REGULETTER

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Special Articles

India's Ease of Doing Biz isn't Just About Permits

India has been lately focusing on issues relating to ease of doing business. A lot of Indian states are pushing reforms on taxes, environmental and labour reforms, single-window online clearance and setting up of commercial courts. The idea is to ensure a competitive spirit among Indian states, each trying to lure the private sector.


The Economic Times

However, most such reforms are focused on ease of obtaining permits, which, unfortunately, cannot be equated with the ease of doing business. Obtaining permits is only one of the factors in doing business, after which the "unease" of doing business often begins. As part of an ongoing project focused on "EoDB among North Indian states with the perspective of improving competitiveness", our team had undertaken a field visit to six North Indian states (Rajasthan, Haryana, Uttar Pradesh, Uttarakhand, Himachal Pradesh and Punjab).

Several Indian states, such as Uttarakhand, have implemented a concept of "deemed approval" under its single-window clearance mechanism. While this laudable reform has helped the state move up the rankings, such "deemed" approval is not considered equivalent of "in-principle" approval by financial institutions, limiting the ability of small and medium enterprises to raise finance. Similarly, while the efforts of the Uttar Pradesh government to institutionalise a dedicated body for providing approvals for setting up of business are worth appreciating and emulating, frequent transfers of key officials seems to have rendered this body dysfunctional.

Thus, the single-window clearance mechanism should not just be a mere mirage which hides several windows behind one single window but should be implemented in a manner which offers an actual one-stop shop for investors, as done in Punjab. The Government of Punjab has established a separate institution for single-window clearance (Invest Punjab), by bringing on board staff from various government departments under one roof and one command. Similarly, the ease of obtaining labour-related approvals does not ensure the availability of skilled and committed labour at all times.

The need to periodically review measures adopted by states is important to gauge progress. However, it is essential to confront implementation bottlenecks to make real progress on the ease of doing business and improving overall competitiveness. Without addressing these, good policies carry the risk of resulting in bad outcomes.

Ascertainment of challenges and designing strategy to address them requires a bottom-up approach. This comprises consultation with key stakeholder groups and involving them in problem identification and solution designing process. Looking at the other side of the aisle also helps in assessing if the governments have been merely enamoured by the rankings or have made sincere efforts to improve the level of competitiveness and the EoDB.

CUTS Centre for Competition, Investment & Economic Regulation
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Aim to Consolidate Leadership

Chile has amended its Competition Law to 'consolidate [its] leadership as a sophisticated agency in Latin America.'

The amendments include the introduction of mandatory premerger notification and a two-phase merger control system, required notification for acquisitions of minority stakes, criminal penalties for cartel involvement, an increase in the maximum fine for anticompetitive conduct, and per se enforcement for interlocks between competitors under certain circumstances.

The most important amendments for parties' doing business in Chile, and those considering potential transactions in the country, are the introduction of a mandatory premerger notification to the National Economic Prosecutor and a two-phase merger control system. *(NLR, 07.12.16)*

Competition Authority in Operation

After three years of hiccups, **Kosovo** Competition Authority members have been selected and are ready to assume their positions and begin work.

The authority has not been operational since 2013, and despite initial efforts members have only now been appointed. Due to the lack of a decision-making body, no decisions have been issued or investigations conducted by the authority since 2013.

The authority is one of the youngest of its kind in the region and thus has a significant lack of practice providing guidance on how competition rules should be implemented. Such uncertainties are common for any new legal system.

(ILO, 13.10.16)

Identify Anticompetitive Behaviour

The Competition Authority of **Kenya** (CAK) has recently announced that a number of proposed amendments to the Competition Act are currently pending before the National Assembly for consideration and approval.

The proposed amendments are generally aimed at increasing sanctions and CAK's authority to detect and prosecute anticompetitive behaviour as well as to ensure that parties provide the CAK with adequate and correct information to properly assess merger notifications.

Importantly, the amendments seek to introduce a financial threshold for respondents who are found to have engaged in abuse of dominance practices. *(AA, 04.11.16)*

Change of Merger Control Regime

A new bill, passed on December o6, 2016 amending Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, is poised to significantly change the **Hungarian** merger control regime, introducing the obligation to report a merger; increased merger control thresholds; possibility to investigate mergers below thresholds; and dawn raids in merger cases.

The bill also introduces rules on the enforcement of private damage claims for the breach of competition rules; and a fast-track review for non-problematic mergers. The amendments to the Competition Act are expected to enter into effect in January 2017.

(www.lexology.com, 08.12.16)

Merger Consent Updated

The **Canadian** Competition Bureau released a revised consent agreement template for merger remedy negotiations. The release of the Bureau's updated template is timely as the number of consent agreements registered with the Competition Tribunal have rise significantly since the last template was published in 2007.

In 2015 alone, six consent agreements have been registered with the Tribunal, compared to two agreements that were registered in 2007. Since 2007, more than 30 consent agreements have been registered with Tribunal, following remedy negotiations between the Bureau and the merging parties.

The intent of the consent agreement template is to provide formal guidance to the legal and business communities in respect of the Bureau's expectations when negotiating measures to address competitive issues likely to arise from a proposed merger.

(www.competitionchronicle.com, 03.10.16)

Markets to Work Better

It is the driest of issues but planned new competition laws could benefit Australian consumers. The so-called 'effects test' will help **Australia**'s two million small businesses operate without feeling they operate in the shadow of big business.

The Turnbull government has introduced legislation to strengthen competition rules that prevent firms with substantial market power engaging in conduct that harms competition.

These amendments will make markets work better for the benefit of all Australians and help to lift our long-term productivity growth.

(www.news.com.au, 01.12.16)

'Blow Whistle' on Cartel Conduct

The Competition Commission of **Singapore** (CCS) announced amendments to a number of its core guidelines, following a consultation process in 2015. CCS has also confirmed the introduction of a new Fast Track Procedure, designed to give parties an incentive to admit liability and settle competition investigations quickly.


www.green4sea.com

The amendments bring several of the guidelines in line with existing CCS practice, and in some cases, provide welcome clarifications as to how CCS will approach its enforcement and administration of the Competition Act.

However, other amendments may have a 'chilling effect' on the willingness of multinational businesses to participate in CCS' leniency process (which provides immunity or penalty discounts to businesses that 'blow the whistle' on cartel conduct). *(www.singaporelawwatch.sg, 01.11.16)*

Competition Law Developments in Africa in 2016

Xolani Nyali*

This article looks at some of the competition law issues making headlines in Africa in 2016 and how they will impact competition law proceedings in 2017

Public Interest in Africa

When South Africa published its public interest guidelines in 2016, it became clear that such guidelines were needed in all the major competition law jurisdictions in Africa. Guidance on public interest issues in mergers would create a degree of certainty for investors and allow merging parties to consider these issues proactively, rather than being met with a condition imposed unexpectedly or unnecessarily.

The most acute public interest factor in South Africa has been employment, where the protection of employment is paramount. Botswana, Kenya and Tanzania have focused on employment issues when considering public interest in mergers and various jurisdictions have focused on protecting local procurement. More countries in Africa are expected to issue formal public interest guidelines in the coming years.

The East African Community Competition Law

With the East African Community (EAC) Competition Authority having appointed five new commissioners in 2016, compliance with the regulations of this new regional authority will likely be required during 2017. In addition, the EAC member states that do not have competition laws in place must now draft them, meaning that competition law should be implemented in an additional three countries in the near future, Burundi, Rwanda and Uganda.

As four of the five EAC member states are also Common Market for Eastern and Southern Africa (COMESA) member states, it remains to be seen what mechanisms will be put in place between the authority and COMESA to streamline the control of merger activity in East Africa, which has been a hub for private sector investment in recent years.

Mozambique

Mozambique's Competition Authority was supposed to become operational in 2016 but it has been delayed. It is expected to begin functioning in 2017. It is the only major jurisdiction in Southern Africa that does not yet have dedicated competition law.

The country is also the only Portuguese speaking jurisdiction in Southern Africa so it is doubtful that it will look to South African competition law for interpretation. Due to language and history, the regulator may look to Portugal or the EU to interpret its law, which will introduce an interesting mix into competition jurisprudence in Southern Africa.

High Court of Kenya's First Competition Case

The High Court of Kenya handed down judgment on the first competition case in Kenya, in the matter between **Mea Limited** and the Competition Authority of Kenya (CAK) in 2016. The ruling confirmed the principle that dawn raids, provided they are based on a reasonable suspicion which is supported by facts, are legal and no prior notice that a search warrant is being sought is required to be given to the company that is to be raided.

2016 Deals

In 2016, Bowmans advised SABMiller in its highly complex transaction with the Coca-Cola Company (TCCC) and Gutsche Family Investments (GFI), included advising on the corporate, employment, tax and competition aspects. The transaction was approved unconditionally in Botswana, Namibia, COMESA and Honduras, and subject to conditions in Kenya, Tanzania and South Africa. After the approval in South Africa, the initial stage of the transaction was completed on 2 July 2016.

SABMiller still intends to transfer to CCBA at a later stage its Swaziland soft drinks and those of its listed subsidiaries in Botswana and Zambia, subject to agreement with those subsidiaries and regulatory and shareholder approvals. The firm was also the South African and Rest of Africa counsel to SABMiller on its US$107bn combination with **ABinBev**. This is by far the largest transaction in South African corporate history and the fourth largest announced deal in global M&A deal history to-date.

The firm represented **Nationwide Airlines** against **South African Airways** (SAA) in relation to ongoing abuse of dominance conduct, in contravention of the Competition Act, resulting in a damages claim against SAA, which was heard before the South Gauteng High Court in 2016. The nature of Nationwide Airlines' claim was the second of its kind to be brought in South African law and the first to be litigated, setting a precedent within South African Competition Law.

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A Healthy Market Demands Effective Competition Law

Udai S Mehta* and Rohit Singh**

"Every quarterback can throw a ball; every running back can run; every receiver is fast; but that mental toughness that you talk about translates into competitiveness", said Tom Brady, Hall of Fame, American Football Quarterback. Sports can teach a lot, especially when the subject is competition.

The competition among nations to attract businesses, investments and growth, is getting tougher. From providing goods and services globally, every country aspires to be more competitive than ever. There is cut-throat competition amongst South Asian countries. Bangladesh is struggling to effectively adopt and implement a competition law. Thus, the focus should be more on setting things right within the country and be mentally tough, to not just run or run fast; but to run fast and for long.

It has been more than four years since Bangladesh enacted the Competition Act. Before its enactment, the Government of Bangladesh constituted the Bangladesh Competition Commission (BCC), under the Ministry of Commerce in 2011. However, the Commission is yet to start its functioning in full swing owing to lack of available resources, required for its efficient functioning.

Till date, the BCC does not have an office or a website and its existence has been limited only on the papers. It is a global fact that competition facilitates better growth and consumer welfare. With numerous examples of countries adopting and effectively implementing Competition Act, Bangladesh has a number of examples to follow within the region (India and Pakistan) including outside the region. Thus, the need of the hour is to ensure effective enactment of the Competition Act, by empowering the Commission.

Bangladesh is often characterised by low internal competition, natural monopolies of state-owned enterprises (SoEs) and weak private sector. SoEs have complete control over rail transport, whereas private companies compete freely in air and road transportation. The banking sector has also been dominated by state-owned banks but recently the private sector has begun to show some promise.

Because of their large number, the SoEs play a critical role in generation of employment and revenues for Bangladesh. However, having a large number of SoEs, in itself attracts anticompetitive behaviour. For Bangladesh, as can also be seen in India, many of the SoEs are incurring massive losses which negatively affect the government budget and revenues.

Despite the Bangladesh government's paradigm shift towards privatisation and liberalisation in 1993, when 74 SoEs were sold out, markets of Bangladesh are far from being beset with anticompetitive practices, such as cartelisation, abuse of dominance, unfair price hikes, hoarding of commodities, which has resulted in endless suffering for consumers and impacted the market dynamics and efficiency. However, with the advent of private players in the market, sectors which were dominated by SoEs, have seen enhanced competition, which in turn has resulted in reduction of cost of services.

An example of this may be drawn from telecommunication services in Bangladesh. Historically, the telecommunication services were dominated by SOE, then Bangladesh Telegraph and Telephone Board (BTTB), which was a monopoly. With the deregulation and technological innovation, the mobile services have seen a number of private players entering the market and the BTTB's market share has gone down substantially. The prices for services have also come down significantly and the consumers have benefited from enhanced competition.

Thus, it may be safely assumed that weak competition law in a country may result in opening opportunities for the malicious market players to indulge in anticompetitive practices. A healthy market is the one which has fair and sufficient competition. These markets in turn strengthen the economic backbone of the country in terms of quality and cost-effective goods and services produces. This is what may be referred as mental toughening of a country in global competitiveness.

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– *Abridged from an article appeared in* The Financial Express, *Bangladesh on November 15, 2016*

ABUSE OF DOMINANCE

Telenor Risks Anti-Competitive Fine

Norway's telecoms operator Telenor risks a €100mn fine for abuse of a dominant market position, the country's competition authority warned.

Telenor, which is 54 percent owned by the Norwegian state, is accused of impeding the entry of a third competing mobile network into the country between 2010 and 2014.

Norway is one of the few European countries to have only two telecoms networks in Telenor and Sweden's Telia.

The Authority's Director Gjermund Nese said the entry of a third network is crucial to increasing competition and "guaranteeing a good supply of (mobile) services at the lowest price possible". *(www.thelocal.no, 23.11.16)*

Tetra Pak Disappointed by Penalty

Tetra Pak has spoken out about its disappointment following a US$96m antitrust fine by China's State Administration for Industry and Commerce (SAIC). The SAIC issued the penalty notice following an investigation in 2013 across 20 provinces and municipalities.

It found six affiliates of Tetra Pak were abusing their market dominance, by bundling its packaging facilities and services with materials, in China from 2009-2013.

Chris Huntley, Senior VP, Communications, Tetra Pak, said China introduced its competition legislation in 2008 and it adjusted its business practices to ensure compliance.

(www.dairyreporter.com, 28.11.16)

Microsoft Target in Antitrust Probe

Russia's competition authority had opened an investigation against Microsoft Corp. over alleged abuse of dominance for giving its own antivirus software an edge on competitors on its Windows 10 operating system.

When Microsoft switched over to the latest version of Windows, it gave developers only six days to adapt their antivirus programmes to be compatible, the Federal Antimonopoly Service said. Previously, the company allowed developers two months to make the necessary changes, the agency said.

Reducing that time period gives Microsoft's own Windows Defender programme a leg up because it is activated by default if other antivirus programmes are not installed, the FAS said.

The company said that Microsoft is committed to work in full compliance with Russian law. *(ET, 10.11.16)*

Google Fights Android Charges

Google has responded to the EC's renewed statement of objections, declaring its case against Google Shopping to be 'wrong on the facts, the law, and the economics' and dismissing it as just 'the interests of a small number of websites'.

The seven-year case revolves around the charge that the market dominance of Google within search is being used to leverage its price comparison service to the detriment of third-party sites.

Within its second 100-page response to the EC, Google said that its Shopping service, which appears as a tab within search results and within adverts at the top of the page, was simply the result of its push to present users with useful information and direct answers to questions. *(WSJ, 10.12.16)*

Aspen Slammed for Market Abuse

Global pharmaceutical firm Aspen has been fined €5mn by Italy's competition authorities for market abuse.

Specifically it has been found that it inflated the prices of anti-cancer drugs by up to 1500 percent, since acquiring the right to commercialise these drugs from GlaxoSmithKline (GSK).

The products concerned are chemotherapy drugs Alkeran, Leukeran, Purinethol and Tioguanine. Aspen acquired the rights to commercialise these drugs, internally referred to as the 'Cosmos' drugs, from GSK in 2009. In the same deal, the UK-based firm acquired a 16 percent stake in Aspen, which it has subsequently divested of. *(www.msn.com, 18.10.16)*

Allegation against OLA Dismissed

The Competition Commission of India (CCI) dismissed allegations of abuse of dominance by Ola Cabs and Taxi For Sure (together, ANI Technologies Pvt Ltd (ANI) for predatory pricing.

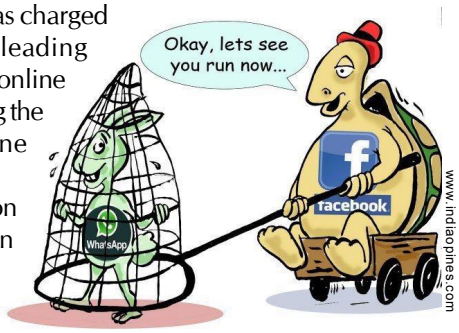
It was alleged that ANI was driving away competitors in the market for paratransit services in the National Capital Region by paying more money to drivers than it collected from passengers.

The CCI noted that in the two relevant markets, ANI was not in a dominant position, as there was stiff competition between ANI and Uber in providing radio taxi services in New Delhi. Similarly, in relation to auto-rickshaw services, ANI's market share was less than 20 percent in New Delhi.

(ILO, 22.12.16)

Facebook 'Misled' on WhatsApp

The European Commission (EC) has charged Facebook with providing misleading information during its takeover of the online messaging service WhatsApp, opening the company to a possible fine of one percent of its turnover.



Facebook becomes the latest Silicon Valley target of EU Competition Commissioner Margrethe Vestager, who has demanded Apple pay back US$14bn in taxes to Ireland and hit Google with two market abuse investigations.

The issue regards a WhatsApp privacy policy change in August when it said it would share some users' phone numbers with parent company Facebook, triggering investigations by a number of EU data protection authorities.

The Commission said Facebook had indicated in its notification of the planned acquisition that it would be unable reliably to match the two companies' user accounts. *(TH, 21.12.16)*

PRICE FIXING

Foodcorp Asks for Review

The **South African** Competition Tribunal has given the Competition Commission until January 31, to provide clarity on some of the charges brought against one of four companies in the pelagic fish sector.

The Commission, in its complaint, alleged that Pioneer Fishing and local food company Foodcorp had entered into at least three agreements between 2002 and 2009, during which they fixed the price of pelagic fish to retailers and wholesalers, through the exchange of sensitive information.

Pioneer is also alleged to have repeatedly put pressure on Foodcorp to increase its prices, besides other things. Foodcorp asked the Tribunal to order the Commission to amend its complaint referral to the tribunal, noting that the present referral was 'vague and embarrassing'.

(www.engineeringnews.co.za, 14.12.16)

Fines over Battery Cartel

Three businesses have been fined a total of €166mn by the EU's competition regulator after it determined they participated in an illegal cartel in the market for the supply of rechargeable batteries found in devices such as laptops and mobile phones.

The EC said Sony, Panasonic and Sanyo, together with Samsung SDI, "coordinated prices and exchanged sensitive information on supplies of rechargeable lithium-ion batteries" in breach of EU competition rules between February 2004 and November 2007.

The final fine served on Sony was €29,802,000. Panasonic was fined €38,890,000 and Sanyo fined €97,149,000. Samsung SDI was not fined at all as it disclosed the cartel arrangements to the Commission.

(www.out-law.com/, 14.12.16)

Banks Admit to Cartel Conduct

Australia's Federal Court fined ANZ Bank and Macquarie Group, respectively, over 'very serious' attempts by their traders to manipulate a key benchmark rate in Malaysia's foreign exchange markets

According to the Sydney Morning Herald (SMH), Federal Court Justice Michael Wigney set penalties in line with those proposed by the competition regulator and the banks, which are cooperating with investigators.

The fines come after the Australian Competition and Consumer Commission (ACCC) initiated legal action against the two banks over private online chat room conversations between Singapore-based traders back in 2011.

(www.themalaymailonline.com, 15.12.16)

Twin Telecom Abuse Probes

Italy's communications authority (AGCOM) opened an investigation into Vivendi's stake building in Mediaset, after the Italian TV broadcaster made a complaint.

AGCOM said it was looking into the matter with regard to Italian anti-trust regulations which prevent companies from having an excessive share of the domestic telecommunications and media markets.

French media giant Vivendi, which is Telecom Italia's main shareholder, has rapidly built up its stake in Mediaset from 3 percent to more than 25 percent.

(ET, 22.12.16)

Cash Handling Cos. Under Fire

The **Spanish** Competition Authority (CNMC) has fined two cash handling companies €46.4mn over an alleged conspiracy to fix prices and exchange sensitive business information in the market for the transportation and handling of funds.

Prosegur Services Cash Spain, Spain Loomis and two of their executives were penalized over the behavior, which took place over seven years. The companies' conduct has allowed Prosegur and Loomis to eliminate competitive pressure between them, preserve and maintain virtually unchanged their relative positions in the market for an extended period of time and has prevented the entry or expansion of new competitors.

The CNMC said that the companies had adopted several schemes to allocate the market between them. Employee emails detailed the extent of the companies' behaviour.

(www.law360.com, 17.11.16)

Five Pharmacy Chains Sanctioned

Peru's National Institute for the Defense of Competition and Protection of Intellectual Property (Indecopi) announced a total of US$2.6mn in fines for the Arcangel, Fasa, Inkafarma, Mifarma and Felicidad pharmacy chains.

The agency also required each company to develop a training programme to teach employees about anticompetitive practices and their legal consequences.

Indecopi said the five companies accounted for 72 percent of Peru's pharmaceutical sales at the time of collusion between 2008 and 2009. The agency estimates that consumers paid an average of five percent more for the 21 pharmaceuticals and 15 nutritional products than otherwise.

(www.perureports.com, 26.10.16)

Model Agencies Fined for Price Collusion

Five of London's leading modelling agencies and a major trade association have been fined more than £1.5m for price collusion by the **UK** competition watchdog, the third time the industry has faced a crackdown in Europe in the past three months.

The Competitions and Markets Authority had found the agencies — FM Models, Models 1, Premier, Storm and Viva — and the Association of Model Agents colluded on setting prices for modelling services.

The CMA's probe did not target the work of supermodels but instead focussed on models engaged in the lower to mid-end of the market, covering fashion magazine shoots that pay a few hundred pounds to advertising campaigns where they can earn more than £10,000.

(FT, 16.12.16)

China Continues Resale Price Maintenance Crack-Down

Adrian Emch*

On December 05, 2016, the National Development and Reform Commission (NDRC) – one of the three Chinese antitrust authorities – issued its decision fining the local unit of Medtronic, a US-listed medical device maker, for resale price maintenance (RPM)

Case Summary

Medtronic was found to maintain a distribution system for cardiovascular, rehabilitation therapy and diabetes medical devices in China, consisting of various tiers of distributors. NDRC held that Medtronic had engaged in RPM practices since 2014, including:

- **Setting resale prices:** Medtronic was found to set the resale prices for distributors at various tiers of the distribution system.
- **Fixing profit margins:** It was found to fix the profit margins of 'platform' distributors reselling its products to tier two distributors.
- **Imposing minimum bidding prices:** It was found to have imposed 'guiding' bidding prices in the distribution agreements, and distributors were required to seek Medtronic's approval for any deviation from those prices.
- **Setting minimum resale prices to hospitals:** It was found to impose minimum prices for the resale of products to hospitals.

Which Benchmark for RPM?

There have been a number of RPM cases decided by NDRC, its local offices and the Chinese courts in recent years. However, there seems to be a divergence between the authority and the courts in applying Article 14 of the Anti-Monopoly Law (AML), which regulates RPM conduct.

The *Medtronic* decision is somewhat more elaborate on the anti-competitive effects of the RPM conduct, when compared to NDRC's past cases. The decision has a sub-heading referring to negative effects on competition and consumer harm, and mentions Medtronic's leading market position and high barriers to entry into the relevant markets.

One interpretation of this somewhat more detailed discussion of NDRC's underlying reasoning would be that the authority's position is converging with that of the courts – in particular, RPM would only be problematic where the company in question has a significant degree of market power and there is not sufficient competition in the marketplace. However, at this point in time, it is far from certain whether this interpretation represents the true intention of NDRC.

Expanding the Scope of the Law?

As noted, NDRC's decision in the *Medtronic* case found the territorial and customer restrictions and the exclusive purchasing requirement to have increased the anti-competitive effects of the RPM conduct. As a result, Medtronic committed to terminating the territorial and customer restrictions (presumably for all products), and the exclusive purchasing requirement for those products where it has market power. This is a very notable development.

As the law currently stands, it would seem that territorial and customer restrictions and exclusive purchasing requirements are problematic only if the company in question has a dominant position. For non-dominant companies, Article 14 of the AML only explicitly prohibits RPM. That said, the provision also contains a catch-all clause allowing NDRC and the State Administration for Industry and Commerce (SAIC) to find other, not specified vertical agreements to be unlawful.

Now, the *Medtronic* decision may signal a shift in the law. Even though NDRC did not find these additional restrictions to be illegal themselves, it found them to aggravate the competition problem and accepted Medtronic's commitments in that regard. Taking into account that NDRC published draft guidelines for the automotive industry which also target certain types of territorial restrictions and exclusive purchasing requirements, a new trend to expand the scope of the AML's application may arguably become visible.

Conclusion

Most of all, the *Medtronic* decision is a strong reminder for companies that they should not engage in RPM conduct – at least until the benchmarks on what distinguishes anti-competitive from pro-competitive resale practices have been clarified.

Beyond this simple lesson, the decision may become more important if it were to indicate a shift in the law – leading to an alignment between NDRC and the courts as to the necessity of an effects analysis for RPM, and/or expanding the obligations on non-dominant companies not to impose territorial/customer restrictions and exclusive purchasing requirements.

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* *Lawyer, Hogan Lovells International LLP ranked by Chambers Asia Pacific 2016.* *Abridged from an article that appeared in* www.kluwercompetitionlawblog.com *on December 20, 2016*

Airtel Announces Axiata Merger

Bharti Airtel has merged its unit in Bangladesh with Robi Axiata Ltd., a unit of Axiata Group Berhad, a move which will form a strong No. 2 mobile phone operator in what is a fiercely competitive market led by Telenor unit Grameenphone.

The merger is a part of Airtel's initiative to restructure operations in all markets where it trails one or more market leaders. The Indian market leader had entered Bangladesh by acquiring 70 percent stake in Warid Telecom in 2010, which it raised to 10 percent in 2013.

Prior to the merger, Airtel was the fourth largest in Bangladesh among six operators, while Robi Axiata was ranked No. 2.

(ET, 16.11.16)

British-Qatar Airways Deepens Ties

British Airways parent IAG SA and its largest shareholder Qatar Airways agreed to set up a joint business that will see them code-share on flights linking dozens of destinations while operating a joint timetable and sharing revenue and costs on services between London and Doha.

The deal will see British Airways attach its code to Qatar flights beyond Doha to destinations in countries including Pakistan, Ethiopia, Iraq and Vietnam, with the Gulf carrier doing likewise on the UK airline's operations to cities across the UK and continental Europe.

The companies will also code-share on their flights between Britain and Qatar, including seven daily trips between London and Doha, which will essentially become joint services.

(FT, 29.09.16)

Rupert Murdoch Expands TV Empire

Rupert Murdoch's 21st Century Fox sealed a US$14.8bn cash deal to take control of pan-European pay-TV giant Sky and create a global entertainment titan.

The Murdoch-controlled Fox group said in a statement that it has reached a formal agreement to buy the 61-percent stake in Sky that it does not already own.

"It creates a global leader in content creation and distribution, enhances our sports and entertainment scale, and gives us unique and leading direct-to-consumer capabilities and technologies. It adds the strength of the Sky brand to our portfolio, including the Fox, National Geographic and Star brands," the statement added.

(TH, 16.12.16)

Green Light to ChemChina-Syngenta

ChemChina's proposed US$43bn acquisition of Syngenta will not be derailed by Australian competition regulators, who have green-lighted the deal saying it had no competition concerns.

The ACCC had been scrutinising the deal, the biggest ever foreign takeover by a Chinese company, as ChemChina owns a subsidiary, Adama Agricultural Solutions (Adama), which competes with Syngenta in Australia as they both supply crop protection products such as insecticides, herbicides, and fungicides.

However, regulators found there was no concerns, as ChemChina would still face competition from Bayer, BASF, Monsanto, Dow and others.

The ACCC found that ChemChina would continue to face competition in the supply of crop protection products from a range of proprietary and generic suppliers such as Bayer, BASF, Monsanto, Nufarm, Dow, DuPont, and FMC.

(CPI, 11.12.16)

Sompo Snaps up Endurance

Sompo Holdings, one of Japan's biggest insurers, is to acquire Bermuda-based rival Endurance Specialty Holdings for US$6.3bn, the latest in a string of overseas acquisitions by Japanese companies bolstered by their strong home currency.

The Japanese insurer would pay US$93 in cash for each Endurance share. Sompo would fund the deal with excess cash on hand.

The acquisition of the global provider of property and casualty insurance and reinsurance is the latest sign that a growing number of Japanese companies are seeking to expand their exposure to the US, where growth prospects are stronger than in their home market.

(FT, 06.10.16)

Siemens Boosts Software Business

Siemens sought to bulk up its industrial software capabilities through a US$4.5bn deal to buy Mentor Graphics, a US company focused on developing electronic components quickly and cheaply.

Mentor helps companies design and manufacture circuit boards and semiconductors with specialist software, notably for the aerospace and automobile industries.

Siemens is best known as an engineering conglomerate that builds power systems but in the past decade it has beefed up its capabilities to prepare for the so-called fourth industrial revolution involving big data and the internet of things.

(FT, 15.11.16)

Bass Pro Captures Rival Cabela's

Bass Pro Shops is to buy rival chain Cabela's in a US$5.5bn deal, including debt, that combines two of the biggest chains of hunting and fishing stores in the US, and underscores the tough environment facing the US$46.6bn specialist retailing market.

The takeover, which values Cabela's equity at about US$4.5bn, will mean the combined group becomes the US's second-largest sports goods retailer by revenues.

Analysts opine that the sporting and outdoor goods retailers that are most likely to survive are those that offer specialist products and services and can successfully integrate their physical outlets with online sales channels.

(FT, 10.10.16)

Nod to SIA-Lufthansa Venture

The Competition Commission of Singapore (CCS) has given approval for the merger of Singapore Airlines (SIA) and the Lufthansa Group.

The airlines have agreed to maintain and subsequently increase passenger seat capacity on the Singapore to Frankfurt and Singapore to Zurich routes, and to carry a minimum number of Singapore passengers on these routes, the CCS said.

The CCS had been concerned that SIA and Lufthansa were the only two carriers operating on these routes and that their combined market share exceeds 80 percent. However, the commitments they have made address the competition concerns.

In addition to SIA and Lufthansa, the agreement includes SIA subsidiary SilkAir, and Lufthansa subsidiaries SWISS and Austrian Airlines.

(www.out-law.com/, 13.12.16)

Boosting Healthcare Operations

Switzerland's Lonza Group has agreed to buy US capsule manufacturer Capsugel in a US$5.5bn deal that will boost the Basel-based company's healthcare operations.

The acquisition of Capsugel from private equity group KKR will reinforce Lonza's position as the biggest subcontractor of drug manufacturing in the world, giving control of the process from production of active ingredients to the making of capsule casings and dosage. Capsugel manufactured 200 billion capsules in 2015.

The combined healthcare business will generate annual sales of US$3.2bn, well ahead of rivals Patheon and Catalent, Lonza said. The company also expects about SFr30m a year in savings from the deal, and an additional SFr100m of savings in the longer term.

(FT, 16.12.16)

Deal to Create Gas Giant

German industrial gases group Linde and US suitor Praxair agreed an outline for a US$65bn-plus merger, with the combined company to be run out of the US by Praxair's chief executive.

The agreement comes after Praxair provided new assurances to Linde over jobs and corporate governance in Germany. As part of the agreement on key aspects of the planned all-share merger, existing Linde and Praxair shareholders would each own about 50 percent of the combined company.

The merged group will target US$1bn in cost savings, the two companies said in a joint statement, although some analysts said that figure looked overly optimistic. *(FT, 21.12.16)*

GE-Baker to Create Oil Business

General Electric Co. is creating a US$32bn oil business by combining its petroleum-related operations with Baker Hughes Inc., betting on a rebound for an industry mired by a historic slump in crude prices.

The new company will be one of the industry's largest players, bringing together a portfolio of capabilities spanning oilfield services, equipment manufacturing and technology. GE will own 62.5 percent of the merged entity, which will be publicly traded.

The new entity will be capable of providing end-to-end oilfield equipment, technology and services solutions at scale. *(Mint, 01.11.16)*

Qualcomm Agreed to Buy NXP

Smartphone chipmaker Qualcomm Inc agreed to buy NXP Semiconductors NV for about US$38bn in the biggest-ever deal in the semiconductor industry, making it the leading supplier to the fast-growing automotive chips market.

The acquisition will also help Qualcomm, which provides chips to Android smartphone makers and Apple Inc, reduce its dependence on a cooling smartphone market.

With the deal, Qualcomm is taking a big bet on the so-called Internet of Things, which enables everyday objects such as fridges and cars to communicate with each other.

(Mint, 28.10.16)

BP to Acquire Fuel Stations

BP has made its biggest downstream acquisition since 2001, spending almost US$1.3bn on 527 fuel stations in Australia, in the latest of a string of deals announced by the oil group before the end of the year.

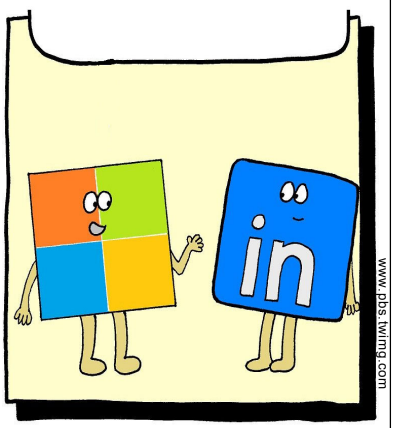
The UK company is acquiring the petrol stations with convenience stores from Woolworths, Australia's largest grocery chain, which has been overhauling its business following the rapid rise of German discounter Aldi in Australia.

The US$1.28bn deal, which includes a further 16 sites that are under construction, is the latest of a number of spending commitments announced by BP in the past month, as it pursues growth opportunities following years of retrenchment after the 2010 Deepwater Horizon oil spill.

(FT, 29.12.16)

Microsoft-LinkedIn Acquisition Closes

Microsoft Corp. closed its roughly US$26bn deal to buy professional-networking site LinkedIn, cementing the largest acquisition in the tech giant's history.



The marriage of two firms is a bet that the social network can reinvigorate Microsoft's software offerings despite recent struggles by both companies. The closure of the deal was announced by Microsoft Chief Executive Satya Nadella in a LinkedIn post.

Nadella hopes the deal will open new horizons for Microsoft's Office suite as well as LinkedIn, both of which have saturated their markets, and bolster Microsoft's revenue and competitive position.

(WSJ, 28.12.16)

Blockbuster Deals in a Race to Stay Ahead of the Competition

Steven Davidoff Solomon*

The number of multibillion-dollar deals announced in recent weeks is staggering by any measure, particularly in an election year, when the uncertainty tends to drive away deals.

Time Warner's & AT&T's US$85.4bn proposed tie-up has dominated the headlines as consumers latch on to tales of media dominance, but in October alone, US$329bn worth of deal activity in the US has been announced. The worldwide number, US$483.1bn, is also no slouch and the fifth highest on record.

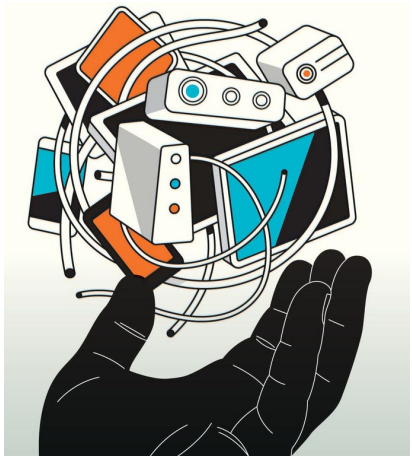
Other gigantic deals include General Electric's combination of its oil business with that of Baker Hughes, British American Tobacco's US$47bn takeover offer for Reynolds American and Qualcomm's US$38.5bn deal for NXP Semiconductors. One of the biggest deals in 2016 is Bayer's US$56bn takeover of Monsanto.

Conventional wisdom is that this activity is all about cheap money. Interest rates are at 400-year lows and the world is awash with liquidity as investors try to find anything that yields a decent rate. Capital markets are so well developed that AT&T can seek to borrow US$40bn to buy Time Warner without missing a step.

The challenge facing chief executives is compounded by the changes wrought by technology. Companies, particularly in technology, media and telecommunications, are racing to keep up and avoid being outmaneuvered. Microsoft's US$26.2bn purchase of LinkedIn can be viewed solely as a defensive play – keeping its global reach on the internet.

This trend has also been apparent in the pharmaceutical and biotechnology deal making of the past years as companies bought drugs instead of developing them.

And tech itself continues to produce new challengers and spur further deal activity. The potential initial public stock offering of Snap at very likely an extraordinary valuation will push other tech companies to go public, generating more money in the pockets of the tech elite to make acquisitions.



World-changing corporate transactions just seem to keep coming. It would not last, however.

But the result of all this merger activity is a broad push toward oligopoly, meaning industries are dominated by just a few big players.

Take media and telecommunications. We are heading into a world that is focused on video as people spend their lives on their smartphones, at least for now. The AT&T-Time Warner combination is built on this premise as AT&T's chief executive, Randall L. Stephenson, bets that the money in telecom is in content.

In this new media world, there will probably be four or five big providers of content, two of which will certainly be Facebook and Google. AT&T is making its play to stay in that elite league through its proposed acquisition.

A cynic might see the AT&T deal and others getting ahead of any changes to our inadequate antitrust laws. In a low-growth economy, getting bigger and squeezing out competitors is a clear way to success.

Yet the monopolistic power play has changed. In the case of AT&T, its businesses do not overlap with those of Time Warner. This is a so-called vertical merger, which is harder to stop, and there is little history of the government doing so.

Thomson Reuters reports there have been 615 deals year to date, down from 967 in 2014, so the deals are concentrated at the higher end. This trend is spurring the return of the oft-derided conglomerates that came about in the 1960s. As was the case then, instead of growth and survival, we may just end up with bloat.

At the moment, it is hard to find anything that can slow the merger train. Everything is going right. But it is in these times that perhaps caution is necessary. The merger market has always been cyclical. The current is moving forward, but sentiment can change.

If we have learned anything from more than 100 years of corporate mergers, it is that the lurking influences eventually emerge and the current trends driving all of this merger activity are unlikely to last. Let us hope it ends slowly and not with a sudden burst.

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* *Professor of Law at the University of California, Berkeley Abridged from an article appeared in the* Business Standard *on November 03, 2016*

After Losing to India in FDI, China Opens up Economy More

Saibal Dasgupta*

China, which in 2015 lost the top position as an investment destination to India, has now opened up more sectors for foreign investors to catch up in the race. It is offering a slice of tightly controlled segments like public transport and railway equipment to foreign players besides cutting down the number of restrictions by a third from 93 to 62.

Times of India

But what prompted Beijing to bite the bullet despite resistance from state-owned enterprises (SoEs) is not just slipping numbers of foreign direct investments. It is worried about US President-elect Donald Trump using China's partially closed market as a reason to launch negative trade actions. Chinese authorities are trying to pre-empt adverse action from Trump, who has accused China of unfair investment practices resulting in the 'theft of American jobs'.

Trump's antagonism for China might be an opportunity for attracting more FDI in India, observers said. But a lot would depend on effects of the demonitisation decision on foreign investments. The China challenge is not any more than last year. Commerce minister Gao Hucheng admitted on Monday that foreign direct investments grew at a slower rate of 3.8 percent in 2016 compared to growth of 6.4 percent seen in 2015. Whether India will manage to retain the top slot this year remains to be seen.

"US-China commercial relations are in for a rough ride in the coming months, as the Trump administration aggressively pushes China to open its markets further to American imports and investment and applies a more critical eye to Chinese investments in the US," Scott Kennedy, Deputy Director of Freeman Chair in China studies at the Washington-based Centre for Strategic and International Studies said.

India surged ahead of China after its FDI inflows slipped 23 percent to US$56.6bn in 2015. "The big FDI story of the past year is India. After a long period of trailing behind China, the south Asian country is now racing past its formidable rival. India was the highest ranked country by capital investment in 2015, with US$63bn worth of FDI projects announced," said Courtney Fingar, Head of Content with London-based fDi Intelligence while releasing its 2016 report.

China's National Development Reforms Commission said that the purpose of opening new doors for foreign investors are to 'improve transparency of policy-making' and 'let foreign capital play a positive role in China's economic development, industry transformation, and reform and innovation'. Chinese experts regard the decision as bold because of a terrible slowdown in the Chinese economy and the worldwide trend of protectionism.

But China is aiming at bigger goalpost, analysts say. It is trying to persuade the WTO to grant China the coveted status of market economy. Beijing says it had been promised by the WTO that it would automatically gain the status after completing 15 years as a member. But the US is determined to resist the move, and the EU is setting up its own hurdles in China's path.

An important question is whether the rule change is for real. Some analysts think it has no more than cosmetic value because foreign players face a lot of difficulties on the ground.

"China has only superficially opened up more sectors to foreign investment. The broader environment is still highly restrictive, with wide swaths of the economy either off limits to foreign investors or with ownership caps that require foreign investors to engage in joint ventures with Chinese partners," Kennedy said.

Foreign businesses are unlikely to lap up the new opportunity thrown up by the latest market opening measures. This is evident from surveys of member companies conducted by the American Chamber of Commerce in China and European Chamber of Commerce.

Besides, Washington has already begun to resist Chinese investments and Beijing is getting ready to retaliate. US President Barack Obama recently blocked a Chinese company's purchase of German chip-equipment manufacturer Aixtron on national security grounds. The US Trade Representative also put an online shopping site of China's Alibaba Group on a blacklist of 'notorious marketplace' for selling counterfeit goods.

* *Correspondent, Times of India. Abridged from an article appeared in the* Times of India *on December 31, 2016*

Big Four Auditors can no Longer Hide Behind their Local Models

Brooke Masters*

The firms must work out how to react to increasingly joined-up oversight

The Big Four accounting firms are curious beasts. On the surface, PwC, Deloitte, EY and KPMG look like four distinct companies that together completely dominate the global audit business — and control a big chunk of the consulting market as well.

In reality, though, they are networks of national firms, legally distinct from one another. That is partly because each one has to comply with local rules and standards, but it has also proved to be reputationally handy: if one far-flung branch happened to get into trouble, the rest of the network could distance itself from the problems.

But increasing globalisation is eroding those distinctions. As investors and companies look abroad for growth, some of their investments have inevitably gone bad, revealing problematic accounting and, sometimes, shoddy auditing. That, in turn, has prompted regulators in countries that actively police their domestic markets to look abroad as well. And what they are finding has not gone down very well.

The US accounting watchdog fined Deloitte's Brazilian arm a record $8m for falsifying reports, altering documents and providing false testimony during an investigation into the audits of low-cost airline Gol Linhas Aéreas Inteligentes.

The enforcement director of the Public Company Accounting Oversight Board described the case as the "most serious misconduct we've uncovered" since the regulator was set up in 2002. Deloitte said the practices were "wholly unacceptable". Separately, the PCAOB also fined Deloitte Mexico US$750,000 for poor quality control policies.

Accountancy experts say the Deloitte cases show how regulators are starting to catch up with the international footprint of the Big Four. More than 50 national accounting watchdogs now belong to the International Forum of Independent Audit Regulators, which sets global standards and seeks to co-ordinate cross-border investigations.

"We have been building a system that aligns regulators with the realities of globalisation and these cases are examples of that," says Robert Hodgkinson, an Executive Director of the Institute of Chartered Accountants in England and Wales. "The system has responded in a way that reinforces the message that we have to do better."

The question now is how the Big Four will react to joined-up oversight and the possibility that local problems can create regulatory issues half a world away.

Although there are legal barriers to full consolidation, it is not completely out of the question. In October, Deloitte announced plans to combine its member firms in nine countries, including the UK, Switzerland, Benelux and the Nordics, to create a single North West Europe office. At the time, the firm said it was responding to demand from multinational companies for a coordinated approach to digital strategy and cyber security. But if the member firms can combine to win cross-border business, surely they can do it to protect themselves from reputational risk.

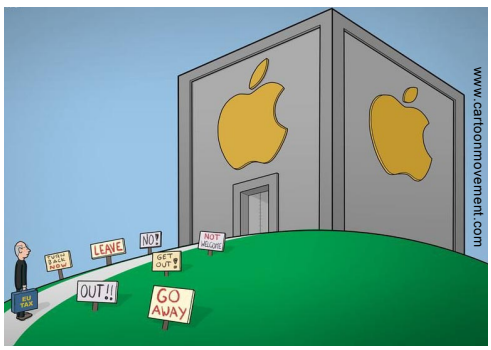
Deloitte says that its network "has adopted policies and protocols to be followed by all member firms in an effort to establish a consistently high level of quality, professional conduct and service". That is all very well. It seems to me it would be a lot more efficient and responsible to actually manage the local offices instead.

* *FT's Companies Editor. The article appeared in* The Financial Times, *on December 10, 2016*

Ireland Vows to Fight EU's Apple Tax Order

Ireland will appeal the EU's order to force it to collect a record €13bn in taxes from Apple, the Irish government said.

The Irish Finance Department's announcement comes nearly four months after EU competition authorities hit Apple with the back-tax bill based on its longtime reporting of European-wide profits through Ireland. The country charges the American company only for sales on its own territory at Europe-low rates that in turn have been greatly reduced by the controversial use of shell companies at home and abroad.



The ruling by the European Competition Commissioner Margrethe Vestager called on Apple to pay Ireland the €13bn for gross underpayment of tax on profits across the bloc from 2003 to 2014. Her report concluded that the California-based Apple used two shell companies incorporated in Ireland to permit Apple to report its Europe-wide profits at effective rates well under one percent. *(TG, 19.12.16)*

'Digital Single Market' Strategy for Europe

The European Commission announced the final elements of its long-awaited "digital single market" strategy for Europe. The announcement includes two new proposed EU regulations as well as a European Commission Communication:

- The first proposed EU regulation released is the new e-Privacy Regulation, which is intended to replace the existing e-Privacy Directive and align requirements with those found in the EU General Data Protection Regulation ("GDPR"). As a regulation rather than a directive, the new e-Privacy Regulation will apply uniformly across EU Member States and will not be subject to implementing legislation at the EU Member State level. As a substantive matter, the proposed e-Privacy Regulation.
- The second proposed EU regulation is focused on the handling of personal data by EU institutions and bodies (and not the private sector), and will bring the data protection requirements into line with the obligations set forth in the EU GDPR.

The next step for the proposed EU regulations is for the European Council and the European Parliament to review and amend the drafts. The drafts that emerge from this process will enter the trilogue phase where the EU institutions and Member States, acting through the European Council, will seek to negotiate and agree on the final text of the two regulations.

The European Commission has announced its intention to finalise and adopt the two regulations before the EU GDPR becomes applicable on May 25, 2018.

(www.huntonprivacyblog.com, 10.01.17)

Improving Pharma Industry

The Health Ministry, with the help of the **Malaysia** Competition Commission (MyCC), has begun administrative interventions to improve the pharmaceutical industry.

Salbiah Mohd Salleh, Deputy Director, Pharmaceutical Services Division said that the government was committed to making affordable medicine accessible to Malaysians.

However, Salleh acknowledged that MyCC was 'not happy with her division' for uploading a consumer price guide on the Internet. The guide contains prices of medicine as listed by suppliers. It serves as a benchmark for consumers to find out whether they have overpaid for a certain drug.

(TSO, 11.10.16)

Allowing for Private Taxi Access

Mexico's Federal Economic Competition Commission says the regulatory framework should change to allow for increased market access for taxi services operating at airports, after the enforcer fined Mexico City's international airport in September for blocking new entrants.

Uber, the transport company celebrated the initiative presented by the Federal Economic Competition Commission (Cofece) to allow public taxis to provide their service in all airports in the Mexican Republic.

Uber said in a statement that 'actions like these promote the right to freedom to choose quality mobility options that are accessible and available at all times for all.'

(CPI, 21.11.16)

Airports for Concession

The **Nigerian** Minister of State for Aviation briefed the public and the industry stakeholders of government plans to concession certain airports to private investors as part of the larger plans to privatize some public enterprises.

The government probably decided on Concession and Privatisation or Outright Sale options because of the failed commercialisation of most of the public sector services and enterprises.

There were public enterprises that were fully commercialised like the NLG and the refineries which were expected to operate as profit-making commercial ventures without any subsidies from the government.

(www.nigerianflightdeck.com, 10.11.16)

Spectrum Re-farming on the Way

The **Taiwan** Ministry of Transportation and Communications (MoTC) and the National Communications Commission (NCC) will finalise the spectrum re-farming proposal for review and approval by the Executive *Yuan*.

The authorities are eyeing full deployment of 5G infrastructure and further mobile and wireless application. Closer consultation is underway with the incumbent mobile operators looking for harmonisation in the 2017 spectrum swap and transfer.

The MoTC and NCC plan to allocate between 920 megahertz (MHz) and 928MHz as unlicensed bands dedicated to the Internet of Things, and are considering dedicating between 5,850MHz and 5,925MHz to telematics. *(ILO, 05.10.16)*

Wreck Removal under German Law

The Nairobi International Convention on the Removal of Wrecks entered into force. One of the main reasons for its establishment was the lack of authority of the coastal states within the Exclusive Economic Zone (EEZ).

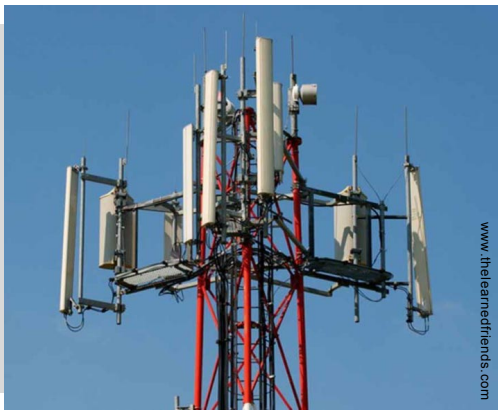
This regulatory gap has now been filled, but the consequence, particularly for **Germany**, is an intricate situation due to the different legal frameworks between the regulations of the convention applicable in the EEZ and the national regulations applicable in the territorial sea of Germany.

Within the German EEZ, the convention applies directly and has precedence over national law. German legislation established the necessary measures to comply with the convention, with German regulations entering into force at the same time as the convention. *(ILO, 21.12.16)*

Regulating Competition the Nigerian Way

Rotimi Fawole*

The history was made in Nigeria as Competition Law principles were rewritten in the telecommunications sector. The Nigerian Communications Commission directed the Mobile Network Operators (MNOs) to review their data charges based on a new price floor, for a variety of reasons, including giving new market entrants a chance to compete and gain market share.



Following the national outrage that ensued, the NCC issued another statement suspending the implementation of the price floor. To everyone's surprise, the MNO association kicked against the suspension. Apparently, there had been a stakeholder's meeting between the NCC and the operators where some had complained about low prices they were charging for data and the consensus was to introduce the floor.

Competition law, to attempt a simple definition, is the system of rules and regulations put in place to ensure that businesses do not adversely affect the market by their conduct. Its ultimate aim is protecting consumers from exploitation and market distortion and it encourages businesses to innovate to gain market share. It generally prohibits agreements between competing firms to control prices.

Section 11 of the NCC's competition regulations do so too. As such, the fact that all the operators got into a room to discuss pricing is an issue of its own. That the NCC was in the room with them and apparently sanctioned the new pricing arrangement is doubly puzzling.

Secondly, the NCC said it was introducing a price floor to level the playing field and enable smaller operators compete. Without some more detail from the NCC, this is an unusual intervention for a regulator to make. On the one hand, a regulator cannot allow existing operators introduce unnatural barriers of entry into the market. On the other however, a regulator does not distort the market simply to favour small operators. If existing operators, due to the efficiency and innovation that their longevity in the market brings, are able to price efficiently at a level beyond where new entrants can compete, it falls to the new entrants to seek further investment, not to the NCC to make the market less efficient for their benefit.

Third, it is extremely rare for a competition regulator to make findings on pricing without robust supporting market analysis. The announcement (re)introducing a price floor did not say whether or not the current price for data was predatory or otherwise. In its subsequent announcement, it compared the data prices currently offered by the 4 major operators." If it is the Globacom price that has put the others in a bind, what the NCC should be doing is to investigate whether or not Globacom's price is artificially low; whether or not the laying of its submarine cables means it can now provide its service more cheaply than its competitors can.

The price floor intervention by the NCC, without more, will be a disincentive to innovation. Instead of compelling every operator to look for the technology or other solution to make them more competitive, everyone is assured of safety, regardless of efficiency, at the expense of the consumer. Its proponents might argue that one was previously existence but this the question remains whether it is right for one to exist in the first place. Furthermore, when one looks at the statistics on the NCC's website, showing market share for data services between the 4 GSM companies, for the period Nov 2015 to October 2016, it has remained virtually flat – no party has either gained or lost significant market share. Why then, is the intervention necessary?

"When consumers make choices about what products and services to buy, they expect that the price has been determined freely on the basis of supply and demand, not by an agreement among competitors." This quote underscores the point that market forces are generally what should determine prices and that consumer interest, regarding choice, is paramount. When our NCC says that it wants to prevent the distortion of the market by market forces, it really does give pause for thought.

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* *Legal Practitioner with a career to date in Intellectual Property, Media and Corporate Law. Abridged from an article appeared in* The Guardian *on December 13, 2016*

Bank Act Amendments delayed

The proposed amendments to the **Canadian** Bank Act which would add a Financial Consumer Protection Framework will be withdrawn from Bill C-29. Bill C-29 passed third reading in the House of Commons and is currently before the Senate of Canada.

The controversial aspect of amendments provide that the provisions of the Financial Consumer Protection Framework are intended to set out a comprehensive and exclusive regime that is paramount to any consumer protection law of a province.

The Finance Minister will ask the Financial Consumer Agency of Canada to review the Framework to ensure that it provides consumer protections that are at least as strong as those available under provincial law. Following this review, the amendments will be introduced as a new bill.

(ILO, 23.12.16)

Changes to Bankruptcy Law

The **Malaysian** Bankruptcy (Amendment) Bill 2016 (Bill) was tabled in Parliament on November 21, 2016. The Bill will rename the Bankruptcy Act 1967 to the Insolvency Act 1967 and will have important implications, in particular to financial institutions and corporates whose loans/debts are secured by personal guarantees, once their amendments are incorporated in the existing Bankruptcy Act 1967 (Act) and are passed and in force.

The Bill has yet been gazetted and there has not been any indication as to when it will come into force. Nonetheless, it would be prudent for financial institutions/corporates who rely on personal guarantees to keep the new changes in mind.

(www.bakermckenzie.com, 22.11.16)

Virtual Currency Regulation

Virtual currency trading value and volume is soaring globally, but regulating virtual currencies and those who provide virtual currency exchange services is challenging.

Exchangers operate at the interface between the physical and the virtual value chains, exchanging virtual money, such as Bitcoin, into tangible, so-called 'fiat' money, or vice versa.

Now, the Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016 (the Regulations) have brought exchangers within the ambit of **Jersey**'s anti-money laundering legislation.

The regulations also make virtual currency exchange a supervised business and require Exchangers to register with, and fall under the supervision of, the Jersey Financial Services Commission.

(www.ogier.com, 04.10.16)

Capped Bank Lending Rates

When **Kenyan** President, Uhuru Kenyatta, signed a law that capped bank lending rates, he justified his decision by stating that Kenyans have long been frustrated by the high cost of credit that was prevalent in East Africa's largest economy. His position was that banks ought to do more to ensure that their customers benefit from the financial sector by reducing the cost of credit.

The new law capped bank lending rates at 4 percent above the central bank's benchmark rate – which is currently at 10 percent. The same law also capped deposit rates at 70 percent of the central bank's rate.

Critics warned that the law would reduce the flow of credit to key sectors of the economy, as well as threaten the country's reputation as a regional free-market financial centre. But Kenyans have largely welcomed the new law.

(www.financialnigeria.com, 08.11.16)

Deutsche Bank Agrees to US Fine

Deutsche Bank has announced a 'tentative deal' with the **US** Department of Justice in the US over the sale of mortgage bonds ahead of the financial crash.

The bank had been put on notice in October that US authorities wanted to hand down a penalty of as much as US$14bn, which would have cleaned out its financial reserves and forced it to raise new money or seek a government bailout.

It was seen as an existential crisis - and the bank's shares plummeted to a record low below €0, around a tenth of their pre-crash peak.

But bosses always said the fine would be no more than around half that amount - and confirmed that by disclosing a settlement of US$7.2bn, comprising of a US$3.1bn fine and US$4.1bn to compensate consumers.

(www.theweek.co.uk, 23.12.16)

Tackle 'Too Big to Fail' Banks

Minneapolis Federal Reserve President Neel Kashkari unveiled a plan to prevent future government bailouts by forcing the largest **US** banks to hold so much capital that they would probably decide to break themselves up.

Kashkari's plan would also penalise large asset managers, with the idea that so-called 'shadow banks' can create systemic risks similar to that of big banks.

"We expect that institutions whose size doesn't meaningfully benefit their customers will be forced to break themselves up," the Minneapolis Fed said in a summary of its plan.

The plan, which would double the amount of loss-absorbing equity capital for large US banks and impose a new tax on hedge funds and other asset managers, is sure to face fierce opposition from Wall Street.

It may also be a tough sell for policymakers who have already imposed rules intended to eliminate the notion that some banks are 'too big to fail'.

(www.cnbc.com, 16.11.16)

Building a Better World Bank, Not a Bigger One

Montek Singh Ahluwalia*
Lawrence H. Summers**
Andres Velasco***

The world has changed, but the mandates and operations of the multilateral development banks (MDBs) have not kept pace

Finance and development ministers from around the world will consider whether the World Bank needs more resources — a new infusion of capital to permit more lending and new contributions from traditional rich-country donors to help the poorest countries.

But a bigger World Bank is not necessarily a better one, and any consideration of new money for it or for the regionally based multilateral development banks demands a fundamental look at their mandates and operations in the face of new development challenges in today's global landscape.

Helping the millions of refugees and people displaced by conflict in countries such as Syria and South Sudan is another major challenge requiring not just humanitarian assistance but investments in their futures through education and jobs — the kind of work the MDBs have long supported in stable settings, but have no simple way to finance for displaced populations.

MDBs are rare in combining impressive technical and fiduciary capability with financial heft and international convening power. But history, habit and staff skills have wedded them largely to the traditional and well-developed instrument of the country-based loan, which for today's climate and other transnational problems is an inflexible and often inappropriate instrument.

We propose that ministers, including those representing the newborn Asian Infrastructure Investment Bank and New Development Bank, consider clearer future mandates for the different banks. The aim would be to raise more resources, but also to tap the assets and capital resources they already have in new ways and deploy them more flexibly, undoing the rigid rules and institutional silos that bog them down in the face of urgent needs.

We urge shareholding governments to give the World Bank specific instructions to support research and deployment of new energy and health technologies, to foster the nascent 'green bond' market, and to issue loans and guarantees on terms that encourage borrowers to take on the upfront costs of climate mitigation.

Environmental sustainability should be at the heart of what the World Bank does in the future. This may well require a scaling up of resources, but these should be linked with stronger performance under this new mandate. We also support an updated system of governance at the World Bank; developing countries, which now constitute over half the global economy, should be adequately represented in decisions about financing and implementing the sustainability priority.

For the regional banks we see an increase in their operations in support of infrastructure as crucial. They have a key role in closing the trillion-dollar financing gap between current investment levels and what developing countries need to build the framework for modern, diversified economies. The Paris climate agreement, now close to ratification by enough countries to become effective, envisages steering US$100bn a year toward 'green' infrastructure projects that protect the planet, as well as the investments in education, agriculture and water that bolster climate resilience in developing countries.

Considerable ambition and fresh thinking are required to equip the multilateral banks for this century's new development challenges. We believe world governments that control the MDB system are able to muster such ambition. Doing so will mark a critical step in safeguarding and further extending the benefits of development progress in this century.

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Why Banking Competition Policy Gives us the Wrong Choice

Simon Caulkin

Regulation-driven strategy makes us decide between near-identical options

The latest regulation-driven attempt to gee up an apparently slothful business sector is 'open banking'. This is meant to improve the customer experience by increasing transparency and hence competition. The aim is to make it easier to switch banks, with, for example, mobile apps to alert customers to the best offers and accounts. Some have talked breathlessly of the Uberisation of banking.

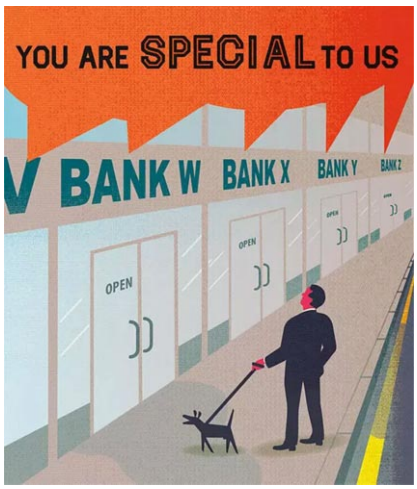
There has been a degree of success with energy groups subject to similar treatment — the market share of the Big Six energy companies has fallen from 97 percent five years ago to 85 percent today. It seems less than clear what extra competition, even the trendy technology-assisted variety, or 'comptech', can do to diminish obstinate customer inertia in high street banking.

With one-third of UK customers sticking with their bank for 20 years or more, many people are more faithful to their banks than to their partners. Could it be that it is the wrong kind of competition?

At bottom, the regulatory stance is based on the standard economic assumption that individuals are rational and self-interested. That being the case, given the chance they will choose an offer of something better or cheaper. That is the rationale behind "choice", dear to politicians of all stripes.

But the choice that the economists' competition has given us is quite particular. For example, many industries these are highly concentrated, even oligopolistic.

For most normal people, a high street with the same chains of shops as any



other is no real choice. Similarly, choosing between near-indistinguishable suppliers of the same mediocre banking, insurance or social care services is not a choice that they recognise. Outside economic textbooks, the idea that people will spend their commute or lunch break on their smartphones eagerly looking up official databases and price comparison sites to respond to offers of new bank accounts or energy tariffs is already a stretch. When the choice is no choice it simply fails the commonsense test.

In a recent Financial Times article *(The American consumer's impotent rage),* Edward Luce suggested that the unexpected bolshiness of US voters is partly due to pent-up rage at being treated as second-class citizens economically as well as politically, denied the personal service and human interaction now only available to the wealthy. He may well be right.

The choice people really want is a doctor who can take the time to answer all their questions; a carer who comes when they want to have a bath rather than when a computer schedules it; a bank that knows their name and listens to their individual circumstances; and customer service that means what it says. In short, they want to be treated as humans rather than numbers or transactions.

There are individual companies and service providers flourishing doing all these things. But they are below the radar, working in the niches left by the monolithic, oligopolistic purveyors of industrialised services sanctioned by the regulators. The danger is that the authorised oligopolists end up squeezing out the good management and real choice offered by the minority.

Banking comptech is the answer to the wrong problem. Most consumers do not want a better means of switching between faceless institutions that are all alike: they want a bank (or energy or telecom supplier) that they can trust to do its best for them over time — that they can have a relationship with. In which case, why would they switch?

On the other side, long-term customer loyalty, reflected in repeat buying and word-of-mouth recommendation, is an essential ingredient in the success of outstanding companies such as Apple, Toyota and Handelsbanken. Managers of such companies know that retaining customers through products and services that reliably make their lives easier, supported by real customer service, is smarter and less costly than trying to shout above the hysterical din of today's advertising to reach unenthusiastic new ones. Are the smart apps of 'open banking' going to help bring this about? Don't bank on it.

– *Award-winning Business Journalist. Abridged from an article appeared in* The Financial Times *on October 17, 2016*

Call for a Multilateral Competition Regime

Pradeep S Mehta*

Four current multibillion-dollar deals in the agriculture sector are ringing alarm bells around the world the takeovers of Syngenta by ChemChina and of Monsanto by Bayer; and the mergers between Dow Chemical and DuPont, and between Potash and Agrium. Consequently, the global agricultural input market will get further concentrated, which in turn would have an impact on the global food value chain (GFVC). After 'defence', it is 'food' that is the most important consideration for a nation's security. Thus, the fact that control over GFVC is getting consolidated in fewer private hands could pose serious security concerns. It is suggested that BRICS (Brazil, Russia, India, China, South Africa) countries should tackle this jointly through a coordinated competition policy.

The core of competition law enforcement is 'economic analysis', which in turn is guided by the 'economic doctrine' followed by the enforcing country. While some will emphasize 'efficiency' during economic analysis, others may like to include the 'public welfare' angle.

There may also be different treatment for different sectors. For instance, farmers' margin getting increasingly squeezed between input providers and commodity buyers. Such uneven bargaining power in GFVC might not come into the ambit of the competition lens from the 'efficiency' and 'optimal resource allocation' angles. On the contrary, such analysis might favour consolidation among 'input providers' and 'commodity buyers'.

It would not be easy for individual, particularly developing countries to deal with cross-border competition concerns. If approached individually, it is more likely that their economic analyses would get influenced by the 'economic doctrine' practiced by powerful, rich countries. Therefore, affected countries, especially developing country blocks such as BRICS should come together to deal with global competition concerns.

Control over the global food value chain is getting consolidated in fewer private hands, posing serious security concerns

Fortunately, there have been some positive developments on this front. Competition authorities from BRICS countries have signed a cooperation agreement and patent authorities are having separate meetings. In addition, there is a BRICS Food Working Group to develop suitable strategies. A suitable approach for BRICS nations could be to first have a plurilateral competition policy among them and then open it for other like-minded countries to join the arrangement.

Albeit, as China's own state enterprise, ChemChina, is acquiring Syngenta, it would like a facilitative approach and may like to 'exploit the global market' in future. Though China has said that it is acquiring Syngenta to improve domestic agriculture productivity, it may be interesting to note here that while the US has given a green signal to the ChemChina-Syngenta deal, China seems to have done the same for Bayer-Monsanto.

The agenda on trade and competition policy was introduced at the WTO in 1996 as 'new issues', along with investment and transparency in government procurement. To begin with, it was a study approach, but later it became a negotiating agenda. This was opposed by the developing world and finally all of them, other than trade facilitation, were withdrawn from the WTO Doha Development Agenda in 2004. Since then there has been a sea change in global economic architecture, following the two WTO ministerial meetings at Bali in 2013 and Nairobi in 2015. With substantial experience of trade and globalisation in the developing world, the developing countries should participate proactively in such negotiations so that they can influence the contents and ensure that they are balanced.

In any multilateral negotiation, contentious issues arise mainly because of two factors: aggressive agenda of market access; and the defensive agenda, which includes protection of policy space to address national concerns. For example, inclusion of intellectual property rights in the WTO acquis was the most contentious issue during the Uruguay round. This was finally settled when trade and intellectual property rules allowed policy space for nation states to address their concerns, particularly with respect to agriculture (seed) and health (pharmaceuticals).

Today finding common ground on the regulation of market distortions in the highly sensitive sectors of food and agriculture through better and cooperative competition regimes, and more so in the multilateral trading system, is an imperative which we can ignore at our own peril. BRICS can offer a middle path and introduce it at WTO.

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Backlash Grows over Swedish Private Sector running Public Services

Richard Milne*

Think of Sweden and an image of a generous welfare state with a large public sector financed by high taxes often comes to mind.

Perhaps less stereotypical is the idea of large number of private companies running public services. But Sweden is also the European leader in private, profitmaking companies running schools, hospitals and care homes.

That has made this supposed paragon of equality a hunting ground for dozens of listed and private equity-backed companies who are participating in a two-decades-long experiment. But there are warning signs of a growing backlash in Sweden against the groundbreaking reforms.

A government report could suggest a cap on profits for private companies that run public services, according to widespread leaks in local media.

Under one estimate commissioned for the report, Swedish companies operating in the public sector made up to SKr20bn in excess profits between 2005 and 2013 based on a 10 per cent weighted average cost of capital.

The report, commissioned by the centre-left government and led by a controversial former Social Democrat mayor of Malmo, Ilmar Reepalu, comes against the backdrop of general unease in Sweden at the idea of private companies making a profit for providing public services. More than half of Swedes support curbs on profits, according to a recent large survey of public opinion.

And the so-called Reepalu report will not just be read locally. Many policymakers across Europe are fascinated by the Swedish model. Just how far should companies be allowed to go to make profits from public services?

Internationella Engelska Skolan is one of the biggest companies behind Sweden's free schools, which are state-funded but privately run. It has more than 21,000 students enrolled in 30 schools this academic year and has been running academic institutions since 1993 with a focus on discipline and learning English.

But at the same time as IES has been successfully growing, the wider Swedish educational model has been under heavy scrutiny. Under the so-called Pisa tests, which compare rich countries' education systems, Sweden has suffered the most rapid decline in learning between 2000 and 2012 of any country.

Role of profitmaking companies in schools, hospitals and care homes under scrutiny

Controversy rages over who is to blame. Those on the left blame deregulation of education, pointing to a number of scandals including the bankruptcy of one big provider, JB Education, a private equity-backed company.

The private companies in turn say they are doing well but that public schools are poorly run and performing far less well. They argue there is a fundamental difference between the way public and private providers run schools. Public schools are encouraged to spend their entire budget otherwise they lose it while private providers prioritise efficiency. Ralph Riber, Chief Executive of Internationella Engelska Skolan, says the answer is not a profit cap but a look at the performance of all schools. "The question should be: are you delivering?" he adds.

The biggest worry for government contractors is not about a possible profit curb, *per se*. The leftwing government's weak position in parliament means such a measure is unlikely to pass. But Swedish companies are deeply concerned about a number of what they deem anti-business proposals, such as a plan to impose quotas to ensure a certain percentage of female directors in boardrooms.

Under this model, companies, workers and politicians have worked together whether they were left or rightwing. The decision to allow private companies to run public services was due as much to previous leftwing governments wanting to give freedom of choice to everybody as those on the right seeking to make things more efficient.

As Riber says of private sector involvement: "Sweden is far ahead of other countries. Is it an anomaly to be quashed or is it the way forward?

* *Nordic and Baltic Correspondent at the Financial Times. Abridged from an article appeared in* The Financial Times, *on November 27, 2016*

Publication

Economiquity


ECONOMIQUITY

1914 Revisited: Open World Order is Breaking Apart

The October-December 2016 issue of Economiquity carries an article entitled, '1914 Revisited: Open World Order is Breaking Apart' which states that great shock came in 1914, with the outbreak of World War I, and it ended an extraordinary four-decade period of rising migration and trade. But that era provides clear parallels to the globalisation boom that gained momentum in the 1980s and stalled during the financial crisis of 2008. Today globalisation is once again in retreat. Populists are on the march, as evidenced by Donald J. Trump's stunning victory.

A special article by Shyam Saran opines that in the next decade, how US-China relations unfold will shape the external environment for countries like India. Much will depend on how China perceives the Trump presidency.

Another special article by Gita Gopinath states that Indian Prime Minister Narendra Modi's 'demonetisation' intervention affected 85 per cent of the money in circulation in India. It was an unprecedented move, whether in India or almost anywhere else, and it is by far Modi's boldest policy intervention to date.

This newsletter can be accessed at: www.economiquity.org/

Investment Policy Monitor

UNCTAD has just released a special issue of its Investment Policy Monitor exploring investment laws around the world.

For many countries investments laws are a core policy instrument to promote and regulate investment. Together with international investment agreements (IIAs), they constitute the basic legal framework for cross-border investment in many countries. Often, these laws and IIAs contain similar provisions.

UNCTAD research finds that at least 108 countries have an investment law as a core instrument to govern investment, almost all of which are either a developing country or an economy in transition. Even though investment laws generally share the same objectives, their content and overall approaches differ significantly.

Key findings from this study include:

- Most investment laws have investment promotion as their main objective, while only a few also deal with investment facilitation.
- Sustainable development is an explicit goal only in a small minority of them.
- Investment laws tend to show an imbalance between the coverage of investor rights and obligations.
- Investment laws often cover the same issues as IIAs and more than half of the laws provide access to international arbitration.

The importance of investment laws calls for a deeper analysis of their content and their coherence with other investment-related policies and international investment treaties.

The Special Issue of the Investment Policy Monitor ca be accessed at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d5_en.pdf

We want to hear from you...

Please e-mail your comments and suggestions to **c-cier@cuts.org**

We put a lot of time and effort in taking out this newsletter and it would mean a lot to us if we could know how far this effort is paying off in terms of utility to the readers. Please take a few seconds and suggest ways for improvement on:

- Content
- Number of pages devoted to news stories
- Usefulness as an information base
- Readability (colour, illustrations & layout)

Sources

AA: African Antitrust; BS: Business Standard; CPI: Competition Policy International; ET: Economic Times; FT: The Financial Times; ILO: International Law Office; NLR: National Law Review; TH: The Hindu; TSO: The Star Online; WSJ: Wall Street Journal

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