REGULETTER

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The Debate Around Net Neutrality

The release of the consultation paper on regulation of Over the Top (OTT) services by the Telecom Regulatory Authority of India (TRAI) coincides with the US Federal Communications Commission's (FCC) recent adoption of Open Internet rules. These rules *inter alia* protect and maintain open, uninhibited access to legal online content without broadband service providers (BSPs) being allowed to block, degrade, or create fast/slow lanes to this content. In other words, these rules enforce network (net) neutrality. Once the rules are notified, it is expected that litigation by aggrieved BSPs will follow. In effect, commentators view this development as just another chapter in the raging net neutrality debate, one that is both apt and inevitable as the internet becomes increasingly important in our lives.

www.teapartytribune.com

Generally, the transmission of data over telecommunications networks is carried out on a best-efforts basis, regardless of type. In other words, the network is 'neutral' towards the data transmitted through it. Proponents of network neutrality point out that, if permitted, BSPs can through various methods of traffic control, manipulate the flow of applications or services, thereby, effectively creating 'walled gardens' in which consumer choice is limited thus stifling innovation and growth of the internet.

It would seem obvious that network neutrality is pro-competition, as it favours consumer choice and innovation and guarantees equal access to all competing content and application service providers (CAPs). BSPs however argue *inter alia* that in the absence of the ability to control CAPs and obtain a fair share of the latter's revenue, they will be deprived of the resources and incentive to expand and improve networks, which will become increasing congested, to the detriment of consumers. A counter argument would be that any attempt to restrict consumer choice or innovation will be self-defeating for BSPs as the demand for varied and bandwidth heavy content gives rise to the demand for high speed internet.

If it is accepted that net neutrality is desirable, another aspect of the debate as encountered in the European context, focuses on the choice between FCC styles, *ex ante* regulation vs leaving the matter to *ex post* remedies under competition law. Abuse of dominance by vertically integrated BSPs which discriminate in favour of their own applications or content or anticompetitive agreements between BSPs and CAPs etc. would fall within the realm of competition law, attracting punitive measures by competition regulators.

In the wireless dominated Indian context, the net neutrality debate takes on an added flavour with arguments ranging from pointing out the need for traffic control by the spectrum starved broadband service providers to the low paying power of the average consumer and hence importance of allowing unhindered access to cost-effective services like VOIP and WhatsApp, rather being forced to use BSPs' paid services. What is certain in the Indian context is that we must not be left lagging behind on the wrong side of the digital divide and thus, our approach must carefully encourage the growth of both network and content.

* *This article has been contributed by Archana G Gulati, Adviser, Competition Commission of India*

CUTS Centre for Competition, Investment & Economic Regulation
CUTS C-CIER

Competition Law Arrives

The recently-passed Competition Law in **Myanmar** could shake up business methods, though it remains to be seen how effective it will be in practice.

Like similar laws in other jurisdictions, the objective is to protect public interest from monopolistic acts, speculation in goods or services, unfair competition, abuse of a dominant position and economic concentration which weakens.

The Competition Law came into force on February 24, 2015 and had been worked on by several ministries and related industries since 2012. Some parts of the Act are based on an earlier competition law from Vietnam, though other parts differ significantly.

The law limits some types of advertising and may add a level of bureaucracy that could stifle small business, which deviates from today's democratic flavour.

(www.mmtimes.com, 12.03.15)

Competition Regulations Published

The **Hong Kong** government is introducing the law – called the Competition Ordinance – in stages, with a view to it being in full effect by the end of 2015. As part of that, it has published regulations laying out which businesses will be covered by the law.

Most agreements will only be covered by the law if the combined turnover of the organisations involved is more than US$200mn. If an organisation is seen as having 'substantial market power', however, the turnover threshold is US$40mn.

These regulations will come into effect when the relevant parts of the main Competition Ordinance dealing with statutory bodies comes into effect, which is anticipated to be later in 2015.

(www.out-law.com, 20.03.15)

Sweeping Antitrust Reforms

The legislative branch of **Taiwan's** government has approved the most significant changes to the country's competition law since its entry into force in 1992.

The Legislative Yuan cleared the way for a raft of amendments to Taiwan's Fair Trade Act that will not only give the country's enforcer, the Taiwan Fair Trade Commission, or TFTC, greater powers over merger control and conduct, but also greatly shift the burden of proof in cartel investigations to defendants.

In merger control, the TFTC will now be able to assign different turnover notification thresholds for different industries – a move that starkly contrasts with most other jurisdictions, which by and large have uniform thresholds. *(GCR, 26.01.15)*

Merger Review Thresholds

The threshold for pre-closing merger notification under the Canadian Competition Act has been increased for 2015. **Canada** uses a two-part test to determine whether pre-merger notification is necessary. This test is based on the size of the parties and the size of the transaction. The transaction size component can be adjusted annually for inflation.

Under the size of the parties test, the parties, together with their affiliates, must have aggregate assets in Canada or annual gross revenues from sales in, from or into Canada in excess of C$400mn.

Under the size of transaction test, the value of the assets in Canada or the annual gross revenue from sales (generated from those assets) in or from Canada of the target operating business and, if applicable, its subsidiaries must be greater than C$86mn. *(ILO, 19.02.15)*

Merger Control Regime

The **Egyptian** Competition Authority published a new notification form and guidelines as a step toward establishing a full-fledged merger control regime, further reducing a regional enforcer's role as a 'one stop shop'.

Although Egypt has had a competition law on the books for more than a decade, it did not empower the authority to review tie-ups, only to receive notice of them. Such notifications had to be submitted within 30 days of concluding the deal and failure to notify could be penalised by up to €60,000.

Instead, as part of the Common Market for Eastern and Southern Africa (COMESA), Egypt left merger control largely to COMESA's Competition Commission, established in January 2013. *(GCR, 24.03.15)*

Competition Law Compliance in Poland

The amendment to the Act on Competition and Consumer Protection of Poland came into force on January 18, 2015. The Amendment will introduce new antitrust enforcement mechanisms, such as a settlement procedure, leniency-plus programme and the Poland Competition Act's right to impose fines on individuals for their involvement in anticompetitive agreements.

After January 18, 2015, the PCA will be able to impose remedies in antitrust cases, and will apply new rules when conducting dawn-raids and reviewing leniency applications. On the merger law front, the Amendment will, among others, introduce a two-phase review, where non-problematic transactions will be cleared within one month and those raising competition law concerns will undergo an in-depth review over an additional four months.

The proposed changes will inevitably lead to market participants giving more thought to competition law compliance. *(www.allenovery.com, 15.01.15)*

The Concentration of Economic and Political Power

A Priority for Competition Law and Policy in Developing Countries?

Amine Mansour*

In the literature dealing with competition law and policy in developing countries, there appears to be a consensus according to which competition law cannot contribute to development unless it wins its battle against what is called the concentration of economic and political power

The idea of concentration of economic and political power deserves some words. The concept in itself is not clear. The idea can be understood either as the collusion between the economic and the political powers leading to a concentration of the two or as the holding of both powers by the same person(s) at the same time. Of course, the concentration can be, in reality, more complex and subtle than what was described and consist of a mix of the two forms. The very concrete impact can be disastrous for an economy.

In order to realise the magnitude that this impact can have, it is interesting to analyse first why powerful economic groups and individuals may attempt to capture political institutions. In reality, according to the developmental conception of competition, it is very important to empower low income people, to protect them against economic power and to ensure that they fully participate and contribute to the economic life. In practice, it is very important to differentiate between three scenarios.

First, if no competition law is adopted in a given country where economic and political powers overlap, the effect can be as simple as the blocking of every attempt to introduce any kind of competition law be it a pro-development or a pro-efficiency. As a consequence, powerful producers will keep benefiting from missing competition to the sacrifice of consumers. In particular, low income consumers that would eventually have been able to afford new products as a consequence of the drop in prices will not see this scenario occurring. Put differently, powerful dominant firms may keep extracting undeserved profits thereby reinforcing their economic power.

Second, even in cases where obstructing the adoption of a competition act is no longer possible, the economic and political powers may try to lower the impact such regulation may have on their welfare by interfering in the enactment process. Having a vested interest in maintaining the *status quo*, the hands concentrating economic and political power will do what it takes to preserve their wealth. Competition law may simply look as an empty shell.

From the two above mentioned situations it emerges that economic and political powers can undertake "preventive" action that simply obliterate the effect competition law may have on addressing inequality.

A third scenario is where a given developing country succeeded in introducing a competition act and setting up a competition authority (CA) but at the same time this authority faces a high concentration of economic and political power. Naturally, the question that emerges relates to whether the issue should be or can be a top priority from the perspective of development competition and, if yes, how to achieve it?

It should be noted first that CAs are not immune to external influences. However, their resistance to these interferences depends to a great extent on the powers they were granted. At the same time, not only the nature of powers and the institutional architecture but also the public support a CA enjoys determines significantly the answer to the question raised above.

Even if the creation of a strong CA materialises, its task will not be an easy one. From a general point of view, it is clear that fighting against the concentration of economic and political power should be considered as a top priority in any CA's mission. The main reason of course is that a balanced development cannot be achieved in the presence of a concentration of economic and political power. Instead, inequality may persist or even be exacerbated. In practice, however, the existence of such concentration of power can greatly obstruct competition authority efforts as long as (as soon as) a proactive approach to the enforcement of competition provisions against powerful economic entities is undertaken.

At the end, it clearly appears that, as some of our readers have commented, one of the most important roles for competition law and policy from the perspective of development is tackling the concentration of economic and political powers but this concentration also can make competition law and policy ineffective in most developing countries.

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ABUSE OF DOMINANCE

Egg Producers Found Guilty

Eagles Nest Ltd and Usuthu Poultry Farm Ltd have been found guilty of contravening the Competition Act after allegedly restricting output and agreeing to allocate customers.

This is contained in the final ruling into the investigations where the Swaziland Competition Commission (SCC) through its Secretariat sought to determine whether the complaints lodged with it in respect of anticompetitive conduct by the two egg producers held any water.

The two major players within the industry were alleged to have engaged in collusive conduct in that they had an agreement, decision or concerted practices which had as their object the distortion of competition to an appreciable extent in the country as a whole or in part. The collusive behaviour has proven to be in contravention of Section 30 of the Competition Act No. 8 of 2007.

(SO, 18.03.15)

CCI Penalty on BCCI Set Aside

The Competition Appellate Tribunal (COMPAT) of India set aside a
₹52-crore fine on the Board of Control for Cricket in India, for alleged irregularities in organising the Indian Premier League (IPL). The Competition Commission of India (CCI) imposed the fine in February 2013.

In 2013, the CCI found the BCCI guilty of violating Section 4(2)(c) of The Competition Act, 2002. It imposed a penalty of six percent of the average annual revenue of the Board between 2007 and 2010.

It also asked the Board to delete an allegedly violative clause in its media rights agreement that said "the BCCI represents and warrants that it shall not organise, sanction, recognise, or support during the rights period another professional domestic Indian T20 competition that is competitive to the league".

(BS, 24.02.15)

Televisa Dominant in Pay TV

A unit of Mexico's telecommunications regulator has reached an initial conclusion that broadcaster Grupo Televisa has substantial power in the country's pay-TV market, according to a document posted on its website, a finding that could lead to stiffer regulations.

The Federal Telecommunications Institute (IFT), which began the investigation, said its investigative arm's initial conclusion was that Televisa did have a substantial market power in pay TV.

The IFT is using new laws pushed by President Enrique Pena Nieto to foster greater competition in Mexico's notoriously concentrated telecommunications and TV markets. It has already ruled that Televisa, which is the country's largest pay TV provider with almost 10 million subscribers, is dominant in broadcasting.

(Reuters, 18.03.15)

Korea Takes Aim at Tech Giants

Korea's antitrust watchdog will be looking at global tech companies that may be abusing their monopolistic control to disrupt fair competition in the local market, a move some insiders say may extend to Google and Apple.

The country's OS market is 99.5 percent controlled by two of the world's leading companies Google's Android and Apple Inc.'s iOS. They also have businesses in social network services and platform operations that can be examined.

The Commission did not say whether these tech giants will be scrutinised because it is the standing policy of the regulator to not release specific names until a decision has been reached to take action.

The intent is to focus on companies that have key technologies and know-how and can utilise their standard essential patents to shut out rivals or demand unfair royalties from users

(KH, 01.02.15)

Turkey Closes Coca-Cola Probe

Turkey's Competition Authority has formally ended its investigation of a Coca-Cola sales and distribution venture after finding no infringement of competition law in the company's practices.

The case began in early 2014 after the authority carried out several dawn raids at the premises of Coca-Cola Sales & Distribution over allegations that it abused its upstream power in the soft drinks market.

The authority's investigation followed a 2007 decision that ordered Coca-Cola to remove the exclusivity clauses from its agreements. This latest case sought to review whether the company had adhered to earlier ruling.

After a thorough investigation, Turkey's Competition Board ruled that Coca-Cola has not violated competition law and has fully complied with the requirements of the 2007 ruling.

(GCR, 11.03.15)

Gas Distributor Abused Dominance

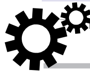
It has been one year since the Slovenian Competition Protection Agency instigated antitrust proceedings against 16 natural gas distributors and the commercial association for natural gas distribution, which allegedly exchanged sensitive commercial information and engaged in price fixing on the market for natural gas distribution to household customers.

www.publics.bg

The proceeding was closed in July 2014 with no decision adopted against the distributors. However, in the meantime, the investigation into Geoplin (Slovenia's largest natural gas supplier) continued and recently resulted in an infringement decision establishing that Geoplin had abused its dominant position in the natural gas market.

Geoplin is one of the most important companies in the Slovenian energy sector, as it acts as an agent and intermediary between the Slovenian natural gas market and neighbouring countries and is the largest trader of natural gas.

(ILO, 19.03.15)



CARTELS

Global Fines for Price Fixing

In a clear sign that the US and Europe no longer have a monopoly on eye-watering antitrust fines, authorities in Brazil and Korea imposed US$2.6bn in penalties in 2014, obliterating previous records and accounting for just under half the worldwide amount.

Fines by Brazil's Antitrust Authority, the Administrative Council for Economic Defence, or CADE, topped US$1bn in 2014. The Authority fined companies US$1.6bn (€1.2bn) in total, most of which came from a US$1.39bn fine against six cement companies for operating a decade-long cartel.

Korea's Fair Trade Commission also had a record-breaking year owing to anti-cartel efforts against construction companies, imposing US$1.01bn (€752mn) in fines, much of which punished bid-rigging on government water and rail projects.

(GCR, 07.01.15)

Extension to Siemens' Bid

The European Union (EU) antitrust regulators have extended their investigation into Siemens' US$7.6bn proposed takeover of US oilfield equipment maker Dresser-Rand Group Inc, the European Commission said.

The EU competition watchdog will now decide by July 14 instead of June 30 whether to clear the deal, one of Siemens' biggest. The extra time will allow the Commission to do a more thorough investigation of the issues.

The EU executive opened a full-scale probe in February 2015, saying the deal by Europe's largest engineering group may reduce competition as the merged company would only compete with General Electric in turbo compressors and drivers for trains. It also cited concerns about possible higher prices.

(Reuters, 10.03.15)

Retail Chains Fined

The Romanian Competition Authority has fined international retailers active in Romania with over €35mn in fines, for price-fixing and anticompetitive practices between IKEAs and their suppliers, occurring during 2005-2009. Metro, Real, Selgros and Mega Image are among the retailers in question, together with 21 suppliers.

The Competition Authority determined that the sale prices were not set according to market regulations, using the supply-demand ratio. Instead, suppliers and retailers agreed on a fixed or minimum price.

Such practices have led to higher shelf prices for consumers, since the retailers were unable to reduce the price below a certain limit agreed upon with the suppliers. *(BN, 28.01.15)*

Inquiry into E-commerce Sector

Europe's top competition watchdog said that companies charging online shoppers higher prices for the same goods depending on where they live could be breaking the law.

The EU's Competition Commissioner, Margrethe Vestager, sounded the alarm as she announced a sweeping inquiry into Europe's e-commerce marketplace, subject to approval by the European Commission.

Her investigation will examine why prices can vary so dramatically between the country-specific websites of retailers, such as Amazon and Apple. It will cover digital content such as films, TV series, music and games, and physical goods such as computers and designer clothes. *(TG, 27.03.15)*

Penalties on 'Yogurt Cartel'

The French Competition Authority fined the country's top yoghurt makers €192.7mn for fixing prices over several years. The authority says 11 companies took part in the cartel, including Yoplait and Lactalis. Together, the companies make up 90 percent of the French market for yogurt and related dairy products.

The scope of the cartel was 'very broad', and its 'secretive nature and sophisticated *modus operandi*' were aggravating factors reflected in the fines. The cartel affected everyday products to which consumers are captive and buy regardless of price.

The authority tacked on fine increases for some companies, while slashing the fines of others. Lactalis saw its fine increase by 25 percent because it belongs to a larger group of companies, while Senagral and Novandie pleaded poverty and received reduced fines. *(BBC, 12.03.15)*

Obama Tougher Antitrust Cop than Bush

President Barack Obama, who famously pledged in 2007 to be a tougher antitrust cop than his predecessor, has lived up to it, particularly on price-fixing and merger challenges.

President George W. Bush's antitrust enforcers collected US$2.1bn in fines for price-fixing from fiscal 2005 through 2008, while Obama's team collected US$3.3bn from 2010 through 2013.

Obama administration probes have targeted auto parts price-fixing, manipulation of the benchmark London Interbank Offer Rate and conspiracies to lower municipal profits from bond proceeds.

Bush's enforcers sent 125 executives to prison for price-fixing during that time period, while 170 were sentenced under Obama.

In two areas, however, the Bush and Obama administrations were very similar. Bush's enforcers had 102 non-merger investigations during his second term; Obama's, 62. Bush's enforcers filed 11 cases; Obama's, 13. The most high-profile case in this category is the prosecution of Apple for working with publishers to push up the prices of ebooks.

Obama had been scathing in 2007 with criticism of Bush for failing to file a single monopolisation case. But the report said Obama's enforcers filed just one: a 2011 settlement with a Texas hospital that prohibited anticompetitive contracts with insurers. *(Reuters, 25.03.15)*

FINES & PENALTIES

Galp Energia Scrutinsed

Portugal's Competition Authority (AdC) fined three companies in the Galp Energia group a combined €9.29mn for anticompetitive practices in the bottled gas market, following a long-running investigation that found that unwarranted restrictions were imposed on retailers supplied by them.

According to the AdC, all suppliers of bottled gas should be able to operate anywhere in Portugal, but as a result of clauses imposed on regional retailers, customers were likely to have been paying higher prices than otherwise necessary due the resulting lack of competition in the regions.

Galp described the ruling as 'unjustified' and said it was analysing it to decide whether to exercise its legal right to contest it. The company is already in a legal tussle with the government over an extraordinary levy on energy companies, which was recently extended to cover long-term gas supply contracts on which it made windfall profits in recent years.

(TPN, 04.02.15)

Fuel Dealers Slammed

The Competition Council (CC) of Latvia fined fuel dealers – SIA LUKoil Baltija R and SIA Akselss – for not submitting a merger notification timely. Both undertakings secretly operated as one undertaking since December, 2010, while a merger notification to CC was submitted only in early 2015.

In accordance with the Competition Law, in case of significant mergers the permission from the CC is required. Thus, the state is able to avoid significant lessening of competition and prevent consumers and undertakings from adverse changes in markets.

If undertakings implement a merger without the approval by the CC, the state cannot fulfil its duty to protect the competition within the market, and the market structure may suffer an irreversible damage. Therefore, undertakings for not submitting the merger notification timely are sanctioned with a fine. The fine set to the undertaking – €104,397 – is the highest penalty applied for such type of infringement in the history of the CC.

(www.kp.gov.lv, 18.03.15)

Insurers Face Crunch Time

Italy's Antitrust Authority has imposed fines totalling €29mn on two insurance companies for agreeing not to compete with one another on tenders by public transport companies.

Generali and Unipol, an insurance provider which has since merged into the UnipolSai group, were fined €12mn and €17mn respectively. Both companies operated a cartel by agreeing not to pursue tenders for the provision of insurance to 15 public transport companies.

The authority considers the agreement, which lasted from 2010-2014 and included 58 different contracts, to be very serious, describing it as a unique and continuous infringement aimed at sidestepping participation in the competitive market. *(GCR, 30.03.15)*

SodaStream Abused Dominance

The German Competition Authority (Bundeskartellamt) imposed a fine of €225,000 against SodaStream GmbH, Limburg an der Lahn, on account of abusive practices.

Due to the dominant position held by SodaStream, other companies must also be given the possibility to refill the CO_2 cartridges of the soda makers sold by SodaStream. The Bundeskartellamt's decision to this effect, which was ultimately confirmed by the Federal Court of Justice, had already been issued in 2006.

According to Andreas Mundt, President of the Bundeskartellamt: "Following the 2008 decision of the Federal Court of Justice, SodaStream modified its distribution concept. However, the company's warning and safety instructions as well as disclaimers of warranties still gave customers and business partners the impression that SodaStream was exclusively entitled to refill the cartridges. This is why we again initiated proceedings against the company." *(GCA, 22.01.15)*

CMA Hits Estate Agents

The UK's Competition and Markets Authority (CMA) has fined an estate agents association in Hampshire, three of its members and a newspaper company for allegedly agreeing not to advertise agents' fees or discounts.

The case marks the authority's first fine since it was established in 2014. The £775,000 penalty comes after the authority's first statement of objections since it was restructured in April 2014 and as it nears the end of its first year in existence.

The fine was issued to Three Counties Estate Agents Association; its members Waterfords Estate Agents, Castles Property Services and Hamptons Estates; and publisher Trinity Mirror Southern. All agreed to pay the fines. *(GCR, 20.03.15)*

Ryanair Fined for Mis-selling

The Competition Authority (AGCM) of Italy recently fined low-cost air carrier Ryanair €550,000 for unfair practices, following an investigation opened in June 2014. The investigation arose from complaints by passengers and consumer associations over major difficulties and exorbitant costs when trying to contact Ryanair regarding the fulfilment of contracts.

The AGCM held that it was 'unfair and unreasonably expensive' to force customers to contact an overpriced call centre to obtain these services. The AGCM highlighted that Ryanair offered no actual alternative means of assistance to customers aside from the call centre.

In particular, it noted that – despite Ryanair's arguments – the online form and online chat services on its website did not constitute actual alternative means of assistance. *(ILO, 18.03.15)*

Landmark Decision for Chinese Antitrust Enforcement

Dave Anderson* and James Marshall**

Largest ever Chinese antitrust fine

- China's National Development and Reform Commission (NDRC) has fined Qualcomm a record US$975mn – eight percent of Qualcomm's 2013 total Chinese turnover), for abusive patent licensing practices.
- The fine is the largest ever imposed in China and is one of the largest antitrust penalties ever levied by a regulator on a single company (comparable to the European Commission's €1.06bn fine on Intel in 2009 for abuse of dominance).
- Qualcomm has also agreed commitments to address the NDRC's concerns. These include reduced royalty rates and enhanced patent buyback rights for Chinese licensees. 3G and 4G smartphone chips will now cost less to license in China than elsewhere, giving Chinese manufacturers an advantage over global rivals.
- This case has reconfirmed China's position as one of the leading antitrust jurisdictions, along with the US and EU.

China Imposes Near-US$1bn Antitrust Fine on Qualcomm for Abuse of Dominance

A landmark investigation

After complaints from a number of Chinese smartphone manufacturers, NDRC opened its investigation in November 2013 with a 'dawn raid' of Qualcomm's Beijing and Shanghai offices.

NDRC found that Qualcomm had abused its dominance in the markets for Standard Essential Patent (SEP) licensing of certain wireless technology as well as baseband chips by:

- charging excessive royalties, including charging for expired patents and requiring mandatory fee-free grant-back of customers' patents;
- bundling sales of SEP and non-SEP licences, making customers buy both types; and
- imposing unfair terms for baseband chip sales, and refusing supply to customers who challenged those terms.

Remedies favour both sides

Qualcomm settled the case by agreeing a package of remedies, in addition to the US$975mn fine. The remedies ban fee-free grant-back of customers' patent licences and bundling of non-SEP licences, and require Qualcomm to change its unfair terms.

Most importantly, while royalty fees will be reduced, Qualcomm retains the commercial structure of its licensing model. Certain of Qualcomm's royalty fees will now be calculated based on a maximum of 65 percent of the smartphone price rather than 100 percent. However, fees will not be charged per chip, as feared. Qualcomm expects revenue growth despite the penalty.

The remedies also demonstrate the role of industrial policy in China's antitrust regime. China's smartphone makers will enjoy lower input prices than global rivals, with reduced licensing fees for phones sold in China. While export prices may not change, the remedies may boost domestic consumption of Chinese-made goods.

China's focus consistent with peers

The intersection of technology, IP rights and competition law is in focus globally. For example, the EU and India are continuing to investigate Google, and US, Chinese and multiple European authorities are investigating online retail issues. This case also chimes with the European Commission's willingness to intervene in high-tech markets (e.g. the 2009 Rambus decision).

China is a leading antitrust enforcer

This case is another significant milestone for China's antitrust enforcers and demonstrates the importance of ensuring robust global antitrust compliance. Regulators in China and elsewhere in the region are increasingly active and willing to enforce competition law against multinational corporations and investors, as demonstrated by numerous recent merger (e.g. Xstrata/Glencore, Seagate/Samsung) and cartel decisions (e.g. LCD, autoparts) affecting foreign firms in China.

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– The article appeared in the Berwin Leighton Paisner in February 2015

AstraZeneca Acquires Actavis

AstraZeneca has completed its acquisition of the rights to Actavis' branded respiratory business in the US and Canada. The UK-Swedish drugmaker said the buy strengthens its respiratory franchise globally and builds on its acquisition of Almirall's respiratory portfolio in 2014, as it extends the company's development and commercialisation rights into the US for both Tudorza Pressair and Duaklir Genuair.

On completion of the acquisition, the drugmaker will pay Activis an initial consideration of US$600mn and has agreed to pay low single-digit royalties above a certain revenue threshold.

AstraZeneca has also paid Actavis an additional US$100mn for a number of contractual consents and approvals.

(www.chemanager-online.com, 04.03.15)

ADM-Glencore Joint Venture

Archer Daniels Midland (ADM) is forming a joint venture with the commodities trading house Glencore to quadruple the amount of oilseeds flowing through a port in Brazil. One of the biggest agricultural traders and processors, ADM agreed to sell Glencore a one-half stake in its export terminal in Barcarena, near the city of Belém on Brazil's northeast coast.

The move comes as ADM seeks to double its worldwide grain trading volumes over the next several years. The joint venture would help ADM economise on its capital outlay as it ramps up trading volumes.

(FT, 04.02.15)

Anbang Seals Tongyang Deal

Anbang Insurance Group, the Chinese financial company that recently acquired the Waldorf Astoria hotel in New York, has continued its buying spree with the US$lbn takeover of South Korea's Tongyang Life.

The deal, announced by South Korea's eighth-biggest life insurer by assets, came a day after Anbang sealed the acquisition of the Dutch insurer Vivat for up to €1.7bn.

Anbang will buy a 57.5 percent stake in Tongyang, which is owned by Vogo Investment, a South Korean private equity fund. If two other investors opt to sell their stakes, Anbang will acquire a total of 63 percent of the company for US$1.02bn.

(FT, 18.02.15)

Hutchison to Buy Telefonica UK Unit

Li Ka-shing's Hutchison Whampoa Ltd has agreed to buy Telefonica's British mobile unit O2 for up to 10.25 billion pounds, hastening the consolidation of Britain's telecoms industry.

Hutchison already operates the Three Mobile network in Britain, and buying second-ranked O2, which has about 22 million subscribers, from the Spanish group will make it the top mobile operator in the country.

The move comes only after former state monopoly BT entered exclusive talks with the owners of EE, Britain's biggest mobile operator to create a dominant provider of fixed and mobile phones and internet services.

(Reuters, 23.01.15)

Merger Creates Largest Law Firm

Dentons plans to merge with one of China's biggest law firms to create the largest global law firm by attorney headcount, in a bid to provide legal services to Chinese companies that are increasingly looking overseas for expansion.

Dentons-Dacheng deal would create a firm of 6,600 lawyers in 120 offices in more than 50 countries. The deal is awaiting Chinese regulatory approval.

The new firm is to be known as Dentons outside of China and Dacheng inside China. It will have a logo that begins with the two Chinese characters for Dacheng and ends with the name 'Dentons'. *(FT, 23.01.15)*

Staples to Purchase Office Depot

Staples is scooping up Office Depot to the tune of US$6.3bn. Combined, the two companies own around 4,000 stores and see annual sales of more than US$35bn. But the pair has been hit by greater competition from online retailers such as Amazon as well as chains such as Target and Wal-Mart, which also sell office supplies and consumer electronics.

The deal, which is expected to close by the end of 2015, has already been okayed by each company's board of directors.

Until the deal is done, Staples will focus on its 'strategic reinvention plan,' while Office Depot will continue to focus on integrating the OfficeMax chain, which it purchased in 2013.

(www.cnet.com, 04.02.15)

Daily News

Cinepolis Snaps up Fun Cinemas

Mexican multiplex chain operator Cinepolis fully acquired Essel Group's Fun Cinemas for an undisclosed sum which is its first acquisition in the country. The company, which started operations in India in 2009, said this acquisition is in line 'with its vision to operate 400 screens by 2017.'

There are two key drivers for the decision to acquire Fun Cinemas. First of all, this will strengthen the reach of the company in the two main cities of India – Delhi and Mumbai. Secondly, there are five markets where Fun Cinemas and Cinepolis are present together and the synergies brought in would maximise the profitability of joint operations.

The company will continue to operate under two different brand names till the time it integrates its processes. With this acquisition, Cinepolis' screen count in India has risen to 193, across 41 multiplexes and 31 cities. Fun Cinemas has a total of 83 screens across 24 properties.

(FE, 29.01.15)

Hitachi Swallows Finmeccanica

Hitachi Ltd., moving to expand its transportation business overseas, signed a binding agreement to buy two units from Finmeccanica for about US$1bn as the Italian company looks to lower debt and concentrate on its core aerospace and defences businesses.

Hitachi will pay US$876.1mn for Finmeccanica's 40 percent stake in rail signaling operator Ansaldo STS and €36mn for unprofitable train manufacturer AnsaldoBreda.

Following the closing of the deal, expected by the end of 2015, Hitachi will launch a mandatory tender offer on Ansaldo STS's publicly traded shares which could boost the Japanese company's total payout to as much as US$2.5bn. *(WSJ, 24.02.15)*

Japan Post Buying Aussie Firm

State-owned Japan Post Holdings Co Ltd has agreed a A$6.5bn takeover of Australia's biggest freight and logistics firm, Toll Holdings Ltd, as the Japanese financial giant embarks on an ambitious global expansion.

In one of Australia's biggest inbound acquisitions, Japan Post offered a 49 percent premium to Toll's last closing price, a valuation deemed 'compelling' by the Australian firm's directors who unanimously recommended it.

Together this will be a very powerful combination and one of the world's top five logistics companies. *(FE, 18.02.15)*

Telecity Agrees Interxion Merger

Telecity, the UK-based data centre provider that hosts servers for Facebook and Google, has agreed to buy Dutch competitor Interxion in an all-share deal that would create a single dominant European player valued at more than £3bn.

The move marks a new chapter for Telecity, a FTSE 250 company whose future was in doubt following the sudden departure of Mike Tobin, its longstanding Chief Executive, in 2014.

The new company is looking to tap into rising demand for data services and storage fuelled by cloud computing and the boom in mobile devices. Technology research group Gartner predicts there will be 25 billion devices connected to the internet by 2020. *(FT, 12.02.15)*

Holcim, Lafarge Agree on New Terms

Switzerland's Holcim and France's Lafarge agreed upon new terms for their plan to create the world's top cement business, giving unhappy shareholders in the Swiss company a better deal but leaving a key leadership question unanswered.

While the merger is back on track after a rocky few weeks, the deal could still flounder over who will run the combined entity with annual sales of more than €30bn (US$32bn).

After days of intense negotiations, the two companies agreed Lafarge shareholders would now receive nine Holcim shares for every 10 Lafarge shares they hold rather than the one-for-one ratio agreed when the deal was unveiled in April 2014.

The companies also agreed that Lafarge boss Bruno Lafont would no longer become chief executive, instead taking on the role of non-executive co-chairman, alongside Holcim's chairman, though they have yet to decide who will take the CEO role. *(WSJ, 20.03.15)*

Scripps Enters Polish Media Market

US media group Scripps Networks Interactive agreed to buy a majority stake in Polish broadcaster TVN for US$615mn, gaining a foothold in a TV advertising market where revenues beat the global average and grew six percent in 2014.

Scripps, which owns the Travel Channel and the Food Network, would buy the 52.7 percent stake in Poland's second largest private TV network from local financial holding firm ITI and French media firm Vivendi.

The US firm is gaining control of a group worth a fifth of its own market valuation. Under the agreement, Scripps will also take on €840mn of debt. *(Reuters, 16.03.15)*

Media Pact Receives Green Light

Canada's Competition Bureau would not be challenging Postmedia's acquisition of rival Sun Media's English language newspapers, digital properties and specialty publications, following a review of the deal.

The C$316mn deal will see two of Canada's largest English-language media units combine. The Bureau found that the deal would not harm competition because there is no close rivalry between Postmedia's broadsheet newspaper and Sun Media's English-language tabloids.

Most significant, though, was the Bureau's acceptance that Canada's media market was evolving and traditional print media is facing severe competition from digital alternatives. *(GCR, 26.03.15)*

Kingfisher Abandons Bricolage Deal

Kingfisher has abandoned plans to buy French retailer Mr Bricolage, amid a cocktail of issues including opposition from the French retailer's board and a failure to win antitrust clearance within the agreed timeframe.

The DIY retailer, which owns B&Q, said the deal would not get the green light from competition regulators by March 31, 2015 a condition of the €275m (£202m) deal agreed in July 2014.

It said that because of this, and 'in light of the positions expressed to date by the ANPF [a major shareholder in Mr Bricolage] and Mr Bricolage', the transaction will not proceed.

Kingfisher had wanted Mr Bricolage to beef up its position in France, the company's most profitable market, where it already trades as Castorama and Brico Depot. *(TT, 30.03.15)*

Comcast: A Case for Revival of Antitrust

Edward Lotterman*

Comcast's well-documented history of contemptuous treatment of its customers reportedly is coming back to haunt it in its quest for approval of a merger with Time-Warner.

Unfortunately, little of the public discussion goes beyond the firm's often outrageous treatment of subscribers, both in terms of quality of service and in resistance to people who simply want to stop buying the product it offers. Its tawdry reputation overshadows the broader issue of the degree to which we have simply abandoned anti-trust as a legitimate function of government. That is unfortunate from the point of view of efficiency in our economy as well as in fairness in consumer-level commerce.

Start with the micro- economics basics. British economist Adam Smith demonstrated that markets often function very well in transforming raw resources into the goods and services that meet the needs and wants of society. But he was equally astute in describing how businesses have inherent incentives to collude to further their own financial position to the detriment of their customers. Competition forces each butcher or baker, taken alone, to strive to meet customer needs. But if all the butchers or all the bakers or all the media companies can get together and act as a monopoly, those incentives for customer service break down. The outcome is waste of resources and not just unfairness.

Later economists lauded the virtues of free markets but detailed specific circumstances in which market competition can fail.

The Sherman Anti-Trust Act that banned "any combination in restraint of trade" established federal authority to limit monopolistic practices more broadly, and many loopholes in it were plugged by the Clayton Act of 1914. States established utility regulatory commissions. So a regulatory framework is in place. What increasingly is lacking is the political will to use it when the gains to society from doing so outweigh the costs.

There is the rub. Decades of regulating transportation rates and scrutinising even small mergers demonstrated that government can easily do far too much in efforts to limit monopoly. Perverse incentives arose frequently. Regulated industries "captured" regulators or used regulation as a means of freezing out new competitors.

Regulation could create barriers to entry instead of demolishing them. Economists and legal scholars, notably Judge Richard Posner, detailed all this in scholarly terms.

So the deregulatory efforts of the Carter Administration were laudable, as was the earlier, largely court-ordered restructuring and partial deregulation of telecommunications. These advanced economic efficiency and inspired technical and managerial innovation in the sectors concerned.

However, recognising that monopoly regulation can have costs as well as benefits is not the same as abandoning such regulation altogether. Yet, that is what effectively has happened at the federal level. Over the past 25 years, in sector after sector, from airlines to pharmaceuticals to telecommunications and media to banking, the Justice Department has turned a blind eye to mergers that any administration, Republican or Democrat, would have challenged in the 1960s or 1970s. The fact that anti-trust actions were too nit-picking in the past does not mean that the entire issue should be abandoned now.

Comcast's bad treatment of its subscribers is legendary and is now cited as a lever by opponents of the merger. The two issues are separate, however. State and local government have the ability to force cable operators to provide good service; it just requires the political will do so.

On the specific problem of Comcast forcing its subscribers to run a hostile bureaucratic gauntlet to simply stop service, legislatures need to man up. There is no reason a state could not enact a law stating that any retail customer desiring to stop buying any subscription service, including cable or other telecommunications, be able to do so with a simple notification and that hard-sell harassment tactics are simply illegal and subject to stiff fines.

Yes, Comcast has often made pious vows to regulators that it would end abuses and improve service, only to ignore such promises once the ink dried. Hefty lobbying and political contributions have allowed it to get away with murder in the past. But if citizens justifiably want it tamed and elected officials hear them, the task can be done.

* *St. Paul Economist and Writer. Abridged from an article that appeared in* Idaho Statesman *on February 28, 2015*

Compliance Challenges for Foreign Businesses in China

John C. Kocoras*

Despite the significance and depth of recent foreign investment in *China*, much of the country's potential for foreign investors remains untapped. With a bourgeoning *middle and upper class*, an unprecedented demographic shift owing to the effects of the one child policy, and dramatic societal changes stemming from the reform and opening up policy, the flexibility and speed that private foreign investments can bring to China is a welcome addition to its economy.

Investment demand is strong and diverse where supply was traditionally not only monolithic and ruled by connections instead of ideas, but also slowed by stubborn bureaucracies and endless layers of required approval.

Compliance Challenges

New *foreign investors* and entrants to the Chinese market are facing significant compliance risks that are endemic, difficult to understand and equally as difficult to stamp out. For many, the biggest challenge is not just identifying the current compliance problems and rooting out rotten apples. Instead, it's the fatigue of having to start another cycle of compliance investigations when the new group of managers turns out to have the same problem as the ones they replaced.

While foreign companies traditionally focused on compliance with the anticorruption laws of their home countries, recent enforcement activity and public declarations in China make it clear that Chinese authorities expect the same level of attention to be paid to China's anti-bribery regime.

Key Chinese Laws

Article 164 of China's Criminal Law provides that whoever gives money or property to any employee of a company or enterprise for the purpose of receiving unjustified benefits is subject to imprisonment for a maximum of three years. If the amount involved is especially large, the person can be sentenced to a term of imprisonment of not less than three years but not more than 10 years, and will be concurrently fined.

Article 393 of China's Criminal Law provides that a "unit" that offers bribes for the purpose of securing illegitimate benefits, or gives rebates to a State functionary in violation of State regulations, in "serious" circumstances, will be fined. Additionally, the persons directly in charge of the unit, and other persons directly responsible for the offense, can be sentenced to imprisonment for no more than five years, or sentenced to criminal detention, which is similar to imprisonment, but less strict.

As new entities, especially foreign entities, attempt to capitalise on China's many fresh business opportunities, they are facing new compliance challenges, new risks and new penalties

Article 391 of China's Criminal Law provides that whoever, for the purpose of securing illegitimate benefits, gives money or property to a State agency or State-owned company, enterprise, institution or people's organisation, or violates State regulations by giving certain rebates, will be sentenced to imprisonment for not more than three years, or criminal detention.

Administrative Liabilities

In addition to its criminal laws, China has administrative laws that address compliance concerns, including bribery and unfair competition. These include Article 9 of the Interim Rules on the Prohibition of Commercial Bribery. China's Anti-Unfair Competition Law similarly provides financial penalties for bribery "in selling or purchasing commodities."

Necessity of Proactive, Systematic Local Compliance

Foreign entities investing in China will encounter compliance risks under both local laws and those in their home jurisdictions. The risk of significant fines, imprisonment and sometimes blacklists combine to ensure that compliance issues in China have the potential to completely derail, disrupt and destroy even the largest of investments.

Proactive, systematic local compliance programmes that are woven into the investment from the start are not only a recommended course of action to try to mitigate legal risks and keep the project from turning into one of the many recent newspaper headlines. They are also a necessary and essential element to protect the investment in the long term. Fortunately, compliance with China's laws does not usually inhibit compliance with other countries' laws, and the overlap is significant.

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* *Partner, McDermott Will & Emery LLP's White Collar & Securities Defense Practice Group. Jared T. Nelson contributed content for this article. Abridged from an article that appeared in the* National Law Review *on March 10, 2015*

HSBC, Tax and Why Good Companies Do Bad Things

Michael Skapinker*

HSBC was surely hoping for a better start to its 150th anniversary than its chief executive Stuart Gulliver calling its behaviour a "source of shame".

The confession was particularly striking as the shame, the tax evasion scandal at HSBC's Swiss private bank, happened largely under the leadership of Stephen Green, now Lord Green, an ordained Church of England priest and author of a book called Good Value: Reflections on Money, Morality and an Uncertain World.

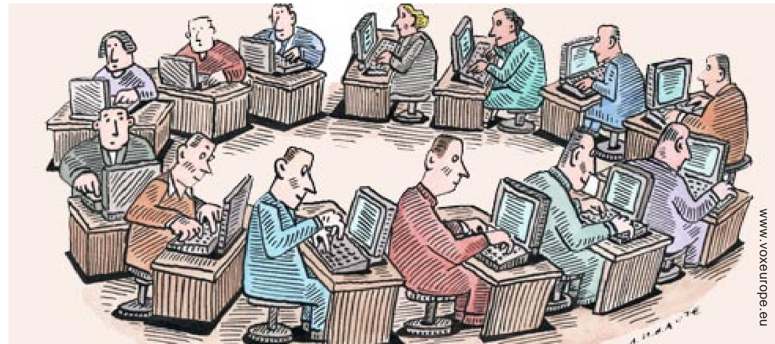
HSBC is not the only company that has tried to project a responsible image, only to be upended by the bad behaviour of some of its staff.

There was GlaxoSmithKline's bribery scandal in China, which led to the company apologising to "the Chinese patients, doctors and hospitals, and to the Chinese government and the Chinese people". And there was the involvement of several banks in foreign exchange and Libor-rigging scandals.

Why do companies that spend so much time and money promising to be good do bad things? Is it because those promises are pure hypocrisy? No. Many, possibly most, of the leaders making those promises mean it. Only a small number of businesses, such as Bernard Madoff's, are thoroughly rotten at the top.

There is no single reason why companies employing many decent people fall into disgrace. But, observing corporate scandals over the years, I have noticed some patterns.

A central issue is that, while we talk about corporate culture, few companies, particularly global ones, have a single culture. Departments, subsidiaries and certain types of jobs within the company have their own microcultures.



There is no single reason why companies employing decent people fall into disgrace

This may be because a bit of the company was an acquisition. HSBC said this was true of its Swiss private bank, which "was not fully integrated into HSBC, allowing different cultures and standards to persist".

Even in longstanding parts of the business, some employees have more in common with those doing similar work in other companies than they do with the rest of their organisations.

You could see this in the Libor and foreign exchange scandals. In one set of messages between three traders from Citigroup, JPMorgan and UBS talking about whether to invite a fourth into their chatroom, one said: "Is he gonna protect us like we protect each other against our own branches?"

In this case, the traders clearly knew what they were doing was wrong. In many others, those involved persuade themselves that it is not, even when, as with HSBC's Swiss bank, they were giving clients "bricks" of cash and helping them to set up offshore companies to hide their wealth.

In explaining itself, HSBC said that the Swiss private banking industry used to think that it was clients' responsibility to declare their wealth and that it was not up to the bank to second-guess them. The implication is clear: any bank that did not accommodate these clients would have lost them to someone else.

If those at the top do learn of a shady practice, there are a number of reasons why they may choose to ignore it: it has been going on for so long it must be all right — or a previous manager clearly agreed to it and must have had good reason, or unravelling it would set off a reaction that would damage the whole business.

When corruption does come out, it damages the whole business anyway, with the added charge that those at the top should have acted sooner.

What should business leaders do? Ethics hotlines may help, but anyone who has spoken to whistleblowers knows that speaking out often wrecks their lives.

The tone, as people say, comes from the top but many employees pay little attention to those at the top, particularly when there are many more interesting messages in their inboxes or social media timelines.

The only defence against corruption is to be out all the time, digging into the business and repeating the importance of not damaging the company's reputation over and over again. It is a battle leaders have to fight every day.

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* *South African Journalist and Associate Editor, Financial Times. The article appeared in the* Financial Times*, on February 25, 2015*

NCC Reviews MVNO Policy

The success of the 2013 auction of mobile broadband communication licences for fourth-generation (4G) Long-Term Evolution (LTE) has been tarnished by accusations of financial game playing and spectrum grabbing levelled by the Consumer Foundation, Taiwan's most powerful consumer lobbying organisation.

Of the six operators awarded licences, Ambit Microsystems Corporation (a fully owned subsidiary of Foxconn) entered into a roaming service agreement with Taiwan Mobile for 4G service coverage, which new entrant Taiwan Star challenged as illegal and unfair on the grounds that it turns out to be mobile virtual network operator (MVNO) without having to fulfil any construction obligations as required under the licence.

The National Communications Commission (NCC) admits that there is a loophole in the regulation with regard to mergers and acquisitions between qualified bidders/operators.

(ILO, 25.02.15)

Review of Energy Policy

When the UK's coalition government came into power in 2010 it faced many challenges. Not the least of these was the need to inject some purpose into Britain's languishing energy policy.

The previous Labour administration had allowed the UK's power infrastructure to run down in the 13 years after 1997, dithering about setting a sensible framework for renewal while intervening selectively to stimulate investment in costly renewable energy.

The incoming administration offered a more hardheaded strategy. It would bolster energy security by building the new capacity Labour had neglected to foster, while simultaneously decarbonising the economy. *(FT, 02.01.15)*

UK Enacts Insurance Bill 2015

The Insurance Bill 2015 received royal assent on February 12, 2015 becoming law as the Insurance Act 2015. The Act will overhaul certain fundamental areas of UK insurance law and will apply to both insurance and reinsurance contracts. The reforms will come into force in August 2016, giving the industry a period of 18 months to prepare.

The Insurance Act 2015 includes amendments to The Third Parties (Rights Against Insurers) Act 2010 (TPRA) to allow the Government to make the necessary changes by way of secondary legislation (which will also allow future changes in insolvency law to be incorporated more easily), following which the TPRA should be brought into force.

The government stated that the draft regulations are being prepared and that it is committed to bringing the TPRA into force as soon as practicable.

(ILO, 17.02.15)

Boosting Aviation Sector

In Nigeria, the Nigerian Civil Aviation Authority (NCAA) is the regulatory body, overseeing the activities of all airlines. The NCAA is essentially a facilitator of compliance of aviation safety and economic regulations.

The NCAA was established in 2006 with the introduction of the Civil Aviation Act. Section 30(2(b)) of the Act empowers the NCAA to make regulations "for the prohibition of aircraft from flying unless certificates of airworthiness issued or validated under the regulations are in force with respect to them and except upon compliance with such conditions as to maintenance and repair as may be prescribed".

The NCAA has promulgated the Civil Aviation Regulations, to give specificity to the ICAO Standards and Recommended Practices. The NCAA further publishes technical guidance in the form of orders to assist NCAA safety inspectors and industry participants. *(ILO, 04.03.15)*

Rule on Clinical Trial Registration

The National Institutes of Health (NIH) published a proposed rule that would expand the clinicaltrials.gov registration and results-reporting provisions first created by the Food and Drug Administration (FDA) Amendments Act in 2007. The NIH would require posting of results for clinical trials of unapproved and uncleared products.

The NIH's action follows the October 02, 2014 release of the European Medicines Agency's (EMA) policy on the publication of clinical trial data. The current NIH proposal does not go as far as the EMA policy, which will require the EMA to publish clinical reports – and eventually individual patient data – that are submitted to the agency in marketing authorisation applications.

Such a requirement is still a possibility in the US, however, as the FDA has considered whether this might be appropriate under certain limited circumstances. *(ILO, 07.01.15)*

End of Roaming Charges in 2015?

The European Union (EU) countries have agreed that mobile roaming charges within Europe should stay in place until the end of 2018, in opposition to European Commission plans to scrap the fees by the end of 2015.

A majority of the 28 EU member states in the European Council have voted in favour of keeping roaming charges in place until at least 2018, but states plan to introduce measures they say will make it cheaper for Europeans to use their mobile phone when travelling within the EU.

Member states, however, have proposed an alternative scheme based on a 'basic roaming allowance'. Once that set amount of data is consumed, operators are freed up to charge an extra fee – albeit one they say is much lower than current rates. *(www.zdnet.co, 05.03.15)*

Regulations in the Upstream Oil & Gas Sector in Africa

Sonal Sejpal, Njeri Wagacha and Sheila Nyayieka

It is an exciting time for oil and gas in Africa! The list of oil producing countries in Africa continues to grow. The traditional oil producing countries - Nigeria, Algeria, Angola, Egypt, Sudan and Libya have been joined by new entrants such as Mozambique, Ghana, South Africa, Tanzania, Uganda and Kenya. This has led to renewed interest in the oil and gas industry in the continent as a whole.

The oil finds promise to give the citizens in the various countries a new life line. Further, oil production will create a new stream of foreign exchange earnings for governments and ultimately elevate the standard of living for their citizens.

The onset of resource nationalism in various countries has played a significant role in shaping emerging oil and gas legislation. The current trend is for the people and governments to assert greater control over natural resources located within their territory. Citizens are more aware of their right to benefit from the resources. Most countries are also wary of the "resource curse" deriving from corruption, environmental degradation and leakage of revenues due to tax evasion. This has led to enactment of stringent local content laws governing different minerals and natural resources.

In South Africa Broad-Based Black Economic Empowerment laws (BBBEE) apply to the oil and gas sector, which is defined as a social or economic strategy, plan, principle, approach or act which is aimed at redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries.

It is vital for foreign investors and contractors to adhere to these laws as contravention can lead to significant fines and in some cases revocation or non-renewal of licenses. It will be interesting to see how laws are applied and whether they are practically enforced.

Key Findings and Conclusions

To a great extent, the intention of the local content laws in the jurisdictions under review is laudable. This is especially true in their intention to establish systems for nationals to actively participate and benefit from upstream petroleum activities through skills development, employment opportunities technology transfer, provision of certain goods and services to the industry and stakeholder participation. Implementation requires careful consideration and understanding of what the industry requirements in this sector are and an understanding of whether a particular jurisdiction has the necessary skills, capacities and know-how before imposing mandatory requirements that are unreasonable, the effect of which is reducing the country's competitiveness and ability to attract foreign investors.

Imposing stringent local content requirements on investors focused on early stage exploration would limit the ability to generate viable returns whilst imposing substantial additional costs making such investment unattractive. For example, unlike Nigeria, Kenya is at the exploration stage. At this stage, the contractors bear all the risk and incur expenditure without a guarantee of any eventual income from their operations.

Local content legislation is fairly new in most African countries. In other jurisdictions such as Kenya, it is still in draft form and the substantive terms are yet to be finalised.

In addition, while some countries have already enacted local content laws, these laws are not being enforced for various practical reasons such as lack of capacity in the local population. For example, Uganda adopted a 48 percent equity participation requirement under its Petroleum (Exploration, Development and Production) Act, 2013. In Angola, oil operators are grappling with a skills gap among the locals since companies are required to have a work force consisting of at least 70 percent Angolan nationals.

It is recommended that governments first develop a national content policy that traverses all extractive sectors followed by industry specific local content policies and regulations that are in line with the overarching national policies. This will ensure consistency in the drafting of laws. A streamlined local content policy will benefit oil producing countries while foreign investors concurrently benefit from a successful local content strategy through reduction in operational costs; the seamless flow of supplies of goods and services; and enhanced engagement with stakeholders.

* *Authors are associated with Anjarwalla & Khanna, Kenya, ALN. Abridged from an article that appeared on* www.kwm.com, on March 16, 2015

Regime for Domestic Banks

The Financial Stability Board (FSB) of Canada recommended that all FSB jurisdictions put in place a policy framework to reduce the risks and externalities associated with global and domestic systemically important financial institutions in their jurisdictions.

The FSB recommended five components for the framework: a higher loss absorbency capacity to reflect the greater risks that these institutions pose to the global or domestic financial system; more intensive supervisory oversight; a robust core financial market infrastructure; a resolution framework to ensure that all financial institutions can be resolved quickly; and supplementary prudential and other requirements.

It appears that Canada has since made good progress in implementing these recommendations. Of course, as is typical with respect to financial services regulation, not all of the measures are transparent.

(ILO, 30.01.15)

Break-up of Big Banks at Risk

Reforms to break up Europe's big banks are on course to be weakened by pressure from France and Britain for maximum national leeway.

The European Commission has faced a wall of opposition from some EU member states and the banking industry since it made proposals in 2014 to force some banks to hive off risky trading activities.

Advocates of structural reforms, including the European Central Bank, are alarmed by ideas to change the blueprint from an EU regulation to a directive, which offers member states more room to interpret the measures in national law.

The reform is part of the EU's attempt to deal with banks deemed too big to fail. It also includes curbs on banks betting with their own funds, proposals that are facing less resistance. *(FT, 30.01.15)*

Bank Reform Bill Approved

Italy's midsized popolari banks would be transformed into joint stock companies under a bill approved by Matteo Renzi's reformist government. The plan will see banks including Banca Popolare, Banca Popolare di Milano and Ubi forced to reform their one shareholder, one-vote governance.

Bankers expect the move, which is expected to be approved by the Italian Parliament, to pave the way to consolidation in the sector. The current voting structure has in effect allowed local banking unions to control strategy and block mergers.

This kind of legal change has been discussed for more than a decade but had been fiercely opposed by local banking unions and politicians. Italy's midsized lenders have traditionally had close ties with local communities and have argued that mergers could deprive some towns and regions of their own bank. *(FT, 22.01.15)*

Regulators Urge Data Sharing

Some of the world's biggest banks are in talks with regulators about loosening privacy laws to allow the sharing of more data on clients that could help law enforcement agencies fight organised crime and terrorism.

Three of the world's biggest banks have withdrawn from correspondent banking relationships in 30 jurisdictions, the central banker said. They are believed to be HSBC, JPMorgan and Citigroup.

Other groups with a licence to clear US dollars, such as Standard Chartered and BNP Paribas, have also been severing hundreds of correspondent banking relationships in some of the riskier emerging markets. *(FT, 24.01.15)*

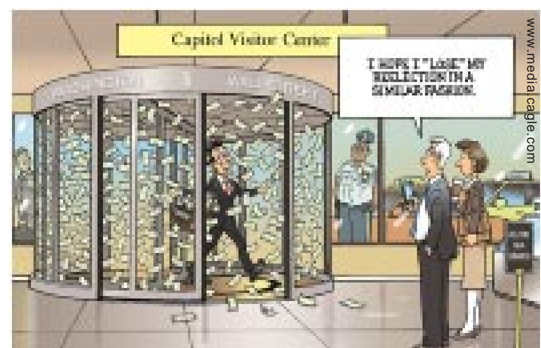
Bonus Cap for Small Lenders

The EU has made another attempt to curb the remuneration of asset managers and executives working for small banks and building societies, triggering 'major concerns' in London financial circles and potentially setting the UK on a collision course with Brussels.

The European Banking Authority, the EU's banking watchdog, wants to remove national waivers used to exempt some financial companies from rules brought in to reform bankers pay in the aftermath of the financial crisis so executives had no incentive to take excessive risks.

The rules cap key staff bonuses at twice their fixed salary and require at least 40 percent of bonuses to be deferred for at least three years. In the UK, standalone asset management companies and personnel at small banks have waivers from the Financial Conduct Authority. *(FT, 05.03.15)*

'Revolving Door' with Banks



A 'revolving door' between US regulators and banks emphatically exists, according to new statistics published by the Federal Reserve Bank of New York, which attracted criticism for its alleged coziness to Goldman Sachs in 2014.

The paper published on the New York Fed's website concludes that banking regulators move into the private sector when the economy is booming, while strained times result in more former bankers joining regulatory agencies. Restricting hiring by either banks or regulators, however, could result in poor retention of quality staff by government authorities, the study claims.

The study, which scrutinised the career paths of 35,000 current and former regulators over 25 years, claims to be one of the only empirical studies into movement between regulators that oversee US banks and private practice.

The authors concluded the data disproved the so-called *quid-pro-quo* thesis, which holds that regulators go easy on banks with whom they may later seek employment. *(FT, 14.01.15)*

Regulators Right to Cut Biggest Banks Down to Size

John Gapper*

Fed's new capital standards hint at forcing complex institutions to break themselves up

Goldman Sachs caused a bit of a stir by issuing an analysts' report suggesting JPMorgan Chase might want to break itself up. I believe in the independence of investment bank research as much as the next person, but it is hard not to notice that the major beneficiary of such a step would be Goldman Sachs.

That is not to say it is a bad idea. In fact, it may be a very good idea, possibly for JPMorgan's shareholders, and definitely for society as a whole. It also suggests that the world's banking regulators are steadily coming around to the idea of dismantling the largest banks with their own tools rather than relying on governments to do the right thing. If so, jolly good luck to them.

Goldman's analysts did not have the idea of running the numbers on a JPMorgan break-up on their own. They were given a prod by the US Federal Reserve, which last month unveiled its plan for higher capital ratios for the eight US banks that figure among the 29 "global systemically important banks". They are the financial institutions that regulators could least afford to let fail chaotically in any crisis.

Top of the US list is JPMorgan, which is not only the biggest and most diverse US bank, with US$2.4tn in assets and operations in many countries, ranging from credit cards to credit derivatives, but is inconveniently successful across the board. Unlike many rivals, such as Barclays, there has been no reason for it to spin off its investment bank or slim down by other means.

The Fed has now stepped forward and provided one, with a suggestion that if this does not suffice, it may raise the stakes further. The Fed's variation on the capital standards agreed by global banking regulators in Basel is to force the largest, most complex, and potentially most fragile US banks to hold a lot more capital. JPMorgan is US$22bn short of the Fed's fresh target for 2019, which is "a pretty impressive shortfall", as Stanley Fischer, the Fed's vice-chairman, noted.

The stated reason for the new capital standards is to promote financial stability, which nobody would argue with, not even most bankers. It is abundantly clear that banks had too little capital entering the 2008 crisis, and much of what they declared was too flimsy to be of real help. For banks' capital ratios, the only way has been up.

But the Fed hints at a second motive, which is to make it so onerous and expensive for large and complex banks to operate that they will decide to break themselves up into smaller operations. Daniel Tarullo, the Fed governor in charge of banking regulation, told a Senate committee in September that its capital proposal "might also create incentives for them to reduce their systemic footprint and risk profile".

Regulators could probably achieve the same end without recourse to law. If the US, and countries such as Switzerland, Sweden and the Netherlands that have supersized the capital requirements for very large banks, wish to prise them apart, they simply have to keep ratcheting up the costs of size.

They would need to make life a lot tougher for systemically important banks because, as Dimon proudly keeps pointing out in his annual letters, JPMorgan gains a lot from being large. It sells various products to the same customers, reaping US$6bn in profits each year; it diversifies its revenues; and it can borrow money cheaper.

According to Goldman, the Fed is handicapping JPMorgan accurately. Its analysts say splitting up JPMorgan's commercial and investment banks, might reduce the level of capital the pair require sufficiently for the parts to be valued more highly than the whole. It is, however, still a close call.

The Fed will in 2015 consider raising the capital penalties for being big and complex even further. I suggest it does. Dimon would worry more, but the rest of us would sleep easier.

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* *Columnist, Financial Times. Abridged from an article that appeared in the* Financial Times *on January 07, 2015*

OPINION

Capitalism's clubby side, from Adam Smith to Libor

Stephen Mihm*

Cartels sound unsavoury, suggesting drug kingpins or despotic rulers of oil kingdoms. They are, in fact, illegal within the US and most developed economies. But agreements among members of a given industry to shape markets to their mutual advantage are as natural a feature of capitalism as competition. Cartels exist openly in many places and covertly almost everywhere. The line between a cartel and a more legitimate joint trading or marketing venture can be a fine one, and cartels take many forms: production quotas, price fixing, import/export quotas.

Some cartels operate inside a single nation; others span international markets. DeBeers controlled the diamond market for decades, and saw its hold loosened only by outside forces, including new competitors and determined prosecutors. More recently, charges or disputes about cartels have involved everything from potash mines in Belarus to currency traders' chatrooms in cyberspace, minor league baseball contracts and foreign car dealerships in China. And then there is Organisation of Petroleum Exporting Countries (OPEC), the 800-pound gorilla of the cartel world.

Agreements among members of a given industry to shape markets to their mutual advantage are as natural a feature of capitalism as competition

The Situation

Saudi Arabia and other key members of the OPEC showed three things in 2014: how far a determined cartel can swing a market that cartels sometimes want to drive prices down as well as up and that even within cartels there are losers as well as winners. Determined to recapture market share being lost to new sources, including oil from shale, Saudi Arabia and other Arab producers opened the taps, sending oil prices down 46 percent by the end of 2014.

Among those hurt were OPEC members Iran and Venezuela. In London and Washington, prosecutors are pushing for fines and possible criminal charges after revelations that traders manipulated prices in the US$5.3tn-a-day foreign-exchange market using instant message groups whose names included 'The Cartel.' Six banks had already been fined US$2.3bn by the EU over collusion over the Libor benchmarks used to set interest rates. In China, foreign businesses were dismayed by cartel cases they saw as a covert way of punishing outsiders.

And the 2014 Nobel Prize in Economic Sciences was awarded to Jean Tirole, a French economist who showed how rules that work well to promote competition in one field can be counterproductive in another.

The Background

The idea is age-old, but formal cartels first emerged in Germany in the 1870s, then spread to other European nations and Japan. The historian Jeffrey Fear has noted that domestic cartels typically emerged in industries with high fixed costs and a record of ruinous competition: steel, coal, salt, paper, fertiliser, aluminum and potash. In the US, the years after the Civil War saw a flowering of pools, trusts and other forms of cartels before antitrust laws reined them in.

International cartels prospered in the 1920s and 1930s in industries ranging from copper to petroleum to rubber. As a consortium of sovereign nations, OPEC stood outside antitrust laws, but its aggressive campaign to control oil prices destroyed the good reputation these cooperative arrangements once had. Recent prosecutions over price-fixing, ranging from cathode-ray tubes and in the international auto parts trade, show the continued lure of collaboration.

The Argument

The idea that cartels operate to the detriment of consumers dates back to Adam Smith, who described them as conspiratorial combines that have 'an interest to deceive and even to oppress the public.' While cartels face more legal hurdles today, their ubiquity throughout the history of capitalism suggests that attempts to eradicate them entirely will fail. Still, there is a threat to them that will never go away – cheating on the cartel's rules by members who cannot entirely suppress their competitive side. EU officials have found that every-man-for-himself spirit useful: UBS and Barclay's avoided US$4.3bn in fines by being the first to come clean about interest-rate manipulation.

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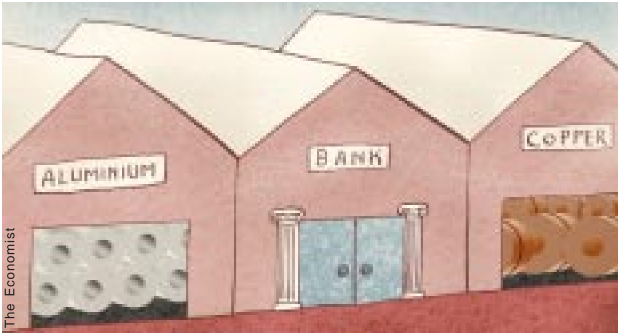
* *An Associate Professor of History, University of Georgia and Contributor to Bloomberg View. Abridged from an article that appeared in the* Business Standard*, on January 10, 2015*

The Missing Finance Plaintiffs in Aluminum Antitrust Case vs. Goldman

Alison Frankel*



Hey, antitrust plaintiffs' lawyers! Here is a case for you. It's against Goldman Sachs, JPMorgan Chase, the multinational mining and commodities trading company Glencore and their subsidiary warehouse operations, which supposedly conspired to manipulate the price of aluminum.

Aluminum purchasers are already way into that case. US District Judge **Katherine Forrest** of Manhattan has already winnowed out extraneous defendants and forced both a class of direct purchasers and three big companies suing outside of the class action to sharpen their allegations. Judge Forrest ruled that the class and the three companies – Eastman Kodak, Mag Instrument and Agfa Corporation – can move ahead with their claims that Goldman and the other defendants engaged in an illegal antitrust conspiracy.

The aluminum purchasers have alleged not just traditional price-fixing by market competitors but rather complicated interactions between the banks and the warehouses with the primary purpose of reaping profits for the banks from trading activity

Though the judge tossed monopoly claims by the class and expressed some exasperation about how long it has taken plaintiffs to come up with a viable theory of the case, her ruling is great news for class counsel at Lovell Stewart Halebian Jacobson, Grant & Eisenhofer, Robbins Geller Rudman & Dowd, and (especially) for Scott + Scott and Steyer Lowenthal Boodrookas Alvarez & Smith, which represent Kodak, Mag and Agfa and impressed Judge Forrest with the cogency of their joint complaint.

So where's the opportunity for other plaintiffs' lawyers? Representing counterparties to aluminum options trades by Goldman, JPMorgan and Glencore. That's because in Judge Forrest's reading of the alleged antitrust conspiracy, financial counterparties – and not direct purchasers of aluminum – were the true target of the supposed price manipulation scheme. Unwarranted prices for actual aluminum were just the "collateral damage" from the alleged scheme, according to Forrest, though the supposed overcharges were enough of an injury to confer antitrust standing on the metal purchasers.

The plaintiffs' antitrust theory that Judge Forrest found plausible enough to permit the suit to move forward is not their original conception of the suit, which followed a 2013 story in the New York Times about aluminum warehouses owned by Goldman Sachs and other banks shuffling aluminum around their lots rather than releasing it to purchasers. Those stories suggested a fairly simple supply-and-demand relationship between the banks' and warehouses' activities and the price of aluminum in consumer products.

Judge Forrest, who was deputy assistant attorney general of the US Department of Justice's Antitrust Division before she was appointed to the bench, found too many holes in that original price-fixing theory, which, in her description, "focused on the creation and maintenance of warehouse queues as the core of the allegedly unlawful conduct, but failed to adequately explain how and why the defendant financial institutions participated in or benefited from the conduct." Last fall, she dismissed the purchasers' case but permitted the class and individual purchasers to amend their complaints.

The aluminum purchasers have alleged not just traditional price-fixing by market competitors but rather complicated interactions between the banks and the warehouses with the primary purpose of reaping profits for the banks from trading activity. In the alleged scheme Forrest found adequately plausible, the banks supposedly manipulated a component of the stated price in aluminum purchase agreements through their "ability to obtain, retain and strategically settle aluminum warrants along with their affiliated warehouses' ability to store or agreeing to accommodate storage requests for aluminum."

If the purchasers' lawyers can show how the banks profited from trades based on manipulated aluminum storage, it seems to me that counterparties on the other side of those supposedly rigged options deals should have a pretty good case for damages.

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* *Editor, On the Case, Thomson Reuters Legal. Abridged from an article that appeared in* Reuters*, on March 27, 2015*

Google Caused 'Significant Harm' to Rivals

Don Reisinger*

Google sidestepped an antitrust lawsuit in the US back in 2013, but newly released documents expose the depth of the accusations against the search giant. Federal Trade Commission (FTC) investigators issued a sharp rebuke of some of Google's search and advertising practices in a 160-page document handed to their bosses in 2012.

The investigators, who handed the document to the five FTC commissioners who would decide whether to launch an antitrust suit, found in 2012 that the search company's "conduct has resulted in real harm to consumers and to innovation in the online search and advertising markets."

In early 2013, the FTC commissioners decided against prosecuting Google on antitrust charges and accepted "voluntary" moves on the search company's part to improve some areas of competition in search and advertising. The FTC and Google reached an accord on a nearly two-year investigation into the search company's practices in January 2013.

During the investigation period, Google was required to hand over millions of pages of documents and its executives and key staff gave hours of testimony to the FTC. The government agency received some complaints from Google competitors that the online company was using its powerful position in search and advertising to hurt competition in the marketplace.

The deal between Google and the FTC saw the search company agree to allow companies, like Yelp and others, to remove their search results from certain Google services, like the company's local, travel and shopping pages. Google also agreed to allow advertisers to use data collected in their Google AdWords online ad campaigns for campaigns they had on other services.

Undoubtedly, Google took aggressive actions to gain advantage over rival search providers. However, the FTC's mission is to protect competition, and not individual competitors. The evidence did not demonstrate that Google's actions in this area stifled competition in violation of US law. The FTC's commissioners make the final call on whether antitrust proceedings should move forward.

The investigators also found that Google forced companies to allow the search giant to use their content in search results or face an outright ban on its search engine, and made it difficult for advertisers to share data on other platforms. The documents reveal that Google was accused of stealing content from Amazon, TripAdvisor and Yelp to bolster its competing services.

Federal Trade Commission (FTC) investigators issued a sharp rebuke of some of Google's search and advertising practices in a 160-page document handed to their bosses in 2012

Implications across the pond?

Despite the FTC's ultimate decision to not launch an antitrust lawsuit against Google, the newly revealed documents could have an impact on the company's current investigation by the EU.

Google has been embroiled in an antitrust investigation in the EU since 2010 over claims that it may be providing preferential treatment to its own services. Google has tried on three occasions to settle the deal, but European regulators have each time decided against accepting an accord.

Google has argued that search engines are no longer just a list of links to other sites and the company should be allowed to provide relevant information without forcing a user to leave its pages. Google now has weather reports, medical information and calculators, among other tools, baked into its search pages.

The FTC documents were not meant to go public. Whether that will result in the EU taking a tougher stance against Google is unknown. Regardless of the nature of the leak, Google responded that it was found to have not engaged in any wrongdoing and the companies cited in the document are doing just fine.

After an exhaustive 19-month review, covering nine million pages of documents and many hours of testimony, the FTC agreed that there was no need to take action on how we rank and display search results. Since the investigation closed two years ago, the ways people access information online have increased dramatically, giving consumers more choice than ever before.

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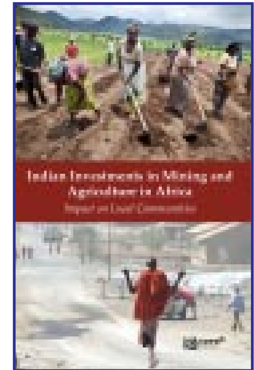
* *Freelance Technology Columnist.Abridged from an article that appeared in* CNET*, on March 20, 2015*

Publications



Indian Investments in Mining and Agriculture in Africa *Impact on Local Communities*

The study analysed one Indian company in select countries, namely, Kenya, Uganda, Zambia and Ethiopia. While mining was looked at in Kenya and Zambia, agriculture was looked at in Ethiopia and Uganda. The countries and sectors were selected on the basis of high Indian investment in them. India is the largest investor in Ethiopia, and one of the top five foreign investors in Ghana and Kenya. Zambia was selected as an example of a least developing country with which India has a burgeoning investment relationship that is likely to lead to further bilateral engagements. This research aimed to provide insight into the contribution of specific Indian companies *vis-a-vis* positive impact on communities in the relevant project countries.

http://www.cuts-ccier.org/iia/pdf/Indian_Investments_in_Mining_and_Agriculture_in_Africa_Impact_on_Local_Communities.pdf

CREW Progresses

The Diagnostic Country Reports (DCRs) of India, Ghana, Kenya and Zambia are the output of Phase I, i.e. Diagnostic Phase, of the CREW project. The reports underscore the implications of competition reforms in the project sectors (staple food and bus transport) on consumer and producer welfare.

The preparation of the DCRs involved primary and secondary research in the project countries, the key findings from which has been documented in the DCRs. The finalisation of the reports entailed a process of periodic consultations with the Project Advisory Committee members (on the international level) and National Reference Group members (from the specific countries). *http://www.cuts-ccier.org/CREW*

Compendium on Competition Regimes

'Competition Regimes in the World: A Civil Society Report' (www.competitionregimes.com) was an attempt to map out competition regimes around the world and covers 120 countries. Most of the countries covered in this volume had competition legislation, while some in the process of adopting one. It contained essays on the countries by a large number of activists, scholars, experts and practitioners, whose names appear as authors in the corresponding chapters.

The final version of this report was released by CUTS in June 2006, and was an improvement over the advance copy that was released at the UN Conference on Competition Policy in Antalya (Turkey) in November, 2005.

Since 2006, there have been various developments in the competition legislations across the world, therefore CUTS plans to revisit and update the report both in content and also in scope. The target is to cover 148 countries and publish the volume by June 2015. *http://www.cuts-ccier.org/CIRCOMP-II/*

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

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

Sources

BBC: British Broadcasting Corporation; BN: Balkans News; BS: Business Standard; FE: Financial Express; FT: Financial Times; GCR: Global Competition Review; ILO: International Law Office; KH: Korea Herald; NYT: New York Times; NYT: New York Times; SO: Swazi Observer; TG: The Guardian; TPN: The Portugal News; TT: The Telegraph; WSJ: Wall Street Journal

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