in place.

In Sri Lanka the state enterprises are excluded from the purview of the proposed Bill which is potentially dangerous and the NRG was unanimous in saying that they must not be excluded.

Advocacy

The NRGs also felt that it was essential to have good advocacy and a strong support base to enforce the laws effectively. At the same time they recognised the need for a strong consumer movement in ensuring that. They also recognised that the consumer movement in these countries (with the exception of India) was rather weak, and needs to be strengthened. In fact in South Africa one of the participants in the meeting was quite confident in saying, "I don't think there is any major disaster about the Competition Policy and Law. What needs to be done is to increase the ability of the consumer to participate better and more effectively."

For example, in one of the countries, the competition authority handled some 68 cases over 1998-2000, but not a single complaint was received from any consumer organisation or such other NGOs. In the African region, in some countries, consumer organisations simply do not exist. In some other where they exist are highly constrained by lack of funds and manpower with adequate expertise. In some of the African countries the NRGs felt that in view of the weak consumer movement in the region, cooperation between sub-Saharan Africa and South Asia (particularly India where consumer movement is relatively strong) should be promoted in the area of consumer movement.

It was also emphasised in one of the meetings that there is a need for social audit of all state regulatory functions. The best agencies to do such work will be the consumer organisations. This will require adequate capacity building of the consumer organisations. ♦

Merger Mania: Slump in the West but Boom in the East

Cross-border M&As have been a driving force behind the recent growth in foreign direct investment flows. The bulk of them take place in developed countries. In developing countries cross border M&As still account for a relatively small share of FDI flows.

Last year, cross-border M&As in Latin America and the Caribbean remained high, while those in South, East and Southeast Asia declined. They nearly doubled in Central and Eastern Europe. The U.S. continues to be the largest country in terms of the value of sales with Germany being the second largest. On the purchase side, UK was the largest acquirer for the second consecutive year.

According to Thompson Financial data, the volume of European M&As during the first half of this year plummeted to \$326bn, half of last year's total for the first six months. During the second quarter, the consolidation of the European financial services and utility industries drove up the M&A

volume slightly. Although depressed stock prices have sharply reduced the potential selling prices of publicly traded companies, the Nasdaq Composite Index remains down 50 percent from its March 2000 peak. During the first six months of 2000, activity in the telecommunications, media and technology sectors reached its peak with a flurry of transactions. But a glance at preliminary data provided by Thomson Financial shows that the most active sectors of last year have been largely dormant in 2001.

In contrast with this, Morgan Stanley & Co. states that Asia will have a 25 percent compound annual growth rate over the next three years, with China being an increasingly important player. According to Michael Berchtold, Managing Director, Morgan Stanley, M&A activity in the Asia Pacific region, which has been dominated by consolidation in the banking sector in Singapore and Hong Kong as well as several high-profile telecom deals, is expected to centre on Korea, Hong Kong, Singapore and Australia over the next three years. Kelly at JP Morgan declares that even if the dollar volume of deals is not greater than 2000, 2001 will still be the second best year ever.

(TH, 27.06.01; FE, 05.07.01 & WSJ, 13.07.01)

Merger Talks Failed

Alcatel SA's attempt to acquire Lucent Technologies Inc. for \$22.8bn in stock unraveled at the eleventh hour, after the French and US telecommunications equipment companies failed to agree on who would control the new company. Lucent balked at Alcatel's reluctance to give it equal representation on the board and an equal say in the merged company's management.

Lucent's shares have fallen about 15 percent since news of the talks emerged and Alcatel's dipped about 8 percent.

Alcatel's bigger US rival, investors in New York and Paris combined to wipe nearly \$6bn from the value of companies.

Lucent is now examining several fundraising options to rebuild its financial position, like a convertible bond offering to ease its debt position or pressing for a quick sale of its optical fibre division. It had already promised its bankers to come up with another \$2.5bn by September.

(WSJ, 31.05.01 & FT, 30.05.01)

Eye Galileo, be Under Telescope

US and European antitrust enforcers are taking a harder look at Cendant Corp.'s \$2.9bn buyout of global reservation system Galileo International Inc. after rivals raised concerns about competition.

This scrutiny could also complicate another potential transaction whereby Cendant would acquire a second major online reservation system, Worldspan LP

of Atlanta, a partnership of Delta Airlines, Northwest Airlines and TWA Airlines.

Should Cendant also succeed in the latter deal, it would shake up the electronic travel distribution industry by creating a giant rivaling Sabre Holdings Corp. of Texas, as the world's largest computer-reservation system for the travel industry.

(WSJ, 02.08.01 & 12.06.01)

Banking Consolidation in SE Asia

In the wave of bank consolidation in South East Asia, Singapore will be left with three banks when the dust settles in about six months, DSB Group Holdings Ltd. President Jackson Tai predicts.

In a flurry of deals, Oversea-Chinese Banking Corp. bought Keppel Capital shooting up to No. 2 and DBS then acquired Overseas Union Bank Ltd. (OUB), which drops to third place. United Overseas Bank (UOB) joined the frenzy with a \$5.5bn friendly cash and share offer for OUB to counter the hostile \$5.2bn bid by rival DBS Group.

To streamline the financial sector in Taiwan, Far Eastern International bank is discussing a merger/strategic alliance with several banks including Dutch-based bank ABN Amro. Makoto Bank would acquire 100 percent of Chiayi Second Cooperative in southern Taiwan.

In Hong Kong, Standard Chartered acquired the credit card and retail banking business of Chase Manhattan, and Bank of

East Asia bought First Pacific Bank last year. DBS is in midst of acquiring Dao Heng Bank Group. The Bank of China and the Industrial & Commercial Bank of China are consolidating their Hong Kong operations. The next wave of consolidation is expected among the approximately 25 smaller local banks with Wing Hang Bank Ltd., Wing Lung Bank and Dah Sing Bank, being attractive targets because of their strong customer base.

(WSJ, 22.06.01; 02.07.01 & FT, 30.06.01)

Brussels Watching Montedison

The European Commission said that its investigation into the takeover of Montedison, the Italian agro-energy group, could focus on Electricite de France (EdF), though Brussels has concluded that Montedison has been acquired by Fiat, the Italian car group.

Fiat and EdF are the leading shareholders in Italtenergia that has acquired 52 percent of Montedison. If the takeover had only involved Montedison and Italtenergia, which has no revenues, it would have fallen short of Brussels' investigation criteria.

Changes to Italtenergia's structure which restricted EdF's voting rights to two percent were particularly important to Brussels' decision. However EC has made clear that such reasoning would not constrain future enquiry and has asked to be formally notified by Italtenergia and Fiat of their plans for Montedison.

(FT, 24.07.01)

Sweet Success for Suedzucker?

German sugar giant Suedzucker AG's purchase of Saint Louis Sucre (SLS), France's second largest sugar company, reflects continuing consolidation in an industry bracing itself for potentially far-reaching changes.

The acquisition, which is subject to regulatory approval, would enable Suedzucker to boost its European sugar quota to 21.4 percent from 16.4 percent. This is likely to spark more takeover activity in the sector as it comes at the same time as a four way split of Eridania Beghin Say, the French foods group controlled by Italy's Montedison.

The move would be followed by the sale of Schoeller, Suedzucker's ice cream manufacturer to Nestle as the company had realised it would be difficult to improve its number three position in the European ice cream market while world market prices for sugar are set to rise and EU sugar directive assured sales through fixed quotas.

(FT, 02.07.01)

Hard to Break

Delaware Chancery Court Vice Chancellor Leo E. Strine ruled that Tyson Foods Inc. couldn't cancel a planned \$3.2bn purchase of IBP Inc. The ruling underscores the difficulties associated with terminating a merger agreement and may lead to more extensive scrubbing of a company's books during transactions.

The deal was a stretch for Tyson from the beginning as IBP is two times its size. Tyson stock sank \$2.01 per share, to close at \$9.37 a share. Tyson had walked away from the merger pact on March 29 after it found out about a pending Securities and Exchange Commission probe into an IBP unit.

Judge Strine determined that a decline in IBP's earnings didn't trigger the key "material adverse change" and Tyson was well aware of the said accounting problems. He said that the only alternative to a forced merger would be for him to grant IBP "staggeringly large" damages. *(WSJ, 20.06.01)*

Golden Merger

Barrick Gold Corp. of Canada has agreed to acquire Homestake Mining Co. of the US for about US\$2.3bn in stock, creating the world's second largest gold producer, with the lowest cash costs of any major producer and about \$900mn in cash. It will have a market value of \$9bn and the merger will create cost-saving synergies of about \$55mn per year.

Under the agreement, Barrick would offer 0.53 of a Barrick share for each of Homestake's 263.3mn outstanding shares.

The transaction would represent a value of US\$8.71 for each Homestake share, a 31 percent premium on Homestake's closing share price.

Since the transaction would further increase Barrick's US shareholder base, it will adopt US generally accepted accounting principles for reporting its financial results after the merger closes. The merger would almost certainly prompt responses from rivals such as Anglo Gold, the world's largest producer, as well as Placer Dome, Newmont and Normandy.

(WSJ, 26.06.01 & FT, 26.06.01)

No Abbey Alliance

UK competition officials blocked banking group Lloyds TSB proposed \$26.77bn bid for mortgage bank Abbey National partly because of concerns about the lack of competition in small business banking services. The competition commission was concerned that the new bank would dominate current accounts, the core product.

The merger would have created UK's second biggest bank after HSBC Holdings Plc and could trigger a new round of mergers and even rival bids for Abbey. Lloyds TSB has moved from seeking a merger with a big European bank to looking for outright acquisitions.

Analysts argue that the merger does not pose any real threat to competition, though Lloyds/Abbey would hold 27 percent of British current or checking accounts. But

politicians are reluctant to give more power to the UK's four main banks, including Lloyds.

A block would have far reaching implications by making further consolidation by larger banks impossible, and ruling out the creation of a national champion. *(BL, 10.07.01 & FT, 10.07.01)*

AT&T Snubs Comcast

Comcast Corp- the third largest US cable operator, made an unsolicited \$40bn stock-swap bid for AT&T's cable business - AT&T Broadband. The merger could give Comcast 22 million cable TV subscribers and leading positions in eight of the top ten US markets.

AT&T has rejected that offer amid concerns about Comcast's stock voting structure saying it didn't reflect the "full value" of the cable assets. With this rejection the company's plans to break into four independent parts are unlikely to be completed.

Shortly after Comcast disclosed its bid, AT&T started talks with AOL Time Warner Inc. The talks are at a very conceptual stage with no formal proposal on table. AT&T would spin off its broadband division and simultaneously merge it with AOL's cable Time Warner cable.

AT&T shareholders would own at least 50 percent of the combined firm, and AOL itself would own roughly 45 percent and could conceivably have effective operating control of the company.

(BL, 10.07.01 & WSJ, 26.07.01)

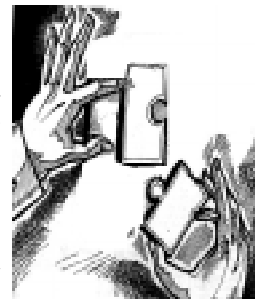
MERGER WAVE IN GERMAN BANKING

Merger talks between DG Bank, the German cooperative banking giant, and GZ Bank, its regional rival, have reached a "critical point", though the deal is almost certain to go ahead. This would create Germany's sixth biggest bank-to be known as DZ bank.

Commerzbank, Germany's fourth largest bank, and Dresdner Bank are in preliminary talks about a possible merger of their mortgage banking units as pressure for consolidation in Germany's real estate financing sector mounts. Analysts said Deutsche Bank, Germany's biggest bank, was also likely to be interested in disposing/hiving off its mortgage unit.

Further, the European Commission has approved the \$20bn acquisition of Dresdner Bank by Allianz, Germany's biggest insurer, on condition that the two companies reduce their stakes in a rival bancassurance group. Allianz would also buy a 45 percent stake in Russia's Rosno, marking the first big investment by a foreign company in a Russian insurer.

(FT, 19.06.01 & 20.07.01)

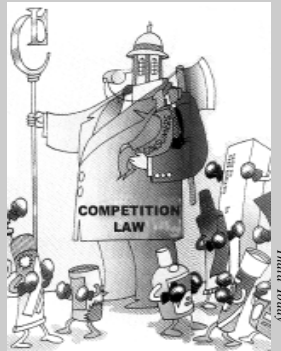


NEW COMPETITION LAW FOR INDIA

The Indian cabinet approved a controversial bill designed to protect consumer interest from monopolistic companies, in the face of strong opposition from anti-reform elements in the government. The approval of the proposed bill is seen as a move forward by the government in its second generation of economic reforms.

The bill, if it becomes law, will replace the Monopolies and Restrictive Trade Practices Act of 1969 and will call into being a new regulatory body, the Competition Commission of India.

The bill is opposed by members of the trade and industry ministry, who claim it favours multinational corporations because, they say, it was framed under pressure from the World Trade Organisation and the European Union. According to experts, the Bill has several shortcomings, the biggest being that only one criterion, size, has been used to stipulate post-merger reviews. *(FT, 27.06.01 & ET, 28.06.01)*



CUTS' Letter to Financial Times on Indian New Competition Law

Consumers and consumer groups are overjoyed with the new bill on competition brought forth in India ("Indian cabinet passes competition bill", June 27) as the existing competition law, the Monopolies and Restrictive Trade Practices Act, is hopeless for the purposes of regulating anti-competitive behaviour of both domestic and foreign enterprises. Indeed there is a strong lobby in India against liberalisation but there is an equally strong lobby for it.

The consumer movement in India has been lobbying for a new competition law ever since the reforms were introduced in 1990. For your correspondent to say that "it has been opposed by members of the trade and industry ministry, who claim it favours multinational corporations because, they say, it was framed under pressure from the World Trade Organisation and European Union", is absurd for two reasons.

First, the ministry does not have "members" but ministers and civil servants; second, the government of India is in favour of a strong competition law, precisely to check the anti-competitive acts of multinationals and domestic enterprises. Even the prime minister of India has stated so publicly.

Indeed, there is pressure from the European Union and others on issues such as investment rules, on which India has been unable to agree because there is no evidence to show that any multilateral rules will lead to higher flows to developed countries.

On the contrary, India and many multinational corporations are strongly interested in the movement of people, so that labour can move as freely as capital. *(FT, 09.07.01)*

New Laws for M&As in Japan

The Japanese government is drafting a set of legal changes that are meant to iron out quirks in the nation's corporate law that hinder business' ability to restructure. But the project is coming under fire for what foreign lawyers and bankers say is a big omission, an absence of revisions that would make it easier for foreign companies to do mergers, acquisitions and other deals using stock.

According to them, Japan hasn't made improvements for cross-border M&A, and is gradually falling behind the rest of the world in this area. While most advanced countries are moving to encourage the integration of industries and capital markets through M&A activity on an international scale, Japan remains focused on domestic issues without due consideration of the

global factor, a group organised by the American Chamber of Commerce says.

(WSJ, 05.07.01 & 31.05.01)

Compulsory Licensing in Drugs

The European Commission ordered pharmaceuticals-data collectors IMS Health Inc. to license a controversial system for tracking drug sales in Germany to competitors.

Michael Gury, a spokesman for Connecticut-based IMS described the decision as "an ominous development for intellectual-property rights that compromise the principles on which free market and competition are based and should be a cause of considerable concern to all companies that compete through intellectual property innovation"

The Commission has ordered that IMS must begin negotiating commercial terms to

license its German data collection system to rivals NDC Health Corp. of the US and AzyX Geopharma Services of Belgium. The Commission gave IMS just weeks to come to an agreement with the companies before a mediator would be chosen to impose "commercially reasonable terms". The Commission decision says that the refusal by IMS to license its drug-sales data system to competitors is likely to "eliminate all prospect of competition in Germany" and cause serious and irreparable damage to NDC and AzyX.

In another instance of competition concern in the sector, the restrictive patent protection enjoyed by half the anti-retrovirals registered in Kenya evaporated last week when the country's parliament unanimously passed the Industrial Property Bill, which for the first time will enable the government and importers to buy patented drugs from the cheapest source.

Companies dealing in drugs, however, are likely to get a temporary reprieve, as the Property Bill requires that the country's authorities give firms with patent rights six months' notice before other companies are able to import or produce generic drugs. *(WSJ, 06.07.01 & The East African, 18-24.06.01)*

Whistleblower Immunity in EU

The European Commission has adopted new draft rules that would give complete immunity to the first company to report an undetected cartel. It is designed to attract more participants in cartels to blow the whistle on their co-conspirators.

"Complete immunity would be granted to the first firm to inform the Commission about an undetected cartel," the Commission said in a statement about companies that conspire to fix prices or carve up territory. Other companies that gave the Commission useful information would also continue to be eligible for some reduction in fines. However, complete immunity would not be granted to the companies at the centre of the conspiracy. *(BL, 19.07.01)*

EU Takeover Rules Fall Through

The European Parliament ended 12 years of efforts to establish cross-border rules on mergers and acquisitions yesterday when it threw out a proposed takeover directive amid unprecedented controversy and confusion.

The directive had been seen as vital to the further integration and restructuring of European industry. Its narrow defeat is likely to disappoint international investors.

The directive's most important clause would force a bidder, once he has gained control of the target company, to make an offer to all shareholders at an equitable price. The clause would oblige management to consult shareholders before taking defensive action against a hostile bid. *(FT, 07.06.01)*

Setback for Swiss Bid Protection

Efforts to end the shareholder restrictions that protect many Swiss companies from hostile foreign takeovers have received a setback after the country's highest court overturned a Swiss Takeover Commission ruling backing a US corporate raider's challenge of a Swiss company's dual shareholder voting structure.

Last week, the Swiss Federal appeals court backed Baumgartner Papiers, a poorly performing paper company, in its dispute with Asher Edelman, the veteran US corporate raider. If the Swiss Appeals court had ruled against Baumgartner, it would have made it difficult for other Swiss companies to protect themselves with limits on voting rights. It would also have accelerated the abandonment of the dual share structures that give some shareholders more rights than others would.

Several of Switzerland's leading multinationals have strengthened their market position through large acquisitions abroad. However, the chances of a Swiss multinational falling prey to a hostile foreign bidder are almost non-existent since Swiss blue chips – from Roche and Nestle to Sulzer and Holderbank – have voting restrictions that pose near-insurmountable obstacles. *(FT, 09.07.01)*

Ruling Brings Down Legal Barriers

In a move that could further erode the barriers to association between lawyers and accountants, the advocate general of the European Court of Justice said that a ban on such partnerships was anti-competitive.

The Big Five have built extensive legal networks and have been engaged in an international campaign to break down what they see as restrictive barriers set up by the legal profession in Europe and elsewhere. A number of European governments have resisted the move towards joint lawyer-accountant practices and opponents have raised issues of conflict of interest and client confidentiality.

Some law firms have said the ability of the Big Five to offer integrated legal and accounting services poses a threat to their business. Although the Big Five are making progress in Europe, the American Bar Association last year killed off a proposal to allow fee-sharing partnerships with accountants in the US. *(FT, 11.07.01)*

M&As Hurt Shareholders

Shareholders are at the receiving end of most merger and acquisition deals, which very often do not add to shareholder value at all, says a recent global study done by premier audit and consultancy firm KPMG.

According to the study's findings, only 30 percent of M&A transaction created

shareholder value, while 39 percent of the deals "produced no discernible difference". The shocking revelation, however, has been the fact that 31 percent of the merger and acquisition deals actually went on to destroy shareholder value.

In a bid to drive up the success rate for M&A deals, the consultancy firm has drawn up a list of key practices to be adopted by companies to drive up shareholder value.

The steps include early action to tackle process management and other key activities, and making a board member responsible for M&A policy and activity. *(FT, 24.06.01)*

China Eases Price Control

China will remove price controls on 128 items from August 1 in preparation for the country's entry into the World Trade Organisation. But Beijing will keep controls on 13 broad categories that cover key areas of the economy.

The items on which price controls are to be lifted included sugar, silk, natural rubber, pure gold jewellery, steaming coal and tea for sale in border areas, according to the State Development Planning Commission.

The lifting of such curbs, though, is little more than symbolic. Most of the 128 items were already being traded according to market forces. More significant are the areas in which price guidelines are to be maintained. These include natural gas, electric power except for that portion sold through pooling, train tickets and fees charged by key sea ports and ports along the Yangtze river, basic telecoms etc. *(FT, 12.07.01)*

Restricting Ads on Violent Movies

A powerful group of national marketers in the US is lining up legal arguments that

centre on the First Amendment as it tries to head off legislation that would restrict ads for violent movies, video games and music. The advertisers want to quash proposals in Washington to prevent entertainment companies from promoting adult-rated products to kids.

The Federal Trade Commission in a report last year unearthed internal memos detailing how companies routinely target the marketing of violent movies music to kids, some as young as 10 year old. Since then, lawmakers have been scrambling to come up with ways to prevent this.

Advertisers hope a recent court ruling will provide them with ammunition. In June, the Supreme Court struck down Massachusetts' outdoor-advertising restrictions on cigars and smokeless-tobacco products. The court found that those restrictions, aiming at shielding kids, violated the First Amendment. *(FT, 27.07.01)*

Cartel Directors to Face Jail

Directors of companies involved in cartels are to face prosecution by a reformed Office of Fair Trading (UK) which has been armed with sweeping new powers, including the use of covert surveillance using hidden cameras etc.

If convicted, they will have to serve a "strong" jail sentence with no alternative option of a fine, the government announced recently. The companies concerned could also face multi-million pound claims by third parties, such as consumer bodies, on top of fines of up to 10 percent of turnover.

The proposals drew a backlash from business organisations, which questioned the need for a criminal regime less than 18 months after the OFT inherited powers last March to impose big fines on cartels. The changes are part of series of wide reforms to competition and insolvency rules, which will form a new enterprise bill. *(FT, 01.08.01)*

PHARMA PRICE CONTROL PROTEST



Pharmaceutical companies are threatening to reduce their presence in France because of government efforts to impose price controls on prescription drugs.

The plan has provoked the ire of drug companies, which have long objected to what they regard as an increasingly hostile environment in Europe. The industry makes an estimated 60 percent of its profits in the US and resents the fact that in Europe cost-conscious governments, rather than the market, determine the price of new drugs.

This, they say, is the principal reason for the industry's rapid decline in Europe, where countries such as France, Germany and Switzerland have fallen behind in terms of pharmaceutical innovation.

Most European companies have shifted substantial research and development efforts to the US in an effort to capture sales in that market. Some, such as Roche of Switzerland and Pharmacia of the US, have shut their European laboratories. *(FT, 11.06.01)*

EU-wide body for Telecom

Telecommunications regulators proposed forming a pan-European authority, amid fears that multinational companies were "picking off" national regulators through lobbying campaigns.

However, national regulators and governments had opposed suggestions that the European Commission should create a new institution to fill this role and overrule existing national regulators. Instead, they intended to formalise an existing ad-hoc discussion group, the Independent Regulators Group, which was formed in 1997 to allow debate between national regulators.

Many of the larger pan-European operators such as Vodafone and Orange were particularly worried that a trend towards greater market intervention by regulators will see Europe becoming out of step with a more *laissez faire* approach proposed by Michael Powell, the new chairman of the US Federal Communications Commission.

(FT, 08.06.01)

Mega Merger in Cellular

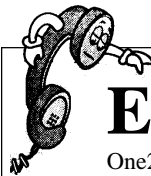
The cellular giants, Birla-AT&T-Tata Cellular (BATATA) and BPL Communications, have entered into a deal to combine operations with a total subscriber base of close to one million or about 24 percent of the market (51 percent of all fixed line telephone users and 38 percent of India's population of over one billion people). However, the merged entity will not participate in basic telephony services. Currently, BPL has about 7,00,000 subscribers while BATATA has about 3,00,000.

The combined entity will have a strong presence in 10 out of the 22 circles and is valued at \$2bn. In the joint venture, BATATA will hold an equity stake of 50.68% and the BPL consortium the balance 49.32 percent. The consolidation will push Hong Kong's Hutchison Telecom to the number two slot with close to 7,70,000 subscribers and leave Bharti Telecom way behind with a little over 6,00,000 subscribers. AT&T's share in the merged entity is going to be more than 17 percent and France Telecom may pick 6-7 percent stake in Birla & BATATA alliance.

(WSJ, 29.06.01 & ET, 28.06.01)

China's Telecom Opening

A notice issued by the Ministry of Information Industry divided telecommunications services into "basic" and "value-added", a distinction that determined both how much and when foreign investment will be allowed in those



3G INITIATIVES

Europe's first cross-border co-operation agreement covering the construction of 3G networks will see BT Cellnet and Telekom's One2One working together in the UK. BT's Viag Interkom and Telekom's T-Mobile will do the same in Germany. The agreements involved a coordinated rollout of 3G infrastructure and the sharing of new and existing base stations, including sites etc., in urban areas. There will be co-operation on bilateral roaming, which allows customers to use the facilities of both companies' networks while subscribing to just one.

Mobilcom, the German telecoms operator, held talks with E-Plus, Group 3G and Mannesmann Mobilfunk about sharing its 3G mobile network. RegTP, the German telecoms regulator, laid down generous rules on 3G infrastructure sharing of electronic hardware, bricks and mortar – a move that could save the industry billions of euros. (WSJ, 13.06.01 & FT, 19.06.01)

services. Basic telecommunications services were those that were run over an operators own network, including fixed-line and mobile telephony as well as Internet data transmission. Companies that offer value-added services, which include Internet access and a variety of specialised corporate services, use another operator's network.

Although the liberalisation timetables differ, foreign companies will eventually be allowed to own 49 percent of joint ventures in basic telecommunications services and 50 percent of value-added service joint ventures after China joins the WTO.

(WSJ, 18.06.01 & 02.07.01)

Price War or Collusion?

The tariff cuts in incoming and outgoing calls in Indian cellular industry by Hutchison Essar, Airtel, BPL and Orange in Delhi and Mumbai are something more than a coincidence. Almost the same tariff plans on the same day definitely smack of collusion or cartelisation.

Before the entry of the government-owned MTNL, announcement of new tariff packages by the private sector cellular operators almost simultaneously in Delhi and Mumbai speak volumes. Operators in these two metro cities appear very prone to this "coincidence" of announcing tariff cuts together.

(FE, 05.06.01)



EU Mobile Raid

European Commission (EC) investigators launched surprise raids on Europe's largest mobile telephone operators. Nine companies were raided, including Vodafone in the UK and T-Mobile in Germany. Officials from the EC were probing allegations that price-fixing might have kept the so-called roaming charges,

for calls made outside consumers' home markets, 35 percent above domestic rates. Operators denied price-fixing, but admitted that the cost of roaming had remained high since an original industry agreement in 1991 had set rates about 35 percent higher than domestic calls.

The industry had always defended its roaming policies, saying that market needs time to develop and that prices will continue to decrease. But, consumer groups argued that roaming charges often bear no relation to the cost of service.

If collusion charges are confirmed, the companies involved could face fines and cease-and-desist orders.

(FT, 12.07.01 & WSJ, 13.07.01)

Take-overs in Australian Telecom

Singapore Telecommunications Ltd. (SingTel) is in the middle of a A\$14bn (US\$7.14bn) bid for Australia's second largest telecom company Optus, behind government-controlled Telstra Corp. and has issued offer documents to shareholders but is still awaiting government approval of the take-over. The friendly take-over has been subject to intense scrutiny on the grounds of defence and national interest.

SingTel is 78 percent owned by the Singapore government and completion of the Optus take-over would give SingTel access to satellites that carry military data alongside telephone traffic. In another deal, Hutchison Telecommunications Ltd. has chosen the local units of Telefon AB L. M. Ericsson and Motorola Inc. to build a national 3G mobile network which is envisaged to allow mobile-telephone users to surf the Internet, send e-mail, access corporate data and watch videos on their handsets. Hutchison bought spectrum licenses at a price that was low due to a lack of price tension in Australia's spectrum auction.

(WSJ, 20.06.01 & 02.07.01)

VODAFONE: UNIFYING EMPIRE

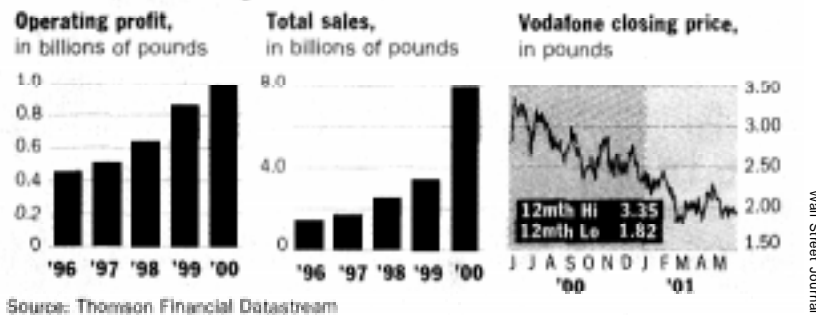
The UK company, Vodafone, had waged an expansion blitz, boosting its total number of registered customers to 188 million in the 29 operators that Vodafone, the world's largest mobile phone operator, either controls or holds a stake in.

Vodafone's name will adorn Ferrari's Formula-one cars as part of a multi-million euro sponsorship-deal. As a part of its effort to meld its global operations, Vodafone intended to roll out a common brand by next year to replace, eventually, the brands under which it now sells services. For the immediate future, the company intended to focus on Japan and China.

However, record profits from Vodafone had increased the prospect of a cap being put on its charges by Ofcom, the UK telecom regulator. The cap could jeopardize Vodafone's latest plan to concentrate on increasing the profitability of its traditional voice businesses, rather than focus on further foreign acquisitions.

(FT, 30.05.01 & WSJ, 31.05.01)

Vodafone's Key Numbers



Telecom Bid Amidst Allegations

With two days to go before the submission of the bids, companies like Reliance, Bharti, Birla AT&T, Escotel, HFCL and BPL had bought 24 tender documents from the department of telecommunications to bid for the fourth cellular license. Each company shelled out Rs 50,000 per form, although there was no restriction on the number of circles that they could bid for in one tender document.

At the end of the second stage financial bids, Bharti had emerged as the single short-listed bidder for the lucrative circles of Mumbai, Haryana, Kerala, Madhya Pradesh, Tamil Nadu and Uttar Pradesh. It already operates cellular services in Delhi.

BPL Communications Limited had alleged that there were no safeguards to prevent cartelisation in the bidding process followed to issue the license and it had yielded lower than expected results.

(BL, 18.07.01 & FE, 20.07.01)

China Enters Telecom Sector

China's telecommunications regulator gave a green light for convergence between Internet and cable businesses – but the TV market regulator remained resistant to the idea.

Whether companies such as China Telecom, China Unicom, China Netcom and China Railcom will be allowed to offer cable TV over their broadband networks was at stake. Another issue was whether numerous

cable TV companies owned by the State Administration of Radio, Film and TV (SARFT) would be able to deliver Internet and voice services over a network that currently reaches about 90 million subscribers in China.

So, when the telecom regulator said that Beijing would allow cable TV operators to delve into the telecom companies and the market to carry TV, it seemed as if the long-awaited dawn of convergence in China had arrived..

(FT, 12.07.01)

MOU between Japan & China

Japanese telecom firms are venturing outside their home market in search of growth. This is evident from the fact that Japan Telecom Co., which will soon be 45 percent-owned by Britain's Vodafone Group PLC, signed a MOU with China's dominant state carrier, China Telecommunications Corp, in the fixed-line and fast data transmission business.

The two companies are already collaborating on international calling services and this memorandum is an extension of that relationship and would, according to analysts, have little material impact on Japan Telecom's bottom line.

(WSJ, 13.06.01)

Arbitration for Telecom Dispute

Telecom Italia and Brazil Telecom are due to face each other at an arbitration tribunal after reaching a deadlock over

expansion. Telecom Italia Mobile (TIM) is one of four telecommunications groups that are driving consolidation in Brazil's mobile telephony market. Telecom Italia has a 38 percent share in the consortium that controls Brazil Telecom while investment company, Opportunity, has a 62 percent stake.

The relation began to sour when Opportunity accused Telecom Italia of wanting to "over-pay" Spain's Telefonía in Brazil Telecom's acquisition of a controlling stake in CRT, a fixed line operator in the far-south. (FT, 16.07.01)

Probe into Phone Bid

The U.S. Federal Communications Commission (FCC) is investigating why SBC Communications Inc. gave incorrect information to regulators who were considering whether to allow the phone company into the long-distance markets of several states. If mis-statements resulted from simple mistakes on the part of the regional phone company, the FCC would be likely to impose large fines and evidence of intentional deception by the company, however, could lead the agency to suspend SBC's ability to sell long-distance services in the three states.

The latest investigation broadens an existing FCC inquiry into whether SBC's Oklahoma and Kansas long-distance applications contained false information about the way the company gives competitors access to its high-speed Internet services.

Although most of the incorrect information concerns relatively minor issues, federal regulators believe that they must make it clear to the companies that such mis-statements, whether accidental or intentional, won't be tolerated.

(WSJ, 18.06.01)

Boost Mobile Internet

The GSM Association, the body that represents mobile telephone operators, launched guidelines for handset manufacturers designed to ensure that all handsets are able to send and receive the same internet-based information, to kick-start the development of mobile internet services and help the industry avoid a repeat of the widely perceived failure of Wireless Application Protocol (WAP) which offers limited mobile internet services.

The Mobile Services Initiatives was endorsed by the handset and telecommunications equipment manufacturers, such as Openwave, Alcatel, Ericsson and Nokia, and telecom operators, like Telecom Italia Mobile, France Telecom, Telefonía, BT Wireless and Vodafone.

(FT, 14.06.01)

Microsoft: Vignettes

Taste of Victory?

On 28th June 2001, the US Court of Appeals for the District of Columbia, constituting of seven judges, set aside past year ruling of a District Court Judge Thomas Jackson that would have split the software giant Microsoft Corp into two. The appeal court further found that Judge Jackson violated the judicial code of conduct. In ways that were “deliberate, repeated, egregious and flagrant.”

However, the appeal court has not reversed the finding of the District Court that by attempting to force PC makers to “bundle” the Windows operating system with its Internet Explorer browser, Microsoft has indulged into an anti-competitive practice and hence violated the Sherman Act. The seven-judge panel upheld the finding that Microsoft holds monopoly power, and declared that it repeatedly and ruthlessly used its dominance to protect its window monopoly from competition. It has only set aside the penalty and has referred to a different judge to reconsider the remedial order.

The original case was brought by the US Department of Justice (DoJ), 19 states and the District of Columbia. Both Microsoft and DoJ initial reaction on the appeals court decision was appreciative.

In mid July Microsoft requested the appeal court to re-examine part of its June ruling. The DoJ criticised the move saying that the question had already been settled twice by the court and that case should proceed as quickly as possible. Finally the appeals court rejected Microsoft’s request and also declined to speed the case’s passage back to a lower court, a move sought by the US government. The decision left the case to return to the lower court in due course unless Microsoft decides to appeal to the Supreme Court.

In the meantime there were meetings between Microsoft, DoJ and state officials toward settlement negotiations. However, it seems nothing concrete has emerged from the same. Furthermore, the Senate Judiciary Committee has decided to hold hearing in September into Microsoft’s business practices that are subject to the case against the company.

These developments are crucial for the much-awaited introduction of Windows XP by Microsoft in October this year. State law enforcement officials believe that the recent appeals court ruling prevents Microsoft from freely including new features in its Window XP operating system.

(BL, 29.06.01; 03.08.01 & WSJ, 24.07.01)

MS-AOL Join Hands

During the end of May 2001, Microsoft and AOL Time Warner were in discussion about the possibility of packaging the software company’s Internet audio and video technology with the AOL Internet service. However soon the talks broke down setting stage for a bitter business and legal conflicts between the two companies. Both companies blamed each other for collapse in negotiation.



AOL said talks broke down because of Microsoft’s desire to create a dominant position in Internet music through its audio and video technology. While Microsoft said that the ultimate snag was AOL’s refusal to make its instant-messaging service work with that of Microsoft.

Later in July when AOL moved to acquire AT&T’s cable business, the number one US cable operator, Microsoft is in full flow to block the move. Microsoft is even prepared to collaborate with alternative bidders for the AT&T broadband division, rather than see AOL become the dominant player in the US cable market.

Microsoft now views AOL as its primary rival in the consumer internet sector, and after the apparent failure of Comcast’s US\$52bn bid for the AT&T Broadband division it wants to stop AT&T’s talks with AOL. MS does not want to acquire the division itself as it has no interest in entering the cable business, but fears that combining AT&T’s cable operations with those of AOL would create an industry giant with about 29 million subscribers, or approximately 40 percent of the US market.

This would place AOL in control of one of the most promising means of delivering advanced internet services to US consumers, on one hand, and on the other, could also create a barrier to Microsoft’s

ambitions to reach beyond the personal computer screen with e-commerce, information and entertainment services.

(WSJ, 19.06.01 & BD, 01.08.01)

MS-Xbox

Microsoft reached an agreement with XBOX Technologies, a small technology-holding company that will, in exchange for an undisclosed amount, alter its name and drop a challenge to Microsoft’s use of the name “Xbox” for its coming video-game console.

XBOX Technologies filed applications with the US Patent and Trademark Office to use the Xbox name in March 1999, more than six months before Microsoft’s first Xbox filing.

(WSJ, 19.06.01)

Linux: An Uphill Battle for MS

A Microsoft Corp. effort to vilify Linux and other open-source software appears to be backfiring, with the campaign drawing criticism from legal experts. Microsoft Chief Executive, Steve Ballmer in an interview called Linux “a cancer that attaches itself in an intellectual property sense to everything it touches.”

Open-source software involves freely available programmes in which the underlying source code, or blueprints, can be viewed and modified by programmers. Microsoft maintains that open-source poses a hidden threat because of licensing provisions that accompany the software.

The company’s main objective is with the General Public License (GPL), under which Linux is distributed. That license requires companies that incorporate GPL software in their own programmes to, in turn, make those programmes freely available

But in its statement, Microsoft failed to draw attention to the fact that the GPL also allows companies to write their own proprietary programmes that work in connection with a GPL code. “Microsoft is spinning this the way they feel they need to,” says one lawyer who deals with open-source licenses.

Many large software companies including Oracle Corp., sell propriety programmes that work with Linux. Other open-sources software, such as FreeBSD, is distributed under license that contain virtually no restrictions at all.

Microsoft campaign has helped unify open-sources leaders, who all signed a statement criticising Microsoft. It said that Microsoft is running the campaign because it views open-source software as the main competition to its “.Net” Internet initiatives.

(WSJ, 15.06.01)

EC Tough on Cartels

The EC has fined •219mn (US\$189mn) upon eight companies for price-fixing in the steel mini-mill industry. The overall fine against firms which make graphite electrodes-ceramics moulded columns of graphite mostly used to recycle scrap metal into new steel in electric arc furnaces-was the second largest ever imposed by the commission in a cartel case.

The leaders of the cartels were SGL of Germany and UCAR of US, which started it in 1992. SGL carbon strongly believes that there are procedural defects in this case and there has been double jeopardy which is not permitted by law. In 1999, the US authorities already imposed a fine of \$145mn against the company for the same conduct.

The Commission proposed revision of its rules for whistleblowing and also emphasised the benefits of co-operation.

(BL, 20.07.01 & FT, 19.07.01)

VW, Michelin Fined

The EC fined Volkswagen (VW), the German carmaker, •30.96mn (US\$26.4) for attempting to set prices for its Passat model in Germany. The fine marks the first EC decision against retail price maintenance, which is illegal under the EU competition law. When VW introduced Pasat in 1996, it instructed its dealers not to grant discounts to customers, but to hold the list price. The EC had imposed a record •102mn fine on VW three years ago for restricting cross-border car sales.

Michelin, the French tyre maker was also fined by EC •19.76mn (US\$16.8mn) for abusing its dominant position in its home market. According to EC Michelin's complex system of quantitative rebates, bonuses and other commercial practices illegally tied dealers and foreclosed the French market to other tyre manufacturers.

(WSJ, 31.05.01 & FT, 30.05.01, 26.06.01)

Dealing Diamond Dealers

The EC has approved the South African diamond giant De Beers' plan to set up a partnership with LVMH, the world's largest luxury goods group, to sell diamond under the DeBeers brand.

But the Commission, which was voluntarily notified of the proposal by De Beers, objected its plan in its present form, warning that it does not conform with European competition law. *(FT, 26.07.01)*

Improper drug Marketing

The US Food and Drug Administration (FDA) ordered Pfizer Inc. to stop running a print advertisement for the cholesterol-lowering drug Lipitor, saying the ad's claim that Lipitor can cut the risk of heart disease

is misleading. Although Lipitor can be promoted as a cholesterol-lowering drug, it hasn't received FDA's approval as a treatment for coronary heart disease.

Similarly, the FDA stepped up action against GlaxoSmithKline over improper marketing of its popular diabetes drug Avandia. There is existence of serious side effects which Avandia users may experience. The FDA rebuked Glaxo for the fact that violative promotion of Avandia has continued despite written assurances. Avandia has been singled out five times since 1999 for improper, misleading or false marketing. *(WSJ 02.08.01 & 03.08.01)*

Pharma Companies Hauled Up

The issue of price manipulation by Johnson & Johnson (J&J) regarding its Coldarin brand, pending before the Monopolies & Restrictive Trade practices Commission (MRTPC), which had issued notice to the respondents.

J&J and others in its reply to the notice have said that as the main thrust of the complainant has been the violation of provisions of the Drug Price Control Order (DPCO), the matter falls within the exclusive jurisdiction and authority of National Pharmaceutical Pricing Authority and not within the purview of the MRTPC.

As Coldarin is a scheduled formulation under the DPCO, prior sanctions of the

Government is required for the its revision of price and formulation. However, exemptions are allowed in small-scale units, in this regard, provided it is the holder of the trademark, handles the marketing of the product, and is an independent unit not a subsidiary operations of any large pharmaceutical company.

The complaint alleged that J&J India, along with its US based parent company and another company NR Jet Enterprises, which is a small scale unit, has entered into an illegal transaction in a bid to avail the exemptions so as to sell Coldarin at a higher price. J&J holds substantial stake in NR Jet through four different entities, which are its wholly owned subsidiaries. *(BL, 07.06.01)*

Titan indulged in RTP

Titan Industries Ltd. has been directed by MRTPC, India to delete a of its franchise agreement, which bars franchisee from dealing in products or goods similar in nature for a period of three years from the date of termination of the agreement within five kilometer radius of the showroom.

"This clause is restrictive both in respect of product, period and territory within which the trade cannot be carried on by the franchisee," hold MRTPC.

(BL, 08.06.01)

EC, US on Music Market

The EC has launched an investigation into the high price of digital versatile discs (DVDs) in the EU following complaints by consumers. The Commission received complains from consumers about high DVD prices in the EU countries and the difficulty of ordering from the US, as well as problem of playing US discs on European players.

The Commission wants to find out if companies are engaging in anti-competitive practices. Manufacturing companies argue that they divide the world into regions to make the collection of royalties easier and to reduce the risk of piracy.

In another incident, the US Federal Trade Commission (FTC) has filed charges against Warner Music and Vivendi Universal, parent of recording group PolyGram, accusing them of price-fixing over albums of Three Tenors, recorded on the eve of 1998 World Cup Soccer in Paris. According to the FTC both the companies agreed not to discount two earlier albums by Luciano Pavarotti, Placido Domingo and Jose Carreras, in hope of propping up the price of the World Cup recording.

Both the companies also agreed not to advertise the earlier recordings of the trio – the 1990 debut album produced by PolyGram and 1994 follow-up by Warner. The price-fixing took place because the music groups, which had a joint venture contract to distribute a recording of the 1998 performance, feared that the Three Tenors were losing their appeal.

Similarly, the US DoJ has opened an anti-trust investigation of the online music business, focussing on two new joint ventures backed by five major record labels. The probe, which is in a preliminary stage, is looking into anti-competitive problems posed by the joint ventures plus how major companies use copyright rules and licensing practices to control online distribution of their music.

(FT, 11.06.01; 01.08.01 & BL, 06.08.01)



Airline Consolidation Terminated

The proposed \$4.3 billion acquisition of US Airways Group Inc., the sixth largest US carrier, by UAL Corp.'s United Airlines, the second largest US carrier, has been terminated because of regulatory problems and worsening economy. For ending the agreement, United Airlines has agreed to pay US Airways a break-up fee of \$50 million. The combination of the second and sixth biggest carriers would have illegally reduced competition on an array of domestic and international routes.

An ending of the deal could discourage other airlines from attempting mergers, suggesting that US Government officials are highly suspicious of any further airline consolidation though the government did grant approval to AMR Corp.'s American Airlines' \$742 million acquisition of failing Trans World Airlines.

The long-term prospects of US Airways as a stand-alone concern are not good, because it is neither a nimble, lower-cost carrier nor an airline with a national route network. (WSJ, 03.07.01 & FT, 28.07.01)

Transatlantic Joint Venture

British Airways (BA) and American Airlines are facing growing opposition from other Airlines to their plans to form a transatlantic joint venture that would become the most powerful alliance on routes between Europe and the US.

Executives from Delta Airlines, Northwest Airlines and Continental Airlines expressed concern about the impact on competition of BA/American alliance on services between London's Heathrow airport and the US. BA and American already hold 61 percent of all slots at Heathrow operated on London-US flights.

BA and American, which are already the leading partners in the oneworld airlines alliance, would need clearance from the competition regulators to be allowed to create a profit and revenue sharing joint venture in which they could collaborate on pricing, schedules and capacity planning and on code sharing (selling seats) on each other's networks. (FT, 23.07.01)

Australia Favours Competition

Qantas Airways Ltd. had sought to grab a substantial Air New Zealand stake and sell off the loss-making subsidiary Ansett Australia, its key domestic rival, to Singapore Airlines Ltd. (SIA) - but Air NZ has rebuffed and favoured a plan by SIA to raise SIA's stake in the New Zealand Airline instead.

The Australian Government refused to be drawn into the battle between the region's

airlines by saying it was a commercial fight and its priority was to ensure the nation's skies remained competitive.

However, SIA will not take control of Air New Zealand under a proposal for SIA to increase its shareholding and help the New Zealand flag carrier raise new capital, because Australian regulations made majority ownership by a foreign firm impossible, and control either through management or through board was not the agenda of SIA. (FT, 20.06.01)

Merger Ruled Out

A planned merger between Avianca, Colombia's oldest and largest carrier, and its rival Colombia's second largest domestic airliner, Aces, was ruled out by regulatory authorities on competition grounds that the merged company would have been four times bigger than its nearest domestic rival.

Avianca, which represents almost half of the sales of its holding company Valores Bavaria that also has media, manufacturing and telecoms interests, had been trying to clean up its balance sheet and saw the merger as a potential answer to the financial problems which have plagued Avianca, Colombia's flagship international carrier and one of the world's oldest airlines, which made losses of 98.4 billion pesos (\$42.7 million) in the first quarter of 2001 compared with a loss of 37.8 billion pesos last year.

The companies had showed the need to unite to compete in international market, at a time when Colombia is opening its international air routes to foreign carriers, which could have left the door open for proposals to co-operate on international operations only. However, most of the objections are in the domestic sphere. (FT, 12.06.01 & 13.06.01)

Ailing Argentine Airline Buyout

The dispute over the future of Aerolineas, Argentina's flag-carrier, has soured relation between Buenos Aires and Madrid. Aerolineas was privatised by Argentina in 1990 and sold to Spanish airline Iberia debt-free. Today the airline struggles under more than \$900 million in debt and is losing in excess of \$30 million a month.

Many Argentines accuse the Spanish State, which inherited control of Aerolineas from Iberia during its own privatisation, of gross management and outright asset-stripping. Argentine trade unions have called for a boycott of Spanish companies and airline workers have blocked the departure of Iberia flights from Buenos Aires.

Spanish groups have invested more than

\$40 billion in Argentina since the early 1990s, snapping up companies in the banking, telecom and the energy sector. SEPI, the Spanish state-holding company that holds nearly 92 percent of Aerolineas, has refused to inject any more capital into the airline, until Argentine trade unions accept a restructuring plan that would entail sweeping salary cuts.

AeroContentente, which is owned mainly by Peruvian investors and has become Peru's number one airline since it began operating nearly eight years ago, has surprisingly announced an offer to buy all outstanding shares in Aerolineas. But it did not make any concrete offer in the hope to discuss a figure with SEPI if it was interested. (FT, 16.06.01 & 22.06.01)

Charges of Predatory Pricing

The US Justice Department asked a federal appeals court to reinstate a controversial predatory pricing suit against American Airlines, a move that took anti-trust lawyers by surprise. The lawsuit, originally filed two years ago, accused American of illegally forcing low-fare competitors out of its Dallas-Fort Worth hub airport by aggressively cutting prices and flooding competing routes with extra aircraft.

The suit has been seen as a test not only of how the new administration will set the rules for price competition in the airline industry, but also of how the Justice Dept. may deal with other cases of alleged monopoly-power abuse, particularly the landmark suit against Microsoft.

The suit has been seen as a lightning rod for conservative critics, who argued that it was the prime example of the Clinton administration's over-reaching in monopoly cases, the area where there is expected to be the most change under President George W. Bush. (FT, 27.06.01)

EC Crackdown on State Aid

The EC is considering opening a formal state aid probe into cash injection from the Belgian government for national airline Sabena.

The investigation is being considered due to uncertainty whether Swissair, which owns 49.5 percent of Sabena, would respect commitments it made in January 2001 with the Belgian government, including a •250mn (US\$214mn) capital increase for Sabena.

Belgium, which owns 50.5 percent of Sabena, agreed to contribute •100mn of the increase. Swissair is considering getting out of the agreement as part of its restructuring.

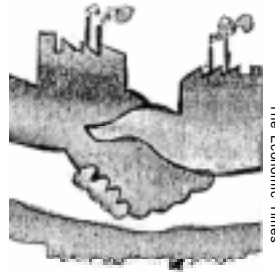
(FT, 16.07.01 & 17.07.01)

WARNING ON TAKE-OVER

A high-level International Monetary Fund Mission had cautioned Indonesia over the planned take-over of the troubled Bank International Indonesia (BII) by the country's largest bank, the state-run Bank Mandiri. It said the deal could unduly burden Bank Mandiri, which was created only last year from the merger of four banks.

BII, re-capitalised in 1999, was listed on the Jakarta Stock Exchange and was previously part of the Widjaja family's business empire. The Widjajas had control of the Sinar Mas Group, founder and former controlling shareholder of the BII. The key concern surrounding the take-over was the \$1.3bn owed to BII by the indebted Sinar Mas Group.

The Government had been looking at options to help keep BII afloat – the country's fifth largest bank. The World Bank recently said it could more than double its annual aid program to \$1bn if the deadlock was broken. *(WSJ, 26.06.01 & 09.07.01)*



Forced Share Sales Plan

Japan's corporate system has had a heavy focus on "cross shareholding", or a pattern where banks and their clients hold shares in each other and rarely sell them. However, the Financial Services Agency (FSA), the main regulator, proposed measures to take effect in 2004 that would effectively force the banks to sell their shares. The FSA also said that it might recommend allowing life-insurance companies to cut their promised payments to policyholders.

Since 1999, the FSA had reprimanded foreign bankers (FB) and closed the derivatives operations of Credit Suisse after uncovering serious irregularities in 1999. Some FBs had welcomed it as a sign that the FSA is trying to clean up Japan's notoriously murky markets. Others feared that the FSA was trying to harm Japan's credibility with foreign investors.

The Bank of Japan (BoJ) also discreetly urged the FSA to develop better methods for measuring questionable bank loans. To tackle the bad loans, vigorous measures had been called for at the recent meetings of the Government's Economics Council. Some board members had been arguing that the FSA needs to improve its measurement of "category two" bad loans – loans to banks that were not yet bankrupt but potentially risky. *(FT, 14.06.01 & WSJ, 27.06.01)*

Criticism for FSA

The French insurance regulator, the Commission de Controle des Assurances (CCA), had criticised the Financial Service Authority (FSA), the principal UK watchdog, over the collapse of Independent Insurance, the British group that had a subsidiary in France. Marsalet, President of the CCA, complained that there had been a failure of co-operation with the FSA and information only seemed to flow from

France to the UK. He said that the FSA was slow in telling the real situation of the parent company, perhaps because it was also not properly informed.

The FSA said it had not received any new and relevant information about the UK's sister company from the French authorities. Even after Independent issued a profit-warning, some analysts remained positive about the shares. Marsalet said that the British regulator tends to lean upon the views of the market. *(FT, 12.07.01)*

Privileges for Foreign Banks

Singapore was likely to grant at least two more banks the qualifying full bank (QFB) licenses and expand the scope of privileges for them. While foreign banks (FBs) might soon have more access to the local market, curbs on take-overs of the country's listed banks by foreign firms would remain in place.

Analysts speculated that Malayan Banking Bhd. and HSBC Holdings PLC will be granted QFB licenses this time, joining the first group of recipients, Citibank, Standard Chartered PLC etc. They suggested that the monetary authority was likely to ease the conditions for granting such licenses which included requiring a bank to maintain regional headquarters in Singapore. The central bank might also allow FBs to make use of local banks' automated teller machines (ATM) network and other point-of-sale services. *(WSJ, 28.06.01)*

Irish Seek Redress

The Irish Brokers Association had asked the Policyholders Protection Board (PPB) whether it would extend its compensation payments to eligible policyholders in Ireland as well as those in the UK. According to the Association, up to 1,100 claims were waiting to be paid in Ireland. However, the PPB pays out claims

only to individual policyholders and not to the small businesses.

Many Irish policyholders believed that Independent's Irish subsidiary was regulated by the UK's Financial Services Authority (FSA). Thus, they deserved the same protection as the UK policyholders. Independent had more than 10,000 policyholders in the Republic.

In the wake of the collapse, the Irish Insurance Federation, the main industry body, had called on its government to monitor insurers operating in the Republic more closely. *(FT, 23.07.01)*

China Shuts Trusts

China planned to close 151 of its 239 international trust and investment companies and merge the remaining 88 into 60 concerns, China's central bank confirmed in the annual report. The trusts were a legacy of the 1990s when local governments and state agencies had set them up as vehicles for raising development capital.

The bankrupt Guangdong International Trust and Invest Corporation issued dollar and yen denominated bonds to lure overseas capital to help develop projects in China. But, many of the projects failed, leaving local governments unable to repay the money to the trust companies and, instead, saddling them with huge debts.

As part of its strategy to clear up the sector, the central bank planned to cancel the operating licenses of 103 trust and investment companies, declared one firm bankrupt and changed the business nature of 47 firms. *(WSJ, 17.07.01)*

Battle On Market Rules

In a row that echoed of the dispute over withholding tax, banking and securities markets representatives had accused Brussels of failing to consult on the proposed directives and ignoring the recommendations they were asked to submit. Opposition was being built to a directive that seeks to curb "market abuse" such as insider trading. There is also dismay over Brussels' failure to consult on easing the burden of legal documentation required by companies selling shares into European markets outside their home jurisdiction.

Although the market abuse directive was part of the harmonisation programme, it predates the Lamfalussy committee's recommendations, which received widespread support among the financial institutions.

Commission officials admitted consultation over the directives had not been as wide-ranging as they would have liked. But, the officials were under pressure to meet the deadline of 2003 set by EU states to get the measures passed into law. *(FT, 11.06.01)*

FINANCIAL SECTOR

Korean Volte Face on Chaebols

The South Korean Government might reverse a landmark financial regulation that limits ownership in local banks by the country's chaebols, or conglomerates. The Finance Minister had planned to launch a new initiative to help stabilise the country's debt-ridden financial sector. It would include targeting nationalised banks for investment by chaebols as part of the government's wider privatisation programme.

The Minister proposed revising current banking regulations that restrict chaebols from holding no more than a 4-percent stake in a bank, lowering the previous one of 8-percent. If realised, it could result in a fundamental re-alignment of financial ownership in South Korea.

Critics feared that once the chaebols were allowed to own large stakes in local banks, they would find loopholes to turn those financial institutions into private cash dispensers. They also contended that the chaebols weren't the best choice for solving some of the banking industry's biggest problems: primitive credit analysis and a lack of sophisticated corporate financing know-how. (WSJ, 30.05.01 & 21.06.01)

Tough Stance Urged

The European Banking Federation urged the European Commission (EC) not to accept any transitional period for abolishing the system of state guarantees for Germany's Landesbanken. Last year, the banking federation complained to the EC that the system conferred illegal state aid on the public sector banks by lowering their borrowing costs.

The EU's Competition Commissioner wrote to the German Government outlining Brussels' concerns about the guarantees, asking Berlin to agree to a timetable for abolishing them. If the German Government does not co-operate with it, the EC could open a state aid probe, which would take the initiative out of Berlin's hands.

The banking federation was also concerned that bonds issued by the Landesbanken enjoyed long-term government guarantees. The creditors who acquired the debt did not know that these guarantees would be abolished. (FT, 06.07.01)

Credit Lyonnais Sued

California's Attorney General, Bill Lockyer, sued Credit Lyonnais, the French bank and related companies over the purchase of Executive Life and its junk-bond portfolio in the early 1990s. He accused the French investors of secretly working together to buy the junk bonds and Executive Life, breaking federal and Californian laws that banned banks or state-owned companies from buying insurers.

The French Government had pleaded in vain with the Bush administration to intervene.

Lawyers representing some of the French parties to the dispute said that the California authorities were delighted to find a buyer for Executive Life, which had collapsed and been taken under the protection of the California insurance commissioner after a plunge in the value of its large junk-bond portfolio. (FT, 22.06.01)

No Cap on Players

The Insurance Regulatory and Development Authority was not in favour of capping the number of private players to be allowed into the pension fund business. Issues like capital adequacy and solvency of pension fund providers, the collapse of the joint family system, increased life expectancy, urbanisation and a skewed coverage needed to be urgently addressed. There was pressure on the public finances, with pension pay outs to retired government servants doubling to 1 percent of GDP between 1994 and last year, when Rs 22, 000 crore was shelled out.

A number of issues where debate was required to evolve a policy framework included: a consensus on whether pension contributions should be compulsory or voluntary; the funding mechanism for pension schemes; whether it was fair to seek contributions from the self-employed and unorganised working classes when the organised sector had an equal contribution

from the employers as well; who would provide the annuity when only life-insurers and Unit Trust of India are permitted to do so; whether all or some mutual funds, banks and life-insurers be allowed entry in the pension fund accumulation; and whether even units employing a minimum of five persons be obliged to contribute to employees provident fund.

(FE, ET, BL, 04.07.01)

BankAmerica Failed

US securities regulators said BankAmerica Corp did not tell the investors that a venture with New York Investment Company, DE Shaw & Co had soured so badly by September 1998 that trading-losses were growing almost daily. The Securities and Exchange Commission (SEC) said that the bank did not account for its investment in DE Shaw properly, treating it as a loan instead of an equity investment, which generally entails greater risk.

BankAmerica began its venture with Shaw in March 1997. By April 1998, the San Francisco bank had provided \$1.4bn to the firm. In October 1998, the losses had grown to hundreds of millions of dollars and BankAmerica was closing its deal to be acquired by NationsBank Corp. This combination created Bank of America Corp in Charlotte, North Carolina.

Under an agreement with the SEC, Bank of America, as the surviving entity, did not admit or deny the agency's findings.

(WSJ, 01.08.01)

DOTCOM ANALYSTS SUED

In the exuberance of a bull market, Blodget from Merrill Lynch and Co. Inc. and Ms. Meeker of Morgan Stanley moved internet stocks as much as corporate press releases did about ever-more customer web-traffic. But, in the aftermath of the tech crash, both the analysts were under attack by disgruntled investors. Brokerages were still standing behind their analysts but were feeling the heat as litigation was expected to rise. The suits were likely to undermine Wall Street research credibility even more and firms had taken steps to reduce public appearances by analysts.

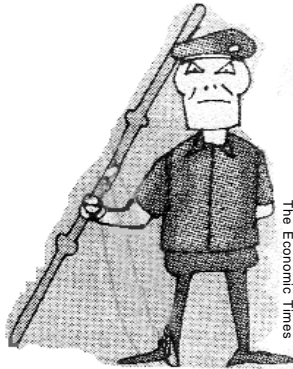
The legal actions essentially alleged that the analysts and their firms defrauded investors by issuing bullish research to keep corporate clients happy and failed to disclose the links between research and banking. The two largest US brokerages by number of brokers tied for top stock research in the prestigious Institutional Investor magazine poll and Blodget and Meeker were the top-ranked web-analysts. They got support from their respective firms.

Hill, the director of research, said that the analysts had not wanted to offend potential clients and that is why the research reports were so bullish. He said inexperience rather than a tendency to favour investment-banking clients caused investors to lose money. Adding a string of suits wasn't going to fix that, he said.

(ET, 04.08.01)



Check on Stock Market Regulations



Although China's securities laws already provide for criminal prosecution for breaches of provisions, both investigation and enforcement of the rules have been lax in practice. A flood of lawsuits is engulfing China's securities industry, as increasingly litigious stockholders bring into focus some of the markets' most intractable problems.

In order to give the regulators more clout in chasing wrongdoers, a senior official will be appointed to China's stock market regulator. China Regulatory Securities Commission (CRSC) was foreshadowed to be beefed up when the government started its crackdown on share price manipulation. (WSJ, 30.05.01 & FT, 07.07.01)

SEC Campaign on Integrity

The Securities and Exchange Commission, the main US financial regulator, has mounted a campaign to target leading authorities that are accomplices to the provision of unreliable or fraudulent financial information. The regulators attacked the auditors for failing to stop companies using over-aggressive accounting to give their profits a more flattering look.

The SEC argues that conflicts of interest within audit firms are part of the nexus of temptation that risks reducing the integrity of company account. The accounting firms say audit and consulting work can co-exist and that companies benefit from the resulting economies of the scale and pooling of knowledge. The SEC tightened its rules on conflicts of interest, putting in place a requirement for companies to disclose the consulting work done by their auditors. (FT, 17.07.01 & WSJ, 04.07.01)

Daewoo Officials Sentenced

Nineteen former Daewoo Group executives have been found guilty of distorting financial records and using falsified financial documents to procure funds for their companies. They were fined a combined total of nearly \$20bn, with five of them being sentenced to prison.

Those sentenced to terms of three to seven years included two former chairman of trading firm Daewoo Corp., a former Daewoo Motor Co. chairman, and a former chairman of Daewoo Electronics Co.

Judge Jang Hae-chang said that the collapse of the Daewoo group is due to their mismanagement through imprudent and illegal loans and it has caused huge damage to the Korean economy and disrupted the society as a whole.

(WSJ, 25.07.01 & BS, 25.07.01)

Problems at Gazprom

Gazprom holds the world's largest gas reserves and is Russia's biggest taxpayer and hard currency earner. The state has long forced Gazprom to subsidise the economy with gas sold at one-tenth the price of gas in Europe. This left the company without enough funds to maintain production and pipelines. Mr. Putin said Gazprom should charge a "realistic price" for gas and that there shouldn't be a "drastic difference" between domestic and international prices.

Mr. Putin said Gazprom's new chief executive, Alexi Miller wouldn't initiate any inquiry into asset stripping and other possible wrongdoing by management of Russia's biggest company. (WSJ, 20.06.01)

Corporate Code of Conduct

A high-level German government commission is expected to recommend the drafting of a voluntary code of conduct to tighten corporate governance standards among the country's publicly listed companies.

Theodor Baums, Frankfurt University law professor and chairman of the commission, said the commission's work was focussed on "modernisation and flexibility". After holding the final meeting,

Chancellor Gerhard Schroder is expected to convene an expert panel to draw up the code.

The code is likely to include an expansion of the powers of supervisory boards over a company's subsidiaries and may require managers to report to the boards on revisions to previously stated targets. (FT, 03.07.01)

More Responsibility

Directors of Malaysia's publicly listed companies say they will have to do a lot more work under a new Code of Corporate Governance, and will need a commensurate raise in pay, according to a survey by Pricewaterhouse Coopers.

The code, which becomes mandatory after this month, outlines requirements that make boards responsible for internal control and risk management, the conduct of management and also for senior management succession planning.

Under the new code, the audit, remuneration and nomination committees must contain at least two independent, non-executive directors. (WSJ, 20.07.01)

Schwab Penalised

In one of the largest fines levied against a US bank, regulators fined Charles Schwab Corp's US Trust unit \$10mn. The Trust agreed to pay \$5mn each to the Federal Reserve and to the New York State Banking Department.

The alleged offences concerned the bank's failure to report currency transactions of more than \$10,000 to the federal government, as required by a federal law designed to combat money-laundering. The bank also turned a blind eye to transactions that appeared designed to skirt those thresholds, such as when a customer either deposited or withdrew an amount just shy of \$10,000.

The action came at a sensitive time for Schwab, which had been struggling to find new revenue streams, as individual stock trading had slumped. Schwab posted a 68 percent drop in first-quarter net income. Its shares had slumped amid the dot-com meltdown and stock market weakness. (WSJ, 17.07.01)

SELF-REGULATION NOT SUFFICIENT

The former chairman of the US Securities and Exchange Commission does not expect much from Wall Street's current efforts to police itself.

In an interview Arthur Levitt opined that the relationship between analysts and investment banking is a "franchise" and it would be hard to unlink. He said that securities industry proposals to strengthen the so-called Chinese wall between analysts who follow stocks and the investment bankers who court the companies behind those stocks could remain more promising on paper than in practice.

He said that unless there is separation of analysts and investment banking, the problem of getting stuck with the same old circumstances couldn't be overcome. (WSJ, 25.07.01)



Compliance Review

CSFB, the investment banking arm of Credit Suisse First Boston, Switzerland's second largest banking group, lost around \$500mn following the turmoil in Russia's financial markets in 1998.

In 1999, CSFB's derivatives unit headquartered in London drew the toughest penalty imposed on a foreign bank in Japan after the Financial Services Authority (FSA) uncovered evidence that clients had been helped to flatter their balance sheets by using accounting loopholes. The Japanese operation was closed after being found guilty on criminal charges of obstructing government inspectors.

The FSA reviewed the compliance procedures and refused to comment on the investigation. The FSA scrutiny was the latest of several embarrassing incidents that had hit the investment bank. They included its involvement in a US investigation into allocations in initial public offerings that had drawn in much of the investment banking community. (FT, 15.06.01)

Hearing for Tainted Companies

Indian Minister for Disinvestment, Arun Shourie said, "Following the prima-facie implication of the guidelines to keep tainted companies out of the privatisation process, the three companies Hindujas, Sterlite and Videocon would be given an opportunity for a hearing before the final orders are passed by the government".

According to the prima facie implication of the guidelines announced, BPL has been allowed to continue in the race for a stake in Videsh Sanchar Nigam (Indian Overseas Communications Corporations). Videocon, BPL and Sterlite were recently indicted and barred from accessing the capital market by SEBI (Securities & Exchange Board of India) on charges of share price manipulation. (HT, 07.07.01)

Hong Kong Falls Short

Hong Kong, Asia's second largest market after Japan, lacks several hallmarks of a world-class financial centre, such as a strong regulator and effective protection for minority shareholders. Critics argue that historically, family domination of Hong Kong's corporate landscape has created little incentive to improve minority shareholder protection.

To reform the system, government has combined regulation spread over ten existing ordinances into one document, the Securities and Futures Bill. Among the key changes, the bill will empower the SFC to conduct fuller probes into companies it suspects of wrongdoing. It also proposes transforming the existing insider dealing tribunal into a "market misconduct tribunal" able to deal with a wider range of cases. (FT, 05.06.01)



Telecom Italia Chairman in Hot Seat

Roberto Colaninno, the chairman of Telecom Italia, has never had an easy relationship with many institutional shareholders since his holding company, Olivetti, took over the phone group in a bitter \$51.4bn takeover battle two years ago. Now, however, he and his company face anger within the board of directors, a new lawsuit from a long time antagonist.

The latest controversy surrounding Mr. Colaninno is reminiscent, observers say, of previous clashes with shareholders two years ago, when he attempted to transfer the company's cash rich mobile phone unit, TIM, into a holding company loaded with debt.

However, Telecom Italia's brush with corporate governance issues does not stop here as it is expected to be presented with a lawsuit from Liverpool Limited Partnership, a Bermuda based hedge fund very soon. (FT, 31.05.01)

Andersen Case 'Smoking Gun'

Commenting on the U.S. Securities and Exchange Commission's landmark fraud settlement with Arthur Andersen LLP over the accounting firm's audits of Waste Management Inc., acting SEC Chairman Laura Unger said the agency now has a 'smoking gun' illustrating a clear instance where an auditor's independence was compromised.

Specifically, Ms. Unger pointed to the fees that Waste Management paid Andersen for non-auditing services, as well as the fact that several Waste Management executives had joined the company from Andersen over the years before the company's accounting violations surfaced publicly. Previously Andersen faced a similar allegation from HIH an Australian insurer. (WSJ, 27.06.01)

One.Tel Ex-Officials Assets Freeted

The Australian Securities and Investment Commission obtained court-enforceable undertakings that freeze the assets of three former top executives of failed Australian telecommunications

company One.Tel Ltd. Jodee Rich, Bradley Keeling and Mark Silberman have agreed not to sell any assets, subject to a number of conditionalities.

The Commission has received undertakings freezing the assets of the companies of which Maxine, wife of Mr. Rich is a director. Messrs Rich, Keeling and Silberman have also agreed they won't leave Australia without giving the regulator seven days' notice in writing. One.Tel is in voluntary administration and is in the process of being wound down ahead of a second creditors' meeting. (WSJ, 14.06.01)

Brokerage Firms Penalised

Japan's Financial Supervisory Agency said it would impose penalties on Tokyo-Mitsubishi Securities Co. and Nippon Global Securities Co. for engaging in illegal transactions relating to trading or sales of exchangeable bonds.

The agency will suspend Tokyo-Mitsubishi Securities' trading in shares for its own account from June 4 to June 15, and bond trading for its own account from June 4 to June 5. It will suspend Nippon Global Securities' bond-trading operations from June 11 to June 22.

Tokyo-Mitsubishi Securities said in a prepared statement that it would work to establish stronger measures for internal management and prevention. (WSJ, 31.05.01)

Clients Awarded

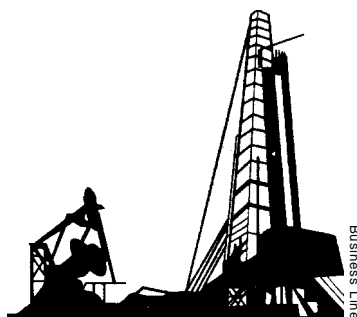
In the largest investor-arbitration award ever, 13 investors had won \$43mn from futures-brokerage firm Refco Inc. A California investor will receive \$15mn of the total, the largest award ever to an individual by the National Futures Association, the commodity industry's self-regulatory organisation.

Goldinger of Beverley Hills, California, had triggered the loss of \$100mn of his client's money. The award from Refco, a Chicago-based futures-brokerage firm that executed Goldinger's trades on exchanges, will compensate some of his customers for most of their losses from his bad trades and the commissions they paid him. Refco is alleged to have aided Goldinger in improperly allocating winning and losing trades to client accounts. The firm agreed to a \$7mn civil settlement with the Commodity Futures Trading Commission to settle federal allegations stemming from Goldinger's activities.

Although arbitrations do not set binding legal precedents the way court rulings do, the award could still signal a shift in commodity investor protections and the nature of trading schemes. (WSJ, 30.07.01)

Imbroglia in EU Energy Market

The European Commission is examining whether Electricité de France (EdF), the French government-owned power company, benefits from any illegal state aid such as tax breaks or financial guarantees. The Commission will also discuss the problems in the European Union (EU) energy market caused by some countries opening up their markets more rapidly, while France has made it hard to break into its power sector. Some transitional measures by EU, that will protect some newly privatised companies from acquisition by their state-owned rivals until the EU market is fully open, has become increasingly important after the acquisition by EdF in Spain, Italy and Germany spurred accusations while remaining protected from privatisation.



Business Line

The French market, EdF admits, has been opened only to the minimum 30 percent level required by the EU. In most of the rest of Europe, however, rivals and angry government officials want EdF to be privatised and the French electricity market liberalised, so that the utility can no longer be a privileged competitor with a secure home base and an unfairly low cost of capital.

Some EdF's potential competitors argue that they cannot effectively compete with the low operating cost of its nuclear stations, constructed with the support of French state subsidies. Mario Monti, the EU's competition commissioner, is believed to have asked Ms Loyola de Palacio whether a state aid case can be made out against EdF over funding for nuclear power, which provides the bulk of EdF's electricity.

(FT, 13.06.01 & 19.06.01)

Consumers Jubilant

Consumers, civil societies and other organisations in Pakistan celebrated the rejection of Water and Power Development Authority's (WAPDA) plea for increase in tariff by the National Electric Power Regulatory Authority (NEPRA).

The case was pleaded and argued by Consumer Rights Commission of Pakistan (CRCP).

The NEPRA, in its decision, directed the WAPDA to reduce its line losses and improve recovery of its outstanding dues with the public sector, instead of demanding increase in its tariff.

The WAPDA has also been directed to explain as to why and on what grounds it has written-off dues worth over 17 billion rupees of the Governments of Sindh, Baluchistan, etc.

A senior NEPRA official stated that it would not encourage an increase in electricity rates for the development of water resources because these should be constructed through the public sector budgetary allocations of the federal government. (NI, 25.06.01 & Dawn, 29.06.01)

Price Caps on Electricity

Faced with mounting political pressure, the US Federal Energy Regulatory Commission (FERC) imposed price controls, a "soft cap" of \$150 a megawatt-hour, on the California market in December and it has been revising its price limits ever since.

The agency will apply the proxy price previously restricted to California, to a vast roughly 11-state electrically interconnected region comprising everything west of Kansas. The proxy price will be based on the operating cost of the least-efficient power plant operating in California during electric emergency. FERC will permit suppliers to charge California buyers 10 percent more than they can charge elsewhere in the West.

The President, George W. Bush, declared his most pointed opposition to caps on wholesale electricity prices. The Governor, Gray Davis, has argued that such price controls are crucial for helping California dig out of its crisis and FERC which regulates wholesale power price has a responsibility to do so. (WSJ, 31.05.01 & FT, 19.06.01)

Power Shake-up in Russia

Russia's Prime Minister authorised a wide-ranging restructuring of the country's power sector and has signed a decree designed to introduce free-market prices and competition into power generation and distribution across Russia and weaken the

hold of the state-controlled UES electricity utility, fearing that UES extended control over the entire national electricity transmission system could impede fair access by regional companies and limit fair price competition.

However, investors raised fears that UES plans to sell-off holdings in regional energy companies would dilute the value of their stakes at a time when the prices achieved would be substantially beneath market value. (FT, 14.06.01; 22.06.01 & 12.07.01)

Licence Tender Boosts Energy

The two-day tender of 53 licences for the exploration and production of oil and gas could prove to be a much-needed boost of confidence in Brazil's energy sector. It is the third oil tender of its kind after Petrobras deserted its 45-year monopoly over oil in 1997. Forty-two companies had qualified to bid in the tender, including Exxon, Texaco and Shell etc.

The low minimum prices for licenses - ranging from R\$100,000 (US\$41,500) to R\$300,000 - are designed to maximise exploration investment. It is expected that total investment in the oil industry will be US\$100bn over the next decade.

The opening of the oil sector to private capital is the Government's determination to meet its own oil needs within four years, whose oil production is still 400,000 barrels per day, short of its 1.8m b/d consumption.

(FT, 19.06.01)

Energy Reforms in Kenya

The Government of Kenya has initiated Energy Sector Reform Programme to restructure the power sector and open it up to competition and private investment. The Government sought an emergency power supply credit of US\$72mn from the World Bank which will be used to contract the supply of 105 MW of power, provide fuel for the plants and finance Kengen's fuel requirements for its thermal plants.

Finance Minister of Kenya, Chris Okemo, announced a Ksh. 2 rise in fuel duty when he read the budget out but ordered oil firms to absorb the cost and not be shouldered by the consumers.

Communications Commission of Kenya had publicly announced that it was considering an application to licence Gilat Satellite Networks, one of the largest satellite equipment manufacturers that has a 51-percent-share of the world Vsat market, to provide Vsat (Virtual Small Aperture Terminal) links for data transmission.

(The People, 30.06.01 & Daily Nation, 16.06.01)

US Wireless Auction Illegal

A US appeals court ruled that the Federal Communications Commission (FCC) illegally re-auctioned \$17bn "spectrum" airwave licences after the original owner, NextWave Telecom, defaulted the original 1996 auction for the rights.

A three-judge panel in Washington ruled that the FCC was in error when it seized the licences from NextWave, which was in the midst of bankruptcy proceedings at the time, saying the Federal Government could not take property that was being litigated in bankruptcy court.

Judge Tatel said that the FCC violated the provision of the bankruptcy code that prohibits government entities from revoking debtors' licences solely for failure to pay debts dischargeable in bankruptcy. NextWave filed another suit in Washington last year, this time appealing directly against the FCC regulatory ruling that cancelled the licences. *(FT, 23.06.01)*

Acquisition of Dabhol Power Co.

AES Corp., a large American power company, is interested in taking over energy giant Enron Corp's troubled Indian unit, the Dabhol Power Co., but with a new deal for selling power to its customers.

Enron has a 65 percent stake in Dabhol, which is embroiled in bitter dispute with its sole customer, the state-run power utility in India's industrialised western state of Maharashtra.

The dispute between Enron, that pumped in India's largest foreign investment valued at \$2.9bn for the 2,184 megawatt power project, and its local client was sparked late last year after the cash-strapped utility, the Maharashtra State Electricity Board, defaulted on its payments to Dabhol and expressed concern at the high rates charged by Dabhol. *(WSJ, 18.06.01)*

Investors Shy Away

Chunghwa Telecom Co.'s secondary public offering received a cool reception, with investors buying just 36 percent of the shares available. Taiwan's Ministry of Transportation and Communications offered 482.4 million shares of the company, or a 5-percent-stake, but only sold 173.5 million shares.

Analysts expect that secondary offering's poor performance would result in further delaying the government's privatisation plan for Chunghwa. Although market confidence in the telecom industry remains fragile, some analysts said mobile-phone operators might not want to wait until next year to raise capital, mainly

because the Taiwan Government plans to auction five third-generation mobile licenses in December.

Many analysts attributed the weak response to Chunghwa Telecom's secondary offering to poor pricing by the Transportation Ministry. On 20th June this year, shares in Chunghwa Telecom shares gained 50 New Taiwan cents to NT\$58 each. *(WSJ, 21.06.01)*

Power Privatisation in Philippines

The Energy Secretary, Jose Camacho, said the Philippines is likely to see the first privatisation of its power assets late next year, should a key power Bill pass the Congress. Foreign investors are expected to be the main players bidding for the assets of state-run National Power Corp., or Napocor, as there are few local companies with enough financial capability to rehabilitate and operate these assets.

Under the Bill, Napocor would be split into several companies and sold-off. Its power generation facilities will be auctioned-off alongwith the operation of its transmission lines under a concession agreement. *(WSJ, 28.05.01 & FT, 30.05.01)*

Probe into Wholesale Price Soar

The New Zealand Electricity market's independent surveillance committee launched an investigation into the rocketing wholesale prices, following complaints that low hydro storage levels are being compounded by transmission constraints and the bidding behaviour of some generators. In the first five months of the year, spot prices more than doubled to an

average of around NZ\$75 (US\$31) a megawatt-hour.

A Marketplace Co. official said water levels in reservoirs feeding the country's hydro-electric power stations, which form the mainstay of the electricity supply, had fallen to 62 percent of their average for this time of the year but investigation will examine whether there are other factors in play or not. *(FT, 13.06.01)*

Conoco's Deal

Conoco, the US energy group, is very energetic in the \$5bn Shaybah gas project, one of the three long-term upstream gas agreements that Prince Saud al-Faisal, the Saudi Foreign Minister signed with international companies in Saudi Arabia and has a 30-percent-stake in the project that follows Royal Dutch/Shell with a 40-percent-stake.

The Company is also in the process of buying Gulf Canada Resource, one of the top 10 oil and gas producers, a former subsidiary of Gulf Oil and the independent Canadian producer, for \$4.3bn in cash and stock.

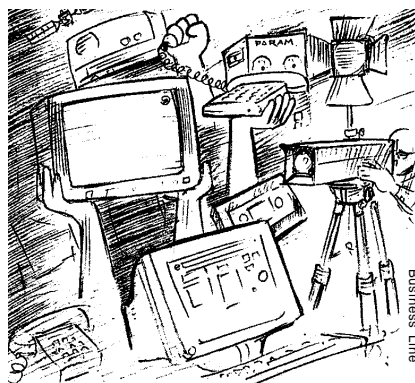
The transaction was expected to generate annual pre-tax savings of about US\$150mn through more efficient administration, production and exploration activities and will make the company, Conoco, the 11th largest oil company, up from 20th, in North America.

Archile Dunham, Conoco Chairman and Chief Executive, said the acquisition would increase his group's proven natural gas reserves and production by more than 50 percent in North America, while establishing Southeast Asia as a strong fourth core business area. *(WSJ, 30.05.01)*

THE BROADBAND BATTLE

The broadband Internet access battle between the regional phone companies and the cable industry is moving to the highest US court. This revolves around the price caps that went into effect after the Congress passed the obscure Pole Attachment Act of 1978, which was designed to help the cable industry, then in its infancy, expand. The Congress passed legislation allowing the Federal Communications Commission (FCC) to set the annual rates, which average between \$5 and \$7 per pole.

A number of utilities sued, charging that the FCC exceeded its statutory authority. If the High court rules for the utilities, large cable operators will be forced to pay much higher prices for attaching their wires to utility-owned poles and these higher prices will be passed on to consumers. However, if the verdict is otherwise, the agency will continue to set pole-attachment rates across the cable industry regardless of whether the companies offer regular cable-TV programming or Internet access and would also let cable concerns maintain competitive advantages over the regional phone companies. *(WSJ, 06.07.01)*



Business Line

Zambian Competition Law:

. . . A Step in Right Direction

Introduction...

The establishment of the Zambia Competition Commission in May 1997 through the enactment of the 1994 Competition and Fair Trading Act which came into force in February 15, 1995 was largely as a consequence of the conditionality set by the International Monetary Fund and the World Bank. Until the advent of full fledged Structural Adjustment Programme (SAP), about 80 percent of the Zambian industries, transport and energy companies were under state control and management.¹ The economic policy was that of a mixed economy with social welfare as the main objective. It is quite obvious that nobody could feel the need of a competition law in such a scenario.

However, privatisation of state enterprises and liberalisation in the wake of the structural adjustment programme, drastically changed the scenario. This established the conditions which necessitated the creation of a competition policy. This subsequently led to the enactment of the Competition and Fair Trading Act in 1994.

Objectives & Scope

The Competition and Fair Trading Act (the Act) was adopted in Zambia with the following objectives:

- Encouraging competition in the economy by prohibiting anti-competition trade practices.
- Regulating monopolies and concentration of economic power so as to protect consumer welfare.
- Strengthening the efficiency of production and distribution of goods and services.
- Securing the best possible conditions for the freedom of trade and expansion of entrepreneurship base.

The Act applies to all economic agents in relation to the supply and demand of all goods and services. However, there are a number of exceptions:

- Treaty or agreement to which the state is a party.
- Activities of employees or associations for their own protection.
- Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment.
- Agreements relating to the use of Intellectual Property Rights.
- Such business or activity as the Minister of Commerce, Trade and Industry may, by statutory instrument, specify.

Institutional Arrangement

The Zambia Competition Commission (ZCC) that came into being in May 1997 is the agency responsible for enforcing the competition law in the country. The ZCC consists of 13 members (known as Commissioners). The Ministries of Finance and Economic Development, and Commerce, Trade and Industry are represented by one Commissioner each. There is also one representative from a statutory Government Department, the Zambia Bureau of Standards. The rest of the commissioners (10) represent Non Governmental Organisations (NGOs) as follows: Zambia Chamber of Commerce and Industry (2), Law Association of Zambia (1), Zambia Federation of Employers (1), Zambia Congress of Trade Unions (1), Consumer Interest Representatives (2), Engineering Institute of Zambia (1), Accounting Profession Representative (1) and Economics Association of Zambia (1).

The Board consists of all the 13 Commissioners and two ex-officio members, the Executive Director and the Secretary. The Commissioners appoint their own chairperson and vice-chairperson among the 10 members representing NGOs. The decision of the Commission is taken by majority vote of the board.

The chief executive of the ZCC is the Executive Director who is responsible for the day-to-day administration of the Commission. The Executive Director is assisted by a total of 25 members of staff of whom 5 constitute the management. They are the Commission Secretary and four Directors (Economics, Consumer Welfare, Finance and Administration, and Legal). There is a provision for 15 professional staff and five support staff.

The ZCC is empowered through the Act to monitor, control and prohibit acts or behaviour likely to adversely affect competition and fair trading in the country.

The Commission takes decision in a case using any of the procedures below:

- Carry out, on its own initiative or through request of any person, investigations in relation to the conduct of business, including dominant position on the extent of anti-competitive trade practices, if any.
- Carry out investigations, on its own initiative or through request of any person who may be adversely affected by a merger, and
- Take any necessary action to prevent or redress the creation of a merger or abuse of dominant position.
- Make, with approval of the Minister of Commerce, Trade and Industry, regulations expedient for efficient and effective carrying out of its functions, through a statutory instrument.

The ZCC is also empowered to:

- Provide business houses and consumers information regarding their rights under the Act.
- Undertake studies and provide public reports on the operation of the Act.
- Co-operate with and assist anybody who develops or promotes the observance of the standards of conduct in order to ensure compliance with the provisions of the Act.

Major Provisions

Any category of agreements, decisions and concerted practices whose objective is to prevent, restrict or distort competition in the country or any substantial part of it are declared anti-competitive trade practices and are prohibited by the Act. The main elements of the competition law relate to:

- Restrictive Trade Practices
 - Abuse of dominant position.
 - Mergers & Acquisitions.
- Dealing with Restrictive Trade Practices

Restrictive trade practices can be of two types: horizontal restraints and vertical restraints to competition. Horizontal arrangements are agreements between firms competing with identical/similar commodities in a common market. Such arrangements manifest themselves in price fixing, collusive tendering, market or customer allocation, sales/production, refusal to supply and collective denials of access to an arrangement.²

Vertical arrangements refers to a situation where a firm buys or sells another firm's product. Such firms are said to have a vertical relationship. This arrangement portrays themselves in discriminatory pricing, exclusive dealing, bundling and tying arrangements and resale price maintenance. However, some of these practices are common commercial undertakings. The ZCC can allow them provided the parties concerned submit the necessary application and in the Commission's view, their use won't restrict competition.

The Act also restrains entities from undertaking acts or behaviour that limit access to the market or otherwise inhibit competition, and which are likely to adversely affect trade or the economy in general.

Dealing with Dominant Market Position

Restraining the abuse of dominant market position is one of the most important elements of the Act. A firm is said to have a dominant position if it substantially controls business throughout the country or a substantial part of it. The position is abused if such a firm is engaged in limiting access to markets by other entities or unduly restrain competition or involved in any other act that could adversely affect trade or the economy in general.

Dealing with Mergers and Acquisitions

The law prohibits any merger or take-over without prior authority from the ZCC. Such action relates to:

- A merger between two or more independent enterprises engaged in the manufacture or distribution of substantially similar goods or providing substantially similar services.
- A take over of one or more such enterprises by another or person who controls another such enterprise.

Moreover, a merger effected abroad by transnational corporations is held to be a merger completed in Zambia and the stipulations of the Act will apply without any discrimination. The essence of regulating mergers/take-overs or indeed of prohibition of anti-competition practices is to ensure efficiency and fairness in the business environment. The Act sets a threshold of 50 percent for unilateral and concentrated market share. The following aspects are taken into consideration in arriving at a decision:

- What is being acquired?
- The relevant markets that may be affected by the acquisition.
- Any barriers to entry that may be created.
- Motives and objectives of the concerned parties and
- The expected effect of the proposed acquisition on competition in each relevant market.

Approach to Cross-Border Abuses

An entity that enters into agreement as a consequence of provisions in respect to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trade is protected by the Act.

On a wider regional basis, the Common Market for Eastern and Southern Africa (COMESA), and the Southern Africa Development Community (SADC), to both of which Zambia is a founder member, recognise the need for protection and promotion of fair competition in its area. However, COMESA and SADC are yet to develop any regional competition policy or framework.

The Challenges

Competition and the competition law are still in their infancy in Zambia. The Commission suffers from an acute short-fall of financial and human resources which have severely limited the scale of its operations and advocacy efforts. The level of understanding and awareness on competition law, procedure and remedial action among the consumers and business concerns is quite low. Although ZCC's performance seems to be quite impressive despite the constraints, building its capacity as envisaged in the Act remains an important challenge.

In the present era of globalisation cross-border issues are becoming increasingly important in all countries. Zambia is no exception. Moreover, the current trend shows that the trans-national corporations are restructuring and integrating at regional level which is aimed at controlling the region rather than any particular country. This may lead to monopolisation of the regional market and foreclosing other potential investment inflows into the region. Zambia alone cannot tackle the challenge. Without a strong and coordinated regional competition policy, it will be difficult to maintain competition in the entire region including Zambia. ♦

Further Information on the Zambia Competition Commission

For further information on the work and operations of the Zambia Competition Commission, you can contact the Executive Director by email on zcomp@zamtel.zm or by fax +260-1-222789.

¹ UNCTAD (1999) - *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa* - UNCTAD Series on Issues in Competition Law and Policy, Geneva.

² Lipimile G. K. (1998)- *Addressing Anti-Competitive Practices of Enterprises in a Developing Country Setting: The Case of Zambia* - Symposium on Competition Policy and the Multilateral Trade System, WTO, Geneva.

Rating the Regulators

In the third installment of our featured paper, the Global Competition Review survey, "Rating the Regulators," we take a look at six more countries' competition institutions. The survey appraises the abilities and assesses the efficiency of some of the most important national and supra-national agencies shaping the business environment of the 21st century, the first global in-depth survey of its kind.

The research was based on a 14-point questionnaire that was sent to thousands of competition lawyers working in all the world's principle jurisdictions, supplemented by interviews with practitioners. The survey was conducted during 1999 and the results collected in 2000.

The proliferation of competition policy regimes across the globe has not meant uniformity of rules or institutional approaches. If anything, it has ensured that there will be vigorous debate over the best model to follow.

Canadian Competition Bureau

| | |
|---------------------|--------|
| Merger handling | ** 1/2 |
| Non-merger handling | ** 1/2 |
| Technical expertise | *** |
| Procedure | *** |
| Independence | *** |
| Leadership | ** 1/2 |

Scores for merger and non-merger case handling are both low, as are scores for transparency and leadership. There is, however, some better news when it comes to technical expertise and procedure. The Bureau's informal guidance is seen as useful, and there is confidence in its ability to keep information secure.

There are also satisfactory scores for the authority's lines of questioning, expertise in handling legal and economic analysis, accessibility to third party complainants, and independence. However, the government's intervention in recent bank and airline cases has somewhat tarnished the authority's reputation for independence.

Background: Canadian competition law was first enacted in 1889, one year before the US authorities. The Commissioner of Competition, Canada's chief antitrust enforcement official, investigates breaches of the Competition Act and initiates proceedings on reviewable practices. Most enquiries begin at the Commissioner's instance, but the sworn application of six Canadian residents or an order from the federal Minister of Industry obliges the Commissioner to commence an enquiry.

Ultimate discretion in initiating criminal proceedings rests with the Attorney General. Only the Commissioner has standing to refer cases to the Competition Tribunal, a court of final resort consisting of judicial and lay members, for final adjudication. Private parties currently have no right to initiate proceedings regarding a reviewable practice that the Commissioner declines to challenge. The Bureau has a staff of 382 and an annual budget of roughly US\$17 million.

European Union Competition Directorate General

| | |
|---------------------|---------|
| Merger handling | **** |
| Non-merger handling | * |
| Technical expertise | *** 1/2 |
| Procedure | *** |
| Independence | ** |
| Leadership | *** 1/2 |

There is great dissatisfaction with speed of non-merger handling in Brussels and there are also biting criticisms of DG Competition's independence and transparency. These perceived failings contrast with satisfactory results in other key areas. Speed of merger handling is warmly applauded, and leadership of the Directorate is given high marks.

There are highly satisfactory scores for the Directorate's technical expertise, in particular for the staff's use of economic analysis. The civil servants in the Merger Task Force are widely regarded as having the tactical know-how to resist political pressures and the economic expertise to promote flexibility in decision-making. The Directorate also has an excellent reputation for meeting its statutorily defined deadlines in merger review. However, almost all practitioners in Brussels say that the Commission's centralised merger notification system is on the verge of collapse.

The Commission has set out its commitment to reform in a much-debated White Paper. For some the document is a blueprint for inconsistency, but most people credit the Commission with actively seeking an efficient means of dealing with backlogs.

Italian Antitrust Authority

| | |
|---------------------|---------|
| Merger handling | *** 1/2 |
| Non-merger handling | *** |
| Technical expertise | *** 1/2 |
| Procedure | *** 1/2 |
| Independence | ** |
| Leadership | **** |

The Italian Authority's expertise in economic analysis is regarded as its greatest strength. The leadership of Giuseppe Tesoro also receives strong endorsement. Like many other authorities, it is let down by slowness in handling non-merger cases. A poor transparency rating and a below par rating for political independence conspire to rob the Authority of four stars.

Ample resources, a proactive approach to investigations (particularly in the telecoms sector) and an emphasis on economic analysis have put the Authority on the map.

Background: The Italian Antitrust Authority, the Autorità Garante della Concorrenza del Mercato, was established under The Competition and Fair Trading Act of 1990. The Authority, based in Rome, has a Chairman and four members who serve seven-year non-renewable terms. They are appointed by the Speakers of the Senate and the Chamber of Deputies. Day-to-day operations of the Authority are overseen by a Secretary General who is appointed by the Minister of Industry on the recommendation of the Chairman.

There are about 180 full-time and part-time staff at the Authority. Decisions of the Authority are taken by majority vote.

SERIAL PAPER

Parties may appeal to the Lazio Regional Administrative Tribunal and further appeals may be filed with the Supreme Administrative Court. The Authority collaborates on a national level with regulatory bodies supervising the banking, insurance, broadcasting, telecom and energy markets.

Portuguese Directorate General for Trade and Competition & Portuguese Competition Council

| | DG | PCC |
|---------------------|-------|-------|
| Merger handling | **1/2 | ** |
| Non-merger handling | * | * |
| Technical expertise | ** | *** |
| Procedure | ** | **1/2 |
| Independence | * | ** |
| Leadership | *1/2 | *1/2 |

Scores for the Portuguese Directorate General are unsatisfactory with just one exception: its ability to keep information secure. It registers its lowest score for non-merger handling, but respondents' assessments of the authority's independence are almost equally severe. In addition, there is dissatisfaction with the staff's legal and economic expertise as well as its readiness to offer useful, informal guidance.

Transparency and consistency are also poor, according to respondents. Scores for merger handling and effective questioning come closer to being satisfactory, but this cannot save the Directorate from turning in such a poor result.

The Council registers modestly satisfactory scores for its expertise in handling legal and economic issues as well as for its ability to keep information secure and for consistency in decision-making. There are, however, disappointing scores in all other areas of the Council's activities. It registers its lowest score for non-merger handling, but leadership, independence and transparency are all well below satisfactory.

The issue of independence of the Competition Council is acknowledged as crucial. Although there is no timetable for reform, the government is considering a single authority, vested with powers of investigation and adjudication, free of interference from the Minister of Economy.

Background: The Directorate General for Trade and Competition and the Portuguese Competition Council are part of the Ministry of Economy. They began operations in 1982. Ministers are responsible for merger control cases and the overall coordination of competition policy.

The Directorate carries out investigations and hearings, and can impose certain fines. Once an inquiry is completed, the Directorate submits a final report to the Council, which provides decisions and opinions. The Council consists of a Chairman and up to six members appointed by the Prime Minister.

New Zealand Commerce Commission

The Commerce Commission earns its highest score for its ability to keep information secure but it also receives an excellent result for speed of merger handling and a good mark for speed of non-merger handling. In addition, respondents see the Commission as adequately independent, transparent and consistent in its decision-making. There are, however, low scores for expertise in economic and legal analysis, and a poor set of results for ease of access to those seeking informal guidance or making third-party complaints.

The Commerce Commission's voluntary notification system is regarded as fast and efficient in simple merger cases. The staff

have more technical expertise in law than in economics. The Commission has not done enough to raise its public profile, to rid

| | |
|---------------------|--------|
| Merger handling | **** |
| Non-merger handling | ***1/2 |
| Technical expertise | **1/2 |
| Procedure | ***1/2 |
| Independence | ***1/2 |
| Leadership | **1/2 |

itself of a reputation for being rather aloof and out of touch with business practices, and to adopt a proactive rather than reactive attitude to investigations. Public awareness campaigns are just starting to modify this image.

Background: The New Zealand Commerce Commission began operations in May 1986. The Commission is a Crown Agency, an independent body not subject to Ministerial direction. The Commission is, however, required to report annually to the Ministers of Commerce and Consumer Affairs, and to "have regard to" any economic policies of the Government communicated to it in writing. The Commission has a staff of 71 and an annual budget of around US\$4 million.

Swiss Competition Commission

| | |
|---------------------|---------|
| Merger handling | ****1/2 |
| Non-merger handling | *** |
| Technical expertise | *** |
| Procedure | ***1/2 |
| Independence | ***1/2 |
| Leadership | ***1/2 |

The Swiss Commission registers very high scores for the speed with which it handles mergers and for the usefulness of its informal guidance. Its decision-making is regarded as fairly consistent. There is also confidence in the staff's legal expertise and in the security of the information given to the authority. There is, however, only marginal satisfaction with the authority's handling of non-merger cases.

The score for lines of questioning borders on unsatisfactory, as does its score for expertise in handling economic analysis. A barely satisfactory result for transparency helps to rob the Commission of a more spectacular rating.

There is a feeling that the combination of a hands-off approach, speedy case-handling and a high degree of formality is the right formula for merger control in Switzerland. Political interference is also a problem, although it is not seen as an everyday concern. In the case of Swisscom, the former phone monopoly, the government initially overruled the Commission's attempt to inject competition into the domestic cable market.

Background: The Competition Commission, which replaced a Cartel Commission set up in 1964, and its Secretariat are the prime enforcers of the 1995 Swiss Cartels Act. The federal government appoints the Commission's 14 members on a renewable, four-year basis. The Secretariat, with a staff of 45, pursues investigations, renders decisions on administrative and procedural matters, and prepares the decisions of the Commission.

Let's Be Proactive On Multilateral Competition Policy

A multilateral competition policy appears to be one agenda item at the WTO where the developing countries might end up losers if they do not take part actively right from its formulation stage. It is immaterial whether they sign any final accord that emerges from the negotiations.

Setting the Premises

During the whole 50-odd year history of the multilateral trading system, its contours have been determined and negotiations driven by the North, with the South in a totally reactive mode. With time, promises and arm-twisting 'persuasion,' the South has ended up, more often than not, 'agreeing' to the northern agenda.

The scenario remains the same in the run up to 2001's Doha Ministerial. However, now, the facile assent of the past has undergone a complete U-turn. Turning to the other extreme, and charged with the experience of a pyrrhic victory in Seattle, a group of like-minded group of developing countries (LMG) is now saying 'No' to any new items on the agenda. However, neither the past assenting nor the current dissenting spree was founded on any strong logic.

History and philosophy teach us that extremes are not good for any situation. Ideally, we should adopt the middle path, weighing the pros and cons before taking any decision.

Be that as it may, the fallout of the LMG's 'Just Say No' attitude is that they are skeptical of even those agenda items which have the potential to favour their interests, if properly negotiated and drafted. This is of course subject to its implementation, which is another ball game. But, if they don't take part in the formulation of the agenda and subsequent negotiations, they could be worse off.

A multilateral competition policy (MCP) appears to be one such agenda item where the poor countries might end up losers if they do not take part actively from the beginning. It is immaterial whether they sign any final accord that emerges from the negotiations.

According to trade pundits, if the main protagonists: EU succeeds, MCP could feature on the agenda for the World Trade Organisation (WTO) Ministerial to be held in November 2001 at Doha. Hence, the LMG should be prepared for the same.

Given these premises, this piece examines the feasibility of a multilateral competition policy under the WTO umbrella and identifies the elements of the same that developing countries should be pushing for.

Why MCP?

The multilateral trading system under the auspices of the WTO is perceptively loaded in favour of big business, who, with their powerful lobbies, are able to influence their governments to make things happen in their favour. Unfortunately, consumers, being on the receiving side, have virtually no such muscle to influence international trade policy making.

Like a domestic competition regime, a multilateral competition regime could be visualised to discipline big business and rectify the persisting business-consumer imbalance in the WTO. Further research and debate will help to design the exact contours.

A brief history of the multilateral approach

Strictly speaking, a multilateral approach to competition policy is not a 'new' issue. A whole chapter was devoted to restrictive business practices (RBPs) in the Havana Charter, which unsuccessfully tried to set up an International Trade Organisation just after World War II. The General Agreement on Tariffs and Trade (GATT), which emerged instead was based on the Havana Charter, yet competition issues took a back-seat.

The issues pertaining to RBPs and measures to deal with the same were raised in the Uruguay Round negotiations. Though no consensus was reached during the round, the continuous efforts culminated in the incorporation of competition provisions in different agreements of the WTO acquis, including the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Besides this, the Agreement on Trade-Related Investment Measures (TRIMs) mandates the Council for Trade in Goods to consider whether the Agreement (i.e. TRIMs) should be complemented with provisions on investment policy and competition policy.

Pursuant to this the Working Group on Interaction between Trade and Competition Policy was established at the first WTO Ministerial Conference held at Singapore in December 1996 to study the interaction between trade and competition, including anti-competitive practices.

At the first meeting of the Working Group, held in April 1997, Prof. Frederic Jenny, the Chairman, emphasised that all discussions should be permeated by development considerations and that particular attention should be paid to the situation of least-developed countries.

Though nothing concrete has emerged in the Working Group, which doesn't have a mandate to negotiate, the discussions have contributed significantly in clarifying some of the issues involved. Throughout this time, the EU and Japan, among others, have been very active, however, some lesser-developed countries, like the Philippines, have also been vocal.

Elements of MCP: Southern perspective

With globalisation the rate of cross-border competition concerns is increasing exponentially. One thing is becoming certain that to deal with these issues, a strong domestic competition regime, though necessary, is not sufficient. This is true for both developed and developing countries.

'Cooperation' is emerging as an effective tool to deal with cross-border competition concerns. This can be more formal through a bilateral agreement or can be achieved on an *ad hoc* basis. For developing countries, cooperation would be a highly beneficial element of any future MCP, as they lack the resources and experience to deal with huge, complex and often very well hidden anti-competitive practices of multinational firms.

Besides cooperation, the other elements of a MCP are discussed below.

International Cartels

Globalisation and liberalisation have increased opportunities for firms to participate in price-fixing and territory-dividing cartels, undermining the benefits of healthy competition, which can help consumers, small businesses and economies. Cartels can also maintain their position with high barriers to entry for other producers, which is particularly effective in thwarting competition from developing country producers who are either new or struggling in the international trading arena.

Though the harm caused to developing countries by these cartels is difficult to quantify, a study estimates that in 1997, developing countries imported goods worth US\$81.1bn from firms, which had seen a price-fixing conspiracy during the 1990s.

Discovering and proving the existence of international cartels is extremely difficult and the South is more or less powerless to deal with these conspiracies.

Secondly, export cartels, which are generally outside the realm of domestic competition law, and often actively promoted by governments, are also a cause of concern from consumers' perspective. As cooperation cannot be expected in these cases, hence a need for an international regime to tackle them.

M&As with international spillovers

The increasing rate of cross-border mergers & acquisitions (M&As) is becoming a major cause of concern for the competition authorities world over. More often than not the South is not in a position even to assess the adverse effects on competition in their market, let alone its regulation. A MCP could consider the anti-competitive impact of cross-border mergers in developing economies and impose such conditions which can address the competition concerns on a country-to-country basis.

Intellectual property rights

Anti-competitive practices involving the use of IPRs could take the form of horizontal restraints or vertical restraints. For instance, IPR licensing agreements among competitors, such as patent pooling, serve as vehicles for establishing cartels to fix price/allocate market/limit output etc. Further, licensing agreements limiting the manufacture or distribution of products in a particular country could be a global competition concern.

In the absence of clear-cut international rules on parallel imports, different countries are following different practices. Given their production structures, parallel imports often help countries to control abuses by the IPR holders, and will definitely benefit consumers. A MCP could strengthen countries that permit parallel imports against attacks by the exploiting brand owners.

Addressing anti-dumping

Due to lack of coherence between trade policy and competition policy, strong sectoral lobbies are able to push governments into imposing anti-dumping duties and other safeguard measures without considering the interests of other stakeholders, especially consumers.

There is a need to discipline the present proliferation of anti-dumping and safeguard measures through domestic and multilateral competition rules.

Whither MCP in WTO?

There are some persuasive arguments against the inclusion of a MCP within the WTO. It is argued that the WTO-DSM (dispute settlement mechanism) does not have the capacity or capability to

carry out thorough investigation and analysis. Secondly, the producer bias at the WTO could turn competition policy into a producer-protecting instrument drifting away from consumer welfare.

Thirdly, it is also argued that as a trade policy body, the WTO suffers from the stigma of promoting politically acceptable results rather than economic optima that competition authorities are often said to pursue. Last, but not the least, the WTO laws and the DSM are focussed on government measures rather than corporate activity and behaviour.

However, laws and their implementation mechanisms are dynamic concepts and require consistent innovation to match with the dynamism of economic, social and political activities. The above-mentioned arguments against a MCP in the WTO acquiesce to treat multilateral trade laws as a static concept. There is always scope for further innovation, should the need arise. For instance, in the present case, a carve-out in the existing DSM could be developed that would efficiently tackle cross-border competition issues, without a) the fear that the domestic judicial process can be challenged, and b) the complexity of the single undertaking. However, to develop such a carve-out in the DSM, members have to take part actively in the agenda formulation.

The development dimension

The MCP would have to be designed carefully to make sure that it really serves the interests of developing countries. For a start, the agreement should not create further burden on member states by requiring each country to have a competition law. Further, the MCP should not require harmonisation of national competition laws and should respect developmental goals of national laws.

Operative special and differential treatment should be reflected in specific provisions, including as regard to:

- progressivity,
- sequencing,
- flexibility, and
- support for capacity building.

Conclusions

As economic activity is cyclical in nature, so are policy responses. Policy-makers fall back on past approaches when the present strategy seems to be failing. Thus it is very likely that in future developing countries may again start their 'assenting spree', if the global economic cycle demands so.

The direction of current trade politics suggests that if consensus among the Members cannot be reached on a MCP, the EU, Japan and some other countries would take this opportunity to sign a plurilateral competition agreement. The other main trader, the US, though opposed to a MCP, has agreed not to block the process proposed by the EU.

Experience with TRIPs and other agreements demonstrate that once an agreement is reached, it is extremely difficult to go back and modify it. Most of the implementation problems could have been avoided if only, developing countries had engaged in negotiations.

Hence, if South enters another 'assenting' phase and has to sign onto the plurilateral competition policy sometime in future, without having taken part in the discussions, they would clearly end up being a loser.

In this background, the best strategy would be for the developing countries to reach a common agenda of their own, if possible with a draft agreement on MCP to bring to the negotiating table. Careful preparation is the key to achieving a beneficial outcome. ♦



The Push For Productivity

The UK government sees competition policy as the key to growth, say Kevin Brown and Jean Eaglesham

A little under 18 months ago, Britain implemented the biggest shake up in competition law since the second world war, introducing a regime lauded by ministers as one of the toughest in the world.

So why did Patricia Hewitt, the trade and industry minister, yesterday, unveil a white paper proposing another upheaval, this time described as “a blueprint to build a world-class competition regime”? The answer lies in the growing focus among senior Treasury officials on the use of micro-economic reform to boost Britain’s economy.

When Labour returned to office in 1997, Gordon Brown, the chancellor (finance minister), was preoccupied with macro-economic reforms - monetary policy independence for the Bank of England and long-term planning for the public finances. Mr. Brown has now completed much of that programme and has been casting around for ways of closing the productivity gap between the UK and its competitors - an issue he sees as fundamental to improving Britain’s long run competitiveness.

The critical moment was a “peer review” of competition law, in which the Department of Trade and Industry - which is nominally responsible - asked 100 experts from around the world to rank various aspects of the UK regime against international standards. The experts put the UK ahead of many developed countries but behind both the US and Germany. Crucially, they called for tougher measures against cartels and a wider role for the Office of Fair Trading, the lead enforcement agency.

For Mr. Brown, the main message was that the much-vaunted 1998 Competition Act, which for the first time explicitly outlawed price-fixing and abuse of a dominant market position, was simply not tough enough. Only two companies have been found in breach of the act’s prohibition of price fixing and both cases are under appeal. Few companies have faced serious investigations, either, although the OFT has made attempts to step up the pace.

John Vickers, the head of the OFT, argues that the act needs time to bed down

and points out that it is not retrospective, which means that only anti-competitive actions since it was implemented in March last year can be investigated. For Mr. Brown, though, time is of the essence. Officials say the chancellor is determined to achieve significant improvements in British Productivity quickly, and that requires a cultural change among business people that cannot be achieved under the existing law.

“The 1998 act was genuinely radical,” says Chris Bright, a London-based partner in Shearman & Sterling, the US law firm. “They made this huge change to the UK system, which the conservatives did not do for 20 years, even though they were supposed to be in favour of competition, and then nothing much happened. It has just not produced the visceral cultural reaction from businessmen that they wanted.”

This time, say competition experts, Mr. Brown is leaving nothing to chance. The white paper proposes jail sentences for business people who fix prices or markets; a legal mechanism intended to encourage victims of cartels to seek damages; and a role for consumer organisations in bringing class actions on behalf of consumers.

Alongside these changes, the OFT and the Competition Commission, which makes the final judgements on mergers, are being given greater independence; ministers will lose their rights to overturn competition commission judgements (in most cases) and there will be more proactive inquiries into the extent of competition in specific market sectors. In a separate white paper, also inspired by Mr. Brown, the DTI is proposing changes to insolvency law designed to help “honest” bankrupts start new businesses more quickly and to stop banks and the government itself closing down businesses to protect their position as preferred creditors.

These changes will create, the competition white paper claims, “a modern business framework with enterprise and productivity at its heart”

There is plenty of evidence that fixing prices and markets damages the economy. The competition and law policy committee

of the Organisation for Economic Co-operation and Development estimates that cartels raise prices by about \$1bn a year in the US. And a study of Japanese companies last year by Michael Porter, the Harvard University competitiveness expert, found that only those sectors that faced strong domestic competition had remained internationally competitive during Japan’s economic slowdown.

There is less evidence that criminal charges are essential to achieve cultural change. The white paper claims that the risk of fines of up to 30 per cent of turnover under the 1998 act is insufficient to be a meaningful deterrent. However, this is the opposite of what ministers were claiming only last year. Some competition experts think they may have been right then but are wrong now.

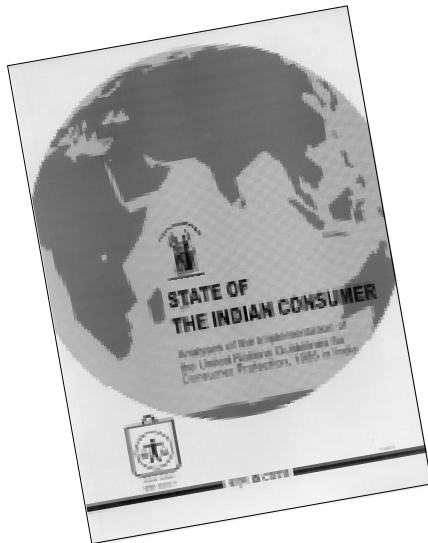
“We have not really seen whether the existing reforms are actually working because so few decisions have filtered through the system,” says Peter Willis, competition partner at Taylor Joynson Garrett, the London law firm. “It is a bit premature to say that it’s not working and let’s go out to the US model.”

Others agree that tougher penalties will affect corporate behaviour. “A profit maximising rational capitalist now has to take into account both the possibility of huge damages and massive fines for the company and personal criminal penalties for himself. That is likely to lead to a big reappraisal of corporate decision-making,” says Mr. Bright.

But even if this is true, it is not clear that tougher competition policy necessarily achieves improvements in productivity. “The theory is that if there is reduced scope for restriction of competition, businesses are going to be forced to channel their efforts in more productive and innovative ways,” says Alex Nourry, head of the competition practice group at Clifford Chance, the London lawyers. “But there are a number of other factors, such as social policy, welfare policy and [the exchange rate of] the euro that have a more direct impact on productivity than competition policy.” ♦

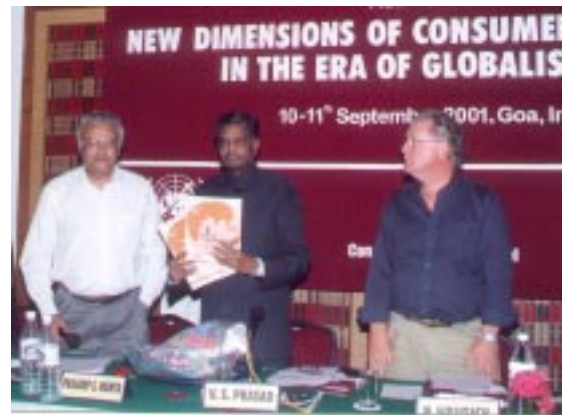
Courtesy: Financial Times, 01.08.01

STATE OF THE INDIAN CONSUMER



“... It will be a valuable document not only for the consumer affairs department of the Government but also for other related departments and agencies to bring consumer perspectives in their decision making process. It will also help other countries, particularly in the developing world in shaping a comprehensive consumer protection regime. ...” observed Mr. V. Sreenivasa Prasad, Minister of State for Consumer Affairs, Food & Public Distribution, India.

He was releasing the report of a study “State of the Indian Consumer in India” at a function in



Mr. V. Sreenivasa Prasad, Indian Minister of State for Consumer Affairs, Food & Public Distribution, releasing 'State of the Indian Consumer'. Also seen in the picture are Mr. Pradeep S. Mehta, Secretary General, CUTS & Mr. Philippe Brusick, Head, Competition and Consumer Policies Branch, UNCTAD

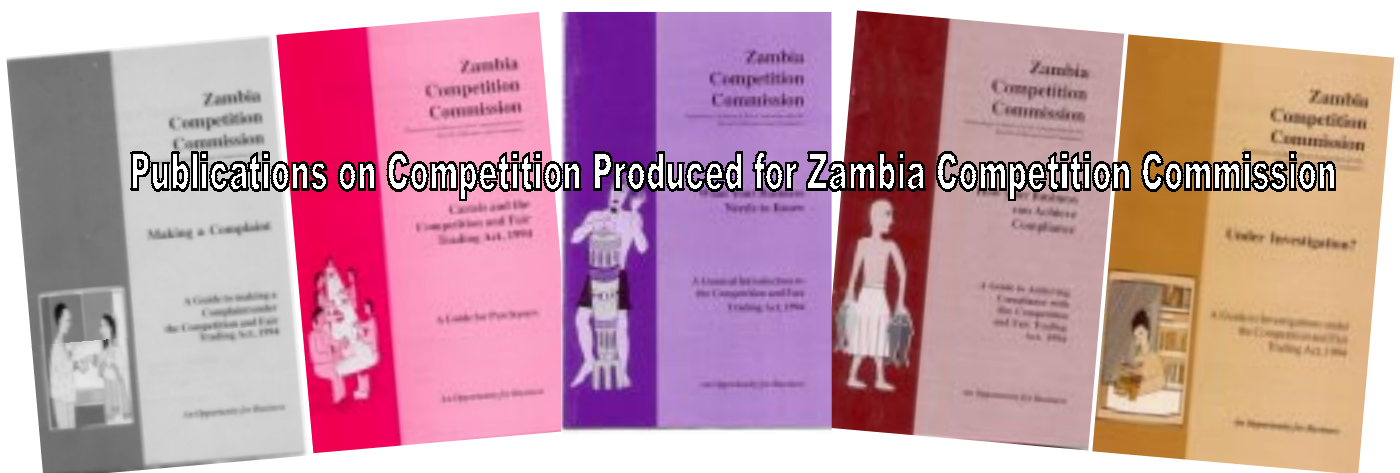
Goa on 11th September, attended by representatives of consumer organisations from several countries of Asia-Pacific region and experts from all over the world. The function was organised by CUTS as an addendum to a Regional Meeting of Asia-Pacific on New Dimensions of Consumer Protection in the Era of Globalisation, also organised by CUTS, in collaboration with United Nations

Conference on Trade and Development (UNCTAD) and Consumers International (CI).

The study was taken up by CUTS with financial assistance from the Ministry of Consumer Affairs, Food & Public Distribution to assess the situation of the Indian consumers in light of the United Nations Guidelines on Consumer Protection after about one and a half decades of its adoption. The Guidelines was adopted by the UN in 1985 which were revised in 1999. The Guidelines addresses the interests and needs of consumers worldwide and provide a framework for government to devise an appropriate consumer protection regime.

While making the actual assessment, study has considered the eight consumer rights that have been derived from the Guidelines and included in the Consumer Charter adopted by Consumers International as the reference points. The eight consumer rights which also constitute eight chapters in the report, are: right to basic needs, right to safety, right to choice, right to information, right to consumer education, right to redressal, right to representation, and right to healthy environment.

The study has surveyed the existing legal provisions and policies of the Government in ensuring those rights and then analysed the implementation of those provisions and policies in India. In terms of legal provisions and policies of the Government, the study finds, India's achievement is quite good. In fact in some respects it has gone beyond as envisaged by the Guidelines. Of course in some aspects the legal provisions and policies need to be rationalised. However, when it comes to implementation, India scores quite low. Thus India has to go a long way to ensure the rights of the consumers in a reasonably well manner. The study recommends an integrated National Consumer Policy for the country and also suggests some measures to improve the situations especially on implementation issues.



Publications on Competition Produced for Zambia Competition Commission