Indian Competition Law: 10 Years On An International Perspective

Suzanne Rab*

India's modern competition law, introduced by the Competition Act, 2002 (Competition Act), marks the arrival and acceptance of the Competition Commission of India on the international competition law arena as a sophisticated emerging competition authority.

Ten years on from adoption and after three years of active enforcement, this article comments, from an international comparative perspective, on four areas which appear to be particularly important in light of the future development of the law: (a) penalties; (b) leniency; (c) dawn raids; and (d) merger control.

Introduction

India's modern competition law, introduced by the Competition Act 2002 (Competition Act), marks the arrival and acceptance of the Competition Commission of India (CCI) on the international competition law arena as a sophisticated emerging competition authority.

Since the implementation on 20th May, 2009 of the behavioural provisions in Sections 3 and 4 of the Competition Act (on anti-competitive agreements and abuse of a dominant position respectively), the CCI has issued major decisions, most notably its recent imposition on 20th June, 2012 of a fine of 60 billion rupees on 11 cement companies for alleged cartelisation. With barely a year of mandatory merger control in operation, effective as of 1st June, 2011, the CCI has some experience of reviewing proposed combinations, although it has yet to prohibit a transaction outright or accept remedies or modifications from merging parties as a condition of clearance.

* Suzanne Rab is a UK qualified lawyer in King & Spalding's London office. She is a Partner in the Antitrust Practice. Suzanne advises clients across all areas of European and UK competition law. She has particular experience advising on transactions and behavioural matters, including in proceedings before the UK competition and regulatory authorities and the European Commission. She has worked on some of the most high profile market and cartel investigations in Europe and the UK.

Despite these considerable milestones, there are areas for potential future development of the Indian competition law regime. Inevitably, the written law cannot address all situations as they arise in practice and often issues are encountered which were unexpected, or where the existing law is either unclear or unworkable.

The Indian competition law was developed with input of the international antitrust community in seeking to formulate a "fit for (the Indian) purpose" legal and regulatory framework and market, while maintaining international best practice. Many of the provisions of the new Indian competition law are modelled on EU/ UK competition law, albeit with local law specificities. The connection with the UK, in particular, with which India shares a history and elements of its legal system, is deep and lasting and suffuses many areas of application of Indian competition law.

In this article I comment, from an international comparative perspective, on *four* areas which appear to be particularly important in light of the ongoing competition law debate in India and elsewhere between businesses, regulators and legal practitioners: (a) penalties; (b) leniency; (c) dawn raids; and (d) merger control.

I shall seek to demonstrate that international insights can be a useful starting point when considering the selected areas in terms of the challenges faced and suggestions as to how the law may develop; if only to determine how those experiences may be useful or improved upon. Each section takes a sequenced approach, looking first at some particular challenges that have been faced in India in the selected areas before suggesting paths of development that the law may take. Selected examples and contrasts are provided from the EU experience for comparative and illustrative purposes only.

Clearly, the objectives of this article are far from an intention to provide a "blueprint for the particular instruments that could or should be adopted by the Indian competition regime to seek to resolve the issues that have been identified so far". In that respect, then, this article seeks to set out some pointers for an extended exploration by others.

Overview of the Legal Framework

In order to set in context the discussion that follows, this section begins with a brief overview of the competition regime in India with a note on its relationship with the international practice and analytical basis that has informed it, or which may be compared with it.

Under the new mandatory merger control regime in India, M&A transactions that meet certain specified turnover or asset-based tests must be notified to the CCI for approval. Merging parties are prevented from closing their transaction before CCI clearance has been given. As with many international merger control regimes, Indian merger control captures, as of 1st June, 2011, mergers, amalgamations and acquisitions of (joint or sole) control, which are referred to collectively as "combinations" and which meet the specified turnover or asset-based thresholds. The regime also extends to the acquisition of a material but minority interest. Certain categories of transactions which do not tend to raise competition problems typically do not need to be notified. These include wholly internal corporate reorganisations and the acquisition of an interest of less than 25 per cent, solely for investment purposes. The criteria that will trigger a merger filing in India relate to either the turnover or assets of: (a) the acquirer and the target (the Parties); or (b) the group to which the merged entity will belong after the acquisition (the Group).

Outside the regulation of mergers and acquisitions, the Competition Act regulates two main categories of commercial behaviour: agreements and abuse of market power.

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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 and Section 1 of the Sherman Act in the United States. The CCI has sufficiently wide jurisdiction to catch agreements and arrangements taking place outside India, provided that they have an appreciable adverse effect (AAE) on competition in India.

There are some India-specific aspects to the regulation of agreements. For example, horizontal arrangements relating to price, production, supply, or market sharing are presumed anti-competitive under the Competition Act. The scope to establish the legality of such arrangements would therefore appear limited. Also, there are no general exemptions for defined categories of agreements that could be likened to the block exemptions that exist in the EU and which assist companies to determine the legality of their agreements where certain conditions are met, including as to market share and the non-inclusion of certain hardcore restrictions such as resale price maintenance. Finally, there is only a very limited efficiency defence in the case of a joint venture improving efficiency – a concept as yet untested.

Section 4 of the Competition Act prohibits companies with market power (a dominant position) from abusing that position. Market shares are a starting point for determining dominance, but neither the Competition Act nor guidance from the CCI provides a "bright line" market share test for determining when a company may be considered dominant for Indian competition law purposes. As in the EU, it is not the holding of a dominant position that is unlawful; only its abuse can be sanctioned. Companies with a significant market position in India will therefore need to consider 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.

Areas for Potential Future Development of the Legal and Regulatory Framework

Penalties

Key issues:

- Guidelines: No developed guidelines for the imposition of penalties for competition law infringements.
- Relevant turnover: Potentially unclear treatment of "relevant turnover" when determining the level of penalty.
- Aggravating or mitigating circumstances: No guidelines on the treatment of "aggravating" or "mitigating" circumstances when determining penalties.
- Ability to pay: The CCI is imposing fines close to the maximum level of penalty, although there are no guidelines on the circumstances in which a company's ability to pay may be relevant to determining penalties.

The consequences of non-compliance with Indian competition law may be serious in terms of significant financial penalties of up to 10 per cent of turnover for anti-competitive agreements and commercial practices (or, potentially, three times profits in the case of cartels). However, a key concern is that there is limited guidance on the factors that the CCI will take into account when determining penalties, potentially leading to unpredictability and allegations of unfair treatment in specific cases.

The levy by the CCI of a record 60 billion rupee (around EUR 900 million/ USD 1.1 billion) fine on 11 cement companies and the Cement Manufacturers Association (CMA) highlights the increasingly tough regulatory stance. The CCI finds that the companies have conspired together to reduce or restrict their cement output to create a situation of short supply, thereby increasing prices. It also maintains that the companies frequently engaged with one another at events and meetings of the CMA, where the industry forum allegedly provided a means for the cement makers to exchange commercially sensitive information which facilitated parallel pricing and market sharing. The CCI fined 11 companies – ACC, UltraTech, Lafarge, Ambuja Cements, Jaiprakash Associates, Madras Cements, India Cements, Century Cement, Binani Cement, Jaypee Cements and the UltraTech owned Grasim Cements. The CMA has been ordered to discontinue collecting wholesale and retail prices from members and circulating their production and distribution details. The basis for the imposition of penalties is controversial and there is, as yet, no guidance on the CCI's approach to calculating penalties. The CCI imposed a penalty amounting to 0.5 times of the net profit for 2009-10 and 2010-11 in the case of each cement manufacturer. Even though the fines did not reach the maximum three times profit which can be imposed in cartel cases, they are considerable by any standards.

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In the EU, the European Commission (Commission) published Guidelines on setting fines (EC Fining Guidelines) in September 2006. The Commission takes into account the nature of the infringement, the impact on the market, and the size of the relevant geographic market. Next, the Commission determines the duration of the participation in the cartel activity and multiplies the value of the sales by the number of years the company participated in the cartel. Even if an undertaking only participates in the cartel for a short period, the Commission imposes a fine (referred to as an 'entry fee') of 15 per cent to 25 per cent of the value of sales in order to deter companies from participating in a cartel. Once the Commission determines the basic amount based on sales, duration, and the "entry fee", it will assess whether to increase or decrease the fine based on aggravating or mitigating circumstances. Aggravating factors include recidivism, refusals to cooperate or attempts to obstruct an investigation, role as leader or instigator of the cartel, or retaliation against other undertakings. If a company has been found to have participated in a prior cartel, the Commission may increase the fine by up to 100 per cent for each similar infringement. Mitigating circumstances include actions such as:

non-implementation of offending practices, infringements resulting from negligence, effective cooperation, and anti-competitive conduct encouraged or authorised by national authorities. The Commission may also take into consideration the undertaking's ability to pay and the economic context. However, it is only in rare circumstances that the Commission will reduce the fine that it would otherwise have imposed on the grounds of inability to pay.

Potential development:

- Develop guidelines on the factors that the CCI will take into account when determining penalties.
- Develop guidelines on whether and to what extent the CCI will take account of the turnover in the *relevant market* and parent company liability when determining penalties.
- Develop guidelines on whether and to what extent the CCI will consider aggravating and mitigating circumstances including the novelty of the issue and co-operation outside the formal leniency programme.
- Develop guidelines and policy on when the CCI will impose penalties at or close to the maximum permitted by law and how it will treat inability to pay where the fine that would otherwise be imposed would jeopardise the financial viability of the company.

Leniency

Key issues:

- Level of leniency reduction: Leniency will only be attractive if the net benefit to the company exceeds the real and likely penalty – yet there is no guidance on the likely level of penalty or the potential size of the reduction for leniency.
- Evidence: Lack of clarity in terms of nature and quality of evidence that is required for the applicant to qualify for leniency.
- Disclosure: Lack of clarity on whether and the extent to which the CCI will permit disclosure of leniency documents to private litigants and third parties in India or elsewhere.
- Whistleblowing: Culture against whistleblowing may undermine the leniency regime.

Experience in other jurisdictions has shown that a competition authority can respond effectively to cartels, whether domestic or cross-border, with a leniency programme. Such programmes typically reward the first (and, in some instances, later) applicants to admit participation in return for cooperating with the investigation and providing all available evidence on the unlawful practices.

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The Lesser Penalty Regulations, 2009 and Section 46 of the Competition Act provide for a leniency programme in India but the success of this will depend, among other things, on the credible threat of meaningful punishment and the actual and potential benefits of leniency. There is no reported case in India of leniency having been granted in the three years since implementation of the prohibition against cartels in Section 3 of the Competition Act. It is not clear how effective the prospect of leniency has been in bringing forth useful evidence to enable the CCI to investigate and prosecute cartels. There are reports that in a selection of cases applications for leniency have been made, but withdrawn. It is speculated that this may have been on the basis of legal advice.

A contrast may be made with a recent leniency case in Pakistan. In a landmark decision on 4th April, 2012, Pakistan's Competition Commission (CCP) granted Siemens total immunity from fines for its co-operation in a cartel investigation relating to bid rigging in supplies to power companies. This case is the first time that the CCP has received and granted a request for leniency. Siemens claimed leniency under the Pakistan leniency regulations which empower the CCP to grant up to total immunity from financial penalties in cartel cases. According to the CCP, Siemens provided direct evidence of how the manufacturers agreed on prices and allocated market shares in the tenders for the supply of switchgears and transformers. Although the CCP was on notice of the cartel before Siemens came forward, the latter was granted 100 per cent leniency for providing "critical" evidence which, according to the CCP, added "significant value" to the information already received.

In the EU, on 7th December, 2006, the Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice). The amendments are in line with the ECN Model Leniency Programme, launched on 29th September, 2006. Grants of leniency are based on two principles: first, the earlier an undertaking makes contact with the Commission, the higher the reward; second, the value of reward will depend on usefulness of information provided. The 2006 Leniency Notice also replicates in many ways the US leniency rules. This makes it easier for companies to apply simultaneously in both the US and Europe, creating ground for further co-operation between the US antitrust agencies and the Commission.

Potential development:

- Develop guidance on penalties and the level of reduction for leniency.
- Develop guidance on what amounts to "vital" evidence to qualify for leniency and whether and to what extent co-operation not meeting that standard will be rewarded, including what degree of cooperation is required during the CCI's investigation as a condition of being granted leniency.
- Guidance on the policy to inform disclosure or protection of leniency documents (whether in private litigation or CCI decisions) and attendant safeguards in the context of the overall competition law policy.
- Further competition advocacy and engagement with business to promote competition law culture and support the leniency framework.

Dawn Raids

Key issues:

- Guidance: The Competition Act contemplates that the CCI will undertake dawn raids but there are no detailed guidelines on the circumstances in which the CCI will use such powers.
- Rights of defence: There is no detailed guidance on investigated companies' rights of defence in the event that a raid is conducted.
- International co-ordination: It is unclear whether and to what extent the CCI will co-ordinate with international authorities on competition law investigations where evidence may be located outside India or where the relevant practices have cross-border elements.

The Competition Act (Section 41) contemplates that the Director General (DG) as the investigating arm of the CCI will conduct unannounced inspections which could resemble the dawn raids undertaken by other international competition authorities, including the

Commission.

In terms of an explanation provided in the Competition Act below Sub-section (3), it would seem that the DG of the CCI may exercise search and seizure with the approval of the Chief Metropolitan Magistrate, Delhi. In November 2011, the CCI Chairman, Mr Ashok Chawla advocated for greater powers for the CCI's investigation wing so that it can undertake search and seizure operations for effective implementation of competition law. Mr Chawla said that the DG should be given powers like its counterparts in the EU and other jurisdictions.

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However, in the absence of detailed and specific provisions in the Competition Act or elsewhere, as yet the limit, conditions and manner in which such an unannounced inspection might be conducted and the obligations of a company faced with such an inspection are not clear.

In the EU, the Commission may conduct unannounced inspections of businesses and domestic premises and in doing so copy documents and conduct interviews. Dawn raids may be conducted under two grounds: pursuant to a written authorisation (Article 20(3) of Regulation No. 1/2003) and pursuant to a formal Commission decision (Article 20(4)). The Commission's principal powers of investigation under Regulation No. 1/2003 are the power to require companies to provide information (Article 18) and the power to conduct voluntary or mandatory on-the-spot investigations (dawn raids) on company premises (Article 20) and to inspect employees' homes and cars, etc. (Article 21). It also has the power to take voluntary statements for the investigation from natural or legal persons under Article 19.

Potential development:

- Develop guidance on the circumstances in which the CCI will undertake a dawn raid, in particular whether this is permitted only where there is a risk that evidence will be destroyed or tampered with and whether third parties may be subject to raids.
- Develop guidance on issues relating to the rights of investigated companies in the event of a dawn raid (including in relation to legal privilege, self-incrimination, right to legal counsel).
- Develop policy and guidance on the circumstances in which the CCI will co-ordinate with international competition authorities to secure more effective application of competition law in India and elsewhere.

Merger Control

Key issues:

- Consultation: Some changes to merger control were implemented with limited notice and without general public consultation (specifically, the Combination Amendment Regulations 2012 made several significant changes to the Combination Regulations 201, including increases in filing fees).
- Intra-group exemption: The exemption from notification is strictly limited to where the enterprises are "wholly owned" yet where there may already be common "control" over the merging entities. This may lead to technical notifications where there is no or minimal change in the status quo, which may be considered a waste of CCI and business time and resources.

- Control: No definition of control for the purposes of assessing whether a transaction requires filing as a combination. This may give rise to some uncertainty in determining whether there is a relevant change in control for notification purposes and the scope of exemption.
- Thresholds – target group: The merger control thresholds can be interpreted as calculated by reference to the target group even where the acquisition relates to a part only. This approach does not accurately reflect the economic weight of the "combination" in the case of an acquisition of part of a business and may therefore result in an over-inclusive determination as to those combinations which are subject to CCI review.
- Limited guidance: There is limited guidance in key areas such as: substantive effects, treatment of joint ventures, remedies and monitoring, concept of control, calculation of thresholds, information exchange with other authorities.

On 1st June, 2011, the merger control provisions of the Competition Act and the supporting Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (Combination Regulations 2011) came into force. Through the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012 (Combination Amendment Regulations, 2012), of 23rd February, 2012, the CCI subsequently amended the Combination Regulations, 2011, with a view to providing greater clarity on filing requirements and generally reducing the burdens of compliance. However, despite these changes there remain several areas of concern and where the law could benefit from greater clarity.

The EU merger control regime, which applies to large-scale transactions, is set out in Council Regulation (EC) No. 139/2004 (EUMR). A concentration is defined in the EUMR as a merger of two or more previously independent undertakings (or parts of undertakings) or the acquisition of direct or indirect control of the whole or parts of another undertaking, which brings about a durable change in the structure of the undertakings concerned. The EUMR applies to concentrations that have a (European) Union dimension measured by turnover.

The Commission has in recent years endeavoured to make its merger control analysis more soundly based on economic theory. This has been made possible by the introduction of a chief economist, who, together with his team, advises on relevant merger cases. In complex cases, the Commission today carries out a detailed economic analysis of the relevant transaction. The Commission's Best Practices for the Submission of Economic Evidence (2010) provide guidance on criteria that parties should observe in relation to economic evidence, as well as indications of the Commission's practice when interacting with parties who submit economic evidence.

Potential development:

- Develop guidance on consultation with stakeholders in relation to changes in the law and ongoing cases.
- Guidance on scope of exemptions, including exemption from filing of intra-group transactions where the enterprises are under common ownership and control, while falling short of a 100 per cent common ownership interest.
- Guidance on appropriate definition of control when determining which transactions should be subject to merger control. Potential insights are available

from EU law (where the concept of "decisive influence" is used and which amounts, in broad terms, to the ability to determine key strategic commercial decisions of the company). By contrast, the UK law adopts three escalating levels of control for merger control purposes ("material influence", "*de facto* control" and "legal control") and where a stepping up of each level of control is a qualifying merger where the relevant turnover or share of supply tests are met.

- Review of notification thresholds in light of practical experience of CCI case experience, the type of transactions coming under review and related policy and resource considerations.
- Develop guidance on notification requirements where the transaction relates to part of a business only.

Conclusion

The Indian Competition Act, now a decade after its adoption, has had some time to bed down even though the actual period of its enforcement – in the last three years – has been confined to a relatively short period. Significant decisions have been taken and fines equivalent to over USD 1 billion have been levied.

Despite some bold decisions, the CCI will understandably want to chose its cases carefully to ensure (a) that they send out the right message in terms of enforcement policies and priorities; and (b) that they are robust to challenge. When going about selecting such cases, the legal enforcement tools and the supporting procedural framework are as important as the CCI's discretion and policy.

I hope that in this article I have emphasised three points. *First*, as with any new competition law regime, inevitably the written law and regulations, guidelines from the authority itself and human foresight cannot cater for all issues as they come up in practice. Competition law is constantly evolving in Indian and elsewhere.

Second, in a new regime there will often be no shortage of sources of advice, assistance and even criticism, which can be refreshing but quite overwhelming. Needless to say, the mere departure of Indian competition law from EU, US or indeed any other international competition law is not itself a reason for concern. If the conclusion reached by India is that the relevant international practice is incorrect or inappropriate for India, or that it should be reviewed in the face of legal and market developments, it would of course be appropriate to develop an approach that is different.

Third, it should not be overlooked that the practices in the EU and US have been developed after long standing experience, and even though they have their recognised imperfections, moving to a system that substantially departs from these examples, without reasons to distinguish them, will invite at the very least curiosity, comment and question.

Defining the *procedural* framework that is best suited to deliver optimal results for a newer competition law charting its way is one of the most challenging issues of competition law, operating to support the application of the substantive law but never completely divorced from it. This article is aimed at taking a minor step in that direction in a spirit of constructive and ongoing dialogue. Newer and more established enforcement regimes may also stand to benefit from the Indian experience as they grapple with the increasing spread of competition law internationally.