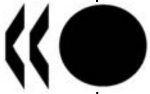
Unclassified **DAF/COMP/GF/WD(2011)3**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **03-Jan-2011**

English - Or. English



DAF/COMP/GF/WD(2011)3
Unclassified

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from CUTS

-- Session I --

This contribution is submitted by CUTS under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.

English - Or. English

JT03294756

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

CHALLENGES FOR DEVELOPING ECONOMIES ON COMPETITION LAW ENFORCEMENT IN THE FACE OF CROSS-BORDER MERGERS AND ACQUISITIONS

-- CUTS [1] --

1. Introduction

1. Globalisation, characterized by trade liberalisation, reduction of restrictions on finance and investment, regional integration, deregulation and to some extent privatization, saw the world being reduced to one geographic market. One essential outcome of this phenomenon was competition from companies located beyond the national borders. Globalisation also opened up new markets in those areas of the world where certain products and technology were yet to be adopted. While such markets could be served through exports, the competitive pressure from local companies imitating production of similar or competing products rendered this option unviable. Thus, it has lead to companies seeking establishment of their operations in all strategic markets around the world.

2. This could be done through two channels; greenfield investment[2] or merger/acquisition with companies already present in these countries. Greenfield investments are time consuming, given the need to construct infrastructure and obtaining operational licences, a process which could also take time. One way of reducing the time between decisions to enter a market and setting operations which found a lot of takers was through cross border mergers and acquisitions (M&A), which facilitated faster entrance into the market. Big companies preferred the latter course and the world market has been witnessing a deluge of cross border M&As.

3. It is estimated that total M&A transactions completed worldwide grew at an average annual rate of 42% since 1980, to reach $2.3 trillion in 1999 (Desai M, 2005). The M&A activities took place mostly in two waves during this period: during the late 1980s (1988-1990) and from 1995 onwards, the periods both characterised by relatively high economic growth and industrial restructuring (Desai M, 2005). It is also estimated that M&A activities also surpassed greenfield investment and other forms of foreign direct investment (FDI); it is estimated that around 80% of investment in the developed countries consists of cross-border M&A (Lall S, 2002). M&A reached a peak in 1998 at about $70 billion in the developing world, which represented about 40% of total FDI inflows., with the highest share (nearly 90% of FDI) being in Latin America, with Africa at 31% and Asia at about 19% (Lall S, 2002). It was also observed further that after a short period of decline following the 1999 peak, the volume of M&A activity gradually went up from about $1.1 trillion, in 2002, to more than $5.5 trillion in 2007 (Onal B, 2009).

---

1 This document was written by Mr. Pradeep S Mehta, Secretary General of CUTS International (psm@cuts.org). Cornelius Dube and Vikas Kathuria of CUTS contributed to this paper.

2 A Greenfield Investment is the investment in a manufacturing, office, or other physical company-related structure or group of structures in an area where no previous facilities exist. The name comes from the idea of building a facility literally on a "green" field, such as farmland or a forest. Greenfield Investing is usually offered as an alternative to another form of investment, such as mergers and acquisitions, joint ventures, or licensing agreements. Greenfield Investing is often mentioned in the context of Foreign Direct Investment.

4. Cross border M&A activity has had an impact in developing countries and economies in transition after facilitating the expansion of trans-national corporations (TNC) into these economies. They have also given rise to serious concerns, the key one being the observation that competition in these economies was adversely affected by the entry of TNCs, (see section 2). It is normally observed that local companies have neither the capital nor the know-how to effectively compete with TNCs. Another concern, which is more serious, is that the TNCs would not in most cases be obliged to notify their acquisition of companies in the developing countries in their home countries, which implies that they would have escaped from the jurisdiction of the more experienced and better resourced competition enforcement institutions in their home countries. Thus they would feel less restrained to engage in anti-competitive behaviour in the countries with lesser resourced and experienced competition watchdogs. TNCs would find it easier to do so either because the competition authorities in developing countries would lack the necessary effective legislative framework, experience and resources to handle concerns at this level, or simply because competition regimes in the countries are not yet established. Clarke and Evenett (2002), found evidence that after the formation of the vitamins cartel in 1990, exports from countries where the cartel conspirators were located to those nations in Africa, Europe, and Latin America that did not have anti-cartel laws tended to grow faster than to those nations that did have such laws.

5. Many transnational companies have also adopted clever strategies to enter into developing and emerging economies markets through cross border mergers. A Lafarge representative for example was quoted in the press in 2002 agreeing that the group had given high priority to emerging markets, because in 2001 more than 40 percent of Lafarge's profits were realized in emerging markets. The strategy had also given very good results in South Africa, Jordan, Morocco, Honduras, Venezuela, Brazil, Chile (Jenny, F 2008).

6. In the Indian pharma sector, in recent times, there was a wave of TNCs acquisition of local entities. Examples include Abbot Labs (which purchased Piral Healthcare), Sanofi-Aventis (which purchased Shantha Biotech), Fresenius Kabi (through Dabur Pharma) and Daiichi Sankyo (which bought Ranbaxy). The hold of TNCs on the Indian pharmaceutical market is increasing; the top four firms now include only one local company (Cipla), a complete contrast to the situation in 2008 when GSK (now ranked fourth in terms of market share) was the only TNC in the top 10. Collectively, TNCs have now cornered about 25 percent share of the Indian market. What is worrying is that none of these mergers were analysed in terms of possible competition concerns as because, the enforcement provisions relating to regulation of mergers and other forms of combinations under the Indian Competition Act, 2002, as amended in 2007, have not yet been notified.

7. In the COMESA region, the merger between Coca Cola Company and Cadbury-Schweppes affected almost all countries, although the merger was only analysed in two countries, namely Zambia and Zimbabwe, both of which approved the international merger with conditions[3] after noticing a lot of competition concerns. The transaction took place in 2000, when the competition authorities in both Zambia and Zimbabwe had just been made operational and most countries in the region were yet to embrace competition laws. Such concerns were not taken care of in other countries where such mergers were examined.

[3] (i) The Coca Cola Company, in addition to acquiring the Cadbury-Schweppes beverages brands, undertook to purchase Schweppes Zimbabwe Limited as a going concern and to establish an appropriate shareholding structure (to include indigenous shareholders) to oversee the operations of the new company to be formed; (ii) that The Coca Cola Company undertook to maintain the local Mazoe and Calypso brands on the Zimbabwean market and develop them into regional brands with wider circulation; and (iii) that the Coca Cola Company undertook to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.

8. It is therefore worrying that developing and emerging economies are finding it difficult to establish fully effective merger control competition regimes to deal with cross border issues. These challenges also include social and political reasons in addition to economic ones. This paper takes a look at some of the challenges faced by developing and emerging economy competition enforcement agencies in dealing with cross border mergers and acquisitions as well as possible measures that can be taken to deal with them.

9. The rest of the paper is organised as follows. Section 2 discusses the major challenges imposed by cross border mergers in the markets. Section 3 explains why it is necessary for competition authorities to find a common approach for dealing with cross border mergers, with possible approaches given in section 4. Section 5 then concludes.

2. Major competition concerns imposed by cross border mergers

10. Cross border mergers, especially those involving big transnationals are always treated with suspicion. The fear being that they might cause competition distortions in the market by facilitating anticompetitive behaviour. One area of concern for transnationals coming into local market is the ease at which they can easily out-compete their locally owned counterparts. In addition, mergers involving big TNCs also create dominant institutions which can easily influence competitors.

11. A good example is the cement market in Egypt where many transnational companies bought Egyptian companies and entered the market. Between 2000 and 2002 there was a spate of merger activities in the Egyptian cement market. Suez Cement Company, a local company bought Tourah Cement Co and managed to account for 31 percent of Egyptian cement production. Lafarge, a French company, which owned Beny Sueif Co, bought Blue Circle Co which produced 75.6 percent of the cement in Alexandria, which mounted to 25 percent share of the total Egyptian cement production. Cemex, a Mexican company bought 90 percent shares of Assyut Cement and accounted for 14 percent of the Egyptian cement market. Simbura Company, a Portuguese firm, also followed suit by buying El Amreya Company.

12. A fierce race to secure a place in the market ensued, and the newly established firms began lowering the price of their goods, sometimes selling them at the break-even point to ensure a market share. When the Egyptian Cement Company started exporting its production to the Spanish Canary Islands at much lower prices than that offered by Cemex, the Mexican cement producer, Cemex and other foreign companies are alleged to have retaliated by pushing prices to their lowest levels to prevent local companies from exporting by burdening them with losses (an allegation Cemex denied). Local players complained, pointing out that they could not influence the practices of foreign companies since they are affiliates of international cement heavyweights; hence they could afford losses for one or two years till they achieve their aims in the market (Jenny, F 2008).

13. TNCs are also known to use cross border mergers as tools for manipulating supplies in the region so as to influence prices. This was a concern noted when Portland Holdings Limited (Porthold), the holding company of Zimbabwe's largest cement manufacturers, was acquired by the Pretoria Portland Cement Company Limited (PCC) of South Africa. There was a strong likelihood of PCC, after acquiring Porthold, closing down the cement plant in Zimbabwe to supply from its operations in South Africa as a way of influencing prices. The merger was therefore approved on condition that PCC gave the competition authority an undertaking to honour its commitment to maintain Porthold's cement plant and to continue producing cement in Zimbabwe[4].

[4] A J Kububa (2008), 'Anti-Competitive Practices And Their Adverse Effects On Consumer Welfare: The Zimbabwean Experience' in 'The effects of anti-competitive business practices on developing countries and their development prospects', UNCTAD, 2008

14. Similar concerns were raised by the Zambia Competition Commission when Pan African Cement registered its intention to sell its 50.1 percent shareholding in the Chilanga Cement PLC, the sole producer of cement in Zambia, to Lafarge SA. Information gathered by the Commission pointed to the fact that Lafarge also owned plants in neighbouring countries of Tanzania, Malawi and Zimbabwe, at a time when Chilanga Cement appeared to be engaged in production and pricing strategies that made Zambian export cement less competitive compared to cement from the plant in Mbeya, Tanzania. Lafarge could therefore divide the regional market (through market allocation and territorial restrictions) whereby Zambian exports would be targeted to the DR Congo, while the Burundi and Rwandese markets were to be supplied from its Tanzanian plant rather than the Zambian plant. Such conduct was likely to make the Zambian plant less competitive by restricting its production capacity (Jenny, F 2008).

15. The merger of Tanzania Breweries Limited (TBL) and Kenya Breweries Limited (KBL) is also a good example of cross border mergers creating distortions in the market. In the merger, the holding companies of TBL and KBL, which are respectively South African Breweries International (SABI) and East African Breweries Ltd (EABL), reached an arrangement on beer business in Kenya and Tanzania. Under the arrangement, TBL acquired KBL based in Moshi. In exchange, KBL acquired SABI Castle Breweries, Kenya in Thika. By the merger, TBL was to be able to command 98 percent share of the beer market in the country. Although the merger is reported to have been rejected by the Fair Competition Commission of Tanzania, it is alleged that the firms submitted a request to the Ministry to allow the acquisition, which subsequently complied by overruling the competition authority’s decision and allowed the merger to go ahead.[5]

16. A race by TNCs in the same business in one country is also likely to result in cartelisation, particularly in a country with a very weak competition regulatory environment. An increase in foreign shareholding in the Indian cement companies occurred in India during the post 1991 period, including the taking over of Tisco's cement plant/s by Lafarge during 1997-99. Swiss cement company Holcim also entered into the picture, through buying a stake in Gujarat Ambuja Cement, before the two companies took up a 50 percent stake in Associated Cement Companies (ACC). While consumers could have been happy that international players were entering into the market to give more competition and hopefully price reductions, the opposite occurred. In March 2008, the media was awash with news that cement companies ACC, Lafarge Cement and four other top cement producers were found guilty of cartelisation by the MRTP Commission, having acted in concert to raise prices in the market through the Cement Manufacturers Association.

17. Again in India, the tyre industry has also seen remarkable involvement of transnational companies over the previous years. JK Tyres for example has a technical tie-up with Continental AG of Germany. In 1993 Goodyear formed a 50-50 joint venture with South-Asian Tyres Ltd (SATL) and in 1998 SATL became a fully owned Goodyear Company. Apollo Tyres bought South Africa registered Dunlop Tyres International in 2006, which it later renamed Apollo Tyres SA. With consumers expecting to fully benefit through stable prices as a result of competition, in May 2008 media reports indicated that the MRTP Commission had issued notices to half-a-dozen leading tyre makers including JK Tyres, Ceat Tyres, Goodyear India, MRF Tyres and Apollo Tyres, accusing them of indulging in price fixing cartelisation. In a recent case in South Africa, Apollo Tyres were hauled up for participating in a cartel along with Goodyear and Continental Tyre, and their association: South African Tyre Manufacturers Conference Ltd. Bridgestone escaped any penalty because it cooperated with the authority under a leniency policy.

5 “Advocacy and Cross Border Competition Concerns: A Country Report on Tanzania”, ESRF, Tanzania, CUTS, Jaipur, 2002.

18. There are also other examples from India to show the extent to which the absence of merger regulations which saw TNCs entering without any control facilitated anticompetitive behaviour. There were many allegations brought to the MRTP Commission involving abuse of dominance against firms that became dominant through acquisitions. Examples include Hindustan Lever Limited, a subsidiary of Anglo-Dutch multinational company, Unilever, which appeared at the MRTPC to answer allegation of abuse of dominance, following a series of acquisitions in the Indian market. The most significant was its take over of Tata Oils Mills Company. Examples also include Coca Cola India which has faced some allegations of abuse of dominance, including two complaints to the MRTP Commission against Coca Cola's Indian subsidiaries Hindustan Coca Cola Beverages in Hyderabad and Hindustan Coca Cola Beverages, New Delhi. Some deals also went unchecked in the Indian market such as merger of Lipton & Brooke Bond into Unilever. While in Pakistan, the competition authority succeeded in getting Unilever to withdraw one of its brands and reduce its shareholding in Brook Bond Pakistan.

3. Need for a rationalization of approach

19. Cross border mergers, particularly those involving two players with a multi-country presence often result in simultaneous investigation by different competition authorities. However, given that each competition agency would be applying its own law, it is likely that the resulting decisions would be different. This becomes a matter of grave concern, given that those relatively young competition authorities lacking the necessary experience, resources and skills might allow potentially harmful mergers which have been stopped or conditionally approved in fairly experienced regimes to go ahead. Even those competition authorities at the same stage in terms of experience could also come up with different decision, depending on the factors considered. For example the competition authorities of Zimbabwe and Zambia both handled a global merger of Rothmans of Pall Mall and British American Tobacco, which had regional effects. The competition authority of Zimbabwe approved the merger with stringent conditions, some of which went on to bring immense benefit to the economy, while in Zambia the transaction was unconditionally approved. Apparently, they did not talk to each other on this merger to enable them to take a coordinated approach. They did speak to each other at a later stage on cement mergers and that really helped (see below).

20. Global mergers also call upon competition authorities to be more careful in their analysis as some competition authorities may end up simply rubber stamping some mergers, on the fear that rejecting a merger that has been approved in other more advanced jurisdictions would result in their competences being questioned. Merging parties are also quick to remind competition authorities that the merger, they are dealing with, has been approved elsewhere, as a way of putting pressure on the competition authorities. The challenges brought about by these global mergers can be understood more by focusing on some few examples.

21. One international merger that was hardly handled in any developing country, although it also had impacts in those countries, is the Gillette/Wilkinson merger, which was conditionally approved by the European Commission and United States in 1990. This involved the acquisition of the consumer product division of Stora AB by Gillette through a company called Eemland Holdings NV. Wilkinson Sword had manufacturing facilities in UK, Germany, Zimbabwe and Brazil. The parties were also found to have been very careful in their approach; they structured the transaction differently in EU and non-EU jurisdictions in line with perceived competition authority strength; in the EU, Eemland acquired the Wilkinson Sword business but Gillette ensured that its minority holding in Eemland was composed of non-voting equity shares and debt while outside the EU, Gillette purchased the entire Wilkinson Sword business by an outright acquisition.

22. Interestingly, although the merger was found to be giving rise to competition concerns in EU and US warranting imposition of conditions, the competition authority in Brazil approved it unconditionally

(Sarah George, 2008). In Zimbabwe there was no competition law as yet so there was no need for the parties to notify the competition authority and consumers were not cushioned against possible competition harm. This shows the extent to which aspects of investigations between competition authorities differ.

23. Another interesting global merger, which involved two global pharmaceutical companies, was between Glaxo Wellcome and Smithkline Beecham (SKB). These companies merged to become Glaxo-Smithkline Beecham (GSK), with headquarters in the UK, supplying about 140 markets in the world. The merger was conditionally approved by the EC while the South Africa competition authority had initially prohibited the merger but subsequently approved it conditionally, after some consultations had been made with the EC. In India, the case was never investigated due to lack of merger provisions in the MRTP Act, while in Pakistan; investigations into the merger were reported to have been abandoned due to lack of resources. In Sri Lanka, after investigations had been initiated based on the effects doctrine, the Board of the competition authority felt otherwise and ordered the investigations stopped, although it later turned out that the two companies actually had a commercial presence in the country. (Sarah George, 2008). Thus it is quite possible that consumers in India, Sri Lanka and Pakistan were not shielded from the potential competition harm that was avoided in other countries.

4. Possible rationalisation in cross-border mergers

24. As observed, cross border mergers involve different competition authorities with different expertise, experience and resources dealing with cases simultaneously. It therefore follows, as has been seen from the discussion, that consumers in those countries where competition authorities are more advanced gain a lot compared to those in countries with young competition authorities. Unless young competition regimes benefit from the expertise of advanced competition regimes, the scenario will continue, with different decisions being undertaken. This form of assistance can happen in a number of ways, which can extend even beyond cross border mergers but just ordinary mergers and other anticompetitive practices such as cartels and abuse of dominance.

25. Firstly, the sharing of information between agencies is suggested and it has also been found to yield results. As has been discussed, the exchange of information between the South Africa Competition Commission and the EC helped the competition authority in coming up with a better position than originally adopted. The competition authorities of Zambia and Zimbabwe have also exchanged information which have helped them make informed decisions with notable impact on the ground, for example on mergers in the cement industry involving *Lafarge* of France, *Blue Circle* of the United Kingdom and *Pretoria Portland Cement* of South Africa, which ensured continuation of cement production in their territories. This is particularly in the context of *Lafarge* having closed some of its cement plants in other COMESA countries not protected by national competition laws, ostensibly for 'viability' reasons but more likely for market sharing purposes (Kububa, A 2008).

26. Cooperation mechanisms can also be done by having competition authorities affected by the cross border merger teaming up with a more advanced competition authority and giving it a leading role in designing the *modus operandi* for the whole process and refer to it any unclear issues. This approach is known as the 'lead jurisdiction approach'. The competition agencies can also adopt a 'co-coordinating agency model', where a lead jurisdiction can co-ordinate a review of the merger for all affected countries and reach on a decision with respect to its own jurisdiction and merely make findings and recommendations for all other countries (Sarah George, 2008).

27. However, one challenge is the confidentiality clause in most competition laws, which limits the amount of information provided by the parties that can be disclosed. In most cases, such information which is considered confidential is the information through which hidden intentions of the merging parties would be camouflaged.

28. An alternative model, which has already been successfully tested in Europe and is already at advanced stages of being replicated in other regions, is the creation of regional competition authorities with both investigative and adjudicative functions. This would also help other countries in the region which are yet to benefit from competition reforms due to inertia on the part of their countries. In Sub-Saharan Africa for example the BAT/Rothmans and the Total/Mobil cross border mergers were not investigated in the bulk of the countries.

29. The need for a regional competition law was recognized and appreciated in COMESA for example after some problems had been noticed. It was found that national competition laws lacked the adequacy and the necessary jurisdiction of dealing with anti-competitive practices of foreign companies. For example some COMESA member States had been threatened by multinational corporations with re-locations to other member States if they (states) challenged the corporations' anti-competitive practices (Kububa, A 2008). ECOWAS and the East African Community have also embraced the aspect of a regional competition authority and the operationalisation of these is now at an advanced stage. The WAEMU already has an operation regional competition body but this is being hampered by several challenges, including the lack of clear separation of mandates between the regional body and national competition authorities.

30. Lastly, competition authorities can just be subjected to the necessary training to empower them to make use of the extra-territorial provisions in their national competition laws to take action on cross border mergers having an impact on their jurisdiction. If competition authorities get enough expertise and confidence in dealing with competition cases, there is nothing for example to stop the Competition and Tariff Commission of Zimbabwe from investigating a merger that is being effected in Europe but whose effects could be felt in Zimbabwe.

31. However it is worrying that not all competition authorities, particularly in developing countries have extra-territorial provisions that are water tight in giving mandates to review cross border mergers outside their boundaries. In a CUTS study under the 7Up project, it was found that Sri Lanka's Fair Trading Commission Act was silent on whether the law has extra-territorial reach, although the wording of the Act's provisions could allow the competition authority to apply the 'effects' doctrine. This was also true for competition laws of Kenya, Pakistan and Tanzania[6] (CUTS, 2003).

5. Conclusion

32. With closely knitted markets, as an outshot of globalisation, physical boundaries of nation-states have been rendered porous by the economic forces. In theory, free trade among the nations has the potential to achieve scintillating results for the economies. However, there are factors which have to be guarded against to fully realise the benefits of free trade. Cross border mergers and acquisitions have been acknowledged as a challenge for a long time now. Ruefully, it appears as if nothing much has been done to ensure that proper paradigms are put in place to control them. While this problem is not serious in developed countries, developing countries continue to be hamstrung by several challenges.

33. Considering the impacts of cross border M&As and the behemoth investigations thereto, competition authorities in developed countries can therefore do more to ensure that they carry their counterparts with them in their progress towards effective competition enforcement. A holistic enforcement of all tenets of competition law world over only, will make the professed growth of free trade equitable and inclusive.

---

[6] Kenya and Tanzania have since changed their competition laws.

REFERENCES

Jenny F (2008), ‘Questions and Challenges for Competition Advocates’, a presentation during the workshop organised by CUTS, Promoting a Healthy Competition Culture in Sub-Saharan Africa Gaborone, Botswana, 14-15 February 2008.

Sarah George (2008), ‘Cross-Border Mergers and the Experience of Developing Countries’, CUTS C-CIER, Briefing paper No. 11/2008.

Desai M (2005), ‘A Note on Cross-Border Mergers and Acquisitions’, International Financial Management, 2005.

Lall S (2002), ‘Implications of Cross-Border Mergers and Acquisitions by TNCs in Developing Countries: A Beginner’s Guide’, QEH Working Paper Series – QEHWPS88.

Onal B, (2009), ‘Cross-Border Mergers and Acquisitions Across Developed and Developing Countries: An Empirical Analysis’, Georgia State University.

Kububa A J (2008), ‘The Need For A Cross-Border Competition Framework’ paper prepared for the Capacity Building Seminar For Members Of The Board Of Commissioners Of The Comesa Competition Commission, Lilongwe, Malawi: 8 – 10 April 2008.

Clarke J L and. Evenett S J, ‘The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel’, 2002.