DECONSTRUCTING THE LEGAL FRAMEWORK OF CARTELS IN INDIA – METHODS OF DETECTION, EVIDENTIARY STANDARDS AND PENALISATION

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Abstract

The Parliament of India enacted the Competition Act, 2002 ("Act") with the intent of preventing practices having adverse effect on competition. This objective is clearly reflected in Section 3 of the Act that prohibits certain types of agreements that are anti-competitive in nature. Cartel agreements find a place amongst other anti-competitive agreements that are prohibited under Section 3 of the Act. However, a major challenge that the competition regulators across the world face today is that such agreements are often entered into in great secrecy and there is seldom any direct evidence available with regard to their existence. In such a scenario, the regulators are often compelled to rely either on circumstantial evidence entirely, or in part, coupled with the little direct evidence available. In this paper, the authors discuss the evidentiary standards that are followed by competition regulators in cases of cartelisation. Further, the authors go on to discuss the methods of cartel detection that are being followed in India and the European Union. In the last part, the authors discuss the penalty regime of India and European Union and conclude with some suggestions.

INTRODUCTION

The Indian Competition Act, 2002 defines a Cartel as *"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."*[1] The Act goes on to prohibit agreements that are anti-competitive and are likely to cause an appreciable adverse effect on competition ("**AAEC**").[2] These include agreements that directly or indirectly determine sale prices, allocate a geographical area of production, lead to big rigging and limit or control production, supply, etc.[3] Thus, Section 3(3) of the Act largely covers all cases of cartelisation and prohibits the same. A similar regime is followed across many jurisdictions, such as the United States[4] and the European Union ("**EU**").[5]

Cartels are arguably the most perilous forms of agreement. A cartel agreement replaces market participants' free will in making business decisions, thereby restricting the free market

[1] The Competition Act, 2002 § 2(c).
[2] The Competition Act, 2002 § 3.
[3] The Competition Act, 2002 § 3(3).
[4] The Sherman Antitrust Act, 1890 § 1.
[5] Treaty on the Functioning of the European Union, 2007 § 101.

mechanism or competition.[6] Restraint of the free market mechanism often leads to inefficiency of production resources, thereby leading to a comparatively 'high price' and 'low production' because cartels prevent destruction of relatively inefficient high-cost enterprises.[7] The reduced pressure to reduce cost through innovation causes considerable harm to production efficiency and this ultimately ends up causing considerable harm to the consumers' interests.[8]

Owing to the aforementioned reasons, Cartels are viewed very seriously under the competition laws of all countries, including India. In fact, the Competition Commission of India ("**CCI**") is empowered to impose a penalty which can be as high as three times the profit of the company for each year of continuance of the cartel or 10% of the company's turnover for each year of continuance of the cartel, whichever of the two is higher.[9] However, that said, it must be understood that such agreements are often entered into in great secrecy and it may be extremely difficult to find evidence against the parties and detect the same.

In light of the same, in this Article, the authors seek to discuss the evidentiary standards that are followed in detection of cartels, considering that direct evidence is seldom available. Further, the authors go on to discuss the methods that are followed to detect cartels – ranging from dawn raids to the leniency programme. Finally, the authors discuss the methods for calculation of the quantum of penalty that is to be imposed.

EVIDENTIARY STANDARDS FOLLOWED

A fact in issue may either be proved by way of direct evidence or through indirect or circumstantial evidence. The difference between the two is that direct evidence is not based on inferential reasoning, however, circumstantial evidence is.[10] In case of cartels, meeting or communication between the subjects and description of the substance of their agreement would qualify as direct evidence.[11] On the contrary, circumstantial evidence would not identify these elements specifically, but would be sufficient in allowing the courts to infer that a cartelisation agreement has been entered into by the parties.[12] This means that circumstantial evidence also

[6] JOHN SANGHYUN LEE, STRATEGIES TO ACHIEVE A BINDING INTERNATIONAL AGREEMENT ON REGULATING CARTELS, 30 (2016).
[7] *Ibid.*
[8] *Ibid.*
[9] The Competition Act, 2002 § 27(b).
[10] *Circumstantial Evidence In The Context of Competition Law,* ASEAN (Feb. 21, 2019, 09:44 PM), https://asean.org/storage/2018/11/Circumstantial-evidence.pdf.
[11] *Prosecuting Cartels without Direct Evidence of Agreement,* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Feb. 21, 2019, 10:28 PM), http://www.ciaonet.org/attachments/11327/uploads.
[12] *Ibid.*

includes evidence of communication between the suspected parties of the cartel and economic evidence with regard to the relevant market and conduct of the parties.[13]

While it cannot be denied that the credibility of direct evidence is more than that of circumstantial evidence, it must be understood that with the advent of technology and globalisation, it is extremely difficult to acquire the same. This is so because transactions have now become digitalised and even beyond geographical boundaries of the concerned state. However, competition law cases across the world evince that circumstantial evidence cannot solely be relied on for the detection of cartels. In the United States, it is a well-settled law that merely parallel conduct that is consistent with permissible competition, without any other evidence to support the same, would be insufficient to support even the inference of conspiracy.[14] This means that circumstantial evidence must be corroborated with direct evidence. The United States Court of Appeals also refused to rely on circumstantial evidence in the case of Blomkest Fertilizer due to the possibility of independent action.[15]

Further, so far as the EU is concerned, it recognises the right of the economic operators to adapt intelligently to the existing and anticipated conduct of their competitors and in that light, the European Court of Justice observed that "*parallel conduct cannot be regarded as furnishing proof of concertation* ***unless concertation constitutes the only plausible explanation for such conduct.***[16] This means that the only way parallel conduct, which qualifies as circumstantial evidence, could be exclusively relied on to prove cartelisation is if there is no other explanation of such conduct.

In India, the CCI was initially of the belief that cartels cannot be proved without the presence of direct evidence.[17] However, the CCI finally deviated from this view and relied purely on circumstantial evidence, when direct evidence was not available.[18] In doing so, the CCI observed that "*If direct evidences are not present, but circumstantial evidences do indicate harm to the competition at a market place, the Commission will certainly take cognizance of the same."*[19] Thus, while the evidentiary standards initially followed by the CCI reflected the necessity of proving the anti-

[13] *Ibid.*
[14] Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp. et al., 465 U.S. 752 (1986).
[15] Blomkest Fertilizer, Inc v. Potash Corporation of Saskatchewan, 203 F 3d 1028 (2000).
[16] AhlströmOsakeyhtiö and Others v. Commission of the European Communities [1993] ECR I-1309, 978 – 979.
[17] Consumer Online Foundation v. Tata Sky Ltd. & Others, Case No. 02/2009 (2011).
[18] Builders Association of India v. Cement Manufactures Association & Ors, Case No. 29/2010 (2012).
[19] *Ibid.*

competitiveness of an act "beyond reasonable doubt," the position has diluted over time to veer towards the "balance of probabilities" test.

RULE OF PRESUMPTION

The agreements entered into by enterprises at the same stage of the production chain for either fixing price or for limiting production for sharing markets are called horizontal agreements.[20] Cartels come under the purview of horizontal agreements.[21] It must be understood that the Act does not specify the party on whom the burden of proof rests. As per the Act, with an exception in case of joint ventures, horizontal agreements that directly or indirectly determine sale prices, allocate a geographical area of production, lead to big rigging and limit or control production, supply, etc, *"shall be presumed"* to have an AAEC.[22] This provision embodies the spirit of the *"per se"* rule of presumption. Thus, if the party alleging the existence of a cartel can prove that an agreement entered into by the parties falls under the purview of this Section, there shall be a rebuttable presumption[23] that there is an AAEC.

In such a scenario, the parties alleged of entering into an anti-competitive agreement may either prove that their actions did not fall under the purview of the said Section, or they may resort to the grounds laid down under Section 19(3) of the Act, for the CCI to consider while determining whether an agreement is anti-competitive or not. In the latter case, presumption process is reduced to *"rule of reason"* and the competition regulator is then required to consider and analyse the reasonableness of classifying a certain agreement as anti-competitive, based on grounds mentioned under Section 19(3) of the Act. In fact, Section 19(3) provides an indirect exception to Section 3(3) of the Act.[24] Thereby meaning that the CCI is required to apply the *"rule of reason"* in order to determine whether an agreement is anti-competitive or not.

METHODS OF DETECTION OF CARTELS

a. MARKET SCREENING

Considering that direct documentary evidence is seldom available in cartel investigations, the CCI often places reliance on economic evidence procured from markets screening. Such evidence is based on a closer examination of the market indicators, such as prices, market shares, bids, quantities etc., in order to find a pattern of collusive behaviour.[25] Methods of cartel detection by way of screening may be either structural or behavioural. While structural approach

[20] PSA, *Anti-Competitive Agreements: Tests And Tribulation,* MONDAQ (Feb. 23, 2019, 10:31 PM), http://www.mondaq.com/india/x/250048/Trade+Regulation+Practices/AntiCompetitive+Agreements+Tests+And+Tribulation.
[21] *Ibid.*
[22] *Supra* Note 3.
[23] Sodhi Transport Co. v. State of Uttar Pradesh, AIR 1980 SCC 1099.
[24] Neeraj Malhotra v. Deutsche Bank Home Finance, Case No. 5 of 2009 (2010).
[25] Hana Blstakova, Detection and Survival Analysis of Cartels. Evidence from the European Union. (2016)

relies on data about the industry to find out whether there is a likelihood of cartel formation in the industry, the behavioural approach deals with data that is itself evidence that a cartel has formed.[26] Screening is usually done to identify potential parties for investigation and to assess the damage caused by such screening.[27]

b. DAWN RAIDS

A dawn raid means an unannounced visit to the office of suspected cartel operators for the purpose of seizing documentary or electronic evidence.[28] These surprise inspections are made without warning and are usually conducted at times when least expected, such as the crack of "dawn," or during weekends – hence, the name.[29] Such a raid is usually conducted when the competition regulator of the concerned country has a strong suspicion that serious antitrust infringements have occurred.[30] The 'raids' are conducted in a covert manner so as to ensure that the party under investigation does not get the chance to scuttle the search in any manner and sanitize records.[31]

In India, the office of Director General ("**DG**"), being the investigative arm of the CCI, has been conferred with the power to carry out unannounced search and seizure inspections and the parties being raided are obliged to cooperate with the officials during the same.[32] However, the Competition Act, 2002 allows the DG to only conduct these raids after receiving an approval from the Chief Metropolitan Magistrate, New Delhi. This condition was absent in the erstwhile Monopolistic and Restrictive Trade Practice Act, 1969. Per publicly available information, the DG in India has only conducted raids twice in order to bust cartels i.e. upon dry cell manufacturers[33] and upon the top beer brewers.[34]

c. LENIENCY PROGRAMMES

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[26] Joseph E. Harrington, *Behavioral Screening and Detection of Cartels,* SEMANTIC SCHOLAR (Feb. 24, 6:40 PM), https://pdfs.semanticscholar.org/cdd8/80848e6240a7c5d17f0fc736a75046bb739a.pdf.

[27] *Supra* Note 25.

[28] Bert Foer, Mauro Grinberg, Udai Mehta, Sanjay Pandey, *Study of Cartel Case Laws in Select Jurisdiction – Learnings for the Competition Commission of Inida,* CUTS INTERNATIONAL (Feb. 25, 2019, 10:02 AM), http://www.cuts-ccier.org/CARTEL/pdf/Study_of_Cartel_Case_Laws_in_Select_Jurisdictions-Learnings_for_the_CCI.pdf.

[29] MM Sharma, *Dawn Raids – When CCI (India) Comes Knocking?,* MONDAQ (Feb. 25, 2019, 10:05 AM), http://www.mondaq.com/india/x/362196/Trade+Regulation+Practices/Dawn+Raids+When+CCI+Comes+knocking.

[30] *Ibid.*

[31] *Ibid.*

[32] The Competition Act, 2002 § 41.

[33] Anshuman Sakle and Soham Banerjee, *Leniency Regime Takes A Step Forward – Reduction in Penalty for Battery Manufacturers*, SCC ONLINE (Feb. 25, 2019, 12:59 PM), https://www.scconline.com/blog/post/2018/08/18/leniency-regime-takes-a-step-forward-reduction-in-penalty-for-battery-manufacturers/.

[34] Aditya Kalra, Aditi Shah, Abhirup Roy, *Exclusive: Top brewers in India raided by antitrust watchdog CCI in price-fixing probe – sources*, REUTERS (Feb. 25, 2019, 01:00 PM), https://in.reuters.com/article/india-regulator-brewers/exclusive-top-brewers-in-india-raided-by-antitrust-watchdog-cci-in-price-fixing-probe-sources-idINKCN1MM0BW.

Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency.[35] Lately, a transparent and predictable leniency programme has proved to be an effective tool to detect, investigate and combat cartel cases worldwide.[36]

There are three main components of a leniency programme - a set of conditions to be satisfied for getting benefits under the leniency programme, the procedure for grant of lesser penalty, and the quantum of penalties that are waived when lenient treatment is meted out to a cartel member who cooperates with the competition regulator by submitting information on the cartel[37] Once an applicant satisfies the conditions laid down by the competition authorities, it is rewarded with the benefit of lower fines, shorter sentences or less restrictive orders that might have been imposed if the relevant cartel had been discovered without the whistleblowers' cooperation. Complete leniency may also be awarded in some cases.

i. THE INDIAN LENIENCY PROGRAMME

The Indian leniency programme is provided for in the Act,[38] which is to be read with the leniency regulations.[39] These govern the procedure, qualification and extent to which leniency (i.e reduced penalties) can be granted to the applicants. The leniency programme covers infringement of any of the situations mentioned under Section 3(3) of the Act. In order for an applicant to avail the benefit of lesser penalty under the Regulations, the applicant shall:

> " 1) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
>
> 2) provide vital disclosure in respect of contravention of the provisions of section 3 of the Act;
>
> 3) provide all relevant information, documents and evidence as may be required by the Commission;
>
> 4) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and

[35] International Competition Network, "*Drafting and Implementing an Effective Leniency Programme*", *Anti-Cartel Enforcement Manual,* INTERNATIONAL COMPETITION NETWORK (Feb. 21, 2019, 9.32 PM), https://www.internationalcompetitionnetwork.org/working-groups/cartel/investigation-enforcement/.
[36] Competition Commission of India, *Competition Act, 2002 - Leniency Programme,* COMPETITION COMMISSION OF INDIA (Feb. 28, 2019, 6:57 PM), https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf.
[37] *Ibid.*
[38] The Competition Act, 2002 § 46.
[39] The Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter 'Leniency Regulations').

5) not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establish of a cartel."[40]

The term 'vital disclosures' of information means full and true disclosures 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.[41]

After these conditions are met by the applicants, the CCI will exercise its discretion, to determine the reduction in the monetary penalty, by taking into account the stage at which the applicant approached the CCI with the relevant information; the evidence which was already in the position of the CCI; the quality of the information in the disclosure made by the applicant; and the facts and circumstances of the case.[42]

There also exists a marker system in the Indian leniency regime where a 'priority status' may be granted to the applicant based on the disclosure made. This is useful in order to determine the extent of reduction of the penalty which may be imposed. Under the leniency regime, the CCI is empowered to grant a benefit of reduction in penalty of up to a 100% to applicant who makes the first vital disclosure enabling the CCI to arrive at a 'prima facie' opinion regarding the existence of a cartel.[43] Additionally, the CCI must not, at the time of application, have sufficient evidence to form such an opinion about the existence of the cartel.[44] The applicant may also be granted a reduction in penalty if the disclosure helps in establishing the contravention of Section 3.[45]

Subsequent leniency applicants who disclose evidence that provides 'significant added value to the evidence' already in possession with the CCI or the DG may also be granted leniency.[46] The CCI can grant an applicant which is marked as second priority a reduction in penalty of up to 50%,[47] whereas the third and subsequent applicants can be granted a reduction in penalty of up to 30%.[48] The leniency regulations also provide for confidentiality.[49] The identity of the applicant

[40] Leniency Regulations, Regulation 3(1).
[41] Leniency Regulations, Regulation 2(1)(i).
[42] Leniency Regulations, Regulation 3(4).
[43] Leniency Regulations, Regulation 4(a).
[44] *Ibid.*
[45] *Ibid.*
[46] Leniency Regulations, Regulation 4(b).
[47] Leniency Regulations, Regulation 4(c)(i).
[48] Leniency Regulations, Regulation 4(c)(ii).
[49] Leniency Regulations, Regulation 6.

along with the information and any related documents provided by it shall be treated as confidential.[50] However, the regulations also state that this information may be disclosed if:

1) the disclosure is required by law;
2) the applicant's consent to such disclosure has been obtained in writing;
3) where there has already been a public disclosure of the confidential information by the applicant.[51]

ii. AMENDMENT TO THE LESSER PENALTY REGULATIONS, 2017

In 2017, the regulations were amended and this had far-reaching consequences on the leniency regime in India. The amended regulations addressed some of the substantive issues faced by the industry. Perhaps the most significant change made to the regulations was that the definition of "applicant" was expanded to include individuals (involved in a cartel on behalf of the enterprise) and make them eligible for leniency. The pre-amendment regulations were only a mirror of the provisions of the Act and limited the term "applicants" to mean enterprises only and individuals could be penalised in their individual capacity.[52] The earlier regulations suffered from a lack of clarity over whether individual employees would get the benefit of leniency which made enterprises hesitant to approach the CCI.[53]

The next significant change was brought about in the marker system. The pre-amendment regulations only provided a maximum of three applicants with the benefit of availing the lesser penalty. However, after the amendment, this limitation has been done away with. This is an important change as even subsequent applicants may be granted a reduction of 30% percent. Often enterprises/individuals shied away from conceding to their involvement in cartels due to the risk of submitting self-incriminating evidence without being certain as to whether they will eventually rank within the first three markers and consequently, be able to receive reduction in penalty.[54] With the introduction of this amendment, not only will more enterprises/individuals be encouraged to disclose evidence on their respective collusive conduct but also will enable the CCI to actively bust cartels in the future.[55]

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[50] *Ibid.*
[51] *Ibid.*
[52] Karan Singh Chandhiok, *India's leniency program 2.0*, CHANDHIOK (Feb. 28, 2019, 7:13 PM), https://www.chandhiok.com/amendments-to-india-s-leniency-prog.
[53] Samir R Gandhi, Aditi Gopalkrishnan and Sangeetha Mugunthan, *India: Cartels*, THE ASIA-PACIFIC ANTITRUST REVIEW 2018 (Feb. 28, 2019, 07:20 PM), https://globalcompetitionreview.com/insight/the-asia-pacific-antitrust-review-2018/1166764/india-cartels#endnote-001.
[54] Anshuman Sakle, Bharat Budholia, *Leniency Regulations Amended,* MONDAQ (Feb. 28, 2019, 07:35 PM), http://www.mondaq.com/india/x/625514/Trade+Regulation+Practices/Leniency+Regulations+Amended.
[55] *Ibid.*

Finally, the amendment also made changes to the confidentiality of information submitted in the leniency application. Now, the DG may disclose any confidential information to any party provided it is in furtherance of the investigation and prior approval for such disclosure has been obtained from the CCI.[56] This amendment is strange as confidentiality is of extreme importance to leniency applicants who run the risk of follow-on civil damages claims and reputational loss. Without broad and robust confidentiality protection, potential leniency applicants may be deterred from coming forward to report cartel activity.[57]

The most laudable development pursuant to the 2017 amendments is that the grant of a reduction in penalty to an applicant who meets the conditions required is now mandatory. Prior to the 2017 Amendment, it was at the discretion of the CCI to reduce a penalty and by how much, if at all. However, the percentage by which a penalty would be reduced is still discretionary and there is still no guarantee of a full reduction even if all the criteria are met.[58]

iii. DECISIONAL PRACTICE

While the leniency regime in India is still in its nascent stage, it has been burgeoning over the last couple of years. The CCI has passed four orders in less than two years granting a reduction in penalty under Section 46 of the Act and the leniency regulations, each of which will be briefly analysed to understand the different approaches taken.

A. SUO MOTO CASE NO. 03 OF 2014

The CCI passed its first order in a matter related to cartelisation in a tender floated for the supply of brushless DC fans to the Indian Railways.[59] The CCI took up the case *suo moto* after it received certain information from the Central Bureau of Investigation ("**CBI**"). While the investigation was ongoing, one of the cartel members (Pyramid Electronics) approached the CCI with a leniency application and submitted detailed information which was used to establish the existence of a cartel.

In the order, the CCI carefully married its decision to the letter of law as it noted that the applicant was the first and only party to accept the existence of a cartel and that the evidence

[56] *Supra* Note 49.
[57] Gayatri Raghunandhan and Abdullah Hussain, *India: Competition Law Year in Review – Highlights Of 2018*, MONDAQ (Feb. 27, 2019, 04:11 PM), http://www.mondaq.com/india/x/776364/Antitrust+Competition/Competition+Law+Year+in+Review+Highlights+Of+2018?type=relatedwith.
[58] Farhad Sorabjee and Amitabh Kumar, *The Cartels and Leniency Review – Edition 7: India,* THE LAW REVIEWS (Feb 26, 2019, 11:55 PM), https://thelawreviews.co.uk/edition/the-cartels-and-leniency-review-edition-7/1179747/india.
[59] 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 of 2014.

submitted by them supported the evidence provided by the Bureau along with establishing the *modus operandi* of the cartel.[60] The CCI also took into account the 'value addition' of the applicant's disclosure and co-operation. This is important as it highlights that merely making a disclosure and co-operating with the investigation does not, by itself, guarantee leniency to the applicant.

As the applicant was the first and only applicant, it was entitled to a 100% reduction in penalty. Since the application was filed at a later stage of the investigation and not at the very beginning, the CCI decided that a reduction of 75% should be granted to Pyramid Electronics. The CCI limited itself to the scope of the Regulations while deciding which factors to account for in granting leniency. Market players were ensured predictability in terms of their treatment under the law.[61]

B. SUO MOTO CASE NO. 02 OF 2016

The CCI passed its second order in the case of cartelisation amongst the 3 leading suppliers of zinc-carbon dry cell batteries. The three companies, Eveready, Nippon and Panasonic were held to be guilty of restricting output and price-fixing by the CCI. The CCI initiated an investigation after it received a leniency application from Panasonic. In its application, Panasonic made several disclosures which were crucial in assessing the domestic market structure of the zinc-carbon dry cell batteries, nature and extent of information exchanges amongst the companies with regard to the cartel and identifying the names, locations and email accounts of individuals actively involved in the cartel activities. It also enabled the DG to conduct dawn raids at the premises of the manufacturers and seize quality evidence in the form of emails, handwritten notes and various other documents.[62] Thus, it was held that the disclosures made by the applicant and its continuous co-operation was crucial in enabling the CCI to order an investigation into the matter and eventually establishing the contravention of Section 3. This case was also the first time the CCI had the opportunity to deal with the question of how subsequent applicants are to be treated. Eveready and Nippon also filed leniency applications but they were not granted the same reduction as Panasonic. This was primarily because the information submitted by the subsequent leniency applicants did not result in a 'significant value addition' to the CCI's investigation.[63] However, the second and third applicants were still granted a reduction of 30% and 20%

[60] Nidhi Singh and Shivani Swami, *Evolving leniency regime under the Indian competition law*, OXFORD BUSINESS LAW BLOG (Feb 27, 2019, 09: 25 AM), https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/evolving-leniency-regime-under-indian-competition-law.
[61] *Ibid.*
[62] In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Moto Case No. 02 of 2016.
[63] *Ibid.*

respectively in light of their co-operation and corroboration of evidence. This somewhat goes against the decision made in the Brushless DC fans case[64] where the value addition factor was ready in conjunction with the co-operation of the parties to decide on the leniency application.

C. CASE NO. 50 OF 2015

This case was filed on information received from a public charitable trust against a group of six firms who bid for tenders issued by the Pune Municipal Corporation.[65] After the DG began its investigation into the matter, all six firms filed leniency applications before the CCI. Out of these six applications, four were granted a reduction in penalty as the CCI deemed that their co-operation and the information provided by them was useful in establishing the contravention of Section 3 and establishing the existence of a cartel.

However, this order did not clear up the ambiguity left by the Dry Cell Battery case.[66] This is because the fifth and sixth leniency applicants were not granted any reduction in penalty. The CCI in its order mentioned that the evidence provided by the fifth and sixth applicants did not provide any significant value addition. The order suffers because the fifth applicant co-operated with the CCI during its investigation and provided evidence in its possession, which helped in establishing the *modus operandi* of the cartel.[67] While a majority of the evidence was already in the possession of the CCI, the evidence of the fifth applicant did add some value to the investigation but it was not afforded the same leniency as the other subsequent leniency applicants. Mere co-operation was held to be enough by the CCI in its order in the Dry Cell Battery case but it did not follow the same reasoning reasoning in this case.

D. SUO MOTO CASE NO. 02 OF 2013

The most recent decision of the CCI came in the case of a bid rigging arrangement of a cartel in the broadcasting service industry.[68] Globecast disclosed the existence of a cartel in the industry in its leniency application and was granted the first priority status. It made vital disclosures which helped the CCI in forming a prima facie opinion regarding the existence of the cartel and its *modus operandi*. The CCI held that at the time of the application, it did not have evidence regarding the existence of a cartel in that industry. Due to these reasons, Globecast was granted a 100% reduction in penalty.

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[64] 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 of 2014.

[65] Case No. 50 of 2015

[66] In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, Suo Motu Case No. 02 of 2016.

[67] Pierre Uppal, *Competition Violators Escape: Lean on Leniency,* MONDAQ (Feb 26, 2019, 10:33 PM), http://www.mondaq.com/india/x/761976/Cartels+Monopolies/Competition+Violators+Escape+Lean+On+Leniency+Regime.

[68] In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters, Suo Motu Case No. 02 of 2013.

In case of Essel Shyam's application, the CCI noted that the application was made after the CCI had formed a prima facie opinion in the matter based on the evidence submitted by Globecast. It corroborated the evidence submitted by Globecast and also furnished additional facts which, though not vital to the establishment of bid rigging, were nonetheless important in the background of the other information exchanged. In light of this, the CCI granted a 30% reduction in penalty to Essel Shyam.

This order was welcomed as the CCI has carefully considered its previous decisions and the relevant factors laid down in them along with the regulations while arriving at its final decision.

LENIENCY REGIME IN THE EUROPEAN UNION

EU is considered to have one of the most advanced and developed competition law regimes in the world. Several developing jurisdictions have based their competition regimes on the EU. It also has a considerable developed leniency regime which, as mentioned before, is crucial for the cartel enforcement.

The framework for the EU leniency regime has been set out in the "Commission Notice on Immunity from fines and reduction of fines in cartel cases".[69] The European Commission ("**Commission**") has issued separate guidelines on the calculation of fine which are to be imposed on cartel participants.[70]

The requirements to qualify for immunity from any fine are set out in Section II of the regulations and state that an if an undertaking is the first to submit evidence and information which, in the Commission's view, will enable it to carry out a targeted inspection in connection with the alleged cartel; or find an infringement of Article 81 of the Treaty Establishing the European Community[71] in connection with the alleged cartel.[72] Apart from these conditions, there are also a few other conditions such as how the undertaking must be the first to approach the Commission, continuous co-operation and more which are also a part of the Indian regime.

[69] Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2006/C 298/11) (Hereinafter 'Notice on Leniency').
[70] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02) (Hereinafter 'Guidelines on fines').
[71] Article 81, Treaty Establishing the European Community.
[72] Notice on Leniency, Point 8.

Though there are considerable similarities in the requirements under the Indian and European regime, a major difference is that an applicant is given complete immunity under the European regulations. In India, the CCI has discretion to grant a reduction in penalty of "up to 100%".[73] The grant of complete immunity is an important incentive for a cartel undertaking to approach the Commission as it eliminates any possibility of the Commission unreasonably granting anything less than a 100% reduction in the fine.

Section III of the Regulations provides that the first undertaking which adds significant value to the evidence already in possession of the Commission will be granted a reduction in fine.[74] In case the Commission is satisfied that the new information adds significant value and also meets the other conditions, it will be granted a reduction in fine[75] of 30-50%.[76] The second and any subsequent undertaking to add significant value will be granted a reduction of 20-30% and up to 20% respectively.[77]

While the Indian leniency regime also makes individuals eligible for leniency[78], no such provision exists under the European regime as individuals are not subjected to any administrative penalties for cartel participation on behalf on undertakings under EU law. EU cartel law also does not impose any penalties on employees and directors of undertakings who have applied for leniency if they refuse to co-operate with the applicant.[79]

An interesting feature of the European leniency regime is the option with applicants to file an application in hypothetical terms.[80] In this case, the undertaking does not need to reveal its identity or the identity of the other participants in the alleged cartel but must, however, identify the product or service concerned by the alleged cartel, the geographic scope and the estimated duration of the cartel.[81] The applicant must also provide the Commission with a detailed list of evidence it proposes to disclose at a later date whilst safeguarding the hypothetical nature of the application.[82]

PENALTIES

[73] *Supra* Note 43.
[74] Guidelines on fines, Section III.
[75] Notice on Leniency, Point 24.
[76] Notice on Leniency, Point 26.
[77] *Ibid.*
[78] Leniency Regulations, Regulation 3(1A).
[79] Matthew Levitt, Christopher Thomas and Falk Schoning, Hogan Lovells, *Cartel Leniency in EU: Overview,* THOMSON REUTER PRACTICAL LAW (Feb 26, 08:10 PM), https://uk.practicallaw.thomsonreuters.com/0-517-4976?transitionType=Default&contextData=(sc.Default).
[80] Notice on Leniency, Point 16.
[81] *Supra* Note 79.
[82] *Supra* Note 80.

Under the Act, the CCI is empowered to impose penalties in case of cartel agreements. The Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.[83] This is a significant deterrent for enterprises from entering into agreement in contravention of Section 3.

The provision states that the quantum of penalty will be calculated based on the 'turnover' of the company. There was considerable ambiguity over whether this referred to the 'relevant turnover' or the turnover of the entire company. This was especially important for enterprises which produced multiple products as the penalty levied on them would be calculated after taking into account the turnover of the entire company and not just the turnover the company generated from the product(s) for which it entered into a cartel.

This ambiguity was put to rest by the Supreme Court in its decision in the *Excel Crop Care case*.[84] The matter originated from an allegation made by the Food Corporation of India (FCI) of contravention of Section 3(3) of the Act by the manufacturers of Aluminium Phosphide Tablets by 3 manufacturers. The CCI in its order held them to be in violation of Section 3(3) and, among other issues, decided to levy a penalty of 9% of the total turnover of the companies.

Feeling aggrieved by the decision of the CCI, the companies filed an appeal in the erstwhile Competition Appellate Tribunal ("**COMPAT**"). The COMPAT upheld the decision of the CCI on all issues except the quantum of penalty to be levied. According to it, the penalty should have been calculated based on the 'relevant turnover' of the company and not the total turnover as this was better aligned with the doctrine of proportionality.

The companies preferred an appeal to the Supreme Court. In its analysis, the court held that Section 27(b) does not explicitly state the word 'relevant' or 'total' while talking about turnover. In absence of a clear answer to this, the court held that a multi-product manufacturer may enter into an anti-competitive agreement for just one of its products and in such a case it would be inequitable to impose a penalty based on the total turnover of the company. It also said that there was no justification for including the other products of the enterprise while calculating the

[83] *Supra* Note 9.
[84] Excel Crop. Care Limited v. Competition Commission of India and Ors., AIR 2017 SC 2734 (Hereinafter 'Excel Crop Care').

penalty. Relying on various landmark judgements, the court held that an interpretation which brings out absurd or inequitable results must be eschewed.[85]

The Court also relied on the judgement of the Competition Appeal Court of South Africa in the case of *Southern Pipeline Contractors Conrite Walls (Pty) Ltd. v. The Competition Commission.*[86] The Competition Appeal Court held that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. The Appeal Court used the words 'affected turnover'. It also stated that there was a legislative link between the damage caused and the profits which accrue from the cartel activity. It determined the amount of penalty on the basis of guidelines issued by the EU and the Office of Fair Trade ("**OFT**") on the calculation of penalty based on turnover.[87]

Finally, in what is seen as the most important part of the judgement, the Supreme Court laid down a step-wise methodology for the imposition of penalties.

Step 1: The Relevant turnover must be determined. Relevant turnover has been held to be the entity's turnover pertaining to products and services that have been affected by such contravention. The Court also said that this definition was not exhaustive. It held that while assessing the penalty to be imposed on an offender, the authority making the assessment should take into account the entity's audited financial statements, and in the absence of audited statements, relevant records which reflect the entity's relevant turnover or estimate relevant turnover may be taken into account.

Step 2: After the initial determination of relevant turnover, the CCI may consider the appropriate percentage, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer, the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc.[88]

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[85] *Supra* Note 84.
[86] Southern Pipeline Contractors and Another v. Competition Commission (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 (1 August 2011).
[87] *Supra* Note 84.
[88] *Ibid.*

The guidelines laid out by the Supreme Court will help to eliminate the application of disproportionate penalties on enterprises and demonstrate appropriate mitigating circumstances for the imposition of a lesser penalty.[89] The Supreme Court's approach in this judgment indicates a healthy respect for foreign jurisprudence, which is tempered by the motivation to evolve indigenous jurisprudence based on, and appropriate to, the Indian constitutional and legal framework.[90]

[89] *Supra* Note 84.
[90] Rahul Goel, *Supreme Court Limits CCI's Penalty Powers: "Relevant Turnover" Upheld,* CYRIL AMARCHAND MANGALDAS (Feb 27, 2019, 07:44 PM), https://competition.cyrilamarchandblogs.com/2017/05/supreme-court-limits-ccis-penalty-powers-relevant-turnover-upheld/.

CALCULATION OF FINES IN THE EU

The calculation of fines for cartels under EU competition law is governed by the Guidelines on the Method of Setting Fines Imposed.[91] The guidelines adopt a two-step methodology to arrive at the final sum of the fine. Firstly, the Commission will determine a basic amount for each undertaking or association of undertakings.[92] Secondly, this basic amount may be adjusted upwards or downwards after taking into account a number of factors.[93] In any case, the total fine shall not exceed 10 % of the total turnover in the preceding business year of the undertaking participating in the infringement.[94]

For the calculation of the basic amount of the fine, the first thing the Commission will determine is the value of the undertaking's sales of goods or services to which the infringement relates in the relevant geographic area.[95] The relevant period for such determination is usually the last full business year. The Commission may also rely on any partial information or any other information which it considers relevant and appropriate in case where the information made available to it is not complete or is otherwise unreliable.[96]

After the value of sales has been determined, it is used to determine the basic amount of the fine. While determining this, the Commission takes into account the gravity of the infringement and this is multiplied by the duration of the infringement.[97] As a general rule, the value of sales taken into account will be set at an upper limit of 30%.[98] Anti-competitive agreements such as horizontal price-fixing and output limitation are considered to be the most dangerous and are usually determined towards the higher end of the scale.[99]

On a final determination of the basic amount, the Commission examines whether this amount may be adjusted[100] by analysing the aggravating[101] and mitigating[102] circumstances, if any. Aggravating circumstances include repeat infringements by an undertaking or if an National

[91] *Supra* Note 70.
[92] Guidelines on fines, Point 10.
[93] Guidelines on fines, Point 11.
[94] Guidelines on fines, Point 32.
[95] Guidelines on fines, Point 13.
[96] Guidelines on fines, Point 16.
[97] Guidelines on fines, Point 19.
[98] Guidelines on fines, Point 21.
[99] Guidelines on fines, Point 23.
[100] Guidelines on fines, Point 27.
[101] Guidelines on fines, Point 28.
[102] Guidelines on fines, Point 29.

Competition Authority finds an infringement of Article 81 or 82 of the Treaty Establishing the European Community which will lead to the basic amount being increased by up to 100% for each such infringement that is established.[103] Aggravating circumstances also include non-co-operation or obstruction of the Commission's investigation by the undertaking and the role of the undertaking in the cartel.[104]

Finally, the Commission will look at the mitigating circumstances before arriving an amount. Mitigating circumstances include if the undertaking participation in the cartel was a result of negligence and when the undertaking demonstrates that its involvement is limited and that it took steps to avoid implementing the agreement in the market by demonstrating competitive behaviour.[105] However, merely stating that it participated for a short duration will not be enough as this would have already been accounted for while calculating the basic fine.[106]

These guidelines lay down an effective method of calculating an appropriate fine for undertakings taking part in cartels. They are far more comprehensive than the provision laid down in the Competition Act, 2002[107] and also the guidelines laid down by the Supreme Court in the Excel Crop Care case.[108] The European approach to calculating fines by first determining the basic amount based on the value of sales is in line with the approach taken by the Supreme Court in Excel Crop Care. However, as the European law also takes into account the aggravating and mitigating circumstances, the method of calculation is more effective in the determination of an appropriate penalty. The decisions in Excel Crop Care was a welcome development but the calculation of fines under Indian competition can still improve.

CONCLUSION

In conclusion, we can say that the development of antitrust law in terms of cartels in India has come a long way from the days of vaguely worded provisions relating to cartels under the MRTP Act. However, it will not be wrong to say there is still room for development before it can be said that India has a robust and effective cartel detection and penalisation regime.

[103] Guidelines on fines, Point 28.
[104] *Ibid.*
[105] Guidelines on fines, Point 29.
[106] *Ibid.*
[107] *Supra* Note 9.
[108] *Supra* Note 84.

In terms of the leniency regime in India, over the past couple of years, it seems to have taken one step forward but two steps back.[109] The CCI's amended leniency regulations have far-reaching consequences for confidentiality as the information and identity of the applicant may be disclosed after receiving approval of the CCI.[110] This may turn out be a significant deterrent for applicants. Thus, the authors believe that there needs to be an amendment in the said provision and sufficient safeguards need to be put in place to ensure that the identity of the applicant is not disclosed.

Additionally, as discussed earlier, there seems to be inconsistency in the orders passed by CCI with regard to the rationale applied by it. A clarity on the position of law may be useful for all stakeholders.

Further, as pointed out in the discussion about penalty calculation, the law regarding grant of immunity to an applicant who fulfils all the requirements (at least at the primary stage of investigation) needs to be such that he is necessarily granted hundred percent immunity, rather than it being a discretion upon the CCI. This will act as an incentive for the parties to an alleged cartel to file leniency petitions, due to the surety of reduction of penalty.

Finally, in the authors' opinion, the guidelines for calculation of penalties in cartel cases laid down by the Supreme Court can be developed by the legislature into a full-fledged regulation, as is the case in the EU.

[109] *Supra* Note 57.
[110] *Supra* Note 49.