

# REGU LETTER

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



## International Merger Co-operation?

Merger evaluation, although an integral component of competition law enforcement in most jurisdictions, remains a hotly debated issue. Some even question the very existence of it, especially in developing countries. This is not surprising, as merger evaluation involves striking a delicate balance between different interests and concerns. It depends much on economic analysis and, often, different economists arrive at different conclusions in the same case. Controversy, therefore, is inevitable.

In the not so distant past, differing decisions in the GE-Honeywell merger case led to a spat between the US and the EU who, otherwise, have been in a co-operative mode for quite some time in the area of competition policy enforcement. The conflict has now been resolved to a great extent. They have agreed, in principle, for simultaneous review of mergers, so that the merging companies do not have to face uncertainties in one jurisdiction, after getting clearance in another.

This was achieved when officials from both the sides of the Atlantic met at the sideline of the first annual conference of the International Competition Network (ICN) held at Naples, Italy, on September 28-29, 2002. In pursuance of this agreement, the US and EU released guidelines on "best practices" for co-ordinating future merger reviews between the US and the EU anti-trust agencies.

What is missing is that such a co-operative effort does not include developing and other countries where the merging firms operate. Often, merger of parent bodies leads to an absolute dominance in a developing country, when their subsidiaries also merge.

For example, when Brooke Bond merged with Lipton around the world, it did not create much competition problems in the rich world. However, its impact in countries like India and Pakistan was quite different. In India, Brooke Bond and Lipton were two of the three major packaged tea companies, the other one was Tatas. The merger was not subject to review under the Indian competition law.

In the case of Pakistan, these two tea companies were the major players. The Pakistan Competition Authority allowed the merger of the Pakistani subsidiaries of Brooke Bond and Lipton, with the condition that the merging companies will invest in growing tea in Pakistan and submit a periodic report to the agency about it.

Another interesting example is the manner in which Zimbabwe handled a merger of two companies. When BAT took over Rothmans, they decided to keep only one factory and closed down the other one. The Zimbabwean Competition Agency allowed the merger, subject to their selling the spare factory to some other entrepreneur who wishes to manufacture cigarettes. A local company did take over and now offers solid competition to BAT, Zimbabwe.

In many cases in South Africa, when multinational companies in the field of drugs and agro-chemicals approached the local competition authority they were allowed to merge only after it was agreed that they would out-license the manufacture of some of their products to other companies.

These were only some situations when multinationals merge, leading to automatic merger of their subsidiaries also. These create situations of a different nature. In most cases, a developing country competition authority would hesitate to stop a merger of subsidiaries. For, even if they did, it will not stop them from acting in league, as their masters are the same.

In a globalising world, merger review co-operation between two giants will be incomplete if it doesn't take into consideration the effects in all countries.

What is striking in these debates and discussions is that they have mostly been dominated by business interests and concerns and near-absence of consumer concerns. Ironically, the very existence of merger review provision in the competition law enforcement mechanism is mainly to protect and promote both economic and consumer interests.

The recent announcement of Mario Monti, the EU Competition Commissioner, to involve European consumer groups in the merger review process thus assumes critical significance. He has also promised to provide financial support to such groups, if they require it. This is a welcome step as there has been a fear that the US has recently been giving more prominence to business interests in its merger review process and simultaneous review of mergers may lead to the neglect of consumer interests even in the EU. Monti's announcement should be an eye opener for many other competition authorities, especially in developing countries, which have not taken the consumer movement seriously so far!

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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". The Project involves a comparative study of the competition regimes of seven developing countries of the Commonwealth, with the aim of strengthening their competition regimes. It is being supported by the Department for International Development, UK. The countries selected for the Project are: India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. The Project was launched on September 1, 2000, and has progressed considerably since then. Its mission has been defined as "Shaping Competition Culture in Developing Countries", while the vision statement for the Project reads: "Towards a Healthy Competition Culture".*

### ○ Project Update ○

#### Major Developments

The Project is on the verge of completion now. The finale is about to take place. The period during September to December 2002 was very significant. Final touches were given to a lot of activities and preparations were made for the final meeting of the project to be held in February 2003 in Geneva. Following is a brief on these activities:

#### Phase-II Country Reports

The second phase of the project dealt with cases having cross border implications. Three case studies were undertaken by each country and a case study report was prepared. These reports are a synthesis of the case studies and give an overview of how similar cases having cross-border implications are dealt differently by different competition authorities.

The reports were deliberated on at the National Reference Group Meetings organised in every country and finalised thereafter. These would now be published for local distribution.

#### Final Report

The synthesis report of both the phases of the Project, entitled, "Pulling up Our Socks", was further worked upon during this period. The report is a compilation of the research results of this two-year study and compares the institutional framework in the Project countries. It carries an analysis of important issues like legal provisions, autonomy of institutions, financial and human resources, etc.

The draft was circulated to the concerned experts for comments and is now being finalised. The plan is to publish the report before the final meeting.

#### Advocacy Document

The project plan had envisaged to publish an Advocacy document at the end of the project duration.

During the period under review, an outline was prepared for the advocacy document. The document, entitled, "Towards a Healthy Competition Culture",

would intend to build awareness in policy-makers and negotiators and stimulate debate on competition policy in the national and international contexts.

A draft was prepared subsequently and was circulated to those directly involved in the Project. The revision of the document is underway and it would be published soon.

#### Handbooks/Briefing Papers

All the partners were requested to prepare a handbook/briefing paper on some selected topics like capacity-building, interface between competition policy and sectoral regulation, restrictive business practices, etc.

The drafts of some of these publications have been received and are in the process of being finalised. These handbooks and briefing papers would be printed soon after the final meeting of the Project.

#### The Final Meeting

The final meeting of the Project is being organised on 19<sup>th</sup> February 2003 in Geneva. The theme of the symposium is "Competition Policy and Pro-poor Development" and would address three main questions: "How does competition policy help the poor"? "What kind of a competition law should a country have"? and "How do developing countries deal with cases of international dimension".

During the period under review, preparations for this meeting were in full swing. Invitations were sent out to the participants and other logistical arrangements like hotel bookings, travel, etc., were taken care of. The speakers started working on their presentation papers, which would now be circulated to the participants and also uploaded on the website.

#### Plan for the Next Quarter

After the final meeting takes place, the most important task would be advocacy and outreach. All the reports and other documents would be published. Some beyond-the-Project activities have been planned and proper outreach of all the publications produced during the Project

duration, particularly the final report and the advocacy document, would have to be ensured.

For advocacy purposes, a follow-up meeting would be organised in all the 7-up countries. The momentum would continue by way of national reference group meetings and efforts to promote a healthy competition culture in these countries would continue to be made.

#### Other CUTS Publications

##### ECONOMIQUITY

(October-December 2002)

The last quarter of the year 2002 was very crucial for the ongoing Doha round of trade negotiations as three important deadlines had to be met. Unfortunately, when negotiators broke for the winter holiday in December, none of the deadlines could be met. First, the US stubborn posture resulting in TRIPs and public health talks ending in a stalemate. Second, the issue of farm talks did not move forward as per the desired pace. Third, on the review of special and differential treatment, a pet issue of many developing countries, the Chairman Smith failed to meet even the second deadline. Overall, the year 2002 ended on an extremely disappointing note for the poor countries.

The latest issue of *Economiquity* besides covering the developments regarding the current Doha Round, also carries excerpts of an interview with eminent economist, Jagdish Bhagwati and trade related news. To know more, please subscribe.

##### Investment For Development

(November 2002)

Do developing countries face a trade-off between foreign investment-led higher growth and greater equity through creation of more jobs? The effect of FDI on employment is a debated issue. The November 2002 issue of the quarterly CUTS' newsletter "Investment for Development" has the theme "investment and employment". It looks into some of the issues relating to foreign investment, labour and employment in Hungary, Bangladesh, India and South Africa.

The issue also deals with the current news on FDI performance and trends, policies, investors and business responsibility. It covers news related to services and privatisation.

## EU Expands Powers

Even as the European Commission's Competition Department suffered a setback due to the European Court of Justice overturning its decisions to block three corporate mergers, it has received new powers to crack down on cartels and other abuses of competition law. The new rules, agreed to by the 15 EU national governments, will allow the Commission to raid the homes of executives of companies involved in price-fixing investigations. It will also allow national regulators to carry out probes in cases affecting more than one EU country.

Still, unlike in the US, where executives can be sent to jail for breaking anti-trust laws, the EU will depend only on fines and cease-and-desist orders, not criminal penalties.

The new rules have, however, caused concerns among the European and the US companies. According to them, the new regime will create confusion and increase costs.

The reform measures do not affect merger review arrangements. The Competition Commissioner, Mario Monti, however, pledged deeper reforms to the way his department decides on merger cases, but vowed to retain his veto power.

(*BS*, 08.11.02 & *FT*, 27.11.02)

## Step towards Public Health

In an overwhelmingly one-sided vote, 494 to 42, the European Parliament defeated the European Commission's proposal to relax the ban on advertisement of prescription-only medicines, thus placing public health concerns above narrow considerations for industry profits. The Commission's proposal was to weaken the ban on the advertising of drugs in three disease groups, viz. HIV/AIDS, asthma and diabetes.

Some think tanks, for example, HAI Europe, have suggested that the direct-to-consumer-advertising debate is intertwined with issues relating to product patents market access. More particularly, widely-advertised and patented drugs are reported to be less known for their attributes of safety and are very expensive at that. The Parliament's ruling has reassured many stakeholders of the former's commitment to public health protection.

## Ban on Tobacco Advertising

An extensive ban on tobacco advertising was agreed to by the European Union Health Ministers, in spite of the tenacious opposition from Britain and Germany. The new law bans tobacco advertisements in print, radio and on the Internet within the 15 EU nations from July 2005.

Tobacco ads and sponsorship on television are already banned in the EU. The new law goes further, forbidding companies from sponsoring sports events, such as Formula One, and abolishing promotions giving away free cigarettes.

The new rules still allow tobacco companies to advertise in cinemas and on billboards. They also permit indirect advertising such as RJR Nabisco Co's (RJR) tie-ins with camel-brand clothing.

The tobacco industry has said that cigarette advertising is aimed at the existing smokers but does not entice non-smokers. Some analysts believe that the law will help companies with well-established brands, since a ban on ads makes it harder for competitors to break into the market.

(*FT*, 03.12.02 & *BL*, 04.12.02)

## Striking the Right Chord

In a pact with far-reaching implications for cross-border mergers, the European Union and US competition authorities have agreed to vet big transactions simultaneously on both sides of the Atlantic.

In an increasingly global economy, the world's top competition authorities are going to extraordinary lengths to avoid situations in which one jurisdiction gives companies its approval for merger, while another one blocks it. That is what happened when the European Commission blocked General Electric Co.'s \$43bn acquisition of Honeywell Inc. after the US

authorities had given the deal the go-ahead.

In pursuance of this pact, the United States and the European Union have released guidelines on "best practices" for co-ordinating future merger reviews between the US and EU anti-trust agencies. The objectives of these "best practices" are to enhance co-operation, minimise the risk of divergent outcomes and reduce the burdens on parties involved in merger investigations, the Department of Justice (DOJ) has said. Many of the guidelines have been in place informally for a long time, it noted, but formal adoption will increase transparency and provide important guidance to all the participants in the process.

(*WSJ*, 01.10.02 & *DOJ Press Release*, 30.10.02)

## Cost of Export Cartels

The Global Economic Prospects 2003, a World Bank report, reports an alarming statistic. Six international cartels, including those dealing in steel tubes and drugs, essential commodities for developing countries, are estimated to have overcharged developing countries up to \$7bn during the 1990s. The Report makes the rather strong suggestion that developing countries should be permitted to take to court those multinational corporations who have formed cartels for exports to developing countries. The Report recommends greater disclosure and stronger enforcement mechanisms to prevent such abuse.

(*BS*, 11.12.02)

## New Package of Reforms



In the aftermath of a series of harsh rulings by the European Court of First Instance with regard to the anti-trust process of the European Commission, the Commission's anti-trust regulator, Mario Monti, has proposed a set of reforms to overhaul the much-censured anti-trust mechanism.

It may be noted that the European court had discovered a number of "errors and omissions" in the Commission's regulation process, especially regarding the faulty economic analysis of merger deals, e.g. invoking the notion of bundling theory in the case of Tetra Laval and Sidel, and serious procedural flaws, e.g. not giving merging entities sufficient opportunity for defence.

- Jul 3 2001: European Commission blocks GE takeover of Honeywell despite high-level US pressure
- Jul 24 2001: Carnival bid for P&D Princess cleared without concessions even though the Commission initially took a tough line
- Oct 2001: Commission blocks Schneider's takeover of Legrand and Tetra Laval's bid for Sidel
- Jun 6 2002: European Court of Justice overturns a Commission veto for the first time, reversing the blocking of the Airtours/First Choice deal in 1999
- Oct 22 & 25 2002: European Court to announce ruling on Tetra Laval/Sidel and Schneider/Legrand deals.

The anti-trust chief has been bedevilled by controversy of one kind or the other for some time. Earlier, the Confederation of British Industry (CBI) had questioned the Commission's proposed clampdown on price-fixing practices that entailed a jail term for those found guilty of price-fixing.

(*FT*, 26.10.02 & *WSJ*, 24.10.02)

## Modernising Competition Law

With a view to building a fair, efficient and competitive economy, the Canadian Government has brought out a comprehensive strategy package for modernising competition laws in Canada, in response to the Report of the Standing Committee on Industry, Science and Technology.

Among the chief features of the package are: (1) issuing a discussion paper this year, i.e. 2003, addressing specific issues for extensive consultations; (2) improving the conspiracy provisions of the Competition Act; (3) introducing changes for administrative monetary penalties, price discrimination, predatory pricing and abuse of dominance; (4) ensuring adequate funding of the Competition Bureau; and (5) commissioning a study on the treatment of efficiencies in merger review internationally and taking subsequent parliamentary action, based on the findings.

Besides, in June 2004, the Government will conduct a review of its enforcement experience relating to the airline-specific and private access provisions of the Competition Act.

## Import Cartel!

After sellers' turn, it may now be buyers' turn to collude. Exploiting the "oligopsonistic" (i.e. concentration in buying) nature of their oil consumption, India and China could join hands to pressurise the oil cartel, Organisation of Petroleum Exporting Countries (OPEC), to

bring down crude-oil prices from \$28 to \$21 a barrel. The idea is predicated on the premise that India and China are two of the largest oil consumers in the world. Oil public sector enterprises feel that such an alliance among the large consumers of oil is necessary, given that the global oil industry is predominantly a seller's market.

Furthermore, they also feel that such a "cartel" could bargain for two slabs of oil prices, one for developed and another, lower than the first, for developing nations, categorising the latter as "discounts". However, the policy suggestion is not without its detractors. Sceptics point to the inability of the US, the largest consumer of oil in the world, to influence the OPEC.

(BS, 26.09.02)

## Study on Trade Practices

Yet another case of distortionary preferential subsidies to domestic producers has surfaced. The European Commission has decided to investigate whether South Korea gave preferential subsidies to domestic memory chipmakers. Subsidised loans from state-owned banks, state-guaranteed export credits and debt rollovers are some of the measures that the Korean Government has been accused of having taken.

The matter at hand is whether the Government extended preferential loans to a few selected companies and whether they benefited from the Government support. If this is found to be the case, then the

European Union could impose countervailing duties to offset the subsidies under the WTO agreements.

(WSJ, 14.10.02)

## No to Rice Cartel

India has decided not to join the international rice cartel proposed by other rice-exporting countries like Vietnam and Thailand. This comes on the heels of its decision to stay away from the coffee cartel. It is instructive to note that Indian rice is much cheaper than rice from elsewhere in the world. Sensing this price advantage and considering a host of other factors, India found little to gain from being party to such a cartel, despite the fact that it is a new entrant in the global rice market and does not have the kind of infrastructure available to exporters in other South-East Asian countries.

It is learnt from informed sources that price co-operation among rice-exporting countries was suggested only after India decided to enter the international rice market.

(BS, 05.12.02)

## Regulated Conduct Defence

In order to foster compliance and ensure greater fairness, predictability and transparency, the Competition Bureau, an independent law enforcement agency in Canada, has issued its Information on the Regulated Conduct Defence (RCD). In the broadest sense, the RCD is an interpretative tool developed by courts to resolve apparent conflicts between two different laws.

Particularly, the RCD is of relevance to the implementation of the provisions of the Competition Act, especially in situations where an activity contravenes the provisions of the Competition Act, on the one hand, and is authorised by a statutory regulatory regime, on the other.

## Shell Tepco Merger

The Competition Commission of South Africa granted a conditional approval to the merger deal between Shell South Africa Ltd and Tepco Petroleum Ltd. The deal was approved after the Commission examined the implications of the proposed merger for competition, employment and consumer welfare at large. It concluded that the deal did not raise competition concerns.

However, it expressed concern over the removal of Tepco, an independent firm owned and controlled by a group of historically disadvantaged individuals, from the market as a competitor to Shell after the latter acquired the former. In order to address this concern, the approval has been conditional on Tepco retaining its independence in terms of brand and ownership, in part.

## New Law for India

The Competition Act, 2003, which seeks to repeal the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, and dismantle the MRTP Commission, got the approval of Parliament in December.

The Act provides for the setting up of the Competition Commission of India (CCI) that will function as a regulator to give impetus to the quality of products and services, competition, smoother merger and acquisition (M&A) activity and its effective regulation. It is aimed at affecting the so-called second-generation economic reforms on the pattern of the global standards set by the UK, the US and the European Commission.

Further, the Companies (Second Amendment) Bill, which seeks to amend the Companies Act, 1956, and provides for a new, modern, efficient and time-bound insolvency law, has also been approved. The latter seeks to provide for both the rehabilitation and winding-up of sick companies within a time frame of maximum two years, as against the existing practice of taking about 18 to 26 years.

(BL, 17.01.03)



Green Politics

## Fine for Price-fixing

The Brussels anti-trust regulators have fined four building material companies a total of •478mn for a six-year price-fixing conspiracy. A four-year enquiry concluded that the companies had conspired to fix the price of plasterboard in France, UK, Germany and the Benelux countries by agreeing to stop a damaging price war.

France's Lafarge was hit the hardest, being fined •250mn – the third largest penalty ever levied by the Brussels authorities on a single company – with its UK rival, BPB, getting a penalty of •139mn. The German group, Knauf, has been ordered to pay •86mn, while Gyproc of Belgium was fined •4mn.

Lafarge had sales of •13.7bn and BPB's turnover was •2.5bn last year. Though the Commission has the power to fine companies up to 10 percent of their worldwide turnover, but it rarely opts to impose the full penalty. (FT, 28.11.02)

## Fee-fixing Fined

The European Commission imposed a •20.4mn fine on Sotheby's, the auction house, for colluding with its rival, Christie's, in a seven-year conspiracy to fix the commission fee. Sotheby's and Christie's are the world's largest auction houses.

Christie's escaped a fine because it gave evidence to EU regulators, which enabled them to prove the existence of the cartel.

The case follows the action in the US, where Sotheby's was sentenced to pay •45.7mn. Christie's was granted an amnesty for co-operating with the investigators, although it agreed to share the costs – a \$537mn settlement of price-fixing lawsuits brought by customers of the two houses. (FT, 31.10.02)

## Jiggled by Authorities

ASML, the Dutch chip-making equipment manufacturer, has lodged a formal complaint with the European Commission, alleging its competitors are "ganging up" to keep it out of the Japanese market. It protested that "cross-licensing" agreements between Japan's Nikon and Canon are restricting its market share in the country to 3 percent.

Similarly, the European anti-trust enforcers have concluded that Nintendo Co, the Japanese creator of video game icons such as Super Mario and Donkey Kong, and its distributors illegally carved up the European market for game consoles and video games by preventing sales from one European Union country to another, thus keeping the prices higher.

In another development, Japan's Fair Trading Commission raided the

## Means to Monopolistic Ends

Advocates of free computer software have expressed concern that Microsoft is engaged in tactics in poor countries that will help it further entrench its dominant position in the industry.

As free alternatives to proprietary software gain credibility, Microsoft is preparing to give away its products to schools across the developing world. It has already announced it will give away its software to schools in Africa and the Middle East. Industry observers believe that by doing so, Microsoft will foster and retain captive markets for its products.

According to the Free Software Foundation of India, the announcement of the Microsoft Chairman, Bill Gates, offering millions of dollars for IT education in India is aimed at maintaining a monopolistic hold on education. Contradicting Gates' claim of assisting 'Project Shiksha', aimed at educating 35 lakh children, the foundation pointed out that the pledge of assistance was tied to the condition that the Project would purchase and use licensed Microsoft software.

Children would be 'indoctrinated' to use only Microsoft software, which would be akin to a medical course teaching potential doctors how to use medicines manufactured by one particular company only. (FE, 19.11.02)



Business Week

headquarters of J-Phone, the Japanese arm of Vodafone, as part of an investigation into possible fixing of retail prices on mobile phones. The raid followed the announcement of a strong profit rise by the Japanese mobile phone operator in the first-half of the year.

(FT, 21.11.02 & WSJ, 28.10.02)

## 'Preservative' Conspiracy

The Canadian Competition Bureau's international investigation in the food preservatives industry, which started in 1998, has revealed that Japan-based Nippon Gohsei Industries Ltd was involved in a conspiracy to fix prices for sorbic acid and potassium sorbate.

The Company pleaded guilty to charges of price-fixing and market-sharing in the Federal Court and was sentenced to pay a \$100,000 fine for its part in the conspiracy.

Nippon is the fifth international company to be convicted of such offences in Canada over the last three years. Ueno Fine Chemicals and Daicel Chemical Industries Ltd of Japan, Hoechst AG of Germany and Eastman Chemical Company of the US were all previously convicted of price-fixing and volume allocation.

## Carbon Cartel

The US Department of Justice charged Morganite Inc. with participating in an international cartel to fix prices of various types of electrical carbon products sold in the US and elsewhere. Its UK parent

corporation, the Morgan Crucible Company Plc, was charged with attempting to obstruct the investigation of the price-fixing conspiracy.

The conspiracy continued from January 1990 to May 2000. Morganite has agreed to plead guilty to the charge and pay, subject to court approval, a \$10mn criminal fine. Morgan Crucible has agreed to plead guilty and to pay, subject to court approval, a \$1mn criminal fine.

The charges arose from an ongoing investigation being conducted by the Antitrust Division's Philadelphia Field Office, with the assistance of the Philadelphia office of the Federal Bureau of Investigation.

(DOJ/Antitrust: Press Release, 04.11.02)

## Fight Against Fine

Carlsberg and Heineken, two of the world's biggest brewers, are to escape fines after European regulators dropped a cartel case against them.

The Danish and Dutch companies had denied the charges and the victory could be a sign that recent court defeats have prompted the Brussels authorities to be more cautious in their anti-trust probes.

The Commission said its evidence dated back to 1995 and was too old to be useful to its investigation, which started in 2000. Brussels can fine companies only if its evidence dates back to less than five years from the beginning of the probe.

It is unusual for the Brussels authorities to drop a case so late in their investigations.

(FT, 05.11.02)

## EU's Probe

As part of a wide-ranging probe into allegations of price-fixing in the chemicals sector, the European anti-trust investigators have raided ExxonMobil, the US oil group and Bayer, the German chemicals group. Crompton, a US chemicals group, also said that its rubber chemicals operation was under investigation in the US and the EU.

Similarly, five German state banks could be forced to repay millions of euros to their regional authorities, if found to be in breach of European rules. The probe will focus on whether the banks paid enough compensation to the regional authorities for the capital injection, which they received from their regional governments.

Phelps Dodge's Columbian Chemicals subsidiary has been contacted by the US and European anti-trust authorities regarding a joint investigation into alleged price-fixing in the carbon black industry.

In the meanwhile, the Brussels anti-trust probe into KPN, the Dutch telecommunications group, could be delayed by several months, in a move that would undermine the competition authorities' efforts to crack down on telecom operators. *(FT, 02.12.02 & 21.11.02)*



concerns the fact the Microsoft has been accused of setting its domestic prices of software related products at relatively high levels vis-à-vis those in other countries and of forcing the sale of multiple software products by bundling them inappropriately.

Following a six-month investigation including holding hearings, collecting market information and taking statements from various businesses, the FTC could not ascertain fully whether Microsoft has violated the Fair Trade Law.

Thus, it has decided to allow Microsoft to initiate a settlement process rather than be subjected to the enforcement of an administrative penalty. Microsoft is obliged to do this within thirty days of receiving FTC's official notice. Moreover, the settlement contract should be disclosed to the public except for those parts that must remain confidential owing to legal requirements.

### Approval to De Beers

The European Union approved a plan by the De Beers Group, the world's leading supplier of rough diamonds, to overhaul its diamond-sales system and give dealers more rights. The system could reshape the multi-billion-dollar luxury market.

Last year, the Commission said that De Beers' criteria for selecting dealers were too restrictive and could violate EU rules. It could use its new strategy to restrict the distribution of rough diamonds to a select few middlemen and thus limit competition, potentially raising retail prices.

De Beers will change its Supplier of Choice distribution programme, which governs ties between Diamond Trading Co, a De Beers unit, and the 120 approved dealers through which it distributes its rough diamonds worldwide.

*(WSJ, 14.10.02 & 13.11.02)*

### Rigging in Cement Prices

Cement prices shot up by up to 15 percent in India during October-November 2002. The insiders attribute it to the "market understanding" among the domestic cement majors.

Cement manufacturers have got into the act of trying to shore up cement prices with a vengeance. The price increase has been possible primarily due to curtailed dispatches, to the tune of 20-25 percent, while the cement makers attribute this to the spurt in demand.

These production cuts have been mainly in South India, owing to the excess supply situation. The North, being the primary demand driver, has largely witnessed a balance between demand and

supply. Clearly, this is a definite measure being taken by the industry in sustaining a price level akin to the unofficial cartel formed in 2001. *(ET, 20.11.02)*

### Advertisement Ban

In India, Jagatjit Industries Ltd would approach the Monopolies and Restrictive Trade Practices Commission of India against the Confederation of Indian Alcoholic Beverages Confederation (CIABC) for sending letters to major television channels to ban the ACP apple juice advertisement of Jagatjit Industries Ltd, objecting to the content of the advertisement.

The advertisement is said to violate the CIABC marketing code and the initiative is taken in the larger interest of all the liquor manufacturers and the advertising industry.

*(BS, 28.09.02)*

### Aventis Fined

The European Commission has fined Aventis and Rhone-Poulenc •2.85mn for a cartel in chemicals. No fine was levied on Merck, which was also a part of the cartel, because it gave vital information to the Commission.

The Companies conspired to fix prices and allocate the market for methylglucamine, a chemical used in X-Ray analysis, between 1990-1999.

*(ET, 28.11.02)*

### Conditional Settlement

The Fair Trade Commission (FTC) of Taiwan has decided to accept Microsoft Taiwan Corporation's proposal to start a conditional settlement process. The case

### Investigation into Cartels

The Korea Free Trade Commission (KFTC) has announced that it imposed cease and desist fines on nine calendar-making companies and six calendar-selling companies. Earlier, it was alleged that, in September 2001, nine calendar companies had agreed to establish a trade association of calendar manufacturers agreeing on the price of 2002 calendars.

It was also alleged that, from August to September 2002, the same nine companies along with six calendar-selling companies reached an agreement on the price of 2003 calendars.

It is instructive to note that in Korea the market volume of calendars amounts to approximately 20bn Won (\$165.4mn) and there are about 10-15 calendar manufacturers and 50-60 sellers.

*(KFTC News, 03.01.03)*

### Investigation Concluded

The Australian Competition and Consumer Commission (ACCC) has concluded its investigation into the joint acquisition late last year of John Glover's Mount Wellington and Hobart Town by the National Art Gallery and Tasmania Museum and Art Gallery. The investigation followed an allegation of an agreement between several public galleries in the Australian art market the purpose of which was to prevent, restrict or limit the acquisition of goods from particular business houses. The ACCC, however, has decided not to take any further action at this stage and wait for more information on the alleged exclusionary arrangement.

*(ACCC Media Release, Dec 02)*

## Cement De-merger

Commonwealth Development Corporation (CDC), a UK-based private equity house, is set to acquire a stake in India's L&T Cement. This would trigger a de-merger of the cement division of L&T, India's largest engineering company. The CDC recently met with L&T to discuss the possible investment into the cement company, which would be formed once a de-merger takes place.

Analysts say Birla, another big Indian firm with an interest in the cement industry, aimed to combine L&T Cement with its own cement business, which would have created India's largest domestic cement company. The entire episode, however, came under harsh media glare, after the Indian stock-market regulator SEBI decided to investigate Birla's control over L&T.

L&T would like to induct a financial partner in the cement business. However, few multinational cement makers seem keen to join in as strategic investors just now. The one player quite keen to acquire the cement business of L&T is the French cement major, Lafarge.

(ET, 01.12.02 & FT, 26.12.02)

## FTC Approves Deals

The US competition watchdog, the Federal Trade Commission (FTC), has approved IBM's sale of most of its hard disk drive assets to Japan's Hitachi. The deal still needs approval from one other jurisdiction, but has already been approved by the competition authorities in the EU, Brazil, Japan and Taiwan. Hard disk drives, similar to other components for computers, have been hurt by slack demand and sharply-reduced pricing in the past year.

The FTC has also approved the purchase by Shell Oil of Pennzoil-Quaker State Co, the largest motor oil maker in the US. The deal is the latest merger in a trend of oil industry consolidation in recent years. The FTC conditioned its approval, however, on Pennzoil selling its share in a company that makes the feed stock that is used in high performance motor oils. The FTC said that without this divestiture the new company would control too large a market share in the feed stock. The merger is expected to result in the loss of about 1,230 jobs.

(BL, 02.12.02 & WSI, 29.09.02)

## Steel Majors in Mergers

The International Steel Group (ISG), US's fourth-largest steel maker, is about to acquire Bethlehem Steel. The merger would create a group that could challenge US Steel and Nucor, the two biggest producers in the US. The move would greatly accelerate consolidation in the US domestic steel industry.

The big hurdle for the deal would be working out an agreement with the United Steelworkers of America over legacy costs such as retiree health care. The merger will be widely watched by foreign steel makers and governments. They are keen to see mergers among US steel makers to create a more robust industry to reduce the need for controversial trade restrictions of the kind introduced by the US in March 2002.

Meanwhile, the merger of the Anglo-Dutch steel maker Corus with its Brazilian counterpart CSN has been agreed by the companies. The deal will make Corus the world's fifth-biggest steel producer. A plus for Corus is the Brazilian Company's access to reserves of iron ore, the main raw material for steel.

(WSJ, 06.11.02 & FT, 01.10.02)

## Metals Loose Shine

Plans by Norilsk Nickel of Russia to acquire the only platinum producer in the US, Stillwater Mining, are awaiting approval from the US competition authorities. Some analysts say the deal is more likely to drive prices down than up, by reducing the risk factor associated with Russian supplies.

In South Africa, Anglo-American, the global resources group, is about to acquire its South African counterpart, Kumba Resources, the world's fourth-largest iron ore producer. Anglo-American has made

no secret of its desire to build an iron ore business, having previously lost similar bids in Australia and Brazil.

Meanwhile, in Canada, the consolidation in the gold-mining industry continued as Canadian Iamgold, with mines in Africa and South America, announced its merger with another Canadian firm, Repadre Capital, which operates as a natural resource royalty company.

Some de-mergers are, however, also taking place in the metal sector. WMC, the Australian mining group, recently activated its de-merging plans to ensure that shareholders' interest is protected, in the event of some entity attempting to take over the company. A US company, Alcoa, had earlier attempted to take over WMC's aluminium arm.

(FT, 22.11.02 & 29.10.02)

## SAB Consolidating in India

South African Breweries (SAB) India, which recently changed its name to SABMiller India Ltd, is consolidating its operations in India. In the first-phase, two of its group companies, Narang Breweries and Pals Distilleries, will merge into Mysore Breweries. In the second-phase, Rochees Breweries will become a subsidiary of Mysore Breweries.

SAB Miller Plc is the second-largest brewer in the world and was formed by SAB Plc's acquisition of the US Miller Brewing Company.

(BS, 29.11.02 & BL 28.11.02)

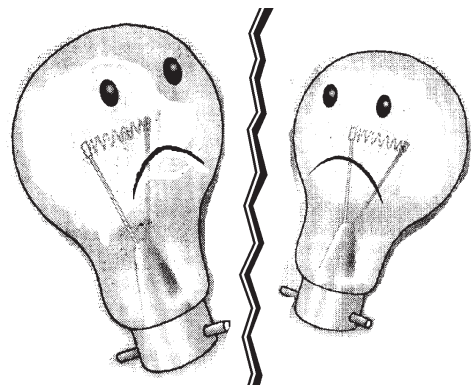
## Schneider Deal Under Clouds

French electrical equipment maker Schneider Electric's attempt to take over its smaller French rival, Legrand, has been riddled with problems. Schneider bought Legrand in 2001, only to see the European Commission (EC) reject the purchase on anti-trust grounds. The Commission's rejection of the take-over on the grounds that the combined group would dominate the European market forced Schneider to negotiate the resale of Legrand - at a loss.

Schneider appealed to the European Court of Justice, which went broadly in Schneider's favour. However, the Court found that the Commission was justified in saying the merged group would be dominant in the French market. Schneider is considering suing the Commission for damages. The judgement will strengthen those who want to take the power to block mergers away from the Commission and give it to the Court, like in the US. The Commission favours the creation of a separate competition court.

The collapse of the merger also adds weight to calls for a speedier appeals process for reviewing European merger rulings. Schneider had earlier offered to sell several businesses in France, in an attempt to persuade the European Commission to clear its bid for Legrand.

(FT, 03.12.02 & WSI, 02.12.02)



## Merger Blocked

The US Department of Justice (DoJ) has filed a suit to block a merger between two US satellite television operators, EchoStar and Hughes, both owned by the US company General Motors. The Justice Department acted after the Federal Communications Commission said it would oppose the merger. The DoJ said that the proposed merger would significantly harm competition and create a monopoly for millions of US households. The merger would have created the largest pay-TV service in the US.

The DoJ's decision is a victory for Rupert Murdoch, the owner of News Corp, who had lobbied against the merger for the past year. EchoStar and Hughes had proposed transferring some of their capacity to a Long Island-based cable operator to launch its own rival satellite TV service to compete with the merged company. The DoJ, however, was not convinced by the argument that Cablevision could become a viable competitor soon enough.

(FT, 01.11.02 & WSJ 22.10.02)

## Squaring-off the Deal

Two of Japan's largest video game makers, Square and Enix, have agreed to merge. The deal is part of a broader consolidation of the global video game industry, which has seen a sharp increase in the cost of developing game software, due to increased technical sophistication of the video game machines.

The merger could set hurdles for Microsoft, which has been striving to

expand its game business in Japan's competitive market. Microsoft has doggedly pursued both Enix and Square in hopes of getting them to write games for the Microsoft game machine, Xbox. But, the two remain firm supporters of the Sony's game machine, PlayStation 2, the world's best-selling video game console. But, Square and Enix may, eventually, have to support the Xbox, as the US market is becoming increasingly important for Japanese game makers, at a time when their home market is shrinking. (WSJ, 27.11.02)

## Big is Beautiful

Seventeen Chinese urban commercial banks and credit co-operatives plan to merge to create a bigger bank to help fend off post-WTO competition. Cross-regional mergers are one way for smaller commercial banks to survive fierce competition with foreign commercial banks, which are penetrating deeper into the Chinese market.

Credit co-operatives are smaller than urban commercial banks, whose business is restricted to the city where they are based. China's banking industry is still dominated by the Big Four state banks, saddled with bad loans due to decades of reckless lending to ailing state firms.

(FE, 19.11.02)

## New Front in Water Wars

French consumer product company, Danone, is close to a deal with Canada's Sparkling Spring Water Holdings Ltd, in a deal that would open up a new front in the global water wars. The acquisition is part

of Danone's drive to strengthen its position in a profitable segment of the water business in the US and overseas. Danone is already the number one player in the home and office delivery business in China and Indonesia. Home and office delivery has become a highly lucrative segment of the beverage industry and is poised for consolidation. The overall US market for bottled water is growing by as much as 30 percent a year.

(FE, 13.11.02)

## Pfizer Razing for Bids

US-based Pfizer, the world's biggest drug maker, plans to sell its candy business, Adams, the world's second-biggest chewing gum company, and its razor blade-making unit, Schick, the world's number two in the global razor business.

UK's Cadbury Schweppes and Swiss Nestlé have emerged as the front runners in the auction for Adams. Gum is the fastest growing segment of the global confectionery market. Anti-trust problems have ruled out any tie-up of Wrigley, which dominates the US gum market, and Adams in the US. Wrigley has, however, shown interest in picking up some of Adams overseas assets, notably in Latin America.

British-Dutch household products company, Reckitt Beckiser, is the top bidder for Schick. Private equity funds have also submitted bids. However, strategic buyers like Reckitt hold an advantage over private equity buyers because they would be able to extract more cost savings and gain synergies in areas like distribution.

(BL, 06.12.02 & FT, 14.10.02)

## ACCC Accepts Deal

The Australian Competition and Consumer Commission (ACCC), on November 13, announced the court-enforceable undertakings proposed by Foxtel, Optus, Telstra and Austar to address the ACCC's concern about the potential anti-competitive effects of the planned pay-TV arrangements between Foxtel and Optus.

The ACCC does not, therefore, intend to oppose the arrangements, which allow Optus and Foxtel to share pay-TV programming.

The undertakings provide access to programs for pay-TV operators, broader choice for consumers and access to Telstra's cable network and Foxtel's set-top boxes.

The decision follows extensive consultations between the ACCC and the industry since June, when the ACCC concluded the proposed arrangements were likely to have the effect of substantially lessening competition in a number of pay TV markets. (ACCC Media Release; 13.11.02)

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# Ripe for Consolidation

The software industry, characterised by many small and medium-sized companies, is, according to some, ripe for consolidation. Since January 2001, hundreds of software companies have gone out of business and some believe the mid-sized speciality software vendors are destined to die. The companies predicted to last are IBM, Oracle, SAP and Microsoft.

Last year, IT investment fell by eleven percent, the first-ever decline. Medium-sized companies have been particularly hit as they, with a limited product range, have little to cross-sell.

Yet, despite compelling reasons for consolidation, the volume of mergers and acquisitions has been paltry. Part of the problem has been a lack of buyers. At the same time sellers are hard to find - top executives are simply unwilling to raise the

white flag. Many executives of smaller firms are pinning their hopes on new software releases. Some believe that the current problems faced by the sector will, in ten years time, seem like nothing but small speed bumps.

(FT, 30.10.02)



## No Ground for Further Action

The Competition Bureau of Canada has not found any grounds for proceeding under the Competition Act regarding Air Canada's recent agreement with the Government of Quebec. The Government of Quebec announced an agreement with Air Canada that would lead to reduced fares for non-government users of air transportation services on 15 regional routes.

Jetsgo, who had filed the complaint, expressed strong concerns that Air Canada was able to obtain commitments from the Government of Quebec by virtue of its dominant position in the Quebec Market.

According to the Bureau, the agreement does not raise any competition concerns. Besides, it does not invoke the provisions of the Competition Act since an agreement to purchase air transportation services is not a violation. Air Canada has not secured any exclusivity and the agreement does not prevent another carrier from entering into the market.

(Bureau News, 11.12.02)

## Looking for Grey Area

American Airlines (AA) and British Airways (BA) have applied for a code-sharing agreement. The two airlines have asked the Department of Transportation to clear their plans for the so-called "beyond gateway" code-sharing.

An earlier application had been stalled by the US competition authorities for two years. The partners have failed twice to win US anti-trust immunity.

In another deal, Hong Kong and the US may sign a pact, including a code-sharing deal between Cathay Pacific Airways & AA. The deal has been closed against the backdrop of Hong Kong's liberalisation of the aviation industry.

(FT, 19.04.02 & 20. 04.02)

## Open Skies Deal Sour

The open-skies deal between the US and the EU was considered null and void in a court ruling of the European Union (EU). The ruling could lead to a dispute between the EU and the US over the existing treaties.

The current agreements remove restrictions on issues such as the number of airlines flying to and from the US and on capacity, frequencies and pricing. But, they continue to exclude foreign carriers from the US domestic aviation market and protect the US airlines from foreign take-overs.

The UK, however, believes that the Court's judgement may not prove to be a stumbling block in its bilateral deal with

Washington, even though the verdict means that such a deal would no longer be able to favour British Airlines at the expense of carriers from other countries.

(FT, 06.11.02)

## Deal in Rough Weather

The deal involving Qantas buying a 22.5 percent stake in Air New Zealand might face scrutiny by the Australian and New Zealand competition authorities. The Australian Competition and Consumer Commission and New Zealand Commerce Commission will analyse the case focusing on competition and fare prices.

The New Zealand government holds a stake of 82 percent in Air New Zealand and will have to give its approval for the deal, which would result in its stake falling to 64 percent.

The agreement is aimed at rivals such as Singapore Airlines. The chairman of New Zealand's Commerce Commission said that the proposal clearly had competition implications for the aviation market. Air New Zealand's chief executive officer said that Australian Airlines would have to ensure that Air New Zealand maintained its independence, in case any deal takes place.

(WSJ, 27.11.02 & FT, 30.10.02)

## Fine Dents KLM's Earnings

An independent Dutch arbitration tribunal has ordered KLM, the Dutch national airline, to pay €150mn to the Italian carrier, Alitalia, as damages for the premature termination in the year 2000 of the merger deal between the two airlines, initially signed in 1998.

Earlier, KLM had argued that it withdrew from the deal sensing an unacceptable business risk emanating from the uncertainty surrounding the proposed privatisation of Alitalia and Milan's Malpensa airport, which was supposed to be developed as the second hub for the alliance, besides Amsterdam Schiphol.

However, the Dutch tribunal has found KLM's position untenable. The fine is suspected to hurt KLM's annual earnings sizeably, especially given that it had already warned in late October that it would incur a net loss despite improved earnings during the first six months of the financial year.

(FT, 05.12.02)

## China Aims at Overhauling

China has announced massive restructuring of its aviation industry by amalgamating nine state airlines into three larger groups that would account for 80

percent of the industry and command together an asset-worth of \$18.5bn. The proposed groups will be headed by Air China, China Eastern Airlines and China Southern Airlines. The reorganisation is to be achieved through debt-restructuring, job cuts and asset reshuffling.

Industry planners in China are reported to hold the belief that the larger groups will facilitate the creation of smoother and safer operations and reduce the risk of smaller, less profitable carriers skimping on maintenance expenses. They also hope that the larger groups will be more effective in warding off potential competition from foreign airline groups. However, sceptics warn that China might weaken its stronger companies by teaming them up with weaker ones.

(FT, 10.10.02 & WSJ, 14.10.02)

## Cathay Links up with DHL

Cathay Pacific, Hong Kong's *de facto* flag carrier, has decided to sell 30 percent of its freight subsidiary, Air Hong Kong, to DHL worldwide. The move is part of a larger venture envisaging an initial investment of \$300mn, followed by the purchase of five additional aircrafts by 2004. Analysts believe that the new venture is better equipped to put to proper account the progressively burgeoning growth in air cargo being shipped through Hong Kong. The deal, it is believed, is set to benefit both sides substantially. While DHL will gain access to the Hong Kong freight market, Cathay will expand its reach to other cargo destinations.

(FT, 10.10.02)

## Airline Deals Welcomed

The European Court of Justice has nullified the agreements between eight European countries and the US over trans-Atlantic airline routes. The Court has ruled that the EU has the right to negotiate the continent's airline treaties. This could effectively open the door to mergers and acquisitions in the airline industry, which has been among the most protected sectors of the continent.

The move, which is expected to usher in an era of low prices and greater choice for consumers, is, however, suspected by some to face several hurdles by way of individual national governments' reluctance to surrender control over their airports. Also, there are suspicions regarding the airline companies' ability to reduce prices, given that they are already running on wafer-thin margins and have limited room for cost-cutting. However, optimists are hopeful of greater deregulation and competition in the industry.

(WSJ, 06.11.02)

### Sigma Pursues Alliance

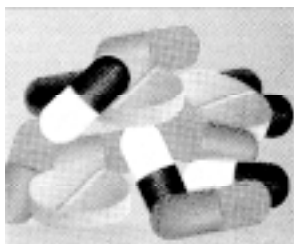
Sigma Ltd has ruled out another attempt at merging with Australian Pharmaceutical Industries Ltd in the current environment, but the Australian drug manufacturer and distributor intends to push ahead with an alliance or joint venture with its one-time partner in an effort to cut costs.

The Australian Competition and Consumer Commission said a merger would give the new entity about 60 percent of the pharmaceutical wholesaling market across Australia's more heavily populated eastern states and a market of more than 50 percent in other states.

A merger would have also cut the number of full-line wholesalers to two from three, reducing services to pharmacies and consumers. *(WSJ, 01.10.02)*

### New Law for Generic Drugs

Pharmaceutical companies in Germany are manipulating prices to skirt the intent of a new law designed to increase use of lower-priced generic drugs, according to the Chairman of the National Association of Statutory Health Insurance Physicians.



The comments came the day after a widely publicised annual drug report claimed that public health insurance drug-

spending could be cut by 20 percent – or about •4.2bn in 2001 – without a loss in quality of care, if doctors would prescribe more generic drugs and avoid certain expensive medicines with no clear therapeutic advantages.

The intent is not to sell so-called “show drugs”, but to stretch the bottom third of the price range higher, meaning that more expensive drugs in the class can be covered by public health insurance. *(Ip-health, 25.10.02)*

### Green Signal for Crestor

AstraZeneca PLC received the go-ahead from the Dutch regulators to sell its cholesterol-fighting drug, Crestor, in the Netherlands and the pharmaceutical company expects approvals from other European countries next year.

Analysts said this bodes well for Crestor's prospects in the US and Japan – the world's two biggest pharmaceutical markets – where regulators have yet to give a final verdict on the drug.

But, in a setback earlier in 2002, the US regulators said that they needed more data before approval for Crestor could be given. AstraZeneca would submit the data, but this will give Pfizer more time to cement its market share.

In a different move, three drug makers, Andrx Corp, Schwarz Pharma AG and Merck KGaA, have struck a deal to market a cheaper generic version of the heartburn drug, Prilosec, in the US, ending AstraZeneca's monopoly. *(WSJ, 08.11.02 & BL, 03.11.02)*

### EMA to Slash Spending

EMA, the European pharmaceuticals Regulator, plans to slash spending on new

drug approvals in the clearest sign yet that there is a productivity crisis in the pharmaceuticals industry.

The Regulator is cutting its annual budget by 7 percent to \$63.3mn this year, in response to a 50 percent drop in the number of new medicines being submitted for authorisation.

While the pharmaceutical industry spends \$30bn a year on research and development, three times more than a decade ago, the number of new medicines coming to the market has not risen.

The downturn is not restricted to Europe. In the US, Merck, Bristol Myers Squibb and Schering-Plough are all expected to report flat earnings because of pipeline problems. *(FT, 07.10.02)*

### AIDS Drugs Favoured

Thailand's state drug-making agency said it would begin production of the Aids drug, didanosine, one of the best-selling treatments for the disease.

The decision follows a recent court order that limited Bristol-Myers Squibb's patent on the drug to certain dosage levels and represents a significant expansion of the Government's capacity to produce its own versions of Aids treatments.

The tablets, which will be easier for patients to take and have fewer side effects, will be sold at prices around Bt20 (44 cents) for a 125mg tablet, less than half the price Bristol now charges for its tablets.

The agency will initially produce about 5000 tablets a day and will, then, scale up to produce greater quantities, all for domestic consumption. *(FT, 17.10.02)*

### Pfizer Wins Approval

Pfizer, the world's largest drug group, has won regulatory approval in the US for Relpax, its latest treatment for migraine. The approval, which has come after an almost four-year hold-up, adds to Pfizer's market-leading franchise in central nervous system therapies.

The progress of Relpax had been stalled after the US Food and Drug Administration ordered further clinical trials because of concerns about possible heart-related side effects. *(FT, 30.12.02)*

### Ceiling Prices

India's National Pharmaceutical Pricing Authority (NPPA) has announced major cuts in the prices of vitamin formulations. Multinationals like Pfizer, Glaxo Smithkline and Pharmacia are among the pharma majors set to be affected by the move. The regulatory authority has revised/ fixed the prices of a total of 70 formulation packs. Of these, 12 are those for which prices have been fixed for the first time. *(ET, 26.12.02)*

## Misleading Ads

Pharmaceutical companies have repeatedly circulated misleading advertisements about some of their prescription drugs, in some cases overstating their efficacy. From August 1997 to August 2002, the Food and Drug Administration issued 88 letters to companies about ads that violate agency rules, such as by exaggerating a drug's effectiveness.

Merck, in a tough battle with Pfizer and Pharmacia for a share of the arthritis-drug market, has begun to employ a controversial advertising strategy that allows it to effectively promote the benefits of its drug Vioxx without mentioning the drawbacks.

The Chairman of the Federal Trade Commission (FTC) is pressing cable channels, newspapers and magazines to reject false and misleading diet and health advertising – and making veiled threats of legal action, if they don't. The Agency was promoted to take action after it conducted a study of 300 weight-loss ads and found that 40 percent of them made obvious false claims.

In the latest enforcement case against an advertiser, the makers of a pain-relief product, Blue Stuff Inc., agreed to pay \$3mn to settle deceptive advertising charges.



*(BL, 05.02.01 & WSJ, 21.11.02)*

## Spanish Deal Approved

The Spanish Government approved the controversial merger deal between the loss-making Via Digital arm of Telefonica and the Canal Satelite Digital business owned by the Spanish Media Company, Sogecable. The merger would create a "new" Sogecable with more than 80 percent of the pay-TV market, 2.8 million subscribers and annual sales of •1.31bn.

To address competition concerns, competition authorities in Spain have attached ten conditions to the merger deal that would subject the Sogecable to regulatory scrutiny in almost all of its dealings. The conditions include a freeze on subscription fees for four years and a ban on Telefonica marketing exclusive movies and football matches on other platforms such as mobile telephones and broadband networks. However, competition experts say that the conditions are, in several ways, more lenient than those proposed previously by the competition authority. (FT, 02.12.02)

## Probe on News Corp

The European Commission has launched an in-depth investigation into the •893mn News Corp-Vivendi deal for the sale of Telepiu, the Italian pay-TV operator owned by Vivendi, to Stream, jointly-owned by News Corp and Telecom Italia. The Commission believes that the takeover could "create a near monopoly" in the Italian pay-TV market. The move has come despite the offer of comprehensive concessions to the Brussels regulators by News Corp and Telecom Italia, e.g. the promise to sell two terrestrial TV frequencies, while also offering undertakings on film and sports rights.

The Commission has deemed the configurations of the contract too complex to arrive at an early decision regarding whether the concessions would be sufficient to address all competition concerns. However, competition experts believe it unlikely that the Brussels authorities will block the deal in any event. (FT, 30.11.02)

## FCC Gives Clearance

The US Federal Communications Commission (FCC) has approved Comcast Corp's, the number three US cable company, \$30.5bn acquisition of AT&T Broadband, the number one US cable company. The decision is likely to have a profound impact on the US communications industry, by creating a powerful new player, to be called AT&T Comcast, which would provide pay-TV and broadband Internet services to 27 million customers.

The deal had earlier faced loud protests from consumer groups who argued that the combine would lead to higher prices and market concentration, 40 percent of the cable and 30 percent of pay-TV market.

However, according to FCC, the benefits of the deal outweighed the costs. It found nothing in the deal that would jack up the prices and, as cable companies operated as local monopolies, the deal would not hurt competition either. Moreover, the companies have argued that the deal would allow them to reap economies of scale, upgrade their systems faster and speed up the rollout of digital television signals, high-speed Internet access and competing telephone service. (ET, 14.11.02 & FT, 14.11.02)

## Profits Boost Merger Chances

Sweden's loss-making Telia, Nordic region's largest telecommunications operator, boosted the chance of its merger with Finland's Sonera, another monopoly, by taking further steps to restructure its business. The largest telecommunications operator has a target of producing stronger-than-expected underlying third-quarter profits. Telia has taken a restructuring charge of \$333mn on its fixed-line operations in Denmark and announced a restructuring programme for its loss-making international operations as well.

Both the Finnish and Swedish Governments have supported the deal between the two monopolies. Under the Finnish rules, Telia has to make a mandatory cash redemption offer for shares not tendered, based on the weighted average share price of Sonera over the past 12 months. The merger of the two monopolies, to be known as TeliaSonera, has not raised

any particular competition and consumer welfare concerns, as shown by the ready willingness of the two Governments to approve it. (FT, 28.10.02)

## Fined for Monopoly Abuse

SWISSCOM AG has been fined \$1.4bn for mailing advertisements with monthly bills for the basic service, which all customers must pay, regardless of the long distance provider they use.

This was the second attempt to win back customers from rival phone groups, after agreeing with the Competition Commission to stop this practice in May. The Company's major rivals are Sunrise, owned by Denmark's TDC A/S. The Swiss Government owns majority stake in Swisscom. (BL 14.11.02)

## Inquiry Discontinued

The Competition Bureau of Canada has discontinued the investigation into Motion Picture Distribution and Exhibition Industry after an extensive enquiry. The investigation, that took place from April to October 2000, was terminated after the Bureau found insufficient evidence of violation of the Competition Act by Motion Pictures.

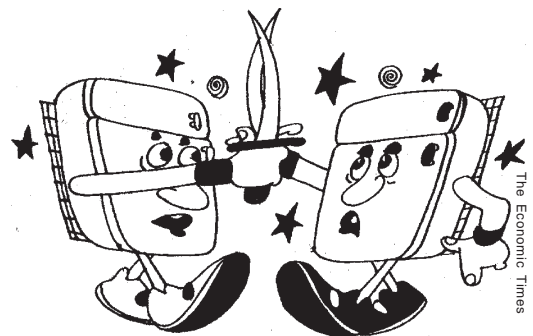
The complainants had alleged that the major motion picture distributors, Famous Players Inc. and Cineplex Odeon Corporation, influenced the supply of motion pictures to independent distributors by exercising the distributor-licensing preferences or licensing a motion picture to only one theatre in a local area. However, the Bureau did not identify any anti-competitive activity in its investigation. (Bureau News, 13.12.02)

## C&W Blamed

Telecom deregulation in the Eastern Caribbean has been delayed, owing to a row between Cable & Wireless (C&W) of the UK and Digicel of Ireland. The proposed deregulation is supposed to end C&W's century-old monopoly in the region with agreements to terminate prematurely its exclusive licenses.

The Irish Company has accused C&W of taking an anti-competitive stance, as reflected in the latter's repeated obstruction of the interconnection agreement between the two sides. Reportedly, C&W rejected the offer by Digicel for ordering equipment for interconnection and seeking reimbursement for the same. C&W's unwillingness to be competitive could be due to the fact that 70 percent of the Company's earnings come from the Caribbean.

Also, there is believed to be some disagreement between the two sides regarding the speed of the deregulation process. (FT, 22.11.02)



### Nod to Pay-TV

Australia's unprofitable Pay-Television industry was given a boost with the announcement of the merger between rivals, Foxtel and SingTel Optus. The merger, which was considered anti-competitive earlier, came as a surprise ruling by the Australian Competition and Consumer Commission.

Foxtel's owners persuaded the anti-trust agency to reverse its earlier decision by committing A\$600mn for digitising the sector and proposing access for content providers, broader choice for consumers and access to Telstra's cable network and Foxtel's set-top boxes.

Till now, Foxtel dominates Australia's Pay-TV Scene and Singtel Optus is on the third spot in terms of the number of subscribers. Optus expects to be the winner in the content-sharing deal, as the arrangement removes its A\$600mn of liabilities mainly linked to the Hollywood Studio payments and its obligation shifting to Foxtel.

(WSJ, 14.11.02)

### The Cost of Regulation

The regulatory commissions that once worked to protect AT&T's monopoly in long distance and telephone terminal equipment now advocate competition, but they continue to impose regulations with substantial costs to business and consumers in the process.

Economists say that telecom regulation has reduced the efficiency of the regulated firms, restrained entry of new firms and slowed the deployment of new technologies. Firstly, federal and state regulators created a distorted rate structure to promote "universal service" that economists

estimated cost the economy approximately \$10bn per year in the 1980s and remains in place today, although in a less extreme form.

Additionally, the Federal Competition Commission (FCC) has often been slow to approve the use of new technologies; for instance, the agency delayed the introduction of cellular telephony until 1983, at a cost to consumers estimated at as much as \$50bn in one year. One estimate suggests that the FCC's refusal, until 1990, to allow the Bell companies to offer voice-messaging services cost a total of \$5bn per year.

In short, the costs of telecom regulation have been very high. It is even more difficult to argue that the benefits – if they exist at all – offset the obvious costs of regulation. By the late 1980s, the Federal Communications Commission (FCC) itself recognised the deleterious effects it was having on productive efficiency and began to shift from cost-based regulation to price caps.

(Robert W. Crandall, Regulation, October 2002)

### Deceitful Advertising

The Korea Fair Trade Commission (KFTC) has issued cease and desist orders and administrative fines of 2,096mn Won \$173.3392mn to three mobile telephone companies in South Korea, namely SK Telecom, KT Freetel and LG Telecom, for deceitful advertising.

The three companies have been accused of having advertised that those who took membership for their mobile cards would get discounts of 150-300 thousand Won on the mobile phone price.

The truth is that these discounts were to be financed by credit card companies

for consumers at a 7-9 percent annual rate of interest. Mobile card is a credit card issued by credit card companies in alliance with mobile telephone companies in which points accumulated in the process of using the card can be used to pay back the loan for purchasing mobile phones.

(KFTC News, Nov 02)

### Stable Environment Urged

After eight years of private sector entry into telecom, India still lacks a world-class interconnection regime. The cellular sector is carrying huge losses. Some of the high-profile foreign investors, Singapore Telecommunications Ltd, Hutchison Telecommunications and First Pacific Company Ltd, have shot off an SOS to the Prime Minister seeking his intervention to ensure a stable policy environment. Pleading with him to prevent the overlap between regulatory, policy and legislative functions in Telecom, they have also noted that corrective measures need to be taken to ensure the investment flow to the sector.

(BL, 19.11.02)

### Coalition for Action

A coalition for action to end the global crisis in the international telecom industry has been launched simultaneously in London, Washington and Mexico City, with the aim of mobilising telecom unions and engaging with employers and governments to share a new vision for the telecom industry, one that is not based on unfair regulation, corporate greed or corruption and produces quality service and quality jobs.

The key to the action plan is a greater involvement of governments in telecom policy and greater commitment to encourage investment.

The coalition has been launched against the background of what Larry Cohen of the Communication Workers of America called an "investment strike" by public carriers, forced by regulators to provide wholesale access to competitors at prices that inhibit profits and cash flow.

### Guide on Dispute Resolution

The Australian Competition and Consumer Commission (ACCC) has issued its guide on the resolution of telecommunications access resolution disputes. Primarily, the guide describes the ACCC's powers and its approach to exercising these powers in relation to resolving telecom disputes.

In the ACCC Chairman's view, the guide incorporates incremental changes to the ACCC's process, consolidating the lessons learned by the ACCC in conducting telecom arbitrations since 1997, legislative changes to the access regime and the findings of an independent review of the ACCC's processes for handling telecom access disputes.

(ACCC Media Release, Jan 03)

## Merger Agreed

Granada and Carlton Communications, rival commercial broadcasters, have agreed to a long-pending agreement for merging their operations in the UK, to create an independent television company. The two Companies expect potential cost-saving of £35mn per annum, by merging the infrastructure and administration in broadcasting, content and central services.

If the clearance for the merger is received before the UK Communications Act comes into force in 2003, the companies will merge in two stages, to comply with the current broadcasting legislation. There are concerns over the dominance of the two companies with their share of 55 percent in the TV advertising market. The advertisers have opposed the move for a single sales house for the enlarged company. It is understood that both the Companies will separate their advertising and sales operations to minimise the competition concerns.

(FT, 17.10.02 & WSJ, 17.10.02)



Business Week

## EdF to Repay • 900mn

The European Commission (EC) has asked Electricité de France (EdF) to repay •900mn of state aid to the Government of France. Also, the Commission authorities urged Paris to abandon its financial guarantees to EdF. The EC Competition Commissioner, Mario Monti, has termed the French state aid distortionary and observed that it would give the French power group an unfair advantage over its rivals.

However, the French Government has reacted strongly to the Commission's move and contended that the issues examined by the Commission do not constitute state aid. It is noteworthy that the decision caused a split within the Commission, with two commissioners of French nationality refusing to approve it. Now, if the French Government refuses to comply with the Commission's directions, the latter will open a formal probe in the matter.

(FT, 15.10.02 & 17.10.02)

## Energy Collusion

The US Federal Energy Regulatory Commission has reported that two power majors, Williams Cos. and AES Corp, colluded to drive up the power prices during the 13-month Californian electricity crisis. The Report, which came after the Wall Street Journal filed a public-records lawsuit, contains excerpts from a series of damaging telephone conversations between Williams and AES officials, recorded by Williams as part of routine company policy.

The said conversation occurred in April and May of 2000, only a couple of weeks before the electricity prices soared chaotically. Specifically, the officials in the telephone conversations discussed prolonging a maintenance outage in one of the AES plants purposely. The shutdown enabled Williams, having exclusive marketing rights for AES' power in the region, to collect \$750 per megawatt hour for electricity it supplied to the grid operators from alternative sources. (WSJ, 18.11.02)

## Deal Boosts Liberalisation

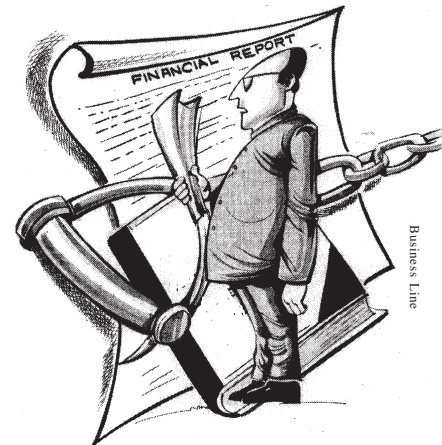
The European ministers have agreed to a deadline of July 1, 2007 for ushering in full competition in electricity and gas, with strong legal safeguards to stop cross subsidies. The deal had earlier been bedevilled by stiff opposition from France and Germany, who were particularly against a key proposal to give separate legal status to those parts of electricity and gas companies that are natural monopolies.

Eventually, however, the representatives of the two countries succumbed to the persuasive reasoning of

## FERC Rule to Ensure Transparency

The US Federal Energy Regulatory Commission has made it incumbent on utilities, natural gas companies and oil pipelines to file an annual report of their financial exposure to derivatives, sophisticated financial instruments often used by firms for hedging. It is noteworthy that many US utilities use derivatives to hedge against variable interest rates and other borrowing costs. On the face of it, this is aimed at ensuring greater transparency in financial management of utilities, especially after the collapse of Enron Corp, the former largest US energy trader.

The new reporting requirement does not limit or regulate derivatives transactions, which were used extensively by Enron before it went insolvent amid allegations of hiding debt and inflating profits. It only seeks to provide the public with a truer picture of the extent of risk exposure of the firms in the three categories. (FT, 10.10.02)



other ministers, who pointed out that such "legal unbundling" would force larger groups like Electricité de France and Eon to restructure internally. The policy change is proposed to be brought about in a progressively phased manner by July 2007. (FT, 19.10.02 & 26.10.02)

## Eon Forays into UK

The German utility, Eon, has stepped up its merger and acquisition activities outside Germany, after suffering legal setbacks in its ambition to acquire Ruhrgas, Europe's largest gas importer. First, it acquired Powergen of the UK for •62bn in June 2002 and, subsequently, it bought the retail and generation assets of TXU Europe in the UK. While Powergen provides Eon with a customer-e of three million, TXU will add another 5.3 million.

The latest deal represents a further consolidation of Britain's household energy supply market dominated by Centrica, which trades as British gas, Germany's RWE, Eon and Electricité de France. (FT 21.10.02 & 25.10.02)

## Blockage on Iberdrola Bid

The Spanish Government has blocked a •577mn bid by CVC Capital Partners, a UK private equity firm, for the electricity grid assets of Iberdrola, Spain's second-largest electricity company. The move has come in the wake of the concerns expressed by Spain's National Energy Commission with regard to the burden of responsibility in the event of a technical failure at the grid.

The CVC management has argued that there should be no ambiguity regarding the issue as the owner of the assets would accept full responsibility in front of the regulator. It added that ownerships of assets did not affect at all the unified management of the network within which CVC would own the assets and Iberdrola would be responsible for the operation and maintenance of the assets for 35 years.

However, there is considerable pressure in the Spanish Parliament to have the deal blocked on grounds of "efficiency" in favour of Red Electrica de Espana (REE), the partially state-owned electricity network operator which owns 60 percent of the high-tension network and was outbid by CVC for Iberdrola's assets. (FT, 25.10.02)

## Applause for Tariff Cuts

The Consumer Education Trust (CONSENT) of Uganda has lauded the recent modest reduction in power tariffs announced by the Uganda Electricity Distribution Company Limited (UEDCL), a company that enjoys monopoly power over distribution in the local electricity market.

However, CONSENT has also expressed concern over the imminent high cost of power, once the huge state subsidy released to the power major in the previous year is used up. It is envisaged that the high cost of power will have repercussions of a direct, through high-price of electricity, and indirect, through high prices of industrial goods which use power as a chief input, nature.

### HSBC's Expansion Plans

HSBC, the UK's largest bank, is buying Household International, a US consumer finance business for US\$13.6bn. The all-share deal – the biggest in HSBC's history – will add 53 million customers and will contribute to a quarter of earnings. Though the shares of Household soared up 60 percent, those of HSBC fell by 17.5 percent, reducing the value of the deal. The deal will take HSBC into sub-prime market dealing with lower-income customers.

In another plan, HSBC completed its acquisition of Grupo Financiero Bital, one of the largest retail banks in Mexico, after paying US\$1.13bn in cash. The Banking and Securities Commission of Mexico, the Finance Ministry and the Mexico City Stock Exchange approved the deal.

Keith Whitson group's chief executive said that the deal is crucial for HSBC, as it will cater to the huge market of 30 million Mexicans residing in the US.

He said that the Bank could combine Bital with Household International in US to offer financial services to the Mexicans staying in the US. (FT, 15.11.02 & FT, 26.11.02)

### Fine Slapped on US Banks

A group of Wall Street banks, in an agreement with the regulators, will pay a fine to the tune of US\$8.3mn to settle charges against not disclosing some emails that could have been used in investigations.

While the amount is small, compared with fines expected as part of this case, it is larger than the usual penalties that Wall Street firms have paid for record-keeping violations. It highlights the increased significance e-mail has achieved in regulatory investigations. Regulators have relied heavily on emails to pursue their investigations this year.

In another case, US District court fined The Broadway National Bank an amount of US\$4mn for not alerting the government to a two-year series of transactions in which more than US\$123mn in drug money was laundered through the Bank.

US law requires that banks notify the Federal Government of any cash transactions that exceed US\$10,000. US prosecutors said the Bank's actions facilitated several large money-laundering schemes involving drug proceeds.

Overall, so much cash was flowing into the Bank that, unlike other banks, it never sought cash from the Federal Reserve Bank of New York, instead delivering millions to the Federal Reserve. (FT, 28.11.02 & BS, 02.11.02)

### Single Watchdog Urged

An association of European financial companies called on the European Union's (EU) constitutional convention to consider a future system of regulation in its planned overhaul of the EU treaties.

According to a survey of leading financial companies, Eurofi financial pressure group said that the constitutional treaty, which the convention is due to make by next June, should commit the EU to achieving an integrated financial market not later than December 31, 2005.

Jacques de Larosiere, joint Eurofi president and honorary governor of the Banque de France told a conference that European financial market regulation should be developed pragmatically and in an evolutionary manner from the present Lamfalussy method for securities regulation, which is based on two powerful EU committees.

But if EU cross-border financial transactions grow in importance, the EU might need a system for regulation. For this, a decentralised structure, akin to the European system of the central banks, should be sought.

Several other financiers were more cautious and felt that the idea of single EU regulator was overambitious and positively frightening. (FT, 27.11.02)

## Probing Uncanny Ties

The Italian investment bank, Mediobanca, is supposed to have an unusually strong influence over two of Italy's largest insurance companies, Assicurazioni Generali and SIA, according to an investigation by the anti-trust authority of the country. This is being interpreted as a process to complete a hostile take-over of rival Fondiaria by SIA.

According to the investigations, Generali's ex-Chairman, along with Mediobanca, lobbied the state insurance regulator in favour of the SAI-Fondiaria merger. It also emerged that, earlier, Generali was itself interested in taking over Fondiaria, but ruled out the option due to potential problems with the anti-trust authority and Consob, the stock market regulator.

SAI acquired 29 percent of Fondiaria from Montedison in July, controlled, at that time, by Mediobanca. Consob then ruled that Mediobanca, which already owned part of Fondiaria, was acting in concert with SAI and demanded a full take-over offer that SAI could not afford.

SAI sold 22 percent of Fondiaria through a series of options, giving SAI the right to get back the shares, once Fondiaria capitulated to its offer. (FT, 22.10.02)



### Regulator Criticises Bank

Japan's bank regulator said that banks should seriously look into their balance sheets if they do not want to invite trouble from the regulator. The regulator has no option but to get tough on non-performing assets and a stricter asset evaluation was the starting point.

According to the investigation conducted by the Financial Services Agency (FSA), at five of the 15 biggest banks, there were discrepancies of more than 50 percent.

The debt-laden banks were given four months to convince the regulator that they were genuinely addressing their financial weakness – or face nationalisation.

The reform measures, which have come in the face of a waning economic recovery, include the use of discounted cash flow, inspection of loan book, external auditors and guidelines for conversion of shares, to tackle the banks at their weakest point. Accurate estimates of conservative assessments of bad loans and structure of capital bases could hasten the injection of public money into the banking system.

The watchdog will also reduce the time offered to a bank to improve its financial strength from three years to one year.

(WSJ, 25.11.02 & FT, 30.11.02)

## Fight to Survive

The number of independent Swiss private banks is expected to decline, as smaller banks struggle to cut costs in the face of declining asset management fees and as brokerage commissions hit all-time lows, despite the fact that Swiss banks still command the maximum share of offshore private banking.

According to Moody's, many Swiss banks are cutting large numbers of jobs to maintain short-term profits. But, over the longer term, the combination of higher production expenses, increased regulation and the high cost of moving into onshore private banking would lead to a major decline in the number of private banks.

The uncertainty over the timing and magnitude of the stock market recovery and the marginal penetration of onshore private banking by the smaller banks will also add to the decline in the number of independent players.

Moody's has said that the smaller banks might look out for avenues of mergers and acquisitions domestically as well as at an international level. *(FT, 29.11.02)*

## More Powers for the Regulator

The Law Commission of India is set to suggest sweeping changes in insurance laws. The changes would include giving more punitive powers to the Insurance Regulatory Development Authority (IRDA), greater corporate disclosures for insurance companies and repeal of some previous legislation. This could initiate the process of arming IRDA with more powers to clamp down on errant insurance companies.

This follows close on the heels of a similar process of empowerment for the Securities and Exchange Board of India (SEBI), the capital markets regulator. It is believed that consumers will also stand to gain as the Law Commission's call for greater disclosure would focus on the investment front forcing companies to exercise greater care in handling policyholders' funds. *(BL, 08.12.02)*

## Regulation Task Force

The Executive Committee task force to streamline and simplify insurance regulation established by the National Conference of State Legislatures (NCSL) in the US has submitted its report to the NCSL executive committee. The task force had been engaged in broad policy issues and carried out its work on two main issues: (1) speed-to-market-issues; and (2) market regulation reform. Whereas the first (speed to market) was to concentrate on allowing insurance companies to market products nationally

within a reasonable time period, the latter represents a key component of market-based systems – as states shift regulatory emphasis from product approval process to greater oversight of how companies conduct themselves in the marketplace. The task force continues to explore possible legislative action to help regulators monitor market competition and company practices.

## New Regulatory Bodies

New pan-European bodies are slated to set future regulations for banks and insurers in the European Union. The shake-up in financial regulation, which aims to harmonise widely divergent national rules is part of Europe's response to the scandals that have rocked US financial markets.

EU authorities are concerned that the current regime based on 30 national regulators is too fragmented to be able to cope with a crisis affecting several countries. Also, financial companies have complained that having to comply with disparate national regulations is costly and reduces the advantages of a common European market.

Although the new regulatory bodies will be pan European in nature, the national governments involved will retain some control over regulation through a new committee charged with giving advice to the new regulators. *(FT, 07.10.02)*

## Authorisation Denied

Ten member banks of the Australian Bankers Association are slated to be denied authorisation to a proposed arrangement

to collectively agree to offer a basic bank account with the minimum agreed features by the Australian Competition and Consumer Commission (ACCC). The ACCC has said that the proposal does not expand consumer choice.

The Commission Chairman, Allan Fels, thinks that the majority of basic banking products already provide a high number of fee-free transactions and satisfy several of the other features proposed under the bank account initiative of the ten banks. Moreover, the Commission has expressed concern that the initiative could dampen competition among the major banks and result in the proposed minimum features becoming an industry standard. *(ACCC Media Release, Jan 03)*

## Acquisition Approved

The Australian Competition and Consumer Commission (ACCC) has decided not to oppose the proposed acquisition of Aviva plc's CGU Insurance by the Insurance Australia Group (IAG). It is worthy of note that IAG and CGU are respectively the largest and fifth largest general insurance companies in Australia.

The ACCC has conducted extensive market enquiries into the proposed acquisition and consulted competitors and other interested parties in the process.

After the acquisition, IAG will have about a quarter of the national market for general insurance in Australia and the largest four general insurers will have about two-thirds of the domestic market for general insurance. *(ACCC Media Release, Dec 02)*

## Water Down Move

France and Italy managed to dilute the European Union (EU) proposal intended to ease stock-trading. The move could spare their stock exchanges from competition but could set back plans to integrate EU financial markets.

According to the proposal, all EU investors were to be allowed to trade shares through banks and other institutions, without the use of stock exchange, as is the case with Germany, Britain and the Netherlands. Italy and France persuaded the European Commission to adopt a measure that would force securities issuers to continue using local brokers, underwriters and stock exchanges.

Investment bankers say that pre-trade disclosure would kill off competition before it starts, as it would entail a lot of time and red tape. If the disclosure measure is adopted as part of the larger reform, it would slow down Europe's plan to integrate 25 national financial systems into a single market.

Critics say that the two countries are resisting change because their stock exchanges cannot compete, if consumers are offered more choices. *(WSJ, 20.11.02)*



## Blocking Unfair Means

The Chairman of Infosys Technologies Ltd and Chief Mentor, N.R. Narayana Murthy, has advocated stringent punishment for erring chief executive officers (CEOs), chief financial officers (CFOs) and the internal management of companies, in order to deter them from using unfair means and defrauding the minority shareholders.

Such proactive action specially becomes relevant with the corporate world in recent times being witness to a number of frauds and the increasing scepticism about corporate behaviour. Stressing the role of independent directors in ensuring that the long-term interests of the shareholder are protected, Murthy said the Board of independent Directors needs to be revitalised.

The Department of Company Affairs is also considering stricter punishment norms for auditor misconduct, which include imprisonment of up to ten years.

(BS, 18.10.02 & FE, 29.11.02)

## SEC Investigation

Gateway Inc. disclosed that the US Securities and Exchange Commission (SEC) has been investigating its fiscal 2000 financial statements for nearly two years. Analysts criticised the Company, which has been reporting losses for the last two years, for failing to acknowledge the SEC investigation earlier.

Gateway said it settled three shareholder suits alleging that the Company misrepresented its financial performance during 2000. Shareholders received \$10.25mn under a settlement in which Gateway admitted no wrongdoing. It also said that the costs were covered by its insurance.

Regulators from the New York State Attorney General's office, SEC and others are also discussing fines against Wall Street that could total more than \$1bn, as they head into the final stages of an investigation into whether securities firms misled small investors with faulty research during the stock market boom of the 1990s. Under discussion are fines that could be more than \$500mn from Citigroup Inc. and about \$200mn from Credit Suisse First Boston securities unit. (WSJ, 18.11.02 & 25.11.02)

## Tokyo Urged to Improve

Japan's banks will never recover their health unless they undergo a drastic improvement in corporate governance similar to that imposed on South Korean financial institutions after the 1997 financial crisis, according to a rating agency's report.

Standard and Poor's study, timed to appear shortly before Japan announced plans to accelerate the disposal of non-performing loans, urged the Japanese Government to take a more radical approach than the last time it injected capital into banks in 1999.

Ratings agencies are eagerly awaiting a plan by Heizo Takenaka, named chief bank regulator last month, to clean up the financial system, which is drowning under at least ¥43,000bn (\$346bn) of bad loans, about eight percent of the gross domestic product. He is expected to announce measures to force institutions to classify loans more stringently and could order the injection of state cash into banks found to be undercapitalised. (FT, 16.10.02)

## Still to Catch the Bus

US companies still have a long way to go before they meet corporate governance requirements proposed by the New York

Stock Exchange (NYSE), according to a new study of the Investor Responsibility Research Centre (IRRC).

Only 51 percent of the companies have committees that deal with corporate governance matters, according to the survey of the 1,500 largest NYSE-listed companies.

The Study's findings also raise the issue of how companies, particularly below the top-tier of blue-chip groups, will find directors. The rising threat of litigation against boards has deterred some candidates and companies report difficulties in persuading directors to sit on audit committees. The IRRC identified a number of companies that had begun to pay "extraordinary compensation" to audit committee members. (FT, 20.11.02)

## Laws Fail to Halt Corruption

Financial corruption remains a serious problem in international business, despite the widespread introduction of laws against bribery, according to a report by an influential international business risk consultancy.

A survey by the London-based Control Risks Group (CRG) of companies in the US, UK, Germany, the Netherlands, Hong Kong and Singapore found that 40 percent believed they had lost business in the last five years because a competitor had paid a bribe.

CRG paints a gloomy picture of the future. While there is tighter legislation and much greater public awareness of the problem of corruption, it suggests that companies are in danger of concentrating on short-term solutions and other priorities at a time of perceived economic downturn.

## Reforms Envisaged

The world's auditors were urged to remedy the crisis of confidence in the accountancy profession by acting as guardians of "truth in markets". Paul Volcker, Former Chairman of the US Federal Reserve, said auditors must act in the public interest to maintain reliable and consistent financial reporting.

Recent failures in accounting and corporate governance underlined the need for high quality and enforceable financial reporting rules. Volcker argued that international accounting standards could meet the need and hailed the new efforts to achieve convergence with US financial reporting rules.

Rene Ricol, the new President of the International Federation of Accountants, set out a reform agenda to bolster the profession's public standing, after the US business scandals undermined confidence in audited company accounts.

(FT, 20.11.02 & 22.11.02)

## Measures for Corporate Governance

European companies will be obliged to report results every three months, in an attempt to increase investor protection and prevent an Enron-style scandal, if proposals by the European Commission are adopted.

The new rules, known as the transparency directive, would force EU companies to make radical changes in the way they deal with investors in some of Europe's largest markets, including the UK, Germany and France.

According to Prof. Nara Srinivasan, the Head of Murdoch University, Australia, a strong regulatory system, backed by a strong legal system, is necessary to ensure transparency of corporate operations. Discussing the role of financial institutions in promoting culturally appropriate framework of corporate governance, Srinivasan pointed out that 'quantitative regulations and qualitative regulations' must co-exist.

(FT, 18.11.02 & BL, 01.12.02)



## AOL in Trouble

AOL Time Warner Inc.'s accounting woes deepened, as the company was slapped with a shareholder suit alleging the media titan was complicit in fraud perpetrated with Homestore Inc. The California State Teachers' Retirement System, the third-largest public pension fund in the US, filed the amended lawsuit in the US District Court in Los Angeles. The suit also names as defendants Cendant Corp. and 14 small companies.

According to the complaint, former America Online executive, Eric Keller, helped set up an arrangement that boosted Homestore's revenues by \$15mn during the first-quarter of 2001. These complex deals allegedly involved Homestore buying products from a third company and that company, in turn, spending almost all the money it received from Homestore to buy ads on America Online. America Online, then, shared the advertising revenue with Homestore.

AOL tried to distance itself from these accounting problems by terminating Keller and his supervisor Colburn and restating about \$190mn in online advertising revenue over the past two years. (WSJ, 19.11.02)

## Curbing Global Fraud

Under orders from Congress, following the recent financial scandals that have rocked US markets, federal securities regulators are proposing rules to beef up company disclosures in financial reports. The Securities and Exchange Commission was to outline new disclosure requirements regarding earnings and off balance sheet transactions.

Timothy Muris, Chairman, US Federal Trade Commission (FTC), called for closer global co-operation in the fight against cross-border consumer fraud. He pointed out that fraudulent cross-border schemes, marketed via the internet and telephone, made it more difficult for national authorities to protect consumers on their own.

Mario Monti, the European Competition Commissioner, welcomed the deepening US and European Union (EU) anti-trust co-operation, but he also called for new efforts to allow the US and EU authorities to share sensitive corporate data in big cartel cases.

(WSJ, 31.10.02 & FT, 01.11.02)

## Good Governance Pays

The stocks of US companies with high standards of corporate governance outperformed their peers over the past five years, according to a new governance-rating agency. GovernanceMetrics International (GMI) launched its new governance

information service for institutions by publishing the names of five companies that scored a perfect ten on governance.

Gavin Anderson, the Chief Executive of GMI, said the five recorded an average return of 27 percent over the past five years. GMI named the five as Johnson Controls, the automotive group; MBIA, the municipal bond insurer; Pfizer, the pharmaceuticals company; Sallie Mae, the student loans group; and Sunoco, the oil and petrochemical company. GMI is only the latest in a shoal of companies offering to rate companies. (FT, 04.12.02)

## Meralco Faces Scrutiny

The Philippine Stock Exchange is investigating possible insider trading in shares of Manila Electric Co, Meralco, after the stock fell amid a Supreme Court ruling that the Company must refund excess charges to customers.

The investigation will cover the period from Oct. 4 to Nov. 17, where three factors will be examined: the price, volume and value of Meralco shares in the market, said the Stock Exchange's President, Ernest Leung.

The Supreme Court released its ruling that Meralco should reimburse its 3.1 million customers for overcharges dating back to 1994. While the Court did not specify how much the reimbursement would cost, Meralco estimated that the amount could total 28bn peso (\$524.5mn).

(WSJ, 25.11.02)

## Stock Options – An Expense

The IASB (International Accounting Standards Board) published its controversial proposal to force many companies to treat stock options as an expense, a move that is likely to curb their

popularity as a form of compensation. The change would take effect in 2004.

In Asia, the rules would have a particular impact in Hong Kong, the Philippines and Singapore, which are moving their accounting practices into line with international rules. They would also affect Australia, which has said it will adopt IAS by 2005.

In Europe, the EU has retained the right to endorse individual rules, as part of a decision to require almost all publicly-traded companies to adopt IAS by 2005. In the UK, the Association of British Insurers, which represents major institutional investors and backs the rules in principle, said it might have to reconsider its position, if the US did not go along. (WSJ, 08.11.02)

## New Wave of Reforms

The Social Investment Forum has outlined the "Next Wave of Corporate Governance Reforms" with a view to preventing future corporate governance abuses such as those exemplified by Enron and World Corp. In all, there are eight recommendations in the improved corporate governance category, one of which calls for creating corporate governance committees to oversee corporate ethics, corporate governance and corporate social responsibility (CSR).

The statement advocates the replacement of a business model that benefits a mere handful of shareholders to one that prioritises all stakeholders. In order to facilitate such a transformation, the document promotes several categories of reforms. These categories include proxy voting disclosure, executive compensation, pension protections, audit reforms, improved corporate governance, and social and environmental disclosure.

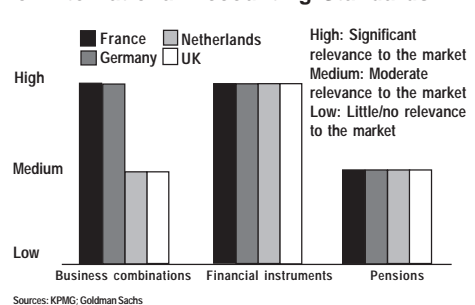
## Educating Investors

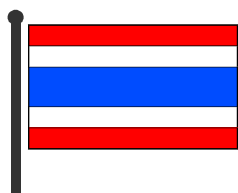
Companies must educate the investors about the dramatic impact that international accounting standards will have on their reported profits and liabilities. The financial statements of 7,000 listed companies in the EU could alter significantly when they start to use international accounting standards from 2005, the survey by KPMG and Goldman Sachs found.

KPMG, the accounting firm, and Goldman Sachs, the investment bank, highlighted the impact on analysts' evaluations of business performance; how most derivatives in the European banking sector are currently not included on balance sheets, and; the potentially huge impact of the International Accounting Standards Board's (IASB) proposals on pensions accounting.

The IASB's planned standard on business combinations should encourage more cross-border company acquisitions. (FT, 19.11.02)

Market Impact on European Companies of International Accounting Standards





## The Competition Law in Thailand

The Constitution of the Kingdom of Thailand has a provision for guiding the economic policy of the country which states that the Government must encourage an economic system under the free market mechanism. Hence, the Government has the responsibility of creating a competitive environment in the country.

Indeed, the Thai Government has been following policies that provide free and fair competition, consumer protection and protection against abusive monopoly practices. Over the past few years, business competition was being regulated by the Price Fixing and Anti-Monopoly Act (PFA), adopted in 1979, that was aimed at protecting the consumers and stimulating competition climate.

However, due to the rapid economic expansion under free market, especially in the last decade, many big firms had built up market power and it was hard for small and medium enterprises (SMEs) and new entrepreneurs to compete in the market. Consequently, it was felt that the PFA was inadequate in the current economic system. Therefore, the Government set out the new competitive conduct rules, the Trade Competition Act (TCA) of 1999, which replaced the PFA in April 1999. The Act is administered by the Trade Competition Commission (TCC).

The TCA is primarily aimed at stimulating competition in the markets to promote economic efficiency and maximise economic welfare. Eventually, consumers benefit through more efficient pricing and increased choice in the products and services offered. The Act presents a framework for promoting free and fair trade and preventing unfair trade practices, in a competitive environment. The salient features of the Act are described below:

### The Scope of the Act

The Act applies to all business operators and business activities in Thailand, with the exception of government agencies, state enterprises, co-operatives or groups related to agriculture or farmers and certain business operators prescribed by the Ministerial Regulation.

### Abuse of Dominance

The issue of abuse of dominance practices has been dealt with in Section 25 of the Act. These practices have been termed as anti-monopoly behaviours. As per the provisions of the Act, a business operator having market domination shall not conduct in any of the following manner:

1. unreasonably fixing or maintaining purchase or selling prices of goods or services;
2. unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators, who are its customers, to restrict services, production, purchase or distribution of goods or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;
3. suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand; and
4. intervening in the operation of other

business operators without justifiable reason.

According to the definition of market domination, the criteria to determine market domination is based on market share and yearly sales volume in the market of certain goods or services. However, the specific criteria to determine market domination is under the process of finalisation and would require prior approval of the Cabinet and notification in the Government Gazette.

### Merger Control

Under Section 26 of the Act, a business operator shall not carry out business merger

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**The Act presents a framework for promoting free and fair trade and preventing unfair trade practices, in a competitive environment.**

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that may result in monopoly or unfair competition, unless the TCC's permission is obtained. The TCC will publish a set of guidelines on business merger specifying the minimum amount of market share, sales volume, capital, shares or assets in respect of which the merger of business is to be governed.

The major provisions concerning merger of business as contained in Section 26 of the Act include:

1. a merger made by a producer with another producer, by a distributor with another distributor, by a producer with

a distributor or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business; and

2. a purchase of the whole or part of the assets or shares of another business with a view to controlling business administration policies, administration and management.

If business operators meet or exceed the thresholds of merger, they may apply to the TCC to obtain permission to merge. However, the thresholds of merger are still under the process of the TCC's consideration before it is published in the Government Gazette.

### Anti-competitive Agreements

Anti-competitive agreements by firms are dealt with in Section 27 of the Act. A business operator shall not enter into an agreement with another business operator to engage in any act that amounts to monopoly, reduction or restriction of competition in the market of any particular goods or services in the following manner:

1. fixing the sales price of goods or services as single price, or as agreed, or restrict the sales volume of goods or services;
2. fixing the purchase price of goods or services as single price or as agreed or restrict the sale volume of goods or services;
3. entering into an agreement to have market domination or control;

4. fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or tender for the goods or services or in order to prevent one party from participating in a bid or tender for the goods or services ;
5. fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services therein or fixing customers to whom each business operator may sell goods or provide services, to the exclusion of other business operators from competition in the distribution of such goods or services;
6. fixing geographical area in which each business operator may purchase goods or services or fixing persons from whom business operators may purchase goods or services;
7. fixing the quantity of goods or services which each business operator may manufacture, purchase, distribute or provide services with a view to restricting the quantity to be that lower than market demand;
8. reducing the quality of goods or services to a level below that of previous production , distribution or provision, whether the distribution is made at the same or a higher price;
9. appointing or entrusting any person as a sole distributor or provider of the same category of goods or services; and
10. fixing conditions or procedures in connection with the purchase or distribution of goods or services in order to ensure uniform or agreed practice .

**A business operator shall not carry out any act which is against free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting the business operations of other business operators or preventing other persons from carrying out business or causing cessation of their business.**

In the case where there is a commercial necessity that the acts, as described above, be undertaken, the business operators may be granted exemption for a particular period of time. In this regard, the business operator(s) shall submit to the TCC an application for the requisite permission.

### Other Prohibited Conduct

Under Section 28 of the Act, a business operator who has business relations with business operators outside Thai region, whether on contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act because of which a person residing in Thai region, and intending to purchase goods or services for personal consumption, will have restricted opportunities to purchase goods or services directly from business operators outside Thai region.

Similarly, Section 29 provides that a business operator shall not carry out any act which is against free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting the business operations of other business operators or preventing other persons from carrying out business or causing cessation of their business.

### Penalties

The violation of Sections 25, 26, 27, 28 and 29 shall be punishable by imprisonment of up to 3 years and/or fine of up to six million Baht (\$140,000 approx). In case of repeated violation of the Act, the violator shall be liable to double the penalty.

## Enforcement of the Law

The Act is administered by the Trade Competition Commission. For operational purposes, the competition enforcement system in Thailand is composed of the Office of the Trade Competition Commission, the Trade Competition Commission, the Appellate Committee and Sub-committees such as the Specialised Sub-committee and the Inquiry Sub-committee.

### *The Office of the Trade Competition Commission*

The Office of the Trade Competition Commission (OTCC) is located in the DIT. The Director-General of the DIT is the Secretary-General of the OTCC who is responsible for the administration of the Act, in order to monitor competitive conducts in Thai region, including submitting the cases that may violate the Act to the TCC for consideration.

### *The Trade Competition Commission*

The TCC has duties to independently enforce the Act and consider the cases on case-by-case basis. The TCC consists of the Minister of Commerce as the Chairman, the Permanent-Secretary for Commerce as the Vice-Chairman, the Permanent-Secretary for Finance as a member, other 8-12 qualified persons appointed by the Council of Ministry as members and the Secretary-General as a member and the

Secretary. Nevertheless, the qualified persons selected as members are not related to political affairs and at least half of them are selected from the private sector. The person selected as the Commissioner shall hold office for a term of two years. The persons selected as members may be re-appointed after a term of two years, but may not serve exceeding two consecutive terms.

### *The Appellate Committee*

The Council of Minister appoints the Appellate Committee (AC) to reconsider the decision made by the TCC in order that the decision of the cases shall get the most fair consideration. The AC is consisted of not exceeding seven qualified persons who are not related to political and the TCC affairs. A member of the AC shall hold office for a term of four years. To start with, at the expiration of two years, three members of the AC shall vacate office by drawing lots and such vacation of office by drawing lots shall be deemed to be the vacation of office at the expiration of the term.

### *The Specialised Sub-committee*

The TCC may appoint one or more Specialised Sub-committees (SSC) to act as expert bodies for giving advice and suggestions. The SSC consists of 4-6 persons who have knowledge and experience in matters such as law, science, engineering, pharmacology, agriculture, economics, commerce, accounting and business administration.

### *The Inquiry Sub-committee*

The TCC may appoint one or more Inquiry Sub-committees (ISC) for investigating anti-competitive cases. The result of the investigation is submitted to the TCC for consideration. The ISC consists of one person who is appointed from among police officials or public prosecutors, with knowledge and experience in criminal cases, one representative of the DIT and others, not exceeding four persons, with knowledge and experience in economics, law, commerce, agriculture or accounting.

## Europe's Efforts to Destroy the Cartels

Does price-fixing pay in the European Union? Judging by the number of illegal agreements uncovered in the past few decades, many EU companies must believe that the financial benefits of cartels far outweigh the risks of being discovered and fined by anti-trust regulators.

Now, the European Commission wants to change that perception.

Radical reforms of Europe's anti-trust rules – agreed on November 26, 2002 by national governments – are aimed at convincing companies that price-fixing conspiracies and other serious breaches of competition law are simply not worth it. However, the new rules – the fruit of a three-year consultation process – have split the anti-trust community.

For the Commission, and most national regulators, they will be a more effective tool to crack down on cartels and prevent companies from unfairly attacking their rivals. Mario Monti, the European Competition Commissioner, who drafted the proposals in 1999, regards them as “the most important legislative initiative in the competition field” for more than a decade.

But, to opponents of the new rules, who come mostly from the corporate and legal worlds, the changes to a system they have been used to since 1962 would result in chaos for companies and headaches for their lawyers. Some even warn that the new regime will make cartels harder to detect and punish.

According to Julian Joshua, a former deputy head of the Commission's cartel unit, who now works for the law firm Howrey Simon Arnold & White, the Brussels authorities missed a golden opportunity.

“This was a chance to produce a streamlined competition enforcement system for Europe in the 21st century.

Instead, the exercise has been all about reshuffling power,” he says.

Even the Commission would agree that the guiding principle of the reforms, known simply as “the modernisation”, is the change in responsibilities and powers of European and national competition regulators.

At present, the Commission is the only body with the power to take action against the two main anti-trust offences that affect the European economy: cartels and abuses of dominant position, when a company uses its large market share to harm rivals.

Under the new system, set to come into effect in 2004, the Commission will lose its monopoly on EU anti-trust law enforcement and will share its powers with national watchdogs.

In two years' time, price-fixers will have to fear not just sleuths from Brussels but also their colleagues from Berlin, Rome and, with the EU's enlargement to 10 eastern European countries, Warsaw and Riga. This decentralisation of the fight against cartels and other abuses is likely to change radically the way companies, lawyers and regulators deal with anti-trust rules.

For companies, the main effect of modernisation will be that they will be fined every time they are caught infringing EU law.

Under the current system, companies that notify their agreements to the Commission escape fines, even if guilty. Notifications are, of course, never used for cartels, but are very

common for less controversial agreements such as joint ventures, infrastructure-sharing deals and exclusive contracts between a company and its suppliers.

Companies and lawyers like the system because it gives them legal certainty. If the Commission clears their deal, they have a bomb-proof guarantee against being prosecuted. And if it does not, at least they will not be fined.

This comfort zone will disappear under the new rules. As Mr Monti said last week, after 40 years of application of anti-trust law, companies and their advisers should know which practices are permitted and which ones are not. And, if they do not know, they will learn by being fined.

“The objective is clear: we have to use the experience acquired to reduce bureaucracy to the minimum and to enforce competition policy better,” he said. For the Commission itself, the end of the notification system will be a huge relief. Snowed under by hundreds of notifications every year, many competition officials feel they waste their time processing non-contentious requests.

Mr Monti believes that, once this system has been put an end to, his anti-trust officials, of whom

there are more than 200, will be able to focus on what he calls the “cancers” of the economy – the hard-core cartels and abuses that harm consumers and destroy competition.

For the same reason, Brussels wants to devolve some of its powers to national regulators. Under the new regime, European and national regulators will form a “European Competition Network” to allocate cases and ensure uniform application of the law.

As a rule of thumb, the Commission will look at cases that affect three or more national markets, while the member states will take on the rest.

But, critics argue the new regime will fragment anti-trust enforcement, increasing costs and risks for companies.

### Clear Rules in a Competition System

The assertion in the article “Europe's Efforts to Destroy Cartels” (November 27), that the new European anti-trust regulation adopted unanimously by European Union Ministers on November 26 will make life more complicated and costly for companies, is totally devoid of truth.

Collecting market data and putting together notifications with respect to distribution agreements, franchising or joint research deals – which, as a rule, are perfectly innocuous forms of co-operation under the anti-trust rules – has over the past 40 years imposed a considerable burden on undertakings, both in costs, legal and others, and in management time. In a mature competition system, the rules governing such forms of co-operation are well-known and there should no longer be an obligation to ask regulators' permission for every one of these agreements.

Talk of a fragmentation of anti-trust enforcement seriously underestimates all of the highly qualified national authorities that comprise our new enforcement community. These national authorities are familiar with Articles 81 and 82 of the Treaty of Rome and we have full confidence that they will apply these rules in a coherent manner.

As to the legal certainty allegedly provided by the Commission “clearance” of such deals, any lawyer will know that it did not provide the “bomb-proof guarantee” you claim. The overwhelming majority of the agreements were invariably waved through by a “comfort letter”, which did not have the legal value of a clearance, meaning that the case could be reopened, if the Commission were to receive a well-founded complaint.

Amélia Torres,  
Spokesman, Competition Policy,  
European Commission, Belgium

(FT, 29.11.02)

"I don't like the sheer duplication of effort," says Stephen Kinsella, a partner in the Brussels office of law firm Herbert Smith. "Companies might find themselves arguing the same cases in different jurisdictions". He points out that in the anti-trust reform, the Commission gave up the role as "one stop shop", which it cherishes when it comes to scrutinising mergers.

Some lawyers argue that the creation of a loose network of more than 20 national regulators will make it difficult to decide which authority is in charge of a case, increasing the likelihood that cartels will go unpunished.

"Networking is good for cocktail parties, but not for the enforcement of competition law," says one. According to the Commission though, the fear of chaos and inaction is unjustified. As part of the changes, national regulators will be required to apply European, rather than national, law. This provision, coupled with a raft of guidance notes to be issued by Brussels, should ensure that regulators from Riga to Rome sing from the same hymn sheet and do not miss important infringements. But, while lawyers

and bureaucrats debate the theoretical merits of the new system, executives in companies across Europe will be worried by one of its practical effects.

Under the new regime, the Commission will be able to raid executives' homes – as well as their offices – in search of incriminating evidence of a cartel.

Although the Brussels investigators will have to be authorised by national courts before rifling through drawers and opening personal e-mails, the sweeping new powers could pose legal problems in a number of countries, such as the UK and Germany.

The desire to hide evidence of a cartel can induce extreme reactions in some executives, such as the one who threw a file out of the window while officials were raiding his office, only for it to be picked up by another investigator standing in the reception.

But many fear that allowing the Commission to raid homes would give the watchdog too many teeth.

*(Francesco Guerrera; FT, 27.11.02)*

## The Right Sort of Competition

One of the issues that will come up for discussion at the next ministerial conference of the WTO in Cancun, Mexico, next year is whether to launch negotiations to create multilateral rules governing competition policy in member countries.

An oft-overlooked fact is that many current rules affect competition, some increasing it, while others reduce it. WTO rules have a curious asymmetry with respect to competition.

Liberalisation of trade in goods through the reduction of tariff and non-tariff barriers (via GATT 1994) and services (via GATS) promotes competition.

On the other hand, measures like the agreement on trade-related intellectual property rights (TRIPS), which grants monopoly rights to patent holders for 20 years, reduce competition.

Provisions to allow compulsory licensing and parallel imports, which could counter the anti-competitive effects of TRIPS, have not been deployed sufficiently or have been blocked, when attempted.

Liberal anti-dumping measures to protect domestic industries against cheap goods from abroad are also anti-competitive. Dumping can be welfare-enhancing, as long as it is not predatory.

Evidence used to show dumping and deploying anti-dumping duties is suspect and does not justify the use of anti-dumping measures. And, anti-dumping measures are used largely against developing countries.

Subsidies and protection in agriculture and textiles used by developed countries are also anti-competitive.

The proposed negotiations are unlikely to deal with these issues. The members pushing for a competition policy, like the EU, have a narrow agenda concerned with competition law that deals with behaviour and interaction of firms in markets.

The link between trade and competition policy, according to this view, arises because the restrictive practices of some firms in some markets could block imports.

The US, for example, has argued that restrictive practices and collusion practised by large Japanese firms block US exports.

There are two main reasons why these countries want this issue in the WTO framework. First, the WTO has a strong enforcement mechanism, through the dispute settlement understanding. Second, it would be simple to extend the basic WTO principle of national treatment to competition policy to suit market access lobbies, mainly MNCs.

While this narrow agenda may ensure that domestic firms face

immediate competition from foreign firms, it may not necessarily mean greater competition in the long run. Many domestic firms, which are likely to be smaller than foreign firms, may get driven out of the market and the foreign firm could establish a dominant presence.

A comprehensive competition policy must include rules to regulate big MNCs. It must prevent monopolistic and anti-competitive practices by introducing necessary safeguards and regulating cross-border mergers which reduce competition.

The regulation of mergers, which have serious implications for competition, is very important. At the moment only US and EU competition authorities are strong enough to take action against global mergers.

An international competition policy should empower developing countries to block potentially anti-competitive mergers. It seems almost impossible to apply uniform competition laws across all countries, given the divergence in levels of development.

Issues dealing with competition including competition law, anti-dumping measures, TRIPS and other forms of protectionism are unlikely to be taken up for negotiations, given the divergence of views among WTO member countries.

Perhaps, the best that an agreement on competition at the WTO can, and should, achieve is to require members to have a domestic competition policy, details of which are available to all other members, whose violation can be challenged via dispute settlement.

In terms of supra-national competition laws and policy, there is a possibility of co-operation at the regional level or between like-minded countries. So, competition policy can be tackled at a regional level, like it is in the EU.

The countries within these groups are likely to have much more in common with each other than with all the countries of the world taken together, and this would make the formulation and implementation of competition policy easier.

Alternatively, developing countries may also get together to form a competition authority which can regulate cross-border mergers and acquisition activities, just like the US and EU authorities do at the moment.

At the same time, stronger efforts must be made to correct the rules, which, at the moment, mitigate competition within the WTO framework.

*(Dhiraj Nayyar; ET, 15.11.02)*



## Unemployment in South Africa Is Competition Policy to Blame?

### Introduction

Unemployment in South Africa is a matter of serious concern for its effects on economic welfare; the erosion of human capital, social exclusion, crime and social instability are immense. Various forums and strategies such as the Employment Strategy Framework, Job Summit and Umsobomvu Fund have been directed at resolving the problem. None of them succeeded.

The unemployment rate is the percentage of the labour force that actively seeks work, but is unable to find it at a given time. Discouraged workers, persons who are not seeking work because they believe the prospects of finding it are extremely poor, are not counted as unemployed or as being part of the labour force.

South Africa's registered non-farming workforce decreased by 0.3 percent in the first quarter of 2002 after retailers and hotels cut seasonal jobs. The number of non-agricultural workers dropped to 4,633,698 (Statistics South Africa). The total number of jobs in South Africa decreased to 10.8 million in September 2001. South Africa's economically active population is 15.4 million (Labour Force Survey). As a result, the unemployment rate rose to 29.5 percent in September 2001. This article looks at the effect of competition policy on employment through merger activities notified with the Commission.

### Some Reasons for Rising Unemployment

There are various reasons for the high unemployment rate in developing countries, particularly African countries. In South Africa, labour experts attribute most of the immense loss of jobs in the formal sector to the restructuring of the world economy, which more than ever favours highly skilled individuals. While there has been some growth in the service and tourism sectors, this has not taken up the lack of the jobs lost. Once those jobs are lost, they are lost forever. The high unemployment rate among qualified tertiary graduates in South Africa has been attributed to a "mismatch between the kinds of skills and training people are getting in the tertiary education sector and what is needed in the labour market". A draft industry profile prepared by the Department of Trade and Industry identifies the following factors for rising unemployment:

- Domestic markets are contracting;
- Exports are contracting;
- Imports are rising; and
- Labour productivity is rising

A formal sector trend survey by Johannesburg-based P.E. Corporate Services indicates that many employers have trimmed their staffing levels back sharply in line with poor economic growth over the past two years.

Labour-intensive industries are considered to be most vulnerable to retrenchment. The major cause of job losses in these sectors is said to be the decline in local demand, implying that output supply exceeds demand and therefore, trimming the work force is considered the last option in order to reduce costs. The next section looks at the impact that mergers and acquisitions have had on employment.

### Product and Labour Market Rigidities versus Employment

Unemployment is also considered to be the result of uncompetitive product and labour markets. An OECD report concluded that labour- and product-market rigidities have hampered member countries' ability to adapt to change, leading to increases in structural unemployment. In other words, competitive markets with low barriers to entry are considered the best mechanism for the creation of job opportunities.

An unpublished study, by Vumendlini (1999), also found that, in South Africa, less concentrated industries employ more people than highly concentrated ones.

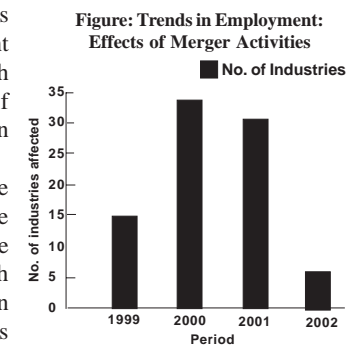
### Merger Activities and Employment

South African competition policy differs from the policies of other competition authorities due to its consideration of public interest issues. This puts an obligation on the Commission to monitor the effects that various merger transactions will have on employment in the country. The graph shows the number of industries, which have been affected since 1999.

The trend seems to be declining, though not all the merger reports were reviewed. The graph shows that it is only in 2000 that more industries (34) were affected. It

should also be noted that some of the industries were affected positively. In other words, there were job gains. This is evident from Table 1.

- September 1999 to date: 10,669 job losses occurred, with gains of about 9,616.
- Net-loss of 1,053 jobs occurred.
- 69 percent (7377) of total losses in 2001.
- 81 percent (7849) of the total gains occurred in 2000.



**Table 1: The Impact of Merger Activity on Employment (All Sectors): 1999-June 2002**

Manufacturing	Losses	Gains	Net Loss/Gains
1999	187	200	13
2000	1177	2760	1583
2001	5704	50	-5654
2002	314	0	-314
Other Sectors	Losses	Gains	Net Loss/Gains
1999	124	0	-124
2000	1342	5089	3747
2001	1673	15	-1658
2002	148	1502	1354
<b>Total</b>	<b>10669</b>	<b>9616</b>	<b>-1053</b>

Note: Data collected from 680 merger cases notified.

**Table 2: Employment Gains or Losses as a Result of Mergers and Acquisitions Activity in the SA Manufacturing Sector: September 1999 – June 2002.**

Distribution of CR4 (%Digit SIC)	No of cases	% of Total cases	No of cases affected	% of Total cases affected	Job losses	% of Total Job losses	Gains	% of Total job gains	Net Job loss/ Gains
0.0-0.2	16	6.7	2	4	450	6.1	30	1	-420
0.2-0.4	64	27.1	10	20	504	6.8	461	15.3	-43
0.4-0.6	58	24.6	15	29	462	6.3	500	16.6	38
0.6-0.8	57	24.2	13	25.4	463	6.3	2	0.07	-461
0.8-1.0	37	15.7	9	17.6	5485	74.3	2017	67	-3468
Other	4	1.7	2	4	18	0.2	0	0	-18
Total	236	100	51	100	7382	100	3010	100	-4372

Considering that a net loss of 1,053 jobs occurred, it becomes apparent that competition policy is not responsible for the increasing unemployment rate in the country. According to a draft document prepared by Department of Trade and Investment (DTI), major employment losses are in the labour-intensive wage goods sectors, which incorporate manufacturing of food, textiles and clothing.

### Concentration and Employment

Concentration is the extent to which an industry is dominated by a small number of companies. There are various measures of concentration, however, and the CR4<sup>1</sup> is considered in this regard. Table 2 breaks down the data according to the concentration levels of the industries/cases notified to the Commission from 1999 to June 2002.

- In 236 cases evaluated, a net loss of 7,382 jobs occurred. 80.6 percent of the overall employment losses were within industries where the combined market share of the leading four firms was between 60 percent and 100 percent (39.9 percent of the cases in the sample).
- Merger activity in competitive industries with low levels of concentration (45.4 percent of the case in the sample) contributed to only 19.2 percent of the overall employment losses.
- It is noteworthy that 67 percent of the job gains were within the highly concentrated industries.

- A net loss of about 4,372 was recorded for manufacturing. If other sectors are considered, the net loss is 1,053.

### Summary

It is clear that the data compiled from cases notified with the Commission do not reflect the high unemployment rate that is reported by Statistics South Africa. This could be due to at least two reasons:

- The firms affected by job losses have downsized and have not been “swallowed up” by bigger firms.
- Mergers take place after job losses have occurred, so that job losses are not attributed to the merger process.

In addition, the industries identified in a draft document of the DTI, namely food, textile and clothing do not account for most of the total losses that occurred as a result of mergers notified with the Commission.

**Charles Mabuza**

Policy and Research

(Abridged from Competition News, Competition Commission, SA)

<sup>1</sup> It is defined as the sum of the market shares of the top four firms in an industry. The closer to one the ratio is, the more concentrated is the industry.

## Federal Electricity Proposal Risky for Consumers

*Consumer Groups Call FERC's Standard Market Design Premature And Overreaching*

The Consumer Federation of America (CFA) and Consumers Union (CU) expressed their opposition to the Federal Energy Regulatory Commission (FERC)'s proposed Standard Electricity Market Design (SMD), saying that it is not in the public interest.

The SMD is FERC's attempt to standardise the structure and operation of the wholesale electricity market nationwide. FERC proposed SMD in response to the meltdown in the western electricity market in 2000 and 2001, which was caused, in part, by FERC's failure to properly oversee companies operating in that market.

In comments submitted responding to FERC's Notice of Proposed Rulemaking on an SMD, CFA and CU stated that the proposal violates the Federal Power Act's requirement that electricity rates be just and reasonable and would not protect

consumers from the type of manipulative behavior engaged in by energy traders such as Enron during 2000 and 2001.

In fact, a report prepared for a November 12<sup>th</sup> hearing of the Senate Committee on Governmental Affairs actually concluded that the FERC “lacked the will and resources to oversee Enron and other politically-powerful energy companies as US electricity markets deregulated in the mid-1990s.” The comments filed argue that little has changed at FERC since that would make consumers feel more protected under the further deregulation proposed by FERC's SMD.

In their comments, CFA and CU state, “Electricity markets around the country are in turmoil and consumers' electricity service is becoming more costly and risky. Rather than bring stability to markets, this proposal will introduce more costs and more risks for consumers.”

## From Our Readers

Thanks for sending the report on "Reorienting Competition Policy and Law in India". The report is highly useful for my research and teaching activities here.

**M. R. Narayana**  
Professor of Economics  
Institute for Social & Economic Change  
Bangalore, India

The information contained in the report on "Reorienting Competition Policy and Law in India" is very useful for our office. You are, therefore, requested to send us copies of reports on China, USA, UK and other Gulf Countries.

**Qamar Bano**  
Asstt. Advisor (Lib. & NRIs)  
Indian Investment Centre  
New Delhi, India

Many thanks for sending me your report on "Reorienting Competition Policy and Law in India." I perceive such an effort to be very useful in creating awareness of the issues at stake.

**Poonam Sarmah**  
Head-Research  
Genesis Public Relations Pvt. Ltd  
Gurgaon, India

## Publications

### PULLING UP OUR SOCKS

This report is the compilation and synthesis of the research results of the 7-Up Project, which is a comparative study of the competition regimes of seven developing countries of the Commonwealth, namely, India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia, implemented by CUTS, with the support of the DFID, UK.

The report compares the institutional framework in the project countries and analyses important issues like legal provisions, autonomy of the institutions, financial and human resources, etc. It concludes with suggestions and recommendations for strengthening the competition regimes in these countries. If you are interested, please ask for a copy.



### FRIENDS OF COMPETITION

This handbook, which has been prepared on the basis of the experiences gained from the 7-Up Project, aims to outline an ideal capacity-building programme for promoting an effective and healthy competition regime in the targeted countries. With necessary variations to suit the socio-politico-economic environment, this would be applicable to most developing and transition countries.

### TOWARDS A HEALTHY COMPETITION CULTURE...

This advocacy document, prepared under the 7-Up Project, is intended to build awareness in policy-makers and negotiators and stimulate debate on competition policy in the national and international contexts. It presents action points for key stakeholder groups in order to promote a healthy competition culture.



CUTS is celebrating its 20<sup>th</sup> Anniversary at a Partnership Conclave with the Theme: "Governance and its Relationship with Poverty Reduction" during 12-14 March, 2003 at New Delhi, India. For more details, please see: [www.cuts.org/CUTS-Anniversary.htm](http://www.cuts.org/CUTS-Anniversary.htm)

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