Cartels
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Overview of the law and enforcement regime relating to cartels

The key statute in relation to cartel regulation and enforcement in India is the Indian Competition Act, 2000 ("Act"); the provisions whereof were enforced on 20 May 2009. Section 2(c) of the Act defines a ‘cartel’ to include “an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”.

The proposed revision to the definition of cartels shall include a reference to buyer’s cartels. As per the proposed Competition Amendment Bill, 2020 ("Competition Bill 2020"), a cartel has been defined to include “an association of producers, buyers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit or control or attempt to limit or control the production, distribution, sale or price of, or, trade in goods or provision of services”.

Under Section 3 of the Act, anti-competitive agreements including cartels are prohibited and are also presumed to have an appreciable adverse effect on competition ("AAEC"). The Act further provides for investigation, inquiry and penalties for violations. Under Section 19 of the Act, the Competition Commission of India ("CCI") is authorised to initiate investigation upon receiving information of anti-competitive conduct of parties. Sub-section (3) of Section 19 provides certain parameters that the CCI shall consider while conducting an enquiry into the anti-competitive behaviour of entities. Section 26 of the Act lays down the procedure for such investigation and inquiry; while Section 27 provides remedies and monetary penalties for violations. In 2017, the Supreme Court of India held that the imposition of penalty on (especially) multi-product companies must be on the basis of ‘relevant turnover’ or the ‘turnover’ for which the enterprise/company was investigated and found to be in violation of the Act. As per the Supreme Court imposition of penalty beyond the ‘relevant turnover’ would be in violation of ‘principle of proportionality’ under the Constitution of India.

The CCI initiates investigations into cartel activities upon receipt of information from parties or on a suo-moto basis (based on news reports, public discussions, etc.) or through the leniency programme (referred as Lesser Penalty Regime under the Act).

The Director General’s office (“DG”) is the investigative wing of the CCI. The DG works in accordance with the direction of the CCI and commences investigation upon receipt of (prima facie) order under Section 26(1) of the Act. The DG has not been vested with powers to undertake investigations on a suo moto basis. After completion of the investigation process, the DG submits its investigation report to the CCI along with all the material, evidence and documents as may be collected during the investigation process. The said investigation report
of the DG may be submitted as ‘Confidential’ and ‘Public Version’ as per the requirements of each case. There are several (writ) petitions pending before various High Courts in India (as well as the Supreme Court of India), challenging the arbitrariness in the orders issued by the CCI and/or the DG. The issues in writ petitions vary from the CCI’s obligations while passing the prima facie order under Section 26(1) of the Act, to the scope of discretion for grant of confidentiality (and the necessary balance with rights of defence), to what constitutes as ‘right to lawyer’ during proceedings under the Act, and many others.

Upon receipt of the DG investigation report, the CCI may direct circulation of the same to all the concerned parties for comments/responses and thereafter conducts a detailed hearing into the matter (wherein all the parties are allowed to present their arguments/submissions). The Act permits the right to cross-examine witnesses, both before the DG as well as the CCI; however, despite the Act permitting this, entities invoking the said provision have had to fight for it before courts in India.

After final arguments/submissions by all parties in a case, the CCI has the power (under Section 27 of the Act) to impose fines and/or issue directions if companies are found to be cartelising, i.e. in violation of Section 3 of the Act. However, if the CCI believes that the DG investigation report requires further investigation, the DG can then be directed to undertake further investigation and submit a supplementary investigation report.

It may be noted that not all information(s) filed under Section 19 of the Act are sent for investigation and further not all investigations always result in imposition of penalty (or other orders, holding parties under investigation to be in violation of the Act). Accordingly, if the CCI is not satisfied with the information filed under the Act, with respect to cartelisation by certain companies, the CCI may either seek additional evidence from the Informant or pass an order closing the case, under Section 26(2) of the Act.

In terms of Section 53B of the Act, only the final orders of the CCI can be appealed before the National Company Law Appellate Tribunal (“NCLAT”). However, in terms of Section 53T of the Act, any order passed by NCLAT can be appealed before the Supreme Court of India. The appeal can be filed within 60 days from the date of receipt of the order.

The Competition Commission of India (Lesser Penalty) Regulations, 2009 (“Leniency Regulations”) were enacted to provide a regime for implementing Section 46 of the Act. Through the Leniency Regulations, those parties which volunteer to provide vital information regarding the existence of cartels are incentivised with reduced penalties, provided the disclosure is ‘full, true and vital’ and the ‘leniency applicant’ cooperates with the CCI until the completion of proceedings before the CCI.

The Government of India has proposed significant amendments to the present Act and the proposed Competition Bill 2020 is likely to be tabled before the Parliament of India in February 2021. The Competition Bill 2020 will come into force after the same is passed by both the houses of Parliament and approved by the President of India. It will then get notified by the Government of India in the Gazette and the same shall specify the date of notification/ enforcement of the amendment to the Act.

**Overview of investigative powers in India**

The DG has been granted powers of investigation under Section 41 of the Act. Section 41 of the Act grants wide-ranging powers to the office of the DG to enable it to carry out the investigation in line with directions of the CCI. In terms of Section 41(2) of the Act, the DG shall have the power to summon and enforce attendance of any person and examining him on oath, requiring discovery and production of documents, and receive evidence of affidavit.
Further, Regulation 20 of the CCI (General) Regulations, 2009 (“General Regulations”) provides for the procedure to be adopted by the DG during investigation.

In terms of Regulation 35 of the General Regulations, the DG has also been granted power to grant confidentiality to the data, documents on its own motion or when requested by parties subject to the following: extent to which the information is known to outside public; extent to which the information is known to the employees, suppliers, etc.; the measures taken by the party to guard the secrecy of the Information; and ease or difficulty with which the information could be acquired by others. Regulation 41 of the General Regulations lays down the procedure for taking of evidence by the DG as well as cross-examination of witnesses (by parties) before the DG.

Regulation 43 of the General Regulations bars any party from adducing additional evidence before the CCI, if the same was in the knowledge and possession of the party during the investigation process and the party did not disclose the same to the DG.

Section 35 of the Act, as well as Regulations 46 and 46A of the General Regulations, empower any party under investigation to seek legal assistance and representation before the CCI and the DG through an Advocate/authorised legal representative.

Section 41(3) of the Act empowers the DG to conduct dawn raids after obtaining orders from the Chief Metropolitan Magistrate. Interestingly, under the Act, the power to conduct dawn raids is not automatically granted to the DG. It is required that the DG first showcases and establishes the need for a dawn raid before the Chief Metropolitan Magistrate and obtains a written order to do so. The scope of dawn raid shall be governed by the order/warrant for dawn raid as may be issued by the Chief Metropolitan Magistrate.

The proposed Competition Bill 2020 seeks to transpose investigative powers to the DG which are antithetical to the intention under the Act. The proposed amendment of Sub-section 8 to Section 41 under the Competition Bill 2020 provides that in the event the investigated party fails to provide any documentation or resource sought by the DG, or fails to appear before the DG for an interview or fails to sign examination notes as recorded by the DG, the said party may be punished by way of imprisonment extending up to six months and fined up to 5 lakh per day. The abovementioned proposed amendment may be evaluated in a context where the witness is not conversant in ‘English’ and cannot read the statement to verify if what was deposed is the same as what has been recorded by the DG (and that there have been no ‘addition’ or deletion’, etc. by the DG) – however, the lawyer representing the party deposing is also prevented from reading and verifying the statement.

Overview of cartel enforcement activity during the last 12 months

The CCI’s cartelisation rulings

While dealing with the economic downturn owing to the effects of the COVID-19 pandemic during the last 12 months, the CCI has displayed a new, more market economy-specific understanding with respect to cartel cases.

In two notable decisions regarding anti-competitive conduct and cartelisation, the CCI found explicit evidence of cartelisation in the form of communications between the impugned enterprises, however interestingly, citing the peculiar facts and circumstances of the cases as reasons, the regulator did not impose penalty provisions but merely passed a cease and desist order against the violators.

The Automotive Bearings case [Suo Motu Case No 5/2017] was initiated upon the filing of a leniency application by Schaeffler, disclosing the existence of coordinated action in terms of
price and distribution of automotive bearings to original equipment manufacturers ("OEMs") between five companies alleged to be operating in a cartel. Upon an examination of the DG investigation report, the CCI found that there was clear and explicit evidence by way of several incriminating communications and meetings between higher management of the companies. Despite coming to a conclusive determination on the existence of a cartel and its presumed AAEC, the CCI digressed from its usual strictness in imposing penalties in cartelisation cases and issued cease and desist orders to the violators – a mere rap on the knuckles as opposed to deterrent application of heavy penalties.

While the CCI stated that “in light of the peculiar facts and circumstances of the present case as detailed in this order, ends of justice would be met if the parties cease such cartel behaviour and desist from indulging in it in future”, it failed to elaborate on the ‘peculiar facts and circumstances’ or provide any mitigating circumstances, on which the digression from penalty provisions was reasoned.

In another such decision in the Composite brake blocks case [Ref Case No 3/2016], the CCI found the opposite parties (“OPs”) guilty of cartelisation and explicitly provided the following reasons for refraining to impose penalty on the violators. Firstly, the CCI took into consideration the Micro Small and Medium Enterprise (“MSME”) status of the OPs; secondly, the Commission noted that most of the OPs have a small annual turnover and thirdly, the economic downturn due to COVID-19 and resultant impact on the OPs. In light of the aforementioned reasons, the CCI considered it sufficient to issue cease and desist directions and not impose monetary penalties on the OPs. As a mitigating factor in favour of the OPs, the CCI took into account the cooperative conduct of the OPs in assisting the DG during the investigation. Upholding the larger objectives of the Act, the CCI observed that “the ultimate object of the [Competition Act, 2000] Act is to correct the market distortions and to discipline the behaviour of the market participants. In such backdrop, the Commission holds that the objectives of the Act would be met if the parties in the present matter cease such cartel behaviour and desist from indulging in similar behaviour in future, as directed earlier.”

The CCI’s recent decisions are a deviation from its earlier strict but uniform imposition of penalties in cartelisation cases, however, presently the CCI has considered market factors, economic conditions of the violators and unprecedented circumstances in which the parties operate while granting relief from imposition of penalties despite having been found to be in violation of the Act.

While the CCI’s considerate decisions may be relevant in a COVID-19 scenario, it must be noted that these decisions inadvertently create a disincentive to the leniency regime of the CCI. In the Automotive Bearings case, the CCI failed to draw a distinction between the leniency applicant and the other violators. This may be seen to discourage further applications under the regime due to lack of drawing a distinction between the applicant and other OPs. Further, the CCI has cited the MSME status of OPs as a reason for non-imposition of penalty. This parameter having not surfaced earlier and not having been envisaged by the Act, may raise future disputes regarding the differential treatment of violators.

CCI’s collaboration with tax authorities

Vide a notification dated July 30, 2020, the Government of India has authorised tax authorities to share ‘relevant and precise information’ with the CCI in order to assist the same during investigations. While this notification is not specific to cartel investigation, it will certainly boost investigation into cartel structures. Cartels are extremely difficult to detect and pin down, owing to the lack of any documentation or other obvious explicit means of detection. Sharing of financial information pertaining to parties under investigation from tax authorities are likely to provide assistance to the DG and the CCI in determining the existence of cartels.
Key issues in relation to enforcement policy

i. Technology and competition law: Due to the rapid advancement in anti-competitive conduct and the role of technology, the competition law requires requisite amendments to law and revision in implementation/adoptions of best-practices around the globe to deal with the investigations and cases. As a routine practice, the DG (during investigations) seeks email-dumps for several years (of parties under investigation) – the issue of ‘fishing and roving’ investigation aside; both the DG and the CCI ought to rely on more efficient means of seeking information and data from parties under investigation. In the light of mergers and combinations involving multinational entities dealing in assets such as ‘big data’, the Act requires amendments to treat acquisition of such assets as adding to the market power of an entity. This will render assistance in determination of anti-competitive conduct and subsequent enforcement of the remedies.

ii. Cross-border enforcement of competition laws: Please refer to the section on ‘Cross-border issues’.

iii. Jurisdictional challenges to the CCI: The CCI has faced several jurisdictional challenges in the past. In a recent ruling of the Delhi High Court in the case Monsanto Holdings Pvt. Ltd. v. CCI, it was argued that the CCI has no jurisdiction to entertain any complaint against an enterprise in respect of matters which relate to exercise of patent rights as the same is governed under the Patents Act. The Delhi High Court rejected the arguments of Monsanto and upheld the jurisdiction of the CCI distinguishing between the standard established by the Supreme Court in CCI v. Bharti Airtel Ltd. (2018 – which pertained to companies in the telecommunications industry). Clarity on the role of the CCI as opposed to other sectoral regulators and statutes will bring about uniformity in the jurisdiction and subsequent enforcement of the Act.

The power of the CCI to direct investigation against officers of the company under Section 48 of the Act and imposition of penalty against such officers (if found to be in violation) on their personal incomes has been challenged (being ultra vires) in Tranter India Pvt. Ltd. & Ors v. CCI & Ors, which is pending before the High Court of Delhi. Regulations 46 and 46A of the General Regulations, which allows legal representation before the DG as well as action against an advocate for misconduct are also under challenge before the High Court of Delhi. In terms of Section 30 of the Advocates Act, 1961, every person is permitted legal representation while recording the statements on oath. It is argued that if during the recording of the statement on oath, the legal representative is permitted to sit in a separate room (not at a hearing distance) then the purpose of permitting legal assistance/representation is defeated and is also against the Advocates Act, 1961. Further, the Supreme Court of India has held that power to regulate Advocates and initiate action against them solely rests with the Bar Council of India and no other authority/regulator is empowered to initiate action for misconduct. In Sumitomo Chemical India Ltd v. CCI, the imposition of interest on delayed payment of penalty under the CCI (Manner of Recovery of Monetary Penalty) Regulations, 2009 has been challenged, before the High Court of Delhi) for being ultra vires and contrary to the provisions of the Act.

Scope of directing investigation under Section 26(1) and interpretation of Section 3 are under review before the Supreme Court of India in Cadila Healthcare Ltd. & Ors v. CCI. In the Cadila Healthcare matter, it is argued that the CCI is mandated to pass an order directing investigation against parties under Section 26(1) and in the absence of any order against any party (directing investigation), the said party cannot be investigated by the DG (on its own). Further, the Act, while covering anti-competitive agreements, only provides...
for agreements between parties at a horizontal level or vertical level. It does not envisage a situation where parties are not located at horizontal or vertical level and have no direct relationship with each other. However, the CCI in the Cadila Healthcare case proceeded against parties which were neither horizontally placed nor vertically placed. Accordingly, the same has also been challenged before the Supreme Court of India, which is likely to interpret Section 3 of the Act. The Supreme Court of India will also examine whether an initiation of investigation based on fabricated/false documents and statements is tenable under the law and whether the CCI has power to recall its own orders.

Key issues in relation to investigation and decision-making procedures

Some of the primary issues with respect to investigation and decision-making procedures of the CCI are discussed below:

i. **Powers of the DG:**

The Act, vide Section 36, empowers the DG with powers of a civil court under the Code of Civil Procedure, 1908 and Section 41 of the Act contains the duties of the DG. As the office of the DG acts as a separate investigative function of the CCI, it inevitably exercises autonomy over several issues in the process of investigation. Despite the CCI keeping a check on the procedures and methods adopted by the DG during investigation, it is essential to maintain institutional transparency of the same.

The investigative methods and autonomy exercised by the DG have faced criticism on being vague and resulting in the abuse of power by the DG office. In several cases, different High Courts have opined on the limitations and scope of the powers of the DG. In *Grasim Industries Limited v. CCI*, discussing the scheme of Section 26 and Section 41 of the Act and Regulation 42 of the General Regulations, the High Court of Delhi concluded that the DG investigation should be “confined to the allegations made in the information…and he is not competent to travel outside the scope of the same”. In the *Hyundai Motor India Ltd v. CCI*, the Madras High Court held that the DG has no power to expand the scope of investigation and is required to work as per the directions of the CCI.

In the most landmark and highly cited case dealing with cartels, Supreme Court of India in *Excel Crop Care Ltd v. CCI* (on the issue of the DG’s scope of power) held that “while carrying out this investigation if other facts are also revealed and are brought to light…. the DG would be well within his powers to include those [in the investigation] as well”. In *Cadila Healthcare Limited case* placing reliance on the decision on Excel Crop Care case, the Delhi High Court found that in investigations directed by Section 26(1) of the Act, “the subject matter included not only the one alleged, but other allied and unenumerated ones, involving other (i.e., third parties)”.

Before the decision of the Delhi High Court in Cadila (supra), it had in *Roche Products India Pvt Limited and Ors v. Competition Commission of India and Ors*, noted that the DG was conducting a fishing and roving inquiry, which was unrelated to the allegations made before the CCI and stayed the investigation.

Such contradictory decisions in aforementioned cases have only increased the uncertainty and confusion regarding the exercise of powers by the DG.

There has been a constant debate on the scope of power of the DG under the Act. Issues such as extensive and exhaustive information requests (even beyond the scope of investigation), roving and fishing investigation, coercion during recording of statements, lack of transparency as an investigative arm, confirmation bias (in several cases), non-compliance with due process and principles of natural justice among others are being
heavily debated and also raised in several cases pending before the Courts in India. Although the Competition Bill 2020 seeks to strengthen powers of enforcement of the DG, it does not include transparency provisions for the same or address many of the issues which are still pending before the Courts.

ii. **Lack of clarity on imposition of penalties:**

The problems associated with lack of clarity regarding imposition of penalties to the violators of the Act remains intact. The CCI’s trend in imposing monetary penalties has been irregular and arbitrary at best.

In two recent cases (*Automotive Bearings* and *Composite Brake Blocks* discussed in response to ‘Overview of cartel enforcement activity during the last 12 months’ above), the CCI, despite finding the existence of cartels, chose to not impose any penalty at all and merely issued a cease and desist order. In *Automotive Bearings*, the CCI made no reference to any mitigating factors supporting its directions. This is inconsistent with its earlier decisions wherein the CCI has imposed severe and harsh penalties on cartels (for example, in the *Cement Cartel* case, the CCI imposed a penalty of INR 67 billion, i.e. around USD 1 billion). It is pertinent to note that in *Excel Crop Care* case, the Supreme Court of India had categorically stated that the CCI should consider aggravating and mitigating factors while imposing the penalty. It also suggested that the CCI should come up with penalty guidelines to provide clarity to all the OPs. However, the CCI has still not issued any penalty guidelines.

The lack of objective principles in the imposition of penalties by the CCI has led to uncertainty, which poses a key issue in the decision-making procedure.

**Leniency/amnesty regime**

The leniency programme of the CCI is formulated under Section 46 of the Act and is regulated by the Leniency Regulations. The Leniency Regulations set out the requirements for qualification of applicants and the procedure to be followed for the imposition of a lesser penalty and the benefits available.

Under the Leniency Regulations, applicants who make ‘vital disclosures’ regarding the existence of cartels are afforded reduced penalties. The Leniency Regulations provide for a reduction in the penalty of up to 100% if an applicant makes a vital disclosure about the existence of a cartel to the CCI and if such disclosure enables the *prima facie* opinion of the Commission. The first applicant to disclose viral information is given priority status. Subsequent applicants can be granted a penalty reduction up to 50% and so on.

Under the proposed Competition Bill 2020, the Commission has made provision for the withdrawal of application for lesser penalty by the applicant. However, upon a withdrawal, the Commission shall have the right to use all relevant evidence and information submitted by the applicant except the admission.

However, the procedures adopted by the CCI and the DG in leniency cases is also under litigation before various Courts in India. In a recent decision in *CCI & Anr v. Forech India Pvt Ltd*, the Supreme Court of India refused to entertain the CCI’s appeal with respect to resile from the content given before the High Court of Delhi to provide all non-confidential documents and orders granting confidentiality (after redacting confidential portions) to Forech in a leniency matter. In effect, the CCI, in accordance with its consent given to High Court of Delhi, will now be required to grant all non-confidential documents and orders granting confidentiality (after redacting confidential portions) to Forech.

As a practice, in leniency matters, whenever a party seeks inspection of public records, before the CCI under Regulation 37 of the General Regulations, the CCI declines the same stating
that the entire file is confidential. The CCI recently introduced Regulation 6A in Leniency Regulations to not grant inspection to parties under Regulation 37 of the General Regulations. However, this has led to investigations wherein the parties are issued notices and are directed to furnish data, information, evidence, email dumps, without being told about the nature of investigation or the allegations or the product segments which are being investigated.

In another matter, the High Court of Delhi disagreed with the CCI approach of keeping everything confidential and on a *prima facie* basis held that the said approach will not allow the parties to defend the case properly/impact rights of defence. On this basis of the direction of the High Court of Delhi, the CCI granted inspection of public files to the petitioner (alone).

In a writ petition filed by *Hindustan Rubbers Silvasa*, before the High Court of Delhi, the validity of the CCI order refusing to grant inspection of public files has been challenged. Further, the nature of the DG notice seeking exhaustive information/data including dumps of all personal email accounts has been challenged for being excessive and amounting to roving and fishing investigation. Also, specific direction is sought from the High Court with respect to permission of legal representation before the DG and during recording of the statements. Interestingly, in this case (conveyor belt cartel matter) the names of the leniency application filer as well as all other parties were published by a prominent national newspaper (along with all the relevant details of the allegations), and this was done almost a year prior to parties receiving any formal notice from the DG.

Similarly in another case dealing with the procurement of male latex condoms, the name of the leniency filer and other parties was published by a prominent national newspaper (along with all the relevant details of the allegations) in too few days after filing of the leniency petition. One of the OPs had filed a writ petition before the High Court of Delhi against the breach of confidentiality and the CCI’s non-action against publishing of such information and also alleged that the leniency filer not only got the information published in the newspaper but also actively lobbied with/coerced/forced other OPs for filing of leniency petition. The CCI decided to ignore the requests made by certain OPs against the action/conduct of leniency filer and the matter is now pending before the High Court of Delhi as well as the High Court for the state of Telangana (at Hyderabad). The High Court of Telangana has passed an interim order staying the investigation in the said matter.

It may also be a matter of coincidence that the news reporter as well as the advocate representing leniency filers in both the cases were the same set of individuals. However, when the issue of breach of confidentiality, coercion, etc. were raised before the CCI, the same were dismissed stating that the same cannot be examined by the CCI and can be raised before any other court/forum.

However, it is likely that the CCI may receive more leniency applications but it is important to settle the procedural flaws so as to avoid any undue coercion/harassment of other OPs. The Constitution of India grants each and every party a right of defence, which cannot be allowed to be taken away, in any manner. The CCI must still take any action against such errant leniency applicants – those who tend to take advantage of Leniency Regulations and still go against the spirit of full and absolute disclosure and confidentiality.

**Administrative settlement of cases**

There are no current provisions in the Act for settlement of cases for anti-competitive conduct. However, the Competition Bill 2020 proposes the inclusion of a new Section 48A. This Section proposes a settlement and commitment mechanism which permits the parties to submit a settlement application after the report of the DG has been received by the CCI; the application must, however, be submitted before the final order of the CCI.
Under the proposed framework for settlement, the CCI will have the discretion to accept or reject the settlement application on the basis of nature, gravity and impact of the contraventions. The specific factors to be taken into account and further details on settlement application are proposed to be notified vide regulations, which will have to be formulated under the Act. It must be noted that the settlement orders passed by the CCI under this provision will not be appealable.

The proposed Section 48B permits any person against whom an inquiry has been initiated to submit an application offering commitments on the contravention. The CCI will examine the commitment application in light of the nature, gravity and impact of the alleged contraventions and the effectiveness of the proposed commitments and proceed to accept or reject the same.

While the Competition Bill 2020 makes a provision for settlement and commitments mechanism, it is not without serious consequences for failing to follow through by the parties. Proposed Section 48C provides that if the “applicant has not made full and true disclosure or there has been a material change in the facts, the order passed under section 48A or 48B, as may be applicable, shall stand revoked and withdrawn and such person may be liable to pay appropriate legal costs incurred by the Commission which may extend to rupees one crore and the Commission may restore or initiate the inquiry with respect to which the order under section 48A or 48B was passed”.

Third-party complaints

The Act does not prescribe any strict *locus standi* requirement on who can file information under the Act.

The CCI, in *Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd.* [Case No. 63 of 2014], while examining the issue of *locus standi* held that “[a]dmittedly, under the scheme of the Act, any person may approach the Commission with an information bringing to the notice of the Commission any anti-competitive conduct in the market. It is not necessary for such a person to be personally aggrieved of such a conduct. This is also the scheme of the Act”.

However, in its decision in the case *Samir Agrawal v. CCI*, the NCLAT noted that despite the fact “*that the concept of locus standi has been diluted to some extent by allowing public interest litigation, class action and actions initiated at the hands of consumer and trade associations*, the Act provides for taking cognisance of allegations regarding contravention of provisions relating to certain anti-competitive behaviour in a “particular manner and at the instance of a person apart from other modes viz. suo motu or upon a reference from the competitive government or authority”.

Further, the NCLAT held that “reference to receipt of any information from any person in section 19(1) (a) of the Act has necessarily to be construed as a reference to a person who has suffered invasion of his legal rights as a consumer or beneficiary of healthy competitive practices. Any other interpretation would make room for unscrupulous people to rake issues of anti-competitive agreements or abuse of dominant position targeting some enterprises with oblique motives”.

Owing to the above reasoning, the NCLAT held that the informant in the case had no *locus standi* to maintain the case and on the ground that no *prima facie* case was made out, dismissed the same.

Recently, Supreme Court of India in *Samir Agarwal’s* case, has concurred with the understanding of the CCI with respect to *locus standi* of an individual to file an information before the CCI. The ambiguity with respect to who can file an information before the CCI has been settled by Supreme Court. Effectively, any person/third party can file information before the CCI.
Civil penalties and sanctions

The CCI can impose significant penalties on the parties which contravene the provisions of the Act or fail to provide due assistance or information to the CCI or fail to comply with the order/directions of the CCI or the DG among others.

Under Section 53Q, the contravention of the order of the NCLAT will lead to a penalty of maximum INR 10 million or imprisonment up to three years or both. The same is to be decided by the Chief Judicial Magistrate of Delhi.

As prescribed in Section 27 (b), the penalty that may be imposed in case of any anti-competitive conduct cannot be more than 10% of the average of the turnover (clarified by the Supreme Court as ‘relevant turnover’ in *Excel Crop Care Limited v. CCI*) of the contravening enterprise for the three preceding financial years.

However, in the case of a cartel, the CCI can impose a penalty of up to three times the profit of the contravening enterprise or 10% of the turnover of the contravening enterprise, for each year of the continuance of the cartel, whichever is greater. Further, the directors and other employees of the contravening entity found responsible can also be penalised under the Act.

Individual penalties

The CCI has also been imposing penalties on individual income of officers of the company for violation of the provisions of the Act by such companies. The officers of the company are investigated under Section 48 of the Act and penalty is imposed under Section 27 of the Act. The penalty for contraventions by individuals found to be responsible may go up to 10% of the average income of the concerned individuals, for three preceding financial years.

However, the CCI interpretation of Section 48 and the power to impose penalties on officers of the Company has been challenged before the High Court of Delhi in *Tranter’s case*. Further, the question of whether the CCI can undertake an investigation against officers of the company, without first finding the company in violation, is also pending adjudication before the Supreme Court of India in *Zydus Cadila’s case*.

The penalty imposed on such individuals is in addition to that imposed on the enterprise in question, and failure to pay the penalty amount could result in such individuals being imprisoned for up to three years, under Section 42(3) of the Act.

The Competition Bill 2020 proposal stipulates that the quantum of penalty that can be levied on individuals will be limited to a maximum cap of 10% of an individual’s average ‘income’ for the last three preceding financial years; in cartel cases, up to 10% of the individual’s average income for each year of the continuance of the anti-competitive agreement (Section 48).

Right of appeal against civil liability and penalties

In terms of the Act, the final order/decisions of the CCI (as specified under Section 53A of the Act) are appealable before the NCLAT. Further, any order or decision of the NCLAT can be appealed before the Supreme Court of India under Section 53T of the Act. However, any appeal must be filed within 60 days of receipt of the order by the party.

The proceedings before the NCLAT are considered judicial proceedings as per Section 53O of the Act. In deciding matters before it, the NCLAT exercises all powers of a civil court as per the Code of Civil Procedure, 1908. The decision is further guided by the principles of natural justice.

The Competition Bill 2020 proposed the addition of a proviso to Section 53B stating that “no appeal by a person, who is required to pay any amount in terms of an order of the Commission, shall be entertained by the Appellate Tribunal unless the appellant has deposited
twenty-five per cent of that amount or such other lower amount as may be prescribed and in such manner as may be prescribed”.

It should be noted that in terms of the Competition Bill 2020, appeal from any settlement or commitment order (proposed Sections 48A and 48B, respectively) passed by the CCI shall not be appealable.

Criminal sanctions

The Act does not prescribe criminal penalties for violators. Only certain contraventions of the Act provide for imprisonment as a deterrent – in Section 42 (contravention of the orders of Commission), if any person does not comply with the orders or directions of the Commission, they are liable to imprisonment, which may extend to three years or fine up to INR 250 million or both.

Section 53Q of the Act provides a penalty of imprisonment up to three years or fine up to INR 10 million or both for the contravention of the orders of the NCLAT.

Under these Sections (42 & 53Q), the Chief Metropolitan Magistrate shall have the discretion to levy the extent of imprisonment and/or fine. However, the CMM does not have the authority to take cognisance of the offence suo moto, it may only be undertaken upon the filing of a complaint by an authorised officer of the CCI.

Cooperation with other antitrust agencies

As per Section 18 of the Act, the CCI may enter into any memorandum or arrangement (upon the prior approval of the central government) with any foreign agency or country.

The CCI actively collaborates with organisations around the world for advancement in competition law and its effective implementation.

Further, the CCI signed on the extension of the BRICS Memorandum of Understanding on cooperation in the field of competition law and policy.

In the latter half of 2020, the CCI also participated in ‘Virtual Meeting of the Heads of the BRICS Competition Authorities’ and supported the joint statement by the BRICS Competition Authorities on consolidating efforts to combat the negative economic consequences of COVID-19 and the initiative of the FAS Russia to include the issue of combatting cross-border cartels in the work of the intergovernmental group of experts on competition law and policy of the UNCTAD.

Cross-border issues

Section 32 (acts taking place outside India but having an effect on competition in India) of the Act provides the CCI extra-territorial jurisdiction to the CCI. While the Act provides for taking cognisance of anti-competitive conduct outside India, there arise several issues in the implementation and enforcement of the provisions of the Act. Some of the issues are discussed below:

Cross-jurisdiction collaboration in enforcement procedures: Since anti-competitive conduct may be present over a number of jurisdictions, it is essential that antitrust authorities over those jurisdictions coordinate in execution and enforcement. For this, it is also essential that the authorities recognise the procedures of the other jurisdictions.

Sharing of evidence: In matters involving multinational entities, sharing of evidence between cross-border antitrust regulators could provide great assistance in making and strengthening claims of anti-competitive conduct.
Enforcement: While the CCI has the authority to direct or give orders pertaining to international entities, the means of enforcing the same are not as robust. However, in recent developments, it is seen that the CCI has been actively involved in developing cross-border relations with foreign competition enforcement agencies and regulators to facilitate the same.

Developments in private enforcement of antitrust laws

At the inception of a case, while the Act permits any person to file information, it does not empower them to assert their private right of action. Under Section 53N of the Act, however, after a positive finding of infringement of the provisions of the Act and anti-competitive conduct is concluded, the parties who have suffered losses owing to the anti-competitive conduct are permitted to seek compensation from the defaulting party vide a compensation application filed before the NCLAT.

The Act provides for a number of persons who have the same claim against a common defaulter of the substantive provisions of the Act, a class action suit can be instituted to seek compensation under Section 53N. This class action suit is subject to the provisions of the Civil Procedure Code, 1908. It must be noted that the Act does not provide a timeline for filing of such claims and also does not prescribe a time limit within which the same must be resolved.

In addition to private persons and class actions, the “Central Government or a State Government or a local authority or any enterprise” may also make an application to the NCLAT to adjudicate on a claim for compensation.

In terms of Section 53N of the Act, any party can file a claim for compensation/damages before the NCLAT after the order of the CCI or NCLAT. Section 53N of the Act does not specify any time period, under which such application for compensation must be filed. However, the Supreme Court of India has repeatedly held that the reasonable period (if not specified under the statute) cannot be more than three years from the last order. Also, Section 53N of the Act is silent on the fact whether an application for compensation/damages can be filed after the Supreme Court of India passes its final order.

Also, Section 53N of the Act does not permit filing of composite application for compensation/damages against several parties. It contemplates a situation where several claimants can file an application against a party (a defendant).

The above issues have been raised before the Supreme Court of India in the *Excel Crop Care Ltd v. FCI* matter and the same is pending adjudication.

Also, the Competition Bill 2020 has proposed an amendment to Section 53N of the Act by including ‘after the orders of the CCI, NCLAT or Supreme Court’.

Reform proposals

The Competition Law Review Committee (“CLRC”) which examines the Act and accompanying rules and regulations as set up by the Ministry of Corporate Affairs (“MCA”) in October 2018, gave its recommendations for amendments in the Act to the MCA in August 2019. On the basis of this report, the MCA released the first draft of proposed amendments to the Competition Act, 2002 titled ‘Draft Competition Amendment Bill, 2020’.

The Competition Bill 2020 was officially released into the public domain in February 2020. Through the bill, significant reforms have been brought about in the functioning, enforcement and efficiency of the CCI. Some of the key reforms are discussed below:

i. **Reform in the regulatory structure of the CCI:** Given that the CCI has several functions (adjudication, investigation, enforcement), the bill provides for the formation of an overarching governing body to oversee the same. This governing body will have six
full-time members from the Department of Economic Affairs, Ministry of Finance, MCA, and other members to be nominated by the Central Government. The creation of such a body brings about clear direction and streamlines the functioning of the CCI.

ii. **Public consultations:** The bill provides that public comments will be invited in terms of formation of regulations for the functioning of the CCI (proposed new Section 64A). This is a welcome reform as it will allow transparency and a more democratic manner of rulemaking.

iii. **Guidance on issuance of penalties:** The new proposed Section 64B (Commission to issue Guidance) mandates that the CCI shall issue guidelines on penalty provisions under the Act.

iv. **Settlement and commitments:** The proposed amendment brings to life a new regime based on settlement and commitments from parties. The new proposed Sections 48A (settlement) and 48B (commitment) make way for settlement and commitment applications to be filed by parties. The CCI will decide and accept/reject the same on the basis of the nature and gravity of contravention, and the effectiveness of the same.
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Anu Monga is a partner at AnantLaw. Her practice focuses on Competition Law, International Trade and WTO law. She also advises clients on Technology, Media & Telecommunication (“TMT”) law. She advises clients on behavioural and adversarial matters, merger control and general compliance, including audit and training.
In particular, she has considerable experience in merger control provisions within the power and oil & gas industries. During her career, Anu has advised foreign, multinational and Indian corporate clients across sectors including healthcare and pharmaceuticals, automobile, chemicals and fertilisers, aviation, manufacturing, steel, cement, telecommunications, broadcasting, information technology, power, insurance and insurance. Additionally, she has a thorough understanding of competition economics and assists clients on competition economics analysis.
Her matters were nominated for the Global Competition Review (“GCR”) Awards in 2013 and 2014. She has represented clients in several high-stake matters including the Builders Association of India (cement cartel matter), Excel Crop Care Ltd. (Aluminium Phosphide cartel matter and obtained the judgment on ‘relevant turnover’), Delhi Development Authority (abuse of dominance), Schott Glass (abuse of dominance), Cadila Healthcare Ltd., RMG Polyvinyl Ltd., and Forech Ltd. She has advised on merger control provisions in several transactions including ONGC-HPCL, PFC-REC, Jabil-Ericsson. Anu is currently involved in the first private damage claim application that has been filed post-final order of the Supreme Court and is acting as a lead counsel for defendants.

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Rahul Goel is a partner at AnantLaw. His practice focuses on Competition Law and TMT law. He also advises on International Trade and WTO Laws. Rahul has over 19 years of professional experience in advising, assisting and representing clients on a wide variety of legal, regulatory and policy issues. He regularly appears before the Supreme Court of India, various High Courts, NCLAT (Appellate Tribunal) and the Competition Commission of India (“CCI”). Rahul has acted as lead counsel in a number of high-stakes matters and he has been involved in many landmark matters in Competition Law, including the Supreme Court’s judgment on imposition of penalty on the basis of ‘relevant turnover’.
Rahul has the distinction of being nominated at the GCR Awards (Washington, D.C.) for matters being handled by him in 2013 (for representing the Informant Builders Association of India in the cement cartel matter); and 2014 (for obtaining an order on imposition of penalty on relevant turnover in the Excel Crop Care matter).
Rahul holds an LL.M. with a focus on Competition and TMT law from the University of Essex. He is a member of the Supreme Court Bar Association and also a Fellow of the UK-based Royal Society of Arts.

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