

**Joint Comments of the American Bar Association’s
Section of Antitrust Law, Section of Business Law and Section of International Law
on
Proposed Draft of the Competition Commission of India (General) Regulations, 200_
Draft Competition Commission (Lesser Penalty) Regulations, 200_
Draft Competition Commission (Determination of Cost of Production) Regulations, 200_**

The Section of Antitrust Law, the Section of Business Law and the Section of International Law (together, the “Sections”) of the American Bar Association respectfully submit these comments on aspects of the Proposed Draft of the Competition Commission of India (General) Regulations, 200_ (“Draft General Regulations”), Draft Competition Commission (Lesser Penalty) Regulations, 200_ (“Draft Leniency Regulations”), and Draft Competition Commission (Determination of Cost of Production) Regulations, 200_, (“Draft Production Costs Regulations”).¹ We are separately offering comments on other aspects of the Draft General Regulations in conjunction with comments on the Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_ (“Draft Combination Regulations”). The views expressed herein are being presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the policy of the American Bar Association.

The Sections recognize that the Competition Commission of India (the “Commission”) has been making substantial efforts to consult with interested parties within and outside of India regarding the Competition (Amendment) Act, 2007 (the “Act”) and the competition enforcement regime in India. The Sections welcome the Commission’s efforts and appreciate this opportunity to comment upon the draft regulations. We would be pleased to provide any additional

¹ These materials recently were posted for comment on the website of the Competition Commission of India (the “Commission”). <http://www.competition-commission-india.nic.in/>

comments, or to participate in consultations with the Commission, as appropriate. The Sections' comments reflect their considerable expertise in the law in the United States, and substantial familiarity with antitrust/competition law internationally.

Executive Summary

The Sections recognize that the Draft General Regulations promote desirable clarity and transparency, as well as the necessary framework for its work. As noted below, we believe, however, that they might benefit from greater flexibility and restraint in some respects, particularly as to time frames for Commission action and the submission of information to the Commission, as well as the functions assigned to the Secretary. Moreover, further specifics regarding the confidential treatment of sensitive business information also would be welcome.

We discuss, in Section 2, the Draft Leniency Regulations, which provide for a program that is instrumental to successful efforts to detect, prosecute, and deter cartels. Based on our experience, we suggest certain additional points for your consideration, which we believe will help to promote an even more effective program. These include clarification as to the entities eligible for leniency, the marker system for those applying for immunity from fines, the leniency process, and the required disclosures to be eligible for leniency, as well as more safeguards for confidential information.

Finally, in Section 3, we address the Draft Production Costs Regulations. These Regulations seek to address many concerns that, in the experience of the United States, have proved difficult to address in regulations. As discussed below, in lieu of regulations in this area, the Sections suggest guidelines which can be more detailed, nuanced, and more readily adjusted in light of experience, and may provide the agency increased flexibility, at least initially. The Sections also discuss definitional issues raised by these Draft Regulations and suggest that expert findings as to the determination of costs should be disclosed to the parties. The Sections also

respectfully caution that enforcement against predatory pricing risks deterrence of procompetitive price competition, and must focus not only on price/cost analysis, but more importantly on proof of actual or likely anticompetitive effects.

1. Draft General Regulations

The Sections appreciate the Commission's recognition of the need for General Regulations that establish a framework for its work. It is important to have clarity and transparency in the procedures that the Commission will follow, and in the functions of its Secretary. The Draft General Regulations promote such clarity and transparency. The Sections suggest, however, that the Draft General Regulations may benefit from greater flexibility and restraint in some respects, particularly as to the time frame for Commission decisions and the submission of information to the Commission. They may also benefit from greater specificity regarding the confidential treatment of sensitive business information disclosed to or obtained by the Commission.

For example, the time within which the Commission must issue an order after final argument is 21 days (up to 45 days after an "ordinary meeting" of the Commission in "exceptional circumstances"), which may not be realistically achievable in complex cases. (Draft General Regulations 33(3).) It may be desirable to permit a potentially longer time period up to a maximum number of additional days, upon an express finding by the Commission of the need for a specific longer period of time in the particular matter and the agreement of the parties. Similarly, the list of the functions of the Secretary in subregulation 14(10) appears to be exhaustive. The Sections suggest that, subject to Indian procedural law, the final General Regulations clarify that this list is illustrative and not exhaustive, to enable the Secretary to perform functions that may be appropriate in particular circumstances but that are not specifically enumerated. Moreover, it may be helpful to clarify, to the extent permitted under

Indian procedural law, that the Secretary has the authority to delegate some of the functions assigned to that position, so that there is the flexibility to allocate resources as circumstances indicate may be optimal.

In contrast, subregulation 48(3) authorizes the Commission and the Director General to “issue a commission for the examination of specific document(s) whether available in any place situated within India or without India and whether or not held in the custody of any witness being examined on questionnaires”. The Sections suggest that the final General Regulations provide further guidance on when this broad, potentially unlimited, extraterritorial exercise of jurisdiction may be appropriate.

The Sections’ experience and observation suggest that a significant portion of the Commission’s caseload, other than merger control, may arise from information provided by the public. The Act provides in section 49(1)(a) that the Commission may open an investigation on the basis of information from “any person, consumer or their association or trade association.”² Therefore, enforcement of the Act would be furthered by facilitating the transmittal of such information by members of the public. However, the Draft General Regulations appear to include some requirements on information submissions that may discourage the provision of information and are unlikely to improve the quality of information submitted. They also appear to establish procedures that must be followed by the Commission upon the receipt of an “information or reference” that do not appear to provide the Commission with flexibility to deal with the information or reference in light of its own investigations and experience.

² The Sections assume that Section 49(1)(a) provides the Commission with the discretion not to open an investigation. This discretion is important, because the Commission may otherwise be burdened with conducting unnecessary investigations. Complaints may be found to be baseless and unworthy of substantial investigation. For example, competitors (or their associations) may submit information primarily in hopes of instigating an investigation that would distract the target of the inquiry. Moreover, it may further due process to require disclosure of any report by the Director General to the subject of an investigation, the report to include the information supporting its conclusions and an opportunity to be provided to the subject of an investigation to respond to the report, to the extent permitted under Indian procedural law.

For example, the Draft General Regulations appear in Regulations 10 to 13 to preclude individuals from making complaints or providing information orally. The Sections submit that this would impose an unnecessarily formal and costly dimension to the enforcement of the Act that might have a chilling effect on some individuals' willingness to provide information to the Commission. The Sections suggest that oral statements may well be sufficient in many circumstances, such as an initial submission to inform the Commission of the possible existence of a violation. Regulations 10 through 13 also impose time constraints on when information must be provided, and require documents to be serially numbered, prefaced by an index and supported by an affidavit. Such requirements, especially the numbering and indexing of documents,³ are particularly onerous on individuals who may have information but lack the resources to comply with the requirements. Moreover, these requirements appear highly unlikely to ensure the quality of the information submitted to an extent that warrants the burden of compliance and enforcement. For example, while requirements such as numbering and indexing may facilitate the use of materials by the Commission, they do not inherently make those materials more substantive. Instead those requirements may discourage individuals from producing the materials. Subregulations 17(2) and (3) of the Draft General Regulations require information providers to cure alleged defects in their materials within specified time periods, failing which their information or application (*e.g.*, complaint) "shall be declared as invalid." This may discourage the submission of information and limit the Commission's ability to use information that "shall be declared as invalid" when the defect is only a procedural one.

Much of the information received by the Commission may be competitively sensitive business data. The Sections discuss certain aspects of the confidentiality treatment of

³ The Draft General Regulations also establish the font and paper sizes that must be used in any information, reference or application that is filed (Reg. 25). The Sections suggest that such detailed requirements may discourage the submission of information by the public.

information disclosed to the Commission in their separate comments relating to the Draft Combination Regulations.⁴ In addition to those areas, the Sections suggest that it would be helpful to be more specific in the Draft General Regulations regarding the nature of the confidential treatment that will be provided by the Commission. For example, procedures and requirements for storage of confidential materials might be specified. It may be beneficial to strengthen the procedures and remedies to be employed in the case of an alleged and/or confirmed breach of confidentiality by either Commission staff or retained professionals. For example, it may increase confidence on the part of entities submitting sensitive information to specify that confirmed breaches of confidentiality by experts may result in the debarring of those experts from appearing before the Commission and Competition Tribunal.

2. Draft Leniency Regulations

In the Sections' experience, an effective leniency program is instrumental to successful efforts to detect, prosecute, and deter cartels. An effective leniency program will often lead cartel members to disclose their conduct to authorities before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon their cartel activities and to provide evidence against other cartel members.⁵ The Sections therefore welcome Section 46 of the Act authorizing the Commission to impose lesser penalties in certain circumstances and the Draft Leniency Regulations implementing Section 46.

The Sections suggest, however, that India's leniency program could be more effective if the final Leniency Regulations were to be clarified regarding the entities eligible for leniency,

⁴ See Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Business Law and Section of International Law on Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_, at pp. 16-18 (March 12, 2008).

⁵ Scott Hammond, Director of Criminal Enforcement, U.S. Dept. of Justice, *Cornerstones of an Effective Leniency Program*, ICN Workshop on Leniency Programs, (Nov. 22, 2004), www.usdoj.gov/atr/public/speeches/206611.htm.

the marker system for those applying for immunity from fines, the process by which leniency may be obtained, and the disclosures required to be made to be eligible for leniency. Additional guidance, clarity, and predictability for those applying for immunity from fines, and more safeguards of the integrity and confidentiality of information obtained from leniency applicants could also serve to promote the leniency program's effectiveness.⁶

For example, under Regulation 7 of the Draft Leniency Regulations, leniency does not appear to be available to individuals if the corporation in question has not been granted immunity. This may deter individuals from providing information that may enable the Commission to investigate offenses involving the corporation. For this reason, the United States is authorized to accept cooperation from (and immunize) a present or former corporate executive serving as a "whistle blower" when that executive's corporation has not sought or obtained immunity.

A marker system is consistent with the approach taken by antitrust authorities in the United States, Canada, and Australia, among others, and the recommendations of the Cartel Working Group of the International Competition Network.⁷ The Sections agree that the availability of a marker system further serves to destabilize cartels and provides additional incentives for corporations to act immediately upon the discovery of evidence indicating the existence of cartel conduct.

⁶ The Sections discuss the confidentiality treatment of information disclosed to the Commission in their separate comments relating to the Draft Combination Regulations. Those comments relating to confidentiality are not intended to be limited to the merger context.

⁷ See Competition Bureau (Canada), *Immunity Program Under the Competition Act (2000) and Responses to Frequently Asked Questions* (October 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2000&lg=e> ; U.S. Department of Justice *Corporate Leniency Policy*, available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>; Australia Competition and Consumer Commission *Immunity Policy for Cartel Conduct and Immunity Policy Interpretation Guidelines* (August 2005), available at <http://www.accc.gov.au/content/index.phtml/itemId/708758>; International Competition Network, Cartel Working Group, http://www.internationalcompetitionnetwork.org/cartels/gen_framework2.html.

However, the Draft Leniency Regulations do not provide complete clarity as to the nature of the information required to obtain a marker and, ultimately, full leniency.⁸ Subregulation 6(11) of the Draft Leniency Regulations appears to require “vital disclosure” to be made at the time of the marker application. In turn, “vital disclosure” is defined in Subregulation 2(1)(l) to mean “the disclosure of information or evidence by the applicant to the Commission in accordance with these regulations, which leads to establishing the existence of a cartel.” This appears distinct from the tests for full leniency set forth in Subregulations 3(1)(a) and 3(2)(a) (“may enable it to form an opinion that there exists a prima facie case under section 26”). If the language in subregulation 2(1)(l) means that the applicant needs to provide limited information, such as the suspected type of infringement and the affected product, we believe that it would be helpful to make that point explicit. If instead “vital disclosure” means information important to demonstrating the existence of a violation, then the experience of other jurisdictions with such a standard indicates that potential applicants are likely to be deterred from relying on the policy, especially if they are peripheral participants in a cartel and may not have access to detailed information.

This uncertainty, which potentially undermines the effectiveness of the leniency program, is increased by the fact that only partial leniency is available to parties who provide “significant value added.” Subregulation 4(1)(a). Moreover, the differing circumstances under which full, versus partial, leniency will be granted is unclear. Finally, if there is a maximum number of participants in a single cartel that will be eligible for leniency, that fact should be clearly stated. It is important that someone who seeks leniency is not placed in a less favorable position than

⁸ For example, it does not appear that a marker can be obtained by telephone communications. Subregulations 6(2) and 6(3) of the Draft Leniency Regulations together seem to preclude a “paperless process”. On this point, the Sections suggest that the experience in the U.S. indicates that a paperless process will encourage more informants to step forward. Requiring document submissions, and therefore the creation of a record that may be subject to disclosure in private litigation and other contexts, may deter potential leniency applicants.

those who do not seek leniency. Clarity in these respects is important for those considering whether to seek leniency.

The experience in the U.S., Europe and elsewhere underscores that clarity as to these points is crucial to the success of a leniency program.⁹ Moreover, the United States and Canada permit companies seeking a marker to do so on the basis of very limited information, such as the suspected type of infringement and the affected product. In fact, those jurisdictions will grant a marker on a no-names (anonymous) basis. The Sections suggest that the Commission consider adopting an approach similar to that used in these North American jurisdictions. The experience of those jurisdictions over many years confirms that the provision of only a minimal amount of information initially is sufficient for a determination of whether the company seeking a marker is indeed the “first in” to initiate a claim for immunity, provided that the marker is subsequently perfected by the applicant providing the detailed information in its possession within a reasonable time period.¹⁰

The U.S. Department of Justice has found that “some of the best results under our amnesty program were achieved with the help of amnesty applicants that, because of their peripheral role, would not have qualified under a decisive evidence standard.”¹¹ Expanding a leniency program to cover anyone who reports participation in a cartel and fulfills other pre-

⁹ The European Commission’s pre-existing 1996 policy was widely considered to be unattractive to potential applicants, in part because one of the requirements of the program was that an applicant be the first to adduce “decisive evidence of the cartel’s existence,” and the determination of whether such evidence had been provided was not made until the very end of the case. Similarly, the Canadian Competition Bureau’s 1994 leniency policy required an applicant to provide “important and valuable” information.

¹⁰ The Draft Leniency Regulations do not appear to provide a “grace period” in which to address alleged non-compliance with cooperation obligations. *See* Draft Leniency Regulations subregulation 6(12). This may also deter applicants on the basis that alleged non-compliance without the opportunity to remedy will result in total loss of leniency and full exposure to penalties.

¹¹ See Scott Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You put a Price Tag on an Individual’s Freedom?*, presentation to the Criminal Justice Section of the American Bar Association, March 8, 2001 at 3, available at <http://www.usdoj.gov/ar/public/speeches/7647.htm>.

conditions to full leniency also expands the field of potential applicants, thereby increasing the destabilizing pressures on the cartel. In addition, it eliminates the incentive for a company to postpone disclosing its involvement in the belief that it might still be able to obtain immunity if it ultimately is found to have provided the most valuable evidence.

3. Draft Production Costs Regulations

Section 4 of the Act prohibits abuse of dominant position, and includes within such abuse “unfair or discriminatory...price in purchase or sale (including predatory price) of goods or service” unless it is “to meet the competition.” The explanation to section 4 states that “‘predatory price’ means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.”

The Draft Production Costs Regulations define “total cost,” “total variable cost,” “average variable cost,” and the cost of “captive consumption.” They also establish the methodology for determining the costs for “joint products and by-products,” the cost in situations where an input is obtained for free or “at a price lower than the price provided or available to a competitor or any other enterprise,” and the cost in situations involving “abnormal costs,” as well as for the apportioning of costs across products in multi-product production settings and how to determine costs when books of account do not exist.

The experience in the United States indicates that it is very difficult to appropriately define in regulations the various types of costs, for both single and multi-product firms, that are likely to be crucial in any cases that may arise in the area of predatory pricing. The Sections recognize that many of the issues addressed by the Draft Production Costs Regulations are raised in section 4 of the Act. These issues are sufficiently complex and difficult that other jurisdictions (including the United States) have not fully resolved them after decades of effort.

While the Sections appreciate the Commission's desire to implement all aspects of the Act to the fullest extent, we suggest that it is premature to issue regulations in this area, until there has been more experience under the Act.

More fundamentally, the draft regulations focus exclusively on measures of cost, without addressing other factors generally considered relevant to determining whether pricing is actually anticompetitive. Based on experience in the United States, such a mechanical approach could impose upon parties accused of predatory pricing, and upon the Commission, an undue and highly burdensome analysis of prices and costs, without consideration of any actual or likely anticompetitive effect of the conduct. Such an approach is likely to deter beneficial aggressive price competition. The draft regulations' sole focus on accounting measures may cause risk averse companies to avoid beneficial competitive pricing by setting prices well above any level that could possibly be found to violate these regulations without having to undertake the precise calculations seemingly required by the regulations every time a product is priced or costs change, resulting in the unintended effect of Indian consumers paying higher prices.

For the foregoing reasons, the Sections strongly recommend that the Commission initially develop flexible guidelines that can be more detailed, nuanced, and readily adjusted in the light of experience than regulations. The Sections also recommend that such guidelines focus not only on cost accounting, but also on issues such as recoupment and exclusion, to assess whether the pricing at issue in fact causes, or is likely to cause, serious anticompetitive harm.

Moreover, the Draft Production Costs Regulations raise certain definitional issues. For example, "total variable cost" is defined (in subregulation 4(2)) as "total cost" minus "fixed costs and share of fixed overheads, if any, during the period of alleged predation." The Draft Production Costs Regulations are silent, however, about how to determine the "share of fixed overheads" (presumably "common costs") to be attributed to the product in question. In defining

“total cost” and “total variable cost” in Regulation 4, the Draft Production Costs Regulations explain that “the Commission shall have due regard to Cost Accounting” Standards 1, 3 and 4 issued by the Institute of Cost & Works Accountants of India. However, accounting approaches to the issues of “cost” do not always coincide with the economic “cost” that is relevant to a competition analysis. This is a notoriously difficult area of antitrust and regulatory economics.

Similarly, regulation 5 of the Draft Production Costs Regulations states that, in the case of a multi product enterprise, the “variable cost” of a product shall be determined by apportioning (i) the variable costs of the enterprise in the ratio of the value of output of that particular product to the value of total output, (ii) the cost of the variable factors on the basis of their utilization, or (iii) the cost by an appropriate procedure “as determined by the Commission.” Conceptual and practical problems are associated with methods (i) and (ii), including most prominently that the ratio of cost to value of one output may be very different from that of another, so that apportioning costs by the relative values of the outputs may have little connection with reality. Similarly, the relationship of the cost of a factor to its utilization may vary widely between factors, so that applying one ratio to all factors will also poorly reflect reality.¹² While accountants have cost accounting standards, as noted above, they may not coincide with true economic costs. Industrial organization economists generally must consider each situation individually. This assessment will go beyond accounting costs, to address opportunity and other costs that are not observed by accountants.

Regulation 7 of the Draft Production Costs Regulations provides rules regarding how cost

¹² These disparities may be clear even if precise ratios cannot be determined. Another reflection of the difficulties of regulating in this area, rather than developing a more general approach with guidelines open to adjustment with experience, is subregulation 6(1) of the Draft Production Costs Regulations, which state that “where joint products are manufactured or produced or provided by any enterprise, joint cost of such product shall be allocated among the products on a rational and consistent basis”. Without any guidance as to how the determination will be made of what is “rational,” the proposed approach may present more questions than answers.

should be determined where an enterprise is provided with input “either free of cost or at a price lower than the price provided or available to a competitor or any other enterprise.” The cost must be determined by reference to (i) the enterprise’s “books of account,” (ii) the “market value, if it is available,” (iii) the “appropriate cost attributable to such product as determined by the Commission,” or (iv) the arithmetic mean of (ii) and (iii), “if the Commission deems it fit.”

This standard of cost assumes that such a cost (“free of cost or at a price lower than the price provided or available to a competitor or any other enterprise”) is an improper one and must be ignored. It requires the Commission to determine what an entity’s cost “should” have been. The Sections are aware of no principled basis for finding an enterprise guilty of predatory pricing that is based on theoretical costs. This draft regulation places the Commission in the role of market price adjudicator, one which governments have historically filled poorly and which is antithetical to competition enforcement’s mission to foster a market economy. This is especially the case if the Commission seeks to determine the “appropriate cost attributable to such product.” Moreover, as already noted, accounting measures of costs are often irrelevant to economic costs, so that “books of accounts” will be of limited usefulness in this context. As to “market value,” even if the Commission can determine that after the fact, it may not be relevant to the enterprise’s actual costs which are the crucial factors in determining whether the enterprise was behaving anticompetitively or was actually pricing to reflect its lower costs, which is the essence of competition.

Similar concerns arise with respect to the calculation of the cost of captive consumption and the determination of cost in the absence of books of account, which are addressed in Regulations 8 and 9 of the Draft Production Costs Regulation in a manner analogous to that of Regulation 7 with respect to “transfer pricing.”

The complexity of certain cost structures and the variety of situations make it very

difficult to be able to appropriately cover all such cases under a regulation. Accordingly, the Sections support the Commission's reliance on guidelines rather than regulations as a more flexible and optimal approach that will enable the Commission to approach each situation on its individual merits and to develop and refine its methodology based on experience.

Finally, the Draft Production Costs Regulations provide in Regulation 11 for the use by the Commission, at the parties' cost, of experts in determining costs. However, while experts must provide any reports to the Commission, there is no provision for disclosure of the expert's findings to the parties. In comparison, Regulation 39 of the Draft Combination Regulations provides for disclosure of any expert's input to the parties for their comments within five days of their receipt by the Commissioner. The Sections support inclusion of a similar provision in the final Production Costs Regulations if they are issued.

Conclusion

We hope these suggestions are helpful and we would be pleased to offer any further assistance that may be helpful as India further develops its competition law regime. The Sections recognize the substantial work that the Commission has accomplished in addressing the major challenges of implementing the Act, and appreciate the Commission's consideration of our comments and those of others as the Commission continues with its mission.

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