

International **Comparative** Legal Guides



Practical cross-border insights into cartels & leniency

Cartels & Leniency **2022**

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

In India, cartelisation is a civil offence prohibited under the Competition Act, 2002 (“Act”).

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 2(c) of the Act defines a cartel as including an association of producers, sellers, distributors, traders or service providers who, by an agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or trade in, goods or provision of services.

Cartels are prohibited under Section 3(1), read with Section 3(3), of the Act. Section 3 of the Act prohibits and renders void agreements entered into between enterprises, persons or associations of enterprises, or persons with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an appreciable adverse effect on competition (“AAEC”) in India.

Section 3(3) of the Act is the specific substantive provision which prohibits anti-competitive agreements in India, including horizontal agreements (and cartels), between enterprises which:

- directly or indirectly determine purchase or sales prices;
- limit or control production, supply, markets, technical development, investment or the provision of services;
- allocate geographic markets or customers; or
- directly or indirectly result in bid rigging or collusive bidding.

Such agreements are presumed to have an AAEC and are consequently void.

An agreement can be in any form – written, oral or even a gesture. It does not have to be legally binding.

1.3 Who enforces the cartel prohibition?

The Competition Commission of India (“CCI”) is the nodal agency which enforces cartel prohibition in India.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The basic procedural steps are as follows:

Step 1: Inquiry into alleged cartelisation

The CCI has the power to inquire into any alleged cartel arrangement in the following instances:

- receipt of information filed by any person or their association;
- receiving a reference by the Central Government or the State Government or a statutory authority;
- suo moto* (on its own motion); or
- upon receipt of a leniency application.

Step 2: *Prima Facie* order passed by the CCI

Upon receiving the information, the CCI is required to form a *prima facie* view on the matter and pass either of the following orders:

- Scenario 1: In case the CCI is of the opinion that there exists no *prima facie* case, it shall close the matter and pass an order to that effect under Section 26(2) of the Act.
- Scenario 2: In case the CCI is of the opinion that there is a *prima facie* violation of the Act, it shall direct the Director General (“DG”) to investigate the matter. To this effect, it shall pass an order under Section 26(1) of the Act.

Step 3: Investigation by the DG

The DG is the investigative arm of the CCI. Upon receipt of an order under Section 26(1), the DG is required to review all the information on record with the CCI and collect further information and evidence. The DG is required to submit a report to the CCI, containing its findings on the allegations made, supported by all the evidence, documents and statements collected during the course of the investigation, along with the DG’s analysis (“DG’s Report”).

Step 4: Inquiry by the CCI upon receipt of the DG’s Report

Upon receipt of the DG’s Report, the CCI has the following options:

- If the DG finds that there is no contravention, the CCI may:
 - invite objections from any of the parties concerned to the DG Report;
 - agree with the findings of the DG and close the matter; or
 - disagree with the findings of the DG and direct a further investigation or support a further inquiry or itself proceed with a further inquiry in accordance with the provisions of the Act.
- If the DG finds that there is a contravention, the CCI may:
 - agree with the findings of the DG and pass any and all orders under Section 27 of the Act; or
 - if the CCI is of the opinion that further inquiry is called for, it shall inquire into such contravention before arriving at a conclusion.

1.5 Are there any sector-specific offences or exemptions?

The Ministry of Corporate Affairs of the Government of India has extended the exemption granted to Vessel Sharing Agreements (“VSAs”) of the liner shipping industry with effect from 4 July 2018 for a period of three years. The exemption applies to carriers of all nationalities operating ships of any nationality from any Indian port provided such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of markets or customers. During the subsistence of this exemption, parties entering into VSAs are required to file the relevant VSA and other documents with the DG of Shipping.

Moreover, under the Proviso to Section 3(3), an exemption is also accorded to any joint venture agreement if the same increases efficiency in production, supply, distribution, storage, acquisition to control of goods or provisions of services.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Section 32 read with Section 19(1) of the Act empowers the CCI with extra-territorial jurisdiction, thereby giving it the power to inquire into any cartel operating outside India, which causes or is likely to cause an AAEC within India.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The following table provides a brief summary of the general investigatory powers of the authorities under the Act:

Investigatory power	Civil/administrative	Criminal
Order the production of specific documents or information	Yes, Sections 36(2) and (4) provide this power to the CCI and the DG (read with Section 41(2))	Not applicable
Order summoning and enforcing attendance of any person and examining them on oath	Yes, Section 36(2)(a) provides this power to the CCI and Section 41(2) read with Section 36(2)(a) provide this power to the DG	Not applicable
Calling upon experts to assist the CCI in conducting inquiry	Yes, Section 36(3) provides this power to the CCI	Not applicable
Carry out an unannounced search of business premises	Yes (after obtaining a search warrant from the Chief Metropolitan Magistrate, Delhi)	Not applicable
Carry out an unannounced search of residential premises	Yes, Section 41(3) of the Act read with Section 220 of the Companies Act, 2013 applies to residential premises	Not applicable

Investigatory power	Civil / administrative	Criminal
Right to “image” computer hard drives using forensic IT tools	Yes, DG officials have the power to seize and copy hard drives, servers and electronic devices including laptops, tablets and mobile phones	Not applicable
Admit evidence in the form of tape recordings, video recordings, and other written statements	Yes, the CCI or DG officials have this power as per Regulation 41(a) of the CCI (General) Regulations, 2009 (“General Regulations”)	Not applicable
Admit documents and other records relevant for the proceedings	Yes, the CCI or the DG has these powers under Regulation 41 of the General Regulations	Not applicable
Admit opinion of handwriting experts or experts in identifying finger impressions	Yes, the CCI or DG officials have this power according to Regulations 41(d) and (e) of the General Regulations	Not applicable
Power to call for information	Yes, the CCI has this power at any time before passing orders in a proceeding, per Regulation 44 of the General Regulations	Not applicable
Right to retain original documents	Yes. However, such documents cannot be retained after the conclusion of the investigation	Not applicable
Right to require an explanation of documents or information supplied	Yes	Not applicable
Right to secure premises overnight (e.g. by seal)	There is no specific provision under the Act	Not applicable

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The Act contains provisions for the imposition of pecuniary penalties for non-compliance with the directions of the CCI and the DG. The CCI, during an inquiry, can also temporarily restrain any party from carrying on the alleged act of cartelisation until conclusion of such inquiry. Further, the DG has the power to conduct unannounced search and seizure exercises (“**dawn raid**”).

2.3 Are there general surveillance powers (e.g. bugging)?

The Act does not provide any general surveillance powers to the CCI or the DG. However, the DG usually, in the course of its

investigation, coordinates with telecom companies to procure telephone call logs. In some extreme cases, the DG has sought cell tower data from telecom companies to geo-locate individuals whom it suspects of having participated in a cartel. In other instances, the DG has continually directed that individuals of companies, alleged to have engaged in cartelisation, provide clarifications in person.

2.4 Are there any other significant powers of investigation?

The Act empowers the CCI to regulate its own procedure. In addition, both the DG and the CCI are vested with the same powers as a civil court under the Code of Civil Procedure, 1908, including summoning and enforcing the attendance of any person, examining him on oath and requiring the discovery and production of documents.

The investigation powers of the CCI and the DG include the power to conduct dawn raids, which has been exercised in six instances thus far. While conducting dawn raids, the DG has the same powers of search and seizure as that of an inspector under the Criminal Procedure Code, 1973.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The searches under the Act are conducted by officials from the office of the DG or any other officer authorised to carry out the search by the DG. Nothing under the Act, or the rules framed therein, requires the officers conducting a search to wait for the legal representatives to be present before commencing the search exercise.

2.6 Is in-house legal advice protected by the rules of privilege?

The Bar Council of India Rules (the code of ethics governing advocates in India) do not recognise a full-time salaried employee of a person, firm, corporation, government or concern as an “attorney”. As such, the professional communications between in-house counsel and officers, directors and employees of a company cannot avail attorney-client privilege in India.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The Act does not provide any specific material limitations to the investigatory powers to safeguard the right of defence of companies and/or individuals under investigation. However, according to Section 57, no information relating to any enterprise being information obtained for purposes of the Act, will be disclosed without prior permission in writing of the enterprise. Likewise, Regulation 35 of the General Regulations details provisions of maintenance of confidentiality of any party, on receipt of request.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities’ approach to this changed, e.g. become stricter, recently?

The Act imposes sanctions for the obstruction of an investigation under Section 43 of the Act. The Act also imposes sanctions for

contravention of orders of the CCI under Sections 42 and 42A. A failure without reasonable cause to comply with the directions of the CCI or the DG in the course of an investigation exposes the offender to a fine of up to INR 100,000 for each day during which such failure continues, subject to a maximum of INR 10 million.

While the CCI has never penalised any person under this provision in a cartel case, a penalty of INR 10 million was imposed on Google (*In Re: M/s Consim Info Private Limited and M/s Google Inc. USA and Ors. (Case Nos 07 and 30 of 2012)*) in an investigation for alleged abuse of dominance, for non-compliance with the directions of the DG.

It may also be noted that in the recent case of *AKMN Cylinders (P) Ltd. & Anr v. CCI (Competition Appeal A.T. No. 50/2018)*, where the CCI had imposed a penalty on an individual on account of non-cooperation with the DG, the National Company Law Appellate Tribunal (“NCLAT”) set aside the penalty after an apology by the Appellant.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In case of cartels, under Section 27 of the Act, the CCI is empowered to impose on the enterprise a penalty of up to three times its profit for each year of the continuance of such an agreement or 10% of the turnover for each year of the continuance of such an agreement, whichever is higher. India, at present, does not have penalty guidelines to determine the quantum of penalty to be levied in each case.

In *Excel Crop Care Limited v. CCI & Anr. (Civil Appeal No. 2480 of 2014)* (“**Excel Crop Case**”), the Supreme Court of India (“**Supreme Court**”) clarified that the “relevant turnover” and not the “total turnover” of an enterprise should be taken into consideration when imposing penalties on contravening enterprises. The Supreme Court further clarified that “relevant turnover” refers to an entity’s turnover pertaining to products and services that have been affected by such contravention.

In addition to monetary penalties, the CCI has wide powers to impose non-monetary penalties such as cease and desist orders, or pass such other orders or directions as it may deem fit.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Section 48(1) of the Act presupposes guilt only on the relevant individuals who were in charge and responsible for the conduct of the company at the time of the contravention of the Act. Section 48(1) also permits this presumption to be rebutted if relevant individual(s) can demonstrate that the infringing act was committed without their knowledge or they had exercised due diligence to prevent such contravention. In contrast, under Section 48(2), the consent, connivance or neglect of the relevant individuals is established by their *de facto* involvement and is therefore not rebuttable. Additionally, Section 48(2) extends to any individual or person that has been involved with the company’s contravention and is not limited to persons in charge of the company at the time of such contravention. In the cases of *Sports Broadcasters (Case No. 02 of 2013)* (“**Sports Broadcasters Case**”) and *Dry Cell Batteries (Case No. 02 of 2016)* (“**Dry Cell Batteries Case**”), the former/ex-employees of the Opposite Parties were also penalised under Section 48 for contraventions of the Act.

The maximum penalty that can be imposed on individuals associated with a company’s cartel conduct under Section 27 is 10% of his/her income for each year during the continuance of

such conduct by the company. However, in practice, on most occasions, the CCI has computed penalties by applying a rate of 10% to the individuals' average income for the three preceding financial years.

In *PK Krishnan (Case No. 28 of 2014)*, the CCI not only imposed a penalty of 10% of the individuals' average income for the three preceding financial years, but also specifically directed the All Kerala Chemists and Druggists Association to disassociate its management, governance and administration from two of its office bearers for a period of two years. Therefore, besides imposing monetary penalties on errant individuals of an organisation, the CCI has wide powers under Section 27 of the Act to pass any other order "it may deem fit". In case of companies, a similar risk (as highlighted above) would exist if the CCI were to order the suspension or removal of directors or key managerial personnel.

More recently, in *International Subscription Agency v. Federation of Publishers' and Booksellers' Associations in India ("FPBAI") (Case No. 33 of 2019)*, the CCI, apart from finding FPBAI to be in contravention of Section 3 of the Act, also found the incumbent Presidents of FPBAI liable in terms of Section 48 of the Act. The CCI hence penalised FPBAI to the tune of INR 200,000 and, in light of the fact that they are both senior citizens and honorary members earning no income from FPBAI, imposed a penalty to the tune of INR 100,000 each upon the incumbent Presidents of FPBAI, in terms of Section 27(b) of the Act.

On 10 July 2020, in *Chief Materials Manager, South Eastern Railway and Hindustan Composites Limited and Ors. (Case No. 03 of 2016)* and others, the CCI, pursuant to several complaints of alleged cartelisation, directed an investigation by the DG. During the DG investigation, several members of the parties being investigated came forward with vital disclosures that indicated cartelisation. The CCI held 10 of the parties guilty of contravention of Section 3. However, despite finding officials liable under Sections 48(1) and 48(2) of the Act, the CCI imposed no penalty on them and only directed them to cease and desist from indulging in cartelisation practices.

In the context of directors at least, an order of the CCI categorically directing the company to disassociate itself from a director is likely to trigger disqualification and vacation of office under Sections 164 and 167 of the Companies Act, 2013. Furthermore, the recently released compliance manual of the CCI also indicates the possibility of a CCI order disqualifying directors of companies. Further, in *Mahyco Monsanto Biotech (India) Pvt. Ltd. ("Monsanto") & Anr. v. Competition Commission of India & Anr. (SLP(C) No. 4254 of 2019)*, it was submitted by Monsanto therein that Section 48 would kick in only after the CCI passes an order under Section 27 of the Act. Monsanto filed the said appeal against a decision of the Delhi High Court. This decision had upheld the CCI order stating that the directors of the firm would be held liable for the affairs of the company in case the CCI concluded that they were the key persons responsible for the affairs of the company. This challenge to the liability of directors of a firm is presently pending before the Supreme Court.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Act does not include any provisions for the reduction of a penalty on the basis of financial hardship.

However, in *Express Industry Council of India and Jet Airways & Ors. (Case No. 30 of 2013)*, a case relating to a cartel for fixing of a fuel surcharge for cargo transport by airlines, the CCI considered the fact that the airlines were incurring losses and had substantial debts when deciding the quantum of penalty.

3.4 What are the applicable limitation periods?

The Act does not set out a limitation period for investigating matters relating to anti-competitive agreements. Further, the decision of the Supreme Court in the Excel Crop Case clarified that the CCI can examine anti-competitive agreements that have been entered into prior to the enforcement of Section 3 of the Act (i.e., 20 May 2009) and are either acted upon subsequently, or the effects of which continue after the enforcement of Section 3 of the Act. However, an appeal under Section 53B (1) of the Act will have to be filed within a period of 60 days from the date on which a copy of the order is received by the party.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The Act does not contain any provision in this regard.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Act does not contain any provision in this regard.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The Act does not contain any provision in this regard.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes, a leniency programme is provided for under Section 46 of the Act and supplemented by the CCI (Lesser Penalty) Regulations, 2009 ("**Leniency Regulations**") as amended in 2017. The Leniency Regulations govern the procedure and extent to which leniency (i.e., reduced penalties) can be granted to applicants who make vital disclosures on cartel activity. The term "vital disclosure" of information means full and true disclosure of information or evidence which would be sufficient to enable the CCI to form a *prima facie* opinion in relation to the existence of a cartel.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, the leniency programme in India provides for a marker system wherein "priority status" is granted to leniency applicants in order to determine the quantum of reduction in the penalties which could be imposed.

The CCI is empowered to grant an "up to 100%" reduction in fines, i.e., complete immunity, to the applicant who is the first to make "vital disclosure" to the CCI. Such information should either enable the CCI to form a *prima facie* opinion of the existence of the cartel or establish the contravention of Section 3 of the Act in a matter under investigation by the DG.

Subsequent leniency applicants who disclose evidence that provides "significant added value to the evidence" already in

possession of the CCI or the DG may also be granted leniency. The CCI can grant an applicant which is marked as second priority a reduction in penalty of “up to 50%”, whereas the third and subsequent applicants can be granted a reduction in penalty of “up to 30%”.

In practice, the CCI does not grant the first applicant an “up to 100%” reduction in fines in cases where an investigation has commenced, and the parties subsequently file a leniency application. In *Cartelisation with respect to tenders floated by Pune Municipal Corporation for Solid Waste Processing (Case No. 50 of 2015, Suo Motu Case No. 3 of 2016 and Suo Motu Case No. 4 of 2016)* (“**PMC Cases**”), all the parties filed their leniency applications after the commencement of the investigation. In this case, the CCI granted “up to 50%” reduction in fines to the first leniency applicant followed by the other applicants. In *Cartelisation in the supply of Electric Power Steering Systems (Suo Moto Case No. 07 (01) of 2014)* (“**EPS Case**”), wherein NSK Limited Japan (“**NSK**”) had disclosed the existence of the cartel, the CCI granted complete immunity by way of a 100% penalty reduction, whereas JTEKT Corporation (“**JTEKT**”), which had filed its leniency application during the pendency of the DG investigation, was granted a reduction of 50% in the penalty imposed on it. While the CCI has exercised its power to grant a 100% reduction to the first applicant in the Dry Cell Batteries Case and Sports Broadcasters Case, where the information brought a new cartel to light, it has also exercised its discretion and not awarded any reduction to the second and third applicants in one of the PMC Cases.

The Leniency Regulations require that an enterprise seeking leniency should, in addition to making vital disclosure, also cease participation in the cartel (unless ordered otherwise by the CCI) and fully cooperate with the CCI. Such cooperation is required throughout the investigation and other proceedings before the CCI. Further, relevant evidence pertaining to the cartel should not be concealed, destroyed, manipulated or removed by the leniency applicant.

The CCI passed its first order in a leniency case in 2017, seven leniency orders in 2018, two leniency orders in 2019 and one leniency order in 2020, wherein zero penalties were imposed. On 5 June 2020, in *Cartelisation in Industrial and Automotive Bearings and Ors. (Suo Motu Case No. 05 of 2017)* (“**Automotive Bearings Case**”), the CCI, pursuant to receipt of a leniency application, established cartelisation by four industrial bearings manufacturers, and held them liable in terms of Section 48 for acts of contravention of the Act by their respective companies. It is to be pertinently noted that the leniency application was filed during the DG investigation period. However, the CCI invoked zero penalties and only ordered the parties in contravention to cease and desist from indulging in cartel behaviour.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

While the Leniency Regulations permit the applicant to initially contact the CCI orally, the CCI will subsequently direct the applicant to submit a written application comprising the information specified in the Schedule to the Leniency Regulations, which includes the goods/services involved, the geographic market covered, the duration of the cartel, an estimate of the volume of the business affected by the cartel, and evidence supporting the existence of the cartel. Oral applications can be made in order to secure a marker.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Leniency Regulations mandate that the CCI treat the identity and all information received from the applicant as confidential. The CCI may subsequently, during the investigation process, request the applicant to waive confidentiality over relevant evidence to enable it to approach other entities which form part of the cartel.

The DG may disclose information in a leniency application if the applicant consents to the disclosure in writing, the disclosure is required by law, or the applicant has made a public disclosure of the information. Further, if the DG deems it necessary, it may disclose information in the leniency application, without the applicant’s consent, only after recording reasons in writing for such disclosure, and obtaining prior approval from the CCI.

The Leniency Regulations also provide for access to the case files not only to leniency applicants, but also to non-leniency applicants (including third parties/private litigants), who have been impleaded in leniency proceedings. Third parties, who are not parties to the proceedings, may be granted the right to access the non-confidential version of the file on application to the CCI. The Leniency Regulations grant those who have the right of access to file, the right to obtain copies of the non-confidential version of the evidence and information submitted by leniency applicants, after the DG’s investigation report has been forwarded to parties involved in any investigations by the CCI.

In 2019, in the EPS Case, the CCI released a redacted public version of the order, with a view to protect the confidential and commercially sensitive information put forth by the DG in its investigation report as well as the parties in their leniency applications. Further, in this case, upon mutual agreement between the parties, the CCI also ordered the creation of a “confidentiality ring”, pursuant to which a non-confidential *qua* parties version of the DG report was forwarded to the concerned parties as well as persons implicated under Section 48.

It is important to note that the DG must maintain confidentiality of such leniency applications and related documents until the time of the closure of the investigation and the publication of the formal order of the CCI. In case the CCI or the DG has agreed to provide confidential treatment to certain information for a certain period of time under Regulation 35 of the General Regulations, such information shall remain confidential for such specific duration of time (generally three to five years).

4.5 At what point does the ‘continuous cooperation’ requirement cease to apply?

The “continuous cooperation” requirement ceases to apply upon completion of the investigation and proceedings before the CCI.

4.6 Is there a ‘leniency plus’ or ‘penalty plus’ policy?

The Indian competition law regime does not include a “leniency plus” or “penalty plus” policy. The Competition Amendment Bill, 2020 proposed to introduce a “leniency plus” regime by offering further reduction in penalties to a leniency applicant for its activities in one market that leads to another cartel in another market. This Bill, however, has not yet come into force.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes, the 2017 amendment to the Leniency Regulations has brought clarity in this regard as it states that individuals involved in a cartel can act as whistle-blowers and also seek a reduction in penalty. To this end, the leniency applicant is required to specify the names of such individuals involved in the cartel at the time of submission to the CCI.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Act does not prescribe any procedure for settlement or plea bargaining.

7 Appeal Process

7.1 What is the appeal process?

Sections 53A and 53B of the Act stipulate that any person aggrieved by an order/decision of the CCI may appeal to the NCLAT within 60 days from the date of receipt of such order/decision. Under Section 53O, all proceedings before the NCLAT are deemed judicial proceedings, wherein the NCLAT has the same powers as a civil court. A final appeal from the NCLAT's order lies before the Supreme Court under Section 53T of the Act within a period of 60 days from the date of communication.

It should be noted that a *prima facie* order directing the DG to conduct an investigation is not appealable. Such an order under Section 26(1) of the Act is administrative in nature only, and does not entail civil consequences, per the ruling in *Competition Commission of India v. Steel Authority of India Ltd.* (2010) (10 CC 744). However, aggrieved parties have approached high courts to interfere/halt the CCI's investigation.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No, there are no specific provisions in the Act for suspension of the company's requirement to pay the fine. The erstwhile Competition Appellate Tribunal ("COMPAT") and, subsequently, the NCLAT as well as the Supreme Court, at their discretion, have typically required appealing parties to deposit between 10% and 25% of the total fine imposed by the CCI before hearing the appeal.

In the case of *Ambuja Cements Limited & Ors. v. CCI & Ors.*, the Supreme Court ordered the cement manufacturers to deposit 10% of the total penalty imposed on them by the CCI and upheld by the NCLAT, during the pendency of the appeal.

In another case, *Himmatlal Agrawal v. Competition Commission of India* (Civil Appeal No. 5029 of 2018), wherein the COMPAT had ordered the Appellant to deposit 10% of the penalty amount and dismissed the appeal upon his failure to do so, the Supreme Court held that the right to appeal was a statutory right, and

an appeal could not be dismissed due to the Appellant's failure to deposit the amount. However, it found that the stay order on recovery of the penalty by the CCI could be vacated if the deposit is not made.

It may also be noted that in the case of *SCM Soilfert Ltd. & Anr. v. CCI* (L.A. 55/2018 in A.T. No. 59/2015), the NCLAT clarified that interest is required to be paid on the penalty amount from the date it was due until the date when it is given to the CCI, regardless of the deposit with the COMPAT/NCLAT registry.

7.3 Does the appeal process allow for the cross-examination of witnesses?

There are no specific provisions in this regard. However, given that the NCLAT has the same powers as a civil court, cross-examination is permissible.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

The NCLAT under Section 53A(b), read with Section 42A or 53Q(2) of the Act, has been empowered to adjudicate upon a claim for civil damages in cases of cartel conduct arising from:

- (a) findings of the CCI;
- (b) orders of the NCLAT in an appeal from the findings of the CCI; or
- (c) the contravention of orders of the CCI and the NCLAT.

The Act does not contain any provisions for "stand-alone" action. Therefore, it only contemplates "follow-on" actions.

8.2 Do your procedural rules allow for class-action or representative claims?

Section 53N(4) of the Act provides for a claim for loss or damages to be filed by way of class actions and representative claims.

8.3 What are the applicable limitation periods?

The Act does not provide a limitation period for filing an application for civil damages arising from cartel conduct. In cases where no period of limitation is prescribed, Indian courts generally adhere to a principle known as the "doctrine of laches", which provides that proceedings ought to have been initiated within a "reasonable period of time", and that a failure to do so results in serious prejudice and harm to the defendant and adversely impacts the ability of the defendant to defend itself.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Act does not contain any provisions relating to the "passing on" defence.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Under Rule 4 of the COMPAT (Form and Fee for Filing an Appeal and Fee for Filing Compensation Applications) Rules, 2009, if the amount of compensation claimed is less than INR 100,000, the

fees payable would be INR 1,000. If the amount of compensation claimed is more than INR 100,000, the amount of fees payable would be INR 1,000 plus INR 1,000 for every additional INR 100,000 claimed, subject to a maximum of INR 300,000.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

No such cases have been decided yet and there have not been any substantial out-of-court settlements. However, follow-on claims have been filed by the Metropolitan Stock Exchange of India against the National Stock Exchange, as well as by East India Petroleum Limited against South Asia LPG. These claims are presently pending before the NCLAT and any decision in these cases may provide guidance for follow-on claims.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Leniency

The trend from recent leniency cases indicates that the CCI will consider granting a 100% reduction in fines or complete immunity only where the applicant has come forward and has disclosed a cartel that was previously not known to the CCI. However, where the investigation has already been under way and a significant time had lapsed from the start of the investigation before the parties came forward and cooperated with the investigation, the CCI has tended to treat the leniency application as a case for reduction of fines as opposed to granting complete immunity.

Most recently, in 2019, this decisional practice of the CCI was evidenced in the EPS Case wherein NSK, which had disclosed the existence of the cartel, was granted complete immunity by way of a 100% penalty reduction, while JTEKT, which had filed its leniency application during the pendency of the DG investigation, was granted a reduction of 50% in the penalty imposed on it.

However, emerging trends disrupt this pattern of the CCI, as mentioned earlier in relation to the Automotive Bearings Case, where zero penalty was imposed.

Confidentiality rings

The CCI *vide* Press Release No. 08/2021-22, dated 17 May 2021, is presently in the process of working with stakeholders to review the extant confidentiality regime under Regulation 35 of the General Regulations and seeking public comments on the same. Such confidentiality rings will be aimed to enable all parties to have access to relevant documents, while ensuring that business-sensitive or commercially sensitive information is protected. The CCI intends to include such provisions in the CCI (General) Amendment Regulations, 2021. The effects of implementation of such provisions remain to be observed.

Price parallelism

In its seminal judgment in *Rajasthan Cylinders and Containers Ltd. v. Union of India* (2018 SCC OnLine SC 1718), the Supreme Court has conclusively held that parallel pricing alone is not sufficient for a finding of bid rigging and that market conditions can be responsible for such parallel behaviour. This decision clarifies the standard of proof required to establish bid rigging in an “oligopsony”, i.e., a market with only a few buyers. Since such a situation is prevalent in most markets involving large-scale competitive bidding in India (for instance, those involving the railways and various natural resources), this decision is of particular significance for companies operating in such markets with public sector undertakings as buyers.

Commercial justification

The CCI has also begun to consider commercial justifications more seriously when deciding on both abuse of dominance and cartel cases. In *Indian Oil Corporation and Ors. (Case No. 05 of 2018)*, the commercial justification provided by parties was accepted by the CCI in relation to a cartel case for the first time.

Emerging trend of investigation into tech companies

In *Flipkart Internet Private Limited v. Competition Commission of India* (SLP(C) No. 11558/2021) and *Amazon Seller Services Private Ltd. v. Competition Commission of India* (SLP(C) No. 11615/2021), the Supreme Court recently refused to halt the preliminary inquiry by the CCI into the alleged anti-competitive practices carried out by Flipkart and Amazon. This demonstrates a judicial demeanour inclined to not interfere in the functions of sectoral regulators, such as the CCI in investigating anti-competitive practices of large technology-based companies.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

It is interesting to note that the Act provides for the levy of a penalty based on the “turnover” of the culpable entities. However, the meaning of the term “turnover” has not been clarified in the Act. Therefore, the CCI has often levied penalties as a percentage of the “total turnover” in the past. In the Excel Crop Case, the Supreme Court sought to correct this practice, by observing that such a practice would bring about inequitable results, and clarified that a penalty ought to be levied on the “relevant turnover” of the culpable entities, i.e., the turnover pertaining to products and services that have been affected by the contravention. However, in the Sports Broadcasters Case, the CCI held that the concept of relevant turnover/profit requires proof that the parties are a multi-product company. Such a multi-product company must prove that its products/services are not related to and not dependent on the products that are involved in the cartel. Essentially, the parties must clearly indicate what proportion of their total turnover does not include the turnover from products/services that are not part of the cartel. If this cannot be proved, the CCI will calculate penalties based on the total turnover/profit, as opposed to a “restricted” turnover/profit that may be submitted by the parties.



Avaantika Kakkar is a Partner and the Head of Competition Practice at Cyril Amarchand Mangaldas. She is highly experienced in complex merger filings with the Competition Commission of India ("CCI") and was the lead lawyer in the first Phase II merger control case in India, as well as in the first few cases involving remedies/modifications. Her experience in corporate and securities laws, mergers & acquisitions, private equity and structured finance equips her uniquely for strategic advice on merger control.

She represents her clients on the enforcement side and provides strategic support on commercial arrangements and compliance issues and was involved with filing the first few leniency applications before the CCI. She is also one of the few lawyers in India with on-the-ground experience in dawn raids. Avaantika was a member of one of the working groups set up by the Competition Law Review Committee established by the Government of India to review the Indian competition law regime.

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