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India: Cartels Comparative Guide

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1 Legal and enforcement framework

1.1 Which legislative and regulatory provisions apply to cartels in your jurisdiction?

The Competition Act, 2002 governs cartels in India.

Section 3(1) of the act provides that no enterprise or association of enterprises, or person or association of persons, shall enter into any agreement in respect of the production, supply, distribution, storage, acquisition or control of goods or the provision of services which causes or is likely to cause an appreciable adverse effect on competition (AAEC) in India. Section 3(2) of the act states that agreements in contravention of Section 3(1) of the act shall be void.

Under Section 3(3) of the act, agreements between competitors which have the following results are presumed to cause an AAEC:

- determination of purchase or sale prices;
- limitation or control of the production, supply, markets, technical development, investment or provision of services;
- sharing of markets or source of production; or
- bid rigging or collusive bidding.

However, this presumption is rebuttable and does not apply to efficiency-enhancing joint ventures.

Section 3(5) of the act exempts export cartels and agreements necessary to protect IP rights.

The act contains various regulatory provisions relating to the commencement and procedure of a cartel inquiry, detailed investigation by the director general and various orders (including sanctions) which can be passed by the Competition Commission of India. The Competition Commission of India (General) Regulations, 2009 also lay down the procedure to be followed in cartel inquiries.

1.2 Do any special regimes apply to cartels in specific sectors?

There are no sector-specific regimes which apply to cartels in India.

Under Section 54 of the Competition Act, the central government has the power to exempt:

- any class of enterprises from the application of any provision of the act, if such exemption is necessary in the public interest or for the security of the state;
- any agreement or practice arising out of any agreement or treaty with another country; or
- any enterprise which performs a sovereign function.

In exercising the powers conferred by Section 54(a) of the act, on 4 July 2018 the central government exempted vessel sharing agreements in the liner shipping industry from the application of Section 3 of the act for a period of three years.

1.3 Which authorities are responsible for enforcing the cartel legislation?

The Competition Commission is responsible for enforcing the cartel legislation in India. Its decisions may be appealed to the National Company Law Appellate Tribunal (NCLAT) and subsequently to the Supreme Court of India.

The Competition Appellate Tribunal was the appellate body for decisions of the commission until 31 March 2017, when it was replaced with the NCLAT by the Finance Act, 2017.

The act bars civil courts from entertaining any suit or proceeding in respect of any matter which the commission or the NCLAT is empowered to determine under the act. However, there is no bar on the parties approaching various high courts to challenge the jurisdiction of the commission or raise issues of violation of the principles of natural justice by the commission.

1.4 How active are the enforcement authorities in investigating and taking action against cartels in your jurisdiction? What are the statistics regarding past and ongoing cartel investigations? What key decisions have the enforcement authorities adopted most recently?

The Competition Commission is very active in taking action against cartels. Up to 2018, 63% of all cases investigated by the commission pertained to cartelisation. As of 31 July 2017 (last published data), 136 of 669 orders issued by the commission contained substantive discussions on cartelisation. In 2018–2019, the commission decided 48 enforcement cases of a total of 68 (including anti-competitive agreements and abuse of dominance). Since 1 April 2019, the commission has imposed penalties in five cartel cases.

Key decisions of the enforcement authorities include the following:

- In the *Flashlights* case (*Suo Motu* Case 01/2017), in spite of the active exchange of information between competitors, the commission held that there was no violation of Section 3 of the act. The commission noted that as the agreement to fix prices had not been implemented, the presumption of an AAEC did not apply.
- In the *Rajasthan Cylinders* case (Civil Appeal 3546/2014) the Supreme Court held that, despite identical prices by bidders and a contemporaneous trade association meeting, there was no collusive bidding. The cause for parallel pricing was the nature of the market (oligopsony) and not collusion.

2 Definitions and scope of application

2.1 How is a 'cartel' defined in the cartel legislation?

'Cartel' is defined to include an association of enterprises which limits, controls or attempts to control the production, distribution, sale or price of, or trade in, goods or the provision of services.

Section 3(3) of the Competition Act does not distinguish between a horizontal agreement and a cartel (as defined in the act). Any horizontal agreement (including a cartel) relating to price fixing, limiting or controlling the production or supply of goods or the provision of services, market sharing or bid rigging raises a rebuttable presumption of an appreciable adverse effect on competition.

2.2 What specific offences are defined in the cartel legislation?

Section 3(3) of the Competition Act lists certain agreements between competitors which are presumed to have an appreciable adverse effect on competition (AAEC). These relate to the following:

- directly or indirectly determining purchase or sale prices;
- limiting or controlling production, supply, markets, technical development, investment or provision of services;
- sharing the market or source of production or provision of services by way of allocation of geographical areas of the market, types of goods or services or number of customers in the market, or in any other similar way; or
- directly or indirectly resulting in bid rigging or collusive bidding.

Any other agreement which is likely to cause an AAEC but is not covered under Section 3(3) of the act can be examined by the Competition Commission under Section 3(1) of the act. However, in such circumstances, the onus to prove an AAEC is on the commission. This was clarified in *Madhya Pradesh Chemists and Distributors Federation v Madhya Pradesh Chemists and Druggist Association* (Case 64/2014).

2.3 Is liability under the cartel legislation civil, criminal or both?

Liability for a violation of Section 3 of the Competition Act is civil. Each enterprise involved in a cartel can be penalised with a fine of up to three times its profits or 10% of its turnover, whichever is higher, for each year of the continuance of the cartel.

The act contemplates the initiation of criminal proceedings in the following cases only:

- Non-compliance with certain orders/directions of the commission: Under Section 42(3) of the act, the commission may file a criminal complaint with the chief metropolitan magistrate of Delhi, who may impose a punishment of imprisonment for up to three years, a fine of up to INR 250 million or both.
- Contravention of an order of the National Company Law Appellate Tribunal (NCLAT) without reasonable grounds: Under Section 53Q of the act, the NCLAT may file a criminal complaint with the chief metropolitan magistrate of Delhi, who may impose a punishment of imprisonment for up to three years, a fine of up to INR 10 million or both.

2.4 Can both individuals and companies be prosecuted under the cartel legislation?

Yes, both companies and individuals can be prosecuted under the Competition Act.

Under Section 27 of the act, the Competition Commission can pass the following orders against a company that is found to be in contravention of Section 3 of the act:

- to cease and desist from the anti-competitive conduct;
- to pay a penalty of up to three times its profits or 10% of its turnover, whichever is higher, for each year of the continuance of such agreement;
- to modify agreements; and/ or
- to abide by any other orders or directions;

Individuals can be prosecuted under Section 48 of the act. Each person who was in charge of, and responsible to the company for, the conduct of its business is deemed to be guilty, unless that person can prove that the contravention was committed without his or her knowledge or that he or she exercised all due diligence to prevent such contravention.

When a contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, a director, manager, secretary or other officer of the company, such person is also deemed to be guilty.

No separate provision in the act sets out the penalties for individuals. The commission generally imposes penalties on individuals under Section 27 of the act. Based on the commission's practice, the maximum penalty that can be imposed on an individual is 10% of his or her average income in the last three preceding financial years.

2.5 Can foreign companies be prosecuted under the cartel legislation?

Yes, foreign companies can be prosecuted under Section 32 of the Competition Act if they enter into an agreement which causes or is likely to cause an appreciable adverse effect on competition in India.

2.6 Does the cartel legislation have extraterritorial reach?

Yes. Section 32 of the Competition Act, read with Section 19(1) of the act, empowers the Competition Commission to inquire into:

- any agreement referred to in Section 3 of the act entered into outside India; or
- any party to such agreement which is outside India whose conduct causes or is likely to cause an AAEC.

The commission may pass any orders against a party outside India which it can otherwise pass under the act against any party in India.

2.7 What is the statute of limitations to prosecute cartel offences in your jurisdiction?

The Competition Act does not prescribe a limitation period to prosecute cartel offences in India. Nor does the Limitation Act, 1963, which is the general limitation statute in India, specify a limitation period for proceedings under the act. For proceedings which do not attract a specific limitation period, the Limitation Act prescribes a general limitation period of three years. Accordingly, the general three-year limitation period should apply to proceedings under the act. Although there is no guidance on the computation of this three-year period, in our view, the limitation period should start to run from the date on which the effects of the alleged cartel cease to exist (and not from the date of the end of the agreement).

In *Excel Crop Care v Competition Commission of India* (Civil Appeal 2480/2014), the Supreme Court held that the Competition Commission was empowered to take cognisance of agreements which were entered into prior to 20 May 2009 (the date of enforcement of the act), provided that the effects of the agreement continued post that date.

To appeal an order or decision of the commission or the National Company Law Appellate Tribunal, the act prescribes a period of 60 days from the date of receipt of the impugned order.

3 Investigations – general

3.1 On what grounds may the enforcement authorities commence an investigation?

Under Section 19(1) of the Competition Act, the Competition Commission can take cognisance of a matter:

- on its own motion;
- on receipt of any information from any person or association; or
- on a reference made by the government or a statutory authority.

Based on the material available to it, if the commission is of the opinion that a *prima facie* case exists, it will direct the director general to investigate the matter under Section 26(1) of the act. The director general is not empowered to initiate an investigation on his own initiative and can do so only on the directions of the commission.

Although the commission may initiate an inquiry on receipt of information from any person under Section 19(1) of the act, in *Jeetender Gupta v Competition Commission of India* (Appeal 30/2014), the erstwhile Competition Appellate Tribunal stated that the legal machinery under the act cannot be moved by a person who has no interest whatsoever in the subject matter of the information. An appeal was also filed before the Supreme Court, but was withdrawn by the appellant.

3.2 What investigatory powers do the enforcement authorities have in conducting their investigation?

For the purposes of discharging its functions, the Competition Act grants the Competition Commission and the director general the same powers as those of a civil court, including the following:

- to summon and enforce the attendance of any person and examine him or her on oath;
- to require the discovery and production of documents;
- to receive evidence on affidavit;
- to issue commissions for the examination of witnesses or documents; and
- to requisition any public record or document or copy of such record or document from any office.

The director general is also empowered to conduct searches and seizures (including dawn raids).

3.3 To what extent may the enforcement authorities cooperate with their counterparts in other jurisdictions during their investigation? How common is such cooperation in practice?

Section 18 of the Competition Act enables the Competition Commission to enter into a memorandum or arrangement with any agency of a foreign country to discharge its duties. As of 31 March 2018, the commission had signed memoranda of understanding (MoUs) with the competition authorities of Europe, the United States, Canada, Australia, Brazil, Russia, China, and South Africa. Under these MOUs, the discussions are generally limited to:

- competition policy and enforcement developments;
- competition advocacy; and
- exchange of non-confidential information during common investigations.

In terms of cooperation on a particular case, interactions between the commission and its international counterparts have so far been mostly limited to combination cases which were notified in other countries along with India. Few cartel cases before the commission have had an international dimension and necessitated cooperation with foreign competition authorities. In a recent case, the commission had to assess the extraterritorial application of the act in relation to a leniency application in the auto-parts sector. However, there is no public information on whether the commission reached out to its counterparts in other countries for cooperation, especially Japan, as many companies involved were Japanese.

3.4 Is there an opportunity for third parties to participate in the investigation?

Regulation 25 of the General Regulations allows the Competition Commission to permit any third party to participate in proceedings if the commission is satisfied that such person has a substantial interest in the outcome and it is necessary in the public interest to consider the opinion of that person.

Regulation 37(2) of the General Regulations enables a third party to inspect the non-confidential version of the commission's case record if such third party demonstrates sufficient cause.

3.5 What are the general rights and obligations of the enforcement authorities during the investigation?

During an investigation, the Competition Commission has the right to:

- exercise the powers of a civil court;
- allow third parties to participate in proceedings;
- join, substitute or strike out parties;
- join multiple information, references or applications;
- allow the amendment of information submitted;
- call upon experts for assistance;
- call for information from any person;
- seek the production of additional evidence from parties;
- proceed *ex parte*;
- conduct dawn raids;
- impose fines to ensure compliance with its orders;
- initiate criminal proceedings against non-compliant individuals;
- pass interim orders;
- rectify its orders;
- prescribe its procedure in a situation not provided for in the regulations made under the act;
- make a reference to a statutory authority to seek its opinion on certain issues;
- open its proceedings to the public in certain cases;
- pass orders (including cease and desist, monetary penalty, modification of agreement, and payment of costs) in case of a violation of Section 3 of the Competition Act; and
- impose a lesser penalty if a target company has made a full and true disclosure of information relating to the existence of a cartel.

During an investigation, the commission is obliged to:

- follow the principles of natural justice;
- maintain the confidentiality of certain information and documents;
- allow parties and third parties to inspect its case records;
- provide certified copies of its case records;
- follow the procedure laid down in its regulations;
- invite objections or submissions of the parties on the director general's investigation report; and
- provide an opportunity to be heard before imposing a penalty.

3.6 What are the general rights and obligations of the target company during the investigation?

During an investigation, a target company or a target individual has the right to:

- authorise a representative to appear on its behalf;
- be represented through a chartered accountant, company secretary, cost accountant or legal practitioner;
- be accompanied by an advocate if summoned by the director general, subject to certain conditions;
- seek confidentiality on certain information submitted to the Competition Commission or the director general;
- apply for leniency by making full and true disclosure of information relating to the existence of a cartel;
- inspect the commission's case records (non-confidential version) and procure certified copies of the same;
- seek interim relief from the commission; and
- comment on the director general's investigation report.

During an investigation, a target company or a target individual is obliged to:

- state all material facts and produce any document;
- not make false statements or furnish false documents;
- not alter, suppress, destroy any evidence or document required to be furnished;
- comply with orders and directions of the commission and the director general;
- keep details of the investigation confidential;
- follow the procedure laid down by the commission; and
- cooperate with the commission and the director general during the investigation.

3.7 What principles of attorney-client privilege apply during a cartel investigation?

The Competition Act contains no provisions on attorney-client privilege.

In India, attorney-client privilege is governed by the Indian Evidence Act, 1872, which recognises privilege for legal advice provided only by external lawyers qualified to practise in India, and not by in-house counsel or foreign lawyers. However, attorney-client privilege applies to written communications between in-house counsel and external lawyers:

- regarding legal advice on a company's legal rights and obligations; or
- for advice in relation to an ongoing or anticipated litigation.

Also, any documents prepared by in-house counsel to enable an external lawyer to advise on the prospects of making or defending a claim are also covered by attorney-client privilege.

Attorney-client privilege does not extend to any communications made in furtherance of any illegal purpose.

3.8 Are details of the investigation publicly announced? If so, what principles of confidentiality apply?

Details of investigations are not publicly announced by the Competition Commission. The general rule is that all proceedings of the commission are held *in camera* and the case record of the commission is not open to third parties for inspection. The commission, upon the request of an informant, may decide to keep the identities of the informant confidential.

Only the final orders of the commission are made publicly available. The final orders do not contain any information in relation to which the commission has granted confidentiality to the parties. The commission may decide to grant confidentiality in relation to information whose disclosure would:

- reveal trade secrets;
- diminish its commercial value; or
- cause a serious injury.

4 Investigations – step by step

4.1 What initial steps do the enforcement authorities take to commence a cartel investigation?

The Competition Commission may inquire into an alleged violation of provisions of the Competition Act:

- on its own motion;
- on receipt of any information;

- on a reference made by the central or state government or any statutory authority to the commission; or
- on receipt of a leniency application.

Once the commission takes cognisance of a matter, it must form a *prima facie* opinion whether there has been a violation of Section 3 of the act. If the commission is of the opinion that there exists a *prima facie* case, it will direct the director general to commence a detailed investigation into the matter. Before the formation of its *prima facie* opinion, the commission may, if it deems this necessary, call the informant or any other person for a preliminary conference (hearing) to form an opinion on whether a *prima facie* case exists.

If the commission is of the opinion that no *prima facie* case exists, it will close the matter and pass such orders as it deems fit.

4.2 Are dawn raids commonly conducted in your jurisdiction? If so, what are the pre-conditions for conducting a dawn raid? When, where and by whom are they conducted? Do the enforcement authorities have the power to search private as well as company premises?

Yes, dawn raids are conducted in India and are becoming increasingly common. According to public sources, the director general has conducted six dawn raids so far, three of which were in 2019. The sectors and parties raided are as follows:

- Construction equipment: JCB India;
- Dry cell batteries: Eveready, Nippo and Panasonic;
- Breweries: United Breweries, Carlsberg and Anheuser-Busch InBev;
- Commodity trade: Glencore, Africa's Export Trading Group and Edelweiss Group;
- Carbon brushes: Mersen and Assam Carbon Products ; and
- Tarpaulins: Climax Synthetics, Shivalik Agro Poly Products, Arun Manufacturing Services and Bag Poly International.

The preconditions for conducting a dawn raid are as follows:

- The director general cannot conduct a dawn raid without procuring a search warrant from the chief metropolitan magistrate of Delhi in advance. The director general may make an application for the issue of a search warrant where he believes that books and papers of a company which are necessary for the investigation may be destroyed, altered or hidden.
- Before commencing the search, the director general must ensure the presence of two independent witnesses who are respectable inhabitants of a locality around the premises to be searched.

Dawn raids are conducted by the personnel of the director general's office at the premises of companies which are likely to have violated the Competition Act. A raid generally starts in the morning of a working day and may last the whole day. The raid may continue until late in the night and may sometimes continue into the following day. The director general has the power to search the premises of a company or an individual.

4.3 What powers do officers have during the dawn raid? Are there any limitations on these powers?

The director general has wide powers during a dawn raid, including the following:

- using reasonable force to access the premise to be searched;
- sealing the premises;
- examining books and other records related to the business in physical and electronic form;
- seizing any documents, taking possession of the originals and making copies;
- keeping possession of seized books and papers for six months;
- returning seized documents with identification marks;
- asking for such books and papers again after their return;
- seizing and making copies of electronic devices, including storage devices;
- examining any person on oath and directing such a person to appear before him; and
- using the notes from deposition as evidence against the person deposed.

If any person fails to follow the directions of the director general, he or she can be punished with imprisonment for up to six months and/or a fine.

There are certain limitations on the powers of the director general to avoid any possible abuse of such powers during a dawn raid. The director general cannot:

- conduct a dawn raid without a search warrant or without the presence of two independent witnesses;
- search any area outside the scope of the search warrant;
- access documents protected by attorney-client privilege;
- conclude the search without providing a list of all documents/devices seized to the company raided; and
- retain seized original documents if certified copies of the same are submitted.

4.4 What are the rights and obligations of the target company and any individuals targeted during a dawn raid?

The rights of the target company or individuals during a dawn raid include the following:

- requesting the search warrant and identity cards of the personnel from the director general's office for inspection before the raid;
- refusing access to the premises if the search warrant or identity cards are incomplete, defective or not presented;
- ensuring the presence of independent witnesses before the search commences;
- ensuring that the raid is limited to the scope of the search warrant;
- obtaining a list of all material (physical and electronic) seized during the raid, which is signed by the director general and the two witnesses;
- making and retaining copies of all documents seized by the director general; and
- ensuring that the notes of examination (deposition) are written, read and signed by the person examined.

The obligations of the target company and individuals during a dawn raid include the following:

- assisting the director general with the investigation;
- producing all books and papers relating to a company in its custody;
- not concealing, destroying or hiding any material information or documents; and
- not furnishing any information knowing it to be false.

4.5 What evidence can be seized during a dawn raid? Do the enforcement authorities have the power to interview witnesses and take statements during a dawn raid?

The director general is empowered to seize any evidence which is necessary for the investigation, except legally privileged documents. Such evidence generally includes documents (physical and electronic), emails and other correspondence, agendas and minutes of board meetings, meeting notes, internal memoranda, travel information and communication/storage devices.

The director general has the power to interview witnesses and take their statements during a dawn raid. He can also use the notes from depositions as evidence against the person deposed.

4.6 How can a company best prepare itself for dawn raids? What best practices should it follow in the event of a dawn raid?

Given that dawn raids are becoming common in India, it is important to ensure that staff are properly trained on how to handle such raids and educated on their legal rights which can be exercised during such raids.

Best practices which may be followed in the event of a dawn raid include the following:

- ensuring that the key staff (including receptionists, heads of the company/premises, legal team, IT team and PR team) are at all times well trained in how to handle a dawn raid;
- having a prior dawn raid strategy and response team (internal and external) in place;
- educating staff on their rights and obligations during the raid;
- in case of a raid, immediately informing in-house counsel and external lawyers;
- shadowing each official on the premises to check what is being searched and seized;
- taking detailed notes of the search conducted by the director general and preparing a record of all employees, documents and devices examined;
- designating a senior person to liaise with the director general and communicate with company employees;
- keeping all privileged documents (physical and electronic) properly marked as 'legally privileged' and asserting privilege on such documents during the raid; and
- ensuring that all objections of the company during the raid are included in the record of the raid and that a copy of the record, duly signed by the director general and witnesses, is provided to the company.

4.7 What are the next steps in the cartel investigation following a dawn raid? What timeframe do these typically follow?

After the dawn raid, the director general proceeds with his investigation and prepares an investigation report recommending whether there has been a contravention of the Competition Act. While the director general is expected to complete his investigation within 60 days, it generally takes much longer to complete the investigation. Investigation timelines vary significantly from case to case and may take several months to years.

The investigation report is submitted to the Competition Commission, which then shares it with the parties, inviting comments. The parties must file their objections within 15 days of receiving a copy of the investigation report from the commission. This timeline is generally extended by a few weeks, to give the parties the opportunity to inspect all documents relied upon by the director general during the investigation.

On receipt of the parties' comments, the commission will grant them an oral hearing. The commission must decide the matter within three weeks of conclusion of the final oral arguments. The commission will then pass and publish its final order. A certified copy of the final order will be served on the parties within four weeks of the date of the order.

4.8 What factors will the enforcement authorities consider in assessing whether cartel activity has taken place?

The primary requirement to establish the existence of a cartel is an agreement (or understanding) among competitors to fix prices, limit market/technical development, share markets or rig bids. If such an agreement is established, the Competition Commission can presume that the agreement is likely to cause an appreciable adverse effect on competition (AAEC). The parties can, however, rebut the presumption by demonstrating that the agreement would not cause an AAEC based on the factors mentioned in Section 19(3) of the Competition Act. These include:

- creation of entry barriers;
- foreclosure of competition;
- benefits to consumers; and
- improvements in production and distribution.

To establish an agreement, the commission takes into account both direct and indirect evidence. Direct evidence includes communications between competitors (ie, emails, telephone records, messages and minutes of meetings), other materials communicating an agreement and statements on oath. Indirect (or circumstantial) evidence includes analysis of:

- price movements of various players (including price correlation and regression analysis);
- the impact of cost and demand/supply on prices;
- capacity utilisation; and
- the dates of meetings and price changes.

If the economic analysis indicates any pattern in the conduct of parties which is commercially untenable, the commission may apply the 'but for' principle to conclude that such behaviour is not possible in the absence of an agreement among the parties.

4.9 In case of a finding of cartel activity, can the company seek to negotiate a settlement, plea bargain or similar resolution? If so, what is the process for doing so?

There is no provision in the Competition Act which allows the parties to negotiate a settlement or similar resolution with the Competition Commission in cartel cases.

Although the commission's position is that the act does not allow settlements in cartel cases, in *Tamil Nadu Film Exhibitors Association v Competition Commission of India* (Writ Appeal No 1806/2013), the Madras High Court directed the commission to consider the settlement proposal of the parties, either with or without modifications. It further stated that, since a settlement had been reached, further proceedings by the commission would be futile. The case related to a decision of an exhibitors' association banning the screening of films released via direct-to-home television. A review petition has been filed by the commission challenging the High Court's order.

In the past, the National Company Law Appellate Tribunal has allowed settlements of disputes between parties in cases relating to vertical agreements and abuse of dominance, but not cartelisation.

5 Leniency

5.1 Is a leniency programme in place in your jurisdiction? If so, how does this function?

Yes, there is a leniency programme in India. According to Section 46 of the Competition Act, the Competition Commission may impose a lesser penalty if an enterprise engaged in a cartel makes a full and true disclosure to establish a violation of Section 3 of the act. However, leniency cannot be granted in cases where the leniency application is made after the director general has submitted the investigation report to the commission.

The Competition Commission of India (Lesser Penalty) Regulations, 2009 lay down the provisions which govern the leniency programme. Any enterprise which is a part of a cartel can approach the commission with a leniency application admitting its participation in the cartel. Individuals for whom a lesser penalty is sought should also be mentioned in the leniency application.

The essential conditions to qualify for a lesser penalty are as follows:

- stopping participation in the cartel unless otherwise directed by the commission;
- providing vital disclosure;
- providing all evidence required by the commission;
- cooperating fully, continuously and expeditiously with the commission; and
- not concealing or manipulating any evidence.

5.2 What are the benefits of applying for leniency, both for the first mover and for subsequent applicants?

The Competition Commission may grant a penalty reduction of up to 100% to the first leniency applicant that makes a 'vital disclosure' by submitting evidence which helps to establish a contravention of the Competition Act. Subsequent applicants that provide 'significant added value' to the evidence are granted penalty reductions of up to 50% (second applicant) and 30% (third and subsequent applicants).

The commission will consider the following factors when deciding on the reduction:

- the stage at which the leniency application is filed;

- the evidence already in the possession of the commission;
- the quality of the information provided (added value); and
- the entire facts and circumstances of the case.

5.3 What steps does a leniency application involve? What timeframe do these typically follow?

The key steps involved in a leniency application are as follows:

- Approach the Competition Commission to furnish evidence in relation to a cartel. This can be done orally, or by fax or email.
- File a marker letter to mark the priority status.
- File a detailed leniency application with all evidence in writing within 15 days of filing of the marker letter (unless additional time has been granted by the commission).
- Respond to various information requests of the director general during the investigation.
- Continue to cooperate with the commission and add value to the investigation by providing any new evidence not included in the leniency application.

At the end of the process, based on the cooperation or evidence provided, the commission will decide on the quantum of penalty, including any lenient treatment, which should be granted to an enterprise or individual.

5.4 What are the rights and obligations of the applicant during the leniency application and over the course of its cooperation with the enforcement authorities?

A leniency applicant has the right to:

- approach the Competition Commission orally, or by fax or email, to furnish evidence on a cartel and to mark the priority status before filing a detailed leniency application in writing;
- receive a written acknowledgement of receipt of the application along with priority status;
- know whether the leniency application has been accepted or rejected;
- be heard before the leniency application is rejected; and
- claim confidentiality on its identity and information, documents and evidence submitted as part of the application.

A leniency applicant has the obligation to:

- cease its participation in the cartel unless otherwise directed by the commission;
- provide vital disclosure in respect of contravention of Section 3 of the act;
- provide all relevant information, documents and evidence as may be required by the commission;
- cooperate genuinely, fully, continuously and expeditiously throughout the investigation;
- not conceal, destroy, manipulate or remove documents that may contribute to the establishment of a cartel;
- provide the names of individuals who have been involved in the cartel on its behalf; and
- comply with any other conditions imposed by the commission.

5.5 Is the leniency programme open to individuals? Can employees or former employees benefit from a leniency application filed by their employer? Do the authorities operate a programme for individual whistleblowers separate to the leniency programme?

The leniency programme is also open to individuals. There is no separate programme for individual whistleblowers.

Employees and former employees can benefit from a leniency application filed by their employer. If the applicant is an enterprise, the leniency application must mention the names of individuals involved in the cartel on its behalf and for whom a lesser penalty is sought.

5.6 Can leniency be denied or revoked? If so, on what grounds?

Yes, a leniency application can be rejected by the Competition Commission if any of the conditions to qualify for a lesser penalty are not complied with by the applicant. However, the commission must give the applicant an opportunity to be heard before rejecting the application. If a leniency application is rejected, the commission is free to use the evidence provided by the applicant to establish a violation of the act.

6 Penalties and sanctions

6.1 What penalties may be imposed in criminal proceedings on companies? What penalties may be imposed on individuals?

The Competition Act does not provide for criminal sanctions for cartelisation, either for companies or for individuals.

However, in case of non-compliance with its orders, the Competition Commission has the power to initiate criminal proceedings with the chief metropolitan magistrate of Delhi, who may impose a punishment of imprisonment for up to three years, a fine of up to INR 250 million or both.

The National Company Law Appellate Tribunal may also file a criminal complaint with the chief metropolitan magistrate of Delhi for contravention of its orders. The chief metropolitan magistrate of Delhi may impose a punishment of imprisonment for up to three years, a fine of up to INR 10 million or both.

6.2 What penalties may be imposed in civil proceedings on companies? What penalties may be imposed on individuals?

Each company involved in a cartel can be penalised up to three times its profits or 10% of its turnover, whichever is higher, for each year of the continuance of the cartel.

Although the Competition Act does not prescribe the maximum penalty for individuals, the Competition Commission generally imposes a penalty of up to 10% of the individual's income for each year of the continuance of the cartel.

6.3 How are penalties in cartel cases determined? In deciding on the applicable penalties, will the enforcement authorities consider penalties imposed in other jurisdictions?

There are no guidelines to determine penalties in cartel cases. However, based on its practice, the Competition Commission will consider certain aggravating and mitigating factors when determining the quantum of penalty. In *Excel Crop Care Ltd v Competition Commission of India* (Civil Appeal 2480/2014), the Supreme Court set out an illustrative list of aggravating and mitigating factors which the commission could use to determine the quantum of penalty. Such factors include:

- the nature, gravity and extent of the contravention;
- the role played (ringleader or follower);
- the duration of the participation;
- loss or damage due to the contravention;
- market circumstances;
- the *bona fides* of the company; and
- the profits derived from the contravention.

In the same case, the Supreme Court also held that in case of cartelisation, companies will be penalised only based on the relevant turnover arising from the products or services which were a part of the cartel, and not their entire turnover or profits, as that would render the penalty unjust and unfair.

The commission does not take into account the penalties imposed on entities in other jurisdictions.

6.4 Can a defendant company pay the legal costs incurred by and/or penalties imposed on its employees?

Yes. There is no provision in the Competition Act barring a company from paying legal costs incurred by and/or penalties imposed on its employees.

7 Appeal

7.1 Can the defendant company appeal the enforcement authorities' decision? If so, which decisions of the authority can be appealed (eg, all decisions or just the final decision) and to which reviewing authority? What is the standard of review applied by the reviewing authority (eg, limited to errors of law or a full review of all facts and evidence)?

The general principle is that all orders which impinge upon the rights or liabilities of a person may be appealed. Accordingly, final orders of the Competition Commission, both contravention and non-contravention, may be appealed. However, a *prima facie* order directing a detailed investigation by the director general cannot be appealed.

Other orders of the commission which can be appealed include:

- interim orders;
- rectification orders;
- orders relating to the recovery of penalties;
- orders penalising non-compliance with directions, failure to furnish information, false statements or document tampering; and
- orders on leniency applications.

Decisions may be appealed to the National Company Law Appellate Tribunal (NCLAT), on errors of both law and facts. An appeal to the NCLAT may be filed within 60 days of the date on which a copy of the commission's order is received.

Orders of the NCLAT may be appealed before the Supreme Court on points of law within 60 days of the date of the NCLAT order.

7.2 Can third parties appeal the enforcement authorities' decision, and if so, in what circumstances?

Any person (including any third party) that is 'aggrieved' by a decision of the Competition Commission can appeal it.

In *Jitender Bhargava v Competition Commission of India* (Appeal 44/2013), the Competition Appellate Tribunal observed that an appeal may be filed only if the appellant can show an actual injury (legal grievance) as a result of the commission's decision.

8 Private enforcement

8.1 Are private enforcement actions against cartels available in your jurisdiction? If so, where can they be brought?

In India, private enforcement actions against cartels are limited to compensation claims only. Such claims can be brought before the National Company Law Appellate Tribunal (NCLAT).

The following cases seeking compensation under Section 54N of the Competition Act are currently before the NCLAT:

- *Crown Theatre v Kerala Film Exhibitors Federation* CA (AT) (Compt) No 01 of 2017;
- *Sai Wardha Power Ltd v Coal India Ltd Transfer* CA (AT) (Compt) No 01 of 2017;
- *MCX Stock Exchange Ltd v National Stock Exchange of India Ltd Transfer* CA (AT) (Compt) No 02 of 2017;
- *Sateyendra Singh v Ghaziabad Development Authority* CA (AT) (Compt) No 01 of 2018;
- *Maharashtra State Power Generation Co Ltd v Nair Coal Services Ltd* CA (AT) No 02 of 2018;
- *Food Corporation of India v Excel Crop Care Ltd Compensation Application* (AT) No 01 of 2019; and
- *G Krishna Murthy v Karnataka Film Chamber of Commerce (KFCC) Compensation Application* (AT) No 02 of 2019.

8.2 Can private enforcement actions be brought against both companies and individuals?

Private enforcement actions for compensation can be brought against companies alone and cannot be brought against individuals.

8.3 Are class actions or other forms of collective action available in your jurisdiction?

Yes, class actions in case of damages claims are available in India. According to Section 53N(4) of the Competition Act, where any loss or damage has been caused to numerous persons having the same interest, one or more of such persons may, with the permission of the NCLAT, make an application for the benefit of interested persons.

8.4 What process do private enforcement actions follow?

Anyone can make an application to the NCLAT for a compensation claim that may arise from the finding of the Competition Commission or the NCLAT that there has been a contravention of the Competition Act. Such an application should be accompanied by the findings of the commission and the prescribed fees.

The NCLAT may, after conducting an inquiry, pass an order for the recovery of compensation from any enterprise for any loss or damage suffered by the applicant as a result of the contravention of the act by the enterprise.

8.5 What types of relief may be sought and what types of relief are most commonly awarded? How is the relief awarded determined?

Private enforcement is limited to compensation claims in India. Based on publicly available information, the NCLAT has not yet granted compensation in any case.

The eligibility and quantum of compensation is determined by the NCLAT based on an inquiry into the allegations made in the compensation application. The NCLAT may also obtain the recommendations of the commission before passing an order of compensation.

8.6 Can the decision in a private enforcement action be appealed? If so, to which reviewing authority?

Yes, the NCLAT order disposing a compensation application may be appealed. Any person aggrieved by any decision or order of the NCLAT can appeal to the Supreme Court within 60 days of the date of communication of the decision or order of the NCLAT.

9 Trends and predictions

9.1 How would you describe the current cartel enforcement landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

The Competition Commission has a strong anti-cartel regime which, as at 31 July 2017, had resulted in the imposition of a total of 55 contravention orders and total penalties of \$2.69 billion.

The commission has been successful in using dawn raids and leniency applications as effective tools to combat cartels in India. In FY 2018–19, the commission dealt with six leniency applications, with 19 of 47 applicants receiving a 100% penalty waiver. Three dawn raids, out of a total of six, were conducted in 2019 alone.

There has been an increase in the number of bid-rigging cases, especially in the public procurement sector. As a result of the commission's advocacy measures, some state governments have updated their public procurement policies to make them more compliant with competition policy.

In October 2018 the Competition Law Review Committee (CLRC) was set up to review the provisions of the Competition Act and the associated rules and regulations. Based on the recommendations made by the CLRC, the government introduced a draft Competition (Amendment) Bill, 2020 in February 2020. Key amendments proposed to the competition act include:

- a provision for buyers' cartels and hub and spoke cartels;
- a provision for agreements other than horizontal or vertical agreements;
- the introduction of a leniency-plus regime;
- a provision allowing withdrawal of a leniency application; and
- power to DG to impose criminal sanctions in case of non-compliance.

Once the draft bill is final after public consultation, it will be put before the Parliament for approval.

10 Tips and traps

10.1 What would be your recommendations to companies faced with a cartel investigation and what potential pitfalls would you highlight?

A company that is the subject of (or is expecting) a cartel investigation should consider the following:

- Conduct a thorough internal competition law audit to discover any breach of the Competition Act.
- Seek legal advice on the feasibility of filing a leniency application if a breach has been discovered. Also, name individuals involved in the cartel in the application for a lesser penalty.
- Set up an ombudsman programme for employees to make anonymous disclosures of any potential breach of the act and any evidence thereof.
- Set up a robust competition compliance programme, if not already in place.

The following are potential pitfalls which a company under cartel investigation may face:

- drainage of time, resource and focus on compliance with the directions and orders of the director general, the Competition Commission and the appellate authorities;
- loss of reputation, decrease in stock value and trust deficit between the company, contractors, clients and shareholders;
- financial loss due to penalties imposed and compensation claims;
- the emergence of certain issues which were not alleged at the time of the start of the investigation; and
- if privileged is not asserted, the director general's access to and reliance on otherwise legally privileged documents.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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