REGULETTER

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Inside this Issue

Special Articles

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CUTS C-CIER

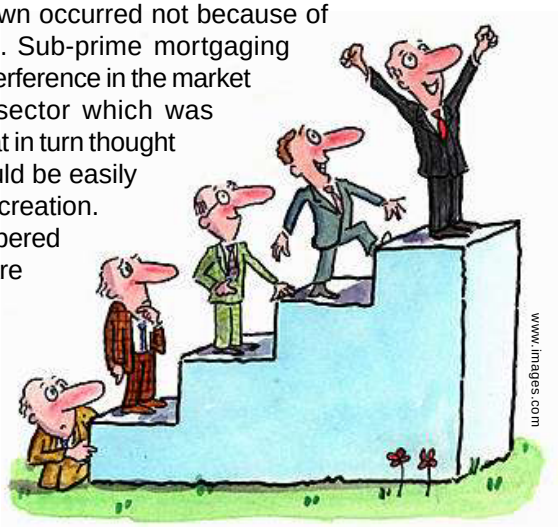
Competition Policy Will Endure

The financial meltdown and the consequent economic recession are often used by critics to take pot shots at the market mechanism. As a consequence, objectives such as 'enforcement of competition' are also being put under the scanner.

The common man and his opinion have been expertly mobilised by the mentioned critics to drum up support for the tight regulation or even suppression of the market mechanism.

Competition regimes, which have been so assiduously nurtured by developing and developed economies all over the globe, are a likely victim of such attacks. But the attacks lack any conceptual basis whatsoever. Here is why.

First, the financial meltdown occurred not because of the market but in spite of it. Sub-prime mortgaging constituted an act of undue interference in the market mechanism by a financial sector which was egged on by a government that in turn thought that deficits in real estate could be easily wiped off through such credit creation.



Second, it must be remembered that 'regulation' and 'markets' are not substitutes for each other: what we need to realise is that the need of the hour is for appropriately regulated markets.

The danger lies in the human tendency to overreact. While the 1980s and the 1990s saw the triumphant resurgence of the market, the 21st century might mark the return of rigid government controls – a state of affairs we should do our best to avoid.

A careful analysis of the neo-classical economic paradigm tells us that it is not an unreserved advocate of free markets. Rather it calls for interference in the market mechanism whenever it fails due to asymmetries of information, externalities or economies of scale. Moreover, 'competition enforcement' itself constitutes regulation of the market, ensuring that market forces are not used or distorted by individual players to gain an unfair advantage.

But are there no lessons from the recent meltdown for competition policy? Absolutely not! An important lesson which emerges from this crisis is the need to treat the financial and real sectors differently. In the case of the financial sector, government attempts to bail out banks are welcome since these help to maintain competition in that sector as well as avoid the adverse cascading influence that the failure of one bank has on others. This is not true for the real sector where the fall of one firm often results in gains for others.

In short, the global meltdown should not spell any danger for the survival of competition enforcement regimes. However, the lessons from it when learnt properly should make competition authorities a much wiser lot.

DOJ: Antitrust Amnesty Agreements

In an unprecedented move, the US Department of Justice released antitrust amnesty agreements that it has signed with some 100 corporations since August 1993.

The release was part of a settlement of a Freedom of Information Act suit against the government, which also agreed to pay US$40,000 in attorney fees to the law firm of White & Case.

Until now, the government would only let companies see a "model letter" that discussed the provisions of an amnesty deal in general terms, rather than the specific details of actual deals. *(Law.com, 09.02.09)*

China Issues New Merger Guidelines

A series of new guidelines issued by the Anti-Monopoly Bureau of the Chinese Ministry of Commerce (AMB) will generate more work in M&A deals, law firms have told ALB.

The new guidelines outline the merger review framework and process, and the information required to notify the AMB of a transaction in accordance with the compulsory pre-merger notification regime under the Anti-Monopoly Law (AML).

Notable changes, including draft guidelines for consultation and a merger filing template, make the system of notification more transparent, making it easier for law firms to advise clients on the relevant procedure. *(ALBN, 22.01.09)*

Poland Adopts Fining Policies

The Poland Competition Authority has adopted its first official guidelines on setting fines for competition-restricting practices. The basic purpose of the guidelines is to enhance the transparency of fining policies and thus allow companies further insight into the financial penalties that they may face for breach of competition rules.

The guidelines reiterate the basic rule laid down by the Anti-monopoly Law, according to which a fine is set on the basis of the aggregate revenue obtained by an undertaking in the fiscal year preceding that in which the fine is imposed.

A fine for infringement cannot exceed 10 percent of the undertaking's revenue. The guidelines apply as of January 01, 2009. *(ILO, 19.02.09)*

FTC Prefers Dynamic Efficiency

A new report from the US Federal Trade Commission shows that it's staff are more likely to accept claims of dynamic efficiencies when reviewing mergers than any other type of efficiencies claim.

The study also shows that, in general, the Commission's Bureau of Economics has over the past decade been more willing to accept efficiency claims than the bureau of competition.

The findings should offer some guidance to merging parties who believe, and plan to argue, that increased efficiency outweighs the potential anti-competitive impact of a deal – especially when arguing for dynamic efficiencies, which can improve cost, quality and product innovation on a continuing basis. *(TAHP, 09.02.09)*

Botswana Competition Law

The drafting of the competition law took longer than it was anticipated due to capacity problems and lack of expertise since it is a very complex piece of legislation.

The ministry was obliged to seek external help from the United Nations Conference on Trade and Development (UNCTAD) and engage in intensive consultations with the stakeholders.

The cabinet memorandum on the Draft Competition Bill was circulated in October 2008 and it was necessary to redraft certain sections of the bill on the basis of the comments received. It is expected that the bill will be presented to the Parliament in July 2009. *(BOPA, 31.03.09)*

Iraq: Capital Investment at Home

Iraq's industry ministry said the sector had sent an invitation to co-owners of the Iraqi capital to direct their investments into Iraq.

The statement in this regard to "What it represents a promising market and has the ability to extend consumer and at least twenty years to come with that enjoyed by Iraq's oil wealth enormous".

The statement said that "Iraq is heading towards the enactment of laws for the protection of the domestic product and consumer protection and competition law, which is a strong impetus to the mixed sector companies that have been played again in spite of the difficult lending conditions and unfair competition". *(II, 29.03.09)*

Canada: Competition Amendment Act on Anvil

The Budget Implementation Bill (Bill C-10) received Royal Assent on March 12, 2009, bringing into force substantially all of the proposed amendments to the *Competition Act* and the *Investment Canada Act*.

These amendments are the most significant changes to the *Competition Act* since 1986, and introduce a two-stage procedure for merger review, administrative monetary penalties in abuse of dominance cases and increased fines and maximum terms of imprisonment upon conviction of an offence under the *Competition Act*. The new dual-track conspiracy regime will not come into force until March 12, 2010.

(Davis LLP News, 12.03.09)

The New French Competition Authority

— Philippe Nogues*

On November 13, 2008, the French Government adopted a sweeping reform of the competition regime in France. The reform takes effect following the first meeting of the new French competition authority, and brings about three key changes to the French competition regime:

- the creation of the *Autorité de la concurrence* ("the **Authority**") to replace the *Conseil de la concurrence* ("the **Council**");
- the new Authority will centralise most of the powers and resources previously shared between the Ministry of Economy and the Council, and will be responsible for merger control in France;
- the Authority will have enhanced powers in the retail sector.

These developments, which will create a modern system by merging jurisdiction over all competition matters into a single independent institution, will have a significant impact on businesses operating in France.

Creation of a New Competition Authority

The key element of the reform is the creation of a new competition authority which will unify the antitrust enforcement powers currently held by the Council and the Ministry of Economy. While this reform simplifies the enforcement of competition laws in France through a central authority, the Minister of Economy will nevertheless retain certain abilities to review mergers and anti-competitive practices considered to have a limited impact.

The Reform of the Merger Control regime

Following the reform, the Authority, rather than the Ministry of Economy, will receive notifications of concentrations and investigate proposed mergers, both in Phase I and Phase II. Nevertheless, the Minister of Economy will retain two significant rights of oversight over concentrations:

- at the end of Phase I, the Minister has **five working days** following the clearance decision to request, but not require, that the Authority open a Phase II investigation notwithstanding the clearance decision;
- at the end of Phase II, the Minister has **25 working days** following the conditional clearance or prohibition decision to review the transaction.

These Ministerial powers have raised questions and criticisms from the French business community as they create legal uncertainty for parties involved in a transaction. While French law prohibits parties from implementing a concentration prior to the Authority's approval, the reform *de facto* extends the legal waiting periods in order to allow the Minister to decide whether he wishes to exercise jurisdiction over the case after the Authority's ruling.

While the notification thresholds remain unchanged, the time periods applicable to merger control have also been modified:

- Phase I – 25 working days, extended by 15 working days if commitments are offered. This time limit also may be frozen (similar to the "stop the clock" procedures that existed before the European Commission) for a maximum of 15 working days.
- Phase II – 65 working days, extendable by 20 working days in the case of commitments being offered late into proceedings. As with Phase I, the investigation's timetable may be "frozen" for a maximum of 20 working days.

Specific Powers in the Retail Sector

The retail sector has been singled out for special treatment in the reform, including several changes relating to both merger control and anti-competitive practices.

First, the reform creates specific merger control thresholds for mergers in the retail trade sector. For example, any merger involving at least two parties running one or several retail trade sale points in France will have to be notified if:

- the total worldwide turnover of all of the parties concerned exceeds US$99mn; and
- the turnover in France of each of at least two of the parties concerned exceeds US$18mn.

These new thresholds target acquisitions of retail stores with individual turnover that do not reach the traditional French thresholds.

Second, the new law broadens the Authority's ability to impose structural remedies in the retail sector. In cases where a business has been found to have abused its dominant position or a position of economic dependence, the business in question could be required to amend or terminate certain contracts, and even to divest the shops involved.

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The article appeared in the O'Melveny & Myers LLP Antitrust and Competition Practice Alert, March 02, 2009.

Will the Recession Make Cartels More Likely and Cartel Enforcement More Difficult?

— Andreas Stephan*

The theoretical view is that a sudden drop in demand will break up many existing cartels. Assuming that cartelists constantly weigh the costs and benefits of cheating a collusive agreement, break up is more likely if the drop in demand is anticipated, as the short-term gains from cheating are expected to be at their greatest. Moreover, dealing with demand instability will test both the mechanics of a cartel and put an enormous strain on the trust which exists between the parties to the agreement. One might thus expect an increase in leniency applications as a result of the downturn

www.images.com

Contrary to some findings in the economics literature on cartels, empirical studies of infringements punished in the last 10 years indicate that many collusive agreements may be formed as a consequence of an economic downturn. Cartels allow competitors to deal with the overcapacity which results from a sudden fall in demand, and to reduce the risk of bankruptcy. There may also be an expectation that demand will increase again soon, making the incentive to deviate from a collusive agreement minimal.

Economic downturns might also influence businessmen's normative perceptions of cartel laws. When faced with the prospect of losing one's job or becoming insolvent, the range of options or strategies for increasing a firm's performance may become wider. Business attitudes to competition law are, in any case, weak as compared to other forms of corporate crime; something that was recently demonstrated by British Airways in promoting to the board an employee pending trial for cartel behaviour.

The relationship between explicit and tacit collusion is also worth exploring. Tacit collusion (i.e. no agreement or direct contact) is less likely to be sustained through a period of sudden demand shocks because firms are unable to adequately communicate to each other as to

The best way forward. By contrast, explicit collusion (i.e. something more akin to a hard core cartel) involves competitors meeting up to reassure one another, to plan for the future, as well as monitoring each other and ensuring the agreement is being adhered to.

Recession can also have a serious implication for cartel enforcement. The increased risk of bankruptcy places constraints on a competition authority's ability to impose pecuniary fines. In the UK, the Office of Fair Trading (OFT) will be struggling to calculate appropriate fines for small firms under investigation for price fixing in the construction industry, as many are already facing bankruptcy as a consequence of the economic downturn.

Understandably, competition authorities do not want to fine firms out of business as this will result in a more concentrated market, although it should not be the role of competition law to protect the number of competitors. However, bankruptcy also involves a number of social costs, such as loss of jobs. One might argue that the bankruptcy issue strengthens arguments for the effective use of criminal sanctions against individuals, as a complement to corporate fines. A criminal offence exists within the UK and a number of other European Union (EU) member states, but has been invoked infrequently and cannot operate on the community level.

One upshot of the bankruptcy issue may be a greater willingness amongst firms to sue upstream cartelists for damages. Under normal trading conditions, these firms may be unwilling to upset the long-term relationship with their suppliers, whereas if the firm is on the verge of insolvency every avenue for extra revenue will be explored.

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* *Lecturer in Competition Law, The Norwich Law School & ESRC Centre for Competition Policy University of East Anglia. Abridged from an article that appeared in the Centre for Competition Policy Newsletter, Issue No 16, February 2009.*

ABUSE OF DOMINANCE

IBM Faces Antitrust Probe

IBM faces fresh scrutiny from European competition regulators as a new complaint is filed formally accusing the US company of abusing its monopoly power in Europe's computer mainframe market.

A much smaller US rival, T3 Technologies, is due to lodge a complaint with the European Commission alleging that IBM has abused its market position by tying the sale of its operating system to its mainframe hardware, preventing sales of competing hardware products.

It will also claim the US company has withheld patent licences and other intellectual property to the detriment of mainframe purchasers in Europe.

(FT, 20.01.09)

Move Over Monopoly

A good sign that no one's in the mood to invest right now is probably the cartoon of the new recession game that's doing the rounds on the internet. The board game, like monopoly, has the usual places you land on depending upon the throw of the die.

It's what each place says that makes the game unique – 'Sales Go Down … Move One Space', and 'Layoff More Workers … Move One Space' are some examples.

The Chance/Community Chest cards of this game are also different from those in your standard monopoly. Samplers: 'Receive Tarp Funds … Try To Buy Corporate Jet … Lose Turn'.

(BS, 10.02.09)

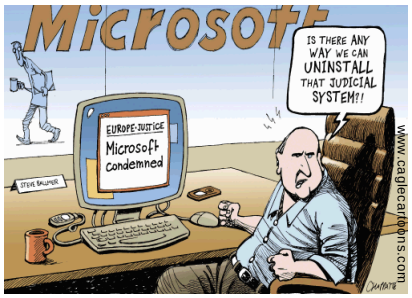
Swisscom on Abuse of Dominance

Switzerland Competition Commission announced its initial finding that Swisscom had abused its dominant position in the asymmetric digital subscriber lines (ADSL) market. Swisscom has been invited to comment on the Secretariat's finding before the commission hands down its decision.

Swisscom offers its competitors access to its ADSL lines on a wholesale basis, so they can then offer broadband services to their customers. However, according to the Secretariat's findings, the prices Swisscom charges its competitors are excessive compared to end-user (retail) prices. Thus, the Secretariat considers Swisscom's price strategy an abuse of its market dominance. *(ILO, 26.11.08)*

EU's Microsoft Probe be Blunt

A year after ending its lengthy legal battle with the European Union, Microsoft, the software giant, is facing new charges of abusing its dominant position with the Windows operating system.



But this time, legal experts opine that the European authorities may have a harder time winning their case because Microsoft may in fact be losing market share – at least in some segments of the software market.

Microsoft could request a private hearing, after which the commission could take up to a year for a decision, which Microsoft could then appeal in court. *(FE, 22.01.09)*

Competition Commission Challenged

Dairy products producers Clover and Ladismith Cheese have petitioned the Supreme Court of Appeal, following the Competition Appeal Court's refusal to grant leave for another appeal on the procedural case Clover and Ladismith Cheese had initiated against the Competition Commission of South Africa (CCSA).

Clover and Ladismith Cheese have already lost the procedural case against the CCSA twice, once in the Competition Tribunal, and again in the Com-petition Appeal Court.

Clover, Ladismith Cheese and the CCSA are currently waiting to find out if the petition was successful or not, thus determining whether the procedural case will be heard yet again or whether the actual merits of the CCSA's cases against Clover and Ladismith Cheese for illegal market practices can finally be dealt with.

(EN, 27.02.09)

CARTELS

Sea Shrimps Raided by EC

The European Commission (EC) has confirmed that it conducted unannounced inspections, in conjunction with officials from the relevant national authorities, at the premises of a number of companies active in the North Sea shrimps and related products industry in several EU Member States.

The inspections were conducted following suspicions that the companies in question may have acted in violation of EC legislation prohibiting cartels, namely Article 81 of the EC Treaty. Surprise inspections are a preliminary step in investigations into suspected anti-competitive practices.

(EC Press Release, 31.03.09)

Cartel Accusation Rejected

The National Commission for the Defence of Competition rejected an accusation initiated by Baro Gas against Repsol YPF Gas SA alleging infringement of the Antitrust Law.

After assessing the facts presented by Baro Gas, the commission concluded that the claim was based on an alleged cartel that was intended to divide the market.

The clients that would have been affected by the cartel were not end consumers, but the distributors, and therefore the alleged infringement also involved vertical restrictions (refusal to deal). After a thorough analysis of the evidence, the commission rejected the accusation. *(ILO, 15.01.09)*

KPPU to Summon Carrefour

The Indonesian Business Competition Supervisory Commission (KPPU) has opened a probe into Carrefour. The KPPU is examining whether the supermarket giant has violated article 17 and 25, which prohibit monopoly and abuse of a dominant position respectively.

Carrefour expanded through acquisitions in 2008 and now reportedly has up to two thirds market share of certain upstream markets, giving rise to concern that it is able to dictate terms to suppliers.

If found to have contravened the law, the supermarket chain could face fines up to US$2.10mn. *(JP, 03.04.09)*

OECD: Guidelines for Bid Rigging

The Organisation for Economic Cooperation and Development (OECD) Competition Committee has adopted new guidelines for fighting bid rigging in public procurement.

The OECD says that by drawing on the experience of more than 30 jurisdictions, the guidelines provide the most comprehensive strategy available for designing tenders to hinder bid rigging conspiracies and for uncovering existing conspiracies.

The guidelines help to identify: markets in which bid rigging is more likely to occur so that special precautions can be taken; methods that maximise the number of bids; best practices for tender specifications, requirements and award criteria; procedures that inhibit communication among bidders; and suspicious pricing patterns, statements, documents and behaviour by firms that procurement agents can use to detect bid rigging.

(OECD Press Release, 13.03.09)

Cartel Linked to Road Fraud

World Bank investigators looking into allegations of bid-rigging in road projects in the Philippines have concluded that the fraud involved collusion among a network of private contractors, officials and political figures, according to confidential bank documents.

The investigation, carried out by the bank's department of institutional integrity, suggests that the alleged corruption was much more widespread than suggested by initial probes, which prompted the bank to bar eight construction companies from China, the Philippines and South Korea from bidding for bank-funded projects. Both sub-projects were scrapped.

(FT, 20.02.09)

Brazil Raids IT Companies

Four IT companies and one trade association have been subject to dawn raids by the Secretariat of Economic Law, the *Secretaria de Direito Econômico* (SDE), and the Federal Police in the Federal District of Brasilia.

They are being investigated for a possible bid rigging in procurement procedures to contract information technology services such as network development and maintenance of software, database and networks within the Ministry of Education.

(www.mj.gov.br, 19.03.09)

Europe Accused of Stealing Jobs

European leaders were accused of "bribing multinationals" and stealing jobs from neighbouring countries as they use taxpayers' money to support businesses battered by the economic turmoil.

Neelie Kroes, Europe's senior antitrust regulator said, "Of course no politician will admit to protectionist policies – it will be presented under better colours, using national money to protect national jobs".

EU officials fear that the scheme – which involves a package of loans for Renault and Peugeot-Citroën – could breach Europe's single market principles or state-aid rules. The plan has angered other EU carmaking states such as Sweden and the Czech Republic. Spain has since unveiled a US$5.2bn car aid plan. Ministers have suggested that government support could depend on manufacturers' ability to guarantee jobs. *(FT, 18.02.09)*

FINES & PENALTIES

Fines on Resale Price Maintenance

The Federal Court of Australia has imposed fines in excess of US$144,499 on Telewater, Australia's largest manufacturer of aluminium boats, and its director for engaging in resale price maintenance.

The court heard that Telewater had informed dealers that they were not allowed to advertise boating packages for select brands below a specified price. Under section 48 of the Trade Practices Act 1974, engaging in retail price maintenance is prohibited.

(ACCC Media Release, 17.03.09)

Regulators Probed Madoff

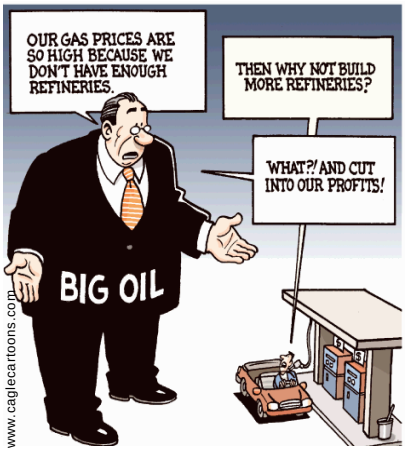
Bernard L. Madoff Investment Securities LLC was examined at least eight times in 16 years by the US Securities and Exchange Commission (SEC) and other regulators, who often came armed with suspicions, the Wall Street Journal said.

SEC officials followed up on emails from a New York hedge fund that described Bernard Madoff's business practices as "highly unusual," the paper said.

Madoff was interviewed at least twice by the SEC, the paper said, adding that regulators never came close to uncovering the alleged US$50bn Ponzi scheme that investigators now believe began in the 1970s. *(FE, 05.01.09)*

Oil Major Fined for Tax Breach

The Turkish government has fined a local unit of oil major BP US$275mn over a tax breach but the company plans to appeal. The fine, which followed an investigation into BP's sales of duty-free fuel at Turkish border crossings, is comprised of US$108mn in back taxes with the rest in penalties and interest.



BP operates Turkey's second-biggest chain of petrol stations. The tax authority now wants BP to pay special consumption and value-added taxes for each vehicle that purchased more than 550 litres of fuel between 2006 and 2008.

BP argues that regulations set the "standard tank capacity" as the basis for the amount of tax-free fuel that can be sold and that it did not breach the limit. *(Reuters, 04.03.09)*

Increased Traffic Fines Stay

The Department of Transportation and Communications, Philippines reiterated that it was time to upgrade fines for traffic violations to instill discipline, help curb reckless driving and prevent accidents on the road.

Transportation and Communications Secretary Leandro Mendoza said a department order titled "Revised Schedule of LTO Fines and

Penalties for Traffic and Administrative Violations" was the result of "consultation and consensus building with the various stakeholders".

"With the increase in the number of accidents occurring daily, it is high time we properly implement the rules and impose stricter fines and penalties to prevent laxity and to build a culture of safety among our road users", he said. *(PDI, 28.02.09)*

Pfizer to Pay Record Fine

Pharmaceutical companies often complain that they spend billions of dollars researching new drugs that never make it to market, but Pfizer broke a new record for the billions spent on settlements linked to promotion of a drug that had already been launched.

In a tiny reference in the company's fourth-quarter results issued it said it had reached a US$2.3bn agreement in principle with the US Attorney's office to resolve a series of investigations "regarding allegations of off-label promotional practices concerning Bextra".

Nearly three years after the company, in April 2005, withdrew from the market, on the recommendation of the US Food & Drug Administration in April 2005, the case has continued to haunt the company. *(FT, 28.02.09)*

Pharmacy Associations Fined

The Spanish antitrust authority, the *Comisión Nacional de la Competencia* (CNC), has imposed a total of US$1.3mn fine on four pharmacy associations, FEFE, CEOFA, APROFARMA and APROFASE.

The investigation follows a complaint filed by Laboratorios DAVUR, a generic drugs producer, which accused three of the four associations of agreeing in recommending their pharmacies members to boycott the commercialisation of its generic drugs.

CEOFA was included in the investigation by the CNC in a second stage. *(CNC Press Release, 02.04.09)*

PRICE FIXING

Nippon Fined for Cargo

Nippon Express said that it has been notified to stop and pay penalties on anti-monopoly activities on international air cargo fare and fuel surcharges.

The Tokyo-based company said it received advance notice of the decision from the Fair Trade Commission (FTC) and it will thoroughly consider its response.

The FTC had notified more than 10 companies that it will fine them a total of about over US$100mn for forming a cartel to hike international air cargo charges.

The FTC believes that the companies, including Japan's three major distribution and logistics service companies – Nippon Express, Kintetsu World Express and Yusen Air and Sea Service – constrained fair competition by forming a cartel, adding fuel surcharges and airport security charges to air cargo service charges.

(Cargonews, 24.02.09)

Armenia's Price-Fixing Probe

Armenia's state anti-trust agency will investigate alleged retail price-fixing, as consumer prices continue to climb following the Central Bank's move to devalue the national currency.

The State Commission on Protection of Economic Competition announced that prices on some foodstuffs and home improvement goods have soared to a "disproportionate and unfounded" degree.

The agency suspects that some importers and suppliers are colluding to fix prices. Commission investigators intend to compare retail stores' profit margins both before and after the dram's collapse. *(EurasiaNet, 03.09.09)*

EDF Offices Raided in Price-Fixing

Investigators from the European Commission have raided the offices of *Électricité de France* (EDF) seeking evidence of price-fixing in the French electricity market.

The Commission said that the inquiry had enabled it "to gain an in-depth understanding of the functioning, and in some respects, the malfunctioning of the energy sector".

The competition authority has conducted numerous raids on the premises of big utilities, including EDF and E.ON, the leading German competitor, and has started infringement proceedings against several countries, including France, over regulated tariff structures that are believed to discriminate against smaller electricity users in favour of major clients of the utilities.

(TO, 11.03.09)

Chocolate Price-Fixing Suits Proceed

A federal judge has ruled that lawsuits alleging price fixing in the US chocolate industry may proceed and gave the plaintiffs additional time to try to prove their claims.

District Judge Christopher C. Conner said the plaintiffs have provided enough evidence to allow claims of antitrust violations to proceed and granted them time to tie in the actions of the companies' foreign subsidiaries to the jurisdiction of U.S. courts.

The 87 lawsuits against Hershey, Mars, Cadbury and Nestle, which collectively control 75 percent of the chocolate market in the US, allege the companies conspired to raise chocolate candy prices by about 10 percent in December 2002, 6 in December 2004, and 5 percent in April 2007.

(Pennlive.com, 05.03.09)

Airlines to Pay for Price-Fixing

The Federal Court has ordered four international airlines to pay a total of US$16mn for their part in an international air cargo cartel.

Air France, KLM, Martinair and Cargolux have admitted to reaching illegal price-fixing agreements in relation to the fuel surcharges on air cargo. A combined US$41mn in penalties has now been brought against airlines, including Qantas and British Airways over the cartel.

The Australian Competition and Consumer Commission (ACCC) has indicated it will be prosecuting more airlines. *(ABC Online, 16.02.09)*

Germany: New Notification Threshold in Germany Reduces Risks to Offshore Transactions

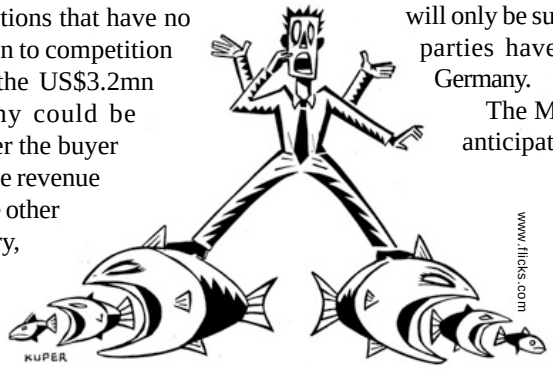
— Johannes Zöttl*, Carsten T. Gromotke** and Thomas Jestaedt***

Germany has introduced a new threshold for premerger notifications to its merger control system. This amendment to the German Act Against Restraints of Competition (ARC) is expected to reduce the number of merger control filings in Germany dramatically. In particular, the amendment will provide (limited) relief for the parties to offshore transactions, although enforcement risks remain for transactions to which the ARC still applies.

Filing Criteria Currently in Force

German merger control is mandatory. If a transaction meets the ARC filing criteria, the parties must delay closing their transaction until the Foreign and Commonwealth Office (FCO) has cleared it. In the past, a merger control filing was required already if (i) one party generated revenues of more than US$3.2mn in Germany and (ii) both parties generated combined revenues of more than US$658mn worldwide. These thresholds apply to the consolidated total revenues of the groups of companies to which the direct parties to the transaction belong, in their last fiscal year.

These filing thresholds have frequently resulted in filing requirements for transactions that have no or only an insignificant connection to competition in Germany. This was because the US$3.2mn threshold for sales in Germany could be satisfied by one party alone, either the buyer or the target. There was no separate revenue test for the German turnover of the other party to the transaction. In theory, the ARC requires – in addition to the revenue thresholds being satisfied – that the transaction affect competition in Germany. In practice, this "effects tests" is meaningless.



Compliance Risks Involved

The broad extra-territorial application of German merger control raises significant compliance risks:

- The FCO recently imposed substantial fines on parties to M&A transactions that – in the FCO's view – failed to comply with the ARC's procedural requirements. The FCO determines the amount of a fine on the basis of the revenues of the parties to the transaction, multiplied by the number of years in which the parties were in non-compliance.
- The acquisition of shares or assets for which FCO clearance was required, but was not obtained, is not legally enforceable in Germany. The FCO no longer accepts corrective filings, that is, post-closing submissions where the acquirer has only realised after closing that a filing was required. Therefore, currently there is no way to "cure" a legally defective acquisition and to obtain retroactive effect.
- The extraterritorial application of German merger control does not only relate to acquisitions of control. Any acquisition of a "competitively significant influence" over another business may trigger the ARC's applicability..

The New Revenues Test

In addition to the US$658mn and the US$3.2mn tests, one of the parties must have generated revenues of more than US$6.6mn in Germany. As a result, transactions will only be subject to reporting in Germany if both parties have substantial business interests in Germany.

The Ministry in charge of the amendment anticipates that the amendment will reduce the FCO's revenue stream through filing fees by at least US$1.8mn per year. The more significant effect on the FCO's daily business will be that the FCO will be able to shift further resources from merger control to its ongoing fight against cartels. Following a recent re-organisation of the FCO, it currently has three units exclusively assigned to cartels, dawn raids, and related sanctions.

Given the size of the German economy, however, revenues of US$6.6mn are not much of a hurdle. Most other EC Member Sates have significantly higher thresholds for either party's local sales. Nonetheless, the Government estimates that the new US$6.6mn test will reduce the number of merger control filings by about one third.

More importantly, for the majority of transactions, businesses can now determine if they have to file a transaction for the FCO's review solely on the basis of their revenues in Germany. The new threshold, therefore, will significantly reduce compliance risks. Issues remain in relation to multi-party transactions, such as when JVs are formed, where the assessment of a filing and clearance requirement in Germany will continue to be necessary on the basis of the FCO's overly extensive and ambivalent criteria.

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*** Competition Law Expert, Germany

The article appeared in the Mondaq, March 25, 2009.

Canadian Oil Giants Merge

Suncor Energy Inc will acquire Petro-Canada for US$15.5bn, uniting two of Canada's biggest oil companies as the nation's energy industry retrenches. If the deal is approved, the combined company would have a market capitalisation of about US$38bn.

The companies could save US$244mn in operating costs and US$81mn in capital efficiencies each year. Petro-Canada common shareholders would receive 1.28 common shares of the expanded company for each share of Petro-Canada, while Suncor shareholders will receive new shares on a one-for-one basis.

Petro-Canada shareholders will hold 40 percent of the enlarged company and Suncor shareholders will hold 60 percent. *(ET, 23.02.09)*

Cement to See M&As by 2009-end

The 207-million tonne Indian cement industry may witness M&A activity again by the end of 2009. However, this time, valuations will be low and deals will be driven by a strategic desire to exit rather than financial compulsion to restructure.

Sourav Mallik, Executive Director, Kotak Investment Bank, said, "Large players or MNCs will make acquisitions when new entrants and small companies start feeling margin pressures".

Apart from issues relating to oversupply, small companies may have made expansions at high costs and will have to spend on brand building; hence, returns may not be up to their expectations and they will look to be acquired. *(FE, 14.01.09)*

Norilsk Eyes Metal Mega-merger

An ambitious plan to create one of the world's biggest mining groups through the merger of up to five Russian companies has been proposed by two billionaire tycoons.

Oleg Deripaska and Vladimir Potanin, the two biggest shareholders in Norilsk Nickel, have proposed the merger as the groups seek to restructure tens of billions of dollars in debts.

The proposal would see the state take a 25 percent blocking stake in the company in return for writing off more than US$27bn in total debts held by all the companies. It would also create a company with a market capitalisation of US$70bn-US$100bn and earnings before interest, tax, depreciation and amortisation of US$23bn. *(FT, 20.01.09)*

Vodafone Fuses with Hutchison

Vodafone, of the UK, and Hutchison Whampoa, of Hong Kong plans to merge their Australian mobile phone operations, in a move that should enable the combined business to better compete with local rivals.

By merging their Australian operations, the 50:50 joint venture between Vodafone and Hutchison will have a market share of 26 percent. The combined business will have 6 million customers and annual revenue of US$2.7bn, and will use Vodafone's brand.

Vodafone will receive a US$361mn payment under the transaction's terms because its Australian business is bigger than Hutchison's. *(FT, 10.02.09)*

China: Chip Design Ripe for Mergers

The global economic crisis is forcing a long overdue shake-out among Chinese chip design companies as venture capital funds have dried up and major players are ready to merge.

Chipnuts, a company co-founded by Taiwanese returnees from the US that designs mobile chips, has sold part of its business to Aptina, an affiliate of US chipmaker Micron.

China has more than 500 design houses, but two-thirds of them have fewer than 50 employees and the largest among them, Hisilicon, achieved just US$170m in revenue in 2007. *(FT, 12.01.09)*

Kirin Acquires Stake in San Miguel

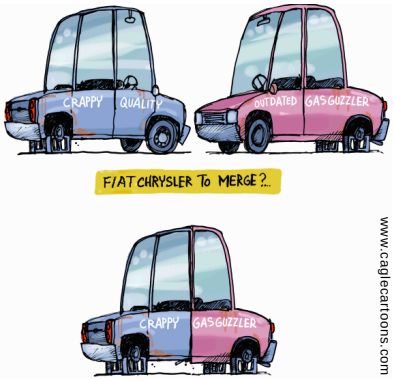
Kirin Holdings, one of Japan's leading beer and beverage companies, has won exclusive negotiating rights to buy up to 43.25 percent of San Miguel Brewery in a deal that could be worth more than US$1bn.

The deal comes on the heels of a US$4.9bn buying spree by Kirin, Japan's second-largest brewer after Asahi. Kirin, which already owns 20 percent of San Miguel Corp, the parent company of San Miguel Brewery, said it aimed to acquire as much of the Philippines' largest beer company as possible. San Miguel has said it wants to retain a majority stake in its brewery.

(FT, 20.01.09)

Chrysler & Fiat in Joint Venture

Chrysler and Fiat are in talks about creating a joint venture that would give the Italian carmaker a significant stake in Chrysler.



Under the proposal being considered, Fiat would help to finance the retooling of some Chrysler factories so they could manufacture Fiat cars and components and give Chrysler access to its technology. Fiat would not inject any cash into Chrysler.

A Chrysler-Fiat combination would have a strong presence in North and South America and in Europe and a broader global footprint and the ability to sell a wider spectrum of cars in various price ranges. *(FT, 20.01.09)*

Air France-KLM Buys into Alitalia

After once describing Italy's state-controlled Alitalia as in need of an exorcist, Air France-KLM bought a 25 percent stake from the airline's new private owners for US$432m. The deal allows Air France-KLM to make an offer for a controlling stake after January 2013 under certain conditions.

The new Alitalia, merged with Air One, will have 148 aircraft and fly to 70 destinations. Under the deal, Air France-KLM and Alitalia expect synergies of US$949mn over three years.

The agreement for Air France-KLM to become the strategic industrial partner for the restructured Alitalia was crucial for the French carrier to maintain its momentum as Europe's biggest airline and strengthen its Italian market position. *(FT, 13.01.09)*

Rio Fights Back over China Deal

Rio Tinto defended its planned US$19.5bn capital injection from Chinalco, the Chinese state-owned metals group, as criticism of the deal intensified from the mining group's UK shareholders.

Heavily-indebted Rio has proposed selling minority stakes in some of its best assets, including the Hamersley iron ore mine in Australia and the Escondida copper mine in Chile, to Chinalco to raise US$12.3bn.

It is also raising US$7.2bn through an issue of bonds to the Chinese group that can be converted into equity, lifting Chinalco's stake in Rio from 9 percent to as much as 18 percent. *(FT, 13.02.09)*

Merck Buys Schering-Plough

Merck agreed US$41bn takeover of its New Jersey rival, Schering-Plough , in the second major deal in the global pharmaceuticals industry within six weeks.

The deal, which will create one of the world's biggest drugmakers with combined sales of nearly US$50bn, will be done via a complex reverse takeover in which the much smaller Schering-Plough will technically acquire Merck.

The deal was designed this way partly because a Merck takeover would have triggered a contract that would have required Schering-Plough to give up its rights to the lucrative immunological drug Remicade to its partner. *(FT, 10.03.09)*

Valin Secures Fortescue Stake

Hunan Valin Iron & Steel joined the swelling ranks of Chinese investors in debt-strapped Australian resources companies by agreeing to buy a 16.5 percent stake in Fortescue Metals for US771m.

Australia's third biggest iron ore producer said that it was also considering an institutional placement, as well as negotiating a hybrid funding package with China Investment Corp (CIC), the sovereign wealth fund. CIC is understood to be considering an even bigger investment to help Fortescue reduce debt.

The transaction gives Fortescue an additional US$399mn in cash, as Valin is buying US$161mn new shares at US$1.78 a share. Valin is also acquiring US$197mn shares from two Harbinger Capital funds, giving the Chinese group a combined stake of 16.5 percent and reducing Harbinger's holding in Fortescue from 16 to 7 percent. *(FT, 25.02.09)*

Harris to Buy Telsima for US$55m

US wireless service provider Harris Stratex Networks is set to acquire a majority stake in Telsima, a five year old India focused WiMax solutions firm backed by marquee valley investors for US$55mn.

India-focussed WiMax solutions firm Telsima also works with telecom networks in African and Russian markets. Telsima's lits of investors investors include Vinod Dham, Tushar Dave, NEA and Intel Capital.

Headquartered at Santa Clara, the firm has manufacturing and software development hub in Bangalore. Apart from offering Telsimas solutions in the US, Harris will also be able to address the lucrative and growing markets of India, Russia and Africa after this acquisition. *(ET, 06.02.09)*

Japanese Insurers Form Alliance

Mitsui Sumitomo Insurance Group, Aioi Insurance and Nissay Dowa General Insurance would integrate operations to create the country's largest non-life insurance group, the fifth largest in the world, with combined premiums of US$31bn.

The new group would seek to expand overseas organically and through mergers and acquisitions, with the aim of staying in the world's top 10 in both revenues and profits.

The deal highlights pressures facing Japanese non-life insurance companies, which are highly dependent on the domestic market. *(FT, 24.01.09)*

Beijing Scuppers Coke Deal

China rejected a US$2.4bn Coca-Cola deal that would have been the country's biggest foreign takeover, stoking fears of protectionism and warnings that the decision could scupper Beijing's push to invest in overseas mining companies.

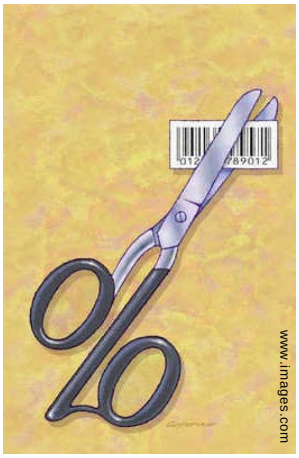
China's Ministry of Commerce ruled against Coke's proposed acquisition of Huiyuan Juice, the country's leading juice maker, on competition grounds, saying the move would hurt smaller domestic companies and limit consumer choice.

Bankers and lawyers denounced the move as a protectionist measure that would also have negative implications for Chinese investment abroad. *(FT, 19.03.09)*

Price Reductions in Takeover Bids

There have been a number of recent takeover bids in Canada where the bidder has varied the bid after commencement to reduce the price offered for the securities. For example:

- Borealis Acquisition Corporation reduced the price of its bid for Teranet Income Fund from US$9.0-US$8.33 per unit. The reasons provided were the deterioration in economic and financial market conditions and increases in the cost of capital. The reduced bid was successful;
- Jaguar Financial Corporation reduced the price of its partial bid for Royal Laser Corp from US$0.65-US$0.51 per share. The reasons provided were a major decline in markets generally and the share price of Royal Laser. The offer expired without the bidder taking up any shares; and
- a subsidiary of Andlauer Management Group Inc reduced the price of its bid for ATS Andlauer Income Fund from US$9.55-US$8.74 per unit. The reason provided was a material deterioration of economic conditions and credit markets that resulted in the failure of a condition to the takeover bid regarding the state of the markets to be satisfied. The reduced bid was successful.



(ILO, 14.01.09)

From Charity to Strategic Partnerships

The economic turmoil brought about by the financial crisis of 2008, compounded by the impacts of a food crisis and pending climate change, has exacerbated many of the existing development challenges in the Middle East and North Africa (MENA).

This paper explores the idea that inclusive, sustainable business partnerships hold the potential to address multiple development needs within MENA. Three reasons are put forward why inclusive and sustainable business practices and CSR-related partnerships may be timely and an important complement to private sector activity in the region includes:

- the global economic crisis and limitations of existing institutions and arrangements open the door for innovative approaches that can both encourage economic activity and address urgent development needs;
- private sector partnerships can address critical social and equity issues in news ways; and
- CSR partnerships can contribute to increased competitiveness and economic dynamism.

(http://www.eldis.org/cf/rdr/?doc=42554&em=020409&sub=corp)

World's 1st True Sustainability Index

The non-profit Centre for Sustainable Innovation (CSI) announced the release of a new model for measuring and reporting corporate sustainability performance. Referred to as the True Sustainability Index (TSI).

TSI is made up of metrics that are context-based, meaning that they express organisational performance relative to actual social and environmental conditions in the world.

CSI's context-based approach to measuring and reporting organisational sustainability stands in stark contrast to other mainstream reporting methods and indexes, most of which are context-free. *(www.csrwire.com, 24.03.09)*

That's why it's called Head Office — they're sacked CEOs of the group ever since the slump hit us.

Oxfam Urges Miner to Improve Community Relations

International aid group Oxfam America commends the Newmont Mining Corporation for conducting a review of its community relationship management practices and calls on the mining company to fully implement the review's recommendations to improve relationships with local communities near mining projects in Peru, Ghana, Indonesia and Nevada.

The independent review is the first of its kind by a major mining company and provides information about community relationships and important recommendations for improving the company's operations on the ground.

(www.csrwire.com, 11.03.09)

Coca-Cola to Clean Water Projects in Africa

The Coca-Cola Company has committed US$30mn over the next six years to provide access to safe drinking water to communities throughout Africa through its Replenish Africa Initiative (RAIN).

Implemented by The Coca-Cola Africa Foundation, RAIN will provide at least 2 million Africans with clean water and sanitation by 2015.

According to the World Health Organisation, more than 300 million Africans lack access to safe drinking water, and millions of them die each year from preventable waterborne illnesses. *(www.afrol.com, 16.03.09)*

NGOs Challenges "Integrity Measures"

Following the refusal by the UN Global Compact (UNGC) to accept and act on a formal complaint of "systematic or egregious abuse" of the Global Compact's overall aims and principles by PetroChina, a UNGC participant, the NGOs that submitted the complaint plan to escalate the matter to the UNGC's Board of Directors.

The complaint, submitted by Investors Against Genocide (IAG) and Centre for Research on Multinational Corporations (SOMO), asks the UNGC to formally apply its established "Integrity Measures."

If after three months, there is no satisfactory resolution of the issues raised, the groups ask that the UNGC to remove PetroChina from the list of participants. *(www.csrwire.com, 19.01.09)*

Business Charity Drop by a Third

According to a survey of 450 business leaders in UK, corporate giving to charity is expected to drop by a third in 2009 as community budgets suffer the same fate as many other corporate budgets in the face of the recession.

The survey, carried out by YouGovStone for the Social Investment Consultancy, showed that an estimated US$2.05bn per year donated is likely to drop to under US$1.5bn.

A number of respondents suggested that companies involved in cut-backs would look for lower cost, creative ways to support communities instead, such as through increased employee volunteering or gifts in kind. *(BR, 23.03.09)*

Larger Firms to have CSR Policies

Companies with a turnover of more than 50m UK pounds are twice as likely to have established policies on corporate social responsibility and diversity, according to new research by KPMG on its own suppliers.

The survey pulled together results from 955 companies, and showed that nearly two-thirds have a diversity policy, and just over half have a CSR policy. 60 percent say that they measure waste reduction and recycling, and nearly as many track energy use.

KPMG said that it remains committed to working with suppliers that share the company's commitment to social responsibility issues. *(BR, 24.02.09)*

Bolivia to Pay for Nationalisation

Bolivia, the linchpin of gas supplies to the southern half of Latin America, is struggling to secure long-term investment for its hydrocarbons sector amid questions over its reliability as a supplier and uncertainty over demand from export markets.

Evo Morales, the country's popular leftist president who faces a presidential election in December, travelled to Russia this week to sign an agreement with Gazprom, the state gas monopoly, to develop Bolivia's gas reserves until 2030.

The fact that Bolivia has to go so far abroad highlights the damage it did by nationalising its energy industry in 2006, driving away technically able international companies with a proven ability to raise funds. *(FT, 17.02.09)*

Investment Faces Regulatory Hurdles

Chinalco's planned US$19.5bn investment in Rio Tinto must clear significant regulatory hurdles in Australia and pass Canberra's "national interest" test when transactions are undertaken by state-backed entities.

BHP Billiton, Rio's larger Anglo-Australian rival and former hostile suitor, will also attempt to derail the deal by using its influence in Canberra.

BHP, Australia's biggest company by market value, has already made known its opposition to the sale of holdings in some of Australia's premier resource deposits. *(FT, 12.02.09)*

Foreign Investment in China

China's actual use of foreign investment plunged 32.67 percent year on year to US$7.54bn in January. Foreign investment use has seen consecutive falls in China since October, when a 2.02-percent annual drop was recorded.

China used US$92.4bn of foreign investment in 2008, up 23.6 percent from 2007, data from the National Bureau of Statistics showed. The growth was 10 percentage points higher than that of 2007.

The upward trend would experience a turning point in 2009 even without the global financial crisis, as China's adjustment to its foreign investment policies took effect. *(ET, 17.02.09)*

Investors Turn Backs on Mega Funds

Investors are turning hostile to "mega-buy-out" groups as many of their heavily leveraged, multi-billion-dollar takeovers of large companies are hit by the financial and economic crisis, according to research published today.

More than half of investors plan to cut their investment in the biggest buy-out houses in 2009 including insurers and pension funds, by the private equity advisory boutique Almeida Capital.

The "mega-buy-out" houses have grown rapidly in recent years by generating big profits from acquiring large companies with a sliver of their own investors' money and big bank loans. *(FT, 19.01.09)*

Economic Reforms Led to 1mn Deaths

As many as one million working-age men died due to the economic shock of mass privatisation policies followed by post-communist countries in the 1990s.

The University of Oxford-led study measured the relationship between death rates and the pace and scale of privatisation in 25 countries in the former Soviet Union and Eastern Europe, dating back to the early 1990s.

They found that mass privatisation came at a human cost: with an average surge in the number of deaths of 13 percent or the equivalent of about one million lives.

The rapid privatisation programme, part of a plan known by economists as 'shock therapy', led to a 56 percent increase in unemployment, which the study says played an important role in explaining why privatisation claimed so many lives. *(FE, 19.01.09)*

Norway to Review Fund Investments

Norway's finance minister has ordered a review of investments by the country's wealth fund in companies active in the Palestinian territories after Israel's crackdown in Gaza.

The US$300bn oil fund, officially known as the Government Pension Fund – Global, invests under ethical guidelines from the Ministry of Finance and has excluded a few dozen companies that produce nuclear arms or cluster munitions, degrade the environment or violate human or worker rights.

Kristin Halvorsen, Finance Minister, Norway has asked the fund's ethics council to assess whether companies in which the fund is invested and which operate in the Palestinian territories comply with the guidelines. *(FT, 07.01.09)*

Sovereign Funds Revive Investing

Sovereign wealth funds plan to resume investing in assets around the world in 2009, with a focus on strong dividend yields.

Many of the funds, the most powerful of which are based in Asia and the Middle East, have stopped investing in the wake of the global economic downturn, which has slashed the value of their portfolios.

Some funds admitted that, after political pressure, they had been diverting cash inflows from their global portfolios to invest in their home regions in order to stimulate local markets. *(FT, 17.02.09)*

Zambia Offers Tax Sops to India

Zambia is wooing Indian companies by assuring no forex controls and tax sops after major investments by Vedanta Resources, Tata Motors and Era Infrastructure.

The Manager, Zambia Development Authority, Robert Buzz Banda, said opportunities are aplenty in mining, tourism, manufacturing, education and healthcare sectors both directly or through public private participatory model.

Several corporate houses from India are looking at tapping natural resources such as coal, coal-bed methane, oil and natural gas exploration and production. *(BL, 09.03.09)*

Greece to Woo Foreign Investors

The Greek government is to launch a charm offensive in Asia and the US to try to attract investors as record levels of sovereign debt make it increasingly hard to raise funds in Europe.

Greece, whose credit rating was downgraded because of rising worries over its public debt, has been forced to pay much higher yields relative to Germany to raise debt owing to the deterioration in financial conditions and rising investor concern over the health of its economy. The country plans to issue a 10-year bond of benchmark size, typically about US$6.6bn. *(FT, 18.02.09)*

HK Watchdog Hits at StanChart

Standard Chartered, a pillar of Hong Kong's financial establishment, is to compensate more than 1,000 investors after being rebuked by the local securities watchdog in a case relating to mutual fund trading.

Hong Kong's Securities and Futures Commission ruled that the UK-based bank had "failed to act in the best interests of its clients" after failing to ensure a level playing field for all investors in third-party funds.

StanChart has promised to contact 1,260 clients who invested in the relevant funds, as part of a "payment scheme" that could total US$320,000 plus interest. The bank, which reported the matter to authorities, denied wrongdoing and insisted that it was making the payments "voluntarily". *(FT, 07.01.09)*

China to Invest in Africa Again

China is regaining its appetite for acquisitions in Africa as asset prices on the continent tumble, according to Standard Bank, Africa's largest lender that is partially owned by China's biggest bank.

Jacko Maree, Standard's Chief Executive, said that Chinese companies were readying to "turn on the taps" once more after 2007's surge of investment into Africa fell away dramatically due to the global financial crisis.

Market valuations for many African companies – particularly miners but also telecoms groups and banks – have fallen sharply during the crisis. Last year, Industrial and Commercial Bank of China (ICBC) took a 20 percent stake in Standard for US$5.5bn.

However, Maree said that the "war chest" the bank had retained to fund further international expansion, which stood at US$1bn in August, had instead been used to shore up its capital base. *(FT, 05.03.09)*

Hong Kong Hot for Investing

The retail-investor market is growing strong in Hong Kong. There are more than 2 million retail investors in Hong Kong, and 10 percent of them are active traders.

Hong Kong's retail investors tend to be well-educated, with 40 percent having education beyond high school. They also tend to favour equities, allocating 70 to 90 percent of their portfolios to stocks. Not surprisingly, perhaps, they are wary of derivatives.

Mutual funds are also gaining popularity. The net asset value of such funds had a compound annual growth rate of 20 percent from 2003 to 2008, and it reached US$1.3tr in assets in 2008.

Responding to the demand, the combined asset management and fund advisory business experienced a 40 percent compound annual growth rate over the same time period. And that fact has not been lost on US asset managers either, which have announced plans to expand their presence in the Hong Kong market. *(IN, 02.03.09)*

China's Contractual Projects Up

China's overseas contractual projects stood at US$7.96bn in the first two months of 2009. The figure was up 24.8 percent year-on-year despite the world economic downturn.

Many companies expanded their target markets from the European Union and the United States to developing countries in Africa and Latin America.

Also, many companies shifted from labour-intensive sectors to technology-intensive industries, such as electric power, oil refining, telecommunications and metallurgy. *(Xinhua, 16.03.09)*

Streamlining FDI Regime

In an effort to streamline the foreign investment administration regime, the Ministry of Commerce issued a circular in August 2008 which delegates part of its approval authority over foreign-invested projects to its provincial counterparts.

The circular establishes threshold investment amounts of US$100mn in any foreign investment project in an 'encouraged' or 'permitted' industry and US$50mn in a 'restricted' industry.

It grants the ministry's provincial counterparts the authority to approve: (i) an increase in the total investment amount of a foreign-invested project up to the threshold amount applicable for existing foreign-invested enterprises; and (ii) the incorporation of and corporate changes to a foreign-invested company limited by shares that has share capital up to the threshold amount. *(ILO, 14.02.09)*

Global FDI now in Decline

Global foreign direct investment (FDI) inflows are estimated to have fallen by 21 percent in 2008 to an estimated US$1.4tr, and will likely fall farther in 2009.

In the face of a global economic recession, tighter credit conditions, falling corporate profits, and gloomy prospects and uncertainties for global economic growth, many companies have announced plans to curtail production, lay off workers, and cut capital expenditures, all of which tend to reduce FDI.

The impact of the crisis varies widely depending on region and country, with consequently varying impacts on the geographic patterns of FDI flows. Developed countries have already been directly hit, while the effects of the crisis on developing economies have so far been indirect in most cases, with varying degrees of severity. *(UNCTAD, 19.01.09)*

Regulators to Renew Battle with IBM

It is 40 years to the week since the US government filed its last official antitrust complaint against IBM, and more than 50 years since it reached a landmark consent decree with the computer maker to open up the early computing industry.

Yet some technology monopolies never die. The market for mainframes – the heavy-duty, monolithic machines that dominate the high-end of the computing market – once attracted the attention of companies including General Electric to Honeywell.

Today, though, it is once again the almost exclusive preserve of IBM, with whose name it has become almost synonymous. *(FT, 20.01.09)*

Telecoms Urging for Less Regulation

Leading European telecoms companies urged governments to ease the regulations on them, so the industry can play a major role in lifting economies out of recession.

Spain's Telefónica and Vodafone of the UK, said telecoms companies could fuel economic recovery, but warned that their efforts were hampered by regulations, notably from Brussels.

Vittorio Colao, Vodafone's chief executive, complained the industry was suffering from "regulatory activism".

Telecoms companies are using the world's largest mobile phone conference in Barcelona to highlight how the industry makes a significant contribution to gross domestic product. *(FT, 18.02.09)*

EU on French Auto Aid

The European Union's top competition regulator expressed concern about France's plan to bolster its auto industry, which has drawn fire from EU allies and German industry.

www.google.com

A spokesman for the European Commission suggested the plan might contravene EU laws by obliging French car makers to keep their plants in France in exchange for government funds.

The state would also double its aid to auto industry suppliers, to US$790, as part of a drive to protect the entire sector, which employs one French worker in 10, from the global economic storm. The aid package, which amounts to US$10.3bn in new funds, was essential to protecting French industry and jobs from the slowdown. *(BL, 10.02.09)*

Russia Supports for Aviation Cos.

The Russian government's Committee on the Improvement of Sustainable Economic Development approved a list of core Russian companies which are of strategic national importance.

These airlines will be reviewed by the working group established by the committee, with the additional participation of the Ministry of Finance, the Ministry of Economic Development, the Ministry of Regional Development and a nominated bank.

The object of the review is to prepare a plan for the companies' rehabilitation, which may involve the provision of state guarantees; interest rate subsidies; plans to restructure tax debt; customs and tariffs benefits; and other approved measures. *(ILO, 21.01.09)*

Czech: Legislative Changes in Banking

In Czech Republic, an amendment to the Act on Banks came into effect to increase the insurance coverage of deposits.

Compensation for clients in the event of a bank's bankruptcy are to be paid from obligatory contributions paid by financial institutions to the Deposits Insurance Fund. However, banks' own deposits do not enjoy the protection of bank deposit insurance.

In light of the credit crunch, banks have adopted a stricter and more prudent approach to existing credit clients and new credit provision, particularly in relation to negotiating security for credits; monitoring various financial indicators; and comprehensive audits of credit conditions compliance. *(ILO, 16.01.09)*

All Modes of Transportation Covered

The Swedish Transport Agency began operations on January 01, 2009. It was established through a merger of the former Aerial, Maritime, Rail and Road Inspectorates and the Traffic Registry of the Road Traffic Authority.

The agency operates under the Ministry of Industry, Employment and Communications. Its role is to formulate regulations; examine and grant permits; and supervise the four fields of transport.

The new agency involves no substantial alterations, but rather is merely a restructuring of the authorities handling transport inspections and regulations in Sweden. *(ILO, 21.01.09)*

No Customs Duty on Turbine Fuel

The Indian Ministry of Finance announced the withdrawal of the five percent basic customs duty on aviation turbine fuel.

Indian oil companies do not directly import aviation turbine fuel; however, the price of domestically produced aviation turbine fuel is determined by oil companies, based on import parity price and factoring in the basic customs duty.

The government's welcome step to ease financial stress in the aviation sector is based on the view that an exemption from the customs duty should lower the base price of aviation turbine fuel and consequently the incidence of other indirect taxes such as excise duty and value added tax. *(ILO, 14.01.09)*

Changes to Fairway Dues Act

The Finland fairway dues collection system has traditionally been based on a procedure whereby a foreign ship owner is obliged to appoint and use a Finnish representative (i.e. an agent).

The agent and foreign ship owner are jointly and severally responsible for payment of the fairway dues imposed on the respective vessel.

The purpose of the system is to safeguard the collection of the fairway dues. The Fairway Dues Act has now been amended to comply with EU legislation. *(ILO, 07.01.09)*

A New 'N' Word

— Bruce Stokes*

Bank nationalisation is the last best option available to the Obama administration, now that most other alternatives for dealing with the banking crisis have proven wanting.

In the end, politics and not economics might be the principal obstacle to nationalisation. President Obama would be slammed as a socialist, eroding public support for the administration's other goals. Yet simply doling out more taxpayer money to the banks will also engender populist outrage.

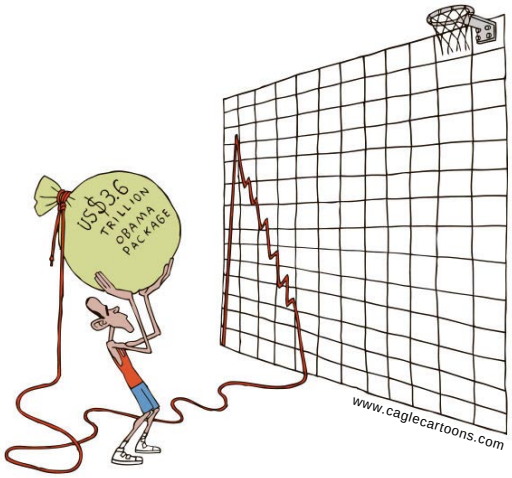
The White House and congressional Democrats should bite the bullet and nationalise the banks now, when public support for bold initiatives will never be higher. Waiting is no longer prudent. It is wishful thinking, both economically and politically.

There are only two potential sources of new funds: private investors or the taxpayer. Over the course of 2008, sovereign wealth funds and other private sources put nearly US$1tr into the US banking system. But now private investors are wary. Investment tailed off markedly toward the end of 2009.

"You cannot rely on the private sector or markets alone to solve systemic banking problems," advised Stefan Ingves, head of the Swedish Central Bank, who oversaw Sweden's response to its banking crisis in the early 1990s.The alternative is nationalisation, what the Swedes called the socialisation of risk in return for the socialisation of control.

This is exactly what the Reagan administration did in 1984 when it nationalised Continental Illinois, one of the country's largest banks. And it is what the administration of George H.W. Bush did in 1989 when it created the Resolution Trust Corporation, which eventually controlled 350 failed savings and loans.

Pelosi is being disingenuous. For many banks, sufficient public funds to keep them from failing would give the government a majority of the institution's shares. Nationalisation by any other name is still nationalisation.



Nationalisation of the banks is the new "N" word. But, unlike the original "N" word, it is not a derogatory epithet to be dismissed out of hand. Nationalisation is a legitimate policy tool that has been used successfully before in the US and abroad

To forestall an inevitable, politically unpalatable nationalisation, there is growing support for an idea put forth by Sheila Bair, chairwoman of the FDIC. She has proposed aggregating banks' bad assets into one government-controlled entity, thus liberating commercial banks to lend again.

This proposed "aggregator bank" poses several problems. Bair wants to buy the bad assets at "fair value". But the original Troubled Asset Relief Program failed on that because it was not easy to establish a fair value for essentially worthless mortgages. To have sufficient capital to begin lending again, banks need the government to pay a high price. This would bail out existing stockholders and management at taxpayer expense.

Nationalising the banks would not obviate the need for new capital for banks to lend. But a new bank bailout vote on Capitol Hill might be somewhat less difficult if the Obama administration can assure skeptics that government-appointed managers will be ordered to re-lend the money, not stash it away as reserves or fritter it away in management bonuses.

Nor will nationalisation be politically without cost. It means bigger government. At the height of the savings and loan crisis, the RTC had roughly 10,000 people on its payroll. And public employees are not necessarily more honest than private sector ones. Allegations of abuse dogged the RTC. Most important, nationalisation means Wall Street will no longer be the scapegoat. The buck will stop at politicians' doors.

Congress faces a choice. It can continue to pour money into the private banking system, with little hope of greater success, and face the wrath of voters in 2010, after wasting hundreds of billions of additional taxpayer dollars. Or it can take the political heat now, nationalise the banks, and begin the slow climb out of this financial hellhole.

* *International Economics Columnist for National Journal.*
Abridged from an article that appeared in the Congress Daily, January 29, 2009

Coming Soon: Capitalism 3.0

— Dani Rodrik*

Capitalism is in the throes of its most severe crisis in many decades. A combination of deep recession, global economic dislocations and effective nationalisation of large swathes of the financial sector in the world's advanced economies has deeply unsettled the balance between markets and states. Where the new balance will be struck is anybody's guess.

The real question is not whether capitalism can survive – it can – but whether world leaders will demonstrate the leadership needed to take it to its next phase as we emerge from our current predicament.

Capitalism has no equal when it comes to unleashing the collective economic energies of human societies. That is why all prosperous societies are capitalistic in the broad sense of the term: they are organised around private property and allow markets to play a large role in allocating resources and determining economic rewards. The catch is that neither property rights nor markets can function on their own. They require other social institutions to support them.

So property rights rely on courts and legal enforcement, and markets depend on regulators to rein in abuse and fix market failures. At the political level, capitalism requires compensation and transfer mechanisms to render its outcomes acceptable. As the current crisis has demonstrated yet again, capitalism needs stabilising arrangements such as a lender of last resort and a counter-cyclical fiscal policy. In other words, capitalism is not self-creating, self-sustaining, self-regulating or self-stabilising.

The history of capitalism has been a process of learning and re-learning these lessons. Adam Smith's idealised market society required little more than a 'night-watchman state.' All that governments needed to do to ensure the division of labour was to enforce property rights, keep the peace and collect a few taxes to pay for a limited range of public goods.

Those who predict capitalism's demise have to contend with one important historical fact: capitalism has an almost unlimited capacity to reinvent itself. Indeed, its malleability

Through the early part of the 20th century, capitalism was governed by a narrow vision of the public institutions needed to uphold it. In practice, the state's reach often went beyond this conception. But governments continued to see their economic roles in restricted terms.

This 'mixed-economy' model was the crowning achievement of the 20th century. The new balance that it established between state and market set the stage for an unprecedented period of social cohesion, stability and prosperity in the advanced economies that lasted until the mid-1970s.

This model became frayed from the 1980s on, and now appears to have broken down. The reason can be expressed in one word: globalisation.

The current crisis shows how far we have come from that model. Financial globalisation, in particular, played havoc with the old rules. When Chinese-style capitalism met American-style capitalism, with few safety valves in place, it gave rise to an explosive mix. There were no protective mechanisms to prevent a global liquidity glut from developing and then, in combination with US regulatory failings, from producing a spectacular housing boom and crash.

The lesson is not that capitalism is dead. It is that we need to reinvent it for a new century in which the forces of economic globalisation are much more powerful than before. Just as Smith's minimal capitalism was transformed into Keynes' mixed economy, we need to contemplate a transition from the national version of the mixed economy to its global counterpart.

This means imagining a better balance between markets and their supporting institutions at the global level. Sometimes, this will require extending institutions outward from nation-states and strengthening global governance. At other times, it will mean preventing markets from expanding beyond the reach of institutions that must remain national. The right approach will differ across country groupings and among issue areas.

Designing the next capitalism will not be easy. But we do have history on our side: capitalism's saving grace is that it is almost infinitely malleable.

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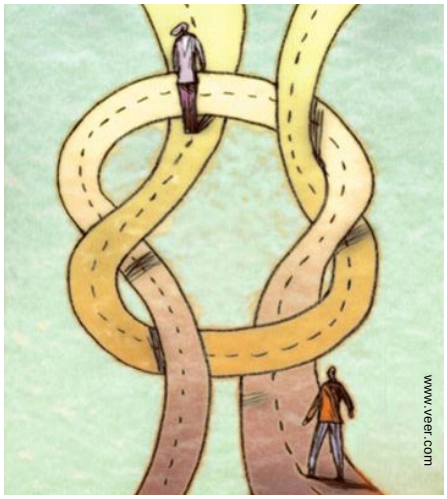
* *Professor of Political Economy at Harvard University. Abridged from an article that appeared in the Business Standard, February 11, 2009.*

The Role of Competition in Anti-crisis Measures in Uzbekistan

— Golib Kholjigitov*

In the anticipation of the global financial and economic crisis and its possible negative implications on the economy of Uzbekistan, the government swiftly increased the capitalisation of all major banks as well as the whole banking system



Since all the problems in the developed markets started from the financial system Uzbek government increased the lending capacity of the banking system and made sure that banks kept lending especially to the small and medium-sized enterprise (SME) sector at least at previous levels. Thus, the total capitalisation of banking system (not specific or privileged banks, but the whole banking system) was increased to 40 percent compared to 2007.

Moreover, the state has guaranteed (blanket guarantee) all the bank deposits of population and developed strict rules for banks to provide full and on time payment of the demanded deposits, if such cases come up. These measures have increased the total amount of deposits to 65,3 percent by the year end 2008 (compared to 2007). The priority for the state was to make sure that the population trusts in its banking system. An overall measure provided to the banking system is expected to lead to two-fold increase in capitalisation by 2010.

Secondly, the government has adopted an Anti-crisis program which addresses measures that supports companies in the real sector of the economy, with the emphasis on the export-oriented companies; providing them with financial support, and making sure that most of the healthy firms are supported. In this case the role of competition policy is to make sure that everything stays in line with the broad competition principles.

Thirdly, the state made too much emphasis on the support of SME sector, by providing extended support for entrepreneurship, (the share of SME at 48,2 percent of GDP in 2008), which is expected to reach 50-52 percent by 2010. It is understood that the role of SME could be vital for the provision of sustainable economic growth during the period of global financial and economic crises, because of its flexibility. The competition authority has developed specific legislation where huge state purchases and orders are mandatorily subcontracted to small businesses. Also to boost investment capacity of SMEs, the state has lowered single tax rate from eight to seven percent.

Fourthly, the state is making sure that only strong companies that felt sudden credit squeeze will get state aid, which also in line with competition principles, because it brings stronger competition and provides effective allocation of resources during the economic crisis.

Moreover, the state is planning huge production and social infrastructure projects, mostly for rural areas where close to 70 percent of population resides, which could boost employment or keep it at sustainable levels. So in this case the state purchases and orders for these big infrastructure projects are at the strong attention of competition authorities, in order to prevent price collusions, concerted actions and thus provide transparency and fairness.

Finally the competition authority is making sure that state aid and other state support are in line with general competition principles, which are the following:

- The recipients of state aid (grants, support) should be healthy (solvent) undertakings that have experienced sudden difficulties (i.e. credit squeeze);
- State aid (support, grants) should be limited in time (period);
- State aid (support, grants) should be limited in the amount;
- State aid (support, grants) should be limited to stabilise the system (i.e. financial);
- State aid (grants) shall set certain conditions (obligations, binding rules) such as increased efficiency, use of environmental friendly (green) technologies and in the case with banks continuation of lending to SMEs and etc.

* *Director of Antimonopoly Policy Improvement Centre, Uzbekistan*

Do not Tie the Markets – Free Them

— Vaclav Klaus*

We need to weaken labour, environm,ental, social, health and other 'standards' that block rational human activity

It is a common feeling that the Czech Republic is taking over the European Union presidency at a rather complicated moment, even though almost all "moments" can eventually be called "complicated".

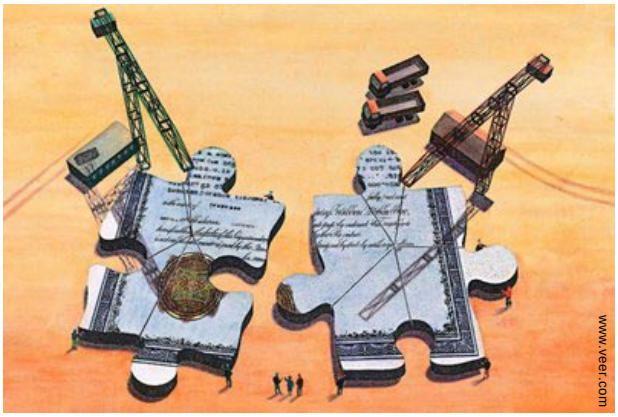
The world is in the midst of a deep financial and economic crisis. The EU has growing troubles with its increasingly visible democratic deficit and is gravely divided as regards its own institutional arrangements. The global climate is basically not changing, but global warming alarmists have succeeded in persuading politicians that a doomsday is coming and on this false assumption they have tried to restrain our freedom and curtail our prosperity.

The economic crisis should be regarded as an unavoidable consequence and hence a "just" price we have to pay for immodest and over-confident politicians playing with the market. Their attempts to blame the market, instead of blaming themselves, are unacceptable and should be resolutely rejected. The Czech government will – hopefully – not push the world and Europe into more regulation, nationalisation, de-liberalisation and protectionism.

A big increase in financial regulation will only prolong the recession. Growth in the global economy is falling rapidly, the banks have ceased to grant credit and confidence is ebbing. Radically changing regulation governing financial institutions in the midst of recession is counterproductive.

Aggregate demand needs strengthening. One traditional way to do this is to increase government expenditures, probably in public infrastructure projects, on condition these are available. It would be much more helpful, however, to have a great reduction in all kinds of restrictions on private initiatives introduced in the last half a century during the era of the brave new world of the "social and ecological market economy".

As regards the EU's "constitutional" stalemate, the Czech government will – hopefully – not lead Europe to an ever-closer union, to a Europe of regions (instead of states), to a centralised, supranational Europe or to an increasingly controlled and regulated Europe masterminded from above. It will keep stressing its EU presidency slogan "Europe without barriers", which means the advocacy of further liberalisation, removing trade barriers and getting rid of protectionism.



Our historical experience gives us a clear instruction: we always need more of markets and less of government intervention. We also know that government failure is more costly than market failure.

The Czech government will hopefully not be the champion of global warming alarmism. The Czechs feel that freedom and prosperity are much more endangered than the climate. The uniqueness of current levels of global warming is not a proven phenomenon. Moves to mitigate climate change by fighting carbon dioxide emissions are useless and, what is most important, human beings have proved themselves to be sufficiently adaptable to an incrementally changing climate.

The world in the year 2009 will not be spared armed conflicts, international terrorism, and territorial and religious disputes which – no matter how geographically distant they may be – will have consequences for all of us. We know that peace cannot be declared unilaterally and that long-lasting solutions are usually not the ones that are imposed from abroad. The Czech government will not support external interventions into the domestic affairs of sovereign countries.

The pragmatic Czechs – with all their criticism of European decision-making mechanisms – will not attempt to initiate a pan-European "velvet revolution" but will promote their interests and priorities. We will treat others as we expect to be treated: with respect for different views. We will be happy if a common denominator in – at least – some cases can be found. Reliance on negotiations and on the positive effect of the diversity of views is what makes Europe Europe.

The EU presidency might give us a chance to make use of some of our views to the benefit of the citizens of all EU member states. Their welfare and happiness will be maximised in a free, democratic, decentralised, open and liberalised Europe.

* *President of the Czech Republic. Abridged from an article that appeared in the Financial Times, Januray 07, 2009.*

About a Competition Law – Egypt*

Egypt is the most populated country in the Middle Eastern and North African (MENA) region; bordering the Mediterranean Sea between Libya and the Gaza Strip, and the Red Sea North of Sudan, including the Asian Sinai Peninsula. A rapidly growing population, limited arable land, and dependence on the Nile, all continue to overtax resources and stress the society. The Government has struggled to prepare the economy for this millennium through economic reform and massive investment in communications and physical infrastructure.

Economy

Egypt took up the socialist ideology after its revolution in 1952, but an increasing number of economic reforms, starting with the Open Door Policies of the early 1970s have moved it into a market economy. Lack of substantial progress on economic reform has limited foreign direct investment (FDI) in Egypt. However, in 2004, Egypt pushed through customs reforms; proposed income and corporate tax reforms; reduced energy subsidies; and privatised several enterprises. The budget deficit rose to an estimated eight percent of gross domestic product (GDP) in 2004. In reality, it is currently something of a mixed economy, officially an open free-market economy, but still bogged down with socialist policies.

Competition Evolution and Environment

The issue of competition is not new in Egyptian legislation. The Criminal Law contains articles that deal with monopolistic and anti-competitive behaviour.

However, Egypt never had a special law devoted to competition until 2005. There were several attempts made, in implementing a competition law, since 1995, with several drafts turning into 17 drafts, but none of these drafts reached the final stages of being approved by the Parliament. It was only in 2004, when the new Cabinet, that took charge in July 2004, agreed upon a draft for the law and passed it to the Parliament for approval. In 2005, the law was approved by the Parliament.

Competition Policy

The objective of the law, *Competition and Prevention of Monopolies Law,* adopted in 2005 is the right to undertake economic activity, which is preserved for all, as long as it does not lead to restraining, preventing, or negatively affecting the status of competition. This objective does not clearly state the ultimate aim of the law, that is, to ensure that it neither negatively affects domestic or international trade, nor economic development.

The Law applies to all natural persons and economic entities with all its kinds, while it excludes all public utilities. The Law gives the Cabinet the right to exclude private firms from being subject to that law if they partake in anticompetitive behaviour, but simultaneously create welfare gains or positive benefits for the consumer, the so-called public interest. The criteria for measuring the economic benefits for the consumer are not identified. Despite such a logical intervention here, such a provision might give room for political and discretionary power to negatively influence the application of the law.

The Egyptian law applies to all kinds of economic activities related to production, distribution, marketing, selling, buying, developing, inspecting, and transporting. The law does not include a de minimis provision. De minimis means that certain agreements are too small in size to do any real harm to competition and are not, therefore, of real concern to competition authorities. The law does not identify specific criteria other than the general competition status for determining the scope of the market.

Consumer Protection

In general, consumer rights and protection are the issues which have been overlooked in Egypt. There is a draft law in Egypt on consumer protection. However, it is still in its early stages, and has not been presented before the Parliament for its final approval. The existing draft law aims at creating a body that governs and oversees consumer protection issues, following the same lines of the competition law. This law, in general, has a number of overlapping articles, like those existing in the competition law. However, it is expected that such overlaps would be dealt before finalising the draft of the consumer protection law.

Future Scenario

Egypt, like other developing countries, has lacked the necessary pillars of having an effective competition policy. The law, in itself, is not sufficient to ensure an effective competition policy. The privatisation programme, in Egypt, has lately suffered a number of delays. Moreover, a number of the privatised companies remain 'semi-privatised', whereas the Government still owns the lion's share of their capital. The inflows of FDI remain constrained by various bureaucratic and red tape measures. The labour market lacks the competitive institutional pillars that would ensure full flexibility.

In a nutshell, the Government has started to move in the right direction, by tackling the different issues related to competition, which were overlooked by past governments. This is a positive step, which however, will have been taken in vain, if comprehensive reforms regarding the enforcement of laws and civil servants' attitude do not experience dramatic changes in the near future.

* *Extracted from Competition Regimes in the World – A Civil Society Report, www.competitionregimes.com*

Publications

PolicyWatch

The January-March (2009) issue of the CUTS newsletter PolicyWatch encapsulates the status of the Right to Information in India in its cover story. Though this Act does bolster the democratic foundations of governance in India, the text as well as implementation needs a lot of fine tuning.

Special article by Arvind Panagariya states that the UPA government arguably had the best economic team, raising the hope that it will go ahead with economic reforms. However, the 'holy trinity of reformers' failed to live up to expectations. The newsletter captures an interview with the Director, Corporate Finance, KPMG, India which says that most competition regulators out greater emphasis on concentration or market share, while deeming which all combinations should fall within its ambit.

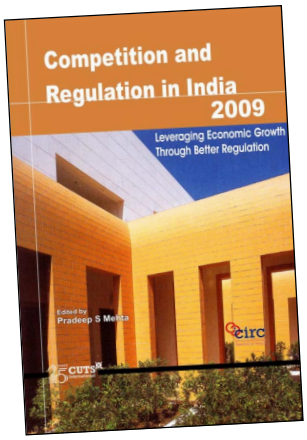
Besides, it carries regular sections on Infrastructure, Trade & Economics, Governance & Reforms, E-governance, Corporate Governance, Expert Corner, Report Desk, Good practices, Corporate Governance etc.


PolicyWatch

Volume 10, No. 1 January-March, 2009

Status of 'Right to Information' in India

To access the newsletter online please click on the following link:
www.cuts-international.org/pw-index.htm



Competition and Regulation in India, 2009
– A Curtain Raiser

India Competition and Regulation Report, 2009 tries to examine the evolution of regulation/regulatory problems from a political economy perspective and assess the quality of regulation in terms of the suitability of content for tackling market failures, the effectiveness and independence of the regulator and the extent to which the set of sector regulations fosters competition. This study is an important contribution towards enriching the available literature in the public domain and encouraging a dialogue to promote a healthy and competitive environment as evolving an appropriate regulatory culture is always a learning curve.

This Monograph can be viewed at:
http://www.cuts-ccier.org/icrr09/pdf/Competition-Regulation-India-CurtainRaiser09.pdf

Forum

Political Economy of Regulation in India

I am sorry to have missed attending this important roundtable due to unavoidable reasons. From the summary of the deliberations I can say my congratulations to you for bringing out detailed analysis of regulation efficiency and independence.

V S Ailawadi
Former Chairman
Haryana Electricity Regulatory Commission

Sources

ABC: Australia Bureau of Circulations; **ACCC:** Australia Competition and Consumer Protection; **AHP:** Antitrust Hotch Potch; **ALBN:** Asia Legal Business News; **BL:** The Hindu Business Line; **BOPA:** Botswana Press Agency; **BR:** Business Respect; **BS:** Business Standard; **CNC:** Comisión Nacional de Competencia; **EN:** Engineering News; **FAS:** Federal Anti-monopoly Service; **FE:** Financial Express; **FT:** Financial Times; **II:** Investors Iraq; **ILO:** International Law Office; **IN:** Investment News; **JP:** Jakarta Post; **OECD:** Organisation for Economic Cooperation and Development; **PDI:** Philippines Daily Inquirer; **TO:** Times Online; **UNCTAD:** United Nations Conference on Trade and Development

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