CARTELS: ENFORCEMENT MECHANISM IN INDIA A CRITICAL STUDY

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ABBREVIATIONS

1) AAEC…….APPRECIABLE ADVERSE EFFECT ON COMPETITION
2) OECD…….ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
3) MRTP……MONOPOLU AND RESTRICTIVE TRADE PRACTICES
4) CCI……COMPETITION COMMISSION OF INDIA
5) NCLAT….NATIONAL COMPANY LAW APPELLATE TRIBUNAL

ABSTRACT

What is the relevant enforcement mechanism in India which regulates the conduct of Cartels?-
Indian competition law is governed by the Competition Act, 2002 (Competition Act), and related rules and regulations. Section 3 of the Competition Act prohibits agreements that cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India, and such agreements are void. Horizontal agreements, including cartels, between competitors which: (a) fix prices; (b) limit/control production, supply, markets, technical development, investment or provision of services; (c) share markets or sources of production or provision of services; or (d) result in bid rigging or collusive bidding, are presumed to cause an AAEC under Section 3(3) of the Competition Act. This presumption does not apply to efficiency enhancing joint ventures.

The Competition Act defines "cartel" to "include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services".

To establish an infringement, there must be an AAEC or a likelihood of an AAEC in India. Cartels are presumed to cause an AAEC, so, once the cartel has been found to exist, the Competition Commission of India (CCI) is not required to assess whether it has or is likely to have an AAEC. The presumption is rebuttable, with the burden of proof shifting on the parties concerned to establish that the agreement does not cause an AAEC.

Territorial scope of the Competition Act
The law also apply to the conducts that occurs outside the jurisdiction. Section 3 of the Competition Act applies even where the agreement is entered into outside India, the parties to the agreement are outside India, or any matter/practice/action arising out of the agreement is outside India, if the agreement causes or is likely to cause an AAEC in India.
In October 2019, the CCI clarified that that Section 32, which empowers the CCI to investigate acts taking place outside India where they have, or are likely to have, an AAEC, is based on the "effects doctrine". This interpretation extended the jurisdiction of the CCI beyond the "principle of territoriality" provided an effect in India could be shown. In this case (*Viayachitra Kamalesh v RCI India*), the acquisition took place outside India and related to services to be consumed outside India. The CCI dismissed at prima facie stage allegations that RCI India, operating in the timeshare sector, had infringed the Competition Act with regard to its involvement in the acquisition of a company involved in time-share arrangements in Europe. The CCI concluded that there was no impact on competition, and competitors, in the Indian markets.

Investigation Process
The CCI along with its independent investigative arm, the Office of the Director General (DG), investigate cartels. The CCI can initiate an investigation into a cartel either: (i) on its own motion (suo moto); or (ii) on the basis of a complaint (known as an "information") filed by any person, consumer or their association or trade association; or (iii) following a reference from the central or state government, or a statutory authority. An investigation may also be started on the basis of a leniency application, which the CCI treats as a suo moto investigation.

On the basis of the evidence available before it, if the CCI is of the prima facie view that a contravention of the Competition Act has taken place, it will direct the DG to investigate the matter. If the CCI is of the prima facie view that there is no contravention of the Competition Act, the CCI will close the investigation.

When the DG is directed to investigate the matter, it must conduct the investigation in a time bound manner and submit a report to the CCI containing its findings on the allegations before it (DG Report). The DG is required to

submit the DG Report within 60 days from the receipt of the directions of the CCI. However, the DG is allowed to request extensions of time, and the submission of the DG Report generally takes around one to two years.

After consideration of the DG Report, the CCI usually forwards it to the parties concerned, giving them an opportunity to respond. If the CCI is not satisfied with the DG Report, it may conduct its own inquiry or may require the DG to conduct further investigation before forwarding the final DG Report to the parties.

After receiving a response from the parties, the CCI may provide them with an opportunity to be heard. Once any oral hearings in the matter are concluded, the CCI must, as far as practicable, pass its final order in the matter within 21 days of the date of final arguments. In practice, the CCI often takes much longer in issuing its final orders.

The key investigative powers available to the relevant authorities-
The CCI and the DG have wide powers for discharging their functions. Their powers include:

- requiring the discovery and production of documents;
- summoning and enforcing the attendance of any person and examining him on oath;
- issuing commissions for examination of witnesses or documents; and
- receiving evidence on affidavit.

Further, the DG also has the power to conduct dawn raids where there is a strong suspicion that relevant material may be destroyed, mutilated, altered, falsified or secreted by the enterprises and individuals under investigation. Before conducting a dawn raid, the DG must secure a prior authorisation (search warrant) from the Chief Metropolitan Magistrate, New Delhi. This power is being increasingly exercised.

DG officials conducting the dawn raid may use reasonable force to access the premises, including

- domestic premises such as houses, land and other means of transport of individuals;
- actively search for information;
- examine the books and other records related to the business in physical and electronic form;
- seize, take copies and originals of documents. The DG however is required to return the documents not later than the conclusion of the investigation;
- seize and copy hard drives, servers and electronic devices including laptops, tablets and mobile phones;
- seal any business premises and books or records for the period and to the extent necessary for the inspection; and
- take statements for the purpose of collecting information relating to the subject matter of the investigation.

Number of appeals
The bulk of the infringement orders of the CCI have been appealed before the NCLAT. There is a large backlog of cases before the NCLAT and it may take some time before these are decided. Many of these cases will likely go to the Supreme Court which is already currently hearing a number of appeals from NCLAT and its predecessor the COMPAT.

The key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?-
Draft Competition (Amendment) Bill 2020
In October 2018, a Competition Law Review Committee (Committee) was set up to review the Act and

associated rules and regulations. In July 2019, the Committee finalized a robust and wide-ranging report on the Indian competition regime (covering both substantive and procedural aspects), taking into account the inputs of key stakeholders. The report was published in August 2019.

In February 2020, the Ministry of Corporate Affairs published a Draft Competition (Amendment) Bill 2020 (Draft Bill) seeking public comments. The proposed changes reflect recommendations made by the Committee. The 49 page Draft Bill contains a large number of proposed amendments to the Competition Act. With respect to anti-competitive agreements, the CCI's jurisdiction over anti-competitive agreements is proposed to be expanded. At present, only horizontal and vertical agreements are expressly addressed, though the CCI has in the past asserted jurisdiction over other types of agreements with an AAEC. It is proposed expressly to include "other agreements" which will be subject to a rule of reason analysis. "Hub and spoke" cartels, involving players at different levels of the supply chain, are also addressed – it is proposed to cover non-competitors in such a scenario who will be liable where they actively participate in the furtherance of an anti-competitive agreement between competitors. Finally, although there are proposals to empower the CCI to accept settlements and commitments, these will apply to cases involving vertical agreements and abuse of dominant position, but not to cases involving cartels.

Introduction

COMBATING CARTELS IN INDIA

Maldistribution of wealth is one of the major problems of an economy. Ensuring free and fair competition in the economy is essential to achieve a balanced distribution of wealth especially for a country like India which is characterised by an appalling rich and poor divide. As Justice Sherman of the U.S. Supreme Court, by whose name the American anti-competitive legislation is often referred to, remarked- *"the popular mind is agitated with problems that may disturb social order, and among them none is more threatening than the inequality of condition of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control product ion and trade and to break down competition*."

An economist"s idea of competition is determined by the performance and not the number of rivals. In the context of competition law, the term competition is understood in the economic context. This implies that contrary to the meaning of the word in the general parlance, it means free and fair performance of all market players. The U.S. Supreme Court in ***Standard Oil Co. v. FTC***1, opined that in passing the antitrust law, *"congress was dealing with competition, which it sought to protect, and monopoly it sought to prevent."* It is undisputed that the general goal of the antitrust laws is to promote "competition". Thus we may say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.

Although Competition Law or Anti-trust Law (as it is referred to as in the United States of America), as it exists today, is of recent origin, but anti-competitive practices have been recognized as a threat to free market since the very inception of competition in markets across the globe. As early as in 1776, Adam Smith wrote: *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary."*2

Intention of competition law is to limit the role of market power that might result from substantial concentration in a particular industry. Because of the control exerted by a monopoly over price, there are economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other.

What is a cartel?

The Competition and Consumer Act requires businesses to compete fairly. Most businesses increase their customer base and their profits honestly through:

- continual innovation to improve products or services
- sales and marketing showing the genuine benefits of their products or services
- keeping costs down so they can offer competitive prices.

Businesses struggling to compete fairly and maintain profits may be tempted to deliberately and secretly set up or join a cartel with their competitors.

A cartel exists when businesses agree to act together instead of competing with each other. This agreement is designed to drive up the profits of cartel members while maintaining the illusion of competition.

How do cartels affect consumers?
Hard core cartels (when firms agree not to compete with one another) are the most serious violations of competition law. They injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.

The categories of conduct most often defined as hard core cartels are:

- price fixing
- output restrictions
- market allocation
- bid rigging (the submission of collusive tenders)

Hard core cartel prosecution is a priority policy objective for the OECD. Increasingly, prohibition against hard core cartels is now considered to be an indispensable part of a domestic competition law.

Challenges in detecting hard core cartels
Cartels are very difficult to detect. They can involve many firms in the industry and customers are rarely in a position to detect the existence of a cartel. Antitrust enforcers should be helped in their ability to detect cartels by various means and instruments, the most effective being leniency programmes. These programmes provide immunity or reduction in sanctions for cartel members that co-operate (or 'whistleblow') with competition enforcers. Leniency programmes have been adopted by most OECD countries and have been instrumental in increasing the success rate of the detection of cartels.

The best outcomes are secured by deterring firms from forming cartels in the first place. Strong sanctions are therefore a fundamental component of an effective antitrust enforcement policy against hard core cartels. An important supplement to fines against organisations for cartel conduct is sanctions against individuals for their participation in the conspiracy. These sanctions can take the form of substantial administrative fines or, in some countries, the criminal sanction of imprisonment. The prospect of incarceration can be a powerful deterrent for businesspeople considering entering into a cartel agreement.(4)

There are certain forms of anti-competitive conduct that are known as cartel conduct. They include:

- price fixing, when competitors agree on a pricing structure rather than competing against each other
- sharing markets, when competitors agree to divide a market so participants are sheltered from competition
- rigging bids, when suppliers communicate before lodging their bids and agree among themselves who will win and at what price
- controlling the output or limiting the amount of goods and services available to buyers.

Cartels can be local, national or international. Established cartel members know that they are doing the wrong thing and will go to great lengths to avoid getting caught. Some estimates suggest that while a cartel is operating,

the price of affected commodities rises by at least 10 per cent. Worldwide, cartels steal billions of dollars every year.

Why are cartels illegal?
The Competition and Consumer Act not only prohibits cartels under civil law, but makes it a criminal offence for businesses and individuals to participate in a cartel.

Cartels are immoral and illegal because they not only cheat consumers and other businesses, they also restrict healthy economic growth by:

- increasing prices for consumers and businesses through artificially inflating input and capital costs across the supply chain, including the cost of buildings and equipment rent, interest and decreased opportunities over the life of an asset
- reducing innovation and choices by protecting their own inefficient members who no longer have to compete so don't bother to invest in research and development
- reducing investment by blocking new industry entrants that might invest in opportunities, economic growth and jobs
- locking up resources because they interfere with normal supply and demand forces and can effectively lock out other operators from access to resources and distribution channels
- destroying other businesses by controlling markets and restricting goods and services to the point where honest and well-run companies cannot survive
- destroying consumer confidence in an entire industry sector, including creating negative consumer sentiment towards law-abiding businesses that are not involved in cartel conduct.
- increasing taxes and reducing services by targeting the public sector and extracting extra costs paid for by all consumers through rates and taxes
- decreasing infrastructure by rigging bids in public infrastructure projects which inflates costs and ultimately reduces the public sector capacity to invest in beneficial projects.

Possible penalties for individuals and corporations involved in a cartel
Individuals found guilty of cartel conduct could face criminal or civil penalties, and corporations could face fines or pecuniary penalties for each criminal cartel offence or civil contravention.

Historical perspect of Cartels
Cartel, association of independent firms or individuals for the purpose of exerting some form of restrictive or monopolistic influence on the production or sale of a commodity. The most common arrangements are aimed at regulating prices or output or dividing up markets. Members of a cartel maintain their separate identities and financial independence while engaging in common policies. They have a common interest in exploiting the monopoly position that the combination helps to maintain. Combinations of cartel-like form originated at least as early as the Middle Ages, and some writers claim to have found evidence of cartels even in ancient Greece and Rome.

The main justification usually advanced for the establishment of cartels is for protection from "ruinous" competition, which, it is alleged, causes the entire industry's profits to be too low. Cartelization is said to provide for distributing fair shares of the total market among all competing firms. The most common practices employed by cartels in maintaining and enforcing their industry's monopoly position include the fixing of prices, the allocation of sales quotas or exclusive sales territories and productive activities among members, the guarantee of minimum profit to each member, and agreements on the conditions of sale, rebates, discounts, and terms.

Cartels result in a price to the consumer higher than the competitive price. Cartels may also sustain inefficient firms in an industry and prevent the adoption of cost-saving technological advances that would result in lower prices. Though a cartel tends to establish price stability as long as it lasts, it does not typically last long. The reasons are twofold. First, whereas each member of the cartel would like the other members to keep the agreement, each member is also motivated to break the agreement, usually by cutting its price a little below the cartel's price or by selling a much higher output. Second, even in the unlikely case that the cartel members hold to their agreement, price-cutting by new entrants or by existing firms that are not part of the cartel will undermine the cartel.

In Germany the cartel, often supported and enforced by the government, has been the most common form of monopolistic organization in modern times. German cartels are usually horizontal combinations of producers—firms that turn out competing goods. A strong impetus to form cartels came from German industry's increasing desire to dominate foreign markets in the decade before World War I. Tariff protection kept domestic prices high, enabling the firms to sell abroad at a loss

But are all agreements among competitors harmful?

Some horizontal agreements between companies can fall short of a hard core cartel, and in certain cases may have beneficial effects. For example, agreements between competitors related to research & development, production and marketing can result in reduced costs for companies, or improved products, the benefits of which are passed on to consumers. The challenge for competition authorities is how to assess these agreements, balancing the pro-competitive effects against any anti-competitive effects which may distort the market.

THE BASICS OF A SUCCESSFUL ANTI-CARTEL ENFORCEMENT PROGRAM

The four necessary ingredients to a successful anti-cartel program are:

1) severe penalties;
2) effective legal tools;
3) a high risk of detection; and
4) transparency and predictability in application.

I'll focus briefly on each of these. I will also say a few words about a fifth ingredient that is playing an increasingly important role in ensuring that anti-cartel programs are effective in our ever-more-globalized economy: cooperation and assistance among competition law enforcement authorities across jurisdictions.

Severe Penalties

There is general consensus on the proposition that a successful cartel enforcement program requires significant penalties. One — if not the — core goal of an anti-cartel program is general deterrence. That is, by imposing significant penalties on the participants in those cartels that are detected and successfully prosecuted, we discourage others from entering into or continuing to engage in cartel conduct. However, cartel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. If the potential punishments are not sufficiently significant, the potential sanctions will likely be internalized merely as a cost of doing business — a tax, if you will.

The United States treat hardcore cartel activity as a crime and prosecute offending corporations and individuals criminally. I realize that there is not an international consensus on the need for criminal sanctions in this area, but based on our experience, we believe that there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Few corporate executives regard spending several months or years in a federal prison as a "cost of doing business" that they will readily absorb. As we have seen time and time again, the potential rewards from engaging in cartel conduct can be enormous — measured in additional corporate profits and in individual professional advancement and bonuses. And in some cartels, such as the graphite electrodes cartel, individuals personally pocketed millions of dollars as a direct result of their criminal activity. Given the enormous potential gains to corporations and individuals from engaging in cartel conduct, a corporate fine alone, no matter how punitive, may not be sufficient to deter such conduct.

The United States is not alone in imposing record-breaking fines on international cartels. Both the European Commission and Canada also regularly impose very significant fines on companies found to have engaged in cartel activity. In fact, both jurisdictions have imposed their own record-breaking fines in cartel cases over the past several years. Over the past three years, the EC alone has imposed penalties on cartel members totaling more than 3 billion euros. For companies engaged in conspiratorial conduct that affects commerce in North America and Europe, the possibility of stiff corporate fines in three different jurisdictions should considerably affect their risk/reward calculation.

It is important to note that more and more jurisdictions are adopting legislation or regulations calling for severe penalties for those who engage in cartel conduct, so the potential cost of engaging in cartel conduct is definitely on the rise. In fact, there is legislation pending in our Congress right now that, if passed, would increase the stated maximum corporate penalty for corporations from its current $10 million, to $100 million. That legislation also would increase the maximum jail sentence for an individual convicted of engaging in hardcore cartel

conduct from its current 3 years to 10 years.

Need For Effective Investigative Tools/Fear of Detection

Talking about the next elements of a successful anti-cartel enforcement program—the need for effective investigative tools and fear of detection—together because it is the availability and the aggressive use of sufficient investigative tools that results in the fear of detection. Of course, no matter how stiff the penalties, they will serve no deterrent effect at all if cartel participants never expect them to be applied. Therefore, antitrust authorities must cultivate a law enforcement environment in which business executives perceive a real and significant risk of detection if they either enter into, or continue to engage in, cartel activity.

The first and most basic step in creating such an environment, of course, is the creation/maintenance of an enforcement authority staffed with well-trained professionals who are provided with sufficient resources to do their jobs. But enforcement officials must also have sufficient legal tools to compel the production of relevant documents and information from subject corporations and their officials.

Transparency and Predictability in Application

Transparency and predictability are the next key ingredients in a successful anti-cartel program. Whether in the context of self reporting or otherwise cooperation from offenders have been essential to our ability to detect and prosecute cartel activity. Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency and predictability, throughout our anti-cartel enforcement program. If prospective cooperating parties cannot predict, with a high degree of certainty, their treatment following cooperation, then they are less likely to come forward.

Transparency must include not only explicitly stated standards and policies; it must also include clear explanations of prosecutorial discretion in applying those standards and policies. It has been sought to provide transparency throughout the enforcement process, with: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements: (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Amnesty Program.

Cooperation and Assistance among Competition Law Enforcement Authorities

The last point I would like to mention today is that cooperation and assistance from foreign governments is increasingly becoming an important ingredient in the successful detection and prosecution of international cartel activity. Cooperation among competition law enforcement authorities has undergone a sea change in the past several years, reflecting the growing worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere.

This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels. This cooperation takes many forms. It may involve, among other things, the execution by one jurisdiction of a formal assistance request from another, the informal discussion of best practices and sharing of experiences among law enforcement officials at the annual cartel enforcers workshop, or in parallel investigations.(5)

INDIA: CARTEL ENFORCEMENT – THE PAST, THE PRESENT AND THE FUTURE

Introduction

1. Competition law in India is regulated through the Competition Act, 2002 ("Competition Act") [6] with the objective "to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto." [7]

2. On May 20, 2009, provisions dealing with anti-competitive agreements and abuse of dominance, amongst others, were effectuated. Subsequently, the provisions relating to combinations (acquisitions, mergers and amalgamations) came into effect through a gazette notification issued by the Government of India, with effect from June 1, 2011.

3. As Indian competition law almost turns a decade old, cartel enforcement has seen significant activity. As is predictable of any new/developing jurisdiction, cartels have been an important enforcement priority of the Competition Commission of India ("Commission/CCI"). Developments till date [8] have been through decisional practice of the Commission. This article provides a short insight on the prevailing legal rules and the practice evolved in India till date [9].

SUBSTANTIVE PROVISIONS REGULATING AGREEMENTS AND CARTELS

4. Section 3 of the Competition Act regulates agreements. It prohibits agreements between enterprises, association of enterprises, persons or association of persons, which causes or is likely to cause an appreciable adverse effect on competition ("AAEC").

> Like other jurisdictions, Indian competition law also recognizes that there are certain agreements or practices which, because of their pernicious effect on competition are presumed to be anticompetitive. Under the Competition Act, such agreements are expressly recognized under Section 3(3) which states: "Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
>
> directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services."

Agreements or practices which fall within the ambit of Section 3(3) are presumed to have an AAEC.

TYPE OF AGREEMENTS

- Interestingly, while in most jurisdictions such per se like treatment is limited to cartels or similar arrangements, in India this legal standard seems to be applicable to a wider set. Section 3(3) applies to all agreements "between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels."
- Cartels have also been defined under the Competition Act as an arrangement which "includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services." [10] Evidently, the language of Section 3(3) suggests that horizontal arrangements, as covered under Section 3(3) of the Competition Act, are broader and not only limited to cartels.

5. Consequently, enforcement in India has resulted in a peculiar scenario where arrangements, which are not necessarily cartels, are also enforced under the same standard. This peculiarity can be seen in cases relating to trade associations. Internationally, it is generally accepted that trade associations have played an important role as a facilitator of cartels. [11] In such cases, trade associations have been seen to be an important mechanism to enforce the cartel arrangement. However, in India, independent decisions of trade associations have also been considered to be an infringement of Section 3(3). [12]

EXEMPTIONS

6. Section 3(5) of the Competition Act provides for certain exemptions. Section 3 of the Competition Act is not applicable to agreements entered to protect intellectual property (IPR exemption) or to export goods from India (export exemption). [13]

7. If the agreement relates to restrictions placed to protect intellectual property rights (IPR), such restrictions must be reasonable and necessary for protecting intellectual property rights available under specific statutes. [14] The Commission has the sole authority to assess and determine if the restriction is reasonable and necessary. In Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors, [15] the Commission held that in order to get/avail the IPR exemption, the intellectual property rights must be recognized by the relevant IPR enforcement agencies in India. In the event the IPR is registered outside India, "satisfactory documentary evidence needs to be adduced to establish that, the appropriate Indian agency administering the IPR statutes, have: (a) validly recognized such foreign registered IPRs under the applicable Indian statues, especially where such IPR statutes prescribe a registration process, or (b) where such process has been commended under the provisions of the applicable Indian IPR statutes and the grant/recognition from the Indian IPR agency is imminent." In this case, the Commission held that rights granted through technology transfer agreements were excluded from this exemption.

8. The CCI has till date [16], not applied an export exemption to any agreement. Notably, in Shri Nirmal Kumar Manshani v. M/s Ruchi Soya Industries Ltd. & Others, [17] it was argued that the agreement was exempted as it pertained to products, which were primarily exported outside India. However, the CCI rejected this argument on the grounds that the defendants were not exporters, nor did the agreement pertain to exports exclusively. Nevertheless, the Commission did conclude there was no infringement because most sales comprised exports outside India. [18]

9. Additionally, Section 54 of the Competition Act empowers the Central government to exempt certain classes of enterprises from the application of the whole Act itself. So far, the Government of India has given a limited

exemption to vessel sharing agreements in the shipping industry from the application of Section 3 of the Act. [19]

ASSESSMENT OF HORIZONTAL AGREEMENTS

10. Horizontal agreements or decision of associations, under Section 3(3) of the Competition Act, are presumed to be anti-competitive. This means that the burden of proof shifts on the defendant, who then has to prove that the agreement is not anti-competitive.

11. Predictably, most cartels and horizontal agreements are established by relying upon circumstantial evidence. [20] In India, the standard of circumstantial evidence is one of preponderance of probabilities . [21] While parallel conduct is not sufficient to prove the existence of an illicit agreement, the CCI has held parallel conduct along with plus factors to be adequate evidence to establish the existence of an agreement. [22] The CCI has taken a varied approach when examining these plus factors. In some cases, the CCI has given considerable weightage to economic evidence to determine the plus factors. [23] Conversely, in other cases, the CCI seems to give these factors low weightage when considering the conduct. [24] The latter assessment has often resulted in conduct akin to tacit collusion, amounting to an infringement. A number of such cases have been challenged and overturned by the appellate courts. [25] Nevertheless, the exact test still remains relatively inconclusive.

12. Unlike most other conducts, CCI did not consider delineating a precise market for the assessment of horizontal agreements. [26] Nevertheless, the Supreme Court of India, in a 2017 decision, [27] held that even in cases pertaining to horizontal agreements, a relevant market needs to be delineated. Notwithstanding, the standard applied by the Supreme Court was similar to the original practice of a relatively expansive definition of the market. The case dealt with the conduct of trade associations of film producers and artists and technicians in the film industry of West Bengal. The Commission, in this case, defined the market to be the "market for film and television industry in the state of West Bengal." On appeal, the appellate tribunal, while not expressly stating the legal standard, rejected this definition as too broad and defined the relevant market to be the "market for telecasting of the dubbed serials on the television in West Bengal." [28] Subsequently, the Supreme Court while agreeing with the implicit legal standard of the appellate tribunal, reverted to the market as defined by the Commission, i.e., "market for film and television industry in the state of West Bengal."

13. Absence of a market definition makes the task of rebutting the presumption of an AAEC difficult. Till date [29], the presumption of an AAEC has been successfully rebutted in only one case. [30] This was a case where the defendants relied on the export exemption. However, the CCI rejected this argument, as there were some sales in India. Notwithstanding, the CCI observed that the agreement did not result in an AAEC as most sales were outside India. Resultantly, the CCI took the view that the insignificant level of commerce in India could not be taken as resulting in an AAEC.

SINGLE ECONOMIC ENTITY

14. Section 3 is applicable to agreements entered into by enterprises, associations of enterprises, persons and associations of persons. It also includes decisions of associations. The definition of an enterprise and person under the Competition Act are broad enough to cover almost any entity engaged in an economic activity. The CCI has adopted the doctrine of "single economic entity." Per its original doctrine, the Commission considered an enterprise under the Competition Act includes all entities belonging to a group. [30]

15. However, there is no straight jacket rule for applicability of this concept. The test seems to be highly fact-based and variants are likely to change depending on the facts and circumstances of each case. For instance, the CCI, in a case dealing with allegations of bid rigging, [31] held four insurance companies did not constitute a single economic entity; despite the fact that all four were government companies and therefore had common

ownership. The CCI held that despite common ownership, the affairs of each company were separately managed and each took economic and commercial decisions independently. Resultantly, the same could not form a single economic entity.

16. In another case, the CCI held that two companies belonging to the same group did not constitute a single economic entity. [32] The case pertained to allegations of bid rigging for tenders floated by Delhi Jal Board (DJB), a government undertaking. The Commission observed that despite having common management, the two bidders gave the impression that they were separate decision-making centers. In such a situation, the procurer (DJB) cannot be expected to know the intrinsic management details of enterprises and their relationship with each other. In fact, not only did the CCI reject the argument of common management as a ground to establish unity, it considered this to be an aggravating factor when imposing penalty for infringement. The CCI observed that making separate bids through a common system, both bidders sought to create a façade of competitive landscape when none existed. The Commission considered this as an intentional infringement and thus an aggravating factor in deciding the quantum of penalty. [33]

AGREEMENTS OUTSIDE INDIA

17. Section 32 of the Competition Act empowers the CCI to assess agreements which take place outside India but have or are likely to have an AAEC in the relevant market in India. Till date [34], cartel enforcement has been limited to domestic conduct. However, application of Section 32 is likely to be at odds with the standard of presumption of AAEC in cartel cases. It still remains to be seen the exact test, which the CCI will adopt when exercising this effects based jurisdiction. The application, currently untested, will be hotly debated, especially in the context of global cartels.

LENIENCY

18. In India, cartel participants can also seek leniency. Section 46 of the Competition Act provides for leniency in cartel investigations. Supplementing Section 46 are the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations), which provide for the procedure in cases relating to leniency.

19. This provision is applicable only to an enterprise participating in a cartel, which has disclosed full, true and vital information relating to the cartel to the CCI. Such enterprises may be entitled to a reduction in the amount of penalty otherwise leviable under the Competition Act, at the discretion of the CCI. [35] In order to seek leniency, an application has to be made to the CCI. [36] Not only does the CCI have the discretion to determine whether the leniency applicant is entitled to leniency at all, it also has the discretion to determine the amount of reduction in the penalty based on the quality of the information and the time at which the application was made. The CCI has the power to grant full immunity (complete exemption of the penalty) or reduce the quantum of the penalty. [37]

20. The method of granting leniency is based on the marker system where the prospective applicants are considered based on the priority status accorded to them. The applicant accorded first priority is entitled to receive full immunity, i.e., a 100% reduction of penalty. Subsequently, the applicant who has the second priority status is entitled to a reduction of up to 50% while the applicants with subsequent priority statuses are entitled to a reduction up to 30% of the penalty. [38] The amount of reduction depends on the quality of the information and the stage of investigation—the CCI has complete discretion to determine whether or not leniency should be given and if so to what extent. [39]

21. In August 2017, [40] the CCI amended Lesser Penalties Regulations. The amendments are demonstrative of the Commission's practical experience in dealing with leniency cases. Given below is a brief analysis of the key amendments made to the leniency regime in India:

Multiple applicants

22. As stated above, leniency is based on a marker system in India. The earlier Lesser Penalties Regulations, while possibly intending to extend the benefit to multiple applicants, only provided express reductions to applicants with first priority, second priority and third priority. The amendments now also extend the benefit of lesser penalties to applicants with a subsequent priority status, [41] i.e.:

applicants marked with first priority status are eligible for a reduction of up to 100% of the total leviable penalty;
applicants with second priority can get a reduction of up to 50% of the total leviable penalty; and
applicants with third or subsequent (to the third) priority can get a reduction of up to 30% of the total leviable penalty.

Confidentiality and inspection

23. The amendments provide a discretionary power to the Commission in relation to confidentiality. The original Lesser Penalties Regulations imposed an obligation on the CCI to maintain confidentiality on the identity of the applicant and the information provided in the leniency application, unless specifically waived by the leniency applicant or the disclosure is required under law. [42]

24. The amendment now permits the Director General (the investigating arm of the CCI) to disclose information even if the applicant does not give a waiver. The amendment states that if during the course of the investigation, the Director General deems it necessary to disclose the information to another party, [43] it can disclose such information, even without a waiver, subject to getting prior approval from the CCI. The Director General must also provide reasons in writing for making such a disclosure. While the language of the amendments seems to permit such unilateral disclosure only for a limited purpose, the exact extent is still unclear. It is hoped that the Director General provides the applicant with prior notice of such disclosure and an opportunity to be heard.

25. Additionally, the amendments now also provide inspection of non-confidential version of the case file. Inspection can only be given once the investigation is complete and the report has been circulated to all parties. [44] Whilst inspection is typically granted to parties to the proceedings, third parties may still be permitted to inspect the files if they show sufficient cause. [45]

Inclusion of individuals

26. Under the Competition Act, individual employees, responsible for the infringing conduct, could also be penalized in their individual capacity. [46] The original Lesser Penalties Regulations were silent on whether such individuals could also receive benefit of lesser penalties. Although the CCI—through case law [47]—has clarified that the benefit would extend to such individuals, the amendment now codifies this position.

Affected commerce

27. Notably, the applicants now have to expressly provide details of the volume of business affected "in India" by the alleged cartel. This is perhaps a subtle indication of the CCI's enforcement priority to concentrate on cartels which have a direct and substantial effect in the Indian market. It is important to bear in mind that when enforcing the provisions of the Competition Act against cartels taking place outside India, the CCI is required to prove that such cartels have, or are likely to have, an appreciable adverse effect in the relevant market in India. [48]

28. Leniency has been a slow starter in India. Till date [49], there is only one decided case pursuant to a leniency application. [50] This case dealt with allegations of bid rigging in a tender floated by the Indian Railways. There were three bidders being investigated. One of the bidders filed for leniency during the course of the investigation. The CCI in this case permitted a 75% reduction in the penalty on the leniency applicant. The CCI observed that it was already in possession of the relevant evidence before the leniency application was filed and therefore, immunity was not warranted at this stage. The slow pace can be attributed to cases caught in litigation on issues involving due process such as not granting access to files. [51]

29. Further, in certain scenarios the Commission has the power to not grant the benefit of lesser penalties to the applicant. These are (i) non-compliance by the applicant of the condition on which the lesser penalty was levied; (ii) the information/evidence provided is false or (iii) the disclosure made by the applicant is not vital in nature. [52]

PENALTY FOR INFRINGEMENT

Fines on enterprises

30. Competition law regime in India is a civil enforcement system. Consequently, penalties for infringing provisions of the Competition Act are primarily in the form of monetary fines. Further, penalties leviable under the Competition Act are administrative in nature accruing to the Consolidated Fund of India.

31. Section 27 of the Competition Act provides for penalties for conduct resulting in a violation of Section 3(3) of the Competition Act, which inter alia prohibits anti-competitive agreements between competitors (including cartels). It empowers the Commission to impose a fine of up to 10% of the average turnover for the preceding three years, on entities that are found to have indulged in the conduct of anti-competitive agreements.

32. With respect to cartels, the CCI has the power to impose penalty on each member of the cartel. This penalty can be up to three times of the profits for each year of the continuance of the agreement or up to 10% of the turnover for each year of the continuance of the cartel, whichever is higher.

33. The Commission has imposed penalty in a total of 47 cases for the violation of Section 3(3) of the Competition Act. Out of the 47 cases, the Commission has only imposed penalty per the proviso for cartels in 3 cases. [53]

34. Per the language of the relevant provision of the Competition Act, the CCI has complete discretion in determining the quantum of the fine to be imposed. The only limitation on this power is an outer limit in terms of quantum: the maximum penalty cannot exceed the 10% of turnover or three times the profits in case of cartels.

35. However, the Supreme Court of India has provided some limitation on the CCI's power to impose penalty. In Excel Crop Care Ltd. V. Competition Commission of India & Anr., [54] the Supreme Court of India held that turnover to be considered for the determination of the penalty to be imposed shall be the "relevant turnover." Relevant turnover is the turnover which pertains to the products and services that have been affected by the contravention of the Competition Act. Additionally, the Supreme Court also held that, when determining the quantum of penalty (i.e., percentage amount or the multiplier for profit), the Commission must consider certain factors, inter alia: [55]

Fines on individuals

36. The Competition Act also attaches personal liability on the officers of the company who were in charge of and responsible to the company found to be in violation of the Competition Act. [56] Where conduct amounting to contravention of the provisions of the Competition Act can be attributed to overt or covert participation of any director, manager, secretary, or other officer, such personnel will also be personally liable. The CCI is empowered to initiate proceedings against such persons and punish them accordingly. While the language of this provision suggests that proceedings against individuals would commence only after infringement has been established, the CCI usually initiates these proceedings simultaneously with the primary proceedings of determining infringement of the provisions of the Competition Act. [57]

37. Intention or knowledge is necessary to impute any liability on the person concerned. However, negligence is not a defense; any conduct contravening the Competition Act due to neglect of company personnel will also make them liable under the Competition Act. In order to be exonerated from any liability, it is necessary to prove that the person had no knowledge of the conduct; or upon knowledge took all reasonable steps to prevent the commission of such a contravention.

38. Individuals are penalized on their income. Usually, whenever the Commission has decided to fine individuals, the multiplier has been the same as the company and the individuals. Out of the 47 cases on which penalty was imposed on companies for violation of Section 3(3), individuals were fined in 15 cases. [58] In 9 cases, the CCI levied the same percentage of penalty on the enterprise and the individuals. In 5 cases, multiplier used for the individuals has been at a lesser rate than that levied on the enterprise acting in contravention of the Competition Act. In one case, the CCI diverged in the methodology used for calculating fines for the individuals from the one used for the infringing company. In Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, [59] the CCI imposed fine on 3 companies for indulging in bid rigging for tenders floated by Indian Railways. The CCI in this case, for 2 companies imposed penalty of 1.0 times their net profits. On the third company, the penalty imposed was calculated as 2% of its turnover. The penalty imposed was for the entire duration of the cartel, which incidentally in this case was one year. However, the CCI imposed a penalty which was calculated at the rate of 10% of the average of their income for the last three preceding financial years. The Commission was silent on the reason for this treatment.

PRIVATE DAMAGES

39. There is a private right to claim compensation available under the Competition Act. This right is available to any private party incurring a loss suffered on account of:

Infringement of the Competition Act; [60] or
Contravention of orders passed by the CCI or the appellate tribunal. [61]

40. This right is provided by way of a follow-on action. An individual can claim for compensation only after the violation has been established either by the CCI or the appellate tribunal in appeal.

ENFORCEMENT TRENDS

41. Predictably, horizontal agreements have been a top-enforcement priority for the CCI. Out of a total of 96 cases where an antitrust infringement has been determined, 59 pertain to violation of Section 3(3) of the Competition Act. [62]

42. Sector specific enforcement reveals an interesting pattern. Maximum cases of infringement have been in the

film and entertainment sector. [63] Given the size and importance of the film and entertainment sector in India, this comes as no surprise. What is interesting is that in almost all cases, the conduct, which has been concluded to be a violation, has pertained to decisions of association and not an arrangement typically comprising a hard-core cartel. A similar scenario is demonstrated in the pharmaceutical sector where most cases of infringement are with respect to conduct of various chemist and druggist associations.

43. Within cartels, the CCI's particular focus has been on collusive bidding in public procurement cases. The CCI has taken suo-moto cognizance of bid rigging cases and has imposed severe penalties on colluding bidders. [64] It plays a two-fold role in public procurement process: enforcement to deter bid rigging, and advocacy to promote the detection of bid rigging. The cement industry also warrants a special mention: till date [65], the maximum penalty imposed by the CCI has been in the cement cartel case, amounting to INR 6,316.59 Crores (approx. $949,471 million or €808,916 million) on the cement manufacturing enterprises.

44. With the Indian jurisdiction maturing and awareness of competition law increasing, leniency filings are likely to see an uptick in the coming future. Additionally, another inevitable topic, which the CCI is likely to address, will be international cartels. The CCI is also now veering towards scrutinizing novel issues such as hub-and-spoke cartels. [66]

Brief overview of the law & enforcement regime relating to cartels

The Competition Act, 2002 ("Competition Act") was passed by the Parliament in the year 2002 replacing the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"), to which the President accorded assent in January, 2003. The Competition Act was enacted with the objective to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.

The provisions of the Competition Act governs abuse of dominant position and anti-competitive agreements including cartels. Section 3 (3) read with Section 3 (1) of the Competition Act prohibits cartel conduct. Sections 3 and 4 of the Competition Act, which deal with anti-competitive agreements (including cartels) and abuse of dominant position, respectively, and the enforcement powers of the CCI came into force on 20 May 2009. A cartel conduct is presumed to have appreciable adverse effect on competition ("AAEC") until proven otherwise.1

With respect to provisions relating to cartels/anti-competitive agreements, the CCI functions as a quasi-judicial authority under the Competition Act. An investigation into alleged anti-competitive conduct can be initiated by the CCI either (i) on its own motion (suo moto); (ii) on the basis of information; or (iii) following a reference from the government or statutory authority. The CCI is also entrusted with the power of imposing sanctions in case of infringement of the provisions of the Competition Act. The Director General ("DG") is the investigating arm of the CCI.

In terms of under Section 53 A of the Competition Act, parties may prefer appeal against final orders passed by the CCI before the Appellate authority – National Company Law Appellate Tribunal ("NCLAT"). The order of the NCLAT can be further challenged before the Supreme Court of India under Section 53 T of the Competition Act.

Unlike competition sanctions in the USA, the nature of penalties imposed under the Competition Act are administrative or civil rather than criminal. Upon satisfaction, the CCI, if there exists an anti-competitive agreement or a cartel between and amongst enterprise or association of enterprises or person or association of persons, may pass the following orders (under Section 27 of the Competition Act): (a) a cease and desist from anti-competitive conduct; (b) the imposition of a penalty of up to 10% of the average turnover of the enterprise for the preceding three financial years; and (c) in case of a cartel, the CCI may impose a penalty of up to three times its profits, or up to 10% of its turnover, whichever is higher, for each year during which the agreement/cartel was in force. Notably, pursuant to Excel Corp Care Ltd. V. CCI [(2017) 8 SCC 47], the CCI while imposing a penalty on a multiproduct company, relies upon the 'relevant turnover' and not the 'total turnover' of the infringer as provided in Section 27 of the Competition Act. The 'relevant turnover' of an entity's turnover pertaining to products and services that have been affected by such contravention. In addition to this, the CCI may (under Section 48 of the Competition Act) impose penalties (up to 10%) on personal income tax returns of the key officials, directors of the company responsible during the continuance of the cartel. However, the constitutionality of Section 48 of the Competition Act, which provides for 25enalizing individuals in case of contravention by the companies, is being challenged before the High Court of Delhi.2

Overview of investigative powers

The DG is the investigative arm of the CCI. Upon receipt of information, if the CCI is of the prima facie opinion that the matter requires investigation, it refers the matter for investigation (under Section 26 (1) of the Competition Act) to the DG. DG conducts the investigation and is generally required to complete the investigation and submit its report within a period of 60 days. Competition Act grants vide powers to the DG for

conducting free and fair investigation. In terms of Section 41 (2) of the Competition Act, DG has the powers of a civil court under the Code of Civil Procedure, 1908.

This includes: (a) summoning and enforcing attendance of any person and examining them on oath; (b) requiring the discovery and production of documents; (c) receiving evidence by way of an affidavit; (d) issuing commissions for the examination of witnesses or documents, and; (e) requisitioning any public record or document from an office. Further, the CCI (General) Regulations, 2009 ("CCI General Regulations") framed under the Competition Act, sets out the procedures to be followed by the DG while conducting the investigation. This includes taking evidence on record and examination of witnesses and documents. In terms of Regulation 41(5) of the CCI General Regulations, DG is also empowered to grant cross-examination of witnesses.

Further, Section 41 (3) of the Competition Act empowers the DG to conduct dawn raids. Section 41 (3) lays down that the investigation made by the DG is to be conducted in accordance with the provisions of Sections 240 and 240 A of the erstwhile Companies Act, 1956 (equivalent to 217 and 220 of the new Companies Act, 2013). Section 220 (3) of the Companies Act, 2013 provides that the provisions of Criminal Procedure Code, 1973 relating to search and seizure is to be applied mutatis mutandis on the search and seizure operations of the DG.

Therefore, the DG is bound to obtain a warrant (for both search and seizure) from the Chief Metropolitan Magistrate, Delhi before conducting a dawn raid on a company's premises. The Supreme Court of India has held that the seized material during Dawn Raid can be used for the purpose of investigation [Competition Commission Of India v. JCB India Ltd. [SLP (Crl) 5899–5900 of 2018]. To date, there have been six instances of dawn raids in India (which are in the public knowledge). The same has been dealt with in the succeeding paragraphs.

With respect to dawn raids, the DG exercises the same powers as entrusted upon it under Section 36 (2) read with Section 41 (2) of the Competition Act. The same has already been captured in the preceding paragraphs. Failure to comply with the directions of the DG, without reasonable cause, may attract significant penalties under the Competition Act which may extend up to INR 1,00,000 (USD 1400) for each day during which failure continues, subject to a maximum of INR 10,000,000 (USD 140,000).

Overview of cartel enforcement activity during the last 12 months

The CCI, being the market regulator and protector of consumer interest, has always been pro-active in conducting investigations and prosecuting for cartel conduct. Pharmaceuticals and auto-parts have been the key sectors where substantial number of investigations were initiated.

In terms of data available in public domain, the CCI initiated around 65 investigations for anti-competitive conducts (covering cartels, anti-competitive agreements and abuse of dominance). The CCI has delivered final orders, imposing penalty under Section 27 of the Competition Act in several matters including: (a) in Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems) v. NSK Limited, Japan and Others;3 (b) In Re: Alleged 26enalizing26on in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Ltd. (HPCL) v. Allampally Brothers Ltd.;4 (c) Nagrik Chetna Manch v. SAAR IT Resources Private Limited & Others;5 and (d) Anticompetitive conduct in the Dry-Cell Batteries Market in India v. Panasonic Corporation, Japan & Ors.6 NCLAT has decided only one case in relation to cartel conduct, i.e. K. M. Chakrapani v. Competition Commission of India & Anr.7

It may be noted that several of the orders passed by the CCI holding companies in violation of Competition Act including enalizing26on are under challenge before the NCLAT; and NCLAT has granted stay on the payment of

penalty. As a practice, NCLAT grants a stay upon deposit of certain percentage of amount of the penalty with NCLAT (in the form of fixed deposit receipts).

The Supreme Court is also seized of several appeals filed against the orders of the erstwhile Competition Appellate Tribunal and NCLAT. Recently, in a matter relating to alleged horizontal anti-competitive agreements between certain telecom operators, the Supreme Court held that sectoral regulator Telecom Regulatory Authority of India will have a primary jurisdiction to examine the allegations and only if it were to come to a conclusion that there exists a cartel/anti-competitive agreement, the CCI would assume jurisdiction to investigate the conduct in terms of Competition Act. A similar view was taken by the High Court of Bombay in a matter relating to certain broadcasters.

Number of dawn raids carried out by anti-trust enforcement authority in the last 12 months

The DG Office of the CCI have been increasingly undertaking dawn raid investigations to pursue allegations of anti-competitive practices. Since the inception of the CCI, there have been only 6 (six) instances of dawn raids in India (which are in the public knowledge). Three of such instances took place in the last 12 (twelve) months. The sudden boost in dawn raids by the investigative arm of the CCI can be attributed to the Supreme Court's recent ruling in Competition Commission of India v. JCB India Ltd.8 where it held that documents seized by the DG during a search can be used as evidence during the inquiry. As per the data available in the public domain, DG has conducted dawn raids at JCB Limited, Eveready Industries Limited and also three brewing companies: United Breweries; Carlsberg; and Anheuser-Busch InBev. DG has also conducted dawn raids at Glencore over alleged collusion on the price of pulses, French firm Mersen over alleged collusion in pricing equipment sold to Indian Railways and Climax Synthetics Private Ltd, Shivalik Agro Poly Products Ltd, Arun Manufacturing Services Private Ltd and Bag Poly International Ltd over alleged accusation in relation to bid rigging for the procurement of tarpaulin by the Food Corporation of India.

Fines imposed in the last 12 months

During the financial year 2018–2019, the CCI imposed a total penalty of INR 3.37 billion on 77 companies in 17 cases. Further, the CCI has imposed a total penalty of over INR 8.40 billion on 126 companies in the last three financial years for indulging in anti-competitive practices. Also, during calendar year 2019, the CCI imposed penalties of around INR 1.1 billion on companies engaged in 27enalizing27on. After considering the reduction granted to the infringers under the leniency regime, the amount of fines comes to approximately INR 550 million. The CCI has imposed a fine of around INR 340 million on JKET, Japan in Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems), which is the highest in the last 12 months. However, the same was reduced by 50% after granting benefit to the contravening parties under the leniency regime.

Additionally, the CCI has also raised demand notice to companies for payment of interest for any delayed payment of penalty amounts. The said notices were raised by the CCI under Regulation 5 of the CCI (Manner of Recovery of Monetary Penalty) Regulations, 2011 ('Recovery Regulations'). The Regulation 5 of Recovery Regulations state that:

"If the amount specified in any demand notice is not paid within the period specified by the Commission, the enterprise concerned shall be liable to pay simple interest at one and one half per cent, for every month or part of a month comprised in the period commencing from the day immediately after the expiry of the period mentioned in demand notice and ending with the day on which the penalty is paid".

However, the constitutionality/vires of the said regulation has been challenged by way of writ petition before the

High Court of Delhi. While hearing writ petitions filed by Sumitomo Chemical India Ltd. And UPL The High Court of Delhi has not only issued notices to the CCI, it has also granted an ad-interim stay on the operation of the demand notices.

Key issues in relation to enforcement policy

The CCI has placed foremost priority on the effective disposal of cases. From the date of enforcement of Sections 3 and 4 of the Competition Act, i.e., from May 20, 2009 to March 31, 2019, 1008 cases were brought before the CCI relating to enforcement of Sections 3 and 4, of which a majority of cases have been disposed from the CCI's end. In addition to effective speedy disposal of cases, the CCI has in last few years boosted its advocacy attempts and its leniency regime to encourage whistle-blowers to come forward and disclose anti-competitive conduct.

However, in several cases, the investigation has stalled due to a lack of clarity on several key aspects of the Competition Act. The CCI, being a creature of statute, is bound to work within the ambit of the Competition Act and as a quasi-judicial authority is required to adhere to principles of natural justice. Several writ petitions have been filed by various parties alleging non-adherence to principles of natural justice by the CCI as well as not granting documents (exculpatory and inculpatory) including documents relied upon by the DG to the opposite parties. This has resulted in a stay on DG investigations and the CCI inquiries by the High Courts.

Also, due to lack of compliance or clarity in enforcement by the CCI, established procedures under the Constitution of India and Competition Act has resulted in a delay in investigations/enforcement. Some of the key issues include:

- ✓ Formation of prima facie orders under Section 26 (1) of the Competition Act. It has been a concern and challenge that several prima facie orders passed by the CCI are broad in nature and do not convey formation of any prima facie opinion by the CCI (either on the issue/alleged violation or parties). In effect, DG has been granted liberty to investigate any issue that he may deem appropriate or any company, which was not even named in the initial information or prima facie order. This has resulted in DG being granted suo moto powers, which are not envisaged under the Competition Act.
- ✓ Review of prima facie order under Section 26 (1) of the Competition Act for various reasons including reliance on fraudulent documents by the informant.
- ✓ Confidentiality granted to documents and orders of the CCI – a balance between confidentiality and rights of defence. As a practice, the CCI has been granting blanket confidentiality on documents, without creating a non-confidential version. The CCI is of the view that non-confidential/redacted portions of orders granting confidentiality are not required to be prepared and a third party cannot challenge grant of confidentiality to any document. Accordingly, no order grating confidentiality shall ever be made accessible to any other party.
- ✓ Right of legal representation – subsequent to High Court of Delhi's order that right of legal representation cannot be denied to a party before DG especially while recording statements on oath; the CCI introduced Regulation 46A of the CCI (General) Regulations, 2009 stating that legal representatives/advocates will be allowed to accompany witnesses during recording of statements but will not sit at a hearing distance. However, DG, in practice, now directs legal representatives/advocates to sit in a separate/isolated room with a glass window to watch recordings of witness statements in a separate room. The same has effectively denied right of legal representation. The constitutional vires of the said provision has also been challenged before the High Court of Delhi.
- ✓ Excessive information requests by DG, which are beyond the subject of investigation and conduct of roving and fishing investigations by DG.

- ✓ Denial of grant of cross-examination of witnesses by the CCI and DG. Several writ petitions have been filed before the High Court's challenging the CCI orders with denial of cross-examinations.
- ✓ Penalty on individuals under Section 48 of the Competition Act – in little more than 10 years of the relevant provisions of the Competition Act being in force; there has been no 29enalizing29o reasoning or procedure adopted for imposition of such liability on individuals and the nature of consequences thereof. The High Court of Delhi is seized of a matter challenging constitutionality of Section 48 of the Competition Act on account of being vague and arbitrary.

Leniency & amnesty regime

The Competition Act provides parties to file applications for reduction of penalties under the leniency regime. The said regulations are framed under the CCI (Lesser Penalty) Regulations, 2009 ("Leniency Regulations"). The first case under Leniency Regulations was filed in 2013 with respect to cartels in the conveyer belt sector. Whilst several applications were received by the CCI under Leniency Regulations, the first leniency order was passed by the CCI in 2017.

This was followed by five leniency orders in 2018 and two leniency orders in 2019. The leniency programme is available to those enterprises that disclose their role in a cartel to the CCI and fully cooperate with the subsequent investigations. Individuals involved in a cartel or any anti-competitive agreement on behalf of an enterprise, can also benefit from leniency if they meet the conditions as required. This was introduced by way of amendment, in 2017, to the CCI (Lesser Penalty) Regulations 2009.

Section 46 of the Competition Act read with the Leniency Regulations codifies and governs the law on leniency in relation to cartel investigations in India. The CCI can impose a lesser penalty on any member of a cartel if the CCI is satisfied that the member has made full and true disclosure in respect of its cartel activities.

Regulation 3 of the Leniency Regulations require that an enterprise seeking leniency, in addition to making vital, full and true disclosure, also cease participation in the cartel (unless the CCI orders otherwise). Their full cooperation is required throughout the investigation into the cartel's activities. All relevant evidence must be disclosed and provided, and nothing should be concealed, manipulated, destroyed or removed by the applicant while filing the leniency application.

In order to file a leniency application, the applicant must make an application to the CCI. It is crucial and imperative that a leniency application is extremely exhaustive and includes all evidence showing the presence of a cartel. In the event that the CCI receives information in oral form or through email, the CCI directs the said applicant to submit a detailed written application with all information and evidence within a period not exceeding 15 days. If the application is not received within the prescribed time, it loses its priority status. The application for leniency can only be filed prior to submission of an investigation report by DG to the CCI.

Upon receipt of application, the CCI shall mark the priority status of the applicant. The Leniency Regulations provides for a priority status depending upon its marker. The applicant may be granted benefit of reduction in penalty up to or equal to 100%, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a prima facie opinion regarding the existence of a cartel. The applicant marked as second in the priority status may be granted a reduction of the monetary penalty up to or equal to 50% of the full penalty; and the applicant marked as third or subsequent in the priority status may be granted reduction of penalty up to or equal to 30% of the full penalty.

In order to obtain a lesser penalty, all relevant evidence must be disclosed and provided and nothing should be

concealed, manipulated, destroyed or removed by the applicant while filing the leniency application. Also, the leniency applicant should continue to cooperate with the CCI and participate in the proceedings.

DG evaluates the evidence submitted and forwards a report with its findings, including the extent of the applicant's co-operation, to the CCI, which then invites oral and written submissions from the applicant. Pursuant to this, the CCI passes its final order and the word 'may' highlights the discretion exercised by the CCI in deciding the quantum of reduction in fines.

Enforcement of leniency regime

The CCI has had considerable success in detecting and prosecuting cartels under the leniency regime. The CCI was tipped off about the existence of a six-year-long cartel between Panasonic, Geep and Godrej as a result of the leniency application filed by one of the parties in the Dry Cell Batteries Case.10 Although the CCI imposed a penalty on Geep and Godrej, Panasonic was granted a 100% reduction in penalty, as the leniency application made vital disclosures, which enabled the CCI to form a prima facie opinion regarding the existence of the cartel between Panasonic, Geep and Godrej and to direct a DG investigation.

In Nagrik Chetna Manch11 case, because of the information disclosed through a leniency application, the CCI was able to prosecute a second bid rigging cartel. Here the CCI extended the benefit of lenient treatment to four of the six cartelists, even though all six had applied for leniency. The first applicant was granted only a 50% reduction in penalty owing to the stage at which it came forward, i.e., after the investigation had begun and one of the leniency applicants (although 30enalizing to be the ring-leader of the cartel) "admitted to have orchestrated the cartel" under investigation and was granted a 25% reduction in penalty.

In Re: Cartelization in the supply of Electric Power Steering Systems case,12 NSK, which had disclosed the existence of the cartel, was granted complete immunity in the form of a 100% reduction in penalty. On the other hand, JTEKT, which had filed its leniency application during the pendency of DG's investigation, was granted a 50% reduction in the penalty so imposed.

The trend, as observed, is that a reduction in penalties depends on broadly three things: (a) timing of the application; (b) quality of disclosures; and (c) continued cooperation between the applicant and the CCI. Applicants might also try to furnish oral testimony to the CCI, in order to 30enalizi corporate risk disclosures. While oral applications can be made to secure a marker, the CCI will subsequently direct the applicant to submit a written application in accordance with the Lesser Penalty Regulations. If this is not followed by the applicant, it cannot avail itself of the leniency application.

Like enforcement issues under other provisions of Competition Act; several High Courts have also stayed several cases where (based on news reports in public domain) leniency applications have been filed. The High Courts have stayed investigations in such cases due to alleged non-adherence to procedures (established under law) by the CCI. In some cases, it is seen that the leniency applicant coerces/influences/30enalizing30 others participants to file for leniency and/or give statements on oath – which may support the first leniency applicant. The CCI has discarded objections to such conduct by leniency applicants by stating that the same is not within the CCI's ambit to examine. It has also come to light that leniency applicants in some cases have disclosed filing of leniency applications, so as to 30enalizing other parties and the CCI has refused to take 30enalizing of the same.

The CCI does not bar the 'ring leader/cartel leader' from filing leniency applications and therefore, even the cartel leader is entitled to file an application for leniency and get full immunity from a monetary penalty. In some of the cases relating to the investigation of the auto-parts cartel, which emerged from leniency applications,

parties have filed writ petitions before the High Court of Delhi, wherein the parties have argued that the investigation has been initiated against the companies, without disclosing the product under investigation. It is also alleged by some companies that they do not even manufacture parts/products under investigation; however, on the basis of information supplied by the leniency applicant they have been roped into the investigation.

Administrative settlement of cases [Plea Bargaining]
The Competition Act, itself, does not prescribe any procedure for administrative settlement or plea bargaining at the time of writing this chapter.

Third party complaints
In terms of the Competition Act, the information can be filed by any person, whether directly aggrieved or not, can file information before the CCI to bring to light an alleged infringement of the Competition Act.

Pursuant to the information received by a third party, the CCI engages in a preliminary examination on the receipt of information. The purpose of this preliminary examination is to ascertain whether the materials presented before it warrants the initiation of an investigation, referred to as formation of a 'prima facie view'. Further, the CCI has the power to implead parties in the ongoing proceedings, if it thinks it is necessary. In addition to this, a third party may also be allowed to have access to the documents, if it makes an application to the CCI in terms of Regulation 50 (2) and demonstrates sufficient cause.

However, the Competition Appellate Tribunal has raised concerns with respect to the locus of parties filing the information, especially in the scenarios of proxy litigation by interested parties. In the case of Board of Control of Cricket in India ("BCCI"), information was filed by an individual named Surinder Singh Barmi, but after filing of the information alleging anti-competitive conduct by BCCI, he never appeared either before the CCI or Competition Appellate Tribunal.

Civil penalties and sanctions
The CCI is not only empowered to inquire into breaches of competition law in India, but also to administer and impose sanctions in the event of infringement of the provisions of the Act. It is a quasi-judicial body, and if satisfied that there exists an anti-competitive agreement or an abuse of dominant position can impose sanctions in the form of monetary penalties. Under Section 27 (b) of the Act, in the case of cartels, the CCI has the power to impose on the company a penalty of up to three times its profit for each year of the continuance of the cartel, or 10% of the turnover for each year of the continuance of the cartel, whichever is higher; or a penalty at 10% of the average of the last three years' (relevant) turnover. The Competition Act only prescribes civil liability for anti-competitive practices, including cartels.

In case, a company fails to make payment of the penalty, the CCI may initiate appropriate action for recovery of penalty including filing a criminal complaint before the Chief Metropolitan Magistrate.

Calculation of penalties on the basis of "relevant turnover"

At present, there is no guidance on the imposition of a penalty. The CCI does keep in mind the aggravating and the mitigating factors along with the principles of proportionality while imposing penalty under the penalty provisions of the Competition Act. However, there are no documented set of standards which the CCI requires to strictly adhere to while imposing a penalty. A certain amount of clarity was however provided by the Supreme Court in Excel Corp Care Ltd. V. CCI. SC where it clarified that the "relevant turnover" and not the "total turnover" of an enterprise must be considered while levying a penalty involving multiproduct firms. The "relevant turnover" refers to an entity's turnover pertaining to products and services that have been affected by

such contravention.

Increasing & decreasing fines

The CCI is empowered to impose fines as per Section 27 of the Competition Act. The quantum of the fine so imposed cannot be more than 10% (ten) of the average of the turnover for the last three preceding financial years. However, the CCI uses its discretion for imposing penalties on the basis of the facts and circumstances of each case. The fines so imposed, can be reduced if the parties to the proceedings availed benefit under the Lesser Penalty Regulations. The leniency programme is available to those enterprises that disclose their role in a cartel to the CCI and fully co-operate with the subsequent investigations. By way of amendment, in 2017, to the Leniency Regulations, in addition to an enterprise itself, individuals involved in a cartel on behalf of an enterprise, can also benefit from leniency. This allows for reduction in the fines so levied. The other factor would be mitigating circumstances. The CCI, while calculating penalties, gives due regard to mitigating circumstances such as: (a) nature, gravity and extent of contravention; (b) the role of the infringer; (c) nature of product; (d) market shares; (e) profit derived from contravention; and (f) bona fides of the entity.

Right of appeal against civil liability and penalties

The Competition Act envisages an exhaustive appeal process. Once a decision/order is passed by the CCI, it can be appealed before the NCLAT and subsequently to the Supreme Court. Since the NCLAT is the first court of appeal, it is empowered to examine both the questions of law and facts. Any person who is aggrieved by an order of the CCI may appeal to the NCLAT within 60 (sixty) days from the date of receipt of such order. An appeal from the order of the NCLAT is also required to be filed within the period of 60 (sixty) days to the Supreme Court. The Supreme Court, being the final court of appeal, generally limits its review to questions of law.

The right to appeal against orders of the CCI, however, is only available against specified orders passed under Sections 26(2), 26(6), 27, 28,31,32,33,38,39,43,43,44,45 and 46 of the Competition Act.13 This right flows from Section 53 A of the Competition Act and is only available, broadly against the following: (a) orders where the CCI finds parties guilty of contravention of provisions of the Act; (b) orders where the CCI closes a case at the prima facie stage; (c) interim orders passed by the CCI; and (d) rectification orders; and (e) penalty orders.

Under the scheme of the Competition Act, the CCI's decision to direct investigation on the basis of prima facie satisfaction of the existence of a cartel is not appealable. This is affirmed in the SAIL case wherein the Supreme Court held that no appeal can be filed against an order of the CCI under Section 26 (1) of the Competition Act as such order is merely an administrative order and is in the form of direction simpliciter.

'Full merits' appeal

An appeal that lies before NCLAT, under the Competition Act, is decided on the basis of both findings of fact as well as points of law, and therefore is a 'full merits' appeal. The prospects of success in reversing the CCI's final order depends on a case-by-case basis as each case before the NCLAT is decided on its own merits. On examination of the facts and evidence, the NCLAT can either dismiss the appeal, or set aside the order of the CCI, either in whole or in part, or substitute the CCI's findings with its own, or remand the case back to the CCI.

Merger of COMPAT into NCLAT

Prior to the 2017 amendment, the first appeal against the orders of CCI (under specific sections of the Competition Act) were preferred before the Competition Appellate Tribunal. Following the amendment, the

appellate function (pertaining to the first appeal) under the Competition Act has been provisioned for the NCLAT.

Criminal sanctions
The CCI has no jurisdiction to impose criminal sanctions on entities for cartel infringement. However, Section 42 (3) of the Competition Act prescribes imprisonment for a term which may extend up to three years, in the event of non-compliance with the orders or directions issued by the CCI or failure to pay the fine. However, the power to pass orders for imprisonment is vested with the Chief Metropolitan Magistrate, Delhi and only when the CCI acts as complainant in such cases.

Co-operation with other anti-trust agencies
The importance of international cooperation is well 33enalizing by the CCI in developing strong linkages and networks with relevant multilateral agencies and competition jurisdictions for capacity building, enforcement cooperation, networking and exposure to the global best practices. The CCI is invited for meetings and conferences 33enalizin by multilateral 33enalizing33on such as the Organization for Economic Co-operation and Development ("OECD"), the International Competition Network ("ICN"), the United Nations Conference on Trade and Development ("UNCTAD") and the BRICS International Competition Conference, etc.

Section 18 of the Competition Act provides that the CCI may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

As per the the CCI's Annual Report on Competition Policy Developments in India, as published by OECD, the CCI has entered into a Memorandum of Understanding ("MOU"), after obtaining approval from the Government of India, with the following competition authorities:

Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), USA;
Director General Competition, European Union ("EU");
Federal Antimonopoly Service ("FAS"), Russia;
Australian Competition and Consumer Commission ("ACCC");
Competition Bureau ("CB") Canada; and
Competition authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa (BRICS Countries).
12

Cross-border issues
Section 32 of the Competition Act allows CCI to exercise extra-territorial jurisdiction by providing it with the power to inquire and pass orders against entities established beyond the territorial boundaries but causing AAEC in India. The scope of Section 32 of the Competition Act is wide as it transcends the place of incorporation of an entity and is also not limited by the place where an anti-competitive agreement has taken place. Additionally, Section 18 of the Competition Act, implicitly, also empowers CCI to enter into any memorandum or arrangement with any agency of any foreign country, with prior approval of the Central Government.

Issue of enforcement

The extra-territorial powers of CCI is at nascent stage and there are not many instances wherein CCI has invoked its extra-territorial jurisdiction under Section 32 of the Competition Act. Several auto-part manufacturers are under investigation for alleged 33enalizing33on in supply of parts to auto companies in India. CCI may impose

penalties on such companies, located outside of India; however, it would be interesting to see the mechanism of recovery of such penalties (if the companies fail or refuse to make the payment).

Developments in cross-border legislation

The issue of extra-territorial jurisdiction of CCI came to the forefront, when it was the subject of dispute in the inquiries against Google Inc. In the Google Inc. case, although the ruling did not give a specific finding on the extra-territorial aspect of influence, the CCI imposed a penalty based on the sales of Google Inc., along with that of its Indian subsidiary, from their operations in India. Also, in cases relating to 34enalizing34on, the CCI has investigated companies located outside of India and imposed penalties on such companies/their Indian subsidiaries.14

Further, in the following cases (i) Biocon v. F. Hoffmann-La Roche and Kaveri Seed Company Limited; and (ii) Ajeet Seeds Private Limited & Ankur Seeds Private Limited v. Mahyco Monsanto Biotech, the CCI has made the parent company (which had presence through its Indian subsidiary in India) a party to proceedings before it.

In the case of Intex Technologies v. Telefonaktiebolaget LM Ericsson, the CCI had called upon foreign officials for the recording of their statements.

Private enforcement of anti-trust laws

The Competition Act provides for private antitrust compensation (damage) claims. Section 53 N of the Competition Act allows an enterprise to file an application seeking compensation from the enterprise in violation of the provisions of Competition Act. The application seeking compensation/damages can be filed before the NCLAT after pronouncement of the order by the CCI or NCLAT.

It is pertinent to mention that the first full hearing in a case relating to compensation claims is currently underway before NCLAT. The Food Corporation of India has filed an application seeking compensation from Sumitomo Chemical India Ltd. (earlier known as Excel Crop Care Limited), UPL Ltd. And Sandhya Organic Chemicals Private Limited for 34enalizing34on in supply of aluminium phosphide tablets to Food Corporation of India. Sumitomo Chemical and Sandhya Organic have challenged the maintainability of the compensation claim. Food Corporation of India has filed the compensation claim (in July 2019) after the Supreme Court delivered its judgment in May 2017. Considering that the language of Section 53 N of the Competition Act does not refer to the filing of compensation applications after the Supreme Court's order and only states 'after' order of CCI and NCLAT; Sumitomo Chemicals has challenged the maintainability of compensation application – as the same has been filed after the Supreme Court's order. Sumitomo Chemical has also raised the issue of limitation period for filing such applications before NCLAT.

Parties to an action

A compensation claim, under Section 53 N, can be filed by: (a) the central government, state government or a local authority; and (b) any enterprise or person who has suffered loss or damage as a result. There is a provision for class action claims under the Competition Act, whereby a class of people with a common grievance can come together to seek compensatory relief from the enterprises who have indulged in anti-competitive conduct, with the permission of the NCLAT. In a collective action, a person can sue or defend on behalf of other persons with the same interest. If the NCLAT gives permission, a notice is sent to every person in the class action informing them of the institution of the suit. Applicants can then 'opt in' or 'opt out' of class action proceedings.

Demonstrating loss

The Competition Act places an obligation on the applicant to demonstrate and quantify the loss caused by anti-competitive conduct. Section 53 N of the Competition Act provides that the applicant is entitled to any loss or damages "shown to have been suffered". There remains a lack of clarity in the quantification of losses since the compensation provisions of the Act are largely untested in the court of law in India. NCLAT is yet to issue a final order in the compensation cases filed before it.

Pass-on defence

The pass-on defence has not been explicitly carved out in the provisions of the Competition Act. This defence may be however, used by the respondents, i.e. a person against whom compensation has been claimed, to contend that since the applicant who is making an claim of compensation has passed on the loss or damage, caused to it, it is not eligible for any compensation.

Reform proposals

To keep in pace with the changing time and needs of the market, the Government has undertaken active measures to keep updating the competition law regime. The Government established the Competition Law Review Committee ("CLRC"), to review the Competition Act (together with rules and regulations framed under it). The CLRC submitted its report to the Ministry of Corporate Affairs on July 26, 2019.

Some of the key proposals are:

- Governing Body: The Committee recommended that the Competition Act be amended to provide for a governing body, to strengthen the accountability of CCI. The governing body will consist of a Chairperson, six full-time members, and six part-time members. It will perform quasi-legislative functions, drive policy decisions, and perform a supervisory role.
- Appellate Authority: The Committee noted that under the Competition Act, appeals against orders of the CCI are heard by the NCLAT. The Competition Act requires speedy disposal of such appeals, preferably, within a period of six months. However, the Committee noted that the NCLAT is overburdened with other cases. Therefore, it recommended that a dedicated bench should be created to hear appeals under the Competition Act.
- Settlements & Commitments: The Committee noted that certain jurisdictions like the European Union accept remedies from parties to antitrust disputes. These remedies are in the form of settlements and commitments. Settlements are generally available for cartels and require an admission of guilt from the parties. Commitments are applicable to all cases other than cartels and do not require any admission of guilt. The Committee endorsed such a mechanism to ensure speedy resolution of cases.
- Hub and spoke cartels: The Committee noted that the Competition Act does not directly address cartels where a third party (a 'hub') facilitates collusion between two or more competitors (the 'spokes') by causing sharing of sensitive information between them. It recommended that amendments to the Competition Act include liability of such hubs.
- Penalties: The Committee noted that the rate of recovery of penalties under the Competition Act is low because several CCI orders are challenged before courts. One of the reasons for this may be that the penalties imposed seem disproportionate and excessive. Therefore, the Committee recommended that the CCI should be mandated to issue guidance on calculation and imposition of penalties under the Competition Act. The Report also suggests that Section 27 of the Competition Act may also be amended to include 'income tax' in order to enable the CCI to continue to impose penalties on individuals (on their personal income tax returns) under Section 48 of the Competition Act. It

suggests that even though the CCI is still imposing penalties on individuals under Section 48 of the Competition Act in accordance with Section 27 of the Competition Act – without Section 27 authorising imposition of penalties on personal income tax returns.

- Compensation: The Committee notes that Section 53 N of the Competition Act does not allow for filing of compensation applications after the order of the Supreme Court. Accordingly, it is suggested that Section 53 N of the Competition Act may be amended to provide for filing of compensation applications after orders of the Supreme Court.
- Expansion of definition of 'cartels' to include 'buyer': to 36enalizin buyer cartels.

On 22 February 2020, the CCI published a draft of The Competition (Amendment) Bill, 2020 ("Proposed Bill") on its website for stakeholder's comments. The Proposed Bill, to a certain extent, mirrors the reforms suggested by the former CLRC. In this regard, the key features of the Proposed Bill are:

- Introduction of Buyers Cartel: The Proposed Bill suggests expansion of the definition of cartel under Section 2 (c) of the Competition Act to include buyer cartels.
- Widened scope of 'enterprise': The Proposed Bill suggests broadening of the definition of 'enterprise' to include, in addition to person or a department of the Government, any other entity engaged in any economic activity. This is in line with the BCCI judgment15 wherein BCCI, even though a sport regulator, was considered to be an enterprise for the purpose of applying the provisions of the Competition Act as it was engaged in economic activities.
- Amendment to Section 3 of the Competition Act: An additional proviso is proposed to be added to Section 3(3) of the Competition Act to include enterprises not engaging in identical or similar trade under the purview of Section 3(3) of the Competition Act (which currently deals only with the agreements entered by the players who are horizontally placed), if they actively participate in the furtherance of any agreement listed under Section 3(3) of the Competition Act. Further, the scope of Section 3(4) has also been widened. The Proposed Bill made the list of vertical agreements under Section 3(4) of the Competition Act – non-exhaustive, by broadening the applicability of Section 3(4) to any other agreement which may or may not be amongst enterprises or persons at different stages.
- Amendment to Section 4 of the Competition Act: The explicit exemptions to discriminatory conditions or prices which are adopted to meet the competition from the purview of current Section 4 of the Competition Act, will under the Proposed Bill, be restricted to only conditions or prices. A discriminatory condition may not be able to take advantage of the blanket exemption earlier granted by Section 4 of the Competition Act, if the Proposed Bill comes into effect.
- Protection to holders of Intellectual Property Rights ("IPRs"): Protection to IPR holder is currently afforded only against any alleged conduct of the party under Section 3 (anti-competitive agreements) of the Competition Act. The Proposed Bill in addition to Section 3 of the Competition Act, confers the protection on the IPR holders even against any alleged conduct under Section 4 (abuse of dominance) of the Competition Act.
- Amendment to merger control provisions: The Proposed Bill intends to capture combinations which do not traditionally fall under the current scheme of Section 5 of the Competition Act. This is intended to be done by giving the power to the Central Government to prescribe any criteria – 36enalizing36 of which will be deemed to be a combination in terms of Section 5 of the Competition Act and hence notifiable. The definition of control has also been widened to include an ability to exercise material influence, in any manner whatsoever, over the management or affairs and strategic commercial decisions. The Proposed Bill has also attempted to provide clarity regarding calculation of turnover for the purpose of calculating the thresholds. Issue of statement of objections by the CCI and proposal of modifications by the parties for allowing such combination has also been introduced in the Proposed Bill. Further, the

timeline for a combination coming into effect has been shortened to 150 calendar days from the date of notice to the CCI as compared to current 210 days. Notably, this change comes with an additional power to the CCI – that is to extend the period of 150 calendar days for more 150 calendar days. Thus, the parties to the combination may have to wait for a total of 300 days, i.e. 90 days more from what has been currently provided under the Competition Act.

- Insertion of new provisions regarding Settlements and Commitments: Keeping in line with the practices followed by the developed jurisdiction, the Proposed Bill has introduced provisions in relation to Settlements and Commitments which allows the alleged parties to propose terms of settlements, on their own terms, to the CCI. CCI can either accept or reject such settlement and commitment application. The catch however, is the complete discretion of the CCI to decide upon such application as the decision of the CCI in relation to settlements and commitments proposed by the parties have been made non-appealable.[67]

End Notes

[1] 340 U.S. 231, 249 (1951).

[2] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations , (1776), Chapter 10, para 82.

[3[***Competition Commission of India vs. Steel Authority of India Ltd. and Anr.*** (2010) 10 SCC 744, Para 1-7.)

[4] http://www.oecd.org/competition

[5] https://www.justice.gov/atr/speech/basics-successful-anti-cartel-enforcement-program

[6] Enacted on January 13, 2003.

[7] Competition Act, 2002, Preamble.

[8] Based on data accessed as on 8 April 2018.

[9] Based on data accessed as on 8 April 2018.

[10] Competition Act, § 2©.

[11] Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations, OECD DAF/COMP(2007)45.

[12] Ibid.

[13] Competition Act, 2002, § 3(5).

[14] Competition Act, 2002, § 3(5)(i). See: Re. M/s HT Media Limited & M/s Super Cassettes Industries Limited, Case No. 40/2011.

[15] Case No. 03/2011.

[16] Based on data accessed as on 8 April 2018.

[17] Case No. 76/2012.

[18] Infra, ¶ 16.

[19] Notification of the Ministry of Corporate Affairs, 16 June 2017 [F. No. 5/20/2011-CS] [http://egazette.nic.in/WriteReadData/2017/176775.pdf].

[20] See Builders Association of India v. Cement Manufacturers' Association & Ors. Case No. 29/2010; In Re: suo-motu case against LPG cylinder manufacturers, Case No. 3/2011; Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. V. M/s Orissa Concrete and Allied Industries Ltd. & Others, Case No. 5/2011; Shri Gulshan Verma v. Union of India, through Secretary, Ministry of Health and Family Welfare & Others,

Case No. 40/2010; In Re: Aluminium Phosphide Tablets Manufacturers, Suo-moto Case No. 02/2011.

[21] Ibid., M/s International Cylinder (P) Ltd and others v. Competition Commission of India, Appeal No. 21/2012 to 65/2012 (against Suo-moto Case No. 3/2011).

[22] See LPG cylinder manufacturers supra n. 15.

[23] All India Tyre Dealers Federation v. Tyre Manufacturers, MRTP Case RTPE No. 20/2008; and In Re: Alleged cartelization by steel producers, RTPE 09/2008.

[24] Express Industry Council of India v. Jet Airways (India) Ltd. & Others, Case 30/2013; M/s Bio-Med Private Limited vs Union of India & others, Case No. 26/2013.

[25] Express Industry Council of India v. Jet Airways (India) Ltd. & Others. Case No. 30/2013; GlaxoSmithKline Pharmaceuticals Limited v. Competition Commission of India & Ors., Appeal No. 85/2015; M/s Sanofi Pasteur India Private Limited v. Competition Commission of India & Ors., Appeal No. 86/2015.

[26] See Builders Association of India, supra n. 15.

[27] Competition Commission of India v. Co-ordination Committee of Artists and Technicians of W.B. film and television and Ors., Civil Appeal No. 6691/2014.

[28] Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry v. Sajjan Kumar Khaitan & Ors., Appeal No. 131/2012.

[29] Based on data accessed as on 8 April 2018.

[30] Shri Nirmal Kumar Manshani v. M/s Ruchi Soya Industries Ltd. & Others, Case No. 76/2012.

[31] Exclusive Motors Pvt. Limited v. Automobili Lamborghini S.P.A., Case No. 52/2012. See also, Exclusive Motors Pvt. Limited v. Competition Commission of India & Ors., Appeal No. 1/2013.

[32] In Re: Cartelization by public sector insurance companies, Suo-moto Case No. 02/2014.

[33] Delhi Jal Board v. Grasim Industries Ltd. & others, Ref. Case No. 03/2013; Delhi Jal Board Vs. Grasim Industries Ltd. & others, Ref. Case No. 04/2013.

[34] Ibid.

[35] Based on data accessed as on 8 April 2018.

[36] Competition Act, 2002, § 46.

[37] Lesser Penalty Regulations, Regulation 5.

[38] Competition Act, § 46.

[39] Lesser Penalty Regulations, Regulation 5.

[40] Competition Act, 2002, § 46.

[41] See: No. L-3(4)/Reg-L.P./2017-18/CCI, available at: http://www.cci.gov.in/sites/default/files/whats_newdocument/178210.pdf.

[42] Lesser Penalty Regulations, Regulation 4©(ii).

[43] Lesser Penalties Regulations, Regulation 6.

[44] Party has been defined as enterprise or person, against whom inquiry or proceeding is instituted and shall include the Central Government, any State Government or any statutory authority and shall include any person permitted to join the proceeding.

[45] Ibid.

[46] Regulations 37 and 50, Competition Commission of India (General) Regulations, 2009.

[47] Competition Act, § 48.

[48] In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo-moto Case No. 03/2014.

[49] Competition Act, § 32.

[50] Based on data accessed as on 8 April 2018.

[51] See Brushless DC Fans, supra n. 43.

[52] Forech India Limited v. Competition commission of India and Anr., C.M.APPL.-32052/2015.

[53] Competition Act, 2002, § 46.

[54] Based on data as on 8 April 2018.

[55] 2017 SCC OnLine SC 609.

[56] Competition Act, 2002, § 27, Proviso (it empowers the CCI to pass orders against the entire group if one of its companies is an enterprise found to have indulged in anti-competitive practices).

[57] Competition Act, § 48(1) states that every person who in-charge and responsible, to the company for the conduct of the business, is also liable. Additionally, § 48(2) states that if the conduct of a company—that is in contravention of the Competition Act—can be attributed to the connivance, neglect or consent of any director; manager; secretary, or other officers, such officers are also guilty of that contravention.

[58] See, Wardha Power Company Limited v. Western Coalfields Limited & Others, Case No. 88/2013; Department of Sports v. Athletics Federation of India, Ref. 01/2015, etc.

[59] Data as on 8 April 2018.

[60] Suo-moto Case No. 03/2014.

[61] Competition Act, 2002, § 53N.

[62] Competition Act. 2002, §§ 42A & 53Q.

[63] Data as on 8 April 2018.

[64] Out of a total of 59 cases dealing with infringement of Section 3(3), 15 pertain to the film and entertainment sector. Data as on 8 April 2018.

[65] Data as on 8 April 2018.

[66] M/s Jasper lnfotech Private Limited (Snapdeal) v. M/s Kaff Appliances (India) Pvt. Ltd., Case No. 61/2014.

[67] https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/india

Conclusion

Let me conclude by simply saying that our experience in law enforcement has convinced us that the hallmarks of a successful anti-cartel enforcement program are (i) the availability and imposition of severe sanctions for those found to be engaging in cartel conduct; (ii) effective legal investigative tools; (iii) a high risk of detection; and (iv) transparency and predictability throughout the enforcement program. These, combined with cooperation and assistance among competition law enforcement authorities, form a solid foundation for anti-cartel enforcement reaching all the way from the small domestic cartels within our own borders to the massive international conspiracies that have harmed consumers worldwide.

The ultimate goal of cartel enforcement is deterrence, and deterrence only works when consequences are real. To effectively deter cartels, antitrust enforcers must aggressively and predictably prosecute cartelists and use the full range of weapons in the enforcement arsenal, from fines to jail time to restrictions on international movement. All of these consequences affect the cost/benefit analysis of cartels, whether as a matter of the corporate bottom line or of the individuals who know they may serve time in jail. It is gratifying to us that some cartels avoid violating the law in the United States specifically because of our enforcement policies. This phenomenon illustrates that aggressive cartel enforcement can effectively deter such collusion. Further, as the number of countries with aggressive cartel enforcement programs increases, the effectiveness of each individual program should increase as well. The cartels will have fewer easy targets, a lower expected profit, a greater likelihood of detection, and a higher expected sanction. Accordingly, I encourage the international antitrust community to continue its efforts to expand and improve global cartel enforcement.

In almost a decade, cartel enforcement in India has seen considerable activity. Case law developments till date show an Indian specific enforcement, which has become a trademark of the Commission. Some of this has been on account of the peculiar language of the legislation—for instance putting cartels and decisions of associations in the same category. The remaining can be attributed to the application of the law, for example the standard of circumstantial evidence adopted by the CCI.

Going forward, the enforcement is likely to continue to demonstrate this unique characteristic. It is also safe to say that cartels will continue to be an important priority for the CCI.