CRITICAL EXAMINATION OF THE USE OF AGGRAVATING AND MITIGATING FACTORS IN CARTEL CASES IN INDIA

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ABSTRACT

*Cartels are considered as one of the most egregious violation of competition law. In order to deter cartel conduct, the penalty should be 'optimal' and the scheme of fining should be clear and consistent. Moreover, the computation of penalty has to be guided by sound legal reasons. There has to be a scientific connection between the reasons provided and the final computed penalty. Lack of transparency in the adjudication of penalty leads to multiple court litigations and loss of credibility of the competition authority. The present article assesses the factors that have been employed by the Competition Commission of India ["**CCI**" or "**Commission**"] in the computation of penalty for cartelization and examines if the Commission has been consistent in the application of these factors.*

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I. INTRODUCTION: 'CARTELS'

'Cartel', in the simplest terms, means an arrangement or understanding between similarly placed firms in the market to 'not compete'.[1] This, in turn, robs the market of the very benefits competition is said to provide in the form of low prices, better and innovated products, and increased choices. Oligopolistic firms may choose to enter into a cartel arrangement to increase their market power. The profit maximizing decision of the cartel is akin to that of a monopolist and leads to similar negative effects including allocative inefficiency, productive inefficiency and dynamic inefficiency.[2] Cartels have the most direct impact on consumers as they face increased prices and reduced supply of products or services.[3] The impact of cartels becomes multifold when the same is considered in developing economies,[4] and especially with respect to small and medium enterprises. Since, the objective of a cartel is to limit or eliminate competition between competing firms and increase profits of the constituent members, without *"producing any objective countervailing benefits"*,[5] many jurisdictions of the world consider cartels as *per se* illegal. As per Section 3(3) of the Indian Competition Act, 2002 ["**ICA**"], cartels are presumed to have appreciable adverse effect on competition ["**AAEC**"] and therefore, the Commission is not required to

[1]As per Section 2(c) of Indian Competition Act 2002, 'cartel' *"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."*

[2]H. Leibenstein, 'Allocative Efficiency v. X-efficiency' (1966) 56 American Economic Review 392.

[3]The average increase of sale price due to price fixing cartels has been estimated to be around 10% and the average decrease in output to be close to 20%. See OECD 'Hard Core Cartels' (2000) <https://www.oecd.org/competition/cartels/2752129.pdf> accessed 30 September 2020. Cartels have been proven to cause great harm especially in poor and developing economies as it restricts access to essential goods and services. See also World Bank, 'Global economic prospects and the developing countries 2003 – investing to unlock global opportunities : Global economic prospects and the developing countries 2003 : investing to unlock global opportunities' (2003) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/867491468124755492/global-economic-prospects-and-the-developing-countries-2003-investing-to-unlock-global-opportunities> accessed 31 August 2020; UNCTAD, 'Impact of Cartels on the Poor' (2013) <https://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf> accessed 30 September 2020.

[4]M. Ivaldi and others, *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer 2016).

[5]Commission, 'Glossary of Terms used in EU Competition Policy' (2002) <https://op.europa.eu/en/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6> accessed 30 September 2020.

prove the anti-competitive effects of a cartel arrangement. The burden of proof shifts to the opposite parties to rebut the presumption of AAEC.[6]

The criticism for cartels stems not only from the economic front but also from the point of view of 'morality'. Cartels are said to involve an element of cheating. This can be evinced from the observations of the US Supreme Court, which termed it as *"deceptive, fraud, oppressive and opposed to public policy"*.[7] *Crowe and Jedličkova* try to offer a model to integrate economic and moral considerations to provide a justification for both, civil and criminal sanctions.[8] They see cartels as something that undermines the free forces of a competitive market and threaten consumer welfare leading to inefficiency.[9] The significant impact of cartels on the market economy coupled with low detection rate advocates for a more comprehensive enforcement regime.[10] It has been argued that the harm that is avoided from anti-cartel enforcement is only a fraction of total potential harm and therefore, deterrence is a much more effective way of removing harm than detection.[11]

II. SANCTIONING CARTELS

The imposition of fine is envisaged to act not only as a punishment for the offence committed but also to create enough deterrence to prevent both, the offenders and outsiders, from repeating the offence. To achieve deterrence, it is not just essential that the fine is high enough but it is equally important that the chances of detection are increased. Optimal fine has two reference points; harm caused to the society from the offence committed and the illicit profits made by the offender. Cost of enforcement is added in the cost to society. Imposition of fines in cartel cases can follow two approaches. As per the *Becker-Landes* approach, which follows the idea of restitution, fines should be *"equal to the harm that criminal activities have caused to society"* plus the enforcement costs divided by the

[6] *Rajasthan Cylinders and Containers Ltd. v Union of India* [2018] AC 3546/2014 (SC).

[7] *Federal Trade Commission v Sperry & Hutchinson Co.* [1972] 405 US 233, 241.

[8] Jonathan Crowe and Barbora Jedličkova, 'What's Wrong with Cartels?' (2016) 44(3) Federal Law Review 401.

[9] ibid.

[10] Ivaldi and others (n 4).

[11] Stephen Davies and Peter L. Ormosi, 'The Economic Impact of Cartels and Anti-Cartel Enforcement' (2014) Centre for Competition Policy, University of East Anglia Working Paper 13-7 v2 <http://competitionpolicy.ac.uk/documents/8158338/8235397/CCP+Working+Paper+13-7+v2+%282014%29.pdf/75e1ba67-d52f-4bf5-ac39-11c687a8ed83> accessed 30 June 2020.

probability of detection and conviction.[12] The second approach is dissuasive in nature rather than restitutive. Restitution fine, which seeks to recover the ill-gotten profits, may not be enough in aggregate because some cartels might go undetected or they might have already broken down. The dissuasive fine disincentives the very participation in cartel. If the firms come to realize that the net profit on account of cartel participation is negative, they will not participate or continue to participate in the cartel. Therefore, as per the second approach fines should be high enough to deter participation. Harm based penalties are generally preferred as the harm caused by cartels is greater than the benefits and therefore, has a higher likelihood to cause deterrence. Harm based penalty forces the cartel firms to *"internalize harm rather than simply taking away the gains made"* thereby, pushing the firms to invest in compliance, monitoring and prevention.[13]

Calculation of an optimal fine on the basis of the harm caused however, becomes difficult in light of the lack of precise data on overcharge, enforcement costs, and the rate of detection. While there have been some studies which estimate cartel overcharge,[14] and costs of enforcement, it is exceptionally difficult to correctly assess dead weight loss or "probability of detection and punishment".[15] Further, the formula ignores other effects of cartel like innovation costs or the 'umbrella effect' which adds to the social costs.

[12]Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 180; See also William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 UCLR 652.

[13]Bruce H. Kobayashi, 'Antitrust Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations' (2001) 69 George Washington Law Review 715, 736.

[14]Cartel overcharge is the difference between the collusion price and an artificial competitive benchmark price and capture the mark-up for purchasers due to cartelization. See F. Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012), ZEW Centre for European Economic Research Discussion Paper No. 12-050 <http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf> accessed 25 November 2020.

[15]Some studies have estimated the cartel overcharge in the range of 20-25% and detection rate in the range of 15-20%. See Y. Bolotova, J. Connor and D. Miller, 'Factors influencing the magnitude of cartel overcharges: An empirical analysis of the U.S. Market' (2008) 5(2) Journal of Competition Law & Economics 361; See also S. Davies and P. Ormosi, 'Assessing Competition Policy: Methodologies, Gaps and Agenda for Future Research' (2010) Centre for Competition Policy, University of East Anglia Working Paper 10-19 <http://competitionpolicy.ac.uk/documents/8158338/8256105/CCP+Working+Paper+10-19.pdf/75b547e1-3c6b-4c08-bc55-79b2a7f3ca46> accessed 30 September 2020.

The inability of the formula for optimal fine to account for these factors makes the final quantified fine as less than optimal.[16] Further, application of the principles of proportionality,[17] and the fear of social costs on account of firm's inability to pay (multiplier is inverse of probability of detection) reduces the fine even further. Multiple studies have been done on the issue of adequacy of fine to cause optimal deterrence and they all conclude that the cartel fines are too low.[18] Cartel fines, sometimes, have also been reported to be less than cartel overcharge.

The debate on the correct methodology, be it 'harm based' or 'gain based', to calculate the optimal fine is continuous and therefore, the issue of quantification of fine for cartel conduct remains unresolved. *Huschelrath,*[19] argues that even though practical fines are lower than theoretical fines, they are still able to create deterrence and benefit the consumers and the economy. What is important is not the quantum of fine but the efficiency of fines.[20] Countries like the United States of America ["**US**"] and the United Kingdom ["**UK**"] have framed penalty guidelines for imposition of penalties. These guidelines, on the basis of experiential data, uniformly assume certain figures to fit in the formula of optimal fine.[21] There are some

[16]John M. Connor and Robert H. Lande, 'Cartel Overcharges and Optimal Cartel Fines' (2008) 3 Issues in Competition Law and Policy 2203 <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1719&context=all_fac> accessed 30 June 2020.

[17]Given that the average detection rate of cartels is less than 25%, the optimal fine should be four times the overcharges of cartel and the dead weight loss. In light of multiple studies that predict cartel detection rate to be somewhere around 20-30%, an average rate of 25% is taken. See E. Combe, C. Monnier and R. Legal, 'Cartels: The Probability of Getting 360 Caught in the European Union' (2008) 12 Bruges European Economic Research Papers No. 12 <https://www.coleurope.eu/system/files_force/research-paper/beer12.pdf?download=1> accessed 31 July 2020.

[18]John M. Connor and Robert H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 Cardozo Law Review 427, 479; OECD, 'Sanctions in Antitrust Cases' (2018) Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf> accessed 30 September 2020.

[19]K. Huschelrath, 'Detection of Anticompetitive Horizontal Mergers' (2009) 5(4) Competition Law & Economics 683.

[20]Jurgita Bruneckiene and Irena Pekarskiene, 'Economic Efficiency of Fines Imposed on Cartels' (2015) 26(1) Inzinerine Ekonomika-Engineering Economics 49 <https://inzeko.ktu.lt/index.php/EE/article/view/7763> accessed 30 September 2020.

[21]The US Federal Sentencing Guidelines, for instance, fix a base fine equal to 20% if the volume of commerce (Sales) affected by cartel decisions. The base fine assumes cartel overcharge proxy to be around "10% of the selling price". The base fine is twice as big as the average gain, because *"…among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices"* as

scholars however, who argue that a fixed methodology to calculate fines makes it predictable in nature which reduces its deterrence value. The predictability of fine when added to the below optimal level quantum may tempt undertakings who are otherwise law abiding to see the benefit of infringement. However, it has been countered that if the fines are high enough, it can aid to the leniency regime of the jurisdiction.[22]

The mechanism of civil penalties lies somewhere between the traditional systems of criminal fines & imprisonment and civil damages. Civil penalties may be used for disgorgement, restitution or forfeiture of assets which are used to facilitate illegal acts. Although the nature of such action resembles the criminal judicial system, the usage of the term 'civil' changes the dynamics of its enforcement. The thresholds of standard and burden of proof, requirement of mental element, double jeopardy, which are required for criminal cases, get relaxed. Civil penalties are "in the form of monetary fines" which are imposed by the administrative agency through the application of civil procedure norms.[23] The idea of deterrence remains behind the imposition of civil penalties. The public enforcement of competition law with an idea of deterrence runs parallel to private enforcement of competition laws which aims to compensate victims of competition law violations. While the idea of civil penalties aims at penalizing anti-competitive behaviour because of its economic effect through the imposition of fines, in order to improve the overall compliance of competition laws, regulators tend to adjust penalties based on parameters like intent, cooperation, aggravating and mitigating circumstances, which takes it slowly within the domain of criminal procedure.[24]

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per Section 2R1.1 Application notes. The difference between the base fine and cartel overcharge makes up for the dead weight loss and enforcement costs.

[22]OECD, 'Sanctions in Antitrust Cases' (2018) Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf> accessed 30 September 2020.

[23]The European Regulations provide for "civil fines in cases of infringement of Article 101 or Article 102 (Regulation 1/2003)". The quantum of penalty will depend on the duration and gravity of infringement. However, the upper ceiling of the penalty is fixed at 10% of the company's turnover of the previous year. The Regulation clearly categorizes the fines as of civil nature. See Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210.

[24]Harry First, 'The Case for Antitrust Civil Penalties' (2009) 76(1) Antitrust Law Journal 127.

III. IMPOSITION OF PENALTY

The scheme of fining should be clear and consistent and its determination has to be guided by sound legal reasons. It cannot be akin to a 'lottery'.[25] Lack of transparency in the adjudication of fine will lead to loss of credibility of the competition authority and multiple court litigations.[26] Fine amount cannot be calculated on an *adhoc* basis and there has to be a scientific connection between the reasons provided and the final computed fine. The conversion of factors like territorial extent, success of cartel (duration), method of operation, sector affected, importance of product or service in question, level of individual participation, in to numbers to increase or decrease the final amount, if vague and incoherent, would lead to numerous appeals thus enabling the offenders to both, prolong and delay, the entire enforcement process.[27]

The existing penalty scheme of the CCI for cartel cases seems to be similar to a lottery where random metric whether in terms of percentage of turnover or that of profit appears at the end of the decision. The Commission has rarely given justification for the computation of penalty and it is not particularly clear whether the Commission considered the above-mentioned factors. The appellate forums have at multiple times questioned the rationale of the Commission to reach to a particular penalty and sent the matter back to the Commission for a reasoned order. An absence of guidelines on the aspect of imposition of penalty means that the Commission has no reference point or a definitive set of parameters to impose penalty. Therefore, while the Commission may take a myriad set of factors into consideration, to what extent such factors should influence the imposition of penalty (degree of application) is left to the discretion of the Commission. *"The quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the*

[25]Similar criticism was made with respect to fining process by European Commission in the initial years. See I. Van Bael, 'The Lottery of EU Competition Law' (1995) 4 ECLR 237. The European Union, however, rectified this later and adopted multiple measures in the form of 1998 Commission Guidelines on Fines (revised in 2006), 1998 leniency scheme (revised in 2002 and 2006) and 2008 Settlement Procedure.

[26]Prof. Damien Geradin and David Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community's Court Judgments' (2005) GCLC Working Paper 03/05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=671794> accessed 31 March 2020.

[27]ibid; R. Richardson, 'Guidance without Guidance – A European Revolution in Fining Policy? The Commission's new Guidelines on Fines' (1999) 20 ECLR 361.

mitigating and aggravating circumstances of the case."[28] N.V. Ramana, J., in *Excel Crop. Care Limited*,[29] outlined the factors to be considered while calculating penalties. The question however is, whether the Commission has given due weightage to the factors underlined above, in its decisions in the last ten years of anti-cartel enforcement.

IV. USE OF AGGRAVATING AND MITIGATING FACTORS BY THE CCI

The initial years of anti-cartel enforcement in India did not really go in to the question of aggravating and mitigating circumstances and therefore, their influence on the computation of penalty was minimal. A list of factors that have been considered by the Commission in the later years of cartel enforcement are as follows –

A. Use of aggravating factors

i. *Leadership role*

Identification of a ringleader may help in making a distinction in the award of penalty amongst various cartel members. It also sends a clear signal that the Commission will single out instigators and coordinators and deal with them in a sterner fashion. The European Union's ["**EU**"] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 ["**Fining Guidelines**"] prescribes a higher penalty for leaders ("*undertaking with a significant driving force*"[30]) and instigators,[31] ("*one who*

[28] *In Re: Builders Association of India and Cement Manufacturers' Association* 2016 SCC Online CCI 46.

[29] *Excel Crop. Care Limited v Competition Commission of India* AIR [2017] SC 2734 [88]. The Apex Court noted, *"commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), 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."*

[30] Case T-15/02 *BASF v Commission of the European Communities* [2006] ECLI:EU:T:2006:74; Case T-410/03 *Hoechst v Commission of the European Communities* [2008] ECR II-881. A leader undertakes specific liability for the operation of cartel, coordinates the operation of cartel from within the cartel and sees to the implementation of the cartel. See also Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission of the European Communities* [2003] ECR II-2597. The entity which "plays a central role in the operation of the cartel by organizing meetings or coordinates exchange of information or undertakes the responsibility of other members or formulates proposals for course of action" can be designated as a leader. See also Joined Case 96/82 and others *International Belgium and Ors v Commission of the European Communities* (1983) ECR 3369; *PO Video Games* (Case COMP/35.587), *Nintendo Distribution* (Case

persuades or encourages other business entities to establish or join a cartel") of cartel.[32] In US, benefit of amnesty is not extended to a leader or originator of cartel or if the firm forced another firm to participate in the cartel.[33] While the idea of leadership has been clearly marked as an aggravating circumstance, there is a general lethargy in the identification of leaders in cartel cases in India. This may be also due to lack of an identification framework.[34] Non-identification of ringleaders fails to create 'specific deterrence' for individual undertakings. In *Uniglobe,*[35] while the CCI identified three trade associations among six as taking the lead role and having a higher degree of involvement, it did not reflect in the actual computation of fine. On the contrary, it acted as a mitigating factor for the other three associations who were left without any penalty. In *Nagrik Chetna Manch,*[36] while the managing director of one of the firms admitted to have established and operationalized the bid rigging, the CCI made no distinction in imposing the penalty, either at the individual or at the undertaking level.[37] A uniform penalty at the rate of 10% of average turnover and income was calculated for six firms and five individuals including the ringleader. Interestingly, the Commission also granted leniency of 25% reduction in penalty for the ringleader. Similarly, in *Dry Cell batteries* case,[38] even though the Commission marked that Panasonic played a key role in the cartel and "*was in a position to influence and dictate the terms"* of the anti-

COMP/35.706), *Omega – Nintendo* (Case COMP/36.321) Commission Decision [2002] OJ L 255; *Graphite Electrodes* (Case COMP/E-1/36.490) Commission Decision [2002] OJ L 100/1.

[31]Not all founding members can be categorized as instigators. Instigators are only those undertakings that have taken the initiative "for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so." Since, "instigation is concerned with the establishment or enlargement of a cartel, it is possible that several undertakings might simultaneously play a role of instigator within the same cartel". See *Shell Petroleum v Commission of the European Communities* [2012] ECR II-000 [155].

[32]Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29> accessed 31 March 2020.

[33]'Corporate Leniency Policy' (US Department of Justice, August 10 1993).

[34]Eva van Leur, 'Characteristics of Cartel Ringleaders: An Analysis of EU Commission Decisions' [2013] 6 Research in Business and Economics – MaRBLe Research Papers <https://openjournals.maastrichtuniversity.nl/Marble/article/view/187> accessed 30 June 2020.

[35]*Uniglobe Mod Travels Pvt. Ltd. v Travel Agents Association of India* [2011] CCI Case No. 3 of 2009.

[36]*Nagrik Chetna Manch v Fortified Security Solutions* 2018 SCC OnLine CCI 61.

[37]*Nagrik Chetna Manch v SAAR IT Resources Private Limited* 2019 SCC OnLine CCI 28.

[38]*Anticompetitive conduct in the Dry-Cell Batteries Market in India v Panasonic Corporation* 2019 SCC OnLine CCI 15.

competitive arrangement to Godrej, it was granted a *"100% reduction in penalty in lieu of the leniency application"*. Non-appreciation of the fact that, Panasonic played the role of a ringleader, has made the outcome of the case a bit unfair. 'Leadership' role therefore has neither been taken in to account in leniency matters nor has been effectively used as an aggravating factor in computation of penalty.

ii. *Detrimental to interests of consumers / critical nature of the product or service*

Seriousness of enforcement and strength of sanctions commensurate the detrimental nature of cartels and the harm it causes to the consumers. Therefore, the harm caused to the consumers at large is not used as an aggravating factor. The CCI has however at times, used harm to consumers' as an aggravating circumstance. In the *Cement cartel* case,[39] the Commission noted the detrimental effect on consumers and the economy without clearly categorizing them as aggravating factors.[40] In the bid rigging case concerning *Insurance companies,*[41] the CCI acknowledged the effect of violation on the consumers (poor families in the present case) as an aggravating factor. However, unlike the *Cement cartel* case, a penalty was not imposed on the basis of profits but on the basis of turnover *"at the rate of 2% (of their average turnover of the last three financial years)*".[42] No reason was provided for the exercise of discretion or for the quantification of penalty. Similarly, in *Western Coalfields,*[43] the Commission considered the criticality of services as an aggravating factor to impose a penalty on the firms and executive of the firms *"at the rate of 4% of average relevant turnover and 4% of their average income of the last three financial years respectively."* Criticality of service for public health was also considered in *Delhi Jal Board*,[44] and it formed the basis of penalty imposed at the rate of 8% of average relevant turnover. There is not much difference in the gravity of

[39]*In Re: Builders Association of India* (n 28).

[40]The Commission used the proviso to Section 27(b) to impose penalty. After doing a comparison of penalty on the basis of turnover and profit as mentioned in the provision, the Commission surprisingly chose to impose penalty at the rate of 0.5 times the profit during the period of violation without adducing any reason as how the figure of 0.5 times the profit was reached. The Cement Manufactures Association on the other hand was penalized at the "rate of 10% of total receipts for the two years in terms of Section 27(b)".

[41]*In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna* 2015 SCC OnLine CCI 192.

[42]ibid.

[43]*Western Coalfields Limited v SSV Coal Carriers Private Limited* 2015 SCC OnLine CCI 192.

[44]*Delhi Jal Board v Grasim Industries Ltd.* 2017 SCC OnLine CCI 48.

offence in the *Insurance, Western Coalfields* or *Delhi Jal Board* matter that commanded separate sanctions. Similarly, in *Arora Medical Hall*,[45] the Commission, acknowledging the principles of proportionality imposed a penalty at the rate of 10% of average receipts of Chemist and Druggist Association of Firozabad (CDAF). The Commission considered both, the harm and the risk caused to the lives of the drug consumers as aggravating factors. However, it ended up imposing similar penalties as in cases without aggravating factors. The CCI in *AIMTC,*[46] considered the cascading effect of fixing of freight charges on the goods and services consumed by common man to impose a penalty on AIMTC at *"the rate of 10% of the average turnover of the last three years"*.

iii. *Harm to overall public exchequer / economy*

Although not as a specific aggravating factor, the CCI has considered harm to the exchequer to determine the quantum of penalty. In *Bio-med,*[47] and *Jet Airways,*[48] the CCI took note of the harm caused to the economy to impose a penalty *"at the rate of 3% of average of turnover in the last three preceding years"*. Harm to the economy thus, has been seen as a lesser aggravating factor than criticality of product or service in question.[49]

iv. *Important position of the player*

It is assumed that by virtue of the position of the cartelist, it is able to influence, instigate or force others to either join the cartel or continue with the cartel. Fear of ostracization prevents members of the cartel from defection. The CCI has used this factor only in the case of trade associations. In *Santuka,*[50] the Commission noted that that All India Organization of Chemists and Druggists by virtue of it being the apex body for chemists and druggists in India was able to *"fix trade margins, limit and control the supply and influence the prices of the drugs and pharmaceutical products by insisting upon NOC for appointment of stockiest."* Similar stance was taken by the Commission for *Chemist and Druggist Association,*

[45]*In Re: M/s Arora Medical Hall, Ferozepur* 2014 SCC OnLine CCI 18.

[46]*In Re: Indian Foundation of Transport Research and Training* 2015 SCC OnLine CCI 33.

[47]*In Re: M/s Bio-Med Private Limited* 2015 SCC OnLine CCI 91.

[48]*In Re: Express Industry Council of India* 2018 SCC OnLine CCI 11.

[49]*In Re: Alleged Cartelization in supply of LPG Cylinders procured through tenders by HPCL v Allampally Brothers Ltd.* 2019 SCC OnLine CCI 33.

[50]*M/s Santuka Associates Pvt. Ltd. v All India Organization of Chemists and Druggists* 2013 SCC OnLine CCI 16.

Ferozepur,[51] and *Bengal and Chemist and Druggist Association.*[52] The Commission in both these cases imposed *"a penalty at the rate of 10% of average of receipts of the associations"*. Listing of aggravating factors as is evident did not seem to have any effect on the quantum of penalty. The CCI had previously imposed penalty on the trade associations at the same rate where there were no aggravating factors. Interestingly, in *TG Vinaykumar*,[53] while the Commission did consider the importance and position of the association which contributed to the violation, penalty was imposed at the rate of 5%. It is therefore, difficult to decipher a clear distinguishing feature in the cases listed above.

v. *Non-cooperation*

Similar to that in the EU,[54] and the US,[55] non-cooperation or an attempt to off track an ongoing investigation is seen as a serious aggravating factor.[56] Non-cooperation may include *"late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc."*[57]

[51]*In Re: M/s Arora Medical Hall, Ferozepur* (n 45).

[52]*In Re: Bengal Chemist and Druggist Association* 2014 SCC OnLine CCI 39.

[53]*Shri T. G. Vinayakumar v Association of Malayalam Movie Artists* 2017 SCC OnLine CCI 13.

[54] Art 23(1) of Regulation 1/2003 provides an alternative route to impose fine for procedural infringements up to 1% of the relevant turnover. This route is unrelated to the gravity of the infringement and is a more preferred route than using non-cooperation as an aggravating circumstance to calculate fine. It has been held that refusal to cooperate cannot be used as both procedural infringement and an aggravating circumstance. See Case T-384/06 *IBP Ltd. and International Building Products France SA v European Commission* [2011] ECLI:EU:T:2011:113.

[55]Three points to the organization's culpability score is added. This is also applicable where the firm took no steps to remove obstruction even when it knew about it. See United States Sentencing Guidelines s 8C2.5(e).

[56]*M/s Rohit Medical Store v Macleods Pharmaceutical Limited* 2015 SCC OnLine CCI 19; *Reliance Agency v Chemists and Druggists Association of Baroda* [2018] CCI Case No. 97 of 2013.

[57]International Competition Network*, 'Setting of Fines for Cartels in ICN Jurisdictions'* (2008) Report to the 7th ICN Annual Conference Kyoto <https://centrocedec.files.wordpress.com/2015/07/setting-of-fines-for-cartels-in-icn-jurisdictions-2008.pdf> accessed 30 June 2020.

vi. *Recidivism*

Recidivism is considered as one of the most serious aggravating factors. A higher rate of recidivism also raises question on the deterrent effect of a previously imposed fine.[58] Both, the Fining Guidelines,[59] and the United States Sentencing Guidelines ["**Sentencing Guidelines**"],[60] prescribe a substantial increase in fines in cases of recidivism. In India, the Commission has dealt with two types of cases. First, where the same entity indulges in antitrust violation of the same type after being previously penalized for it and second, where the entity indulges in violation similar to that of another entity known to have been penalized for it.[61] There is an abundance of cases of the second nature with the first type not lagging much behind. All these cases have been centered on sector specific trade associations. Recidivism amongst trade associations also indicates that the sanctions imposed by the Commission on the trade associations have been unable to create either specific or general deterrence. This may be either due to the belief of the trade associations of non-detection or the idea that even if they are detected, the resultant penalty will not hurt them much. The Commission has on multiple occasions lamented about the repeated nature of the violation especially among trade association of the pharmaceutical sector. But the irony is that the CCI has not gone beyond penalizing trade associations at a rate which is similar to any ordinary case. In some cases, the Commission has imposed fines on office bearers of the association. For instance, the Commission penalized *Chemist and Druggist Association, Goa (CDAG)* in 2012,[62] *"at the rate of 10% of average receipts"*. In 2014, the Commission while noting its 2012 order stated that, the CDAG continued its anti-competitive behaviour with *"utmost disrespect to the Commission's mandate"* and imposed a penalty at the precious rate of 10%

[58]Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (1983) ECR 3461.

[59]Increase of base amount up to 100% for each of such infringement established. See Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210 [28]; See also Case T-141/94, *Thyssen Stahl v Commission of the European Communities* [1999] ECR II-347; See also OECD, 'Sanctions in Antitrust Cases' (2018) Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf> accessed 30 September 2020.

[60]The US sentencing Guidelines use recidivism in the culpability multiplier. See United States Sentencing Guidelines s 8C2.5(c)(1)-(2).

[61]*Reliance Agency v Chemists and Druggists Association of Baroda* [2018] CCI Case No. 97 of 2013; *M/s Maruti and Company v Karnataka Chemists and Druggists Association* 2016 SCC OnLine CCI 43; *Sudeep P.M. v All Kerala Chemists and Druggists Association* 2017 SCC OnLine CCI 54.

[62]*Varca Druggist and Chemist v Chemists and Druggists Association, Goa* 2012 SCC OnLine CCI 41.

of average of receipts.[63] Similarly, the Commission in its 2015,[64] order against Himachal Pradesh State Chemists & Druggists Association noted the previous orders against the association by MRTPC in 2008. However, the CCI ended up penalizing the association at the same rate of 10%.[65] A similar scenario is seen in the matter of *Indian Foundation of Transport Research & Training*,[66] and *Kerala Film Exhibitors Federation* ["**KFEF**"].[67] Interestingly, the Commission in KFEF, barred two office bearers from engaging with administration, management or governance of the trade association for two years because of their continued indulgence in anti-competitive activities. Such a measure however, was not taken in other cases of recidivism. The Commission has imposed similar penalties even in cases of multiple counts of recidivism. In *Kannada Grahakara Koota,*[68] Karnataka Film Chamber of Commerce (KFCC) was penalized *"at the rate of 10% of average income"* even after the Commission noted the prior sanctions imposed on it on two previous occasions. Since, the CCI has been mostly faced with recidivism cases of trade associations, the contentious issues of change in ownership (or management),[69] time and territory,[70] have not been fleshed out in detail.

[63]*In Re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.* 2014 SCC OnLine CCI 134.

[64]*Macleods Pharmaceutical* (n 56).

[65]*Mr. P. K. Krishnan v All Kerala Chemists and Druggist Association* [2015] CCI Case No. 28 of 2014; *Madhya Pradesh Chemists and Distributors Federation (MPCDF) v Madhya Pradesh Chemist and Druggist Association (MPCDA)* 2019 SCC OnLine CCI 7.

[66]*In Re: Indian Foundation of Transport Research and Training* 2015 SCC OnLine CCI 33.

[67]*M/s Crown Theatre v Kerala Film Exhibitors Federation (KFEF)* 2015 SCC OnLine CCI 143.

[68]*Kannada Grahakara Koota v Karnataka Film Chamber of Commerce (KFCC)* 2015 SCC OnLine CCI 113.

[69]In US, the involvement and punishment of a subsidiary company for involvement in a particular type of cartel in the previous serious will not make the parent company or a new acquirer, a recidivist if later the parent company is found to be involved in similar cartel. European Commission however has a different stance. See Case T-203/01 *Michelin v Commission of the European Communities* [2003] ECLI:EU:T:2003:250. The General Court endorsed "the parental liability presumption for assessing recidivism and held the subsidiary of the Michelin Group as recidivist because of an earlier indictment of another subsidiary company of the same group. The parent company was not an address in the Commission's decision". See also Case T-558/08 *Eni SpA v Commission of the European Communities* [2014] ECLI:EU:T:2014:1080. The General Court in this case, however, laid out the rights of defence of the parent company. Accordingly, parent companies will be given the opportunity to rebut the parental liability presumption. Even prior knowledge of the parent company about a previous indictment of its wholly owned subsidiary in a case where it was not the party, would not be sufficient

vii. *Other factors*

Apart from the above-mentioned aggravating factors, there are other factors that although are very common in other jurisdictions, have failed to find a place in the Indian decisions.[71] For instance, "retaliatory or threatening measures" taken by the cartel members against one or more entities whether as a disciplining exercise for an insider who refused to toe the line of the leaders or against a cartel outsider, is seen as a serious aggravating factor. While in many cases in India, especially the trade association cases, the principal trade association used its market position to issue diktats to boycott or not to deal with entities refusing to follow their decisions, the behavior although brought under section 3(3)(b) of the ICA, was not used as an aggravating factor to impose higher penalties.

B. Use of mitigating factors

i. *Immediate termination or correction of anti-competitive conduct or very short duration of practice*

Similar to the EC Guidelines, the CCI considers immediate termination or correction of anti-competitive action as a mitigating circumstance. Therefore, where there is no harm that was caused by an anti-competitive clause in the bye-laws of the associations and which the association offered to correct immediately, the Commission chose not to impose any penalty.[72] Similarly, in *PV Basheer,*[73] when the new management of the association showed

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to remedy the absence of a determination in the previous EC decision that the parent company and the subsidiary form a single economic unit, so that the responsibility for the previous infringement is imputed to the parent company. History of cartel punishment is carried forward by the parent company or a new acquirer. See Case T-55/08 *Eni SpA v Commission of the European Communities* ECLI:EU:T:2014:1080; See also *Slovak Telekom* (Case COMP/AT.39523) Commission Decision [2014] OJ C 314/7.

[70]The US Sentencing Guidelines for instance uses a time frame of ten years to check for recidivism. Simultaneous involvement in multiple cartels is taken as repeated offence but not as recidivism. The European Commission Guidelines do not prescribe a time frame for the use of recidivism as an aggravating factor to calculate fine. Therefore, the Commission is in fact free to consider past and historic involvement in cartels as a factor to calculate fines.

[71]Prof. Damien Geradin and David Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community's Court Judgments' (2005) GCLC Working Paper 03/05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=671794> accessed 31 March 2020.

[72]*Mr. Vijay Gupta v M/s Paper Merchants Association, Delhi* SCC OnLine CCI 6; *Shri Ghanshyam Dass Vij v M/s Bajaj Corp. Ltd.* 2015 SCC OnLine CCI 174.

compliance to CCI's orders and corrected the anti-competitive conduct by reinstating the informant as a member of the association, it was taken as a mitigating factor in the quantification of fine. The CCI in *Cochin Port Trust,*[74] chose not to impose any penalty considering the short duration of the conduct in question which was terminated even before the investigation started.

ii. *No harm caused due to violation*

In *Shree Cement,*[75] the CCI considered the harm caused in the form of cost to exchequer and time loss. It then went on to make an artificial distinction between two terminologies, 'causes' or 'likely to cause AAEC' and held that, the two need to be seen separately. In light of other factors like the peculiar nature of the bid and the presence of competition compliance program, the Commission imposed a penalty *"at the rate of 0.3 % of their average turnover of the last three financial years"*.[76] The Commission did not need to read a distinction or gradation in Section 3 when the statute does not envisage such a categorization. Cartels have been proved to cause AAEC and 'foreseeability of harm' is enough in such cases even when actual harm is not ascertainable,[77] a position that has now been rightly taken in *Composite Brake Block,*[78] bid rigging cartel.[79]

iii. *Penalized in other case with similar period of investigation*

Multiple cases,[80] have been filed against trade associations in the last ten years for their alleged involvement in anti-competitive practice. Many of such complaints relate to

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[73]*Shri P.V. Basheer Ahamed v M/s Film Distributors Association, Kerala* [2014] CCI Case No. 32 of 2013.

[74]*Cochin Port Trust v Container Trailer Owners Coordination Committee* 2017 SCC OnLine CCI 39.

[75]*Director, Supplies & Disposals, Haryana v Shree Cement Limited* 2017 SCC OnLine CCI 2.

[76]ibid.

[77]*Paper Merchants Association* (n 72).

[78]*In Re: Chief Materials Manager, South Eastern Railway* 2020 SCC OnLine CCI 28.

[79]*In Re: Cartelization in Industrial and Automotive Bearings* 2020 SCC OnLine CCI 19.

[80]*M/s FCM Travel Solutions (India) Ltd., New Delhi v Travel Agents Federation of India* 2011 SCC OnLine CCI 77; *Sunshine Pictures Private Limited and Eros International Media Limited v Central Circuit Cine Association, Indore* 2012 SCC OnLine CCI 9; *Mrs. Manju Tharad v Eastern India Motion Picture Association (EIMPA), Kolkata* [2012] CCI Case No. 17 of 2011; *Mr. Sajjan Khaitan v Eastern India Motion Picture Association* 2012 SCC OnLine CCI 28; *M/s Cinergy Independent Film Services Pvt. Ltd. v Telangana Telugu Film Distribution Association* [2013] CCI Case No. 56 of 2011; *M/s Peeveear Medical Agencies, Kerala v All India Organization of Chemists and Druggists* 2013 SCC OnLine CCI 147; *M/s Sandhya Drug Agency v Assam*

violations of a similar nature in a particular range of time leading to investigations around similar periods of time. Therefore, if the Commission has already penalized for a particular anti-competitive practice, it will not do so again for a violation of a similar nature in the same period of time. These are not cases of recidivism but of parallel violations. The Commission has chosen to not read such situations as different violations but as one common violation. The Commission has erred in a few situations though. In *Gulshan Verma,*[81] the CCI mistook two violations in the same time period having different subject matter as one common violation and chose not to impose a penalty on account of the previous sanction. The Competition Appellate Tribunal later set aside the order as the CCI had also relied on evidences from the previous case.

iv. *Lack of awareness and small size of the players*

Lack of awareness and small size of the defendants has been taken as a reason to reduce or exempt the parties from being penalized.[82] In *Sheth & Co.,*[83] the Commission noted that the defendants were small scale units and therefore, reduced the quantum of penalty. In *Dry Cell Batteries case,*[84] the Commission held that Geep Industries (India) Private Limited was only a dealer of the product with insignificant market share and no negotiating power, while Panasonic was *"in a position to dictate the terms of the anti-competitive agreement to it"*. In light of this, the Commission imposed a penalty at the rate 4% of the turnover for each year of the continuance of the cartel on Geep Industries (India) Private Limited.

v. *Small size of the bid/tender*

Small public procurements are not unimportant. *"The contravention of the competition law cannot be considered non-serious only because the amount of the bid was small. The size of*

Drug Dealers Association 2013 SCC OnLine CCI 84; *The Belgaum District Chemists and Druggists Association v Abbott India Ltd.* 2017 SCC OnLine CCI 20.

[81]*Shri Gulshan Verma v Union of India, through Secretary, Ministry of Health and Family Welfare* 2012 SCC OnLine CCI 30.

[82]*In Re: Shri B P Khare, Principal Chief Engineer, South Eastern Railway* 2013 SCC OnLine CCI 21; *Shri Vipul v All India Film Employee Confederation* 2017 SCC OnLine CCI 53.

[83]*In Re: M/s Sheth and Co.* 2015 SCC OnLine CCI 93.

[84]*In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India* 2018 SCC OnLine CCI 81; *Anticompetitive conduct in the Dry-Cell Batteries Market in India* (n 38).

tender in itself is not a decisive factor for taking a lenient view".[85] The CCI has, however, considered the size of the bid as a factor in many cases related to bid rigging.[86]

vi. *Peculiar or weak position of the sector/industry*

The CCI has been mindful of the fact that certain sectors are in distress. Therefore, even though that in itself does not justify cartelization, the Commission has taken a lenient view while imposing penalties. The CCI for instance in *Indian Sugar Mills*, appreciated the fact that jute industry was going through a rough financial phase and therefore needed support. In light of this, a reduced penalty *"at the rate of 5% of the average turnover of the last three years"* was imposed on Indian Jute Mills Association and Gunny Trade Association.[87] The CCI in the *Insurance matter*, considered the *"peculiarities of the insurance sector"* including the *"importance of insurer's solvency for the consumers as a mitigating circumstance"*.[88] Similar stance was taken by the CCI in the aviation sector.[89] The weak economic position of the enterprise as a mitigating factor, however, is a bit contentious. The European Commission has maintained that to treat weak economic condition of the enterprises as a mitigating factor would be akin to *"conferring an unjustified competitive advantage on an undertaking."*[90] Recently, the CCI in the *Composite Brake Block*,[91] bid rigging cartel case refrained from imposing penalty on account of mitigating factors like small size of the cartelists and the effect of COVID-19 on the prevailing market conditions. Even though the Commission concluded that a cartel existed and operated for eight years, not even a token penalty was imposed. Such lenient treatment sets a wrong precedent for future cases.

[85]*In Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab* 2014 SCC OnLine CCI 16.

[86]*In Re: M/s Bio-Med Private Limited* (n 47); *In Re: Shri B P Khare, Principal Chief Engineer, South Eastern Railway* (n 82); *In Re: M/s Sheth* (n 83).

[87]*Indian Sugar Mills Association v Indian Jute Mills Association & Gunny Trade Association (GTA)* 2014 SCC OnLine CCI 141.

[88]*In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna* (n 41).

[89]*In Re: Express Industry Council of India* (n 48).

[90]*Carbonless Paper* (Case COMP/E-1/36.212) Commission Decision [2004] OJL 115/1; Joined Case 96/82 and others *NV IAZ International Belgium v Commission of the European Communities* (n 30).

[91]*In Re: Chief Materials Manager, South Eastern Railway* (n 78).

vii. *Co-operation and compliance*

The CCI tends to treat defendants lightly when they cooperate in the proceedings.[92] In *Western Coalfields,*[93] the CCI considered the cooperation by the defendants during the proceedings as a mitigating circumstance. With respect to competition compliance programmes, the CCI only tends to treat it as a mitigating factor if they were undertaken before the investigation began.[94] There is a certain divergence of opinion on whether effective compliance programme,[95] can be used a mitigating circumstance or is it just a 'natural obligation of all firms',[96] geared towards their own self-interest. For instance, the Fining Guidelines do not consider effective compliance programme as a mitigating factor while calculating fine. It is considered that the effectiveness of the compliance programme would have been the prevention of anti-competitive behaviour since the company is always in the best position to do that. The Sentencing Guidelines,[97] on the other hand, is not in favour of penalizing the corporation when certain employees or officers indulge in cartelization despite the corporation taking all the effort for competition law compliance.[98] The principle of 'good faith' underlines the use of compliance programme as a mitigating factor. This means, it has to be shown by the defendant that it diligently enforced the programme and took all actions in good faith and with the intent of complying with competition law.[99] Further, the benefit will not be advanced if a senior executive were involved or if the

[92]*Shri P.V. Basheer Ahamed v M/s Film Distributors Association, Kerala* [2014] CCI Case No. 32 of 2013.

[93]*Western Coalfields Limited v SSV Coal Carriers Private Limited* 2017 SCC OnLine CCI 45.

[94]*Director, Supplies & Disposals, Haryana v Shree Cement Limited* (n 75).

[95]T. Banks and N. Jalabert-Doury, 'Competition Law Compliance Programs and Government Support or Indifference' (2012) 2 Concurrences, Mayer Brown <https://www.mayerbrown.com/en/perspectives-events/publications/2012/05/competition-law-compliance-programs-and-government> accessed 31 March 2020.

[96]J. Murphyand and N. Jalabert-Doury, 'Cartel Prevention and Compliance Regimes: It is time for a smarter Approach' (2013) 82 Business Compliance 03-04 <https://www.mayerbrown.com/-/media/files/news/2013/03/cartel-prevention-and-compliance-regimes-it-is-tim/files/cartel-prevention-and-compliance-regimes/fileattachment/cartel-prevention.pdf> accessed 30 September 2020.

[97]United States Sentencing Guidelines S8C2.5(f) (1-3). Presence of effective compliance program allows reduction of three points from the culpability score. However, in case the company "unnecessarily delays" the reporting of the infringement or "or under specified instances in which high-level or substantial authority personnel participated in, condoned, or were willfully ignorant of the offense".

[98]Douglas H. Ginsburg and Joshua D. Wright, 'Antitrust Sanctions' (2010) 6(2) Competition Policy International 3-39.

[99]*United States v International Paper Co.* [1978] 457 F. Supp. 571 **(**S.D. Tex.).

company took no steps when it got to know about the violation or there was an inordinate delay in reporting the violation. There is a growing trend in favour of using the effective compliance programme as a mitigating factor.[100]

viii. *Peculiarities of the tender*

In cases related to bid rigging, the CCI has sometimes attributed a given conduct of the parties on account of the peculiar terms and conditions of the bids.[101] A tender design that created entry barriers and made collusion amongst the bidders conducive will be taken note of by the Commission.[102] Factors like *"nature of the product procured, total volume of tender, involvement of small scale units, irregular requirement of product, single source of raw material, and revenues generated from the product under consideration",*[103] are considered by the CCI when quantifying penalty.

ix. *Succumbed to pressure of the leader*[104]

It is interesting to note that while the Commission does not generally identify ringleaders in the cartel to penalize them at a higher rate in comparison to others, it has used 'undue influence' as a mitigating factor. Instead of focusing on the coercer, it has given benefit to the coerced entities. In *Kerala Film Exhibitors Federation*,[105] the CCI reduced the penalty for Film Distributors Association (Kerala) as it acted under the pressure of KFEF. KFEF on the other hand, was only penalized at the rate of 7% of average receipts which is lesser than the general penalty at the rate of 10%. In *TG Vinay Kumar*,[106] even though it was noted that FEFKA Director's Union and FEFKA Production Executive's Union followed the diktats of Film Employees Federation of Kerala, they were penalized at the same rate as that of the coercing entity. Acknowledgment of the mitigating factor on account of being 'coerced' did not result in the actual reduction of penalty when compared to that of the 'coercer'. Resultant

[100]Courts in countries like UK, Brazil, Chile, Malaysia, Singapore have used this a factor to reduce fines.

[101]*Director, Supplies & Disposals, Haryana v Shree Cement Limited* (n 75).

[102]*Delhi Jal Board v Grasim Industries Ltd.* (n 44).

[103]*In Re: M/s Sheth* (n 83) [45].

[104]The European Commission treats 'passive role' as a mitigating factor but the threshold to get the benefit under this is a bit onerous. The party claiming this mitigating factor must be able to prove that it was merely a "follower" of the leader in the cartel and it did not participate in any of the meetings.

[105]*In Re: Kerala Cine Exhibitors Association* 2015 SCC OnLine CCI 98.

[106]*Shri T. G. Vinayakumar v Association of Malayalam Movie Artists* (n 53).

penalty for FEFKA Director's Union was, in fact, more than Film Employees Federation of Kerala.

Another anomaly was seen in the *Dry Cell matter*.[107] The Commission acknowledged the fact that Panasonic, "*being the manufacturer of dry-cell batteries and supplier of Geep, was in the position to influence and dictate the terms of the anti-competitive agreement to Geep, and Geep being a very small player having insignificant market share in the market for dry-cell batteries was not in a bargaining or negotiating position vis-a-vis Panasonic."* Ideally, therefore, Geep should have been penalized lesser than Panasonic. However, since the CCI does not make a distinction between cartel leaders and others in terms of culpability and application for leniency, Panasonic was able to claim a 100% reduction in penalty while Geep ended up paying more than nine crores in penalty.

x. *Other factors*

Apart from the above-mentioned mitigating circumstances, the Commission has also considered factors like nature of product,[108] and low amount of revenue generated,[109] as mitigating factors. Clearly, the CCI has used a wide variety of mitigating factors as compared to the aggravating factors. The numbers are more than most of the jurisdictions which have laid out a set of fining guidelines. Although, the lists in these guidelines are not exhaustive, a definitive idea of circumstances that affect the quantum of penalty brings in both transparency and consistency.

V. CONCLUSION

The CCI has, without fail, underlined the objective behind the imposition of penalty as deterrence. The quantum of penalty, as per the Commission must correspond to the gravity of offence after taking in to account aggravating and mitigating circumstances. The CCI, unlike other jurisdictions does not start from a minimum (base) fine, which then gets amplified by the use of 'culpability multipliers'. The CCI does not employ any methodology to compute penalty. In all the cases concerning trade associations, no penalty has been imposed on individual participants and despite the presence of aggravating factors, the penalty has been imposed at a fixed percentage of average receipts. It seems that the Commission finds itself in a difficult position every time it has to impose penalties on trade associations. Since the

[107] *In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India* (n 84).

[108] *In Re: M/s Sheth* (n 83).

[109] *In Re: M/s Bio-Med Private Limited* (n 47).

penalty cannot exceed beyond the prescribed limit under Section 27(b), the penalties that have been imposed on trade associations are grossly inadequate. The Commission unlike its counterpart in the US or the EU, has not explored the possibility of imposing penalty on the basis of turnover of individual members and then putting the onus on the association to collect the penalty from the members.[110] Imposition of the fine at a flat rate of 10% meant that Commission could not exceed the percentage even in cases where there were one or more aggravating factors.[111] There are also cases wherein despite the non-existence of mitigating factors, the Commission did not impose a penalty at the rate of 10%.[112] Departure from the norm created by the Commission itself has not been explained. This gets even more problematic when the existence of aggravating factors has not yielded in fines up to a mark fixed by the Commission itself.[113] Similar issue exists with respect to mitigating factors. It has not been made clear as to what factor will be counted as a mitigating factor and to what degree will it have an impact on the calculation of the penalty. It is therefore not surprising that the list of mitigating factors consists of a whole range of factors as indicated in the earlier part of the article.

In other cases, while the quantum of penalty itself has oscillated between 0.3% (*Shree cement*[114]*)* to 10% of average of turnover in the preceding three years (*Pune Municipal Corporation*[115]*),* the application of aggravating and mitigating factors has not been consistent. The Commission has neither provided any reason behind imposition of penalty nor used any structured methodology to compute penalty by taking into account the various aggravating and mitigating factors. Therefore, similar factual scenarios have yielded different results.[116]

[110]*In Re: Express Industry Council of India* (n 48).

[111]*M/s Santuka Associates Pvt. Ltd. v All India Organization of Chemists and Druggists* (n 50); *M/s Arora Medical Hall, Ferozepur v Chemists and Druggists Association* (n 45); *Reliance Agency v Chemists and Druggists Association of Baroda (CDAB)* [2018] CCI Case No. 97 of 2013; *In Re: Bengal Chemist and Druggist Association* (n 52).

[112]*M/s Cinemax India Limited (now known as M/s PVR Ltd.) v M/s Film Distributors Association (Kerala)* [2014] CCI Case No. 62 of 2012; *M/s Swastik Stevedores Private Limited v M/s Dumper Owner's Association* 2015 SCC OnLine CCI 13.

[113]*Macleods Pharmaceutical* (n 56).

[114]*Director, Supplies & Disposals, Haryana v Shree Cement Limited & Ors.* (n 75).

[115]*Nagrik Chetna Manch v Fortified Security Solutions* (n 36).

[116]For instance, while the penalty in *In Re: M/s Sheth* (n 83) with six mitigating factors was calculated as 3% of average turnover, penalty at the rate of 0.3% of average turnover was imposed in *Director, Supplies and Disposals, Haryana v Shree Cement Limited* (n 75) which had lesser number of mitigating factors and higher

Needless to say, that had the Commission provided reason to reach to a particular percentage, it would have been more transparent and transparency would have led to consistency.

Ideally, the set of aggravating and mitigating factors should have an effect on the imposition of penalty. One of the ways to go about it is to set the degree of influence these factors will have on the computation of fine. Therefore, a case with aggravating factors must show a greater penalty when compared with cases involving no aggravating factors. Further, a case with a greater number of aggravating factors must reach to a higher quantum of penalty when compared with cases with a lesser number of aggravating factors. The same goes with mitigating factors as well. The imposition of a penalty without consideration of these factors, will lead to a situation where every case of cartelization will be dealt similarly causing a serious dent to the overall deterrence value of such imposition of penalty.

A penalty regime without a reference scale is like shooting in the dark. The Commission has rarely given reasons as to why a particular penalty, whether in term of a certain percentage of turnover or in terms of profit for the duration of cartel or as lump sum amount was imposed. The vague, arbitrary and inconsistent criteria to fix penalties have made the entire system appear '*like a lottery'*.[117] Many jurisdictions of the world today have recognized the issues related to cartel sanctions and in the pursuit of optimal fine have framed penalty guidelines to impose fines taking into account various factors which have been outlined throughout this article. These guidelines have ensured both fairness and transparency in the imposition of fine enabling it to withstand the scrutiny of appellate forums. The Competition Law Review Committee Report,[118] has also recommended that the CCI should come up with a penalty guideline. It is hoped that the CCI comes out with penalty guidelines in order to "*reduce discretion and increase certainty for stakeholders*".[119]

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number of aggravating factors. In *A Foundation for Common Cause and People Awareness v PES Installations Pvt. Ltd.* [2012] CCI Case No. 43/2010 penalty was imposed at the rate of 5% when compared with *In Re: Aluminium Phosphide Tablets Manufacturers* [2012] CCI Suo Moto Case No. 02 of 2011, where penalty was imposed at a rate of 9% despite the fact that PES had one aggravating factor. Other examples are cases of *Delhi Jal Board v Grasim Industries Ltd.* (n 44) and the *LPG cartel (In Re: Suo Moto Case against LPG cylinder manufacturers* [2014] CCI Suo Moto Case No. 03 of 2011. In the *LPG cartel*, absence of any aggravating or mitigating factor led to imposition of fine at the rate of 7% while in the *Delhi Jal Board*, presence of four aggravating factors led to a fine being imposed only at the rate of 8% of average turnover.

[117]I. Van Bael, 'The Lottery of EU Competition Law' (1995) 4 ECLR 237.

[118]'*Report of the Competition Law Review Committee*' (Ministry of Corporate Affairs, July 2019).

[119]ibid 84.