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TRADE ASSOCIATIONS- TOEING THE COMPETITION LAW LINE

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ABSTRACT

The present paper intends to focus on the regulation of anti-competitive activities of trade associations, particularly their cartelisation. After culling out the existing provisions from the Competition Act of India regarding such regulation, this paper analyses all activities of trade associations that threaten the competition in the market but are not strictly covered under the Act. Further, the legality of a boycott as a bargaining tool of trade associations, is examined in the context of competition law. While reviewing international jurisprudence with respect to such regulation, the paper provides an insight into certain mechanisms that can be adopted in India to ensure a healthy, pro-competitive functioning of trade associations.

Keywords: trade associations, cartels, boycott, anti-competitive, CCI, price fixing, exchange, territorial allocations, concerted, pro-competitive, AAEC, economic activity, antitrust, enterprises, report, violation, whistle-blower.

1. INTRODUCTION

The Indian Constitution accords its citizens the right to form associations or unions or cooperative societies.[1] Trade associations are typically formed to promote the economic sector they represent and play an active role in shaping the way in which their particular industry functions. They increase the efficiency of markets by providing a forum for discussion, exchange of information, deliberation and tackling issues of common interest. However, since members of a particular industry collectivize in order to discuss issues, this may quickly lead to a breach of competition law.

[1] INDIA CONST., art. 19, cl.1, sub cl.c.

Competition law has been instrumental in ensuring the smooth operation of markets. The Competition Act, 2002 ("**the Act**") safeguards free and fair competition which protects freedom of trade. The question then is, when are activities of trade associations within boundaries of freedom of association and when do they become anti-competitive? Analysing the nature of activities of trade associations will help us in understanding this difference and will facilitate better regulation of such activities. This in turn will take us closer to achieving the goal of a healthy and competitive market.

2. DEFINITIONS AND MEANING

2.1. Trade Associations

An association or a union is formed for the primary purpose of collective bargaining. The term trade association has been defined in the Black's Law Dictionary as an association of business organizations having similar concerns and engaged in similar fields, formed for mutual protection, the interchange of ideas and statistics and the establishment and maintenance of industry standards.[2] Though it is not explicitly defined in the Act, it is discussed through concepts such as 'person'[3] which include**s** an association of persons and 'anti-competitive agreements,'[4] which include**s** agreements entered into by such associations which could cause an appreciable adverse effect on competition ("**AAEC"**) within India. Trade associations also find mention in the 'inquiry into the dominant position of enterprise'[5] as carried out by the Competition Commission of India ("**CCI**") at the behest of such associations.

Medical associations, film associations, sports associations and transport associations are some kinds of trade associations. For example, the All India Organisation of Chemists and Druggists, which is a trade body that manages the supply of drugs in the market, is registered

[2] *Trade Association*, BLACK'S LAW DICTIONARY (10th ed. 2014)..
[3] The Competition Act §2, cl.1, sub cl.v (2002).
[4] *Id*., at §3.
[5] *Id*., at §19, cl.1.

under the West Bengal Societies Registration Act, 1961.[6] The Eastern India Motion Picture Association which regulates the distribution of films in West Bengal, and North East, is formed under the Companies Act, 1956.[7] The Board of Control for Cricket in India (BCCI) which is the primary regulatory body of cricket in India is registered under the Tamil Nadu Societies Registration Act, 1975.[8]

The objective of a trade association is to represent the views of its members to the government and then to relay the views of the government to the members, to provide service to its members and to handle public relations of the industry sector.[9] Additionally, trade associations cater to the needs of its members by creating frameworks about legislative, commercial, non-commercial and taxation issues.[10]

2.2.Cartels

Cartels comprise enterprises which generally abominate any sort of competition, as it not only reduces their profits but also takes away their control over market activities. As a result, players in the market prefer coming together in concurrence to coordinate their production and pricing activities in order to increase their collective and individual profits by restricting market output and raising the market price.[11] These agreements are inherently harmful to the competition existing in the markets of any country. The Act defines cartel in § 2(c) as: [12]

> *"cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control*

[6] Sandhya Drug Agency, In re, 2014 Comp LR 0061, ¶3. ("hereinafter Sandhya Drug")
[7] Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶1.8.2.
[8] Surinder Singh Barmi v. Board of Control for Cricket in India, 2013 Comp LR 297, ¶1.2.
[9] ALAN REID, EU COMPETITION LAW AND TRADE ASSOCIATIONS (2003) ("hereinafter REID"); GREENWOOD J., THE CHALLENGE OF CHANGE IN EU BUSINESS ASSOCIATIONS 76 (2003) (Palgrave Macmillan, London).
[10] MARK BOLEAT, TRADE ASSOCIATION STRATEGY AND MANAGEMENT, 1-2 (1996).
[11] PRADEEP S. MEHTA, STUDY OF CARTEL CASE LAWS IN SELECT JURISDICTIONS, (2008). https://www.cci.gov.in/sites/default/files/cartel_report1_20080812115152.pdf.
[12] The Competition Act, §2, cl.c (2002).

the production, distribution, sale or price of, or, trade in goods or provision of services;

The Supreme Court, in the case of *Union of India v. Hindustan Development Corporation*, has laid down the meaning of cartel as *"An association of producers who by agreement among themselves attempt to control production, sales and prices of the product to obtain a monopoly in any particular industry or commodity."*[13]

Commonly referred to as 'cancers on the open market economy' and 'supreme evil of antitrust', [14] cartels are essentially formulated so that the participants do not compete against each other on price, product (including services) or customers[15], thereby, ruling the entire market collectively and leaving the buyers with little or no choice. Although the requirement of meeting of minds is mandatory, the mere formation of the cartel by itself does not give rise to any action. Something must be proved to demonstrate the detrimental effect, thereof.[16] Thus, such collusions should necessarily have AAEC to be held liable. These collusions are mostly proved by a chain of events formed by circumstantial evidence since the existence of cartels is seldom proved by direct evidence.

There are three major factors that are necessary to establish a cartel:[17]

a. The cartel must be able to raise prices above the non-cartel level without inducing substantial increased competition from non-member firms.
b. The expected punishment for forming a cartel must be low relative to the expected gains.
c. The cost of establishing and enforcing a cartel agreement must be low relative to its expected gains.

[13] Union of India and Ors. v. Hindustan Development Corporation. and Ors., MANU 1, 18 (1993), ¶15.
[14] VINOD DHALL, COMPETITION LAW TODAY 41 (2007) ("hereinafter DHALL").
[15] S M DUGAR, GUIDE TO COMPETITION LAW, 98 (6th ed. 2016).
[16] Haridas Exports v. All India Float Glass Manufactures Association and Ors., MANU 1, (2002).
[17] DHALL, *Supra* note 14. p. 41.

It is a presumption that a cartel will have an AAEC. The only aspect that is to be established is the existence of an agreement amongst competitors, of the nature as laid down under § 3 of the Act.[18] This is a rebuttable presumption and the moment the existence of such an anti-competitive agreement is established, the burden shifts onto the opposite parties to such an agreement to prove how it does not cause AAEC.[19]

When acting together, the parties of a cartel can pose a combined threat in the market as monopolists. As a result, it is of paramount importance to appropriately identify what collusions or associations or agreements constitute a cartel and to bring into force a strong cartel enforcement regime.

2.3.The Grey Area

There is no denying the fact that the objective of most voluntary trade associations is the betterment of its members and the development of more commercial opportunities. However, there is a very thin line between such trade associations operating lawfully and unlawfully. Being organized on a geographic or industrial basis in a particular line of business, there are instances where these associations also tend to exercise measures of control over prices, output, channels of distribution etc. and before one realises, the association has transformed into a fully functional cartel, restricting and eliminating competition in the market. The rights of an association to bargain collectively may also amount to an anti-competitive act. For instance, in the case of *Builders Association of India v. Cement Manufacturers' Association,*[20] CCI held that the cement manufacturers were, in fact, a cartel that controlled production and raised prices of cement by exchanging commercially sensitive information amongst themselves.

[18] The Competition Act §3 (2002).
[19] Uniglobe Mod Travels Pvt. Ltd., In Re, (2011) CCI 64, ¶68.2.1. ("hereinafter Uniglobe").
[20] Builders Association of India., In re, 2016 SCC OnLine CCI 46. ("hereinafter Builders Association").

Trade associations remain by their very nature exposed to antitrust risks, hindering the survival and growth of the competitors in the market, despite their many pro-competitive aspects like trade promotion, industry cost analysis, product standardization, etc. [21] These associations have the capability to adversely affect the competition by fixing prices through concerted action, [22] controlling and restricting the supply and distribution of goods, services or rights,[23] making membership to the association mandatory in a particular region[24] and collectively boycotting business and commercial dealings,[25] among other means. In such situations, it becomes imperative to clear out the blurred line dividing trade associations and cartels by distinctly laying out the factors that distinguish the two, the conditions which would convert a legitimate trade association into an unlawful one and a proper machinery to appropriately tackle such a transformation.

3. THE DEMARCATING LINE: WHEN DOES A TRADE ASSOCIATION BECOME A CARTEL?

The activities of Trade Associations and Cartels often overlap in several aspects. As a result, it becomes onerous to clearly comprehend the line dividing the two. Since all countries around the world with a competition law regime descend harshly on cartels, various traders, manufacturers and suppliers have tried to deceive the system by secretly indulging in cartelisation discussions in meetings held under the garb of trade associations.[26]

A number of instances of trade association-induced cartelisation can be found from all corners of the world, with India being no exception to it. In 1977, the MRTP Commission had to issue a cease and desist order to the Indian Woollen Mills Federation after it had

[21] *Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations*, (Organisation for Economic Co-operation and Development, working paper no. DAF/COMP (2007) 45).
[22] Bengal Chemist & Druggist Assn., In re, 2014 Comp LR 221, ¶61.
[23] Manju Tharad v. Eastern Indian Motion Picture Assn., 2012 Comp LR 1178, ¶5.15.
[24] Ghanshyam Dass Vij, In re, (2015) CCI 155, ¶56.
[25] FCM Travel Solutions (India) Ltd., In re, 2012 Comp LR 47, ¶18. ("hereinafter FCM").
[26] Pradeep S. Mehta, *Trade Associations as Cartels*, FINANCIAL EXPRESS, Nov. 13, 2019 https://www.financialexpress.com/archive/trade-associations-as-cartels/859262/.

facilitated a price fixing cartel among its members. The Commission was forced into action again in subsequent years, passing similar orders against the Food Grains and Kirana Merchants Association (1983), the Alkali Manufacturers Association (1985) and various local Truck Operators Unions which had transformed themselves into conduits for cartelisation by members.[27]

As mentioned earlier, there are certain requisites for the formation of a cartel, which trade associations can effortlessly fulfil. Firstly, a cartel can be created only if its members are assured that they will be able to raise prices above the normal level without being pushed out of business by the non-participant firms. An association, composed of several firms, would be confident of profitability as the decisions made are binding on all members. Any deviating firm could be easily whipped into line through the association. Secondly, the cost of formulating and administering a cartel has to be necessarily lower than its expected gains, which is true for trade associations where the association also bears the costs of organisation and monitoring. Thirdly, a well-functioning cartel would require lobbying and strategizing by the cartel leader to induce other firms to join. Acquiring a platform to pitch such a strategy is a very difficult task, as this would entail meetings with rivals. However, the presence of an association makes it convenient for leaders to achieve this.[28]

There are no concrete conditions under the Indian law that aid in demarcating the point where a beneficent trade association becomes an illegitimate cartel. However, decisions taken by trade associations can be examined under §3(1) read with §3(3) of the Competition Act.[29] Accordingly, three scenarios can arise. Firstly, an association of enterprises may be liable for breach of §3. Secondly, constituent enterprises of the association may be held liable for

[27] *Id.*, at ¶2.
[28] *Id.*, at ¶6.
[29] The Competition Act § 3 (2002).

contravention of §3. Thirdly, members who were responsible for running the entity involved in an anti- competitive activity may be held liable.

On an analysis of these sections, there exist certain conducts that assist in unveiling such illegitimate cartelisation.[30] This can be categorised as follows:

3.1.Collection and Dissemination of Statistics and Other Sensitive Information

The collection and dissemination of statistics pertaining to an industry is quite a productive function of a trade association. However, great care must be exercised in the use and handling of the same. The U.S. Supreme Court in the *Sugar Institute* case has indicated that the failure of the association to make complete disclosure to the trade of statistics collected and circulated within its ranks may be in itself an unreasonable restraint of trade.[31] In certain circumstances, the exchange of trade information among its members concerning the names of customers, prices, and other like information can be competent evidence of an intent to violate the Competition law as it is particulars like these that help in devising ways of eliminating competition.

3.2.Barriers to Entry

Bid rigging or fixing of bids acts as a barrier to new entrants in the market. Trade association members coordinate amongst themselves to get a higher price and accordingly appoint a common agent to tender identical bids. This drives away new entrants due to high prices.[32]

3.3.Price Control and Price Fixing

Price fixing is *per se* a violation of the anti-trust laws in all jurisdictions around the globe. Agreeing on a particular price, fixing and controlling the price in the market constitute one of

[30] HARRY AUBREY TOULMIN, TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES AND INCLUDING ALL RELATED TRADE REGULATORY LAWS 411 (20th ed., 1950).
[31] United States v. Sugar Institute, (DC N.Y.) 15 F.Supp. 817, 899, modified, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859.
[32] International Cylinder Pvt. Ltd., In Re, 2014 Comp LR 184, ¶37.

the main allegations against most trade association and their members. This illegal activity can be carried out in three ways: firstly, by attempting to eliminate price competition between members, themselves; secondly, by attempting to control the prices of competitors who were not members of the association; and thirdly, by directing efforts towards resale price fixing. For instance, certain cement manufacturers were allegedly restricting production way below the available capacity and carving up the market into zones to control supply. CCI used circumstantial evidence to penalise the eleven cement manufacturers and the Cement Manufacturers Association for indulging in monopolistic and restrictive trade practices to control the prices of cement.[33] Even in *Sandhya Drug Agency, In Re*,[34] fixation of trade margins payable by members of the association, the imposition of Product Information Service charges, determination of purchase or sales prices of drugs in the market, all amounted to anti- competitive conduct under §3.

3.4.Restriction of Production

Another method employed by the trade associations to limit competition is by regulating production. By releasing fewer products or services in the market, trade associations create scarcity, following which, the prices of the same shoot up. Thus, not only do they cut down their own production or provision costs but also make extra profit margin by the dearth created. Recently, CCI found two chemists and druggist associations guilty of cartelisation by mandating 'No Objection Certificate or Letter of Consent' for appointment of stockists, which limits the access of consumers to various pharmaceutical products. Therefore, they were controlling the supply of drugs in the market by ensuring that only those distributors which are favoured by them are eventually selected by the pharmaceutical companies for

[33] Builders Association, *Supra* note 20.
[34] Sandhya Drug, *Supra* note 6.

business.[35] In another case, the Karnataka Television Association (KTVA) and Karnataka Film Producers Association (KFPA) restricted and limited the market of dubbed films or serials in Kannada language, despite there being no restrictions to this effect in their bye-laws. This was held to be in contravention of § 3(1) and §3(3)(b) of the Competition Act.[36]

3.5.Boycott

It is unlawful to exclude from the market anyone who supplies goods or provides services merely because it would result in benefits to remaining consumers or producers. The concept of collective boycott becoming anti-competitive is dealt with subsequently in Section IV.

3.6.Common Sales Agency

This classic cartel practice was challenged in the *Appalachian Coals* case. The defendants who were the coal producers in Appalachia, agreed to sell exclusively through a common sales agency that would set output allocations or quotas for each producer. The agency hoped to sell its output at a cartel price by reducing sales below the competitive level. In such a practice, assuming that the producers do not bypass the agency, cheating is avoided as the firms do not negotiate directly with buyers. In effect, one seller replaces many.[37]

3.7.Territorial Allocations

When the participants of a trade association decisively agree and allocate specific territories to specific firms for carrying out trade, it amounts to an act of cartelisation. Under this, a firm which has been assigned a particular area has to compulsorily carry out trade only in that area. Expanding to other regions might attract punishment or penalties by the association. For example, film associations often enjoy a position of dominance in their region of existence.

[35] Madhya Pradesh Chemists and Distributors Federation v. Madhya Pradesh Chemists and Druggist Association and Ors., MANU/CO/0021/2019.
[36] Karnataka Film Chamber of Commerce v. Kannada Grahakara Koota, 2017 SCC OnLine Comp 75.
[37] William M. Landes, *Harm to Competition: Cartels, Mergers and Joint Ventures*, 52(3) Antitrust L. J., 625, 628 (1983).

Imposition of conditions such as mandatory membership for all producers in order for their films to get released; refraining from carrying on business with non-members make these associations dominant in their pertinent geographical market.[38]

Some other specific association activities that can result in anti-competitive behaviour include: (i) board and membership meetings, (ii) exchanges of competitively sensitive information (e.g., information relating to fees, customers, costs, bidding or tendering, etc.),[39] (iii) association rules and bylaws (e.g., mandatory or suggested fee guidelines, membership restrictions, etc.) and (iv) advertising or marketing restrictions.[40]

As the International Lysine Cartel case illustrated, calling something a trade association does not change the nature of a cartel if the competitors are using the meeting itself, or the events before or after the meeting, to fix prices, set production levels, allocate territories, or allocate customers.[41]

4. LEGALITY OF COLLECTIVE BOYCOTTS

4.1.Meaning

Any firm or association may, on its own, refuse to do business with another firm. However, an agreement among competitors to not do business with targeted individuals or enterprises may be an illegal boycott, especially if the group of competitors working together has market power.[42] For instance, in the case of *FCM Travel Solutions*,[43] travel agents' associations engaged in a group boycott against international airlines. If any member of this association

[38] *Supra* note 7 at ¶21.
[39] Competition and Markets Authority, *CMA warns creative sector about illegal price collusion*, COMPETITION LAW AND CARTELS (December 2, 2019), https://www.gov.uk/cma-cases/conduct-in-the-clothing-footwear-and-fashion-sector#contents.
[40] *Trade Associations & Competition Law*, CANADIAN COMPETITION LAW, https://www.ipvancouverblog.com/2010/04/trade-associations-and-the-competition-act/.
[41] Spencer Weber Waller, *Trade Associations, Information Exchange, And Cartels*, 30(2) LOY. CONSUMER L. REV. 174 (2018).
[42] Group Boycotts, Federal Trade Commission, Protecting America's Consumers, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/group-boycotts.
[43] FCM Travel Solutions (India) Ltd., In re 2012 CompLR 47, ¶18

did not participate in the boycott, that member would be suspended or expelled.[44] The parties were directed by CCI to refrain from indulging in anti-competitive conduct in the future by filing an undertaking to that effect.[45]

Boycott essentially refers to a concerted refusal to deal by traders, dealers, or stockists with the intent or foreseeable effect of exclusion from the market of a manufacturer in order to obtain concessions or to express displeasure.[46] This boycott when effectuated by an association or group of associations is referred to as collective or group boycott. It is ordinarily carried out with the resolution to inhibit the competitiveness of rivals by threatening to withhold dealings from third parties unless such third parties help the association in injuring the rivals.[47]

These collective boycotts are not simply non-cooperation with other competing firms. They are, more often than not, designed to enforce collective resale price maintenance, collective exclusive dealing arrangements and concerted refusals to supply or trade.[48] A collective boycott may be horizontal or vertical. It is horizontal when there is an arrangement among the competitors not to sell or buy from certain other firms or customers. Such an action is not a 'boycott' but rather a cooperative agreement to terms where the participants absolutely refrain from engaging in a particular transaction until the terms of that transaction are agreeable.[49] The associations which indulge in this activity also tend to boycott their own members, who engage in anti-associational conduct.[50]

4.2.Conditions

[44] *Id*., at ¶11.6.
[45] *Id*., at ¶20.
[46] D.P.MITTAL, COMPETITION LAW & PRACTICE, 174, ¶5.14-1 (2nd ed., 2008). ("hereinafter D.P. MITTAL").
[47] Fashion Originator's Guild of America Inc. FTC 312 US457.
[48] D.P.MITTAL, *Supra* note 46 at 175, ¶5.14-2.
[49] Hartford Fire Insurance Co. et. Al. v. California et. al. 509 US 764.
[50] Uniglobe, *Supra* note 19, ¶2.

An analysis of cases dealing with boycotts reveals that certain broad conditions need to be satisfied in order for any collective boycott to violate anti-trust laws. They are as follows:

4.2.1. Existence of an agreement or a concerted action.

Firstly, a boycott must involve a concerted action. If the call to boycott is in the form of an agreement that limits or controls production, supply, markets, technical development, investment or provision of services; thereby violating §3(3)(b) of the Act, such a boycott is anti-competitive.[51] Furthermore, if any conduct, pursuant to a boycott, amounts to a vertical agreement resulting in AAEC, then it violates anti-trust laws.[52]

4.2.2. Nature of object of conduct or boycott

A commercially motivated boycott by one group against its competitors, suppliers and consumers classifies as anti-competitive. This issue was addressed by the U.S. Supreme Court in a case where a price motivated agreement among certain attorneys to boycott a program to defend indigent clients until reimbursement rates were raised to a reasonable level amounted to a commercially motivated action.[53]

4.2.3. Extent of power in the market or horizontal control of the entity.

If a group boycott is engaged in by entities that are competitors with respect to market power or with control over an essential facility or resource, the per se rule is applied to the boycott conduct. For instance, twenty-eight trade unions and associations in the film industry indulged in activities such as issuing non-cooperation directives, conducting vigilance checks, boycotting producers who appointed crafts persons from outside the association, etc. All of these entities exerted substantial power within the

[51] FCM, *Supra* note 25, ¶18.
[52] FCM, *Supra* note 25, ¶ 11.8.
[53] F.T.C. v. Superior Court Trial Lawyers Association 493 U.S. 411 (1990).

market as a result of which they were found to be in violation of §3 of the Act and were asked to cease and desist from such conduct.[54]

4.2.4. Existence of pro-competitive justification

In general, the per se rule, as implicitly contained in §3(3) of the Act,[55] is applied in cases of group boycott unless there exists a plausible justification that the conduct does not blatantly restrict competition. Some examples of such pro-competitive justification are market efficiency, lack of severe restriction on competition on the relevant market and enhanced consumer welfare. In such exceptional cases the rule of reason analysis is applied. For instance, in *Craftsmen Limousine, Inc. v. Ford Motor Co*.,[56] it was held that an agreement between Ford and a trade association of limousine converters preventing Ford from advertising its products in the trade association publications was motivated by safety concerns, therefore, the per se rule was not applied.

4.2.5. Strikes and Group Boycotts

There exists a fine distinction between a strike and a group boycott. A strike is defined as *"cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment."*[57] On the one hand, strikes are undertaken by employees or individual members of any particular company or association for their demands to be met by the employer. Whereas, on the other hand, the participants of a collective boycott are associations comprising several commercial undertakings, acting as a whole, to abstain from conducting business with a particular entity in the market.

[54] Vipul Shah, In re, 2017 SCC Online 53. (hereinafter Vipul")
[55] The Competition Act § 3, cl.3 (2002).
[56] Craftsmen Limousine, Inc. v. Ford Motor Co., *363 F 3d. 761 (2004).*
[57] The Industrial Disputes Act, §2, cl.q (1947).

Several aspects of the definition of strike overlap with the ingredients of a cartel as defined under §3(3) of the Act,[58] as strikes are concerted actions leading to the cessation of work thereby affecting the production of goods and services. It is essential to understand why strikes undertaken by workmen are not anti-competitive but those by associations or enterprises threaten competition. Legality of strikes by enterprises is scrutinised because any independent concerted economic activity by an 'enterprise' resulting in AAEC is deemed illegal. This, however, does not apply to workmen who go on strike as they are not 'enterprises'. 'Employment' is the prerequisite for protection under labour laws and such employment ensures that there is no independent commercial conduct by workmen. Thus, workmen who go on strike are protected under these laws.

This crucial difference is best understood through the *West Bengal Artists'* case.[59] The case dealt with a complaint that the Eastern India Motion Pictures Association ("**EIMPA**") and Committee of Artists and Technicians of West Bengal Film and Television Investors ("**Co-ordination committee**") denied the dubbing and telecasting of the serial 'Mahabharata' in Bengali by another entity. The issue was whether the Co-ordination committee and the EIMPA engaged in any economic activity amounting to an enterprise within the ambit of §3 of the Act. It is recognised that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in §3.[60] Had the Co-ordination committee acted as a trade union by itself, without conjunction with any other party, it would not be classified as an enterprise or an association of persons within the scope

[58] The Competition Act §3, cl.3 (2002).
[59] CCI v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television (2017) 5 SCC 17.
[60] *Id.*, at ¶45.

of §3. The Supreme Court stated that both, the Co-ordination committee and the EIMPA acted in a concerted and coordinated manner and such conduct could not be brushed aside by merely giving it a cloak of trade unionism.[61]

5. COMPARATIVE ANALYSIS

5.1. European Union

Article 101 of the Treaty on Functioning of European Union, (then Article 81 of the EC Treaty) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.[62] Furthermore, the term 'economic activity' in the context of anti-competitive activity has a broader ambit. If a major portion of the total activities of a trade association is to impart monetary benefits to its members, it attracts the scrutiny of competition authorities.[63] Therefore, trade associations cannot escape liability by virtue of lacking a profit motive or an economic purpose.[64] It is not permissible for trade associations to coordinate and facilitate anti-competitive activities of its members through its rules, membership criteria, exchange of information or other forms of collusive activities.

For instance, resolutions passed at a meeting of associations, rules and regulations issued, even if they are not mandatory, are in the prohibition of Article 81. In the *Fenex* decision a Dutch freight association issued certain non-binding recommendations to its members. These regulations were held to be in violation of Article 81 as the system of recommendations was well established within that sector, was exhortative and was also updated yearly.[65] Similarly, the terms of association in the *FRUBO* case were held to be anti-competitive as the

[61] *Supra* note 59 at ¶47.
[62] REID, *Supra* note 9 at ¶75, 76.
[63] California Dental Association v. F.T.C, 1999 SCC OnLine US SC 51.
[64] Albany International B.V v. SBT, (2000) 4 CMLR 446, ¶85.
[65] Fenex Commission Decision, 96/438 (1996) OJ L 181/28.

association could exclude wholesalers or importers from fruit auctions if certain terms were violated.[66]

Another significant decision in this regard was the *UK Tractors* decision in which an agreement to exchange information which is both sensitive, recent and individualised in a concentrated market where there are important barriers to entry, was held liable for restricting competition.[67]

Therefore, under European Union law, for Article 101 to apply, trade associations need not be involved in an independent economic activity. Article 101 applies to associations where its activities or the activities of its members are calculated to produce the results which Article 101 aims to suppress.

5.2.China

Trade associations in China are creatures of the government in which membership is mandatory. These associations often act as agents of the government in coordinating competitive activities, implementing policies and deciding prices. If such activities are conducted by purely private entities, they become cartels. China's Anti- Monopoly Law ("**AML**") contains express provisions under Articles 11, 13, 16, 46 amongst other provisions, to tackle the anti-competitive behaviour of trade associations. Article 11 provides that associations of undertakings should intensify the self-discipline of the industry and guide undertakings to lawfully compete and safeguard the competition order in the market.[68] Article 16 prohibits such associations of undertakings from organising its participants to carry out

[66] FRUBO v. Commission (Case 71/74) [1975] E.C.R. 563, [1975] 2 C.M.L.R. 123.
[67] Commission Decision, UK Agricultural Tractor Registration Exchange, 1992 OJ 1992 L 68, ¶19.
[68] Anti-Monopoly Law, art.11 (2008).

monopolistic conducts.[69] Under Article 46, trade associations that organize monopoly agreements are subject to fines up to RMB 5,00,000 and cancellation of their registration.[70]

The Shandong subsidiary of the SAIC ("**SAIC Shandong**") found six companies that operate home decor and furniture shopping malls to have violated Article 13(1)(v) of AML which prohibits competitors from reaching agreements that collectively boycott business dealings.[71] In its decision, SAIC Shandong found that the six companies' boycott of their competitors had impeded business dealings between the tenants and the boycotted media, websites and third-party sales platforms and had restricted the rights of the tenants to choose their trading counterparties. Each company was fined CNY 100,000.

5.3.United States of America

The number of trade associations in the United States ("**USA**") rose exponentially during the period of the two World Wars, increasing the risk of anti-trust infringements, as well. §1 and §2 of the Sherman Antitrust Act 1890 ("**Sherman Act**"), clearly lays down that "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations*" and any "*monopolization, attempted monopolization, or conspiracy or combination to monopolize any part of trade and commerce among the several states, or with foreign nations*" is declared to be illegal. The activities of a trade association or other like group satisfy the 'concerted action requirement' of §1 of Sherman Act because an agreement among firms has the same economic effect in every scenario, regardless of whether it is explicitly among the firms themselves or a decision of a trade association of which those firms are members. In addition to the Sherman Act, §5

[69] *Id.*, at art.16.
[70] *Id.*, at art.46.
[71] Shopping Mall Collective Boycotts case: SAIC Competition Enforcement Announcement 6 (2018)http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201804/t20180403_273501.html.

of the Federal Trade Commission Act also prohibits unfair methods of competition, which encompasses any conduct in violation of the Sherman Act.[72]

The Federal Trade Commission ("**FTC**") and the Department of Justice ("**DOJ**") of the USA recognize that trade associations often drive important pro-competitive activities. However, such benefits do not afford their activities blanket immunity from the antitrust laws.[73] Trade associations and individual market participants need to carefully consider the antitrust risks of association activities, even when the association is arguably acting as an independent market participant as was illustrated by the FTC in the *National Association of Animal Breeders* ("**NAAB**") case. In this matter, the FTC alleged that the restrictions imposed by NAAB relating to the use of certain technology rights held by it (i) stifled competition in the sale of bulls by allowing some NAAB members to acquire genomic predicted transmitting ability ("**GPTA**") of a particular bull only after purchasing an interest in the bull and (ii) 'impeded' development of a market for NAAB members selling GPTA access to non-members. Pursuant to this, a consent decree was entered into by both the parties.[74]

Per se violations such as arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids, do not allow any defence or justification.[75] Merely forming a trade association does not shield joint activities from such anti-trust scrutiny and they would be equally held liable. This was observed in the case of *American Guild of Organists*, where the FTC found the association to be guilty of (i) directing its members not to seek contracts where doing so would displace an existing service provider and (ii) urging the members to

[72] Statement of The Section of Antitrust Law, American Bar Association, https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mcdavid/.
[73] *Antitrust Guidelines for Collaborations Among Competitors*, FEDERAL TRADE COMMISSION AND THE U.S. DEPARTMENT OF JUSTICE (APR. 2000),https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf. .
[74] National Association of Animal Breeders, Inc. a corporation, Docket No. C-4623 (Sept. 2017)https://www.ftc.gov/system/files/documents/cases/151_0138_c4623_naab_complaint.pdf.
[75] The Antitrust Laws, Federal Trade Commission and the U.S. Department of Justice, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

forgo price competition and instead seek the terms of compensation specified by the association.[76] Furthermore, the FTC and DOJ have also developed certain guidelines, known as the 'Statements of Antitrust Enforcement Policy in Health Care', for health care providers sharing price and cost data, which is broadly applicable to other like trade associations too.[77]

The penalizing regime for engaging in anti-competitive activities is quite severe in the USA, thereby acting as a deterrent. In the past, several foreign nationals have been sentenced to serve jail time in the USA, and corporations convicted of such criminal offences have been fined hundreds of millions of dollars. In addition, private persons or firms may sue for damages under the Federal laws and a company found liable may be required to pay up to three times the actual damages suffered by the plaintiff, as well as all of the plaintiff's costs of litigation and attorneys' fees.[78]

5.4.Hong Kong

The Hong Kong Competition Commission ("**HKCC**") published an advisory bulletin on 28th November 2016, which clearly highlighted its ongoing concern with possible price-fixing by trade associations as a serious form of anti-competitive conduct under the 'First Conduct Rule' of the Competition Ordinance.[79] In only its first year of full operation, HKCC has identified and engaged with over twenty trade associations whose practice risked the contravention of the Competition Ordinance. In addition to this, it has published a guidance pamphlet specifically targeted for the trade associations to bring their conduct in line with the law.

[76] American Guild of Organists a corporation, Docket No. C-4617 (May 2017),https://www.ftc.gov/system/files/documents/cases/american_guild_of_organists_complaint_c4617. .
[77] Statements of Antitrust Enforcement Policy in Health Care, Washington: FTC and US DOJ (August 1996), https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.
[78] Antitrust Compliance, O.G.C. Making Location Count (Apr. 2001), https://www.opengeospatial.org/ogc/antitrust.
[79] Henry Wheare & PJ Kaur, *Beware your associations*, KLUWER COMPETITION LAW BLOG (Dec. 2, 2016), http://competitionlawblog.kluwercompetitionlaw.com/2016/12/02/beware-your-associations/.

5.5.Germany

The land of cartels enacted the 'Act against Restraint of Competition' in 1958, which came to be known as the 'constitution of the free market economy'. Under §1 of this Act, any sort of agreement between companies on uniform prices that they intend to charge, quantities each may offer or the territory reserved for each of them is absolutely prohibited.[80] §21 further prohibits boycotts by associations in the country.[81] The cement cartel case uncovered in 2002 was the largest case in the history of Bundeskartellamt, whereby, fines totalling approximately €660 million were imposed on the accused companies for market allocation and quota agreements.[82]

5.6.Canada

Canada has severe concerns about the legality of certain trade and professional associations under its Competition Act, even now, as it did in 1889 when its first competition legislation was enacted. According to a presentation by a bureau official in 2013, there were at least four ongoing criminal investigations in which the bureau was examining the role played by trade associations in anti-competitive conduct, one of which involved alleged price-fixing by concrete companies in the Toronto house-building industry.[83]

6. ANALYSIS

6.1.Proper Definition

One of the biggest limitations of the Indian Competition Legislation is that it lacks a perspicuous definition of the term trade association which then becomes the origin of all the ambiguities that follow. Indian law-makers can take guidance from Anti-trust Acts of various

[80] German Act against Restraints of Competition §1 (1958).
[81] *Id.*, at §21.
[82] DHAL, supra 14, at p. 299.
[83] Mark Katz , *Risky Business:Trade Associations and Canadian Competition Law*, KLUWER COMPETITION LAW BLOG (Jan. 8, 2013), http://competitionlawblog.kluwercompetitionlaw.com/2013/01/08/risky-businesstrade-associations-and-canadian-competition-law/.

countries which accommodate a well-defined meaning of the phrase. The Anti-Monopoly Act of Japan contains a very exhaustive definition of trade association in Article 2(2), defining it as any combination of enterprises for the furtherance of their common interests excluding those in which contributions are made by the constituent enterprise and which operate a commercial business for profit. The definition includes any incorporated association, foundation or contractual combination of which enterprises are members.[84] This definition envisages all possible alliances among undertakings, thereby making it unexacting to identify trade associations. Further, such identification makes accountability for offences easier. USA in §114.8 of The Code of Federal Regulations[85] and Hong Kong's Competition Commission in its report of 14th March, 2016 [86] also distinctly lay down the definition of a trade association. In order to successfully discern when an association is indulging in illegal activities, it is essential that we first formulate such a thorough definition of the same.

Restrictions on any kind of anti-competitive activity are rooted in such activity being carried out by enterprises or association of enterprises. Such anti-competitive activities include cartelisation, abuse of dominant position and entering into vertical agreements. Trade associations have only been penalised for entering into horizontal anti-competitive agreements. Adjudicatory bodies have failed to distinguish between trade associations imposing anti-competitive activities on its members leading to the formation of vertical agreements on the one hand and involvement of trade associations along with the consensus of its members in anti-competitive activities amounting to cartelisation on the other. Thus, trade associations have not been found guilty of entering into vertical agreements. Similarly, since trade associations have generally not been considered as enterprises, they have not been

[84] Japan Fair Trade Commission, Chapter III Trade Associations, Legislations and Guidelines, https://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama15_03.html.
[85] Federal Election Commission, §114.8 Trade Associations, Regulations, https://www.fec.gov/regulations/114-8/2019-annual-114#114-8.
[86] Competition Commission of Hong Kong, Competition Commission Report on Trade Associations in Hong Kong and the Competition Ordinance, Reports Publications, https://www.compcomm.hk/en/media/reports_publications/files/TA_project_report_EN.pdf.

held to abuse their dominant position in their respective markets. A comprehensive definition of trade associations will ensure appropriate action to tackle all anti-competitive economic activities undertaken by them.

6.2.Economic Activities

An increased market transparency through sharing of information increases efficiency in the market and is beneficial for consumers, producers and innovation within such markets. However, it can also result in collusive and anti-competitive activities. The type of information exchanged and structural characteristics of the market concerned are some key factors in determining the extent of anti-competitive activities.[87] Along with a prohibition on information exchange and activities leading to price fixing,[88] clearer guidelines are required that demarcate limits of nature of information exchange to avoid a breach of anti-trust laws. For instance the DOJ and FTC set out an 'anti-trust safety zone' which described the kinds of exchanges regarding price and cost information in healthcare services permissible under antitrust laws.[89] The European Commission also published for consultation a revised version of guidelines to offer an insight on when exchange and dissemination of information between competitive companies may breach European Union anti-competitive laws.[90]

The release of data that is based on surveys conducted by third parties like government agencies or educational institutions can be considered pro-competitive, unless they are based on future prices for service providers or future compensation for employees. An advisory committee can also be set up which will analyse at the wish of associations, the legality of information that is sought to be released.

[87] OECD Competition Commission Policy Round Tables on Information exchanges between competitors under Competition Law, 2010, http://www.oecd.org/competition/cartels/48379006.pdf ("hereinafter OECD Policy Roundtable").
[88] The Competition Act §3, cl.3, sub cl.a (2002).
[89] U.S. Department of Justice and the Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, 49 (Aug. 1996), https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf.
[90] OECD Policy Roundtable, *Supra* note 87, at p. 39.

Another cause of concern with respect to economic activities undertaken by trade associations is geographical trade allocation. CCI has already taken a step in tackling this issue by holding that allotting services on the basis of geographical area is anti-competitive.[91] Comprehensive provisions must, however, be implemented through the Act in order to discourage the designation of areas for carrying on trade.

6.3. Whistle-blowers and Leniency Program

Whistle-blowers play an important role in the easy detection of anti-competitive activities. However, they are often faced with direct or indirect physical threats of violence or harassment and as a result, require proper protection. The provision of ample security to whistle-blowers incentivizes them to provide information. The Act makes a provision for imposing lesser penalty on a participant of a cartel on full and true disclosure regarding violations under the Act.[92] CCI also introduced the Lesser Penalty Regulations, 2009, explicitly laying down the conditions, procedure and grant of such lesser penalty. For instance, in a case, CCI awarded a 100% reduction in penalty to one of the leniency applicants and a 30% reduction to the other for providing information regarding the bid-rigging arrangements.[93]

However, it is observed that this protection is only restricted to §3 violations and to participants of such cartels. The need of the hour is to expand protection for whistle-blowers to include violations under other sections of the Act, too, while also applying to third parties apart from those involved in the illegal activities. Further, in cases where such whistle-blowers are falsely accused, proper trial and investigations should be conducted to ensure that

[91] Vipul, *Supra* note 54 at ¶202.
[92] The Competition Act §46 (2002).
[93] Cartelization by broadcasting service providers by rigging bids submitted in response to the tenders floated by Sports Broadcasters, In Re, 2018 SCC OnLine CCI 58.

no injustice is done. Companies should also be encouraged to establish an internal whistle-blowing policy governing its employees.[94]

6.4.Periodic Reports

The Act only talks about Director General's reports relating to investigations of alleged anti-competitive activities. It makes no mention of any periodic submission of reports by trade associations or independent enterprises. It is of paramount importance that the associations produce reports regularly to the officials concerned regarding their prices fixed, production of goods or service provided, crucial decisions altering or challenging the market scenario of the country taken at their meetings and any other business-related activities. Such report publication should not be restricted only for compliance purposes. This way, monitoring the activities of such association becomes easier and helps in the detection of any anti-competitive behaviour at the nascent stage. However, such a reporting mechanism has to be structured properly, ensuring no unlawful interference or confidentiality breaches of such associations. For instance, publication of such reports should be with the express consent of the association and keeping in mind their confidential information. Even the report published should be in an aggregate form so as to avoid information relating to individual transactions from being disclosed in the public domain.[95]

6.5.Penalties and Punishment

It is essential to formulate or mention specifically in the already drafted laws, a distinct enforcement regime for trade associations. For instance, it should be clearly laid down as to whether a particular percentage of the turnover of an association as a whole or its participant companies only, is to be paid as a penalty. The delinquent association should be disintegrated

[94] Iheb Chalouat, - et al, *Law and practice on protecting whistle-blowers in the public and financial services sectors*, ILO, 4, 2019,https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf.
[95] Venable LLP, Antitrust Compliance Guide for ABC Members and Staff, ABC.

and those in charge of the management of the same should be disqualified for a specified period of time from acting in such position for any firm or association of firms. Instead of providing for imprisonment only on failure to comply with the order of CCI, the same should be meted out as a punishment for such persons which even after repeated warnings, continue to indulge in anti-competitive behaviour. Furthermore, anyone found assisting an anti-competitive trade association should be held liable in the same manner as any of the participants of such association.

6.6.Extensive Guidelines

In addition to the requisite and possible amendments to the Act, CCI also needs to issue a set of extensive guidelines for trade associations that should be read and mandatorily followed in conjunction with the existing legal instruments, as is the case in the United Kingdom.[96] Certainly, the most important guidelines should be the establishment of a Competition Compliance Programme, the procedure for carrying it out and the appointment of officers concerned.[97] Apart from the recommendations mentioned above, CCI can include a number of other directions such as the appointment of a lawyer for the association to review the agenda or attend the meeting to ensure its legality, standards for pricing activities and reporting of any abuse of administrative power eliminating or restricting competition. A well-laid down code of conduct with appropriate implementation of the same is of paramount importance.

7. CONCLUSION

Cartels are an increasingly international phenomenon threatening and thwarting the gains that should ideally follow from global market liberalisation. As a result, it becomes crucial to

[96] Office of Fair Trading, Trade associations, professions and self-regulating bodies, 2, December 2004, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284404/oft408.pdf.

[97] Competition Commission of India, Competition Compliance Programme for Enterprises, https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf.

clearly identify any entity that even remotely indulges in such cartel-like behaviour and deal with them accordingly. On these lines, it is often difficult to ascertain the point when a legal trade association turns into an anti-competitive one due to the absence of any parameters for discerning the same. Trade associations, primarily constituted for the benefit of its members, are an easy platform for conducting unlawful activities due to the nature of its functioning. However, it is more often than not difficult to detect such behaviour as compared to individual firms indulging in similar activities. Not only do we need a proper definition for trade associations but also a well laid down list of all the possible situations when such associations can function illicitly. A very common practice of collective boycott undertaken by trade associations also requires adequate mention as they very conveniently can breach anti-trust laws.

There is a dearth of laws, bylaws and guidelines in India regarding the functioning of trade associations which aids them in getting away with anti-competitive behaviour under the colour of benevolent functioning for its members. Necessary amendments will aid in making our competition law provisions even more robust and facilitate continuance of free and fair markets.

INDEX OF ABBREVIATIONS

&	And
AAEC	Appreciable adverse effect on competition
Art.	Article
Cl.	Clause
CCI	Competition Commission of India
DOJ	Department of Justice
Ed.	Edition
Edt.	Editor
Etc.	*Etcetera*
€	Euro
EU	European Union
FTC	Federal Trade Commission
Id.	*Ibidem*
Ltd.	Limited
p.	Page
¶	Paragraph
%	Percentage
RMB	Renminbi
§	Section
the Act	the Competition Act, 2002
US/ USA	United States of America
v.	*versus*