The Revised Leniency Regulations–A Mixed Bag

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The re-issued leniency regulations contain several useful improvements upon the earlier draft regulations as well as a major change that could seriously impede the efficacy of the commission’s efforts to unearth and break up cartels and cartel activity. This article highlights and analyses the changes and the possible effect they may have upon the regulation of cartel activity in India.

Now that the Competition Commission of India is off and running, it is of paramount importance that the regulator quickly efficiently establishes its Authority in its field. Equally important is the presentation by the regulator to stakeholders as well as the public at large of a clear and unambiguous set of Rules and Regulations by which it will function. The commission has so far been admirable in its openness to suggestion and its obvious keenness to provide guidance by issuance of Rules and Regulations after open consultation with stakeholders.

It is also important that the importance of the provisions regarding cartel and anti-competitive agreement activity or dominance is not marginalised and placed in the background as merger control grabs the spotlight. Unfortunately, there may appear to be an excessive focus on merger control, largely due to the enormous interest this obviously evokes in corporate circles.

In fact, the deadliest weapon bestowed upon the competition commission is its power to impose colossal fines and penalties upon cartelist companies. The importance of this weapon will fully be brought home to enterprises, and its full weight felt, only be when the commission hands down its first fines to enterprises. And when this is done there could be will be an enormous swing of interest towards behavioural compliance amongst corporate entities.

There is one available provision relating to cartel activity that surprisingly benefits both the regulator as well as a cartelist company–the leniency provisions, loosely referred to as whistle blowing. The leniency provisions embodied in the Act, together with what are known as the Lesser Penalty Regulations, provide both a powerful tool for the regulator to unearth cartel activity as well as a powerful incentive to a cartelist to avoid massive penalties and fines.

The draft Lesser Penalty Regulations were issued some time ago, but were withdrawn in the first half of 2009. Around September last year, fresh penalty regulations were published. The purpose of this article is to consider some of the changes in the regulations, many of which are improvements on the previous draft regulations and some of which are potentially fatal to the intent of the leniency programme and need urgent clarification.

The earlier regulations specifically provided for a definition of full leniency which definition has been deleted. The
earlier regulations provided that the commission would mandatorily grant full leniency of 100 per cent to the First Applicant, provided other conditions and requirements were met and the information provided was of the requisite level and quality. Most disturbingly, the new regulations convert the mandatory grant of full leniency into a discretion to the commission to grant up to a 100 per cent leniency.

Therefore, an enterprise that provides vital disclosures as required or vital additional evidence as prescribed and also complies with all the conditions imposed upon an applicant for a 100 per cent reduction in penalty shall nevertheless be uncertain as to whether it will receive full leniency or not.

The regulations mentioned how the discretion shall be exercised and include “the entire facts and circumstances of the case”. This ambiguous and general discretion with no specificity is way too uncertain and unattractive to any enterprise contemplating providing information in exchange for a waiver of penalty.

It is but natural for regulators to want to retain some discretion for themselves. In fact, this was also the case at the beginning of the leniency programmes in both the US as well as in some EU countries. These jurisdictions very quickly realised that there would be no information forthcoming from an enterprise required to completely bare its illegal activities if there was no certainty that they would be provided immunity from penalties and fines. Today almost invariably across every major jurisdiction it is accepted practice that if other conditions and requirements are fulfilled by the immunity Applicant, full exemption from penalty and fines will be granted as a matter of course, though discretion is duly exercised by regulations with respect to subsequent applicants in the marker system queue.

The huge disincentive to enterprises to come forward and expose cartels caused by the introduction of this discretion cannot be over-emphasised. Experience in other jurisdictions suggests that the provision it is then just ignored. In turn, this practically destroys one of the most powerful tools in the commission’s armoury to expose and destroy cartelist practices which have a much wider effect upon the common good of the market and eventually, the public interest.

Let us also examine the ramifications of this discretion upon disclosures by leniency applicants with respect to international cartels. In considering jurisdictions in which to file for leniency, a global enterprise considers as paramount the certainty of avoiding fines and penalties if it is granted a marker or priority as the first informant. If this is going to be uncertain in a particular jurisdiction, an enterprise may well just carve out the uncertain jurisdiction and not apply and provide information at all in that jurisdiction.

All indications are that India, considering its size and markets, is likely to be a major jurisdiction to consider for many enterprises contemplating applying for leniency. The disincentive provided by the discretionary power now introduced in India is colossal and should not be under-estimated. The effect of India being left out of a cross-jurisdictional leniency application in an international cartel would be of great harm to the interests and ultimate aims of the commission and its mandate. It would, in effect, be left to attempt to conduct its own investigation into the activity if it so chooses, and then without the benefit of important documentation that it knows is actually certain to be available somewhere. As of now the commission has no cooperation agreements in place with the major antitrust/competition jurisdiction,
even then, considerably complex issues of confidentiality would arise.

The commission needs to very quickly clarify that full leniency will be the rule once all other conditions are satisfied, and this will not be scrutinised and repeatedly subjected to its discretion except perhaps in extremely peculiar and exceptional situations.

Turning to other provisions of the new regulations, there is a salubrious expansion of the remit of applications for full leniency, in that earlier applications could not be received for full leniency if the investigation report had been received by the commission. Under the new regulations, an application can be made at any time in a matter under investigation simpliciter. This provides greater flexibility to enterprises in terms of the timing of the provision of useful information to the commission.

Yet another welcome deletion is the removal of the provision which allowed disclosure of confidential information by the commission if “the disclosure is in compliance with or for the purpose of the Act”. Considerable uncertainty and discomfort would have been caused as to how the phrases “disclosure in compliance with the Act” or “disclosure for the purpose of the Act” would be interpreted. It would have been perfectly reasonable to interpret these phrases in such a way that confidential information could be disclosed in a completely untrammelled and opaque manner. The deletion of this exception is indicative of a healthy and open approach by both the commission and the government and a desire to make the legislation and provisions effective. It also provides some comfort and confidence to stakeholders and users of its mechanisms, in particular on the sensitive issue of the confidentiality of information provided. However, the commission and government needs to look very quickly at removing the possibility that a person who complies in every manner with every requirement for claiming 100 per cent leniency is then subjected to an undefined discretionary fine or penalty. It is difficult to emphasise enough how vital this is to determine whether the entire cartels provisions of the new law shine vibrant or languish in relative morbidly.

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