

REGULETTER



A Quarterly Newsletter of the CUTS Centre for Competition, Investment & Economic Regulation

CUTS
International

Is Competition Law Good for Business?

Business lobbies have generally been against the adoption or strengthening of a competition law almost everywhere. For they fear that their enterprises or profits will be curbed due to such a law, which seeks to create orderly markets. Though, this need not be true if seen from a larger perspective. While driving on a road, should one be delighted to see no traffic lights? No, perhaps never. Because, for the benefit of all drivers, traffic has to be regulated. Otherwise, there will be utter chaos, resulting in road accidents. Similarly, a competition regime can promote business welfare along with consumer welfare, even though, often, some business entities might not like it.

If one looks at the major anti-competitive arrangements, businesses face the brunt in the first instance, while consumers feel the impact only at a later stage. Indeed, companies engaged in production of basic goods and services often find it easier to carry on with anti-competitive arrangements, like cartels. Since such goods and services are not bought directly by general consumers, they fail to attract media attention or publicity. What's more, such goods are generally homogenous in nature, which facilitates price and market fixing. Worldwide, the goods that have received the dubious distinction of being prone to cartelisation are basic goods, like steel, cement, aluminium, etc, used across various industries as raw materials. Obviously, buyers of such goods are other businesses.

Cement, being a low value bulky good, is more or less immune from export competition in major relevant markets, as the transportation cost is very high. In line with this, cement cartels were detected and busted in most major jurisdictions throughout the world. Notwithstanding, what happened in India is quite interesting. When the cement manufacturers in India raised prices through collusive arrangements, the major construction companies, which consumed about 60 percent of the total cement in the country, found the going tough. These

companies, under the banner of Builders Association of India (BAI), urged the Cement Manufacturers Association (CMA) of India to roll back the prices. But, the CMA turned down their demand. The Competition Authority of India, being quite ineffective, was of no use. BAI thus decided to go for selective boycotting. It targeted two major companies, which were believed to be leading the cartel. This worked and the price of cement fell.

Steel industry is also prone to cartelisation, both at the international level as well as in the national markets. Use of steel could be found in a host of industries, including automobiles, engineering goods, construction etc. Firms in all these industries pay a heavy price for such anti-competitive behaviour in the steel industry.

Egypt has just passed its own competition law after 12 years of deliberation. It experienced heavy business lobbying to prevent it from being adopted. In the forefront of the opposition, was a leading ruling party MP, Ahmed Ezaz. Incidentally, Ezaz owns Ezz-Al-Dekhela Steel, which controls 60 percent of the steel market. That's not all; there are monopolies or oligopolies in cement, fertilisers, food, mobile services and movies also.

One of the most talked about international price fixing is the infamous bulk vitamins cartel. Vitamins are used in several industries, including pharmaceuticals, food and food additives. Needless to say, all of these industries might have suffered a lot due to this cartelisation.

Another international cartel that is considered to be highly damaging as well for industries is the heavy electrical equipments cartel. These equipments are used by electricity generating plants throughout the world. Higher prices of these equipments due to cartelisation lead to higher prices of electricity. Thus, this arrangement adversely affected business everywhere in the world.



Business Standard

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One ubiquitous problem encountered in most countries is that often traders, including wholesalers as well as retailers, operate in a collusive manner and extract heavy trade margins from the manufacturers. Recently, it was found in India that the retail prices of several medicines were as high as 10-15 times the wholesale prices. These kinds of practices raise the prices artificially, hurting not only consumers but also manufacturers.

These types of problems often get compounded when some manufacturers themselves engage in exclusive dealing arrangements. Such agreements hurt them too in the long run. The experience of Bhutan, where the Government took specific measures to deal with such problems, can be illustrative in this regard.

Over 80 percent of goods sold in Bhutan come from India, and the Indian companies operate through local distributors in Bhutan. In 1994, the Ministry of Trade and Industry (MTI) of Bhutan promulgated a regulation to demonopolise the wholesale distribution trade in Bhutan by asking all companies to have more than one distributor in the country. In its first action, the MTI asked Hindustan Lever Ltd (the Indian subsidiary of Unilever) to appoint a second wholesaler for distributing its goods in Bhutan. But, HLL refused to comply. After much insistence and a threat to cancel the trade licence of its existing dealer, HLL agreed to appoint Food Corporation of Bhutan (FCB) as its second dealer. FCB rose to the occasion and soon

multiplied HLL's business in Bhutan. Ultimately, HLL benefited a lot due to the demonopolisation drive of the Government, as its business nearly quadrupled within a couple of years.

In several economies, the share of intermediate consumption is in excess of 50 percent of total output. This amply indicates the costs of anti-competitive practices that are incurred by the businesses themselves. These users of intermediate goods and services are not always able to pass on the enhanced costs of their raw materials to the final consumers. Over and above, even if they are able to do so, increased costs of raw materials leading to high price of their products may have a negative impact on the demand for their product. This would impede the long-term growth of the industry they are engaged in. An appropriate competition policy is thus good for business as well.

This is not a sensational discovery. Indeed, in probably all jurisdictions, it is the business entities that approach the competition authorities more for ensuring fair market practices, rather than the consumers. Yet, the business lobby, especially in developing countries, remains antagonistic to adoption or enforcement of competition law. Sooner they understand the utility of a good competition regime, the better it is for everybody.

In the words of the media mogul, Rupert Murdoch, "Monopolies are terrible things...until you have one". Can every businessman dream of having a monopoly someday?

Regulatory Accountability

Independent regulation is becoming the order of the day in several sectors in developing countries. The area of infrastructure services has possibly seen the establishment of independent regulators, perhaps the most. The reason being that infrastructure services are scarce in many developing countries, and the governments alone are unable to cope with the growing demand stemming from the ever-increasing population pressure. In order to balance the demand, the sector has undergone policy alterations, with the prime object of attracting private investment. This necessitated the adoption of regulatory frameworks.

Day-to-day regulation of markets is an entirely different ball game as compared to policy-making. Therefore, the regulators are being provided with considerable amount of authority and autonomy to deal with market failures.

Parallel (and subsequent) to the debate on regulatory independence, another equally important and somewhat controversial issue has cropped up. This relates to *regulatory accountability*, i.e. accountability of the regulators.

It has been argued that even when elected governments are answerable to people, and have to seek renewed mandate at regular intervals, how could a regulatory body have the luxury of not being accountable? The debate is gaining momentum everyday with the emergence of situations, where, either the integrity of

regulators is being questioned, or their decisions are challenged as being sub-optimal. The entire debate is centred on having a workable arrangement for ensuring accountability in the regulatory institutions in a sustained manner.

In majority cases, these independent bodies have to submit a report before the legislature every year, and their expenditures are subject to independent audit. Moreover, appellant bodies have also been provided for most of these regulators to deal with grievances. However, it is arguable whether the submission of an annual report to the legislature alone is a measure good enough to uphold the accountability of the regulators? How often does the legislative find time and interest to evaluate the performance of the regulatory bodies? Is it desirable to keep pulling these regulatory bodies before their appellant body time and again?

It would, thus, be worthwhile to find out other alternatives for holding the independent regulatory bodies accountable:

Asking these 'independent' regulatory bodies to report directly to the government would surely defeat the entire purpose of setting these institutions outside the government domain. Hence, this option is ruled out.

Positioning civil society organisations (CSOs), particularly consumer groups, to ensure accountability of regulatory authorities could be a workable way of dealing with the issue. Currently, the role

of these groups is recognised in a very narrow and limited perspective. They are only observed as advocates for consumer interests. However, several examples from the world over demonstrate that consumer groups have worked in tandem with regulatory bodies and have been instrumental in evoking appropriate action against defaulters.

Consumer groups, in particular, and the civil society, in general, should be empowered to monitor the activities of the regulators to ensure effectiveness. These groups should play their part by bringing issues to the public domain, when required.

Such mechanism can be incorporated, in addition to the existing provisions of regulators reporting to elected representatives of people. Though, making this prescription workable would require two major provisions. Firstly, recognising this larger role of civil society/consumer groups in the law itself. Secondly, ensuring a performance-based sustained funding for such activities.

In the US, most of the energy and gas regulators host and support the office of consumer advocates. This may not be a desirable arrangement, as the consumer groups may not remain critical enough of the regulators who are supporting them. The UK model of providing for establishing a consumer watchdog within the Act, and supporting its activities by imposing a minuscule cess on consumers, could prove to be appropriate.

Amendments in Canada

The Minister of Industry, Canada, tabled amendments to the Competition Act in the House of Commons. The proposed changes will strengthen Canada's competition framework in a global economy to benefit both consumers and businesses by:

- providing authority for the Commissioner of Competition to seek restitution for consumer loss resulting from false or misleading representations;
- introducing a general administrative monetary penalty provision for abuse of dominance in any industry;
- removing the airline-specific provisions from the Act to return it to a law of general application;
- increasing the level of administrative monetary penalties for deceptive marketing practises; and
- decriminalising the pricing provisions.

(Canada Competition Bureau News Release, 13.12.04)

Move on EU Shipping Laws

An 18-year-old law that grants immunity from antitrust sanctions should no longer protect European shipping industry. Shipping groups should no longer be allowed to fix prices and artificially limit supply – practises that are strictly forbidden to other industries, but were permitted to groups of cargo ship companies known as liner conferences.

The exemption was granted in a 1986 law that was intended to create stable maritime freight rates, and therefore ensure that exporters could count on reliable shipping services.

Shipping lines have agreements among themselves to provide regular, scheduled maritime services, where operators offer a common freight rate to shippers. They argue that the ability to fix rates and capacity prevents price swings that sometimes force carriers out of business, which hurts consumer choice.

(FT & BL, 13.10.04)

Japan Whips Cartels

The Fair Trade Commission (FTC) proposed amendments to the current anti-monopoly law, the most sweeping in more than 25 years, aimed at toughening Japan's competition policy by cracking down harder on cartels and collusive activity.

But the FTC, which has faced fierce opposition from the business lobby, was forced to water down many of its

proposals. The opposition Democratic Party of Japan has presented its own reforms; these included a proposed doubling of the maximum fines that can be levied against a firm that violates antitrust laws, from 6 to 12 percent of the turnover. Some business groups and opposition parties have been lobbying for the rate to remain below 10 percent.

(NERA Economic Consulting, 20.11.04, & FT, 21.10.04)

Danish Law Overhauled

As a result of the European Union (EU) regulation on the implementation of competition rules and the EU Merger Regulation, the Ministry of Economics and Business Affairs, Denmark, has initiated an amendment to the Competition Act. In amending the Act, the Ministry seeks to introduce more transparent competition rules and ensure that Denmark's competition regulations do not differ significantly from those throughout Europe.

Certain aspects of the draft law have been criticised in the hearing procedure. One particular controversial change is the proposed empowerment of the Competition Council to order dominant

undertakings to compile trade conditions and report them to the competition authorities, which, in turn, can decide to accept, amend or reject them. A further criticism is that the binding agreements cannot be subject to judicial appeal.

(ILO, 03.12.04)

Chinese Agency for Antitrust

Although China's antitrust law is yet to be enacted, the Ministry of Commerce has recently established an office to direct anti-trust investigations, comprised of its own staff from the Department of Treaty and Law.

The major goal of the anti-trust office is to prohibit monopolistic practises and maintain fair competition and perform the responsibility of the Ministry of Commerce with regard to antitrust issues, including the promulgation of relevant legislation, conducting investigations, implementing antitrust law, and engaging in international cooperation.

Even after the antitrust law is passed and a clear determination of the proper authority is made, there will be doubts regarding the effectiveness of such an office.

(GCR, 03.12.04)

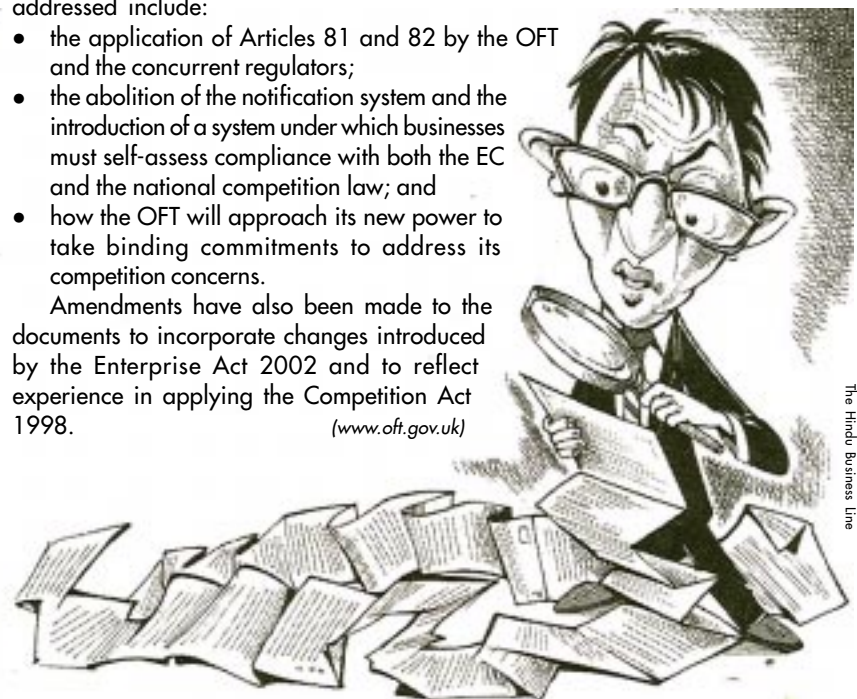
OFTs Revised Guidelines

The Office of Fair Trading (OFT) Commission has published its revised competition law guidelines and related guidance in the light of the European Commission (EC) Regulation known as Modernisation Regulation, which substantially changed the framework for enforcement of EC competition law. Key changes and points addressed include:

- the application of Articles 81 and 82 by the OFT and the concurrent regulators;
- the abolition of the notification system and the introduction of a system under which businesses must self-assess compliance with both the EC and the national competition law; and
- how the OFT will approach its new power to take binding commitments to address its competition concerns.

Amendments have also been made to the documents to incorporate changes introduced by the Enterprise Act 2002 and to reflect experience in applying the Competition Act 1998.

(www.of.gov.uk)



The Hindu Business Line

South Korea Antitrust Reform Bill

Uri, South Korea's ruling party, has seen its bill to reform the Fair Trade Act pass through a National Assembly Committee. Grand National Party, the main opposition, boycotted the vote. The bill will now be scrutinised by the Assembly's plenary session before it is finally approved. The reforms are chiefly aimed at curtailing the power of the *chaebol*, large family-owned conglomerates. Under the new law, the FTC will be able to seize bank account details when investigating alleged inter-company cross-subsidisation. The bill also seeks to prevent *chaebols* extending their influence beyond non-core activities by limiting their voting rights. The International Monetary Fund (IMF) said it 'strongly supports the FTC bill'. (KT, 03.12.04 & AFX Asia 02.12.04)



EU Watchdog Wrong

The EU antitrust regulator suffered a blow, when the EU's second-highest court ruled that Brussels had been wrong to block a merger between WorldCom and Sprint, the two US telecommunications groups.

The European Court of First Instance found that the EU Competition Commissioner should not have ruled in the case at all, because the two parties had already withdrawn their bid. The judges annulled the prohibition, though without ruling on the merits of the Commission's decision. (FT, 29.09.04)

Tools for Tackling Cartels

The New Zealand Commerce Commission has announced the introduction of new tools aimed at tackling anti-competitive behaviour, including a lenient policy to tackle cartels. The policy will provide immunity from prosecution to the first person that approaches the Commission about a cartel they have been involved in. The Commission cannot offer immunity from action that may be taken by injured third parties, although such action is not common.

The Commerce Commission Chairperson, Paula Rebstock, said that overseas experience has clearly demonstrated that providing incentives to cartel members to be the first to share information about the conduct is critical to enforcement.

(Commerce Commission Media Release, 26.11.04)

Mexico Amends Law

The Mexican Federal Competition Commission has been working on amendments to the Federal Economic Competition Law. These will almost

certainly modify the section dealing with concentrations in order to limit, as far as possible, notification of concentrations where adverse consequences to the competitive process are genuinely possible.

These could include acquisitions of the following:

- assets in the normal course of business;
- voting shares where these or the assets of the acquirer do not exceed, for example, 10 percent of the capital of the company; and shares by stockbrokers for the purpose of reselling to the general investment public. (ILO, 03.12.04)

Vietnam Developments

Vietnam National Assembly (NA) passed the new Competition Law, with 77.89 percent voting in favour, on November 9, 2004, the fourteenth day of the month-long National Assembly legislative session. It is the first time that definitions of market dominant position, multi-level trade, and unfair competition will be contained in a comprehensive legal document. The introduction of the competition law has been seen by many as an urgent necessity, since a market economy has been steadily developing in Vietnam. The Competition Law also established a Competition Commission and Competition Council and set out enforcement measures. It is another important development of a comprehensive system of commercial law. (Various Sources)

Pressure to Open Railways

The Business Competition Supervisory Commission (KPPU) has suggested the government to open the railway sector for private players to boost efficiency and quality of service.

"Without competition a monopoly mentality prevails, resulting in a decreasing quality of service and high prices," said KPPU member, Mohammad Iqbal.

Currently, the entire railway network is owned by the government and operated by PT Kerata Api Indonesia (KAI).

"One way to introduce competition is by having separate operators (of the network and rolling stocks)," said Iqbal.

Law No. 13/1992 on the railway network allows for private companies to be involved in the sector, but supporting regulations for the law have never been drafted.

The Ministry of Transportation had prepared a revision of the law, which would specify the role of the private sector, said Harris Fabillah, Director of Railways at the Ministry of Communications. He added that with or without appropriate laws, it was unlikely there would be much interest in investment in the capital-intensive railway sector. (The Jakarta Post, 04.12.04)

Canada-US Comity

Canada and United States (US) signed a positive comity agreement to enhance cooperation in competition law enforcement between the two jurisdictions. The 2004 agreement builds on, but does not replace, the 1995 agreement between Canada and the US, which sets out a framework for coordination and cooperation in enforcement activities, including:

- notification of enforcement steps;
- exchanges of information; and
- positive comity.

The 2004 agreement describes in more detail the circumstances and procedures for making a positive comity request. Neither the 2004 agreement nor the 1995 one applies to mergers. (ILO, 22.12.04)

Antitrust Lawsuit Dismissed

RSM Production Corporation, a Texan oil company, had sued Petr6leos and two of its subsidiaries in the Federal Court in the US, saying it had been prevented from exploiting a license to develop offshore oil and gas resources in Grenada. Petr6leos is wholly owned by the Venezuelan Government. Its subsidiaries – PDVSA Petr6leo and CITGO — are its exploration and marketing arms, respectively

RSM had alleged that Petr6leos scuttled its opportunity to “preserve its monopolistic regional standing as the representative of the only country (Venezuela) in the region with which foreign investors must conduct trade”. But on September 30, the district court in Denver dismissed RSM’s claims on jurisdictional grounds. It said the defendants were agents of the Venezuelan state shielded by the Foreign Sovereign Immunity Act. They could only be sued in an American court if their conduct had a direct effect in the United States.

Although RSM had prevented “potential importation of oil to the United States,” the court held that this was evidence only of indirect effects and dismissed the lawsuit. (GCR, 01.11.04)

Glass Cullet Collusion

The Competition Commission of South Africa has recommended a case to the Competition Tribunal, referring a complaint that alleges Consol Private Limited and Nampak Private Limited of being involved in price fixing and market allocation activities for cullet.

Cullet is the glass destined for recycling for manufacturing glass containers. The Enviroglass and Waste Services Division of Reclamation Group Private Limited has brought this case to the notice of the Competition Commission, complaining that the two groups were involved in collusive conduct through the Glass Recycling Association from September 1999 to June 2002.

The Competition Commission has asked the Tribunal to deem the alleged activities an illegal practice, and to fine the groups up to 10 percent of the annual turnover. (BD, 12.11.04)

Softbank Fights Hard

Softbank, a Japanese telecom company has brought a case before the Tokyo District Court saying that it wants an ‘equal opportunity’ to provide a third generation mobile phone service in the country.

The Company declared that it is at a disadvantage because it cannot secure access to the most-wanted radio frequency

of 800 megahertz, as was indicated by the Government. The Company is unhappy with the ‘differential treatment’ of the Government, which provides access for the two top mobile carriers, NTT DoCoMo and KDDI, to this ‘favourable’ frequency. Softbank, who is willing to fight the case ‘for one hundred years’, alleges that this bias in favour of incumbents is partly because ex-regulators often go for jobs at Japan’s top telecom firms.

The Company is demanding that the Government should accept new licenses granting access to the disputed frequency, and urges that records of all negotiations between the regulators and established mobile phone operators be made public.

(GCR, 03.11.04)

Banking Concentration

The Consumers’ Association brought a complaint to the OFT regarding concentration in the banking sector, in Northern Ireland.

The consumer watchdog claims that the current account market is dominated by just four main players – The Bank of Ireland, First Trust Bank, Northern Bank and The Ulster Bank; and alleged that they overcharged consumers for virtually every service they offer. The Association says that the bank customers in Northern Island

are charged an average of 21 times the best rates available to UK customers.

The OFT is expected to respond to the fast track complaint within ninety days.

(TI, 16.11.04)

Nippon Electrodes Fined

Investigation by the Canadian Competition Bureau found the Nippon Electrodes Company Ltd (NDK) guilty for its role in a conspiracy to fix the price of cathode block, used in the production of aluminium, and has fined the company US\$225,000.

The Bureau’s investigation revealed that during 1996 and 1997, representatives of the NDK and other producers agreed to fix the price of carbon cathode block sold in Canada. At various times throughout the period between these two years, producers agreed implementing and maintaining fixed prices and price increases for the product. It was estimated that NDK sold at least US\$1.5mn worth of the cathode block in Canada, through trading companies, over the course of the agreement.

The Japanese company is the second company convicted in Canada for its role in the cathode block conspiracy. Earlier, VAW Carbon GmbH pleaded guilty in the Federal Court and was fined US\$500,000.

(Canada Competition Bureau News release, 04.11.04)

Coke Settles Antitrust Case

Coca-Cola brought to a close its five-year antitrust battle with the European Commission, when it signed an agreement promising deep changes to its marketing practices in Europe. In return for these changes, the company will not have to pay a fine and will not be found guilty of breaking European Union Competition Law. The deal was finalised in a meeting in Brussels between Monti and Neville Isdell, Coca Cola’s chief executive, and puts an end to one of the commission’s most controversial antitrust investigations.

Under the terms of the agreement, which still needs to be tested with rivals such as Pepsi before it is formally approved by Brussels, Coca Cola promises not to force retailers into exclusivity deals. It will also have to restructure its rebate system in a way that reduces the incentives for retailers to stock only Coca Cola products.

Pepsi said it was pleased with the successful conclusion of the investigation and added that the settlement would increase “competition and finally (give) retailers the freedom to offer consumers more product choices”. (BS, 20.10.04)



EC Prohibits Acquisition

The EC has decided to prohibit the proposed acquisition of joint control over *Gás de Portugal* (GDP), the incumbent gas company in Portugal, by *Energias de Portugal* (EDP), the incumbent electricity company in Portugal, and ENI, an Italian energy company, because the deal would have impeded effective competition.

EDP generates, distributes and supplies electricity in Portugal. GDP enjoys exclusive rights for import, storage, transportation and wholesale supply of natural gas; and controls five of the six Portuguese local gas distribution companies. ENI is a company active internationally at all levels of energy supply and distribution.

The Commission concluded that the transaction would strengthen EDP's dominant position in the electricity wholesale and retail markets in Portugal. It would remove GDP's potential to compete in the electricity markets. The concentration would also have made current and possible future power producers in Portugal dependent on their main competitor, namely EDP. In addition to that it would have also strengthened GDP's dominant position in the gas markets in Portugal, through the foreclosure of a significant part of the gas demand (controlled by EDP) and the elimination of EDP as the most likely entrant in the gas markets.

(European Commission Press Release, 09.12.04)

Spain Fines Healthcare Cos.

The Tribunal de Defensa de la Competencia, Spain's competition court, has fined four healthcare companies a quarter of a million euros each, for their part in bid-rigging.

The court ruled that the four companies involved – Amersham Health, Nucliber, and the Spanish subsidiaries of Tyco Healthcare and Schering reached a collusive agreement prior to bidding for a contract to provide radio-pharmaceuticals to Gregorio Marañon, a Madrid hospital, in 2001.

Responding to a complaint reported by the hospital in the following year, the court decided that the close similarity between the four companies' bids could not be explained by chance and that the 'only rational explanation' for it was that the companies deliberately fixed prices.

The four companies are preparing to appeal against the decision. *(GCR, 06.10.04)*

Italy Imposes Largest Fine

Telecom Italia was hit by the largest fine ever imposed on a single company in Italy. The first part of the abuse was for exclusionary terms in contracts, and for offering financial and technical conditions to customers that the competitors could not match. Secondly, Telecom Italia won a 2002 bid for the supply of telecom services to Consip, a public administration service provider. The Italian Antitrust Authority says that Telecom Italia's offer was lower than the costs that it charged rivals to connect to its own network, offering prices that its smaller upstream competitors could not match.

The Authority said that in calculating the fines, "it took account of the very serious nature of the violations and the fact that Telecom Italia has been found liable on several occasions before of substantially exclusive conduct."

Telecom Italia will appeal against the decision, as it seriously limits Telecom Italia's possibility to participate in public

tenders, thus damaging the final users of telecom services. *(GCR, 26.11.04)*

Sanitary ware Flushed

The EC antitrust officials raided the premises of a number of major European manufacturers and importers of bathroom fittings.

These sudden raids were simultaneously carried out in Austria, Belgium, Germany, Italy and The Netherlands to investigate possible price-fixing arrangements between the manufacturing companies and trade groups. The Commission was said to believe that the manufacturers were sharing information, such as potential price rises, rebates, discounts and other sensitive materials.

Among the firms said to have been raided were the European premises of Sphinx, American Standard Co., and some Dutch trade groups.

(GAW, Issue No. 312, November 2004)

Fine for Abusing Dominance

Zeleznicna Spolocnost (ZSSK), the national railway operator of Slovakia, has been fined SKK 37 mn for abuse of its dominant position in provision of cargo railway transport services.

'At a certain volume of ordered freight car shipment, companies receive commissions from ZSSK. But ZSSK did not provide these commissions to some companies, while it granted differing commissions to other companies for the same volume of ordered freight cars', said Miroslav Jurkovic, Competition Authority spokesman.

This use of selective commission payments was found to have distorted the nature of competition in the provision of cargo railway transport services.

(GAW, Issue No. 311, November 04)

Merck on Counterattack

Merck, the US drug maker, will hit back in the growing scandal over Vioxx, its painkiller, withdrawn from sale because of links to heart failure. It intends to produce internal documents and e-mails to rebut allegations that it tried to protect annual sales of US\$2.5bn with a five-year campaign of deceitful science and marketing. Merck, a conservative blue chip, has been reeling from the legal and regulatory fallout, since Vioxx was pulled from the market. Raymond Gilmartin, Chief Executive Officer, has been called to appear before the Senate Finance Committee.

Merck pulled Vioxx, a cox-2 inhibitor anti-inflammatory drug used often for arthritis, after an internal study suggested it doubled the risk of heart attacks and strokes after 18 months' use. Vioxx, if used daily, caused 15 cardiovascular events per 1000 patients, verses 7.5 in those taking a placebo. The

company is now under federal criminal investigation and the subject of inquiry by securities regulator. Because of the litigation risk and other uncertainties, Merck's credit rating has fallen two notches below AAA and its shares have plunged 41 percent.

(FT, 15.11.04)



www.inrpf2001.com

Bank Mergers and Stability

Federal Reserve Chairman, Alan Greenspan, while highlighting the role of consolidation, improved risk-management and technology and regulatory changes in strengthening the US financial system, opined that US bank mergers had increased the stability of the financial sector.

Greenspan's comments contrast with critics of the large financial groups, who argue that their size and complexity should be of concern to regulators.

According to Greenspan, improved risk management had moderated credit losses during the 2001 recession. He considers better risk management as a truly necessary element of success in banking. He cited the limited impact of Worldcom and Enron, the largest corporate defaults in history, and Argentina, the largest sovereign default, on the strength of the industry.



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(FT, 06.10.04)

Steel Giant Merge Assets

Lakshmi N Mittal, the UK-based steel giant, will merge his steel assets (Ispat International and LNM Holdings) and buy Ohio-based ISG in a deal worth US\$17.8bn to form the world's largest steel company, overtaking European steel major Arcelor.

According to an analyst, the enlarged group's market value would be about \$21bn. The group, with an annual capacity of 70 million tonnes, will have operations in 14 countries, employing 165,000 people.

The combined company will encompass all aspects of modern steel-making, to produce a comprehensive portfolio of both flat and long steel products and serve all sectors, such as automobiles, appliances, machinery and construction sectors. (BS, FT & ET, 25.10.04)

Electrabel Faces Dissection

A report commissioned by Belgium's federal energy regulator, the CREG, has recommended the division of Electrabel, Belgium's largest electricity company, into four units.

According to experts, the step is the most complete solution to a current lack of competition in the Belgian electricity market. If implemented, it would increase the number of local players to eight companies.

(GCR, 22.11.04)

France Approves Union

The French Government has backed the creation of a new champion in the aerospace and defence sector, as Sagem, a maker of electronic equipments, and Snecma, a state-controlled manufacturer

of aircraft engines, announced a merger plan, to create a group with sales of about \$10bn.

The merger will allow the Government to raise badly-needed funds to reduce its budget deficit, by selling part of its stake in the new company. The French Government will own around 35 percent of the new company, compared with the 66 percent stake it currently holds in Snecma alone.

Some analysts questioned the logic of a combination they said appeared to be driven more by political than financial interests. The consolidation between these two French groups will create a world-leading group in complementary technologies.

The Sagem and Snecma combination, which is expected to be complete by May 2005, would not result in any staff reductions, because there was little or no overlap in their operations. The deal is subject to merger approval in EU, South Africa and Brazil.

(BS, 29.10.04)

EU Eases Fusion

The EU Ministers finally approved the long-awaited legislation designed to make it easier for companies to merge across countries' borders within the EU, but included employee-protection clauses that business had opposed.

The key to finding a compromise among the 25 EU nations was the agreement on workers' right that broke a deadlock that lasted years. Although the deal now has support from the executive commission, and the 25 governments, the European Parliament must approve the legislation.

EU Ministers agree to follow the German rules on employee participation in mergers. Under the German law, worker representatives serve on the supervisory boards of most large companies.

The companies had been waiting for this directive to increase company mobility in the internal market. The European Commission had made easing cross-border deals a major part of its project to construct a single market, as well as to help revive Europe's mergers and acquisitions.

(WSJ, 26.11.04)

Scepticism over Merger

The concern among academicians and lawyers is whether the proposed merger of MTFG and UFJ, to create the world's largest bank by assets, is legal by international standards.

The two groups have agreed to merge in October 2005, subject to shareholders' approval. Some terms of the merger could form the basis of legal action by UFJ's shareholders, which might claim that their interests have been abused. The main criticism is the decision by MTFG and UFJ to proceed with the merger without agreeing a merger ratio that ascribes a value to UFJ. At the same time, UFJ rebuffed an offer from rival bank SMFG, which has provided a merger ratio.

Analysts opine that the Japanese M&A law is so underdeveloped that a shareholder suit could scupper the alliance.

(FT, 19.11.04)

Sears-Kmart Amalgamated

US department store operator, Sears, Roebuck & Co, and discount retailer, Kmart Holding Corp, have agreed to merge in a US\$11bn deal to form the third-largest retailer in the US.

The companies expect the combination to result in cost and revenue synergies worth US\$500mn over three years and a portfolio of 3,500 stores, with annual revenues of US\$55bn.

Both companies have been struggling to compete with Wal-Mart, the world's largest retailer, whose scale has allowed it to squeeze suppliers and reduce prices.

The combination of Kmart and Sears will create a powerful leader in the retail industry, with greatly expanded points of distribution, leading brands and significant opportunities for improved scale and operating efficiency. The deal is expected to close by March 2005.

(FT & BS, 18.11.04)

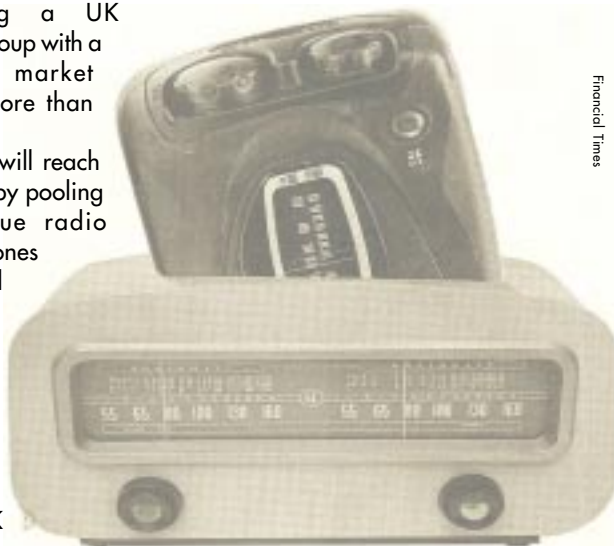
Radio Groups Merger in UK

Two of UK's biggest commercial radio groups, Capital Radio and GWR, have agreed the terms of their widely expected all-share merger, creating a UK commercial radio group with a combined market capitalisation of more than US\$1.3bn.

The new group will reach 18 million listeners by pooling 55 local analogue radio stations, 93 digital ones and one national radio station. Together, Capital and GWR will have 40 percent of the UK's commercial radio advertising revenue and reach 36 percent of the UK commercial radio audience.

Although the companies claim the deal follows competition guidelines, it could yet face regulatory scrutiny and any developments will be closely followed by other radio groups seeking similar tie-ups.

(FT, 30.09.04)



Financial Times

The EC, however, stated that it assessed the impact of this merger on the market very carefully and concluded that, on balance, the market would remain competitive to the benefit of the music lovers in Europe.

The appeal is unlikely to force a break-up of the combined Group, even if the European Courts find in favour of the challenge. In the past, successful appeals have only forced the Commission to issue a new ruling in favour of the merger.

(FT, 04.11.04)

Structural Remedies Imposed

Following the initiative of beverage producer, AmBev, to acquire rights to exploit Gatorade, an isotonic drink brand owned by Pepsi, in Brazil, the country's competition authority, CADE, has decided the company must divest its participation in Marathon, another isotonic drink marketed by AmBev.

According to the antitrust authority, the structural remedies are necessary because the transactions would give AmBev a 94 percent share in the market for isotonic drinks. CADE has also decided that the eventual purchaser of Marathon must be independent of both Pepsi and AmBev.

(NERA Economic Consulting, 12.11.04)

DIY Deals Shun Advisers

Investment bankers, already depressed by the dearth of deals, are being dealt another blow: the trend of companies shunning external advisers, turning to their in-house teams instead.

Do-it-yourself (DIY) deal-making has become more prevalent, as chief executives sidestep the hefty fees charged by M&A advisers.

According to Dealogic, 17 percent of announced deals worldwide, in 2004, with a value of US\$500mn and above, were carried out without a financial adviser, compared with 12 percent in 2003.

(FT, 11.10.04)

Deal Creates World No.2

Southern Peru Copper Corporation (SPCC) is to buy mining company, Minera Mexico, for US\$4.0bn. The deal will create the world's second-largest copper company.

Minera Mexico is the biggest mining company in Mexico, and SPCC is one of the largest companies in Peru, and currently the eighth-largest copper producer in the world. The deal is subject to antitrust clearance in Mexico.

(GCR, 17.11.04)

Pharma Merger in Japan

Dainippon and Sumitomo Pharmaceuticals have announced to merge in a deal worth US\$2.2bn in a step towards the consolidation of the Japanese pharmaceutical industry. The new Company will become a consolidated subsidiary of Sumitomo Chemical, which owns 78 percent of Sumitomo Pharmaceuticals.

The merger, to be effective from October 1, 2005, will create Japan's sixth-largest drug group, by revenue. It will have the fourth-highest number of medical representatives in the country.

Behind the merger accord is an increasingly difficult business environment for drug firms, caused by the Government's policy of limiting spending on drugs and growing competition from foreign groups. This outlook had triggered the merger of Yamanouchi, Japan's third-largest drugs group, and Fujisawa, the fifth-largest, in early 2004. Smaller companies have also merged with foreign competitors.

(FT, 26.11.04)

Brussels' Digital Worries

Microsoft and Time Warner face opposition from the EC to their takeover of ContentGuard of the US – a deal that would give them control over key technologies in the market for digital media.

The market for digital-rights' management is widely seen as crucial for the development of digital entertainment, because the technology allows content providers to control the way consumers use online music and films. ContentGuard owns a string of promising patents and other intellectual property rights that are valuable for the development of these technologies.

The Commission fears that this joint acquisition could slow down the development of open interoperability standards. The Commission is likely to seek commitments from Microsoft and Time Warner that would allow competitors reasonable and non-discriminatory access to ContentGuard technology.

(FT, 10.11.04)

Merger Faces Music

The EC is facing a legal challenge over its approval of the merger between Sony Music and Bertelsmann Music Group (BMG). The EC had ruled in favour of Sony and BMG, after acknowledging that it did not have sufficiently strong evidence to oppose the deal, which will reduce the number of big record companies from five to four.

The association of independent record producers and music publishers behind the challenge argue that the merger was unlawful, as it leads to market power and concentration, which would be against choice and diversity.

Indian CG Standards Weak

The corporate governance (CG) standards in India have been reported to suffer from weak enforcement due to overlapping regulatory functions among the Securities and Exchange Board of India (SEBI), the Ministry of Company Affairs and the various Stock Exchanges. The Government, though, denies this view.

Michael Carter, India Country Director, World Bank, has said that the major challenges faced by India in the area of corporate governance are transparency in transaction and matters related to insider trading. According to him, corporate governance laws in India should specify the role of directors on board, make provisions for nomination of independent directors and improve disclosure standards. (BS, 18.10.04)

Facing Trial in Indonesia

The US-based mining company, Newmont Mining Corporation, admitted that it has released tons of mercury into the air and water of Buyat Bay of Sulawesi Island of Indonesia. This came as a setback for the company after it had battled hard over the last six months to defend charges of dumping heavy metals and causing severe health impacts to the local community.

A company spokesperson, Doug Hock, said the mine released 17 tons of mercury into the air and 16 tons into the water over five years. He added, "The government was aware that mercury was being released from the plant". The company, nonetheless, asserted that the plant at no times endangered human or environmental health.

Indonesia plans to put on trial five Newmont executives: an American, an Australian and three Indonesians, accusing them of corporate crimes in connection with the pollution. If found guilty, they could face up to 15 years in jail. Villagers also have filed a US\$543mn lawsuit against the company. Newmont has also been alleged of environmental degradations before in Peru, Turkey, and the US.

(FT, 07.10.04 & CNN.com 23.12.04)

Business Berates Law

European business leaders have attacked the Sarbanes-Oxley Act, stating that the Act goes too far and imposes too many costs and burdens, and kills hopes for European businesses for US listings.

The Act, introduced in response to the recent spate of financial and accounting scandals in the US, tightens corporate governance rules. European business leaders complain that the needs of entrepreneurs are not best served by the Act, and the strictures present a huge problem for the companies.

The other side of the story, as has been stated by Alastair Ross-Goobey, the Chairperson of International Corporate Governance Network, is that the Act offers immense potential for Europe to become a haven for global public offerings, as many businesses presume it 'suicidal' to list in the US. (BS, 19.10.04)

Out of Corporate Ghetto

Corporate social responsibility (CSR) has never been so prominent on the corporate agenda. It has been a subject of hundreds of articles in the business press and a favourite topic in meetings. Yet, the broad view of the civil society is that business performance on CSR has never been worse.

For all the attention to CSR, the only group that seems to have gained substantially appears to be the 'CSR alchemists': the consultants who promise

Fund to Correct Misdeeds

Max Keiser, an 'investment activist', has teamed up with Zak Goldsmith (of the *Ecologist* magazine) to launch a hedge fund in early 2005, with the aim of halving Coca Cola's share prices from its current (US\$40) value in 12 months. This first activist hedge fund in the world plans to donate a portion of its profits towards mending the social wounds of communities inflicted by companies like McDonalds, Starbucks and Microsoft, in addition to Coca Cola.



Keiser, who launched the website www.karmabanque.com few years ago, is planning a showdown on Coca Cola with the 'Coke Boycott', in the wake of the company's misdeeds, as witnessed in India and Colombia.

A hedge fund is a type of private investment vehicle for wealthy investors who choose to pool their money and invest in securities. It sometimes assumes substantial risks on speculative strategies, including 'hedging', or leveraging investments to get the most gain. Hedge fund managers already see a lot of merit in Keiser's strategy.

(ET, 27.11.04 & The Washington Post, 25.12.04)

CSR to all comers. CSR in most companies is in a ghetto: it is a marginalised activity. The amount spent on CSR initiatives generally pales in comparison to the marketing budgets; in some cases more is spent on touting the good works than on doing them.

Therefore, in reality, the social effects of businesses are left unexamined. There is a need for CSR to be mainstreamed. No companies have got it right yet, but a few are coming close. Root-and-branch changes are yet to come, but what is significant is the fact that some businesses perceive identifying and fulfilling societal expectations as crucial to their business model. (FT, 08.12.04)

Tokyo Tough with Rules

The Tokyo Stock Exchange is planning to toughen disclosure rules, following a flurry of reporting scandals, by forcing executives to certify company financial statements. The initiative would bring reporting requirements in Japan close to those of the US.

Although Japan has witnessed cases of corporate fraud and deceit, the country, instead of introducing sweeping legislation, has been pushing a series of fragmented regulatory changes. The new rules would make it obligatory for executives to submit sworn statements on the veracity of financial statements from early next year or face de-listing.

Market observers have welcomed the move, anticipating it to promote accountability. Some opposition, though, has been seen from the government quarters criticising this tendency of following the US pattern of governance. (FT, 12.11.04)

Donating Generously

Responding to the need for immediate relief and the subsequent reconstruction requirements for the victims of the Asian Tsunami disaster, companies across the world have poured funds into the relief effort, supplementing government donations with tens of millions of euros in financial aid, food, medicines and supplies.

On December 26, 2004, an earthquake, under the Indian Ocean off the Indonesian coast, led to a massive Tsunami that annihilated over 140,000 lives in Indonesia, Thailand, India, Sri Lanka and other countries facing the Indian Ocean; separated thousands of people from their homes and families; and damaged billions of dollars worth of property. The challenge that lies ahead is to distribute the food, medicines and other services that have been collected, through a co-ordinated process so that it reaches everyone in need, even in the remotest and most inaccessible parts.

(Various Sources)

Business Responsibility in Development

Corporate responsibility could be one of the keys to the Millennium Development Goals (MDGs). It is the quality, not just the quantity, of business activity that determines whether companies contribute to economic development and sustainability, locally.

Many businesses are weak on managing their impact on, and the economic development of, disadvantaged communities where they operate. There are a handful of companies that have started grappling with this dilemma in terms of how their economic footprints lead to social and environmental benefits for the disadvantaged.

This interface between business and economic development at the grassroots level has been examined in a recent study, jointly undertaken by Accountability and Business for Social Responsibility. *(CSR Wire, 17.12.04)*



Responding to Hostile Bid

Fear that foreign investors are extending a growing baleful influence over South Korean industry is running high in the business circles of South Korea. Companies like SK Corp have embarked on a campaign, lobbying the public to buy their shares. SK Corp's move is in response to the hostile bid by a Monaco-based investment fund to take it over. The Chamber of Commerce and Industry is supporting the campaign.

An acrimonious dispute is brewing between family-run business houses – *chaebol* — and foreign investors. The *chaebol* conglomerates are bristling at foreigners' presumptions in telling them how to run businesses that have been in the family for generations. Even lawmakers are rallying with the *chaebol*, calling for legal protection against foreign bids.

It has been rumoured that to quench the anti-foreign sentiment, the government might limit the number of foreign directors allowed on board. The first step is in sight with the Financial Supervisory Commission, the financial regulator in the country, considering imposing residency requirements on foreign directors of domestic banks. *(FT, 24.11.04 & 29.11.04)*

Auditor Rotation Undesirable

Asking companies to switch auditors every few years threatens the quality of financial reports and may lead to the concentration of audits in the hands of the 'big four' firms, suggests a report by the European Federation of Accounts.

After a wave of corporate scandals, the European Commission had proposed in March 2004 that companies in EU rotate auditors. The current report that compiles the opinion of regulators and experts around the EU challenges the Commission's proposal.

The report cautions that mandatory firm rotation could have a negative impact on audit quality through loss of cumulative knowledge and the difficulty in maintaining industry specialisation. *(BL, 20.10.04)*

Chinese Governance Drive

The Chinese Government recently launched a governance drive as a means of dealing with the aftermath of the China Aviation Oil trading crisis.

China Aviation Oil has recently been caught in a speculative oil-trading debacle that has led to a loss of US\$550mn. It has emerged that there were few, if any, efficient controls on senior management, which allowed them to use company funds to place high-risk bets on the price of oil futures. The company is listed in Singapore, but is, in majority, owned by the Chinese state-owned enterprise (SOE), Aviation Oil Holding Company, the country's designated supplier of aircraft fuel.

Observers believe that Beijing will subsequently push ahead a raft of legislative measures, especially focusing on ways to regulate the governance of SOEs. China's giant SOEs have been criticised for their unwieldy structures, their lack of accountability and transparency, and overly politicised culture. *(Ethical Corporation, 17.12.04)*

Unocal to Settle Suit

Unocal has said that it has reached an agreement in principle to settle a long-standing action based on allegations of corporate complicity in the use of enslaved labour for constructing the Yadana gas pipeline in Burma.

According to the lawyers representing villagers from the area, soldiers committed atrocities in the process of clearing the pipeline's route, on behalf of the company. The action was being brought under the

contentious Alien Claims Torts Act, and was seen as a key test whether multinational corporations could be held responsible in US courts for alleged violations in the developing countries.

Unocal had consistently denied that it was responsible for any human rights' violations during the pipeline construction. *(BR, 13.12.04)*

EC on Corporate Governance

The European Commission (EC) has adopted two non-binding recommendations on the disclosure of directors' remuneration and the role of non-executive directors. The recommendations are meant for companies with shares or bonds listed within the European Union (EU), regardless of whether they are incorporated in one of the Member States.

The recommendation concerning directors' pay includes an annual statement of policy about their remuneration; discussion on the same during the annual general meeting of shareholders; disclosure of remuneration details of individual directors; and prior approval in the annual general meeting for variable remuneration schemes.

The Commission has also issued guidelines concerning the role of independent directors, which include strengthening of non-executive directors' role; independence criteria and suitable qualifications for non-executive directors; supervisory board with a sufficient number of non-executive or supervisory directors for independent oversight; and creation of committees to resolve conflicts between shareholders and the management.

Member States have been invited to take measures to promote these recommendations by June 30, 2006. *(Mercer Human Resource Consulting, 19.11.04)*

Diamond: Africa's Best Friend?

Appealing to Belgium's High Diamond Council (HDC) to make diamonds 'Africa's best friend', South African President, Thabo Mbeki, has urged the diamond merchants to change the world's negative view of minerals as a cause of instability, corruption, poverty, environmental degradation and long-running conflicts in Africa.

Mbeki added that diamonds are important to Africa as they provide employment, foreign exchange and tax revenues. He highlighted the importance of restructuring and transforming the multimillion-dollar diamond industry in Africa to enable it to embrace good corporate citizenship, be responsive to poverty alleviation, reinforce economic empowerment and be a leading force in value-adding investments in Africa. *(BuaNews, 16.11.04)*

CalPERS Eyeing Real Estate

After dipping a toe in the Indian securities market, CalPERS (California Public Employees Retirement System) is now looking for opportunities for investment in the Indian real estate.

To begin with, CalPERS is looking at investing in commercial real estate in urban centres. The continuous migration of population to urban areas is leading to development of attractive opportunities in housing and commercial real estate projects.

CalPERS have invested over US\$100mn in the Indian equities market over the last few months. The fund has also made an investment of US\$5-10mn in private equity in India. CalPERS' decision to invest in India is expected to show the way for other public pension funds to look at India as an investment destination.

(BL, 04.11.04)

Yamato in Legal Action

Yamato Transport, a parcel delivery company, has filed an injunction against Japan Post in a dispute that foreshadows the fierce turf battles likely to develop, as the country's huge postal system is privatised. The point of contention is the pick-up and delivery of parcels, which Yamato claims will be affected, following the tie-up of Japan Post and Lawson, the convenience store chain.

Yamato contends that the deal breaches anti-monopoly laws. It says that Lawson does not pay commercial rents to set up its convenience stores inside post offices, and that the mailboxes placed inside Lawson stores, from which Japan Post collects letters free of charge, constitute a waiver of fees.

According to Yamato, private sector transport firms went to great lengths to create a network capable of delivering parcels to every household nationwide. However, Japan Post is now intruding into the market through its contract with Lawson.

(FT, 30.10.04)

Pollution Hurts Investment

The palm-fringed bay in northern Indonesia has become the site of a bitter tussle between Newmount Mining and environmental groups that claim that the world's biggest gold producer has polluted the bay and made villagers ill. For Denver-based Newmount, which denies any wrongdoing, the dispute is threatening to embroil it in a long-drawn-out legal battle.

But the wrangling could also deal another blow to Indonesia's fragile investment climate. Approvals for foreign direct investment have tumbled from

US\$34bn in 1997 to a tenth of that in 2004, largely due to corruption and the legal harassment of foreign companies.

(FT, 01.10.04)

Pak's Telecom Privatisation

Pakistan Government is likely to decide the fate of the country's main telecom utility, Pakistan Telecommunications Corporation (PTCL) for privatisation.

The plans to privatise PTCL come at a time of unprecedented activity in the sector. The sale of two new mobile licences earlier this year for about US\$582mn, or almost six times the value expected by telecom analysts, has attracted a number of prospective new investors to the country.

In addition to the challenge posed by new cellular providers, PTCL's market share is under threat from private companies offering phone cards for cheaper long-distance calls. Despite these issues, PTCL still faces government interference in its affairs.

PTCL's further expansion plans have prompted fresh concerns that senior government officials – who, in the past, have used the company as a resource for patronage – maybe hoping to delay its privatisation. But analysts warn that any further delay would not be in PTCL's best interest, given the increasingly tough market conditions.

(FT, 08.10.04)

Malaysia Tightens Water Sops

Malaysia has imposed tough new conditions on the privatisation of water utility assets, as it seeks to make more transparent the sale of state assets to reduce alleged cronyism and corruption.

The move comes as the country is preparing to award its biggest privatisation contract — a 30-year concession for water services in the densely populated Klang valley area. The government seeks to end its reliance on state-run water operators, which have run up huge debts.

The multimillion-dollar deal is part of a M\$50bn (US\$13bn) government programme to improve water and sewage services in one of the country's biggest infrastructure projects.

The water privatisation programme was, however, criticised for awarding contracts without open bids and giving generous terms to the new concession operators, when it was conducted under the previous government.

The Klang valley concession is seen as a test of the new government's ability to introduce more competition in the awarding of contracts.

(ET, 01.12.04)

Turk Telecom for Sale

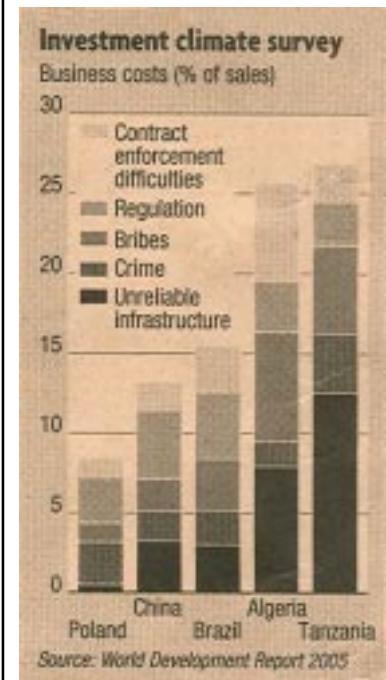
Turkey launched the tender for the block sale of a 55 percent stake in telecommunications company, Turk Telecom.

According to Metin Kilci, Chairman of the Privatisation Administration Board, firms with dominance in the GSM sector will be prevented from entering the bidding independently, although they will be allowed to participate in consortiums.

(NERA Economic Consulting, 04.12.04)

Investment Climate

Developing countries must take action to reduce corruption and cronyism in order to improve investment climate and promote growth and poverty reduction, said the World Bank in its annual World Development Report.



The report, based on the survey of more than 30,000 companies in 53 developing countries, said that the costs associated with crime, corruption, over-regulation, weak contract enforcement and inadequate infrastructure could amount to more than a quarter of a company's turnover, or more than three times what companies typically paid in tax.

Improving the accountability of governments and creating greater transparency would reduce rent-seeking and obstacles to entry for new companies.

(FT, 29.09.04)

Indo-Mauritius Treaty

A renegotiation of the India-Mauritius Double Taxation Avoidance Convention (DTAC) is on the cards.

India wants to have safeguards to minimise “treaty shopping”, i.e. when foreign investors of a third country route their investments through Mauritius taking advantage of the Indo-Mauritius DTAC. DTACs can be re-negotiated only if both countries agree to do so.

Incorporation of the ‘limitation of benefit clause’ in DTACs – where the benefit of the treaty is limited to qualified residence in either of the states – could curb the practise of treaty shopping.

India has, in fact, been pushing for the inclusion of this clause in the DTACs that are being negotiated for the first time.

(ET, 11.12.04)

Kabul Seeks Hardy Investors

During the past three years, traders have poured into Afghanistan’s busy bazaars. About a dozen banks have set up shops in Kabul during the past year, and two wireless telecom providers have invested more than US\$100mn.

The Afghan Investment Support Agency (AISA), a government organisation set up as a “one-stop shop” for investors, has registered nearly US\$500mn in new private sector investment since November 2003. More than 99 percent of the investments registered were less than US\$20mn and 85 percent were less than US\$1mn.

To smooth the way for investors, AISA has cut the wait for an investment license from weeks or months to five to six days.

However, Afghanistan remains challenging for anything but the most hardy investors. The country needs to build institutional support for a market economy:

a currency that is stable and trusted, a court system that works and property rights that are secured. There appears to be risks, but there are also tempting rewards in the country’s fast growing population.

(FT, 30.09.04)

Conoco Gets Lukoil Stake

ConocoPhillips agreed to acquire a minority stake in Russia’s Lukoil in a landmark deal that could also give the US oil group first-mover advantage on developing Iraq’s energy reserves.

The third largest US oil and gas group is the first to take an equity stake in a Russian oil group after winning the auction for the government’s remaining 7.96 percent stake in Lukoil with a bid of US\$1.99bn. It also plans to acquire an additional 2.4 percent and will be allowed to lift its share to 20 percent.

The proposed deal is Russia’s largest privatisation by value. Analysts said the move would be seen as a validation of the Russian Government’s attempts to improve the business and investment climate inspite of its ongoing battle with the owners and management of Yukos.

(FT, 30.09.04)

MNC Monopoly at Peak

Nearly one-third of the world’s top 500 enterprises chose to get into China by acquiring domestic enterprises. Among the channels used to select domestic enterprises is one where a multinational acquires two or more domestic enterprises in one industry at the same time. Back in 1998, through an array of M&As, Kodak obtained almost all manufacturers of developing and printing materials and photographic apparatus in China.

Brand control is also an important means through which multinationals gain

superiority quickly in China. The most typical example is China’s dairy packaging industry, which is dominated by foreign enterprises now. In beverages and concentrated solutions, Coca Cola takes up a market share of 70 percent, holding a position of explicit monopoly. In Suzhou, American and German enterprises make up nearly half of the electronic and communication equipment manufacturing industries.

To capture the anti-virus software market, Symantec, the maker of Norton anti-virus software, undercut its competitors, which played havoc with numerous domestic enterprises. The price of Norton has since gone up by almost 400 percent. Monopolistic behaviour is said to exist in the retail sector as well, where foreign enterprises take up more than 80 percent of the market.

The implicit monopoly held by multinationals has caught the attention of competent authorities in China, and the formulation of Chinese antitrust law is underway.

(China Economy Net, 04.12.04)

Govt. move for SA fixed-line

Telkom, South Africa’s fixed-line monopoly, has been criticised for its high pricing structures and fees by telecom companies and subscribers in that country. This prompted the South African Government to open up the sector to foreign players.

Following this, the Government had permitted FDI in the country’s second network operator that would give the company a mandate to develop and operate national long-distance and fixed-line networks. India’s Tata Group is among the bidders for the 26 percent stake.

(BL, 15.11.04)

India: Third Best FDI Destination

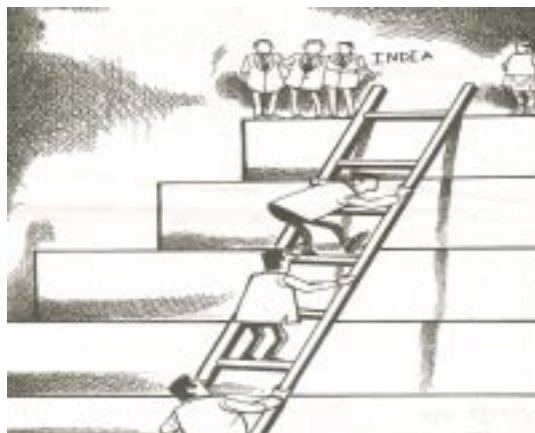
India is threatening to displace the United States as a destination for foreign direct investment (FDI), according to the latest FDI confidence index, an annual survey of executives from the world’s largest companies, conducted by management consulting firm AT Kearney.

In its list of top 25 FDI destinations for 2004, India has been placed at number three, behind China and the US. In 2003, India was ranked sixth in the list. Among manufacturing investors, for the first time, India displaced the US to become the second most attractive FDI location.

As China and India forge their leading positions in global economy, the US and the rest of the world will face severe competitive pressures from these two dynamic and rapidly evolving economies.

The survey suggests that investors favour China over India for its market size, access to export markets, government incentives, favourable cost structure, infrastructure and macroeconomic climate.

(BS Corporate Bureau, 13.10.04)



Pre-empt Deregulation

Tokyo Electric Power (TEPCo), the world's biggest utility, will lower its average electricity charges by 5.21 percent. Observers see this move as a pre-emptive strike against competitors ahead of further deregulation in the electricity market in 2005.

The cost cut, which is expected to be followed by Japan's eight other regional electricity providers, could foreshadow a steady reduction in Japan's electricity prices, in spite of criticism that deregulation is taking too long.

The move by TEPCo and other regional suppliers is being interpreted as a ploy to drive small competitors out of business. Independent suppliers, lacking scale and forced to rely on access to a grid controlled by their competitors, have struggled to compete with big utilities.

(FT, 01.10.04)

Telecom Regulators Sued

Softbank, Japan's broadband and internet service group, has filed a suit against the country's telecom regulator, claiming that the regulator was unfairly allocating mobile phone spectrum to existing carriers and obstructing its plans to launch a competing mobile service.

Softbank, which recently acquired Japan's third-largest telecom operator, is trying to block plans by the regulator to allocate additional spectrum to NTT DoCoMo and KDDI, the country's two market giants. It alleges that the telecom regulator and former officials from the regulator, now employed at DoCoMo and KDDI, had negotiations behind closed doors to allocate additional spectrum to the two Groups.

In another similar move, PCCW, Hong Kong's dominant fixed-line operator, has sued the territory's regulator for allowing rival companies to use its network to offer cheap internet-based calls. While PCCW wants rivals to pay to use its network, the Office of the Telecommunications Authority (OFTA), has so far allowed rival operators to use PCCW's network for VoIP services free, maintaining that the service is legal.

(FT, 14.10.04 & 07.10.04)

Chinese Ministry in Court

Aux Group, a Chinese private company that produces large electrical goods, has launched a landmark lawsuit against the powerful Ministry of Information Industry (MII) over its policy of restricting access to the mobile phone market.

The Ministry issued a limited number of licences for handset production, forcing Aux to 'rent' a licence from one of the lucky recipients and barring it from selling the phone under its own brand.

Aux claims the refusal of the MII to allow it to sell wireless handsets under its own brand violates a law on administrative approvals that took effect in July 2004. The law, part of a raft of legislation intended to bring China into line with the requirements of membership of the World Trade Organisation, limits the sectors controlled by the state.

(FT, 25.10.04)

Financial Regulator in Action

South Korea's financial regulator, Financial Supervisory Service (FSS), has announced it would investigate Citigroup's Korean operations, following Japan's decision to shut the US Group's private banking unit.

The world's largest financial service provider suffered a serious blow to its business and reputation when it was ordered by Japan's Financial Services Agency to close its private banking operations in that country for violating banking laws.

An official at the FSS added that the regulator would probe foreign exchange deals at Citibank, a unit of Citigroup, for possible links with money laundering and domestic fund outflows through the US bank.

(FT, 05.10.04)

Austrian Market in Order

In its interim report, the Austrian Federal Competition Authority (FCA) noted that the price increases in electricity sector reflect developments on international electricity exchanges. The report, apparently, does not find any 'smoking guns' or other traces of hard-core illegal practices.

The report, in collaboration with the energy regulator E-Control, was requested by the Federal Ministry for Economic Affairs and Labour, in response to public pressure over the high cost of electricity.

The report, however, notes that local suppliers in each region have maintained their strong positions, despite full liberalisation of the market.

(GCR, 10.12.04)

Regulators' Divergent Views

The Portuguese antitrust body has said that it will advocate the separation of the networks of the major telecom operator in the country, Portugal Telecom (PT), in its analyses of the telecommunications sector.

This view runs contrary to the opinion expressed by the sectoral regulator, Anacom, which stated that, currently, it is too early to impose such a structural measure and market evolution will show whether it is necessary.

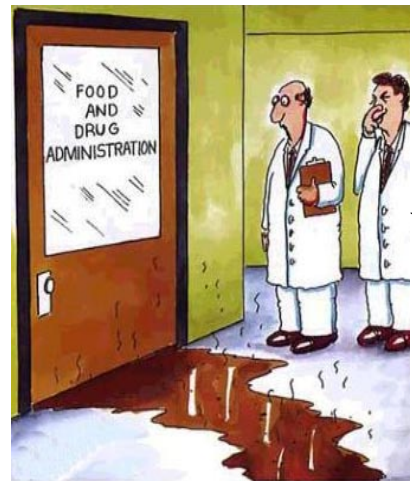
The Portuguese legislation dictates that in the event of a conflict of decisions between two regulatory bodies, neither decision prevails, but appeals can be submitted to the court, which has the final say.

(DE, 02.12.04)

FDA Restructuring Demanded

Pressure is building for deep structural changes within the Food and Drug Administration (FDA), the US medicines' regulator, to bring more rigorous scrutiny of drugs. The FDA was caught in a "classic conflict of interest" because its researchers, who worked with companies on drug approvals, had authority over the agency's drug safety office.

Following the testimony, the FDA faced strongest calls yet to reorganise itself, giving more authority to the office of drug safety. Several senators support the proposal for establishing an independent office of drug safety. The proposal would remove safety researchers from under the authority of the FDA's new drug office.



Criticism of the FDA's safety mechanisms and allegations of a "too cosy" relationship with drug makers came after two high-profile safety failures this year, the Vioxx withdrawal and increased suicide risk found in children on anti-depressants. In both instances, FDA safety researchers complained that superiors at the office of new drugs worked to suppress their findings.

(FT, 20.11.04 & 07.10.04)

Restrict Dominant Position

The Portuguese antitrust authority has recommended that the Government implement policies in order to restrict the market power of Galp, a Portuguese energy company, in the retailing of oil products.

Galp is a monopoly in the refining of oil products in the Portuguese market and has a dominant position in both (i) the use of the port facilities of Sines and Matosinhos and (ii) tanking for the storage of oil products.

The authority has suggested that port facilities should be tendered through public bidding, and the storage facilities should be subject to an open access regime to any interested company. *(DE, 18.11.04)*

Cracking Audit-Tax Links

Regulators are preparing to crack down on the ability of accounting firms to sell lucrative tax services to their audit clients. The Public Company Accounting Oversight Board (PCAOB), the US accounting watchdog, is close to proposing that firms should not be allowed to provide tax services to executives at companies they audit.

In the wake of a crackdown on tax shelters by the Internal Revenue Service, the PCAOB is trying to prohibit accounting firms from supplying certain avoidance strategies to audit clients that the regulator regards as abusive. *(BS, 23.11.04)*

China's Software Curbs

China is poised to issue rules about the extent to which government departments must favour local software, raising concerns that some overseas vendors could be cut out of the large state procurement market.

Software procurement has emerged as a hot topic after the purchase of a reported US\$3.5mn worth of Microsoft software by the Beijing Municipal Government. Chinese rivals claim they were not given a chance to bid and local media questioned the decision to support a US monopolist, rather than local suppliers.

Draft policy details suggest that government buyers will be ordered to distinguish between software that is "domestic", "non-domestic" and "preferred non-domestic". Departments will have to apply for special permission to buy "non-domestic" software. *(FT, 26.11.04)*

Seeking Level Playing Field

Telenor, the Norwegian telecommunications company, has called for a 'level playing field' in Thailand's mobile industry and urged the newly-established Thai telecom regulator to swiftly create a fair new interconnection regime.

Telenor holds a 40 percent stake in DTAC, Thailand's second-largest mobile operator, which has been disadvantaged by interconnection fees that its rival, Advanced Info Systems, founded by Prime Minister Taksin Shinawatra, is not required to pay.

Thailand's 2001 telecom law requires the establishment of a non-discriminatory interconnection regime. But, controversy over nominees for the new regulatory body, the National Telecom Commission, has delayed the process. With the Commission now appointed, and ready to start work in early 2005, Telenor is hoping for quick adoption of an interconnection regime that will be fair to all players, including TA Orange and Hutchison. *(FT, 26.10.04)*

UK Operator under Check

Ofcom, the UK telecommunications regulator, ordered the BT Group to implement sweeping behavioural and organisational changes, in a bid to force the UK's dominant telecom operator to deliver equivalent wholesale services to rivals.

In the UK, rival telecom operators of BT have long complained that they do not have access to the same wholesale services that BT's network provides to BT Retail, the group's consumer arm.

The decision could herald tougher regulations for BT, which has operated under the same regulatory regime since it was privatised in 1984. Once implemented, the new rules will enable rival retail telecom suppliers to compete more aggressively for clients. *(FT, 19.11.04)*

Fuel Under Fire

Under a package of International Monetary Fund endorsed reforms, the Nigerian Government is set to implement price reforms, which would raise gas prices by eliminating fuel subsidies. Yet, low gas prices are currently the only economic benefit for cash-strapped Nigerians, who see price increases as another kickback to local elites and foreign oil companies.

The proposed reforms have caused domestic turbulence. Unions launched a series of paralysing strikes, with more promised. The strikes called into question the prevailing orthodoxy from international financial institutions that economic reform and poverty-reduction go hand in hand.

It is perceived economic reforms may benefit Nigeria's economy in the long run. However, the Government has undermined its case by ignoring domestic opposition. *(Yale Global Online, 29.10.04)*

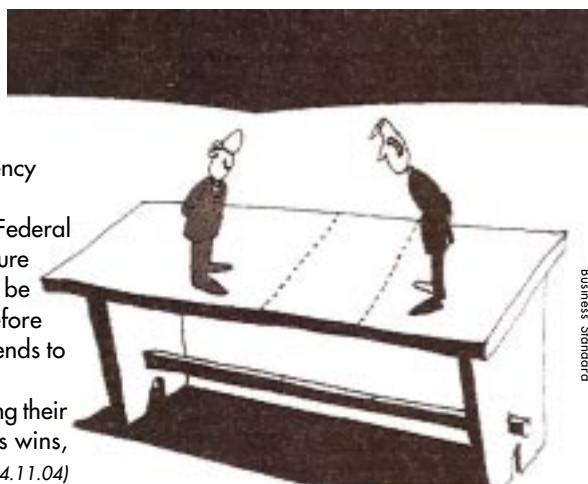
Who has the Power to Regulate Telecom?

The Nigerian Government has asked the Supreme Court to determine whether the Lagos State Government had the power, authority and constitutional capacity to legislate on the regulation of telecommunication operations in any part of the State.

The suit anticipated the promulgation of the Lagos Infrastructure Maintenance Agency Bill, which seeks to establish a state agency charged with various functions to regulate the telecom sector.

The Supreme Court refused to consider the merits of the Federal Government's suit, on the grounds that the Government was premature in expressing its views and should have waited for the Bill to be adopted as a law and assented to by the State Governor before challenging it. The Nigerian Government has indicated that it intends to file a new suit, now that the law has been promulgated.

Meanwhile, telecommunication operators in Nigeria are keeping their fingers crossed, as it is entirely possible that, if the State of Lagos wins, other States will follow suit. *(ILO, 24.11.04)*



Cable Television Monopoly Case Study: An Investigation by the Thai Trade Competition Commission

Deunden Nikomborirak*

Introduction

Thailand is the first country in Southeast Asia to have a competition law that dates back to the year 1999. One of the first three complaint cases that were filed at the time, related to tariff hike in the cable television service. All eyes were on this particular case because it marked the first challenge facing the nascent competition authority. The Competition Commission's ruling on this matter not only proved its ability (or lack thereof) to effectively and impartially deal with competition cases, but also served to establish its jurisdictional boundary in relation to other relevant regulatory authorities.

Background

The nation-wide cable television service in Thailand became a monopoly in February 1998 as the two operators, namely, the International Broadcasting Corporation (IBC) and the United Television Network (UTV), merged to become the United Broadcasting Corporation (UBC). The merger was approved by the Mass Communication Organisation of Thailand (MCOT), the state enterprise that holds television licensing authority in Bangkok¹. The main justification for the merger was the need for the operators to consolidate, given the cost hike following a sharp devaluation of the baht in June 1997, which marked the beginning of the country's financial crisis that spread globally. It is not surprising that the merger went undeterred by the regulatory body at the time, given that the MCOT itself holds a financial interest in the cable television business through a revenue-sharing arrangement.

A little over a year after the merger, UBC raised its monthly subscription fee for its "gold package" (the subscription package with the largest number of channels) by a whopping 22.47 percent, from 890 baht (US\$23.42) to 1090 (US\$28.68), in May 1999. Following the complaint filed by the Consumers Foundation, an expert subcommittee was established to probe the anti-competitive conduct of the cable monopoly, UBC. Its mandate was to investigate whether the cable monopoly was abusing its market power in general and whether the price increase was excessive. This article briefly captures the key findings in the investigation report of the subcommittee.

Main results and findings

Anti-competitive conduct probe

The subcommittee applied a comparative analysis in assessing the market conduct of the cable monopoly by comparing market behaviour of service providers before and after the merger in 1997 (see graph 1). It found that service choices became increasingly limited, albeit gradually.

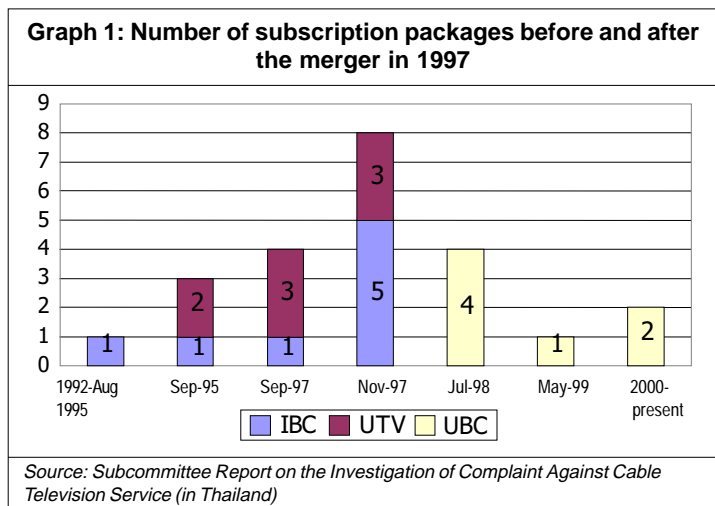
During 1995-1997 when both operators, IBC and UTV, were competing, consumers were presented with at least four choices:

- mini-package at 400 baht,
- MMDS package at 500 baht (signals transmitted through terrestrial broadcasting),
- basic package at 790 baht, and
- premium package at 1090 baht.

Shortly after the merger, UBC, the merged entity, started to rationalise its services by cancelling the lowest price option for

new subscribers. For incumbent subscribers, the operators continued to provide the service but removed the most popular channel, HBO, from the package. This can be seen as a move to force subscribers to switch to more expensive packages. However, to appease customers' discontent, it offered the most expensive package with all available channels for a lower price.

Indeed, many subscribers were content with the sweetened offer, at least as long as it lasted, which turned out to be only two months. In August 1998, UBC raised the price tag of its "all channels" package by 100 baht, from 890 to 990, for new



subscribers. In February 1999, all MMDS subscribers were denied services of prime channels, i.e. HBO, ESPN, Discovery, and CNN. The operator quoted widespread piracy as the reason for the cancellation of services.

Subscribers were given three months of free services before the MMDS service was cancelled altogether. This was followed by further rise in the price of the "all channels package" by 100 baht, from 990 to 1090 baht, such that in only nine months between August 1999 - May 2000 the price went up 22.4 percent. Again, to dampen the potential customers' discontent, a "silver package" with 10 channels for a lower price of 790 baht was offered as an option, similar to the package offered by IBC before the merger. However, the package offered was obviously much inferior as it did not include any of the prime channels such as CNN, HBO, and ESPN. And again, the measure taken to lessen the initial impact of the price rise was phased out within six months, after leaving both old and new subscribers with only the single most expensive choice, the "gold package" with all the channels.

The subcommittee found that the failure to provide the silver package constituted a breach of the concession contract between the MCOT and UBC, which required the service provider to offer both packages, although the specific content of each package was not specified. Interestingly, during the investigation and before the subcommittee report was released, the silver package was suddenly re-introduced, although the content of the lower-cost package was significantly inferior to that offered before the merger. Nevertheless, the lower-priced package allowed certain subscribers who needed the service simply for better reception in the crowded city, to save costs on unwanted pay programmes.

The Tariff Probe

The subcommittee was given the mandate of determining whether the post-merger tariff increase was justified, and if so, whether the pending further increase at the time was warranted. The task was particularly difficult, as it required the examination of costs. As a competition authority is not a sectoral regulatory body, it does not have the capability of scrutinising costs' information. Hence, cost figures were taken as given from the income statement and the balance sheet of the private operator as submitted to the Stock Exchange Commission.

In order to assess whether the tariff increase was justified, the subcommittee calculated gains from the merger and post-merger tariff and fee hikes against the additional cost burden borne by the operator, resulting from the devaluation of the baht and the company's operational loss as shown in table 1.

According to the income statement, the cable service provider recorded an operational loss of 2,217 million baht in 1997. The merger generated 1,350 million baht of annual cost savings. The additional revenue generated from the post-merger increase in monthly subscription, equipment rental fee, installment fee etc. was estimated to be 800 million baht, resulting in a total revenue gain of 2,150 million baht per annum.

When additional revenues and cost savings were netted against exchange rate-related costs, the income was to improve by 827 million baht in 1998 and 1,122 baht million in the following year. However, the service provider's operational bottom line was estimated to continue to remain in the red, somewhere between 1.0-1.3 billion baht per year, as the declared net loss before the merger was fairly high.

Item	Value (million baht)
1. Cost savings from merger	1350
2. Additional revenue from the increase in monthly subscription fee, installment fee and monthly equipment rental.	800
3. (1) + (2)	2150
4. Operational loss in 1997	2127
5. Cost increase due to exchange rate	1323/1028
6. (4) + (5)	3450/3155
7. Additional revenue (3) - additional cost (5)	827/1122
8. Additional revenue (3) - additional cost (5) - operational loss in 1997 (4)	(-1300/-1005)

Source: Subcommittee report on the Investigation of Complaint Against Cable Television Service (in Thailand)

The Decision of the Trade Competition Commission

The Trade Competition Commission decided that since the cable television service is a regulated one, the matter should be handled by the *de facto* regulatory body, the MCOT, which is responsible for approving tariffs and ensuring licensees' compliance to the terms of the license. The case was therefore transferred, after which one never heard about it again.

Conclusion

The cable monopoly case provides us with a few lessons. First, in the absence of a merger control, unchecked increase in

market concentration can lead to many competitive problems that may easily overwhelm the competition authority, in particular a nascent one. Second, the jurisdiction of a competition authority and that of a regulatory body needs to be clearly defined, otherwise a competition case involving an undertaking in a regulated industry may end up in no man's land. Third, a regulatory regime that harbours conflict of interests between the regulator and the regulated cannot guarantee consumers any protection. In such a case, a competition authority should perhaps be provided with broader authority, unless, of course, it is also captured by private or political interests.

Type of subscriber	Tariff before merger September 1997	Tariff at the time of investigation May 2000	Effective tariff increase (%)	Current Tariff July 2004
Mini-package	400	<i>Gold package only:</i>	200-212	<i>Gold package:</i>
MMDS package	550 (province) 800 (Bangkok)	1190 for cable 1250 for DsTV	116-127 49-59	1562 for either technology
Basic package	890-1130		5.3-40	<i>Silver package:</i> 928 for either technology
Premium package	1180-1200		- (4.1) - +5.9	

Source: Author's re-arrangement and calculations made on data available in the subcommittee's report

The report recommended that each cost component be thoroughly scrutinised by the responsible regulatory body, the MCOT, before the pending tariff raise was given a green light. Such a cost probe never took place. Subsequent price increases were approved by the MCOT simply on the basis that the company continued to show a loss in the income statement. Since the time of investigation, the price has gone up by approximately 25 percent as shown in table 2.

Assessment of the Impact on Consumers

The subcommittee also examined the impact of the tariff increases and the cancellation of lower-priced service packages to consumers. Table 2 above summarises tariffs that customers had to pay before and after the merger. As can be seen, the greatest effect was on subscribers of low-price packages, i.e. the mini-package and the MMDS in the province whose services were discontinued and were thus forced to subscribe to the most-expensive package, the gold package.

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Nikomborirak, Deunden (2000), Case Discussion on the Cable Television Monopoly in Thailand, paper presented at the World Bank Course on Competition Law and Policy, Singapore, May 14-21, 2000.

Endnote

- 1 The licensing authority is presently suspended pending the establishment of the National Broadcasting Commission, the independent regulatory body established by law.
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Multinational Corporations under Chinese Anti-monopoly Law

Wang Xiaoye*

With the implementation of economic reforms and open policy, transnational corporations have made large-scale investments in China. However, some foreign investors have been becoming a little uneasy, because of a recent report that warned that foreign business giants were building monopolies in China.

After a year of investigation, the State Administration for Industry and Commerce's Fair Trade Bureau published a report entitled "The Competition-restricting Behaviour of Multinational Companies in China and Countermeasures."¹ The report gave specifics. For instance, Microsoft's operating system software and Tetra Pak's packaging materials, each have 95 percent share of the Chinese market. Eastman Kodak, which formerly held more than 50 percent of China's roll film market, is expected to further consolidate its market dominance after taking over 20 percent share of its sole major Chinese rival, Lucky Film Corporation.

According to the report, some transnational companies have been using their dominant role in technology, brand recognition, capital and management to suppress competitors and maximise profits from the Chinese market. For example, on the eve of the release of WPS97, a set of computer programmes developed by a Chinese company, a multinational hurriedly brought forward its version of the same kind of product at much lower prices. To ensure dominance, some multinationals carry out sweeping mergers and acquisitions (M&As) to absorb their major competitors.

From the above-mentioned report, one should not jump to such a conclusion that the Chinese anti-monopoly law is only directed against the multinational corporations. But, no doubt, this report has shown grave concerns of the Chinese Government over the foreign-controlled giants in the domestic markets. China's admission to the World Trade Organisation (WTO) and the further opening up of the Chinese market to the outside world means that more and more transnational corporations will enter. In addition to the high-level technologies, abundant financial resources, world famous trademarks and strong sales networks, the multinational corporations can also rely on various supports from their parent corporations.

In order to prevent transnational corporations, both from monopolising the market and from abusing dominant market positions, China urgently needs to adopt anti-monopoly law. Since the anti-monopoly law also targets the abuse of dominant positions, the adoption of this law will serve as an important tool for China to check the influence of the transnational corporations. The report should, therefore, be regarded as a push for Chinese anti-monopoly legislation.

Out of the concerns over the negative influences of the multinational corporations on competition, the Chinese Government has promulgated "The Provisional Rules on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors" last year.² Its Article 19 stipulates: If any merger with and acquisition of a domestic enterprise involves any of the following circumstances, the investors shall submit a report thereon to MOFTEC³ and SAIC⁴: (1) the business turnover in the Chinese market of a party to the merger or acquisition in the current year exceeds RMB1.5 billion (Chinese currency; US\$100 = 830 yuan RMB); (2) the aggregate number of mergers and acquisitions of domestic enterprises in the relevant industry in China within one year exceeds 10; (3) the share of the Chinese market of a party to the merger or acquisition has reached 20

percent; or (4) the merger or acquisition will result in the share of the Chinese market of a party to the merger or acquisition reaching 25 percent. Even if no circumstances set out in the previous paragraph exist, MOFTEC or SAIC may still require foreign investors to submit a report, after any competing domestic enterprise, relevant authority or industrial association so requests, and MOFTEC or SAIC believes that the merger or acquisition by foreign investors involves an enormous market share or there exist any other major factors which may substantially influence market competition, the national economy and people's livelihood or the economic security of the state. "A party to the merger or acquisition" mentioned above shall include any affiliates of the foreign investor.

According to Article 20, if any merger with or acquisition of domestic enterprises by a foreign investor involves any of the circumstances set out in Article 19 hereof, and, according to MOFTEC and SAIC, may result in excessive concentration so as to jeopardise fair competition and harm consumers' interests, MOFTEC and SAIC shall, within 90 days from the date on which all the documents submitted are received, jointly, or upon consultation, solely summon the relevant departments, institutions, enterprises and other interested parties to a hearing, before deciding whether or not to grant the approval in accordance with the law. The implementation of Article 20 needs detailed rules, for example, for interpreting "excessive concentration" or "fair competition". Due to the lack of such detailed rules, the Provisional Rules on Mergers have not been used in real cases so far.

Obviously, the Provisional Rules on Mergers is aimed to control the market power caused by transnational corporations in the Chinese market. However, along with economic globalisation and the wave of transnational movements in terms of capitals and technologies, the nationalities of a lot of corporations seem unclear, sometimes even difficult to be identified. For example, McDonald's and Starbucks are thriving today on main streets in Beijing. Are they Chinese or American companies?

Of course, in view of the stronger financial forces and higher techniques of the transnational corporations compared with the national enterprises, it is necessary for the Chinese Government to control M&As by foreign investors and to prohibit abusive activities by the foreign enterprises with dominant position in the market. But for this purpose, the best way is to establish and implement an effective antitrust law in order to afford a free and fair competitive environment for all enterprises, no matter whether they are private or public, foreign or domestic.

It is quite obvious that not only Chinese people, but also both domestic and foreign investors will benefit from China's future anti-monopoly legislation. The creation of the anti-monopoly law has been put on the legislative agenda of the 10th NPC in its five-year tenure, which ends in March 2008.

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1 See China Administration for Industry and Commerce, May 2004.

2 Adopted at the 1st Executive Meeting of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China on 2 January 2003, entered into effect on 12 April 2003.

3 MOFTEC is the abbreviation of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China. Since March 2003 it belongs to the Ministry of Commerce of P. R. China.

4 SAIC is the abbreviation of the State Administration for Industry and Commerce of P. R. China.

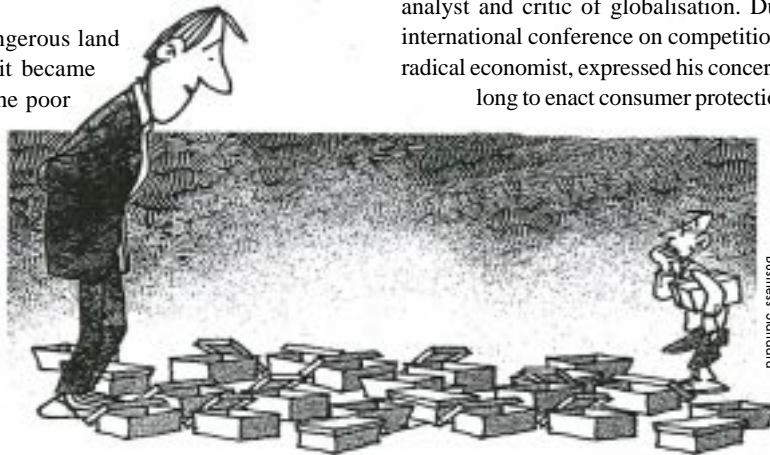
Regulating Competition Good For Consumers

Shaban Sserunkuma*

Sometimes laughter is inevitable, even during times of sorrow. I found myself in that mood-defying moment a fortnight ago, after I read a news article about a herd of marauding and drunken elephants that trampled hapless peasants to death in the village of Marongi, located in the north-eastern Indian state of Assam. Yes, it's not a typo, 'drunken elephants'.

Apparently, during this time of the year, peasants brew rice beer and store it in drums. During the same period, hungry elephants attack the villages while in search of food, and perhaps a drink too. The prayers of the giant mammals are normally answered. But instead of receiving payment for their effort, the 'barmen' and their associates often have to pay with their dear lives.

As I examined the dangerous land that Assam seems to be, it became apparent that the fate of the poor peasants is akin to that of the predominantly small businesses and consumers in unregulated markets. Only that the elephants in this regard are giant firms or humungous arrangements made by many small firms that in the end hurt their smaller counterparts as well as consumers.



Business Standard

Unfair competition

comes in the form of restrictive business practices, for instance, involving agreements (often secretive) between otherwise would-be competitors to charge given prices or limit production/product markets. In Uganda, the oil industry has been identified as a possible culprit. Although they deny it, sector analysts maintain there can't be another convincing reason to explain why almost all filling stations charge the same pump price.

On the other level of the market, the telecommunication sector appears to be a shining example of fair competition, though not systematically regulated, taking shape. Look at the phone companies: MTN, UTL and Celtel are drenched in blood following a gruelling battle that has consumers smiling. And why not, when the dreaded 'service fee' is no more. Call rates have dropped drastically, and above all, coverage is at its all time high – from less than 50,000 lines 10 years ago, to over one million today. But, regrettably, the story of fair competition and sector transformation of such sterling proportions could but end there.

The amiable Trade Minister, Prof. Edward Rugumayo, would grapple if he had come up with an explanation as to why the good 'accident' that has befallen the communication sector shouldn't spread out to rest of the economy. But it's not hard to notice that in Uganda and many developing countries, governments have traditionally pampered multinationals, newly privatised companies and other 'good' investors by granting them tax holidays, backing them for cheap loans and generally shielded them from gross competition.

Such markets are unsustainable as the fallout has negative implications on the industry and the economy at large. It's for

these very reasons that governments must, as a matter of policy, curtail the excesses of the powerful that are not often ethical and fair in the marketplace. This is effectively done through a comprehensive competition regulation (policy and law) framework.

Unfortunately, Uganda is at the bottom of the heap in the region, and Kenya and Tanzania have operational competition regimes, complete with regulatory bodies to enforce the law. The Common Market for Eastern and Southern Africa (COMESA) as well as the East African Community (EAC) are expected to have operational trans-regional competition regimes very soon.

World-renowned consumer activist, Pradeep S Mehta, from the Consumer Unity & Trust Society (CUTS), is an avid trade analyst and critic of globalisation. During a coffee break at an international conference on competition and investment, Mehta, a radical economist, expressed his concern that Uganda has taken too long to enact consumer protection and competition policies.

Indeed, it should be worrying that in a free-for-all environment that Uganda boasts of today, no business entity or consumer is safe and beyond threat. Then, there is the sad dimension of unfair competition at the global level. Poverty alleviation through empowerment may not be successful unless

beneficiaries and actors are linked to the markets, which are made to work for the benefit of the poor.

Take the example of coffee. According to the UNCTAD report, annual export earnings of coffee-producing countries in the early 1990s were US\$10-12bn and global retail sales about US\$30bn. About a decade later, retail sales exceeded US\$70bn, but coffee-producing countries, including Uganda (the biggest producer of Robusta coffee in Africa), received only US\$5.5bn. The reason for the divergence is that coffee distribution is a roaster-driven chain and four big roasting companies control 45 percent of the global market.

Back to our world of elephants. The beasts in Assam have been credited with the death of some 150 people over a period of five years. Angry villagers have retaliated by killing up to 200 elephants. From our markets, local consumer organisations receive hundreds of complaints annually, related to products in the market place. Some are not just complaints, but stories of consumers whose health and lives have been impaired by adulterated or dangerous products they have consumed.

Like the beer brewers who get killed by drunken elephants, consumers are affected and sometimes killed by products made by companies that thrive in unregulated markets. But, unlike the residents of Assam, Ugandan consumers are not yet empowered to strike back. (*Consumer Perspective, The Monitor, November 16-22, 2004*)

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Competition Law in Turkey

Introduction and Brief Historical Evolution

The Turkish Constitution's Article 167 provides the State with the responsibility of developing and ensuring a sound and regulated functioning of markets, for money, loans, capital, goods and services, in addition to preventing monopolisation and cartelisation. As a requirement of this constitutional clause, the Law on the Protection of Competition, No. 4054, was enacted in Parliament on December 7, 1994. The specifics of the Law were published in the *Official Gazette*, and came into effect on December 13, 1994.

The Competition Authority, commencing its operation in 1997, rapidly adapted the EU legislation (the source of the Act), via the EU's Communiqués, thus guaranteeing considerable alignment in terms of competition policies. Whilst performing the tasks of surveillance and supervision entrusted to it by the Act, the Authority made an attempt to extend the reach of competition culture, engaging in continuous cooperation and communication with public institutions and sectoral participants. By 2003, the Authority had decided upon 1352 breaches of competition cases, out of 1558 applications.

Competition Law

Purpose

The purpose of this Law, as stated in Article 1, is to protect competition by enforcing the necessary regulations and supervision, in order to curb the abuse of dominant positions of enterprises; and agreements, decisions and/or practices that prevent, restrict or distort competition, within goods and service markets.

Scope

The scope of the Law, as stated in Article 2, mainly regulates three areas:

- a. Agreements, decisions and practices restricting competition
- b. Abuses of dominant position
- c. M&As, which would create a dominant position in the market and adversely affect competition

Article 4 aims to prevent the distortion of competition by the associations, between enterprises, agreements or concerted practices in a certain market for goods and services.

Article 5 of the Law states that even in the presence of an agreement, concerted practice or decision that restricts competition, in some cases, the Board may allow exemptions from the provisions of Article 4. An exemption, if given, is issued for a period of not more than five years. The conditions for exemption are given below:

When an agreement, concerted practice or decision by the enterprises concerned:

- a) contributes to new developments and progress, or ensures technical/economic improvements in production or distribution of goods and in providing services;
- b) allows consumers a share of the resulting benefit;
- c) does not eliminate competition in a substantial part of the relevant market; and
- d) does not restrain competition in a manner that is more than essential.

Article 6 prevents the abuse of dominant position by enterprises, similar to and stemming from Articles 81(1) and 82 of the EC Treaty.

The enterprises, or associations, against which a Board decision is given, are fined up to 10 percent of their gross income earned during the previous financial year. In cases where a fine is imposed,

an additional fine, of up to 10 percent of the corporate fine, may also be imposed on the managers of these entities. The Board may even impose periodic penalty payments per day.

Article 7 of the law deals with M&As. There are two thresholds for the notification of M&As in Turkey.

- 1) Where total market shares, of the undertakings for the relevant product, exceed 25 percent of the market within part or entirety of the country; or
- 2) Where total turnover exceeds £25tn (Turkish lira, approximately US\$15mn).

It is compulsory to apply for authorisation from the Competition Board.

In cases where an M&A has not been disclosed, the Board, once informed of the transaction, will conduct an investigation. If the M&A concerned is not found to create any problems, with regard to competition, the Board will consent to the transaction. However, if the Board finds that this merger or acquisition "creates or strengthens the dominant position of one or more undertakings, as a result of which competition would be significantly impeded," then the Board may impose fines or terminate the transaction.

Other Regulatory Laws

The Consumer Protection Act (No. 4077), dating back to 1995, aims to protect consumers against fraud and other harmful processes. The law establishes a 2-tier redressal system, differentiating between small and large damages. The Consumer Arbitration Board deals with small damages, whilst applications for large damages must be filed in court. Other regulatory laws include:

- *The Banking Regulation Act*: to safeguard the rights and benefits of depositors, creating a proper environment in which banks and financial institutions can operate in a disciplined, healthy and globally competitive manner;
- *Capital Markets Act*: enacted in 1981, for market organisation, and developing capital market instruments and institutions; and
- *Energy Markets Act*: to establish a financially viable, stable, transparent and competitive energy market, providing sufficient and good quality electricity and natural gas to consumers, at low costs, in a reliable and environmentally friendly manner.

There are also other regulatory authorities, such as the Telecom Regulatory Authority, and Radio and TV Supreme Council. All of the aforementioned laws and authorities are fairly new to Turkey.

Future Scenario

The Competition Authority has successfully implemented the Law, and been the major player in shaping the Turkish Competition Policy. There are certain measures, which can be introduced, to enforce the competition policy successfully:

- The lack of monitoring and prohibition of State Aid and the overlapping, often contradictory, of competition regulation (regulated via Turkish Commercial Code) and antitrust regulation, implemented by the Competition Authority; these subjects should be under the sole control of the Competition Authority.
- The responsibilities and roles of sectoral bodies, like the Telecommunications Authority, Energy Market Regulatory Authority, and Banking Regulation and Supervision Agency, should be clearly stated and bound by rules applicable to all authorities.

From Our Readers

I would like to take this opportunity to thank you for the detailed and insightful publications that you have made available on trade, investment, competition and consumer policy.

In this regard, in an effort to combine research resources for best possible results, it is my pleasure to invite your organisation to serve with us on priority and concrete issues, such as investment policy and strategies' formulation. This is particularly important at this point as the Ministry seeks development through capacity and consensus building, research, analysis and technical assistance.

Dipak K A Patel, MP

Minister of Commerce, Trade & Industry
Republic of Zambia

From Our Visitors

Thank you very much for reserving so much time for your discussions with me. It was a great learning exercise for me that will greatly help us in monitoring the programmes. Thanks again and I am looking forward to meeting again next year.

Coen Van Kessel

Novib
The Netherlands

Thank you for the good co-operation we enjoy with CUTS, and for the fruitful exchange of views and proposals at the meeting.

Vidan Hegenen

Deputy Minister of Foreign Affairs,
Norway

Forthcoming Publications

Towards a Functional Competition Policy for India

"Towards a Functional Competition Policy for India" comes at a time when India is poised to implement a new competition law, whilst there is lack of understanding of the nature, and extent of prevalence, of different types of anti-competitive practices. The book comprises of 22 chapters, giving comprehensive treatment to competition policy in India, covering both systemic and sectoral issues.

The study tracks the evolution of Competition Policy and Law in India; discusses the interface of Competition Policy with Government Policies (at the Federal as well as State level), and Consumer Welfare; and identifies competition and economic regulation issues in agriculture, manufacturing, and services.

Towards a Functional Competition Policy for India is the result of the effort put in by top experts in the country. The study will be useful to all those who are interested in economic policies, in general, and competition policy, in particular. The report is being published as two separate volumes. One is an Overview, which carries all papers in précis form, while the second is a more detailed report, carrying all chapters in greater depth. Both the reports will serve as curtain raisers and road maps for future, more in-depth work.

The overview version of the report can be purchased from Academic Foundation, New Delhi at: http://academicfoundation.com/n_detail/cuts.asp

Policy Watch

CUTS C-CIER publishes a newsletter, Policy Watch, providing a bird's eye view of the policy directives and decisions of the Indian Government. In addition to apprising the readers of the views expressed in various circles about reservation in the private sector, the current volume (October-December, 2004) of the newsletter takes a look at issues pertaining to Institutional Independence and Rural Development Policies in the country. (Subscription: Rs 150/US\$30 per annum)

For further details please visit our website at:
<http://www.cuts-international.org/pw-index.htm>



Forthcoming Events

Launch Meeting of 7Up3 Project

CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER) has recently undertaken a project entitled: 'Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa', popularly referred to as '7Up3' Project with support from the Norwegian Agency for Development Co-operation (NORAD), Norway, and the Department for International Development (DFID), UK. The project is being executed in seven countries of the region: Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia and Uganda.

The Launch Meeting of the 7Up3 Project would be held at Entebbe, Uganda, on March 22-23, 2005.

Participants from the project countries would share the experiences of their respective countries in addressing competition-related issues with experts, including competition authority representatives from other countries in the region; international specialists on the topic; regional authority officials; representatives of inter-governmental organisations and development assistance providers.

For further information please visit our website at:
<http://cuts-international.org/7Up3.htm>

Outreach Seminars in Various Indian Cities

CUTS C-CIER is organising one-day outreach seminars in select Indian cities in the month of February-March 2005 to augment public understanding on Competition Policy and Law issues. The cities chosen are New Delhi, Ahmedabad, Mumbai, Kolkata, Chennai, Bangalore, Hyderabad and Lucknow.

Various stakeholders, such as policy-makers, elected representatives, trade unions, civil society organisations, academia and media are being targeted to create awareness among them about issues pertaining to competition and economic regulation, in India.

For further details please visit our website at:
<http://cuts-international.org/forthcomingevents.htm#devmarketfeb3>

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SOURCES

ET: The Economic Times

FT: Financial Times

BL: The Hindu Business Line

BS: Business Standard

KT: Korea Times

BR: Business Respect

GCR: Global Competition Review

GAW: Global Antitrust Weekly

TI: The Independent

WSJ: Wall Street Journal

ILO: International Law Office

BD: Business Day

DE: Diario Economico

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