Keeping up with the competition

A case study reveals how to ride the regulatory waves created by India's new competition regime as well as similar laws in the UK, the US and the EU

By Suzanne Rab

The introduction of India's new competition law has sparked great debate and analysis. Domestic companies in India are studying the law in an effort to understand how it may affect business operations. For Indian companies with a global footprint or international companies with assets or operations in India, this task may be much trickier, particularly because of the increasing penetration of competition law worldwide.

Over 100 countries have laws to regulate agreements, commercial practices and mergers that may affect competition. It is vital for businesses to take both a local and a global approach when assessing commercial practices for competition law compliance because practices taking place in one country may be caught by the competition laws of another. Individual countries may be inspired in their legal developments by international laws but they tailor their approach to suit their needs.

So despite areas of convergence, differences remain in the detail. In areas of doubt or where there is no clear guidance in a particular situation, experiences that businesses and their advisers have gained internationally can be useful in addressing challenges in a new environment where the law and practice are emerging. This article addresses the practical implications of India's competition law for international businesses with operations in, or which may affect, India, or those planning to do business in India.

Through an international comparative analysis, the article identifies the implications of the applicable rules for cross-border commercial practices and the steps that can be taken to address them.

Insights are drawn from the UK, EU and US competition regimes, which have, in varying degrees, influenced the development of the new competition law regime in India.

The article begins with a brief look at the competition law that has been adopted in India. It then illustrates the new rules through the example of a typical yet hypothetical case that potentially could have effects in India, the UK, EU and US. The article concludes with some tips that businesses may want to consider when managing competition law risk and opportunity in India and beyond.

Introduction to India's competition law

Common to most modern competition regimes, India's Competition Act, 2002, regulates the following areas:

- Agreements: Section 3 of the Competition Act prohibits two categories of agreements: horizontal agreements (between businesses at the same level in the supply chain, such as two manufacturers); and vertical agreements (between businesses at different levels in the supply chain, such as a manufacturer and retailer). The provisions are broadly analogous to the provisions on anti-competitive agreements under article 101 of the Treaty on the Functioning of the European Union (TFEU) and section 1 of the Sherman Act 1890 in the US.
  India's competition authority, the Competition Commission of India (CCI), has sufficiently wide jurisdiction to catch agreements and arrangements taking place outside India, provided that they have an "appreciable adverse effect" on competition in India (AAE).
- Abuse of market power: Section 4 of the Competition Act prohibits companies with market power (a dominant position) from abusing that position. As in the EU, it is not the holding of a dominant position that is unlawful; only its abuse.
  Companies with a significant market position in India will therefore need to consider whether they may be found dominant and, if so, whether their commercial practices may be considered abusive. Examples of such potentially abusive conduct include predatory (below cost) pricing, discriminatory pricing, denial or restriction of market access, and tying or bundling.
- Merger control: M&A transactions that meet certain specified turnover or asset-based tests must be notified to the CCI for approval. Merging parties cannot close their transaction before CCI clearance has been given. The criteria that will trigger a merger filing in India relate to either the turnover or assets of: the acquirer and the target (the parties); or the group to which the merged entity will belong after the acquisition. In total, there are eight possible permutations of threshold, so applying the tests is not entirely straightforward.
  The CCI has a set period of 30 days from a notification being accepted in which to conduct an initial assessment and deliver a prima facie opinion as to whether the combination will, or is likely to, have an AAE. However, if the CCI raises initial concerns which cannot be resolved by remedies which the parties are able or willing to offer, a further in-depth review may be launched. The CCI will endeavour to clear all transactions within a waiting period of up to 180 days. The substantive test for whether a merger is approved (with or without remedies) is whether the transaction will, or is likely to, have an AAE in the relevant market in India.

A case study in context

The hypothetical case study below explores a series of commercial practices and the potential competition issues raised. The facts are for illustrative purposes and the comments are intended to highlight issues for further investigation rather than to provide a definitive assessment. In any particular case, the analysis must be based on specific facts and supported by economic evidence and legal arguments.

The focus is on the main similarities and differences in the treatment of practices under the different legal regimes. Although the case study focuses on manufacturers and component suppliers, many of the principles are transferable across industries.

The facts

There are several manufacturers in the industry and several suppliers of components that meet the needs of those manufacturers. Gamma is both a manufacturer and a supplier.

Manufacturers	Market share worldwide (%)	Market share India (%)
Alpha	50	40
Beta	25	40
Gamma	15	10
Other smaller players	10	10

Suppliers of components	Worldwide market share for professional product components (%)	Worldwide market share for consumer product components (%)
Delta	45	40
Epsilon	25	25
Gamma	20	20
Other smaller players	10	15

A trade association meeting

Tom and Joyce, the heads of sales at Alpha and Beta, respectively, meet at the annual meeting of their trade association in New Delhi and discuss the market conditions affecting their industry in India, Europe and the US, including the increasing pressure on margins.

Was it (a) unlawful, (b) unwise, or (c) OK, for them to discuss the adverse conditions affecting their industry?

It was not unlawful to speak about adverse conditions affecting the industry. General discussions about the business environment are not unlawful and trade associations can freely provide a legitimate forum to share ideas on common issues affecting an industry.

However, it was probably unwise to talk about margins generally, given the risk that this could easily slip over into a discussion about actual margins, pricing and other commercially sensitive information, which should not be exchanged between competitors. The Indian, UK, EU and US competition laws all take a similar approach, which tends to focus on the effects on the market and the behaviour of market participants.

Agreements or practices occurring outside a territory can be caught by the competition laws of another jurisdiction, broadly, where they appreciably affect competition in that territory or are implemented there (e.g. if the agreement affects customers located in another territory). For example, exchange of information on pricing outside India could be caught by Indian competition law if it is likely to reduce uncertainty for independent market players in relation to their future competitive behaviour in India.

Contract tenders

Six months later, Tom emails Joyce saying that times were better when Beta focused on the India market and Alpha could concentrate on the EU and US. When the next major tender comes up to supply a leading business in India with products for the next five years, Alpha does not bid and Beta wins the contract.

Was this conduct by Tom and Joyce lawful or unlawful?

This action could be regarded as an attempt to allocate markets and maintain prices because Tom has signalled that Beta should focus on the India market and Alpha should focus on the EU and US in order to keep prices up. It is not clear that Joyce has intimated that Beta would actually comply with the suggestion that Beta should not compete in the EU and US.

However, the fact that Tom and Joyce have met in the past and discussed challenges to their industry and pressure on prices and margins and potential solutions, could provide some evidence supporting a finding of infringement of the competition law prohibitions on restrictive agreements.

In certain countries, including the UK and US, criminal sanctions can be imposed on individuals found guilty of serious anti-competitive activity such as price fixing, market allocation and bid rigging. The possible sanctions include fines and imprisonment.

Does it matter that Joyce did not reply to the email from Tom?

An agreement may be formal or informal and can be implied from conduct. It does not matter that Joyce did not reply to the email if there is other evidence of an agreement or arrangement, the aim or effect of which is to restrict competition.

Could the CCI, the European Commission (which has the power to investigate violations of EU competition rules) or another competition authority use the email from Tom to Joyce as evidence of a competition law violation?

In recent competition cases internationally, emails have often been used as evidence of an anti-competitive agreement. Relevant information may be found in hard copy or electronic form including hard drives, optical media (CD-ROM, DVD), removable media (secure digital cards, memory sticks, floppy disks), mobile phones and personal digital assistants. Emails are often easy to detect and can also be restored by IT specialists in a competition investigation.

Competition authorities have extensive powers to request or demand the production of documents relevant to their investigation. The European Commission has the task of ensuring compliance with EU competition laws.

The European Commission is entitled to carry out unannounced inspections at the premises of a company if it suspects that the company has been involved in a cartel to fix prices or to share markets or has otherwise infringed EU competition law. Such visits are known as "dawn raids".

On a dawn raid under EU competition law, officials from the European Commission are empowered to: (i) search the premises, examine and copy materials that fall within the scope of an investigation (except legally privileged material); (ii) require an explanation of issues arising from documents found during the search and factual clarification of the subject matter of the investigation; (iii) enter domestic premises if used in connection with business or if business documents are kept there. The US Department of Justice Antitrust Division is responsible for the investigation and prosecution of criminal violations of antitrust laws in the US. The Antitrust Division often works closely with the Federal Bureau of Investigation and other federal criminal investigatory agencies in the conduct of investigations. It often obtains warrants for the search of corporate premises and the homes of corporate executives for evidence of criminal conduct.

In India, the Competition Act contemplates that the director general (the investigating arm of the CCI) will conduct unannounced inspections which could resemble the dawn raids undertaken by other international regulators, including the European Commission. However, in the absence of detailed and specific provisions in the Competition Act or elsewhere, it is unclear how such an unannounced inspection might be conducted in practice and what the specific obligations of an enterprise might be in this situation.

Pricing strategies

Gamma threatens in a letter to report Alpha to the competition authorities in the EU, the US and India for abusing its dominant position in the market by selling at less than cost.

Is Alpha dominant in a relevant market?

EU

Dominance concerns typically arise where a company has a market share of above 40%. A company with a market share of less than 25% would generally not be considered dominant (although there could be exceptional cases). A company with a market share of 50% or more would generally be presumed dominant. Alpha has market shares of 50% (worldwide) and 40% (India). Shares of this level would typically raise dominance concerns. However:

- A company may only be found dominant in a correctly defined economic product and geographic market. Further consideration would need to be given, for example, to whether there is a relevant market for the segment where Alpha has large shares or whether the market might be more narrowly or widely defined and the relevant geographic scope of that. A key question when defining the market is substitution – would customers switch to product B if the price of product A increased by, say, 5-10% over a year? If so, the two products are likely to be in the same market.

- Although a company's market share may be a good indication of dominance, it is important to understand that a large market share does not necessarily mean that a company is dominant. The following factors may also be relevant to the assessment of whether a company is dominant: (i) the relative strength of the competitors and their market shares; (ii) the extent of buyer power; (iii) the potential for other companies to enter and expand in the market; and (iv) intellectual property rights.

US

Monopoly power is broadly defined as the power to control prices or exclude competition. Monopoly may be inferred if a company has a dominant share of a relevant market that is protected by entry barriers.

Although there are no precise market-share boundaries, many federal courts have taken the position that a 50% market share is a prerequisite to prove monopoly. Monopoly is generally presumed if a company's market share is above 70%. Companies may rebut the presumption of monopoly, however, by showing the absence of any significant entry barriers.

India

The Competition Act defines dominance as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour".

This definition is similar to that adopted under EU competition law. There is no clearly defined market share test for determining dominance under Indian competition law. It is expected that the approach taken under EU competition law will be relevant to the assessment in the absence of detailed Indian precedents at this stage.

What consequences would flow from Alpha being found dominant?

EU

Merely having a dominant position is not unlawful. However, various types of pricing and other conduct may amount to an abuse of dominance if carried out by a dominant company, or jointly dominant company, and may therefore be unlawful.

Such conduct includes predatory (below cost) pricing, excessive pricing and discriminatory pricing. Those found guilty of abuse of dominance could face financial penalties or orders to modify their commercial practices.

US

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations".

To prove a monopolization offence under section 2, courts require the plaintiff to prove two elements: (i) possession of monopoly power in the relevant market; and (ii) the wilful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business skill or historical accident.

To prove an attempted monopolization offence, a plaintiff must prove that the defendant has engaged in predatory or anti-competitive conduct, with a specific intent to monopolize, and a dangerous probability of success in achieving monopoly power.

Section 2 of the Sherman Act thus addresses the method by which a company obtains and maintains, or attempts to obtain, a monopoly (and not simply how the company exploits monopoly power). Therefore, a non-dominant company that becomes dominant through predatory or exclusionary conduct can violate section 2 of the Sherman Act.

India

As under EU law, merely having a dominant position is not unlawful – only its abuse. The Competition Act sets out in section 4(2) a list of illustrative activities that may constitute an abuse of dominance. The list largely follows the illustrative categories of abuse identified under the EU competition law prohibition of abuse of dominance in article 102 of the TFEU. This includes "directly or indirectly imposing unfair or discriminatory conditions or prices in purchase or sale (including predatory prices) of goods or services".

In relation to abuse of dominance, there is no strict requirement for proof or a likelihood of an AAE, either in legislation or interpretative guidance of the CCI at the time of writing. An exception is where an enterprise: (i) indulges in a practice or practices resulting in denial of market access in any manner; or (ii) uses its dominant position in one relevant market to enter into, or protect, other relevant markets. With appropriate evidence, Alpha may seek to rely on a "meeting competition" defence for its below cost pricing.

Merger

Alpha proposes to acquire 100% of Delta and source all its components requirements from Delta. The following preliminary information is available on the parties' turnover.

Turnover	Alpha	Delta
Worldwide	€2 billion (US$2.7 billion)	€600 million
US	US$200 million	US$80 million
EU	€350 million	€90 million
UK	£250 million (US$390 million)	£75 million
India	US$1 billion	US$200 million

Does the transaction need to be notified to a competition authority? What further information would you need to determine filing requirements?

To confirm filing requirements, as an initial stage a full breakdown of the turnover (and potentially assets) of Alpha and Delta by geographic destination of turnover and location (in the case of assets) should be obtained. In view of the turnover information available, at least the UK, EU, US and India would need to be considered for potential filings.

Other national merger control filing requirements may need to be considered depending on the geographic allocation of the parties' turnover and assets. Market share information may also be relevant in some countries. In all cases it is important to consider whether exemptions from filing may apply and seek local counsel advice in appropriate cases.

Does the transaction raise any competition concerns?

In assessing the competitive impact of the transaction, it will be necessary to consider the effect of the transaction in the relevant countries and markets. As a starting point each authority is likely to focus on the effect of the transaction on its own local market, even if there are arguments that the relevant markets may be wider (and even where potentially worldwide markets may be involved).

Top three traps to avoid

1. One size fits all: Following the same approach where a company has a competition compliance programme in all regions and not considering a more tailored approach adapted to the local situation and recognizing that multiple laws may be engaged on similar facts.

2. Competition compliance red tape approach: Involving only compliance officers and lawyers in developing and implementing competition compliance initiatives and not also senior businesspeople or employees on the ground.

3. False economy: Cutting the compliance effort when financial pressures would tend to create incentives for the very practices (e.g. collusion) which tend to violate competition laws. Investment in preventative measures needs to be set against the consequences of infringement. For example, fines of up to 10% of turnover may be imposed for violation of competition law in the EU, UK and India. Criminal sanctions may be imposed in the US and UK.

Top three tips to consider

1. Fit for our purpose: Start with an approach that works best for the company in one business or geographic region and seek guidance from experts on whether it is suitable for another compliance area and what modifications may be needed.

2. Top down and bottom up: Seek input from all levels in the business; encourage a culture where everyone in the company can come forward with their issues without fear. This may reveal areas where the business may compete with more flexibility (e.g. where the company is non-dominant in a relevant market).

3. Easy wins: Adopt some basic ground rules in obvious risk areas (e.g. cartels, distribution, trade associations) as a basis for continuous improvement and enhancement.

The potential issues to consider initially are:

1. The relevant directly or indirectly affected markets in their product and geographic dimensions, including: (a) manufacturing markets; (b) components markets; (c) any related or neighbouring markets.
2. Whether there is any market power at any level in the supply and distribution chain.
3. The degree of potential foreclosure of rivals at each level in the market. Delta has the leading market position in the supply of components. Potentially, all of these could be sold captively to Alpha in the future. However, other manufacturers (Beta, Gamma and smaller manufacturers) will have other sources of components that may be able to meet their needs. Alpha has 50% or 40% of the manufacturing market, depending on whether this is considered worldwide or national (i.e. India). Delta will likely fulfil all of Alpha's consumption needs after the merger. However, other component suppliers (Epsilon and smaller component makers) may, in principle, be in a position to sell to the other manufacturers.
4. The competitive significance of Gamma as a vertically integrated company that competes for sales to end customers as well as supplying its own components needs.
5. The impact on downstream customers.

Practical steps

It is encouraging that competition authorities internationally are moving towards greater convergence in their approaches. Such cooperation has been facilitated through bodies such as Organization for Economic Co-operation and Development and the International Competition Network.

Against this background, one approach to international competition compliance in the case of agreements and commercial practices may be to adopt the strictest approach to competition compliance wherever a company does business based on the most stringent competition laws that apply where it operates. At the other extreme, a company may want to seek a more focused approach, jurisdiction by jurisdiction, creating flexibility where local rules may be more permissive.

Where merger control is concerned, each case needs to be treated on its facts since each competition regime will adopt a different threshold test as to the transactions that are caught by its rules. A company operating internationally may also want to consider maintaining and updating annually a bank of information on its turnover and assets by jurisdiction and identifying the "go to" business and legal personnel in each jurisdiction who are familiar with the local market.

Timing, cost and strategic benefits can also be obtained through appointing a central coordinator for merger control filings, who can liaise with appropriate external counsel. The choice of approach will depend on the scale and scope of the company's operations, its approach to risk management and the nature and extent of the competition law risks it faces. ■

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