

Unclassified

CCNM/GF/COMP/WD(2004)18



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

09-Jan-2004

English - Or. English

**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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Unclassified

OECD Global Forum on Competition

HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

Contribution from Pakistan

-- Session IV --

This contribution is submitted by Pakistan under Session IV of the Global Forum on Competition, to be held on 12 and 13 February 2004.

JT00156487

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ACTUAL CASES THAT ARE BELIEVED TO HAVE CONTRIBUTED TOWARDS ECONOMIC DEVELOPMENT

Introduction

1. A well-structured program of regulatory reform brings lower prices and more choices for consumers, helps stimulate innovation, investment, and, thereby boosts economic growth. Some important considerations showing the central place of competition law and policy in the national economic development policy framework are as under:

- International cartels and other restrictive business practices of private firms operating in international markets can be detrimental to economic development. Domestic competition laws can be used as effective instruments to alleviate the problem of international anticompetitive practices in at least two ways: (a) they can deter international cartels from operating on the territories of the countries which have adopted such laws; and (b) they may enable the authorities of these countries to prosecute successfully (either alone or in cooperation with competition authorities of the country where the firms are located) international firms adopting anticompetitive practices on their territories¹.
- There is a movement away from government intervention and towards increased reliance on market mechanisms. It is recognised that government interference in market mechanisms may lead to a reduction in the real income of citizens compared with the level they would enjoy if competition prevails. When a reduction in the real income of a large proportion of the population combines with a perception that large profits are being made by a small number of recipients of state protection, resentment may grow, threatening democratic reform. Thus, highly regulated economies are often considered by the public to be unfair to consumers.

2. An effective competition policy/law, therefore, can go a long way in poverty alleviation, promotion of foreign direct investment, a competitive domestic industry and, last but not least, the economic development of the economy as a whole. In this background this write-up presents briefly the contribution made by the Pakistan's competition law towards economic development.

1. Pakistan's competition law and economic development

3. The Monopolies and Restrictive Trade Practices (Control and Prevention), Ordinance 1970 (MRTPO), has three substantive provisions through which it controls and prevent:

1. undue concentration of economic power i.e., more than Rs.300 m. assets of a private limited company; more than 50% voting power with an individual; and dealings between associated companies that unfairly benefit owners/shareholders of one company at the cost of other - (Section 4);
2. creation of monopolies i.e., associated companies having 1/3rd market share; merger/acquisition creating monopoly power; and granting of loan by a bank or insurance company on relatively favourable terms benefiting an associated company - (Section 5); and

3. unreasonably restrictive trade practices such as cartels to fix prices restrict supplies, division of markets, trade restrictive agreements, etc. - (Section 6).

4. Theoretically speaking, all the actions of competition agency lead towards economic development. However, in the paragraphs to follow the developmental impact will be discussed with reference to above three provisions for creation of competitive markets. It may be noted at the outset that though the MRTPO was enacted in 1970 but this was followed by the nationalisation of businesses in early seventies which reduced the role of the Monopoly Control Authority (MCA). It was only in 1994 that the MCA was granted an autonomous status to enforce the Law.

2. Some instances of cases involving undue concentration of economic power viz. disinvestment of excessive shareholding

- Mian Farooq Ahmad Sheikh of Colony Sarhad Textile Mills Ltd. had 58.66% shareholding. This attracted Section 4(a)(2).MCA ordered to reduce voting power to 48%.
- Mr. Aftab A. Sheikh of Sunshine Cotton Mills Ltd. had 57.59% shareholding. This attracted Section 4(a)(2). In response to MCA's show-cause, he brought his voting power up to 48.7%.
- Mr. Muhammad Siddiq Khan of United Carpets Ltd. possessed more than 50% voting power. MCA ordered to reduce voting power. He requested for extended time period since it involved foreign participation in equity and loan from PICIC. The case started in 1979 and in 1980, he complied with MCA's order and offered shares to the public.
- Mian Mohd. Aslam of Sargodha Spinning Mills Ltd. possessed 100% voting power and assets were more than statutory limit of MRTPO. MCA ordered to bring shareholding below 50%.
- Mr. Ghulam Muhammad A. Fecto of Fecto Cement Ltd. possessed more than 50% voting power. Subsequent to MCA's proceedings the individual brought down his shareholding to 28.5%.

3. Some instances of undue concentration of economic power viz. Inter-corporate financing

- Kohinoor Sugar Mills Ltd. did not pay dividend to shareholders due to paucity of cash but did grant loan to associated undertakings. After MCA's proceedings, the company paid the dividends and thus complied with MCA's requirements.
- United Sugar Mills Ltd. granted loans free of interest to the associated undertakings (Rs.29.1m). MCA ordered to charge interest and to prepare books of accounts accordingly.
- Faisal Spinning Mills Ltd. granted loan (Rs.43.70m) but did not charge any interest. MCA ordered the undertaking to recover mark-up and principle amount.
- Kohinoor Power Company Ltd. did not charge any interest on delayed payments from its associated undertaking amounting to Rs.34.87/- million. MCA ordered to pay the balance according to a 'road-map' specifically designed for this purpose.

4. Merger/acquisition cases

- MCA allowed acquisition of Polka Group of Companies by M/s. Unilever Group (UK) along with its subsidiary marketing Walls Ice cream in Pakistan (27 June 1996). Acquisition was allowed on following conditionalities:
 - fair market value of assets will be determined and transaction will be done in foreign exchange through official channels;
 - details of tangible assets, plant capacity/output, prices of important raw materials and retail prices, quantified projected gains will be provided to the MCA;
 - price reduction will be announced by the company preferably along with announcement of acquisition.
- Merger of Lever Brothers Pakistan Ltd. with Brooke Bond Pakistan Ltd. (16 September 1996) was allowed on the conditionality that the company will promote tea cultivation at 600 hectares in areas identified around Shinkiari, Mansehra District – main idea was to start import substitution for tea requirements of Pakistan. It is noted that the United Kingdom supplied technical support and computer based planning system continued during the entire period; LBPL exported a number of tea clones and tea plant selections to private buyers in Hawaii, USA.
- Merger of M/s. Exide Pakistan Ltd. with M/s. Automotive Battery Company Ltd. (03 April 2001) producing motor batteries was allowed on grounds of induction of improved Japanese technology and cost-effective production.

5. Some instances of unreasonably restrictive trade practices

5. Cases under Section 6 have involved the MCA to firstly deal with the cartel formation and secondly to modify/amend suitably the restrictive clauses in the agreements among companies. A review is provided in the paragraphs to follow.

5.1 MCA's experience in breaking cartels

- Cement has remained a cartel prone sector. thus far three cartel-like situations have been dealt with by the MCA. In early nineties most of the cement plants owned by State Cement Corporation were privatised. After going into the hands of private entrepreneurs, there was a tendency to raise prices of cement and make fortune out of the privatisation process. Unfortunately, the most devastating floods of 1992 provided an excellent opportunity to the cement manufacturers. When re-construction and re-habilitation work was started in October, 1992 first cartel in the cement sector was formed. At this juncture MCA undertook an exhaustive investigation, examined distribution system, pricing pattern, capacity utilisation and cost structure. After reaching the conclusion that cartel has been formed, MCA made recommendations to the Economic Coordination Committee of the Federal Cabinet (ECC) which were approved and there-by State Cement Corporation's units were directed to open their retail shops at important points in major cities and sell the cement at the rate recommended by MCA and approved by the ECC. Private cement companies were directed to break the cartel. With these measures cartel was effectively broken and competitive environment in cement industry re-established.

- Cement manufacturers again tried to form a cartel in February 1998. MCA was vigilant enough to persuade a few manufacturers not to join the cartel. Thus the attempt to form a cartel in February 1998 was foiled. But in October 1998 the cement manufacturers succeeded in forming the cartel. MCA passed an order in February 1999 directing the cement manufacturers to break the cartel, operate at the optimum level and reverse the prices to pre-cartel position.
- MCA has recently decided the case of a cartel formed by the Pakistan Cable Manufacturers Association. In September 2002, Islamabad Electric Supply Company (IESCO) which itself comes under the regulatory jurisdiction of National Electric Power Regulatory Authority (NEPRA) referred a case of collusive bidding by nine suppliers of cables, PVC pipes, etc. IESCO alleged that all the nine bidders quoted the same price for all the items offered for supply. MCA in this case ordered the nine bidding companies to desist from collusive bidding.

5.2 *Modification of trade restrictive clauses in the agreements*

6. Several companies namely: Pakistan Oxygen Limited, Bata Shoe Company Ltd. M/s. Muller & Phipps Pakistan Ltd., Exxon Chemical (Pakistan) Ltd, Searle Pakistan Ltd., M/s. Siemens Pakistan Engineering Co. Ltd. & M/s. Schuckertwerke Aktiengesellschaft Berlin and Erlangen, M/s. Warner Lambert (Pak) Ltd., Chloride (Pakistan) Ltd., Lever Brothers (Pak) Ltd., Pakistan Burma Shell, Sterling Products (Pak) Ltd, Rafhan Maize Products Ltd, SmithKline & French (Pak) Ltd., Burshane (Pak) Ltd, Shell (Pak) Ltd. & Cyanamid (Pak) Ltd. are among those who were directed to delete or modify trade restrictive clauses in their agreements.

NOTE

1. The following merger cases: of two US aircraft companies, the Boeing and McDonnell Douglas, of giant oil companies, and the Microsoft anti-trust case all present interesting examples in this regard. See EU, Financial, Times, AOL websites, for details.