

‘LIFTING THE ASSOCIATION’S VEIL’: INADEQUACIES IN PENALIZING TRADE ASSOCIATIONS FOR ANTI-COMPETITIVE BEHAVIOUR

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ABSTRACT

Trade associations play a vital role in providing a platform for discussion on issues of common interest, for laying down standards of business and facilitating legitimate cooperative behaviour in case of negotiations with government bodies. The legitimate functions of the association have to be distinguished from the illegitimate anti-competitive practices. The Competition Commission of India [“CCI” or “Commission”] on many occasions has lifted the charade to penalize the actions of trade associations when they were devised to further anti-competitive ends. However, there are concerns with respect to the adequacy of fines imposed on the trade associations. The imposition of a fine on the basis of annual receipts has raised questions about its deterrence value. The present article first examines the anti-competitive practices of the trade associations and proceeds to assesses the quantum of penalties imposed on them by the regulator. It is argued that the present system of penalizing trade associations is inadequate and requires the regulator to lift the veil of association to penalize on the basis of turnover of constituent members.

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I. INTRODUCTION

Market regulation entails encouraging the desired behaviour from the market participants as well as discouraging undesirable behaviour by implementing a mechanism to punish such undesired or non-compliant behaviour. The deterrence of anti-competitive behaviour is a crucial part of antitrust enforcement and punishing an offender (disutility) is justified to prevent others from committing the same offence (utility to society). The quantum of penalty should be fixed at a level that will “*deter unlawful conduct to an efficient level*”.¹ Therefore, if the unlawful conduct has only costs and offers no benefits to the society or if the costs always outweigh the loss to society, the quantum of penalty should be kept at the “*absolute deterrence level*”.² Any amount of penalty would be able to create deterrence only if the business organizations know that the penalties accrued would surpass any profit they would make out of violation of competition laws. The deterrence level of the penalty is also affected by the probability of detection. The optimal sanction “*must consist of a fine equal to the perpetrator’s expected gain from the violation multiplied by the inverse of the probability of detection*”.³ Law generally combines the theory of deterrence with the idea of proportional punishment and the ability to pay off the offender by providing for an upper ceiling to the quantum of penalty. While the practical fines are themselves lower than the theoretically shown level required to create deterrence, the inability of the competition authority to adequately penalize trade associations acting in violation of competition law further lowers the deterrence value of penalties.

II. WORKING OF TRADE ASSOCIATION AND ITS INTERFACE WITH COMPETITION LAW

Trade Associations play a crucial role in “*mobilising voices of market players in a sector or across sectors, which help them in negotiating issues of common interest to the members*”⁴. They help in improving the standards of operation and act as platforms for collective bargaining, thus creating a conducive environment of business for all the stakeholders. Some of the activities of the trade associations - like product standardization and harmonization to improve the product quality and safety, promotion of good business practices, advocacy of industry interests before

¹ K. Yeung, ‘Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective’ (1999) 23(2) Melbourne University Law Review 440.

² *Ibid.*

³ John M. Connor and Robert H. Lande, ‘Cartel Overcharges and Optimal Cartel Fines’ (2008) 3 ICLP 2203 accessed December 2021.

⁴ Competition Commission of India, *Introduction to Competition Law (Part 3 - Trade/Industry Associations)*, accessed at CCI Trade Association.

governments and public agencies, determination of ethical rules for professions⁵ - are functions that that can only be pursued if businesses cooperate and collaborate, thereby shaping the way the respective industries work.⁶ The operation of trade associations enhances consumer welfare and has a positive effect on market efficiency. Such cooperation, however, can limit the autonomous decision-making process of individual business units and consequently undermine the competitive process which in turn proves detrimental to consumer welfare.

The right to associate freely or join an association is protected by law and therefore participation or membership in an association is not unlawful under the competition law.⁷ The legitimate functions of the trade associations involving repeated contacts may, however, provide an opportunity for the competitors to co-ordinate their behaviour that is detrimental to the overall competition in the relevant market. The legitimate and important function performed by the trade association may not preclude them from either facilitating collusion or indulging in anti-competitive activities themselves. A distinction, therefore, has to be made between the legitimate functions of the trade association that increase market competitiveness and the illegitimate activities that undermine competition. Exchange of information related to price, quantity, customer base, production, business strategy, etc., may facilitate collusion between the horizontal players.⁸ A study of cartel prosecution shows that many trade associations have been used as a platform to both, sustain and monitor the cartel. Even under the erstwhile MRTP Act, 1969,⁹ the activities of the trade associations were held to be anti-competitive for creating barriers to entry or foreclosing competition in the relevant market by preventing entry of new players through unreasonable and discriminatory standards. The Competition Commission of India [**“Commission”**] in the *Bengal Chemist and Druggist Association Case* observed, “When the trade associations indulge in taking commercially sensitive business decisions on behalf of the entire industry as to whether or not to offer discounts, 24x7 service, free home delivery etc., then competitive forces are not allowed to operate in the market for furtherance of one's business. Innovative business practices, superior services, consumer choice, lower prices, etc., take a back

⁵ Competition Commission of India, *Fair Play Volume 2: July - September 2012*, https://www.cci.gov.in/sites/default/files/Newsletter_document/Newsletter_Sept.pdf.

⁶ OECD, *Potential pro-competitive and anti-competitive aspects of trade Associations, Policy Roundtables* (2007), <https://www.oecd.org/daf/competition/sectors/41646059.pdf> accessed 5 March 2022.

⁷ The Constitution of India 1950, Article 19(1)(c).

⁸ S.W. Waller, ‘Trade Associations, Information Exchanges and Cartels’, (2018) 30(2) *Loyola Consumer Law Review* 163.

⁹ See, *Sirmur Truck Operator*, [1995] 3 CTJ 332 (MRTPC); *Vinod Chopra, Prop. Vinod Chopra Productions v. Film Makers Combine (FMC)*, [2001] CTJ 436 (MRTP); *Johnson & Johnson Ltd. v. Maharashtra State Chemists & Druggists Associations & others.*, [2002] CTJ 265 (MRTP); *Bhiwadi Manufacturers Association v. Truck Operators Association*, 1 CTJ 126 (MRTPC); *In re: Goods Truck Operators' Union, Faridabad*, RTP Enquiry No. 1313/1987 [1989].

seat and do not become the guiding force for doing business. Consequently, not only the businesses suffer but irreparable harm is caused to the consumers."¹⁰

The Indian Competition Act, 2002 ["Act"] does not create any exception for the trade associations. As per clause (v) of Section 2 (l), 'person' includes, "an association of persons or a body of individuals, whether incorporated or not".¹¹ Section 3 of the Act prevents 'association of persons' or 'association of enterprises' to enter into an agreement that causes or is likely to cause an appreciable adverse effect on competition ["AAEC"].¹² In addition, Section 3(3)(d) specifically includes 'practice' carried on or 'decision' taken by any association of persons or enterprises engaged in identical or similar trade.¹³ The decisions of the trade association can be examined as an 'agreement' indicating consensus or meeting of mind between constituent members or as a decision of the trade association itself. The Commission has examined the actions of trade associations for abuse of dominant position under Section 4 of the Act only after declaring that the association is an 'enterprise' under Section 2(h) of the Act.¹⁴ However, if the role of the trade association is limited to being a platform for its members and it does not undertake any commercial activities, then it cannot be categorized as an 'enterprise' which will keep its actions outside the scope of Section 4 i.e., Abuse of dominance.

Liability for anti-competitive behaviour befalls the trade association, as an entity in itself, if it had a "separate role in suggesting, orchestrating or executing an illegal conduct."¹⁵ Sanctioning the trade associations, however, may pose practical challenges before the competition authority as there is always a risk of under-deterrence. This article examines the sanctioning scheme for anti-competitive conduct of trade associations to determine if the monetary penalty which in most cases is imposed on the basis of annual receipts, is adequate to create any 'general' or 'specific' deterrence.

¹⁰ *In Re: Bengal Chemist and Druggist Association*, Suo moto Case No. 02 of 2012 and Ref. Case No. 01 of 2013.

¹¹ Competition Act 2002, §2(I)(5).

¹² Competition Act 2002, §3.

¹³ Competition Act 2002, §3(3)(d).

¹⁴ See, *Re: Air Cargo Agents Association of India*, CCI Case No. 79 of 2012; *In Re: Shivam Enterprises*, CCI Case No. 43 of 2013.

¹⁵ OECD, *Competition Issues in Trade Associations*, Latin American Competition Forum, 2011, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2011\)8&doclang=ge=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2011)8&doclang=ge=en), accessed on 14 March 2022.

III. ROLE OF TRADE ASSOCIATIONS IN CARTEL FORMATION

The trade associations can serve either as cartel facilitating structures or act as a cartel themselves. In an oligopolistic market, where the trade associations act as channels for the dissemination of sensitive information¹⁶, it results in the reduction of competition.¹⁷ Exchange of information related to cost, shipment details, sales data, discount and rebate plans, or information of credit, have served as ways to enable the cartel to survive and also attain stability. The platform of the association has been used to lobby, strategize and decide on the common behaviour, mostly initiated by the more influential members of the association. This reduces the dependency on a more direct form of coordination and thereby reducing the threat of detection. A trade association not only provides a platform for collusion and keeps a check on cheating members but also helps in reducing the cost of managing the cartel. There is a very high rate of involvement of trade associations among prosecuted cartel cases across jurisdictions.

Similarly, the decision of the trade association¹⁸ in the form of recommendations, guidelines, voluntary standards,¹⁹ code of conduct²⁰/by-laws²¹ or practice guidelines for the members results in fixation of prices directly or indirectly or a decision of the association to limit the production or share the market is bad in law.²² Therefore, when the trade associations tried to determine the margins or profits of member distributors and retailers by fixing the upper ceiling of customer discounts²³ or fixed freight charges,²⁴ it was held to be bad in law. Similarly, the Commission, on

¹⁶ CMA, Do's and Don'ts (2014), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358304/Trade_Association_dos_and_don_ts.pdf; Trade Association and Competition Act – Trade Association Dos and Don'ts, Government of Canada (2015), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03691.html>.

¹⁷ Collection and tabulation of information is one of the basic activities of a trade association. Such exercise is done for multiple reasons including development of strategy, identification of sectoral problems, as a lobbying tool etc. Sometimes, it is also done in sectors where the Government regulations mandate such a record keeping and submission of the same at a regular interval. However, exchange of commercially sensitive information which is generally kept to the individual firm in a competitive market creates problems. Such information exchange increases the likelihood of collusion. It can also bring transparency in the market to such an extent that competition is lessened.

¹⁸ See, *Uniglobe Mod Travels Pvt. Ltd., v. Travel Agents Federation of India*, [2011] Comp LR 400 (Commission).

¹⁹ See, *Automobiles Dealers Association, Hathras, UP v. Global Automobiles Ltd. and Pooja Expo India Pvt. Ltd.*, [2012] Comp LR 827 (Commission).

²⁰ *Dhanraj Pillay v. Hockey India*, [2013] Comp LR 543 (Commission).

²¹ *Manju Tharad v. Eastern India Motion Pictures Association (EIMPA) and Others*, [2012] 110 CLA 136 (Commission).

²² *Verband der Sachversicherer v. Kommission*, [1987] ECR 405.

²³ *Bengal Chemist and Druggist Association*, Suo moto Case No. 2/2012, decided on 11/3/2014 (Commission); *Varca Druggist & Chemist v. Chemist and Druggist Association, Goa*, 2012 Comp LR 838 (Commission).

²⁴ *Indian Foundation of Transport Research and Training v. All India Motor Transport Congress*, Case No. 61/2012, decided on 16/2/15 (Commission.); *In Re: Cochin Port Trust and Container Trailer Owners Coordination Committee*, Case No. 6/2014, decided on 1/8/17 (Commission).

multiple occasions, has objected to the practice of trade associations in form of refusal to supply²⁵, mandatory NOC²⁶, boycott²⁷, ban²⁸ or refusal to deal²⁹ with non-members of the association.³⁰ These practices were held to be restricting the supply or output of products or services in the market, thereby violating Section 3(3)(b) of the Act. The same has been held to be depriving consumer choice and creating barriers to entry in the market.³¹ In more than 60% of cartel cases decided by the Commission, a trade association has been the primary cartelist or leader.³²

IV. INDIAN EXPERIENCE WITH TRADE ASSOCIATIONS

In the last twelve years of the active enforcement of Indian competition law, the Commission has scrutinized the role of trade associations in facilitating cartels. In many cases, the platforms of the trade associations have been used to sustain and monitor cartels³³ by either facilitating exchange of commercially sensitive information between constituent members or providing a platform for active discussion on prices. A majority of cases under Section 3(3) of the Act involved the primary role of the trade associations having direct evidences of anti-competitive

²⁵ *FICCI Multiplex Association of India v. United Producers/Distributors Forum*, [2011] Comp LR 79 (Commission).

²⁶ *Maruti & Co., Bangalore v. Karnataka Chemist and Druggist Association (KCDA)*, Case No. 71/2013, decided on 28/7/16 (Commission).; *Rohit Medical Store v. Macleods Pharmaceuticals Limited*, [2015] Comp LR 451 (Commission).; *In re: Bengal Chemist & Druggist Association*, 2014 Comp LR 221 (Commission).; *The Belgaum District Chemists and Druggist Association v. Abbott India Ltd.*, C-175/09/DGIR/27/28-MRTP, decided on 2/3/17 (Commission).; *Reliance Agency v. Chemist and Druggist Association, Baroda*, case No. 97/2013, decided on 4/3/18 (Commission).; *Ghanshyam das Viz v. Bajaj Corp Ltd.*, Case No. 68/2013, decided on 12/10/15 (Commission).

²⁷ See, *TG Vinay Kumar Bharathim and Association of Malayalam Movie Artitsts (AMMA), Film Employees Federation of Kerala (FEFKA)*, Case No. 98/2014, decided on 24/3/17; *In Re: Kannada Grahakara Koota v. Karnataka Film Chamber of Commerce*, case No. 58/2012, decided on 24/3/17 (Commission).; *Sajjan Khaitan v. Eastern India Motion Picture Association*, 2012 Comp LR 914 (Commission).; *Cinemax India Ltd. v. Film Distributors Association*, 2015 Comp LR 81 (Commission).; *Uniglobe Mod Travels Pvt Ltd. v. Travel Agents Federation of India*, 2011 Comp LR 400 (Commission).

²⁸ *Kerala Cine Exhibitors Association v. Kerala Film Exhibitors Federation*, [2015] Comp LR 666 (Commission).

²⁹ *UTV v Software Communications Ltd., Mumbai v. Motion Pictures Association*, [2012] Comp LR 20 (Commission).

³⁰ *Shivam Enterprises v. Kiratpur Sahib Truck Operators Co-operative Transport Society Ltd.*, [2015] Comp LR 232 (Commission).

³¹ *Commission v. Co-ordination Committee of Artists and Technicians of WB Film and Television*, Civil Appeal No. 6691/2014 (SC).

³² In contrast, in only 5 cases out of total of 36 cases (14%) under Section 26(6) had an allegation of primary involvement of trade associations.

³³ See, *Builders Association of India v. Cement Manufacturers' Association and Ors.* [2012] Comp LR 629 (Commission); *Cartelization in respect of zinc carbon dry cell batteries market in India v. Eveready Industries India Ltd & Ors., Suo-Moto* Case No. 02/2016, decided on 19/4/18 (Commission).

behavior in the forms of diktats³⁴, notices³⁵; by-laws³⁶; letters of intent³⁷; circulars; minutes of meetings or press releases and with an implicit threat for compliance. While in most cases, the executive bodies of the trade associations have been taking decisions on behalf of the members, there are also cases where general body meetings were called to make decisions.

Almost 60% of the cartel decisions of the Commission involved the behavior of limiting or controlling production majority of which were the result of decisions taken by sector-specific voluntary and powerful trade associations. Many of the cases are similar in nature and revolve around the questions of fixing margins, offering of discounts by retailers, the requirement of mandatory NOC or PIS, refusal to deal with non-members and boycotts for non-compliance.³⁸ Similarly, almost 50% of price-fixing cases – primarily in the pharmaceutical, transport or media sectors - involved the primary role of trade associations in the form of executing boycotts³⁹; fixing the rate of revenue⁴⁰/transport⁴¹/ freight charges⁴²/commission⁴³ or fuel charges⁴⁴.

³⁴ See, *Swastik Stevedores Pvt. Ltd. v. Dumper Owners' Association* [2015] Comp LR 212 (Commission); *Varca Chemist and Druggist v. Chemist and Druggist Association, Goa*, [2012] Comp LR 838 (Commission); *Santuka Associates Pvt. Ltd. v. Al Indian Organization of Chemists and Druggists and Others*, [2013] Comp LR 223 (Commission).

³⁵ See, *Uniglobe Mod Travels Pvt. Ltd., v. Travel Agents Federation of India*, [2011] Comp LR 400 (Commission).

³⁶ See, *Manju Tharad v. Eastern India Motion Pictures Association (EIMPA) and Others*, [2012] 110 CLA 136 (Commission).

³⁷ See, *Automobiles Dealers Association, Hathras, UP v. Global Automobiles Ltd. and Pooja Expo India Pvt. Ltd.*, [2012] Comp LR 827 (Commission).

³⁸ *Varca Druggist & Chemist & Ors. v. Chemists and Druggists Association, Goa*, MRTP C-127/2009/DGIR4/28, decided on 11/6/2012 (Commission); *In Re Bengal Chemist and Druggist Association*, Suo Moto Case No. 2/2012, decided on 11/3/2014 (Commission).; *Sudeep P.M. & others v. All Kerala Chemists and Druggists Association*, Case No. 54/2015, decided on 31/10/17 (Commission); *Reliance Agency v. Chemists and Druggists Association of Baroda & Others*, Case No. 97 of 2013, decided on 4/1/18 (Commission); *M/s. Alis Medical Agency v. Federation of Gujarat State Chemists & Druggists Associations & Others*, (71/2014) *M/s. Stockwell Pharma v. Federation of Gujarat State Chemists & Druggists Associations & Others*, (72/2014) *M/s. Apna Dawa Bazar v. Federation of Gujarat State Chemists & Druggists Associations & Others*, (68/2015) *M/s. Reliance Medical Agency v. The Chemists & Druggists Association of Baroda & Others*, Case 65/2014, 71/2014, 72/2014 & 68/2015, decided on 12/7/18 (Commission).

³⁹ *M/s. FCM Travel Solutions (India) Ltd., New Delhi v. Travel Agents Federation of India & Ors.*, RTPE 09/2008 (C-31/2009/DGIR) decided on 17/11/2011 (Commission).

⁴⁰ *FICCI – Multiplex Association of India v. United Producers/Distributors Forum & Ors.*, Case No. 1/2009, decided on 25/5/2011 (Commission).

⁴¹ *M/s Swastik Stevedores Private Limited v. M/s Dumper Owner's Association & Ors.*, Case No. 42/2012 decided on 21/1/15.

⁴² *Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh, President and Ors.*, Case No. 1/2012, decided on 16/2/15 (Commission). The COMPAT on 18/4/16 set aside the order of the Commission as the DG ignored replies from most of transport companies. Further, as per the Appellate Tribunal, there was not enough evidence to prove that there was diktat or directive from the association to increase prices. Rental was also noted to have not increased by 15% across board.

⁴³ *The Air Cargo Agents Association of India v. International Air Transport Association (IATA) & other*, Case No. 79/2012, decided on 04/06/2015 (Commission).

⁴⁴ *Express Industry Council of India v. Jet Airways (India) Ltd. & Others*, case 30 of 2013, decided on 7/3/18 (Commission).

Most of the anti-competitive behaviours originated from the diktats of the trade association and were enforced by virtue of their command and authority in the market. For this reason, the cartelized behaviours have not seen defections. There is always a credible threat of boycott for not towing the lines of the association⁴⁵ for those who indulge in the boycott, strike, picketing, non-supply or non-dealing with any insider who tries to go outside the terms of agreed behaviour. There seems to be a general acceptance within large trade associations for mutually accepted anti-competitive behaviours and they are passed off as market practice.

V. IMPOSITION OF PENALTY ON TRADE ASSOCIATIONS

Section 27 of the Act enables the Commission to direct an “*enterprise or association of enterprises or person or association of persons*” to discontinue a continued violation of Section 3 of the Act.⁴⁶ In addition, the Commission under Section 27(b) may impose a penalty *to a maximum of ten percent of the average of the turnover for the last three preceding financial years, upon each of such person(s)*. Within the upper limit fixed under Section 27(b), the Commission can impose a penalty either on the basis of profit or on the basis of turnover, taking into account the duration of the cartel. Section 27(b) or the proviso is silent on the imposition of penalty on trade associations. The Commission has interpreted the provision to impose a penalty on the trade associations in a similar manner to firms involved in cartelization: for instance, the Commission in *Eros International*⁴⁷ observed:

“7.3 As per the provisions of Section 27(b), penalties for anti-competitive agreements are to be imposed either on turnover or profit. Since the associations are not having turnover of their own out of exploitation of the activities of film distribution and exhibition and are having receipts from members besides some other miscellaneous income and also considering that the associations represent the collective intent of the members and the decisions of the associations are having anti-competitive effects on the market, the Commission finds it appropriate to impose penalties on receipts/income of these associations.”

⁴⁵ See, *Vijay Gupta v. M/s Paper Merchants Association, Delhi*, Case No. 7/2010, decided on 3/2011 (Commission).

⁴⁶ Competition Act (2002), §27(a).

⁴⁷ *Eros International Media Ltd. v. Central Circuit Cine Association, Indore & Ors.*, Case 52/2010; Case 56/2010, 2012 (CCI).

Over the years, the Commission has consistently imposed penalties on associations by way of Section 27(b).⁴⁸ Since these trade associations did not have an actual turnover (since most of these trade associations were not ‘enterprises’ and were not doing an economic activity on their own), the computation has been done on the basis of annual receipts which majorly constitute contribution by the members i.e., membership fees. Further, in the majority of cases where the decision(s)/practice(s) of trade associations were held to be anti-competitive, the Commission has imposed a penalty at the rate of 10% i.e., at the upper ceiling level. The presence of aggravating⁴⁹ or mitigating factors did not alter the quantum of penalty imposed on the trade associations by the Commission. While logically speaking, the presence of aggravating factors should increase the quantum of penalty. However, the same is not seen in many cases decided by the Commission.⁵⁰ Similarly, the Commission penalized associations at the same rate in case of repeated violations (recidivism). On very limited occasions, the Commission has reduced the penalty on the trade associations from the general rate of 10%.⁵¹ It is to be noted that Section 27 does not mention the term ‘receipts’ and therefore is silent on the imposition of fines on trade associations acting as cartels themselves. The imposition of a 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. Cases against trade associations as seen in matters of *Santuka*⁵², *Arora*⁵³, *Reliance*⁵⁴, *BCDA*⁵⁵, *CDA* etc. are evidence of such a problem.

A. Recidivism

European Commission defines recidivism in its 2006 Fining Guidelines⁵⁶ as the situation “where an undertaking continues or repeats the same or similar infringement after the Commission or a

⁴⁸ See, *In re: M/s Cinergy Independent Film Services Pvt. Ltd.*, Case No. 56/2011, order dated 10/1/2013 (CCI); *Mr. Nadie Jauhri v. Jalgaon District Medicine Dealers Association (JDMDA)*, Case 61/2015, order dated 20/6/2019 (CCI); *In Re: Madhya Pradesh Chemists and Distributors Federation (MPCDF)*, Case 64/2014, order dated 3/6/2019 (CCI); *In Re: Vedanta Bio Sciences, Vadodara*, Case No. C-87/2009/DGIR, order dated 15/1/2019 (CCI).

⁴⁹ See, *In re: M/s Arora Medical Hall, Ferozpur*, Case No. 60/2012, order dated 5/2/2014 (Commission).

⁵⁰ See, *M/s Arora Medical Hall, Ferozpur v. Chemists & Druggists Association*, Case No. 60/2012, decided on 5/2/2014 (Commission).; *In Re: Bengal Chemist and Druggist Association*, Suo moto Case No. 02 of 2012, decided on 11/3/2014 (Commission).

⁵¹ *In Re: Kerala Cine Exhibitors Association*, Case No. 45/2012, order dated 23/6/2015.

⁵² *M/s Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists*, Case No. 20/2011, decided on 19/2/2013 (Commission).

⁵³ *M/s Arora Medical Hall, Ferozpur v. Chemists & Druggists Association*, Case No. 60/2012, decided on 5/2/2014 (Commission).

⁵⁴ *Reliance Agency v. Chemists and Druggists Association of Baroda (CDAB) & Others*, Case No. 97 of 2013, decided on 4/1/2018 (Commission).

⁵⁵ *In Re: Bengal Chemist and Druggist Association*, Suo moto Case No. 02 of 2012, decided on 11/3/2014 (Commission).

⁵⁶ Para 28(a), Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006/C 210/02, Official Journal of the European Union (2006).

national competition authority has made a finding that the undertaking infringed Articles 101 or 102 of the Treaty of Functioning European Union (TFEU)". Recidivism in the Fining Guidelines is considered an aggravating factor that increases the base amount of the fine up to 100% for each such infringement established. A higher rate of recidivism raises questions about the deterrent effect of a previously imposed fine.⁵⁷ In India, there have been many cases where sector-specific associations have indulged in anti-competitive behaviour of a similar nature.⁵⁸ The Commission has on multiple occasions lamented about the repeated nature of the violation, especially among the trade associations in the pharmaceutical sector. However, the Commission has not gone beyond penalizing trade associations at a rate of 10%. For instance, the Commission penalized the *Chemist and Druggist Association, Goa* ["CDAG"] in 2012 at the rate of 10% of average receipts.⁵⁹ In 2014, the Commission observed that the CDAG continued with the anti-competitive behaviour with "utmost disrespect to the Commission's mandate".⁶⁰ However, it only imposed a penalty at the rate of 10% of the average receipts. Similarly, the Commission in its 2015⁶¹ order against Himachal Pradesh State Chemists & Druggists Association noted the previous orders against the association by MRTPC in 2008 and ended up penalizing the association at the same rate of 10% on the association.⁶² A similar scenario is seen in the matter of the *Indian Foundation of Transport Research & Training*⁶³ and the *Kerala Film Exhibitors Federation* ["KFEF"]⁶⁴. In *Kannada Grahakara Koota*⁶⁵, the 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. While some jurisdictions prescribe an increase in the quantum of penalty in case of repeated violations, the Commission has found itself

⁵⁷ The European Commission in the *Michelin* case remarked, "Recidivism is a circumstance which justifies a significant increase in the basic amount of fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent". Judgment of the European Court of Justice, Case C-322/81 *NV Nederlandsche Banden industrie Michelin v. Commission*, (1983) ECR 3461.

⁵⁸ *Reliance Agency v. Chemists and Druggists Association of Baroda & Others*, Case No. 97/2013, decided on 4/1/18 (Commission); *M/s Maruti & Company v. Karnataka Chemists & Druggists Association & Others*, Case No. 71/2013, order dated 28/7/2016 (Commission); *Sudeep P.M. & others v. All Kerala Chemists and Druggists Association*, Case No. 54/2015, decided on 31/10/17 (Commission).

⁵⁹ *Varca Druggist & Chemist & Ors. v. Chemists and Druggists Association, Goa*, Case No. MRTP C-127/2009/DGIR4/28, decided on 11/6/2012 (Commission).

⁶⁰ *In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.*, Suo-Moto Case No. 05 of 2013, decided on 27/10/14 (Commission).

⁶¹ *M/s Rohit Medical Store v. Macleods Pharmaceutical Limited & Others*, Case No. 78 of 2012, decided on 29/1/2015 (Commission).

⁶² See also, *Mr. P. K. Krishnan v. All Kerala Chemists and Druggist Association & Ors.*, Case No. 28 of 2014, decided on 1/12/2015; *Madhya Pradesh Chemists and Distributors Federation (MPCDF) v. Madhya Pradesh Chemist and Druggist Association (MPCDA) & Ors.*, Case No. 64/2014, decided on 15/1/2019 (Commission).

⁶³ *Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh, President and Ors.*, Case No. 61 of 2012, decided on 16/2/2015 (Commission).

⁶⁴ *M/s. Crown Theatre v. Kerala Film Exhibitors Federation (KFEF)*, Case No. 16 of 2014, decided on 8/9/2015.

⁶⁵ *Kannada Grahakara Koota v. Karnataka Film Chamber of Commerce (KFCC) & Ors.*, Case No. 58 of 2012, order dated 27/7/2015 (Commission).

limited in its ability to impose a penalty at a higher rate due to the upper-capping provision. The Commission has not utilized Section 27(g) either to impose additional restrictions.

B. Failure to identify ring leaders

The Commission, over the years, has not made the effort of identifying cartel ring leaders even while assessing leniency applications.⁶⁶ In cases where the trade associations acted as cartels themselves, the Commission has imposed penalties on the basis of annual receipts. In some cases, the Commission has also imposed a penalty on the office bearers or the executive members of the association, quantified on the basis of their respective salaries.

The Commission does not seem to consider that even when the decision is taken by the trade association through the executive committee/members, there are certain ‘undertakings’ or ‘enterprises’ within the association that assume the leadership role and guide the decision-making process. The non-identification of these ring leaders helps the real culprits escape liability. Many jurisdictions, in order to create a higher level of deterrence, treat the cartel ring leaders differently from other cartel participants. These ring leaders can act as initiators, instigators and even coercers in specific circumstances. Therefore, in order to create some level of fear, competition law in many countries either prescribes a higher penalty for ring leaders when compared to other cartel participants or excludes them from leniency.⁶⁷ Considering that the membership of trade associations is comprised of business undertakings, it would have been worthwhile for the Commission to identify the leader firm behind the decision making of the association. The Apex Court has recognized ‘leadership’ as one of the factors to compute penalty.⁶⁸ The non-identification of ring leaders fails to create ‘specific deterrence’ for individual undertakings. Moreover, this loophole can encourage the potential ring leaders to encourage/coerce cartelisation in their respective industries and then seek leniency at the first sign of investigation by the Commission.

⁶⁶ See, *Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, Suo Moto Case No. 3/2014, order dated 18/1/2017 (Commission).

⁶⁷ See, Para B(e), *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases*, Official Journal C 207, 18/07/1996 P. 0004 – 0006, European Commission; *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, Official Journal C 045, 19/02/2002 P. 0003 – 0005, European Commission.

⁶⁸ Para 13, *Per N.V. Ramana, J., Excel Crop. Care Limited v. Competition Commission of India and Ors.*, AIR 2017 SC 2734.

VI. LIFTING THE 'VEIL OF ASSOCIATION'

Since most of the trade associations are not themselves engaged in any commercial activity, the turnover of the association is primarily composed of membership fees and is therefore very low. This further raises questions about the deterrence effect for the association in question and towards other associations indulging in practices which are violative of competition law. Additionally, the administrative fine calculated on that basis of turnover limited to membership fees has no relation whatsoever to the actual impact on the market of the illegal behaviour. Some competition authorities,⁶⁹ therefore, lift the 'veil of association' to calculate fines on the basis of the turnover of the constituent members. For instance, in cases where the infringement of an association relates to the activities of its members, Article 23(2) of the European Council Regulations ["**ECR**"]⁷⁰ allows the European Commission ["**EC**"] to impose a penalty on the association based on the sum of the total turnover of each member active on the market affected by the infringement of the association. And, if the association is not solvent, the association will call for contributions from its members to cover the amount of the fine.⁷¹ This has also been incorporated in the European Guidelines on the method of setting fines, 2006.⁷² Article 26(4) also ensures that the contributions from the constituent members are done within a time frame failing which, *"it may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association"*⁷³. The undertakings will not be required to pay if they are able to prove that they did not implement the anti-competitive decision of the association or *"were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case"*⁷⁴.

The Commission while penalizing the constituent members of the association may consider the relative size of the undertakings belonging to the association and, in particular, the situation of small and medium-sized enterprises.

⁶⁹ *Potential pro-competitive and anti-competitive aspects of Trade/Business Associations*, Policy Roundtables, OECD (2007), DAF/COMP (2007)45, (July 2020) <http://www.oecd.org/regreform/sectors/41646059.pdf>.

⁷⁰ Art. 23(2), Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001>.

⁷¹ Article 23(4), Id.

⁷² See, Cl. 13 read with Cl. 14 and cl. 33, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 210/02).

⁷³ Art. 23(4), Id.

⁷⁴ Para 4, Id.

When a fine is imposed on an association of undertakings, whose own turnover most often does not reflect its size or power on the market, it is only when the turnover of the member undertakings is taken into account that a fine with a deterrent effect can be determined.⁷⁵ It is not necessary that the members of the association should have actually participated in the infringement, but the association must, by virtue of its internal rules, have been able to bind its members.⁷⁶ The European courts have on different occasions emphasized the correctness of this view and noted that “*the influence which an association of undertakings has been able to exert on the market does not depend on its own turnover, which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power.*”⁷⁷

The ECJ through its judgment in *Coop de France and FNSEA and Others v. Commission, ECJ (Third Chamber)*⁷⁸ (Coop de France) was a breakthrough in terms of piercing the veil of association to impose fines on constituent undertakings for violations of EC competition law.⁷⁹ The alleged violation was a crisis cartel with an agreement to suspend imports of beef entered into between federations representing beef farmers and those representing the slaughterers.⁸⁰ The Court held that the turnover of constituent members of associations could be considered even if it was not within the formal powers of the associations to bind their members.⁸¹ Fixing liability on the basis of turnover of constituent members has two justifications. Firstly, in determining the penalty, the influence of the offender's undertaking on the market in terms of its size and

⁷⁵ Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission*, [1983] ECR 1825, para 120 and 121.

⁷⁶ Case C-298/98 P, *Finnboard v Commission*.

⁷⁷ (Case C-298/98 P, *Metsä-Serla Sales Oy v. Commission*, [2000] ECR I-10157, para 12 and para 62-74). See also Joined Cases T-39/92 and T-40/92, *CB and Europay v. Commission*, [1994] ECR II-49, and Case T-29/92, *SPO and Others v. Commission*, [1995] ECR II-289; Joined Cases T-213/95 and T18/96, *SCK and FCK v. Commission*, [1997] ECR II-1739; Case T-338/94, *Metsä-Serla Sales Oy v. Commission*, [1998] ECR II-1617.

⁷⁸ *Coop de France bétail et viande and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others*, ECJ (Third Chamber), judgment of 18 December 2008, C-101/07 P and C-110/07 P.

⁷⁹ Florence Alexandr Svetlicnii, *Piercing the Corporate Veil: Imposition of Fines on Associations of Undertakings for Violation of EC Competition Law*, ELR 3, 2009.

⁸⁰ Tjarda van der Vijver, The French beef case: *Coop de France Betail et Viande v. Commission of the European Communities*, 30 Eur. Compet. Law Rev., 2009.

⁸¹ The Court distinguished the facts from those in *Finnboard v. Commission*, ECJ [2000] ECR I-10157 by remarking that the members of the association took an active role in the anti-competitive agreement and hence, it did not matter if the association had powers to bind its members or not. Contrastingly, the members of the association were not participating in the infringement in the case of *Finnboard* and hence, the condition of the association binding its members was a prerequisite to be able to impose fines on the basis of the constituent members' turnovers. Further, the anti-competitive practices under consideration were undertaken by the association for the direct benefits of its members, given how the objectives and the interests of the association were not independent of those of its constituent members.

economic power has to be accounted for. Second, penalties will have a dissuasive effect only when the turnover of constituent members is taken into account.⁸²

Another argument in favour of lifting the veil of the association is to prevent indirect penalty on innocent members of the association which has engaged in cartelisation. It has been seen in several cases that while the association in question has indulged in cartelisation, not all its members were party to such cartel conspiracy.⁸³ In such situations, the penalty on the association leads to an indirect penalty on the member who had never participated in the cartel conspiracy and may not even be aware of the same.

VII. CONCLUSION

Fines should have a sufficient deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in or continuing, behaviour that is contrary to competition law (general deterrence). Fines imposed on an association therefore should be proportionate in relation to the economic influence it deploys on the market, thereby safeguarding the effectiveness of fines as a means to suppress illegal activities and prevent their reoccurrence. At the same time, justice requires that innocent enterprises should not be punished merely because they are members of an association which may have indulged in cartelisation without the knowledge of such enterprise. Both the objectives can be achieved under competition law by lifting the veil and assessing the actual cartel participants and their ring leaders.

⁸² See, *Musique Diffusion and others v. Commission* [1983] ECJ 1825.

⁸³ See, Case No. 29 of 2010, Ref. Case No. 08 of 2013, Suo Moto Case No. 02 of 2016.