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## **Regional Cooperation among Competition Agencies**

My introduction with Consumer Unity & Trust Society (CUTS) and, therefore with Pradeep Mehta, the man behind the institution and my friend, happened one day in the summer of 2004, when I was strolling the aisles of the Library at the Lahore University of Management Sciences (LUMS) in Lahore, where I came across a copy of *ReguLetter*, a quarterly newsletter of CUTS. I browsed through *ReguLetter* and one thing that stayed with me was the underlying motto (philosophy) of CUTS, *i.e.*, “it is better to light a candle than to curse the darkness.”

Indeed, the philosophy of CUTS is not just a mere slogan, but a work in progress. Finding its origins in a small village level organisation initiated in 1983, producing a monthly wall newspaper in Hindi called *Gram Gadar* (village revolution) to an international organisation, is witness to such work in progress. *Gram Gadar* proved to be pivotal in providing a platform for the oppressed classes to obtain justice.

The word ‘darkness’ has long been a metaphor for ignorance or evil. Collusion or cartelisation has been declared as the ‘supreme evil of antitrust’. Whereas in the case of cross-border mergers, ‘ignorance’ is perpetrated through asymmetric information supplied by merger parties to various competition agencies to get positive review. Transborder darkness necessitates cooperation among competition agencies—where cooperation is the ‘light’, and competition agency is the ‘candle’. Thus, the philosophy of CUTS has within it the idea of cooperation among competition agencies.

In the following few paragraphs, let us examine the rationale for cooperation both in the case of cross-border cartels and mergers.

With the proliferation of regional trade agreements and globalisation in general, public barriers to trade are being dismantled and the national markets are being transformed into a global market. Activities that transcend national and regional boundaries are certainly beyond the ability of any single state to effectively regulate or police.

(A) state cannot exercise effective authority alone when the problems it is trying to solve or the actors it wishes to regulate are not centred within the state's borders. To the extent that these issues are state-based, such a location usually is only temporary and easily shifted. Thus, the decrease in state-centred regulatory power is a result that flows primarily from the nature of global problems, the global reach of the technologies involved, and the relative mobility and freedom of the transnational actors to which the law would apply.

This global and regional restructuring has thus undermined the reach of national competition agencies to effectively monitor and arrest transnational anticompetitive practices.

Advances in technology, free flow of capital and liberalisation of trade allow transnational corporations (TNCs) to make decisions concerning production, finance, investment among others, independent of direct state control. TNCs view the entire globe as a market. With a centralised mode of management, TNCs strive for flexibility and take 'advantage of favourable conditions—natural, financial, political and legal—prevailing in each host country'. Globalisation of business results in cross-border acquisitions and mergers as well as expansion of the scope of cartel activities from national to global level.

Various multilateral fora have issued recommendations and guidelines for the competition authorities to cooperate on anticompetitive practices that transcend national borders. For example, the Organisation for Economic Cooperation and Development (OECD) issued recommendations in 1995 and more recently issued best practices and revised recommendation in 2005,

urging member states to cooperate when enforcing laws prohibiting hard core cartels when they affect other countries' important interests. Similarly, the International Competition Network (ICN) in May 2007 issued a report titled, *Co-operation between Competition Agencies in Cartel Investigations*. The report gave the following reasons for promoting cooperation between competition agencies in cartel investigations:

- Possibility that an agency may not be aware of a cartel affecting its jurisdiction, while another agency has knowledge of it.
- For international cartels, coordination of investigation may be necessary in order to avoid the risk of destruction of evidence if one agency moves before other agencies, on whose territory evidence may be located.
- More general discussions and comparing of notes between investigators of the same cartel in different agencies may facilitate the smooth progression of the case and better rebutting of the arguments of the parties.
- Information on turnover relevant for the calculation of sanctions may be exchanged.
- Jurisdictions that can sanction individuals, extradition proceedings may also play a part in cooperation.

One prime example of cooperation in cross-border cartel case is "The Marine Hoses Case". The producers of Marine Hoses successfully operated an international cartel from 1986 to 2007. The companies used all sorts of covert methods for fixing price, market sharing, customer allocation, restriction of supply and bid rigging. One company simultaneously applied for leniency in Japan, the US and the EU, "triggering co-ordinated actions among the investigating authorities."

The US, UK, EU, Australian and Japanese competition authorities brought proceedings in the cartel case. The Australian Competition and Consumer Commission (ACCC) attributes the successful outcome of its proceedings to the assistance of both the [US] DOJ and [UK's] OFT, who provided documents that were

significantly important to Australia's case. The information required was obtained informally in the case of the US-based information from the DOJ but formally for the UK-based information from the OFT under the relevant sections of the UK Enterprise Act. The ACCC and OFT had also been in close cooperation informally before the formal request was made.

Had there been no coordination among competition agencies, Australia would not have been successful in pleading its case against the cartel. Coordination and cooperation can be effective both through formal and informal channels.

Similarly in the case of cross-border mergers, OECD and ICN have issued recommendation and best practices for coordination and cooperation. OECD issued Recommendations on Merger Review in 2005. Recommendations B, entitled "Coordination and Cooperation" require Member states: to cooperate and to coordinate their reviews of transnational mergers in appropriate cases. When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.

Likewise, ICN issued "Guiding Principles for Merger Notification and Review" in September 2002. Principle 6 on coordination require: "Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs." Later ICN Recommended Practices for Merger Notification Procedures also had a section on Interagency Coordination.

In a recent US\$11.85 bn cross-border acquisition of Pfizer Nutrition Business of Pfizer Inc. by Nestlé S.A., the Competition Commission of Pakistan (CCP) and the ACCC coordinated their merger review. It was revealed during the coordination that the parties have given different rationale to the two agencies for the transaction. In Pakistan, it was submitted that the reason the acquirer is giving such a high price is because it wants to keep the target's brand name and brand following; whereas in Australia, the

acquirer does not want to keep the target's brand and brand following. This asymmetric rationale is clear from the undertakings, which Nestlé gave to CCP and ACCC. To CCP, the undertaking of Nestlé is to the effect that "Pfizer (Wyeth) products will continue to be available for a period of three years from the date of the closing of the transaction in Pakistan." Whereas the undertaking given by Nestlé to ACCC includes an obligation to divest Pfizer Nutrition business through exclusive licence to a prospective purchaser to be approved by the ACCC. The cooperation between CCP and ACCC informed them of the asymmetric information supplied by the merging parties, and helped both agencies in designing the remedies.

The global scope of business and the limitation of domestic laws to arrest actions and decisions taken beyond the borders of a nation-state has made it imperative that the competition agencies cooperate with each other. Given the global reach of transnational business, competition agencies should endeavour to cooperate with all competition agencies around the globe. However, competition agencies in a specific region, formed either through naturally contiguous national borders or through a membership of a specific trade agreement, should develop a network of competition agencies of that region with a view to share experiences on a regular basis, through annual workshops, and to act as a forum to address competition issues specific to that region.

The sustaining efforts being made by Pradeep and CUTS through their advocacy to push for regional cooperation will certainly add weight to the efforts being made by competition agencies themselves. Globally, Pradeep is recognised as an adroit advocate of promoting competitive markets and is well regarded by national and international agencies.

