

Cartel Enforcement and Competition

ICN Special Project



भारतीय प्रतिस्पर्धा आयोग
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Introduction

This is the Report of the Special Project on ‘Cartel enforcement and competition’ for the 2018 ICN Annual Conference in New Delhi, India. Busting cartels is of utmost priority to any competition agency as they are the most egregious violation of competition law. Cartels raise prices and limit supply, thus making goods and services unaffordable for some and expensive for others. Recent literature provides evidence that there are significant gains from combating cartels, particularly for developing countries. The micro foundations of growth are embedded in competitive markets and in developing countries this relationship can be leveraged by a robust cartel enforcement regime that will ensure an efficient allocation of resources and increase in consumer welfare. Indirect fiscal effects of cartel enforcement in public procurement can lead to release of scarce government resources for financing development priorities.

Over the last two decades, many developing countries have enacted competition law, prohibition of cartels being an integral part of it. However, the mere presence of a law is not sufficient. What matters is its effective enforcement and the consequent opening of markets to competition with attendant benefits in terms of prices and availability of goods and services to consumers. While it is a challenge for every competition agency regardless of their age, the young jurisdictions share a set of common, acute challenges in building an effective cartel enforcement regime, besides facing issues specific to the jurisdiction. First, developing a toolkit and using it for detection of cartels, given that cartels are conceived and executed in secrecy. While the experience of mature jurisdictions provides useful guidance, the market realities in developing jurisdictions are often distinct. Unlike their mature counterparts, leniency applications may not initially be a significant source of information in young regimes, thereby compounding the problem of detection. Secondly, deterring firms from forming cartels is a challenge as the awareness of the law and the implications for non-compliance is low in the initial years when most cases are yet to attain finality in the appellate process. Creating awareness requires very focussed and targeted advocacy. In order to carry out effective advocacy, an understanding of the behaviour of firms in various sectors is crucial. It is important to strike a balance between effective enforcement and advocacy. Effective enforcement is the best form of advocacy. Young competition authorities are heavily constrained by the lack of a robust competition culture and striking a balance between the two is extremely critical for creating both deterrence and awareness. Further, many young competition regimes are economies in transition where the policy architecture may still have elements that restrict the size of the market, limit market participation and thereby create conditions conducive for collusion. Such legacy rules can seriously circumscribe the application of competition law.

India is in its ninth year of conduct enforcement and 63% of the investigations undertaken

in this nine-year period pertained to cartel allegations. Over these years, the Competition Commission of India (CCI) has strived to address the challenges in cartel enforcement through a blend of detection tools and outreach measures. In view of this and based on the consultation with the Non-Governmental Advisers (NGAs) in India, the topic of ‘Cartel enforcement and competition’ was selected by the CCI for the Special Project.

The objective of the project is to document the issues that India has faced in cartel enforcement, to identify the common underlying cartel-facilitating elements across sectors and to gauge the extent of stakeholder awareness and their perspectives on impact of the CCI decisions and policy/regulatory controls over markets. The project also aims at providing a brief factual matrix of various key aspects of cartel enforcement in ICN member jurisdictions.

With these objectives, the Special Project included a detailed review of the analyses and decisions of the CCI in cartel cases. In addition, a survey eliciting factual information on various key aspects of cartel enforcement from ICN member agencies was conducted. Responses were received from 37 member agencies. In order to gauge the level of awareness and compliance among the key stakeholders, i.e. enterprises, trade associations and government ministries/departments regarding cartels, the Special Project included a nationwide cross-sector stakeholders’ survey. The questionnaires were distributed to 871 respondents in India and 331 responses were received. Based on the findings of the survey, strategies for focussed advocacy were drawn up and focussed advocacy events were organised with key stakeholder groups in sectors with prevalence of cartels.

The Special Project Report comprises the following:

- i. Review of the cartel enforcement decisions of the CCI;
- ii. Survey of ICN member agencies on legal frameworks and procedures relating to cartel enforcement;
- iii. Stakeholders’ survey on awareness, compliance, impact of the CCI decisions and policies/ regulations affecting markets; and
- iv. Report on focussed advocacy amongst domestic stakeholders in sectors prone to cartelisation.

It is our hope that the findings of the project will be of significance to the younger jurisdictions in optimising their cartel enforcement efforts. We also expect that the Special Project will be a harbinger of a deeper engagement with the various stakeholders to increase their awareness of competition law in general, and cartels, in particular. Awareness of the law and cartel enforcement will help in creating a much-needed culture of competition and a recognition by the stakeholders that business practices need to be changed if they do not want to fall foul of competition law. Moreover, this Special Project hopes to strengthen the initiatives of the CCI and provide sufficient basis for the prioritization of its activities.

2. A Review of CCI Decisions Relating to Cartels

2.1 CCI's Cartel Enforcement at a Glance

Since the provisions of the Competition Act, 2002 (the Act) governing anti-competitive agreements came into force on 20 May 2009, the CCI has been active in the investigation and enforcement against cartels. This desk review of the CCI decisions relating to cartels is based on various details including the source of information, nature of allegations, evidence collected, arguments put forward by the parties to rebut the presumption of Appreciable Adverse Effect on Competition (AAEC), tools and methods of analyses used by the CCI to evaluate evidence and arguments, arguments rejected by the CCI, arguments accepted by the CCI, nature of the orders and nature of CCI intervention or remedy.

Legal Basis

Section 3 of the Act prohibits all anticompetitive agreements, both horizontal and vertical. Section 3(1) states “No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.”

Section 3(3) deals specifically with horizontal agreements. It states:

“any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –

- (a) directly or indirectly determines purchase or sale prices;
 - (b) limits or controls production, supply, markets, technical development, investment or provision of services;
 - (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
 - (d) directly or indirectly results in bid rigging or collusive bidding,
- shall be presumed to have an appreciable adverse effect on competition.”

Once it is established that there is an agreement of any of the kinds mentioned in Section 3(3)(a), 3(3)(b), 3(3)(c) or 3(3)(d), it is presumed that there has been an AAEC. Once such an agreement is established, the burden of proof is on the alleged contraveners to demonstrate that such agreement did not lead to any AAEC.

Section 2(b) of the Act defines agreement to include any arrangement or understanding or action in concert,- (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. Section 2(c) of the Act defines “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. Section 19(1) provides for the various sources of information which can form the basis for initiating an inquiry– *suo motu*, upon receipt of information through an informant, or through a reference from Government or statutory authority. Also, upon the establishment of the CCI, all pending investigations under the previous Monopolies and Restrictive Trade Practices (MRTP) regime were transferred to the CCI under Section 66(6) of the Act.

Section 19(3) provides a list of factors that the CCI shall consider during an inquiry into alleged anti-competitive agreements including cartels. Section 26 lays down the procedure for such an inquiry. In short, if the CCI, on receipt of information believes that there is no prima facie case of contravention, it can dismiss the allegations under Section 26(2) without further investigation. If, however, there is a prima facie case of contravention, it can direct the Director General (DG) to cause an investigation into the matter under Section 26(1). Once the investigation has occurred, upon the receipt and analysis of information uncovered during the course of the investigation, the CCI can dismiss the allegations under Section 26(6) if it believes that no infringement has taken place. If, however, it comes to the conclusion that an infringement has taken place, then it can pass an order under Section 27, prescribing remedies and / or monetary penalties.

Section 41 grants wide-ranging powers to the DG to enable him to carry out the investigation. These include asking for further information and conducting interviews with various categories of stakeholders. The DG also has power to conduct dawn raid under Section 41(3) of the Act.

Number of Cases

As of July 31 2017, 669 final orders/ decisions have been issued by CCI; it has passed 136 orders that have contained substantive discussions¹ on cartelisation under Section 3(3) of the Act. Only these cases have been taken into consideration in this review. A breakdown of the 136 cases under review, by the type of order, is shown in Figure 1.

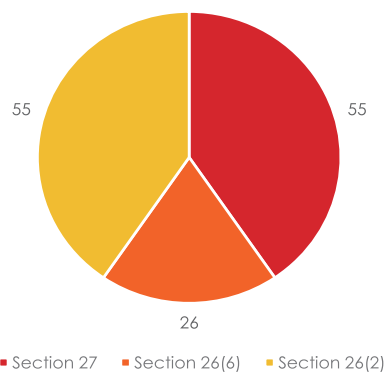


Figure 1: Number of orders passed by the CCI relating to cartels

¹ This review only includes cases where the CCI order has explicitly discussed whether the allegedly infringing behaviour forms a contravention under Section 3(3) of the Act. It does not include cases where (i) the informant made allegations under 3(3) (among other Sections) even though the allegedly infringing behaviour was not, in fact, concerned with Section 3(3), and consequently the CCI order did not discuss cartelisation or bid rigging; and (ii) the case was dismissed for reasons unrelated to the allegedly infringing behaviour under Section 3(3) (e.g. the CCI not having jurisdiction).

A total of fifty five orders were passed under Section 27 of the Act, where infringements were found after a detailed investigation, usually resulted in financial penalties and/or behavioural remedies. Another twenty six orders were passed under Section 26(6) of the Act, where a detailed investigation was initiated by the investigative arm of the CCI due to prima facie concerns, but no infringement were found. In addition, there were fifty five orders passed under Section 26(2) of the Act, where allegations were set aside by the CCI at the prima facie stage itself. In most of these prima facie non-infringement cases, abuse of dominance was the main allegation and cartelisation was used as a secondary, alternate line of attack.

Decisional trends

The table below provides the breakdown of these decisions by year.

Table 1: Number of CCI orders relating to cartels by year

Year	Section 26(2)	Section 26(6)	Section 27	Total
2009	0	0	0	0
2010	2	1	0	3
2011	13	10	4	27
2012	6	4	13	23
2013	5	3	8	16
2014	10	2	8	20
2015	10	4	13	27
2016	7	2	3	12
2017	2	0	6	8

While the CCI initiated several cartel investigations upon the notification of the horizontal agreements provisions in 2009, most of these investigations reached fruition only in 2011, with twenty seven orders containing substantial discussions on cartelisation. Since then, the CCI has maintained a consistent pace in disposing of cases relating to cartelisation.

In five of the eight years, over 40 per cent of relevant orders found cartel infringements. Of the four years where a low proportion of orders found cartel infringements, three are the initial years, 2009, 2010 and 2011. The CCI’s activity in this regard has been consistent since 2012, with a brief dip in 2016. At the same time, over 40 per cent of the relevant cartel decisions were disposed of at the prima facie stage itself, indicating the judicious approach followed by the CCI in its scrutiny as well as the need for qualitatively better filings by informants relating to competition issues.

Sources of Information

All but one prima facie non-infringement orders (Section 26(2) orders) related to cases where information was received from an informant (under Section 19(1) (a) of the Act). The only exception was a case initiated by the CCI on a *suo motu* (ex officio) basis. Of the cases where the CCI had prima facie concerns but found no infringement after a detailed investigation (Section 26(6) orders), over a third were inherited from the erstwhile MRTP regime that preceded the Act. When it comes to infringement orders, almost a quarter were initiated by government agencies themselves, either *suo motu* by the CCI (9 cases) or through references from other government agencies (4 cases, under Section 19(1)(b) of the Act).

In the cases initiated on the basis of information from informants, they have been typically the aggrieved parties - customers who had to bear the high prices or unfair terms imposed by the cartel, or industry participants who were being excluded due to anticompetitive conduct. In the cases where reference was made by other government agencies, the referring agencies were often sector regulators, or, in the case of public procurement, the procuring agencies.

Kinds of Evidence Considered

When the CCI does not dismiss an allegation at the *prima facie* stage, the DG can collect additional information during the course of the ensuing investigation. The analysis of this evidence then determines the fate of the case. Figure 3 below shows the kinds of evidence that have been considered by the CCI during the course of its detailed investigations.

The trend has been to rely heavily on direct evidence, with 73 percent of infringement orders (i.e. Section 27 orders) and 88 per cent of non-infringement orders (i.e. 26(6) orders) having considered and found a contravention on the basis of direct evidence.

Regarding infringement orders, when there is direct evidence of collusion, it is usually not required to consider other evidence, and there is a reduced reliance on circumstantial and economic evidence in such orders. Interestingly, of the cases where direct evidence was not available, circumstantial evidence was used in all but one case. Economic evidence was used in 40 per cent of such cases. The only case where no evidence was used at all was *In Re: Suo-moto case against LPG cylinder manufacturers*²

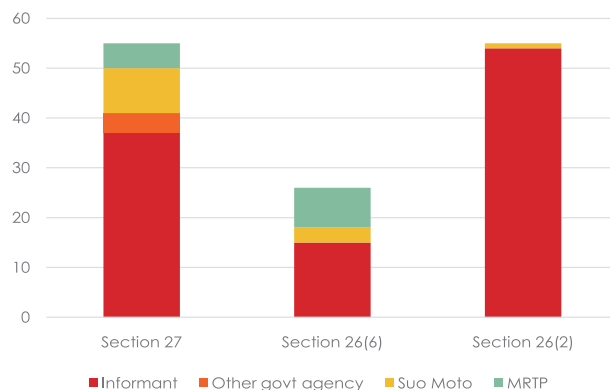


Figure 2: Relevant orders by source of information

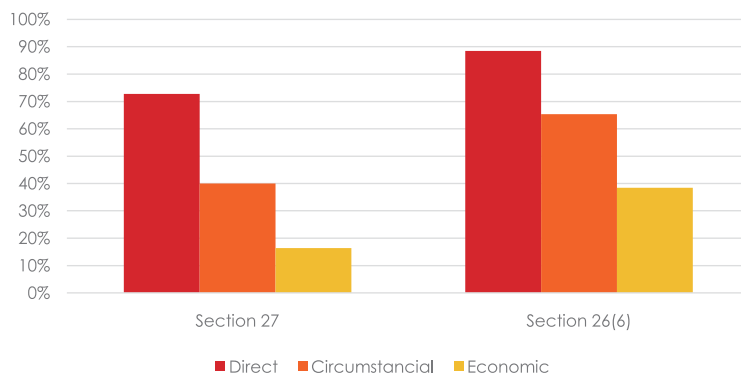


Figure 3: Kinds of evidence considered

² In Re: Suo-moto case against LPG cylinder manufacturers, (Case No. Suo Moto 03 of 2011) Order dated 6 August, 2014.

which related to mitigating a fine issued in an earlier case. Only two infringement orders relied on all three kinds of evidence, i.e. direct, circumstantial and economic evidence. Regarding non-infringement orders, as many as 7 orders out of the total of 26 considered all three kinds of evidence.

Interventions made so far

In assessing the regime, the various methods/tools adopted by the CCI in cartel enforcement are critical. In the infringement decisions relating to violations of Section 3(3) of the Act, the CCI has:

- (a) imposed penalties on enterprises, trade associations and their office bearers;
- (b) passed cease and desist orders, the breach of which could be a criminal offence under Section 42 of the Act;
- (c) required trade associations to disengage from collecting price information;
- (d) disqualified office bearers of trade associations responsible for repeated contraventions;
- (e) ordered alteration of the infringing conduct; and
- (f) directed introduction of competition compliance procedures.

The CCI has consistently sought to make interventions through advocacy initiatives with both government bodies and private enterprises. Further, with a view to identify elements in various government enactments and policies that can potentially restrict the ability of economic agents to effectively compete at the market place, the CCI has framed ‘*The Competition Commission of India (Competition Assessment of Economic Legislations and Policies) Guidelines, 2016*³. These Guidelines would facilitate an objective and transparent assessment of existing and upcoming economic legislations and policies made both at the central and at the state level, from a competition perspective.

(i) Nature of Contraventions

Figure 4 shows the nature of contraventions that infringement orders have identified.

21 of the 55 infringement orders found the classical cartel outcome of price determination (under Section 3(3)(a) of the Act). The most common infringement, however, was limiting or controlling output, markets, technical development or investment (under

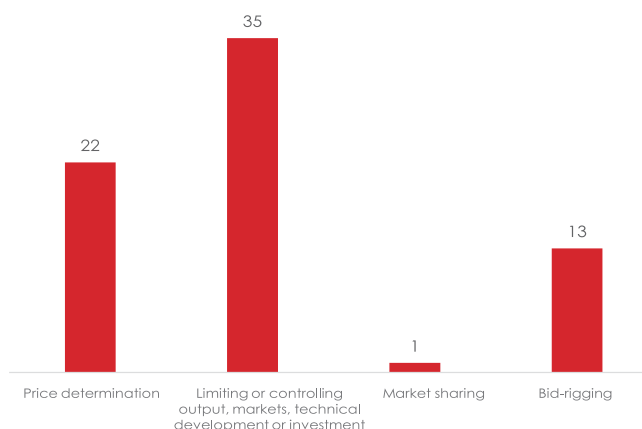


Figure 4: Nature of contraventions

³ http://www.cci.gov.in/sites/default/files/whats_newdocument/Competition%20Assessment%20Guidelines%2C%202016.pdf.

Section 3(3)(b)), which arose in over 60 per cent of infringement orders. There were only two orders that found market sharing (under Section 3(3)(c)), and there were 14 instances of bid-rigging (under Section 3(3)(d)).

(ii) Monetary Penalties

Of the 55 infringement orders, a monetary penalty was imposed in 41 cases. The total quantum of monetary penalties imposed by the CCI in these orders was INR 17,160.67 crores.^{4,5}

However, the penalties were not evenly distributed between cases. 12 orders imposed low penalties, with penalties on all opposite parties totalling less than INR 10 lakh. These orders relate mostly to trade associations of small service providers in informal sectors being held guilty of collusion. On the other side of the spectrum, there were 9 orders where penalties of over INR 100 crore were imposed. Three of these contained penalties of over INR 1000 crore; however two of these pertained to the same case, *Builders Association of India vs Cement Manufacturers' Association & Ors*⁶, where the first order of the CCI was remanded by the erstwhile Competition Appellate Tribunal (COMPAT)⁷. The second order CCI contained similar fines, totalling INR 6,317.32 crore, which is presently pending appeal.

Appeals

Figure 5 shows the number of orders that were appealed to the COMPAT.

As can be seen, almost three quarters of CCI cartel infringement orders were appealed. The incidence of appeals was much lower in non-infringement orders, both Sections 26(6) and 26(2). Most appeals of non-infringement orders were dismissed; however two appeals of prima facie non-infringement orders resulted in the COMPAT remanding the cases to the CCI for reconsideration.

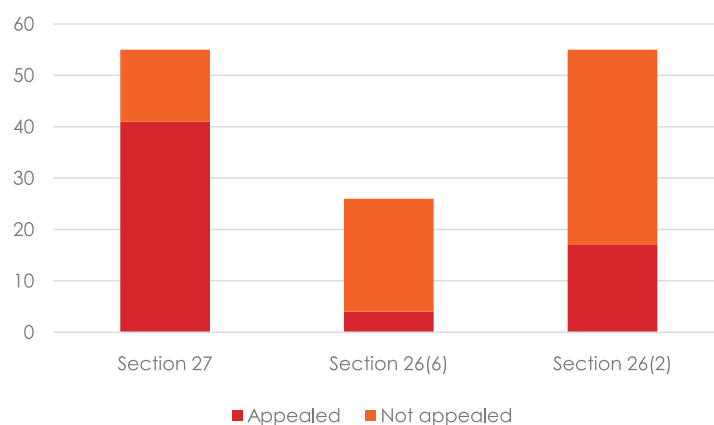


Figure 5 Appeals to the COMPAT

The high incidence of appeals for infringement orders deserves further analysis.

⁴ Approximately USD 2.69 billion.

⁵ This figure includes orders where the COMPAT ultimately quashed or modified the CCI order.

⁶ Builders Association of India vs Cement Manufacturers' Association & others (Case No 29 of 2010), Order dated 31 August 2016.

⁷ Pursuant to the amendments brought forth by the Finance Act, 2017, the National Company Law Appellate Tribunal has been designated as the Appellate Tribunal of the CCI, in place of the COMPAT.

Figure 6 below breaks up the 41 appeals by outcome.

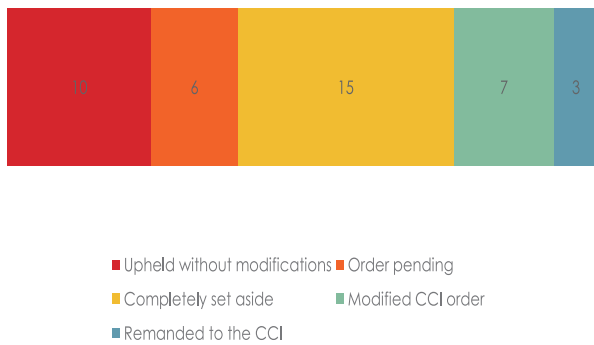


Figure 6 Infringement order appeal outcomes

17 of the 41 appeals resulted in the CCI orders being upheld with or without modifications, a positive outcome for the CCI. Not considering the 6 orders where the outcome of appeals is pending, 18 of the 41 orders resulted in a negative outcome for the CCI. These orders were completely set aside or remanded to the CCI for reconsideration.

Figure 7 below shows appeals of COMPAT orders to the Supreme Court.

11 orders of the COMPAT relating to infringement orders of the CCI have been appealed to the Supreme Court. Of these, 9 are pending, 1 was allowed and 1 set aside the COMPAT order, reinstating the CCI order. The only appeal of a Section 26(6) order to the Supreme Court was ultimately withdrawn. Of the 4 appeals of Section 26(2) orders to the Supreme Court, 1 was disallowed and 3 are pending.

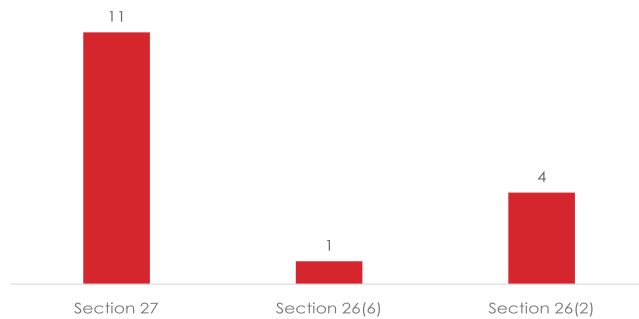


Figure 7 Appeals to the Supreme Court

Thus, the total number of infringement orders that still stand are 25 out of 55 (including the 14 orders which were not appealed, the 10 orders upheld by the COMPAT and the 1 order set aside by the COMPAT but upheld by the Supreme Court). Most of the CCI orders that were considered ‘seminal’ were appealed, with the appeals either being upheld or currently pending in the courts.

Identifying focus sectors

International experience has shown that structural factors make some industries more prone to cartelisation than others, and therefore antitrust activity is concentrated in these sectors.⁸ The Indian experience is in line with this. Figure 8 highlights the CCI experience in eight key sectors, which account for almost three quarters of all orders related to cartelisation. Of these, six sectors may be considered prone to cartelisation, accounting for almost 90 per cent of all infringement decisions.

⁸ See Chapter – 3 on Screens for Identifying Sectors vulnerable to Cartelization.

The highest number of infringement decisions (15) took place in the entertainment sector, which is not usually regarded as being prone to cartelisation. Another unconventional sector is pharmaceuticals distribution, with thirteen (13) cases and eleven (11) infringements. Public procurement through online tendering saw fifteen (15) cases with eight (8) infringement findings, and transport (excluding railways) saw fourteen (14) cases with seven (7) infringements findings.

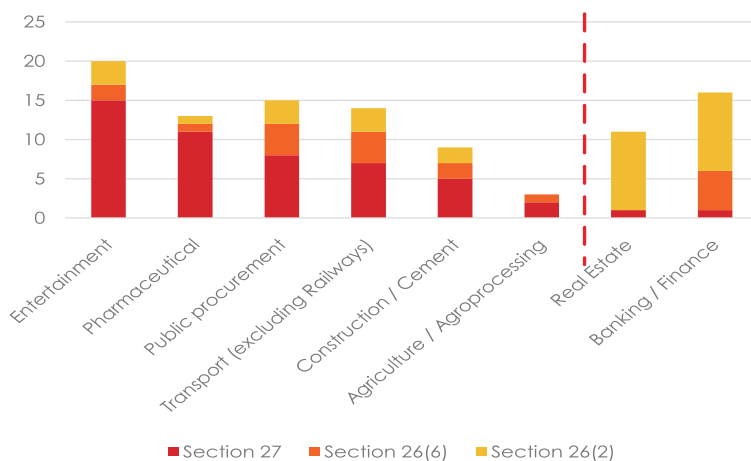


Figure 8 Cartel investigations in key sectors

Of the sectors which are internationally regarded as hotspots of cartel activity ⁹, public procurement, construction/cement and agriculture/agro processing have seen infringement decisions in India. Two (2) sectors, real estate and banking/finance, have seen a lot of antitrust activity, but almost no findings of infringement. In the real estate sector, there were eleven (11) cases out of which ten (10) were dismissed at the prima facie stage. The banking / finance sector saw sixteen (16) cases, but only one (1) infringement finding. Therefore, purely based on the cases thus far, these sectors cannot be said to be “prone” to cartelisation in India. However, given the high number of cases brought before the CCI, they also merit attention.

2.2. CCI Activity in Focus Sectors

This section contains analyses of CCI decisions in eight (8) key sectors. Of these, six (6) are arguably prone to cartelisation:

- Entertainment;
- Pharmaceuticals;
- Public procurement;

⁹ Internationally, the list of industries with frequent cartel activity is long and diverse, including agriculture, stone, glass and machinery, chemicals, agricultural products, textiles, steel, construction and electrical contracting. In the United States, it has been found that the manufacturing industry is most prone to cartel activities, with a total of 243 cartels taking place between 1961-2013 followed by construction (43), transportation and warehousing (17), wholesale trade (14) and retail trade (14) industry during the same period. Similarly in the EU, the chemicals and transport cartels (both transport services and the manufacturing of transport equipment) have been frequent areas of collusive activity. The prosecution of collusion in the chemicals sector has been common in EU both before and after the introduction of the leniency program by the European Commission. There have been 23 cartels in the EU involving 106 firms, illustrating that the chemical industry is highly concentrated with predominantly homogeneous products and is prone to collusion across many different firms. Cartel activities are also common in government procurement programmes across various jurisdictions and the most affected sectors include construction projects (roadways, buildings), schools, medical supplies, and military services and supplies. It has been observed that many “repeat industries” seem to be driven by repeat customers, especially where the government is the customer. This may be the result of the design of public procurement auctions or rules requiring transparency; it could also be the result of public corruption. (for further information, see OECD ‘Serial Collusion in Context: Repeat Offences by Firm or by Industry?’ (2015), DAF/COMP/GF(2015)12).

- Other Transport (excluding railways);
- Construction & Cement;
- Agriculture/Agro processing;
- Banking and Finance; and
- Real Estate.

Each of these is discussed in detail below. A discussion on those sectors which are not prone to cartelisation but which have nonetheless seen several cases brought before the CCI follows. The section concludes with a brief discussion on the CCI's proactive practices in addressing sectors prone to cartelisation.

Entertainment

The film and television sector has seen a significant amount of antitrust churn in India. The CCI has initiated and/or taken action against enterprises active in this sector on twenty (20) occasions. This sector has also seen one of the first substantive decisions on merits by the Supreme Court of India in *Competition Commission of India vs. Coordination Committee of Artists and Technicians of West Bengal Film and Television & Ors.*¹⁰ (*Bengal Artists Case*). The defining characteristic of this sector is the control exercised by trade associations. Most aspects of this industry are unionised, and these associations and unions exercise significant influence on the way in which their constituent members do business. By far, the largest chunk of cases under the Act have been on account of concerted action by trade associations.

The cases under Section 3 of the Act in this sector fall mainly in two (2) broad buckets:-

(i) Films and television

There are nineteen (19) cases under this head. As said above, the defining characteristic of this sector is the prevalence of trade associations. These trade associations are mostly limited by linguistic and state boundaries, and represent almost each and every stakeholder in the industry. These trade associations exert a significant amount of control on the functioning of the sector, and all the cases in this sector involve concerted action against third parties. The case of *FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum & Ors.*¹¹ was the first antitrust case in India where the CCI passed an affirmative order under Section 27 of the Act. The informant filed an information alleging that United Producers/ Distributors Forum (*UPDF*), the Association of Motion Pictures and TV Programme Producers (*AMTPP*) and the Film and Television Producers Guild of India Ltd. (*FTPGI*) had formed a cartel. AMPTPP and FTPGI were the members of the UPDF, which was an association of film producers/distributors which included both corporate houses and individual independent film producers and distributors.

¹⁰ *Competition Commission of India vs. Coordination Committee of Artists and Technicians of West Bengal Film and Television & Ors.* (2017) 5 SCC 17) Order dated 7 March 2017.

¹¹ *FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum & Ors.* (Case No. 1 of 2009), Order dated 25 May 2011.

The DG found that the producers and distributors behaved in a cartel-like manner. They came together on a common platform by raising the bogey of survival and indulged in concerted action after talking to each other openly under media glare. They then took a joint decision not to supply films to the multiplex owners with a view to garner higher revenue for themselves. The CCI took into account the quintessential aspects of a cartel, as identified by the DG in its report, which included, (i) ability of the producers/distributors to control release of films, (ii) pre-meditated and calculated joint stand taken by the producers/distributors in their face-off with the multiplexes; (iii) convenient existence of forum for cartel-forming in the guise of active associations of producers/distributors; (iv) geographical concentration of the film industry in Mumbai, enabling intense and regular interaction necessary for cartels; (v) policing of the cartel “agreement” and ability of punishing any violators of the cartel agreement as evidenced from letters written with impunity to members; (vi) open threats of dire consequences to intimidate members who may not be too willing to abide by the cartel agreement; and (vii) complete ownership and control of their films by the producers/distributors, gave them a commanding position to dictate terms.

The CCI regarded the arguments on copyrights and efficiency made by the opposite parties as weak, and found the opposite parties guilty of breaching the provisions of Section 3(1) read with Section 3(3)(a) and (b) of the Act. Given that this was the first substantive case under the Act, the CCI imposed a token penalty of only INR 0.1 million on each of the opposite parties. In appeal, the COMPAT agreed with the findings of the CCI and left the penalty unchanged, as it was considered ‘insignificant and tends to be on the lenient side’. The salient features of this first case are broadly reflected in each of the cases in this sector which subsequently came out. These are as follows.

The film and television sector is characterized by the presence of trade associations for all stakeholders, be they artists¹², distributors¹³, exhibitors¹⁴, and sometimes the industry as a whole¹⁵. Most of these associations have strict rules for members not being allowed to deal with non-members. In all these cases, the CCI has passed similar orders – finding the association guilty of restrictive practices under Section 3(3) of the Act and imposing penalties accordingly.

In several cases, the issue of collective bargaining has been raised by the parties, in that

¹² See, for example, Mr. Sajjan Khaitan vs. Eastern India Motion Picture Association & Ors. (Case No. 16 of 2011) Order dated 9 August 2012, Shri T. G. Vinayakumar (also known as Vinayan) Vs. Association of Malayalam Movie Artists & others. (Case No. 98 of 2014), Order dated 24 March 2017.

¹³ See, for example, Sunshine Pictures Private Limited & Eros International Media Limited vs Central Circuit Cine Association, Indore & Ors. (Case Nos. 52 and 56 of 2010) Order dated 16 February 2012, Shri Ashtavinayak Cine Vision Limited vs. PVR Picture Limited and Ors. (Case No. 71 of 2011) Order dated 8 May 2013, Cinergy Independent Film Services Pvt. Ltd. vs. Telangana Telugu Film Distributors Association and Ors. (Case No. 56 of 2011), In Re: Shri P.V. Basheer Ahmed vs. Film Distributors Association, Kerala (Case No. 32 of 2013) Order dated 23 December 2014, Cinemax India Ltd. vs. Film Distributors Association (Kerala) (Case No. 62 of 2012) Order dated 23 December 2014, Kerala Cine Exhibitors Association v Kerala Film Exhibitors Federation (Case No. 45 of 2012) Order dated 23 June 2015.

¹⁴ See, for example, In Re: . Crown Theatre vs. Kerala Film Exhibitors Federation (KFEF) (Case No. 16 of 2014) Order dated 8 September 2015.

¹⁵ See, for example, Reliance Big Entertainment & Ors. Vs. Karnataka Film Chamber of Commerce & Ors. (Case Nos. 25 of 2010, 41 of 2010, 45 of 2010, 47 of 2010, 48 of 2010, 50 of 2010, 58 of 2010, & 69 of 2010), Mrs. Manju Tharad & Ors. vs Eastern India Motion Picture Association (EIMPA), Kolkata & Ors. (Case No. 17 of 2011) Order dated 24 April 2012, UTV Software Communications Limited, Mumbai vs. Motion Pictures Association, Delhi (Case No: 9 of 2011) Order dated 8 May 2012, Kannada Grahakara Koota vs. Karnataka Film Chamber of Commerce & Ors. (Case No. 58 of 2012) Order dated 27 July 2015.

the acts of boycott of trade unions came under scrutiny.¹⁶ On this issue, the CCI's stance has been that the guise of 'collective bargaining' cannot be used to justify restrictive acts by an association, whose members are commercial enterprises. The Supreme Court, in the *Bengal Artists Case*, has conclusively settled the issue by ruling that if the membership of a trade union consisted of (even a few) commercial enterprises, they cannot use the guise of collective bargaining and industrial action to impede competition.

Besides ordering penalties on the contravening trade associations, the CCI has also imposed individual penalties on the office bearers of the association¹⁷. In one case, the CCI has barred two such individuals from being part of the association for a certain period of time¹⁸.

This sector has mostly seen appellate affirmation of the CCI's orders by the COMPAT.¹⁹ In rare cases, the COMPAT has set aside the order of the CCI on evidentiary grounds²⁰ or ordered a fresh investigation by the DG.²¹

(ii) Cable & DTH

There is a single case under this head, which deals with issues of interoperability of Direct To Home (**DTH**) hardware. In *Consumer Online Foundation vs. Tata Sky Limited and Ors*²², the allegation was that DTH service providers such as Dish TV India Ltd, Tata Sky Ltd., Reliance Big TV Ltd. and Sun Direct TV Pvt. Ltd, were allegedly restraining competition in the market by preventing interoperability between hardware and DTH signals provided by different manufacturers and DTH service providers. On consideration of the DG report and the Telecom Regulatory Authority of India (*TRAI*) recommendations on interoperability issues faced by subscribers, the CCI observed that the technical problems associated with interoperability can be resolved by sectoral regulators like TRAI. According to the CCI, there was no evidence that the market practice was a result of any action in concert by various DTH service providers, and hence they could not be said to be in infringement of the provisions of Section 3 of the Act. Further, the CCI held that there was no evidence that the DTH operators entered into an agreement not to compete with each other by mutually agreeing to avoid interoperability or by any other means. Accordingly, it was held that no case for a violation of Section 3(3) of the Act was made out in this case.

¹⁶ See, for example, *FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum & Ors.* (Case No. 1 of 2009) Order dated 25 May 2011, *In Re: Shri P.V. Basheer Ahmed vs. Film Distributors Association, Kerala* (Case No. 32 of 2013) Order dated 23 December 2014, *Cinemax India Ltd. vs. Film Distributors Association (Kerala)* (Case No. 62 of 2012) Order dated 23 December 2014.

¹⁷ See, for example, *In Re: Shri P.V. Basheer Ahmed vs. Film Distributors Association, Kerala* (Case No. 32 of 2013) Order dated 23 December 2014, *Cinemax India Ltd. vs. Film Distributors Association (Kerala)* (Case No. 62 of 2012), *Kerala Cine Exhibitors Association v Kerala Film Exhibitors Federation* (Case No. 45 of 2012), *In Re: Crown Theatre vs. Kerala Film Exhibitors Federation (KFEF)* (Case No. 16 of 2014), *Shri T. G. Vinayakumar (also known as Vinayan) Vs. Association of Malayalam Movie Artists & others.* (Case No. 98 of 2014).

¹⁸ See *In Re: Crown Theatre vs. Kerala Film Exhibitors Federation (KFEF)* (Case No. 16 of 2014).

¹⁹ See, for example, *FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum & Ors.* (Case No. 1 of 2009), *Sunshine Pictures Private Limited & Eros International Media Limited vs Central Circuit Cine Association, Indore & Ors.* (Case Nos. 52 and 56 of 2010), *Reliance Big Entertainment & Ors. Vs. Karnataka Film Chamber of Commerce & Ors.* (Case Nos. 25 of 2010, 41 of 2010, 45 of 2010, 47 of 2010, 48 of 2010, 50 of 2010, 58 of 2010, & 69 of 2010), *UTV Software Communications Limited, Mumbai vs. Motion Pictures Association, Delhi* (Case No: 9 of 2011), *In Re: Shri P.V. Basheer Ahmed vs. Film Distributors Association, Kerala* (Case No. 32 of 2013), *Kannada Grahakara Koota vs. Karnataka Film Chamber of Commerce & Ors.* (Case No. 58 of 2012), *In Re: Crown Theatre vs. Kerala Film Exhibitors Federation (KFEF)* (Case No. 16 of 2014) Order dated 8 September 2015.

²⁰ See *Cinergy Independent Film Services Pvt. Ltd. vs. Telangana Telugu Film Distributors Association and Ors.* (Case No. 56 of 2011) Order dated 10 January 2013.

²¹ See *K Sera Sera Digital Cinema Pvt. Ltd. vs. Digital Cinema Initiative LLC* (Case No. 30 of 2015) Order dated 22 April 2015.

²² *Consumer Online Foundation vs. Tata Sky Limited and Ors.* (Case No. 2 of 2009) Order dated 24 March 2011.

Pharmaceuticals Distribution

The pharmaceutical sector in India has been growing steadily over the years, with a market size of USD 27.57 billion in 2016-17. Over-the-Counter (*OTC*) and generic formulations account for close to 91 per cent of this market.²³ The CCI has, over the years, extensively scrutinized practices in the pharmaceutical industry, and some of its interventions have demonstrably resulted in industry-wide changes. Even government committees have recognized the important role played by the CCI in ensuring that the pharmaceutical sector in India delivers efficient outcomes consistent with public interest, economic development and consumer welfare.²⁴

Since its inception, the CCI has passed final orders in thirteen (13) cases dealing with cartelisation in the pharmaceutical sector. Of these, three (3) investigations were transferred to the CCI from the erstwhile MRTPC, two (2) were initiated by the CCI on a *suo-motu* basis and the remaining were initiated by the CCI on the basis of information received under the provisions of Section 19(1)(a) of the Act. The CCI issued orders noting the existence of contravention in eleven (11) cases, it dismissed allegations at the *prima facie* stage in one case, and in another case found no contravention after a detailed investigation.

By and large, most of the interventions of the CCI have been directed at the pharmaceutical distribution chain and in particular at the All India Organization of Chemists and Druggists (*AIOCD*) and various other state-level associations of chemists and druggists.

The first substantive order passed by the CCI in this regard, was in the case of *Varca Druggist & Chemist & Ors. Vs. Chemists and Druggists Association, Goa*²⁵, where the informant alleged that the Chemists and Druggists Association, Goa (*CDAG*) had been imposing restrictive guidelines which (a) required pharmaceutical companies to appoint only *CDAG* members as stockists; (b) required that a No-Objection Certificate (*NOC*) be obtained by any pharmaceutical company prior to appointing a new stockist or distributor; (c) restricted the introduction of new drugs and pharmaceutical formulations into the market by requiring new stockists and distributors to pay sums of money to the *CDAG* under the guise of Product Information Service (*PIS*) fees; and (d) fixed margins of pharmaceutical products and restricted the ability of retailers and wholesalers to provide discounts, and pass on the benefits of beneficiary schemes to their customers. The CCI passed a *prima facie* order under Section 26(1) of the Act directing the DG to cause an investigation into the matter. The DG, upon review of the evidence on record, including (i) various circulars and guidelines issued by the *CDAG*, (ii) nature of terms of the Memorandum of Understanding (*MoU*) between the *AIOCD* and the Organization of Pharmaceutical Producers of India (*OPPI*), (iii) various communication issued by the *CDAG* to pharmaceutical companies, (iv) minutes of the meetings held by the *CDAG*, and (v) depositions of the office bearers of *CDAG* and others, held that the cumulative

²³ See, India Brand Equity Foundation, "Sector Report: Pharmaceuticals", July 2017; Available at URL: <https://www.ibef.org/download/Pharmaceutical-July-2017.pdf> (Last accessed on 13 August 2017).

²⁴ See, Recommendations High Level Committee Report on FDI in Existing Indian Pharma Companies (Arun Maira Committee Report), 2011.

²⁵ *Varca Druggist & Chemist & Ors. Vs. Chemists and Druggists Association, Goa* (MRTP C-127/2009/DGIR4/28), Order dated 11 June 2012.

effect of the above practices rendered the activities of the CDAG akin to a cartel, and, thereby, contravened the provisions of Section 3(3)(a) and 3(3)(b) of the Act.

Similar facts were considered by the CCI in two other cases transferred from the Director General of Investigation and Registration (*DGIR-MRTPC*), i.e. in the case of *Vedant Bio Sciences vs Chemists & Druggists Association of Baroda*²⁶ and *the Belgaum District Chemists and Druggists Association v. Abbott India Ltd. & Others*²⁷.

The CCI subsequently received cases with similar allegations against state-level and district-level associations in Karnataka,²⁸ Goa,²⁹ Himachal Pradesh,³⁰ Assam³¹ and Kerala,³² and undertook *suo-motu* investigations in respect of practices adopted by state and district-level associations in West Bengal³³ and Goa.³⁴

Following the initial decisions of the CCI with regard to cartel-like conduct in the pharmaceutical distribution sector, where the CCI noted the involvement of individual members of the various chemists and druggists associations,³⁵ the CCI went beyond looking merely at the turnover and receipts of the associations, and imposed individual penalties upon the members of the association in terms of Section 48 of the Act. In *Re: Bengal Chemist and Druggist Association*³⁶ the CCI imposed a penalty at the rate of 10 per cent of the respective turnover/income/receipts of the office bearers of the association who were directly responsible for running its affairs and played lead role in decision making, and at the rate of 7 per cent of the respective turnover/income/receipts of the members of the association's executive committee.

Given the size and importance of the pharmaceutical sector in India, in addition to enforcing the provisions of the Act, the CCI has (i) engaged in targeted advocacy and (ii) issued public notices highlighting the importance of fair and competitive conduct.³⁷ Resultantly, instances of boycott / restrictive terms and conditions upon pharmaceutical companies have reduced significantly. In fact, the AIOCD issued a circular to all its members and all state-level associations to this effect.

²⁶ *Vedant Bio Sciences vs Chemists & Druggists Association of Baroda (C-87/2009/DGIR)*, Order dated 5 September 2012.

²⁷ *The Belgaum District Chemists and Druggists Association v. Abbott India Ltd. & Others (C-175/09/DGIR/27/28-MRTP)*, Order dated 2 March, 2017.

²⁸ *Ibid.*; *Maruti & Company, Bangalore vs Karnataka Chemists & Druggists Association & Ors. (Case No. 71 of 2013)* Order dated 28 July 2016.

²⁹ *Royal Agency vs Chemists and Druggists Association, Goa & Ors. (Case No. 63 of 2013)* order dated 27 October 2015, *Varca Druggists & Chemists Association v. Chemists and Druggists Association, Goa, (MRTP Case No. C-127/2009/DGIR)* Order dated 11 June 2012.

³⁰ *Rohit Medical Store v. Macleods Pharmaceutical Limited & Ors. (Case No. 78 of 2012)* Order dated 29 January 2015.

³¹ *In Re: Sandhya Drug Agency v. Assam Drug Dealers Association and Ors. (Case No. 41 of 2011)* Order dated 9 December 2013.

³² *Mr. P. K. Krishnan Proprietor, Vinayaka Pharma vs Mr. Paul Madavana, and Ors. (Case No. 28 of 2014)* Order dated 1 December 2015, *In Re: Peeveear Medical Agencies, Kerala v. All India Organization of Chemists and Druggists and Ors. (Case No. 30 of 2011)* Order dated 9 December 2011.

³³ *In Re: Bengal Chemist and Druggist Association (Reference Case No. 1 of 2012, Suo-moto Case No. 02 of 2012)* Order dated 11 March 2014.

³⁴ *In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), Glenmark Company and, Wockhardt Ltd. (Suo-moto Case No. 05 of 2013)* Order dated 27 October 2014.

³⁵ *Varca Druggists & Chemists Association v. Chemists and Druggists Association, Goa, (MRTP Case No. C-127/2009/DGIR)*; *Vedant Bio Sciences v. Chemists & Druggists Association of Baroda, (C-87/2009/DGIR)* Order dated 5 September 2012; *Santuka Associates Pvt. Ltd. v. All India Chemists and Druggists (Case No. 20 of 2011)*; *Sandhya Drug Agency v. Assam Drug Dealers Association (Case No. 41 of 2011)* Order dated 9 December 2013.

³⁶ *Re: Bengal Chemist and Druggist Association (Reference Case No. 1 of 2013 and Suo-moto Case No. 02 of 2012)*, Order dated 11 March 2014.

³⁷ See, Competition Commission of India, "Public Notice Regarding Anti-competitive Practices in the Pharma Sector" dated 30 January, 2014.

Public Procurement

Globally, public procurement accounts for 15 per cent of Gross Domestic Product (*GDP*). However, in India this figure is 30 per cent, owing to continued government involvement in sectors like railways, healthcare and telecommunications, which in many developed economies are dominated by private players.³⁸ The antitrust activities have mainly related to procurement in railways, healthcare and defence.

It is estimated that the railways procure over INR 250 billion worth of goods and services annually. When a procurement contract crosses a certain monetary threshold, procurement is required to take place through an open online tender system, where participant vendors are required to be pre-approved by the railways.

The size of the Indian healthcare industry was estimated to be INR 9.2 trillion in 2016, growing at a Compound Annual Growth Rate (*CAGR*) of 14 to 15 per cent between 2011 and 2015.³⁹ The importance of the public sector can be gauged by the fact that of all the organised and unorganised hospitals in India, over 30 per cent are government-owned.

Online bidding is a relatively new innovation in government procurement, only after the introduction of the Information Technology Act in 2000. The rationale for moving to e-Procurement was to improve transparency and reduce the discretionary power inherent in manual tendering.⁴⁰

This sector has seen a substantive decision on merits by the Supreme Court in *Excel Crop Care Ltd. vs Competition Commission of India & Anr.* The Supreme Court held that the defence of price parallelism being a general feature of oligopolistic markets does not hold good in bid-rigging cases. While upholding the order of CCI, the Court also noted that parallel behaviour is a strong evidence of cartelization unless the same corresponds to the normal market conditions.

In *Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*⁴¹, the CCI conducted a qualitative analysis of documentary (bid documents), oral (recorded statements) and forensic (call data records and e-mails) evidence. For instance, it compared prices shared through e-mail and prices quoted in the bid documents and corroborated the recorded statements with the call data records. The CCI passed a cease and desist order along with different monetary penalties for different parties. The CCI noted that Pyramid Electronics (*Pyramid*) was the first one to make a disclosure in the case by extending co-operation and made value addition in establishing the existence of cartel. Therefore, Pyramid's penalty was reduced by 75 per cent under the leniency regime and was fined only INR 1.6 million instead of INR 6.2 million.

Most investigations that resulted in an infringement finding followed the same broad

³⁸ http://www.cci.gov.in/sites/default/files/presentation_document/p4.pdf?download=1.

³⁹ Frost & Sullivan analysis, <http://download.dionglobal.in/admin/Reports/DRHP220520171.PDF>.

⁴⁰ <http://nisg.org/files/documents/UP1418303129.pdf>.

⁴¹ *Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (Suo Moto Case No. 03 of 2014)*, Order dated 18 January 2017.

contours. In both *In Re: Aluminium Phosphide Tablets Manufacturers*⁴² and *Re: Reference Case No. 01 of 2012* filed by Director General (Supplies & Disposals), Directorate General of Supplies & Disposals, Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi⁴³, the CCI found infringement and imposed a monetary penalty. In *Re: Reference Case No. 05 of 2011* filed by Shri B P Khare, Principal Chief Engineer, South Eastern Railway,⁴⁴ the CCI passed a cease and desist order, but did not impose any monetary penalty. In *Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. (PES) and Ors.*,⁴⁵ the CCI found an infringement and imposed a monetary penalty, but the COMPAT reduced the quantum of the penalty.⁴⁶

The COMPAT has set aside some of the CCI infringement orders in this sector. This happened both in *Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab*⁴⁷ and in *Bio-Med Private Limited v. Union of India & Ors.*⁴⁸, where the Supreme Court confirmed the COMPAT's judgement.⁴⁹

Investigations that led to the dismissal of allegations also followed similar modes of inquiry, albeit reaching different conclusions. In *Dy. Chief Materials Manager, Integral Coach Factory, Chennai v. Celtek Batteries (P) Ltd., Bangalore & Ors.*⁵⁰, the CCI accepted that higher quotes resulted from an increase in cost of inputs and that the difference in rates quoted for different procuring units was on account of varying transportation cost. Similarly, in *Chief Materials Manager - I North Western Railway v. Milton Industries Ltd. & Others*⁵¹, the CCI held that the higher prices could be attributed to external events such as a devaluation of the Indian rupee and a rise in the price of petroleum. In *Shri Vijay Bishnoi v. Responsive Industries Ltd. & Others*⁵², the CCI accepted similar objective justifications and also took note of the fact that the opposite parties had not formed any trade association.

The CCI order *In Re: Deputy Chief Materials Manager, Rail Coach Factory vs. Faiveley Transport India Limited & Others*⁵³ exonerated the opposite parties in this case due to lack of evidence and because it felt the railways procurement system itself was not conducive for competition. This order was upheld by the COMPAT.

⁴² In Re: Aluminium Phosphide Tablets Manufacturers (Suo Moto Case No. 02/2011), Order dated 23 April 2012.

⁴³ Re: Reference Case No. 01 of 2012 filed by Director General (Supplies & Disposals), Directorate General of Supplies & Disposals, Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi (Ref. Case No. 01 of 2012), Order dated 6 August 2013.

⁴⁴ Re: Reference Case No. 05 of 2011 filed by Shri B P Khare, Principal Chief Engineer, South Eastern Railway (Ref. Case No. 05 of 2011), Order dated 21 February 2013.

⁴⁵ Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. (PES) and Ors (Case No. 43/2010), Order dated 16 April 2012.

⁴⁶ Appeal No. 93/2012, 94/2012, 95/2012 with IA No. 151, 154, 157 of 2012.

⁴⁷ Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab (Suo Moto Case No. 03 of 2012) Order dated 5 February 2014.

⁴⁸ Bio-Med Private Limited v. Union of India & Ors.(Case No. 26/2013), Order dated 4 June 2015.

⁴⁹ C.A. No.-003525-003526 / 2017.

⁵⁰ Dy. Chief Materials Manager, Integral Coach Factory, Chennai v. Celtek Batteries (P) Ltd., Bangalore & Ors. (MRTP Case No. C-57/09/DGIR (26/28)), Order dated 27 June 2011.

⁵¹ Chief Materials Manager - I North Western Railway v. Milton Industries Ltd. & Others (Reference Case No. 02 of 2014), Order dated 1 July 2015.

⁵² Shri Vijay Bishnoi v. Responsive Industries Ltd. & Others (Reference Case No. 08 of 2014), Order dated 21 September 2016

⁵³ CCI order in Re: Deputy Chief Materials Manager, Rail Coach Factory vs. Faiveley Transport India Limited & Others (Ref Case no. 06 of 2013), Order dated 8 September 2015.

There were also some cases brought before the CCI where the allegations were dismissed at the *prima facie* stage, usually because no cogent material was presented by informants or the accused parties were not engaged in similar activities. However, the cases of bid-rigging continue to be a priority for the CCI since this pernicious form of anti-competitive practice affects the tax-payers adversely.

Transport (excluding Railways)

This section deals with the other sub-sectors of transport in which allegations of violation of Section 3(3) of the Act have been repeatedly examined by the CCI, namely – (A) air transport and activities of travel agents in the air transport sector; (B) ports; and (C) road transport. Railways have been excluded from this sector as it is part of the public sector. The antitrust cases related to railways have already been covered under public procurement.

(i) Air transport and activities of travel agents in the air transport sector

There are fourteen (14) scheduled airline operators in India (passenger as well as non-passenger i.e. cargo).⁵⁴ Given the safety concerns around air travel, civil aviation in India is regulated by the Ministry of Civil Aviation (and its nodal agencies) which prescribes rules and procedures governing several aspects of civil aviation.

The travel agent industry comprises of three large associations, namely the Travel Agents Association of India (*TAAI*), the IATA Agents Association (*IATA*) and the Travel Agents Federation of India (*TAFI*), (collectively *Travel Agents Associations*).

In the air transportation sector, till date there has been only one instance where the CCI has found a violation of Section 3 of the Act. In *Express Industry Council of India v. Jet Airways (India) Ltd. & Ors. (Express Industry)*⁵⁵ the CCI imposed a penalty upon three airline operators for violation of Section 3(3)(a) of the Act, for indulging in anti-competitive conduct by (i) levying fuel surcharge (*FSC*) at a uniform rate from the same date by the three airline operators, and (ii) a uniform increase in *FSC* despite fluctuations in fuel price. The CCI found a contravention of Section 3(3)(a) of the Act, as there was parallel behaviour by the airlines, for which no sufficient explanation was given. However, this matter was remanded by the erstwhile COMPAT to the CCI on procedural grounds.

The CCI has also conducted investigations into other aspects of the air transport/civil aviation sector, albeit without finding any infringement. The CCI has investigated into possible cartelisation in the pricing of tickets, but did not find any supporting evidence.⁵⁶ It also inquired into whether a strategic alliance for joint network and route rationalization between Jet Airways and Kingfisher Airlines resulted in any competition concerns, but it found the agreement to be pro-competitive by reducing costs and facilitating passenger

⁵⁴ Based on the information available on the DGCA website. Link: <http://dgca.nic.in/operator/sch-ind.htm>, Last updated: 20 July 2017.

⁵⁵ *Express Industry Council of India v. Jet Airways (India) Ltd. & Ors. (Case No. 30/2013)*, Order dated 17 November 2015.

⁵⁶ The investigations by the CCI were conducted over a period of 3 to 4 years. However, the parties were exonerated as there was no conclusive proof of cartelization and anti-competitive conduct. In re: Domestic Airlines, (Suo moto Case No. 2/2010) Order dated 11 January 2012.

travel.⁵⁷ Lastly, the CCI investigated whether Lufthansa Airlines was offering differential fares for tickets issued through its website and through travel agents, but concluded that the sale of tickets online and sale of tickets through agents constituted two separate markets with different price considerations, and so the conduct of Lufthansa was not anti-competitive.⁵⁸

Additionally, in *IATA Agents Association of India vs Federation of Indian Airlines & Ors*,⁵⁹ airline operators were alleged to have cartelized to reduce the commission paid to travel agents. The matter was closed at prima facie stage as the reduction in commission was not found as a concerted action by different airlines. In a separate case, the CCI examined a boycott of Singapore Airlines by travel agents in retaliation to a directive by the airline to discontinue payment of commission to the agents.⁶⁰ The CCI concluded that individual travel agents and the Travel Agents Association of India (TAAI) were in violation of Section 3(3) of the Act, and this order was upheld by the COMPAT on appeal.⁶¹

(ii) Ports

Indian ports can be classified into two categories: major and minor. Minor ports, numbering around 187, are under the jurisdiction of the respective state governments.⁶² Major ports are governed by policy directives of the Ministry of Shipping, under the Indian Ports Act, 1908, and the Major Port Trust Act, 1963. According to the Ministry of Shipping, over 90 percent of the country's trade by volume moves through maritime transport, highlighting the importance of ports and their contribution in sustaining the growth and development of the Indian economy.⁶³

In *Cochin Port Trust v. Container Trailer Owners Coordination Committee (CTOCC) & Ors. (Cochin Port Trust Case)*,⁶⁴ it was alleged that the imposition of a 'turn system' by CTOCC was anti-competitive as it, (i) led to the unilateral fixation of prices, leading to unnecessarily high freight rates; (ii) restricted registered transporters from operating for Export-Import (EXIM) containers, affecting the supply of EXIM containers and raising rates for EXIM trade, and (iii) restrained outside transporters from lifting the containers which impeded the ability of users to hire container trailers of their choice.

The CCI held the opposite parties and ten (10) of their office bearers to be in contravention of Section 3(3)(a) of the Act as (i) they could not adequately justify the price fixing; (ii) the turn system was an excessively restrictive mechanism; and (iii) arguments that external factors had affected pricing were implausible. Accordingly, a cease and desist order was passed but no penalty was imposed.

Swastik Stevedores Private Limited vs Dumper Owner's Association (DOA) (Paradip Port Trust

⁵⁷ M.P. Mehrotra v. Jet Airways (India) Ltd. with Kingfisher Airlines Ltd. (Case No. 04/2009), Order dated 11 August 2011.

⁵⁸ Travel Agents Federation of India v. Lufthansa Airlines, (F. No. C-136/2009/DGIR), Order dated 3 September 2010.

⁵⁹ IATA Agents Association of India vs Federation of Indian Airlines & Ors (Case No. 35/2012) Order dated 7 November 2012.

⁶⁰ Uniglobe Mod Travels v. TAFI, TAAI, IATA & Ors., (Case No. 03/2009) Order dated 4 October 2011; . FCM Travel Solutions (India) Ltd. v. TAFI, TAAI & IATA (RTPE Case No. 09/2008), Order dated 17 November 2011.

⁶¹ IATA Agents Association of India vs. FCM Travels Solution (India) Ltd. & Ors.in (Appeal No. 9 of 2012), Order dated 10 July 2013.

⁶² Ministry of Shipping website. <<http://shipping.nic.in/index1.php?lang=1&level=0&linkid=16&lid=64>>.

⁶³ Ministry of Shipping website. <<http://shipping.nic.in/index1.php?lang=1&level=0&linkid=16&lid=64>>.

⁶⁴ Cochin Port Trust v. Container Trailer Owners Coordination Committee & Ors.(Ref. Case No. 6/2014), Order dated 1 August 2017.

Case)⁶⁵ concerned allegations of collusion in determining the sale price of; and limiting and controlling the service of dumpers. The CCI noted that members of the DOA were not allowed to negotiate rates for providing dumper services to their customers, and thus stevedores were forced to abide by the rates decided by DOA. The CCI held that the DOA and five (5) of its office bearers had determined rates for provision of dumper services for intra-port transport operations within the Paradip port restricted area, in violation of the Act. Accordingly, the CCI imposed a penalty on the DOA and its office bearers.

(iii) Road transport

Road transport in India is highly unorganized and highly fragmented. There are various associations / co-operative societies of truck owners in each state.

The CCI assessed whether the directions given by the All India Motor Transport Congress (AIMTC) to their member transporters to uniformly raise truck freight rates by 15 per cent across the country owing to a diesel price hike of INR 5 per litre, amounted to a violation of Section 3 of the Act.⁶⁶ While examining the evidence presented by the DG, the CCI observed that various press reports had appeared in the media indicating that the president and the spokesperson of AIMTC had given statements suggesting the freight charges be increased if the hike in diesel prices was not rolled back by the government. The CCI stated that unless there was a meeting of minds amongst the members, similar statements containing identical issues would not have been issued.

Importantly, the media statements and interviews given by AIMTC also indicated anti-competitive conduct by AIMTC. The CCI's decision was set aside by the COMPAT on account of lack of evidence that such a directive was issued or received by the members, and in view of the fact that a 15 per cent increase in prices had not, in fact, been given effect to by all the members.⁶⁷

In another case, the CCI examined the conduct of the *Kiratpur Sahib Truck Operators Cooperative (KSTOC)* and its member truck owners regarding placement of orders for truck services through KSTOC only and restriction of truck owners to directly compete for orders. The CCI agreed with the DG that truck-owner members, who were competing enterprises, agreed with each other to fix prices for the supply of services of freight transport by trucks in the Kiratpur region under the garb of a co-operative society/KSTOC.⁶⁸

Lastly, the CCI examined whether there was any collusion in the increase of prices for auto-rickshaws in Andhra Pradesh. The CCI did not find a *prima facie* case as there was no cogent evidence indicating collusion and the increase in prices could have been due to increased demand.⁶⁹

⁶⁵ Swastik Stevedores Private Limited vs Dumper Owner's Association, (Case No. 42/2012), Order dated 21 January 2015.

⁶⁶ Indian Foundation of Transport Research and Training vs. Shri Bal Malkait Singh, President All India Motor Transport Congress & Ors., (Case No. 61/2012) Order dated 16 February 2015.

⁶⁷ Appeal No. 60/2015.

⁶⁸ Shivam Enterprises vs Kiratpur Sahib Truck Operators Co-operative Transport Society Limited & Ors. (Case No. 43/2013), Order dated 4 February 2015.

⁶⁹ Nagole Auto Drivers Welfare Association vs. Abhinandan Motors (P) Ltd. & Ors. (Case No. 85/2013), Order dated 5 February 2014.

Construction / Cement

India is the second largest producer of cement in the world. Ever since it was deregulated in 1990, the Indian cement industry has attracted huge investment, both from Indian as well as foreign investors. India has a lot of potential for development in the infrastructure and construction sector and resultantly the cement sector is expected to largely benefit from it. In the Twelfth Five Year Plan (for 2012 to 2017), the Government of India set out its plans to treble investment in infrastructure to USD 1 trillion⁷⁰ and increase the cement industry's capacity by 150 million Metric Tonne (MT). India's total current cement capacity is estimated to be at 420 MT as of March 2017 with production growing at 5-6 per cent per year and India's per capita consumption stands at around 225 kg.⁷¹

Cement is of two types: grey cement and white cement. The majority of cement production in India is of grey cement. Three main kinds of grey cement are manufactured in India: (1) ordinary portland cement; (2) portland pozzolana cement, which is cheaper in comparison to ordinary portland cement; and (3) portland slag cement (PSC). The differences between these products depend on differences in specifications and quality, which are linked to the purpose for which the cement is used. However, within each variety, the product is considered homogeneous.

The housing sector is the biggest demand driver of cement, accounting for about 67 per cent of the total consumption in India.⁷² The other major consumers of cement include infrastructure at 13 per cent, commercial construction at 11 per cent and industrial construction at 9 per cent.

In *Builders Association of India v. Cement Manufacturers Association & Ors.*⁷³, Builders Association of India filed the information under Section 19 of the Act against eleven (11) cement manufacturers representing approximately 60 per cent of the market, alleging violations under Sections 3 and 4 of the Act. The data furnished by the cement manufacturers revealed that (a) price movements were similar across manufactures, indicating prior consultation on price movements; (b) cement manufacturers were not able to explain away their low capacity utilization even during the period when demand was high; (c) cement manufacturers were trying to take advantage of the demand situation to earn better margins on sales rather than producing at the competitive level and (d) there existed a system of exchange of price information among the members of association on weekly basis across the country, which enabled them to take collective decisions about future price changes. Consequently, the CCI concluded that the cement manufactures were controlling the supply of cement in the market by way of some tacit agreement and had indulged in collusive price fixing. Based on the DG report, the CCI passed an order holding the cement manufacturers and the Cement Manufacturers Association in contravention of the provisions of Section 3(3)

⁷⁰ Link: <http://www.financialexpress.com/opinion/union-budget-2017s-impetus-to-infrastructure-may-not-be-enough-to-revive-sector/548408/>.

⁷¹ Link: <https://www.ibef.org/industry/cement-india.aspx>.

⁷² <https://www.ibef.org/industry/cement-india.aspx>.

⁷³ Builders Association of India v. Cement Manufactures Association & Ors (Case No. 29 of 2010) Order dated 31 August 2016.

(a) and 3(3)(b) read with Section 3(1) of the Act, and imposed a penalty of 0.5 times of the net profit for FY 2009-10 and 2010-11. On appeal, the COMPAT set aside the order on procedural grounds and remanded the matter to the CCI. However, a fresh hearing by the CCI yielded exactly the same result and a penalty cumulatively amounting to INR 63 billion was imposed.

In *Re Alleged Cartelisation by Cement Manufacturers v. Shree Cement & Ors.*⁷⁴, the case was transferred from the erstwhile MRTPC to the CCI. It was alleged in the complaint that cement prices were stable between INR 125 and INR 145 per bag between 2003 and 2005, but started increasing in December 2005, reaching INR 210 to INR 230 per bag in January 2006. Further, there was no corresponding increase in input costs, taxes or demand to justify this. It was also alleged that the cement manufacturers resorted to unfair trade practices by under-production or choking up of supply in the market, thereby raising the sale prices. The CCI *vide* its order dated 30 July 2012 passed under Section 27 of the Act *inter alia* imposed a penalty of INR 3.9 billion upon Shree Cement Limited (all the other parties in this case were also parties in Case No. 29 of 2010 where they were found to be in cartel and were penalized). The matter was tagged along with the main cement case on appeal and followed the same course.

In *Re: Director, Supplies & Disposals Haryana v. Shree Cement Limited & Ors.*⁷⁵, a reference was made to the CCI under Section 19 (1)(b) of the Act against a number of cement manufacturers that participated in a tender in August 2012 floated by the State of Haryana. As per the reference, it was alleged that the cement manufactures had colluded with each other and engaged in bid-rigging. The CCI found the cement manufactures guilty of contravening Section 3(3)(d) read with Section 3(1) of the Act and imposed a penalty of 0.3 per cent of the average turnover for FY 2012-13, 2013-14 & 2014-15, cumulatively amounting to INR 2.06 billion.

In *Re: Manufacturers of Asbestos Cement Products*⁷⁶, a complaint was made to the Serious Fraud Investigation Office (SFIO) alleging that the manufacturers of Asbestos Cement Sheets (ACS) had formed a cartel under the garb of their association and had restricted output by forcing members to close plants and increased price. A reference was made to the CCI by the SFIO and the CCI initiated a preliminary inquiry. The CCI, however, did not find sufficient evidence to hold collusion amongst the ACS manufacturers and closed the case under Section 26(6) of the Act.

Agriculture / Agro-Processing

Agriculture comprises establishments primarily engaged in growing crops, raising animals, and harvesting fish and other animals from a farm, ranch, or their natural habitats. On the other hand, the agro-processing industry involves transformation of products originating from agriculture.

In *Re: Sugar Mills case*⁷⁷, the CCI conducted an investigation into alleged anti-competitive

⁷⁴ In Re: Alleged Cartelisation by Cement Manufactures v. Shree Cement & Ors. (RTPE No. 52/2006) Order dated 31 August 2016.

⁷⁵ In Re: Director, Supplies & Disposals Haryana v. Shree Cement Limited & Ors (Case No.05 of 2015), Order dated 18 January 2017.

⁷⁶ In Re: Manufacturers of Asbestos Cement Products (Suo Moto Case No. 01/2012), Order dated 11 February 2014.

⁷⁷ In Re: Sugar Mills case (Suo Moto Case No. 01 of 2010), Order dated 30 November 2011.

practices of the sugar mills based on a newspaper report. In order to determine whether the cooperative and private sugar mills colluded to collectively increase price of sugar, the CCI conducted a qualitative assessment of available oral depositions, press releases, letters, minutes of the meetings of the relevant associations, newspaper articles and price data. The CCI also considered the regulatory framework of the sugar industry and concluded that the sugar industry does not operate within the free market and therefore, the possibility of successful cartelisation of sugar prices was remote. Accordingly, the matter was closed under Section 26(6) of the Act.

*In Re: Indian Sugar Mills Association and Ors. vs. Indian Jute Mills Association and Others*⁷⁸ (*Jute Case*), the primary allegation related to anti-competitive agreement between the members of the Indian Jute Mills Association (*IJMA*) and the Gunny Trade Association (*GTA*) for the fixation of sale price of jute packaging material. The CCI considered the material available on record, including Daily Price Bulletins (*DPB*) issued by *GTA* and correspondences exchanged between the *GTA* and *IJMA*, and observed that members of *IJMA* communicated with *GTA* in relation to *DPBs* and in fact, followed the prices mentioned therein. Thus, the CCI concluded that *IJMA* and *GTA* agreed to control and to determine the prices of jute bags. Accordingly, the CCI, in addition to passing a cease and desist order, imposed a penalty of 5 per cent of the average turnover of the previous three years. The CCI also directed the Ministry of Textiles, Government of India to consider reassessing the current market situation and strive to remove the distortions which militate against the principle of competitive neutrality. The *COMPAT* did not agree with the order of the CCI and allowed the appeal and hence the impugned order was set aside.

In *Cartelisation in sale of Sugar Mills by the Uttar Pradesh State Sugar Corporation Limited (UPSSCL) and the Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (UPRCGVNL)*⁷⁹ (*Sugar Mill Sale case*) the primary allegation against the opposite party was the lack of competition in bidding process of sugar mills. The CCI examined (i) the circumstances surrounding sale of sugar mills including interventions by the High Court of Delhi; and (ii) the policy of Government of Uttar Pradesh for sale of sugar mills to private players, in addition to relevant circulars/notifications/notices, bidding method and process of sale, etc. to observe that the onerous and litigious nature of the property itself acted as deterrent for prospective purchasers from bidding. As a result, the CCI concluded that there was no contravention of Section 3(3) and the matter was closed under Section 26(6) of the Act.

Banking and Finance

The banking and finance sector in India has not seen a lot of activity in terms of cartel enforcement and so far there has only been one instance, in the case of *Rashtriya Swasthya Bima Yojna v. National Insurance Co. Ltd.*⁸⁰, where the CCI has found the existence of a cartel.

⁷⁸ *In Re: Indian Sugar Mills Association and Ors. vs. Indian Jute Mills Association and Ors.* (Case No. 38 of 2011), Order dated 31 October 2014.

⁷⁹ *In Cartelisation in Sale of Sugar Mills by the Uttar Pradesh State Sugar Corporation Limited and the Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited* (Suo Moto Case No. 01 of 2013), Order dated 4 May 2017.

⁸⁰ *Rashtriya Swasthya Bima Yojna v. National Insurance Co. Ltd.* (Case No. 02 of 2014), Order dated 10 July 2015.

In the abovementioned case, the CCI ordered an investigation into the conduct of four public sector general insurance companies, i.e., National Insurance Co. Ltd., New India Assurance Co. Ltd., Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd. (Insurance Companies). It was alleged that these four companies had created a cartel to increase the premium for RashtriyaSwasthyaBimaYojna of the Government of Kerala. The CCI levied a total penalty of INR 6.7 billion on the Insurance Companies for manipulating the bidding process initiated by the Government of Kerala.⁸¹ The CCI relied upon the 'direct evidence' to determine the collusion such as (i) minutes of meetings between the Insurance Companies, (ii) internal office notes that recorded the strategy for future course of action and (iii) the statements of individuals provided during the investigation undertaken by the DG.

Other than the abovementioned case, there have been several cases in the banking and finance sector where the CCI has: (i) either not formed a *prima facie* opinion of an infringement; or (ii) has concluded that there has been no contravention of Section 3(3) of the Act post the investigation by the DG. In arriving at such conclusions, the CCI has noted that circumstantial evidence such as parallel behaviour and charging similar interest rates cannot be considered to be an act of collusion unless such activity is substantiated with additional evidence or plus factors. In one instance the CCI also formed a *prima facie* opinion of no contravention as the proposed arrangement had sufficient efficiency justifications.⁸²

Real Estate

The CCI has been called to adjudicate on several cases of alleged cartelisation in the real estate sector, all but one of these cases have been dismissed at the *prima facie* stage. The only case that saw further investigation was also ultimately dismissed. The vast majority of cases concern allegations of collusion among builders to the detriment of end consumers, manifesting in the form of exploitative builder-buyer agreements.

In *Jyoti Swaroop Arora v. Tulip Infratech Ltd. & Ors*,⁸³ the only case that saw a detailed investigation, the primary allegation was that the opposite parties were colluding by signing a common code of conduct and imposing exploitative agreements with common clauses upon buyers. After a detailed investigation by the DG, the CCI concluded that there was not enough direct or circumstantial evidence to indicate collusion, and that the evolution of common clauses and codes of conduct are common in many markets to aid efficient functioning.⁸⁴ All other cases where informants have alleged collusion among builders have been dismissed at the *prima facie* stage – either there has been no evidence of collusion, or because the agreements fell out of the purview of the Act.

The preponderance of cases brought before the CCI in this sector suggests that the sector is not functioning efficiently, and that there are perhaps underlying structural issues causing this. As the CCI has noted in *Jyoti Swaroop Arora v. Tulip Infratech Ltd. & Ors*,⁸⁵ consumers

⁸¹ On appeal, the COMPAT upheld the CCI's finding of a cartel but reduced the quantum of fine imposed on the parties.

⁸² Association of Third Party Administrators v. General Insurers (Public Sector) Association of India (Case No. 107/2013), Order dated 4 January 2016.

⁸³ *Jyoti Swaroop Arora v. Tulip Infratech Ltd. & Ors* (Case 59 of 2011) Order dated 3 February 2015.

⁸⁴ The order for this case has been listed under Section 27 on the CCI website.

⁸⁵ *Jyoti Swaroop Arora v. Tulip Infratech Ltd. & Ors* (Case 59 of 2011) Order dated 3 February 2015, pp. 121-125.

continued to face hardships and several industry practices appeared plainly exploitative. There appeared to be no pressure on industry participants to improve services, and self-regulation in the sector has seen declining standards.

The CCI's view has been that consumers repeatedly faced problems not because of lack of competition among builders, but because the real estate sector had remained largely unregulated, with a lack of adequate consumer protection. Accordingly, it had recommended that Parliament take immediate and urgent steps by enacting the Real Estate (Regulation and Development) Bill, which would establish a sector regulator, the Real Estate Regulatory Authority (*RERA*), and contain clauses which would adequately address concerns surrounding consumer protection.⁸⁶ Accordingly, the Real Estate (Regulation and Development) Act, 2016 (*RERD Act 2016*) was passed by the Parliament in March 2016 with a view to coming into force on 1 May 2017. At the time of writing, while the Central Government and several State Governments have notified corresponding statutes, the rest are in the process of notification. The provisions of the RERD Act 2016 have been widely regarded as being pro-consumer, and would obviate many of the consumer concerns that have been brought before the CCI in the past. For instance, if a developer takes more than 10 per cent of the price from the buyer before possession, an agreement must be registered containing several standard clauses as specified in the RERD Act 2016.

It is still too early to evaluate whether the introduction of the RERD Act 2016 has led to fewer cases being brought before the CCI. However, there have been no cases in this sector alleging contravention of Section 3(3) of the Act since 1 May 2017. Moreover, the CCI has actively conducted investigations in this sector relating to Section 4 allegations (abuse of a dominant position), most significantly imposing a penalty on DLF⁸⁷ for abusing its dominant position in Gurgaon.⁸⁸ Thus, where a dominant position has been found, the CCI has actively enforced the provisions of the Act.

2.3 Screens for Identifying Sectors Vulnerable to Cartelisation

A screen is an economic, statistical or behavioural test which needs to be fulfilled in order to identify the existence of any anti-competitive behaviour to be established. Using data points such as prices, production details, bids, market shares etc., screens serve to identify patterns which would be improbable had there been free and fair competition. A screen should generally be capable of capturing both the implications of collusion as well as ordinary, natural relationship between key market variables.⁸⁹

A screen is typically of two types. A structural screen lays emphasis on identifying collusion based on factors such as lack of competitors, homogenous products, stability of demand etc. An example of this type of approach was developed in Great Britain, at the Office of Fair

⁸⁶ *Jyoti Swaroop Arora v. Tulip Infratech Ltd. & Ors* (Case 59 of 2011) Order dated 3 February 2015, paras 356-358.

⁸⁷ *Mr. Pankaj Aggarwal v. DLF Gurgaon Home Developers Private Limited* (Case No. 13 of 2010) with *Mr. Sachin Aggarwal v. and Gurgaon Home Developers Private Limited* (Case No. 21 of 2010) with *Mr. Anil Kumar v. DLF Home Developers Limited* (Case No. 55 of 2012) Order dated 12 May 2015, *Shri Ashutosh Bhardwaj v. . DLF Limited & Ors.* (Case No. 01 of 2014) with *Shri Lalit Babu & Ors. v. DLF New Gurgaon Homes Developers Pvt. Ltd.* (Case No. 93 of 2015) Order dated 4 January 2017.

⁸⁸ These cases are under appeal before the Supreme Court of India at the time of writing.

⁸⁹ OECD 'Ex officio cartel investigations and the use of screens to detect cartels' (2013), DAF/COMP(2013)27.

Trading (*OFT*). The *OFT* empirically identified industry-level variables that predict cartel activity, using a data set of DOJ's price-fixing cases since 1994, and European Commission's price-fixing cases since 1990. The *OFT* tried to predict the incidence of cartels with industry level data, and concluded that industry turnover, cost measures, concentration measures, entry barriers, and employee costs, among others, help explain the probability of collusion in an industry.⁹⁰ An empirical screen on the other hand, uses empirical industry data to search for improbable events. This may include using a 'control group', i.e. assessing the behaviour of firms in one particular area with those in other, comparable areas.

It is important to note that screening for cartels can be difficult and data availability still remains a challenge. However, if there are certain markets that seem more prone to collusion, the development of market specific behavioural screens would be a good approach. In addition, the competition authorities can adopt an inductive approach for structural screens. This approach would consist of three steps: (i) the identification of a market with a high rate of cartel formation; (ii) the description of the economic characteristics of the market; and (iii) the identification of markets with similar characteristics.⁹¹

Screens typically act as force multipliers for leniency programmes, which remain one of the most effective cartel-busting tools in the arsenal of antitrust regulators. Proactive investigations by antitrust authorities in which antitrust screens indicate a high probability of a cartel, which together with a robust leniency programme, would be a very effective cartel-busting tool in the hands of competition authorities.

Structural Approach

The structural screening is premised on the market characteristics that exhibit the propensity to collude. Some of the internationally recognised structural factors are high concentration due to less number of players, high entry barriers, frequent interaction amongst competitors (bidding, co-operation agreements and/or other contractual arrangements), price transparency, low demand elasticity/predictability of demand, homogeneous nature of products, mature industry with low levels of innovation, symmetry of market participants in terms of market shares, capacities, etc. and high buyer power. Some of the additional factors that arise from the peculiar nature of the Indian cultural, economic and regulatory landscape are presence of strong trade associations, informal services sector and low value of typical transaction.

Behavioural Approach

The behavioural approach is based on the premise that since certain kinds of behaviour are usually only consistent with an underlying cartel, the observance of such behaviour patterns could strongly indicate the presence of a cartel. Some of the price-based factors which flag possible collusion or manipulation are increased and more uniform pricing, a series of steady price increases preceded by a sharp decline, prices rise but imports decline,

⁹⁰ Ibid.

⁹¹ Para 44, Page 9, OECD 'Serial Offenders: A discussion on why some industries seem prone to endemic collusion' (2015), DAF/COMP/GF(2015)13/FINAL.

parallel price changes, low price variance, periodic switching between high and low price levels (Structural Shifts) and disappearance of discounts which previously existed. Non-price indicators of cartel include consistent market shares, reduced production, capacity utilisation or capacity expansion when faced with increased demand and abnormal increase in profits without increased demand.

The Perils of Prediction

Antitrust authorities may (and indeed, do) use these factors to predict the presence of anti-competitive collusion. However, such factors are indicative at best. The presence of any of these factors may suggest that there may be a cartel amongst the incumbent market players, but that does not positively establish the presence of a cartel.

To get around this uncertainty, antitrust authorities set up antitrust screens, which are tripwires to detect markets where there is a high probability of cartel formation.

Use of Screens in Other Jurisdictions

A number of competition authorities are now using statistical screens and apparently successfully detecting cartels that had escaped leniency-induced detection. In the United States, the Federal Trade Commission implemented a gasoline price monitoring program which performs systematic screens of gasoline prices, to scan for possible cartels. A similar approach has been introduced in the gasoline retail market in Brazil. In Korea, the public procurement authority notifies the competition authority (*KFTC*) of public tenders which pass the bid-rigging indicator analysis system, resulting in around 80 notifications being provided to *KFTC* each month. A similar method has been implemented in the pharmaceutical sector in Mexico, through price and market share screening of bids. As a result, several investigations have been initiated, some of which led to convictions for collusive behaviour.⁹²

The LIBOR case is an example of how screens put into place acted as tripwires, alerting authorities to the possibility of a cartel. The case involved a cartel which manipulated the US Dollar London Inter-Bank Offered Rate (*LIBOR*), which was essentially the rate at which banks borrowed money from each other. The market had several structural factors which intrinsically favoured collusion – such as a small number of players and transparency – which disincentivised deviations, and interaction through a trade association, the British Banks Association. The empirical screening of LIBOR showed that since January 2008, banks had understated borrowing costs. This led to a series of investigations by multiple regulators, including antitrust regulators. Leniency was granted to UBS which disclosed the details of the cartel to investigators. The resultant investigation led to hundreds of millions of dollars paid by banks to settle some of the matters.

The review of the global literature on cartel enforcement reveals that there are certain factors which serve as indicators for the possibility of cartel formation in a sector. These include – a small number of firms, high barriers to entry, the presence of interaction through trade

⁹² OECD 'Serial Collusion in Context: Repeat Offences by Firm or by Industry?' (2015), DAF/COMP/GF(2015)12.

associations, market transparency, homogeneity in products, commonality of factors such as technology and costs, market conditions etc. However, these factors, structural or otherwise, are only indicative of a cartel – they do not prove its presence.

As a result, antitrust authorities deploy a variety of screens which act as tripwires alerting authorities to the possibility of a cartel. Combined with pro-active investigations in such sectors and an effective leniency regime, such screens help the authority to identify sectors which are prone to cartels and take effective action.

CCI's Use of Screens so Far

In general, screens can be used in two scenarios – first, in the absence of specific information, to identify sectors and industries which might be prone to cartelisation; and second, in the presence of specific information, to determine whether the behaviour on display is likely to be due to underlying collusion.

Internal Mechanism to Identify Sectors Vulnerable to Anti-competitive Practices

The CCI, in the past, has sponsored/commissioned market studies to assess the competitiveness of various sectors of the Indian economy. Such reports have also helped the CCI in building capacity to screen the markets for its enforcement purposes. Set out below is a brief summary of some prominent sector studies:

- Competition issues in the onion market in Maharashtra and Karnataka⁹³: The study highlighted many findings and recommendations including indications of collusion among traders in selected markets in Maharashtra and Karnataka that may cause high prices of onion. The study also set out policy recommendations that aim at improving efficiency of market through competition.
- Competition issues in the pharmaceutical sector⁹⁴ : This study highlighted that although the pharmaceutical sector in India is growing at an exponential rate, price competition among retailers can be hardly witnessed. Further, the drug promotion matrix revealed that there are various unfair trade practices prevailing in the industry.
- Study on concession agreements⁹⁵ in key sectors like transportation and energy: It was found that competition concerns may arise during the life cycle of the concession agreement and how to ensure that they are taken into account, while structuring, granting and implementing the concession agreement so as to mitigate any potential challenges against them. In this regard, it was suggested that the CCI should commence a dialogue with other sector regulators as well as various government ministries and state governments that are actively granting concession agreements.
- Competitiveness of the petroleum industry: It was observed by the CCI that

⁹³ "Competitive Assessment of Onion Markets in India" by Institute for Social and Economic Change (ISEC), Bangalore.

⁹⁴ Commissioned by CCI to Centre for Trade and Development (CENTAD).

⁹⁵ Commissioned by CCI to Clarus Law associates, New Delhi.

domestic petroleum market is close to a monopoly.⁹⁶ The study suggested that the most expeditious way of introducing competition is freeing up imports since there cannot be competition in exploration and production if refining and distribution are concentrated; and there cannot be competition in refining unless crude is freely importable. Hence, an important condition for a more competitive market is absence of restrictions on foreign trade.

- Competition in the Indian steel industry⁹⁷ : The study suggested removal of export/import curbs as well as opposed the need for an independent steel regulator.
- Competition issues in air transport sector⁹⁸ : This study revealed that while there was some evidence of price parallelism, it may not be termed as price collusion. It noted that creation of new airports, expansion of airports and ensuring inter-airport competition are important in preserving and promoting a competitive environment in the air transport sector.

CCI’s use of Screens in Investigations

The CCI, during the course of its investigations, has often used both structural and behavioural screens. Of the 136 orders under consideration, the CCI did not explicitly use any screens in 29. While the previous section has given some examples of how the CCI has used screens, this section provides further insight.

(i) Number of Screens Used

Figure 9 below shows the number of screens used in various kinds of orders.

Some insights can be drawn out from this. The vast majority of cases – 66 per cent – use two or fewer screens. With Section 26(2) orders, this percentage is even higher at 87 per cent. This indicates that, in general, the number of screens used was limited when dismissing allegations at the *prima facie* stage, as would be expected.

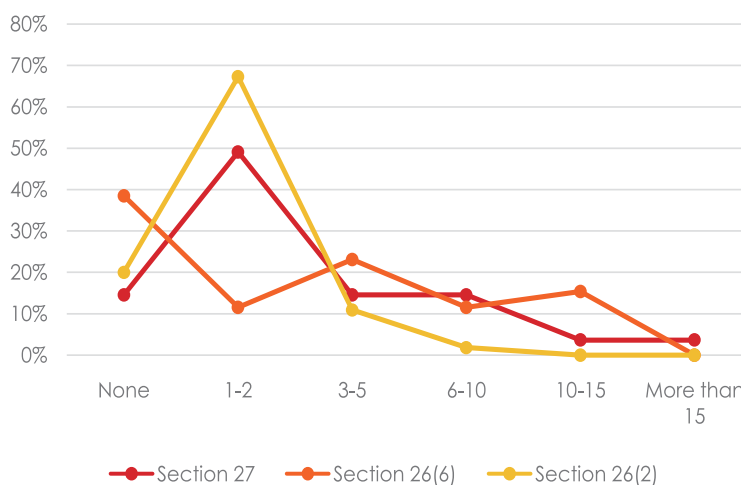


Figure 9: Number of screens used

In the case of infringement orders, half the orders used either one or two screens. The majority of these relate to orders dealing with trade

⁹⁶ “Public Enterprises, Government Policy and Impact on Competition: Indian Petroleum Industry” by Indicus Analytics Pvt Ltd.

⁹⁷ “Public Enterprises, Government Policy and Impact on Competition: Indian Steel Industry” by Indicus Analytics Pvt Ltd.

⁹⁸ “Competition Issues in the Air Transport Sector in India” by Administrative Staff College of India, Hyderabad.

associations. There are also a good number of orders where a much larger number of screens are used, with 22 per cent of infringement orders using 6 or more screens.

In the case of Section 26(6) orders, almost 40 per cent of orders do not refer to screens at all. However, there is also a significant number of cases where many screens are used; 27 per cent of such orders use six or more screens.

(ii) Screens used by type

Figure 10 below shows screen usage by type of screen – structural and behavioural.

As can be seen, Section 26(2) orders relied heavily on internationally recognised structural screens, with nearly 80 per cent of orders referring to at least one such screen. In such cases, while dismissing allegations at the *prima facie* stage, structural screens were often used to observe that the market is not conducive to collusion.

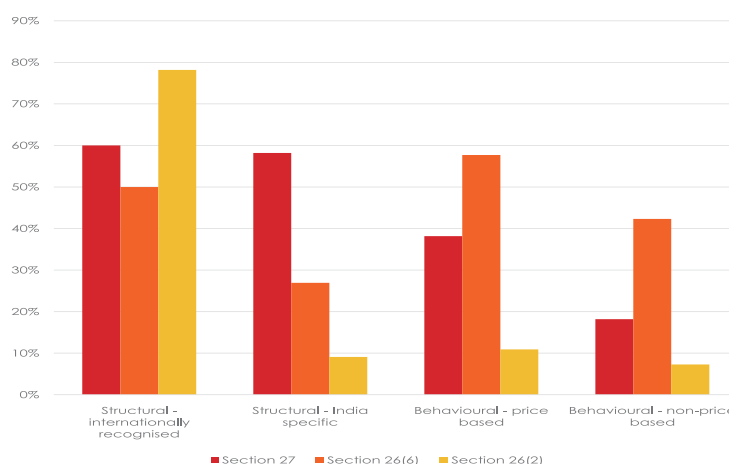


Figure 10 Screen usage by type

Infringement orders also relied heavily on structural screens with little reliance on behavioural screens. The reliance of infringement orders on India specific structural screens was the highest, at roughly 60 per cent of orders. This, no doubt, arises from the large number of cases dealing with strong trade associations.

Section 26(6) orders, on the other hand, relied heavily on behavioural screens, both price based and non-price based. About 60 per cent of Section 26(6) orders referred to price based behavioural screens and 40 per cent to non-price based behavioural screens. This is indicative of the higher level of sophistication of analysis that precede such orders, with the opposite parties providing economic and behavioural data to support their assertion that collusion did not take place. Another factor contributing towards this was the high number of infringement orders where direct evidence of collusion was found, obviating the need to use behavioural data or screens.

(iii) Use of Specific Screens

Table 2 shows the percentage of cases where the various specific screens have been used.

Table 2: Use of specific screens

Orders	Section 27	Section 26(6)	Section 26(2)
1. Structural screens – Internationally Recognised			
1.a. Small number of competitors / high concentration	21%	35%	38%
1.b. High entry barriers	16%	23%	5%
1.c. Frequent interaction among competitors (bidding / cooperation agreements / contractual agreements)	41%	23%	33%
1.d. Market transparency	13%	4%	9%
1.e. Low demand elasticity / predictability of demand	13%	19%	5%
1.f. Product homogeneity	25%	23%	11%
1.g. Low innovation / mature industry	5%	4%	4%
1.h. Symmetry	25%	0%	11%
1.i. High buyer power	0%	23%	0%
2. Structural screens – India specific			
2.a. Presence of strong trade associations	57%	27%	5%
2.b. Informal service sector	0%	0%	2%
2.c. Low-value of individual transactions	2%	0%	2%
3. Behavioural screens – price based			
3.a. Increased price and more uniform price	32%	27%	9%
3.b. Series of steady price increases preceded by steep declines	7%	12%	0%
3.c. Prices rise but imports decline	0%	4%	0%
3.d. Firms prices strongly positively correlated	18%	50%	4%
3.e. Reduced variance of price	16%	8%	0%
3.f. Periodic switching between high and low price levels (structural shifts)	7%	4%	0%
3.g. Discontinuing of discounts that were previously common	0%	4%	2%
4. Behavioural screens – non-price based			
4.a. Market shares consistent over time	7%	38%	4%
4.b. Reduced production / capacity utilisation / capacity even when demand increased	13%	19%	2%
4.c. Abnormal increase in profits / increase in price without increase in cost	16%	35%	2%

This table shows that the most common internationally recognised structural screen used in infringement orders was ‘*frequent interaction among bidders*’, with 41 per cent of infringement orders referring to this. This is undoubtedly related to the large number of infringement orders relating to trade associations, which is also indicated by 57 per cent of orders using the India-specific structural screen ‘*presence of strong trade associations*’.

For non-infringement orders, ‘small number of competitors / high concentration’ was the most commonly referred to internationally recognised structural screen. The use of ‘presence of strong trade associations’ is much lower in non-infringement orders.

When considering behavioural screens, ‘*increased price and more uniform price*’ was referred to in most infringement orders, ‘*firms prices strongly positively correlated*’ was referred to in

most Section 26(6) orders, while there was little to no reliance on these screens by *prima facie* non-infringement orders. Section 26(6) orders were also more likely to refer to market shares and profits than infringement orders or *prima facie* non-infringement orders.

(iv) Usage of Screens by Sector

Figure 11 below describes the usage of various screens in each of the eight focus sectors.

In this diagram, each line represents a type of screen. If the usage of types of screens was uniform, each line would be at the same distance from the centre for each sector. However, this is not the case. Thus, the usage of screens varied substantially with sector.

Orders in most sectors are heavily reliant on internationally recognised structural screens. In most sectors, at least 50 per cent of the orders used internationally recognised structural screens. The exceptions are entertainment and agriculture / agro-processing.

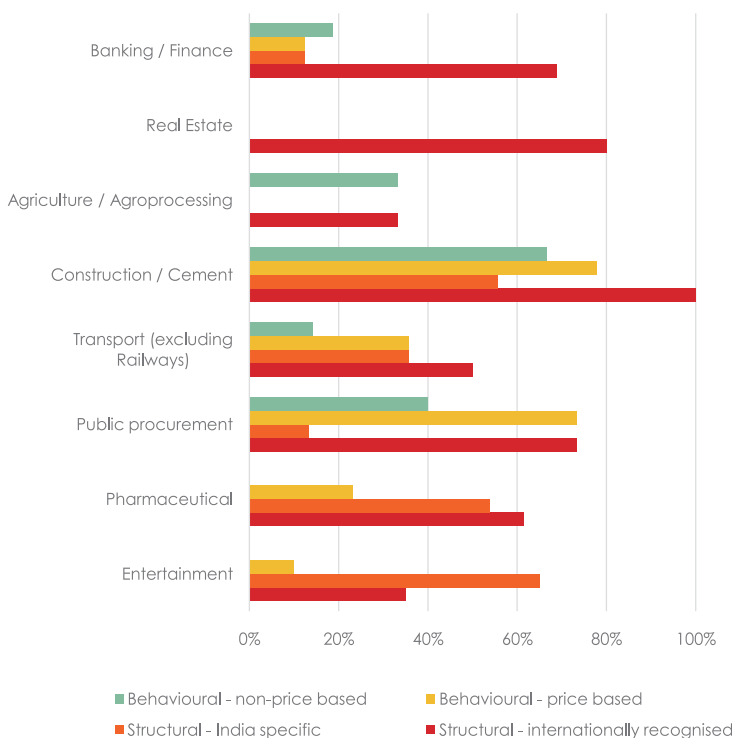


Figure 11: Usage of screens by sector

India specific structural screens were concentrated in three sectors, with ‘presence of strong trade associations’ accounting for nearly all these occurrences. The highest incidence was in the entertainment sector, with 65 per cent of cases referring to them, followed by cement / construction, where 56 per cent of orders relied on them; and pharmaceutical distribution, where 54 per cent of orders referred to them. Incidentally, this category of screens is completely absent from or has an extremely low incidence in public procurement, transport (excluding Railways), agriculture / agro-processing, real estate and banking / finance.

Price based behavioural screens are heavily concentrated in public procurement, where 73 per cent of orders referred to them; and construction / cement, where 78 per cent of cases referred to them. Non-price based screens follow the same trend of being concentrated in these two sectors, although the absolute magnitude of reliance was lower – 40 per cent in public procurement and 67 per cent in cement / construction.

In relation to specific sectors,

- Orders relating to the construction / cement sector were the most reliant on screens in general, with all orders using internationally recognised structural screens. In addition, each category of screens was referred to by over half the orders in this sector.
- Entertainment was a unique sector in that orders in it relied more heavily on India specific structural screens than internationally recognised structural screens.
- Pharmaceutical distribution also showed a high reliance on India specific structural screens, due to several orders dealing with conduct driven by trade associations.
- Public procurement saw a high reliance on price based behavioural screens, which is natural since most of these cases concerned bid-rigging.
- Transport (excluding Railways) and agriculture / agro-processing saw a low incidence of the use of screens in general.
- Real estate and banking / finance were characterised by an almost exclusive reliance on internationally recognised structural screens, which is undoubtedly related to the large number of prima facie non-infringement orders in these sectors.

2.4. Drawing Conclusions

India's short cartel enforcement journey so far has been very unique. Many of the underlying structural and other factors that lead to cartel formation in India are uniquely Indian factors, deeply rooted in the cultural, economic and regulatory landscape.

The 'Indian Cartel'

It is telling that approximately half of the CCI's infringement decisions relate to sectors that are not regarded as cartel enforcement hotspots internationally – entertainment and pharmaceuticals distribution. Moreover, even though transport (excluding railways) may be regarded as an international hotspot, the kinds of cases arising in this sector in India have been qualitatively different to those in most advanced jurisdictions.

Almost all the infringement findings in these sectors share extremely striking common characteristics. These uniquely Indian cartels almost always have the following features:

- An extremely strong trade association forms the fulcrum of the cartel;
- The participants of this association are largely small or micro enterprises or individuals with a low business turnover; and
- The participants operate in the informal sector, with high degree of self-regulation and ineffective government regulation.

That these features are conducive to cartel formation is not immediately apparent. However,

when seen in the context of certain unique features of the Indian economy, the link becomes clear.

First, although India is regarded globally as having a free and fair judicial system, it is no secret that it is overworked, and the backlog of cases can sometimes stretch into decades. Knowing this, many parties engaged in low value professional relationships do not even draw up contracts, and the relationships are governed by informal understandings. In effect, small and micro enterprises or individuals are left to fend for themselves. It is natural, then, for them to form associations and look out for their interests collectively.

Second, a large part of the Indian economy is informal, in that labour and other corporate laws do not always apply, or are rarely enforced if they do. In such cases, associations of small service providers typically self-regulate the sector in a manner that they believe best represents the interests of their members.

Third, given that the turnover levels of association members is typically extremely low, the associations themselves are often cash strapped, and lack the technical know-how to ensure compliance of their internal rules and operating procedures with all the relevant laws. This fact is borne out by the quantum of fines imposed on these associations by the CCI once an infringement is found.

Lastly, the antitrust regime in India is still relatively young, and these associations have been operating in the same way for much longer than the present antitrust regime has existed, given the lack of sanctions under the erstwhile regime. Even many sophisticated industries are only just beginning to realise that some of their legacy practices may now be illegal in the eyes of the law. It is no surprise, then, that unsophisticated associations are taking time to realise this.

Thus, these associations may be viewed as an attempt at increasing bargaining power and creating a collective insurance policy by small, unsophisticated service providers.

The CCI's decisional practices against trade unions across sectors shows its reliance on direct and circumstantial evidence, such as circulars issued to members,⁹⁹ minutes of trade association meetings,¹⁰⁰ depositions of stakeholders¹⁰¹ and resolutions passed under the charter documents of the trade association in question¹⁰². In many cases, the charter documents of these trade associations themselves enforced anti-competitive practices.¹⁰³ In certain cases, even when the charter documents of the association revealed no such restrictions, circumstantial evidence revealed that the members were engaging in acts of market restriction and boycott.¹⁰⁴ A trend assessment shows that the practice of the CCI, in terms of standard of evidence, has remained largely consistent over the years.

⁹⁹ M/s Ashtavinayak Cine Vision Ltd. vs. PVR Picture Limited & Ors. (Case No. 71 of 2011) Order dated 28 July 2016.

¹⁰⁰ P. V Basheer Ahmed vs. M/s Film Distributors Association, Kerala (Case No. 32 of 2013) Order dated 23 December 2014.

¹⁰¹ M/s Cinemax India Limited vs. M/s Film Distribution Association (Kerala) (Case No. 62 of 2012) Order dated 23 December 2014.

¹⁰² Sajjan Khaitan vs. Eastern India Motion Picture Association & Ors. (Case No. 16 of 2011) Order dated 9 August 2012.

¹⁰³ Manju Tharad & Ors. vs. Eastern India Motion Picture Association (EIMPA) Kolkata & Ors. (Case No. 17 of 2011) Order dated 24 April 2012.

¹⁰⁴ Kannada Grahakara Koota vs. Karnataka Film Chamber of Commerce & Ors. (Case No. 58 of 2012) Order dated 27 July 2015.

However, over the course of the last 6 years, the decisions of the CCI and appellate courts in this sector have clarified several key concepts which overlap between competition and labour law. An example is the fine line between collective bargaining by trade unions and concerted action by trade associations, which was drawn by the Supreme Court in the *Bengal Artists Case*. In the *Bengal Artists Case*, the Supreme Court took this a step further in a case of alleged cartelisation by members of a film and television artists' trade union in the state of West Bengal. The key takeaway is that the anti-competitive actions of an association whose members are engaged in supply of goods or provision of services could not have been brushed aside by merely giving it a cloak of trade unionism.

Going forward, the developing jurisprudence, coupled with the CCI's increased focus on outreach programmes in relation to these sectors is expected to change attitudes among associations and increase compliance.

The Curious Case of Public Procurement

While public procurement is regarded as an international cartel hotspot, the Indian experience in this sector has two distinguishing features.

First, online tendering is a relatively new practice in India, and many public authorities have not yet come to terms with efficiently designing the procurement process. In several Indian cases, the design of the process itself has been regarded as being conducive to collusion. This is, perhaps, due to the relatively low levels of awareness of the Act among the public procurement authorities, and of good practices while specifying tender requirements and designing the bidding process, among government departments, arising mainly from the rotational transfer policy of the government that limits institutional memory and leads to imperfect knowledge transmission.

Second, there have been numerous allegations of strong personal networks between vendors and the procuring officer, for the award of contracts. It is possible that some of these relationships endured even after online tendering was mandated, and vendors and procuring officers alike tried to find ways around the online tendering process to achieve their desired outcomes. However, the transparency imposed by online tendering has helped create a data and document trail that makes finding cartels easier.

A closer scrutiny of the bidding patterns has been an important factor in the CCI's assessment in public procurement cases. The analysis in these cases has been fact-based, focussing on documents, e-mails, call records and testimonies related to specific tenders. The standard of proof has largely remained the same and the CCI still relies on both circumstantial and economic evidence. In addition to such qualitative analysis, the CCI has also relied on quantitative techniques such as cost analysis and comparative cost analysis wherever the DG has been able to bring on record such economic evidence.

The starting point in these cases has been a quantitative assessment of the bidding pattern. In almost all cases, the leading evidence has been identical or similar quotes for the respective

tenders. Predictably, higher weightage has been given to identical bids when drawing an adverse reference.¹⁰⁵ Most of these cases have been in relation to price quotation. Parallel pricing was also typically accompanied with an increase in the prices quoted by the bidders. Notwithstanding parallel conduct being the leading evidence, the CCI has not considered this as sufficient to establish a contravention. In various cases, the CCI has exonerated parties where the only evidence was parallel conduct.¹⁰⁶ In these cases, the CCI also considered the increase in price. Plausible justifications for the increase in price has led to conclusions of no contravention.¹⁰⁷

In addition to parallel conduct, presence of plus factors has been the clinching evidence to establish a contravention of the Act. A succinct illustrative list of plus factors has been provided by the CCI in the *LPG cylinder manufacturers* case¹⁰⁸. The plus factors have been qualitative and quantitative in nature. Illustratively, these have ranged from comparative analysis of cost structures vis-à-vis the price quoted to methodology adopted when bidding (for example, time at which bids were placed, commonality of errors when making the bids, making courtesy bids etc.)¹⁰⁹. Evidence of actual or possible information exchange between bidders has also been an important factor.¹¹⁰ In these cases the CCI has placed limited reliance on market characteristics prone to cartelization. This could be attributed to the fact that the analysis for all these cases has been extremely fact based and specific to the tenders.

Pursuant to the CCI's decisions in cases relating to public procurement such as that of the medical devices, an overhaul in the tender conditions for subsequent tenders has been observed. Post such decisions, bidders, previously found to have indulged in bid-rigging/ cartelization were not eligible to bid.¹¹¹

The CCI, in one of its orders, remarked that the system of procurement in railways in India is not conducive to competition. To supplement the efforts of the CCI, the Ministry of Finance comprehensively revised its *Manual for Procurement of Goods*¹¹² in March 2017 in consonance with the fundamental principles of transparency, fairness, competition, economy, efficiency and accountability. Some salient features of this manual are as follows:

- Emphasis on designing of tenders to ensure “widest possible competition” of bidders for the tender (including suggestions on slicing, packaging, etc. of scope of work) to ensure this.

¹⁰⁵ In Re: Aluminium Phosphide Tablets Manufacturers (Suo-Moto Case No. 02 of 2011), Order dated 23 April 2012.

¹⁰⁶ Chief Materials Manager, Integral Coach Factory, Chennai v. M/s Celtek Batteries (P) Ltd., Bangalore & Ors. (MRTP Case No. C-57/09/DGIR (26/28), Order dated 27th June 2011; Chief Materials Manager - I North Western Railway v. M/s Milton Industries Ltd. & Others (Reference Case No. 02 of 2014), Order dated 1 July 2015.

¹⁰⁷ Id.

¹⁰⁸ In Re: suo-motu case against LPG cylinder manufacturers (Suo-Moto Case no. 03/2011), Order dated 24 February 2012.

¹⁰⁹ Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. (PES) and Ors. (Case No. 43/2010), order dated 16 April 2012.

¹¹⁰ Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (Suo Moto Case No. 03 of 2014), Order dated 18th January 2017; In Re: suo-motu case against LPG cylinder manufacturers (Suo-Moto Case no. 03/2011), Order dated 24 February 2012.

¹¹¹ For instance see: In Re: Sh. Surinder Saini v. Delhi Metro Rail Corporation Ltd. and Ors. (Case No. 89/2013), Order dated 2 January 2014; Foundation for Common Cause v. PES Installations Pvt. Ltd. & ors. (Case No. 43 of 2010), order dated 16 April 2012.

¹¹² Link: http://doe.gov.in/sites/default/files/Manual%20for%20Procurement%20of%20Goods%202017_0_0.pdf.

- Adherence to a Code of Integrity for Public Procurement (CIPP) which provides that procuring authorities as well as bidders, suppliers, contractors and consultants should observe the highest standard of ethics and should not indulge in prohibited practices, either directly or indirectly, at any stage during the procurement process or during execution of resultant contract, including “anti-competitive practices”¹¹³. If any bidder is found to have breached the CIPP, in addition to cancellation of the contract, banning/blacklisting of such bidder, the manual clearly stipulates that an action before the CCI may also be initiated.
- Usage of limited tender/local sourcing/direct purchasing in very limited circumstances. In such cases the procuring authority is encouraged to maintain up-to-date and current list of registered, capable and competent suppliers, to ensure competitiveness of the process continues to be protected.

It is hoped that the new guidelines contained within this manual will help improve the design of e-procurement tenders and dissuade further collusion.

An Evolving Leniency Regime

In January 2017, the CCI passed the first infringement decision¹¹⁴ involving a leniency application, but in this case, the leniency application was filed after the commencement of the investigation by the DG pursuant to a reference made under Section 19(1)(b) of the Act. Reduction of penalty by 75% was granted to the first applicant whose disclosure and cooperation in investigation helped the CCI in establishing a cartel. However, the CCI has received several leniency applications over the past few years in cases which are presently under investigation.

Furthermore, changes have been brought to the Competition Commission of India (Lesser Penalty) Regulations, 2009 (*Lesser Penalty Regulations*), to further propel leniency applications to the CCI. The major changes include enlargement of the scope of leniency applicant to include individuals/ whistle blowers and extend the benefit of lesser penalty to them and clarification that lesser penalty benefits may be awarded to more than three applicant. These are being supplemented with a focus on the leniency provisions of the Act during CCI’s outreach programmes. With these, leniency applications should become a much valued source of information for investigations, thereby giving a fillip to the CCI’s cartel enforcement activities.

The CCI’s Use of Screens

This analysis has used a review of CCI’s cartel enforcement activity to identify various factors,

¹¹³ Anti-competitive practice means any collusion, bid rigging or anti-competitive arrangement, or any other practice coming under the purview of The Competition Act, 2002, between two or more bidders, with or without the knowledge of the Procuring Entity, that may impair the transparency, fairness and the progress of the procurement process or to establish bid prices at artificial, non-competitive levels.

¹¹⁴ In Re: Cartelization in Respect of Tenders Floated by Indian Railways for Supply of Brushless DC Fans and other Electrical Items, (Case No. Suo Moto 03 of 2014) Order dated 18 January, 2017.

in addition to internationally recognised ones, that are conducive to cartel formation in India. These factors can be and are being used as screens by the CCI in various situations.

CCI has not yet formally used screens to identify industries prone to cartelisation but screens have been used during investigations to determine whether the information on record is reflective of underlying collusion.

Going forward, screens have the potential to be a useful tool. It would be helpful to (i) publicly spread awareness of the screens used by the CCI to probe cartelisation and (ii) carry out formal screening exercises periodically to identify sectors prone to cartelisation.

Impact of CCI's Interventions

Overall, the CCI's activities must be seen in the context of a modernising and rapidly developing economy.

A high proportion of cases have arisen from non-conventional sectors, indicating that the CCI has unearthed endemic structural inefficiencies in these sectors, which are unique to India. The changes in practice that the CCI's decisions have caused in these sectors, particularly pharmaceutical distribution and entertainment, means that these inefficiencies are being mitigated. Also, even though some of these have been limited to local practices, the impact of the CCI's decisions have gained national importance.

However, viewed holistically, the true triumph of the CCI's activities in these sectors would be if other arms of the government took note of these inefficiencies and took steps to erase them at an underlying structural level. Two major cases where this has happened is in public procurement, where the Ministry of Finance has released new guidance through the Manual for Public Procurement, specifically geared towards maintaining competitiveness; and in real estate, where the Real Estate (Regulation and Development) Act 2016 has come into force to address the concerns of under-regulation and lack of consumer protection unearthed through, among other avenues, the CCI's decisions.

The CCI's cartel decisions have identified further sectors that might need better regulation by other arms of government – entertainment, pharmaceuticals distribution and transport. Moreover, to the extent that corrupt practices manifest themselves in the form of anti-competitive behaviour, the CCI's interventions may help check corruption, in line with the Prime Minister's objectives. Thus, the CCI is playing an important role in the wider march to transform India's economy into a modern, efficient and developed economy.

The Way Forward

This review has revealed certain factors unique to India that make some sectors conducive to collusion, arising from the unique economic, cultural and regulatory landscape of India. Many of these are legacy factors from India's years as an underdeveloped economy, leading to endemic structural inefficiencies.

Therefore, the CCI should add these factors to its list of screens, and extend its advocacy and outreach programmes to these, uniquely Indian, sectors. In general, regular screening exercises would lead to more targeted and cost-effective enforcement.

Further, to the extent that the CCI's investigations continue to unearth endemic inefficiencies in parts of the Indian economy, other arms of the government should continue to take note of these and work to plug these inefficiencies.

3. Survey of Foreign Jurisdictions

The goal of cartel enforcement is the same in most countries but the substantive law and the procedures for enforcement do vary. To understand the legal frameworks of cartel enforcement in different jurisdictions and to study some key statistics relating to cartel enforcement, the Special Project included a survey of the ICN member agencies. The objective of the survey was to bring out a factual cross-country comparison of the legal provisions and the status of cartel enforcement in different jurisdictions.

3.1. Approach and Methodology

A questionnaire was developed and sent to the ICN member agencies (Annexure -1). 37 competition agencies responded.¹¹⁵

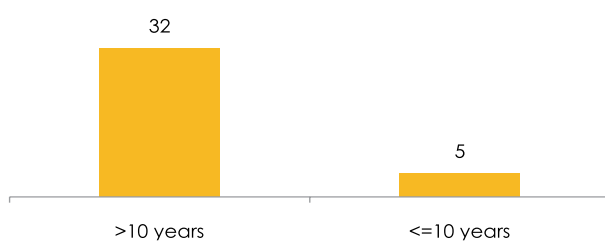


Figure 12 Age of the Agencies

The competition agencies that are either 10 years old or less are classified as young agencies. Figure 12 maps the agencies who responded. It can be seen that 32 competition agencies were more than 10 years old and the remaining were less than or equal to 10 years.

For understanding the legal frameworks relating to cartels in different jurisdictions, the questionnaire covered the following:

- Definition of cartel
- Nature of offence - criminal or not
- Existence of leniency provisions in the law

¹¹⁵ Russia- Federal Antimonopoly Service of Russia; Zambia- Competition and Consumer Protection Commission; Panama-Authority of Consumer Protection and Competition Defence; Cyprus -Commission for the Protection of Competition; Malaysia-Malaysia Competition Commission; South Korea- Korea Fair Trade Commission; Ireland-Competition and Consumer Protection Commission; Spain- National Authority for Markets and Competition - CNMC; El Salvador- Superintendencia de Competencia de El Salvador; Denmark -Danish Competition and Consumer Authority; Colombia- Superintendencia of Industry and Commerce; Greece- Hellenic Competition Commission; Japan- Japan Fair trade Commission; Poland- Office of Competition and Consumer Protection; Austria- Federal Competition Authority; Hungary- Hungarian Competition Authority; Brazil-Administrative Council For Economic Defense-CADE; Israel- The Israel Antitrust Authority; Canada-Competition Bureau-Canada; Lithuania- Competition Council of the Republic of Lithuania; Croatia- Croatian Competition Agency; Singapore- Competition Commission of Singapore; Australia- Australian Competition and Consumer Commission; Bulgaria- Commission on Protection of Competition; Ukraine- Anti-Monopoly Committee of Ukraine; Hong Kong-Hong Kong Competition Commission; Estonia- Estonian Competition Authority; Sweden- Swedish Competition Authority; Europe- DG Comp; Germany-Bundeskartellamt; France- French Autorite de la concurrence; Portugal- Autoridade da Concorrenca (AdC); Mauritius- Competition Commission of Mauritius; Netherlands- Netherlands Authority for Consumers and Markets; USA- United States- Department of Justice; India- Competition Commission of India; Montenegro- Agency for protection of Competition Montenegro.

In addition, for the purpose of factual comparison, the following statistics were elicited :

- number of cartel cases initiated and the number of cases in which infringement was found in the last ten years;
- top five sectors where cartels were found in the last ten years
- number of leniency applications received in the last ten years
- number of cartel cases commenced through leniency application
- number of cartel cases taken up on ex officio basis
- number of cartel cases where monetary penalty was levied and criminal sanctions were imposed.

3.2. Results and Findings

(i) Definition of cartel

The first step towards cartel enforcement is to articulate what kind of conduct would be treated as a cartel. It is necessary to clearly define the prohibited behaviour to provide guidance to enterprises and to help them comply with the law. The competition agencies across the world agree that existence of cartels is detrimental to competition and consumer welfare. But whether they agree on what conduct constitutes a cartel is a question that needs to be explored. The questionnaire scrutinized the same by asking the agencies *“How does your competition law define cartels (i.e. which practices are covered by the notion of cartels)?”*.

In almost all the respondent jurisdictions, forms of cartels include collective determination of prices, limitation of production/supply, allocation of markets and bid rigging. However, in some jurisdictions, the scope of cartel includes some other specific kinds of agreements. For instance, in India, Cyprus and Malaysia, an agreement to limit technical development and investment is also a cartel. In Russia, agreements refusing to conclude contracts with particular sellers or buyers is covered under the definition of cartel. Some of the other behaviours falling under the ambit of a cartel are - collective refusal to deal in Zambia, agreements preventing/restricting the establishment/extension of facilities or installation of equipment necessary for production of goods or rendering of services in South Korea, and restrictions of imports or exports in Spain and the EU. In Brazil, the practices covered under the notion of cartels include promotion or influencing of uniform or concerted commercial conduct among competitors. Israel includes arrangements between competitors involving a restraint relating to the profit to be obtained within the definition of cartel.

In Canada, in addition to the main cartel provision that defines cartels as a conspiracy, agreement or arrangement among competitors to fix prices, allocate customers or markets, or restrict supply, there are specific provisions defining cartel offences related to issuing foreign directives for the purpose of giving effect to a cartel and cartel offences relating to professional sport and financial institutions. Further, their cartel provision includes a defence to account for legitimate competitor agreements, called the ancillary restraints defence. India provides a similar leeway in case of joint ventures if they are efficiency enhancing.

(ii) Number of cartels investigated and infringement found

To gain an understanding of the frequency of cartel infringement in different jurisdictions, questions were asked on the number of cartel cases investigated and the number of cartel infringements found in the last ten years.

In the last ten years, Austria investigated the highest number of cartel cases (557) followed by Australia (395), Poland (382), United States (218)¹¹⁶. South Korea reported the maximum number of cases (618) where corrective measures were imposed, followed by Poland where the number of actual cartel infringements during the last ten years was 183. United States Department of Justice filed 425 criminal cartel cases in US Federal District Courts(Annexure 2). If one looks at cartel cases where infringement was found as a percentage of total cartel cases investigated in the last ten years, in the case of Spain and Germany, it was around 98 %.

(iii) Top five sectors

Table 3 Frequency Distribution of Sectors

Sectors	Number of Jurisdictions
Construction	16
Transport	16
Food and Beverages	15
Health	12
Financial Services	11
Agriculture and allied activities	9
Telecom	6
Energy Sector	6
Public Procurement Sector	5
Automobile	4
Retail	4
Consumer goods	3
Commerce	2
Real estate	1
Others	43

The respondents were asked to identify the top five sectors where the maximum number of cartel cases was found. This was to see if certain sectors emerge across jurisdictions as sectors vulnerable to cartelization. The information received is classified into broad sectors. As per Table 3, it can be observed that the sectors which are most common to the surveyed jurisdictions are construction, transport, food and beverages, health, and financial services.

In India, entertainment, pharmaceuticals, public procurement, transport (excluding railways) and construction (including cement) are the top five sectors where cartels were found. The country-wise responses received on top five sectors are tabulated in Annexure 3. Some unique sectors that have seen cartels included ophthalmic optics (Germany), private security (Greece, Croatia), driving schools (Greece, Croatia).

¹¹⁶ All data for the United States pertain to United States Department of Justice, the respondent agency from the United States.

(iv) Nature of offence

The principal purpose of imposing sanctions is to create effective deterrence and to take away the prospects of gains from cartel activity. Consequently, jurisdictions impose fines on enterprises which are often multiple of the estimated gain from the cartel. Some jurisdictions impose sanctions on individuals, thus making them personally liable for their conduct while some jurisdictions treat cartels as a criminal offence. Strong sanctions against enterprises and individuals increase the effectiveness of leniency programs.

Of the 37 respondents 16 jurisdictions treat cartelisation as a criminal offence whereas 16 jurisdictions treat it as an administrative / civil offence. In India, cartel is a civil offence whereas advanced jurisdictions like United States, Canada and France (individual) treat it as a criminal offence. In Columbia, Austria, Poland, Germany and Croatia, only bid-rigging is treated as a criminal offence. In some countries like Brazil, Denmark and Greece, cartels may be subjected to both administrative and criminal proceedings.

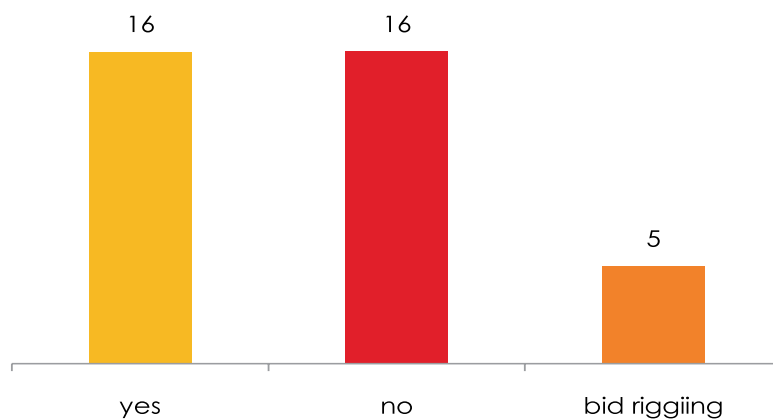


Figure 13 Cartel a criminal offence or not

(v) Source of information- leniency application or ex officio investigations

Competition agencies receive information about cartelization through complaints filed by third parties or through leniency applications. Apart from this, competition agencies initiate investigation on their own. An analysis of the source of information throws light on the effectiveness of both advocacy and enforcement measures. In case the source of information is a leniency application, it would imply that sanctions of cartelization are seen as a significant deterrent by enterprises. The next two graphs look at the number of cases initiated by the respondent jurisdictions via leniency application and on ex officio basis.

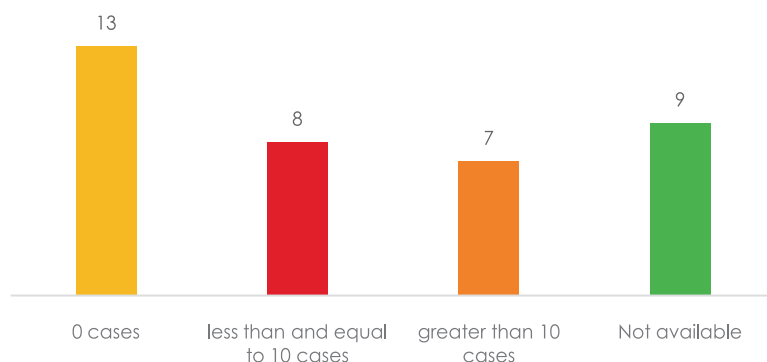


Figure 14 Number of Cartel Cases Commenced through Leniency Application¹¹⁷

From the responses received, in 8 jurisdictions, upto 10 cases were initiated on the basis of leniency applications; in 7 jurisdictions more than 10 cases were initiated following leniency applications. It was further observed that in Japan about 112 cases were initiated in the last ten years through leniency applications. Germany commenced 296 cases through leniency. In Netherlands, immunity applications were source of investigation in 40% of the cartel cases that led to imposition of fines (on an average). In India, none of the decided cases at the time of survey had been initiated on the basis of leniency application.

It can be observed from Figure 15 that of the 37 responses received, in 6 jurisdictions up to 10 cartel cases were started on *suo moto* basis and in 13 jurisdictions more than 10 cases were by it. In India, most cases which resulted in infringement findings were started on ex officio basis. In Hungary and Canada, 103 and 141 cartel cases respectively were initiated on an ex officio basis.

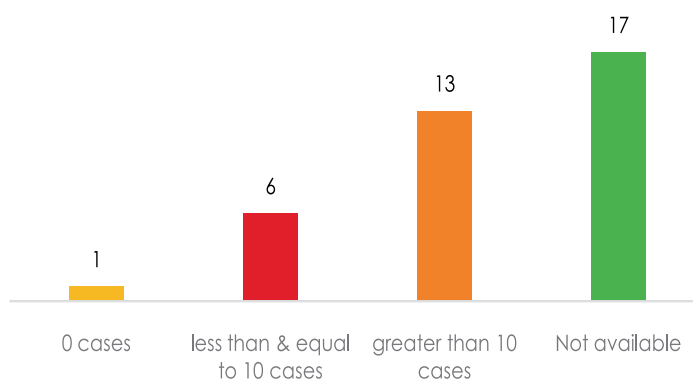


Figure 15 Number of Cartel Cases on *Suo Motu* Basis¹¹⁸

(vi) Leniency provisions

Given the unstable nature of most cartels and threat of prosecution under the law, many competition agencies have leniency provisions in their law. It is a system of offering lenient treatment to such member of the cartel who is willing to cooperate with the enquiry and the investigation process. It incentivises those who come forward on realizing that their actions were in contravention with the provisions of the competition law by giving relief from stringent action and penalties by the competition agency.

¹¹⁷ Data for Portugal is for last ten years.

¹¹⁸ Data for Portugal is for last ten years and for Brazil, it is for last five years.

All the respondent jurisdictions have a system of leniency in place. While most have leniency provisions in their respective laws, in United States and Australia leniency stands as a separate policy document.

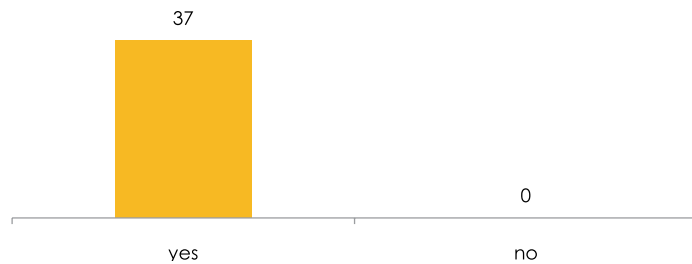


Figure 16 Presence of Leniency Provision/Policy

Figure 17 depicts the number of leniency applications received per year on average during the last 10 years by the respondents¹¹⁹. Of the 37 responses received, 22 jurisdictions received up to 10 applications per year on an average and 8 jurisdictions received more than 10 leniency applications per year. Amongst these, Japan received the highest number of leniency applications i.e. around 95 applications per year on average. Three jurisdictions namely Panama, Cyprus and El Salvador didn't receive any leniency application. Four jurisdictions namely South Korea, Ireland, Denmark and United States treat the information related to the number of leniency applications as confidential.

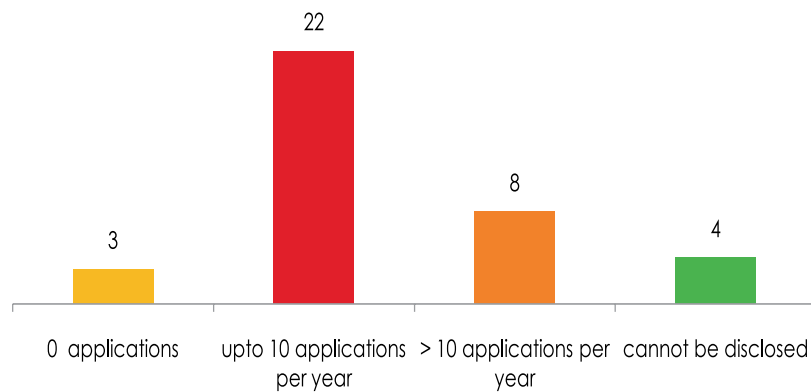


Figure 17 Leniency Application Received on Average over the Last Ten Years

Even if a leniency application is received, whether leniency or reduction in penalty is granted or not depends on a number of factors. These include the level of cooperation, submission of evidence and the timing of the leniency application.

(vii) Monetary penalty levied and criminal sanctions imposed

The survey sought information on the number of cartel cases where monetary penalties were levied and criminal sanctions were imposed. Figure 18 shows the number of cartel cases in which monetary penalty was levied in various jurisdictions, for which data was available. From the graph, it can be observed that Germany had the highest number of cases with imposition of monetary penalties, followed by South Korea and Poland. India imposed penalties in 41 cases. The lowest number of cases where monetary penalty was levied were in Ukraine and Mauritius. In Hong Kong, no monetary penalty was levied.

Majority of the respondents who have criminal sanctions, did not provide information on the same. Out of the responses received, Canada imposed the highest number of criminal sanctions (35 cases), followed by Israel (14 cases), Japan (6 cases), Estonia¹²⁰ (6 cases) and

¹¹⁹ The data for leniency application received by Brazil is from 2012.

¹²⁰ The punishments in these cases did not envisage jail term and were limited to criminal monetary penalty.

Australia (1 case). From the information received, South Korea has referred 107 cases for criminal sanctions.

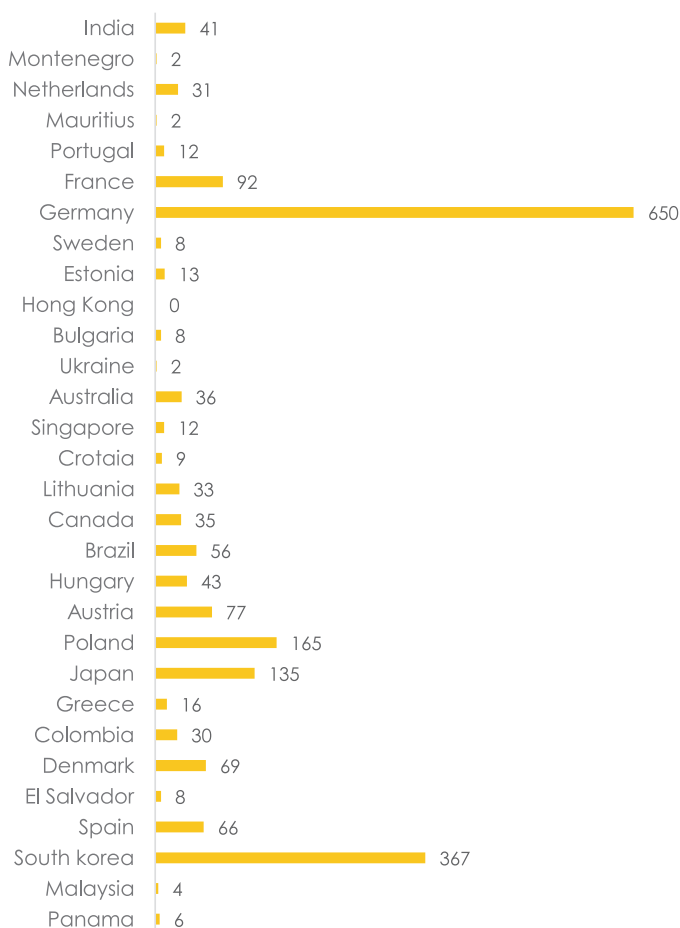


Figure 18 Number of Cartel Cases where Monetary Penalty was levied

3.3. Final Observations

The survey reveals that while the understanding of cartel activities remains almost the same across jurisdictions, the ambit of cartels is wider in some jurisdictions. Differences in definition emerge from the specificity of the laws. The survey further brings out that many jurisdictions have criminal sanction to create effective deterrence. However, not all jurisdictions which have criminal sanction have imposed it and many still rely on monetary penalties as a tool for deterrence. In some countries, both civil and criminal sanctions are imposed. In addition, it is seen that leniency applications are an effective source of cartel detection.

4. Stakeholders' Survey

Creating awareness of competition law is central to its implementation. It is a challenge that every new or young competition regulator faces. During the initial eight years of its enforcement regime, CCI has strived to create awareness about the Act and promote compliance amongst the stakeholders through the twin instruments of enforcement and advocacy. As part of the Special Project, a nation-wide, cross-sector survey was designed and conducted amongst three key stakeholder groups viz. enterprises, trade associations and government ministries/ departments. The objective was to gauge the extent of awareness of the provisions of the Act. Additionally, the survey also aimed at understanding the state of compliance with the Act as well as the measures adopted by enterprises and trade associations to be compliant. The survey also elicited responses of the stakeholders on government policies/regulations affecting market mechanisms and competition.

4.1. Approach and Methodology

Questionnaires were sent to the three stakeholder groups: enterprises, trade associations and government ministries & departments. The questionnaire was separate for each of the three stakeholder groups [Annexure 4 to 6]. Questions on awareness of competition law were common to all the categories of respondents while a section on compliance was addressed to the enterprises and trade associations. Keeping in view the large number of cases that CCI received with respect to bid rigging in public procurement, the questionnaire for the government departments/ministries included a section on public procurement. Often in case of economies in transition, government regulations and policies restrict the size of the market, lay down the ground rules in ways that limit market participation and thereby create conditions conducive for collusion. The legacy regulatory architecture can seriously circumscribe the application of competition law. In view of this, in the survey pertaining to enterprises and the government ministries/departments, the respondents were asked to provide information on state control over markets in the form of price regulation, entry restriction, preferential policies etc. as well as any policy change or regulatory reforms undertaken in the recent past to address structural rigidities and/or promote competition in markets.

The questionnaires were circulated via e-mail to the respondents. Additionally, the questionnaires were also canvassed during the outreach activities of the CCI. The questionnaires were sent to a total of 871 respondents across the stakeholder categories and 331 responses were received.

4.2. Sectoral Distribution

A total of 224 responses were received from enterprises representing diverse sectors. While 110 of

the respondent enterprises did not specify their respective sectors, the remaining responses were received from the following sectors: manufacturing (25), construction/cement (18), agriculture/agro-processing (16), pharmaceutical distribution (13), banking and finance (10), real estate (10), entertainment (09) etc. The response rate in case of trade associations has been unsatisfactory. Only 15 responses were received while questionnaires were sent out to 180 trade associations. The tepid response from the trade association may be attributable to the fact that 70% of the cartel enforcement decisions of CCI involve trade associations and several of their rights and obligations under the Act are still evolving and sub judice before the Appellate Tribunal and the Apex Court.

4.3. Results and Findings

(i) Awareness of the Competition Act, 2002

Besides antitrust enforcement and merger regulation, the Act also mandates the CCI to undertake outreach activities to create awareness about competition issues and the provisions of the Act. The CCI strongly believes in an appropriate blend of advocacy and enforcement measures to promote a culture of competition in India so that the behaviour of economic agents are consistent with the objective of competition, efficiency and consumer welfare.

Over the past eight years, the CCI has been making consistent efforts to create awareness of the Act amongst stakeholders. The survey results corroborate the same with 93% of the respondent enterprises and 100% of the respondent trade associations having reported to be aware of the Act.

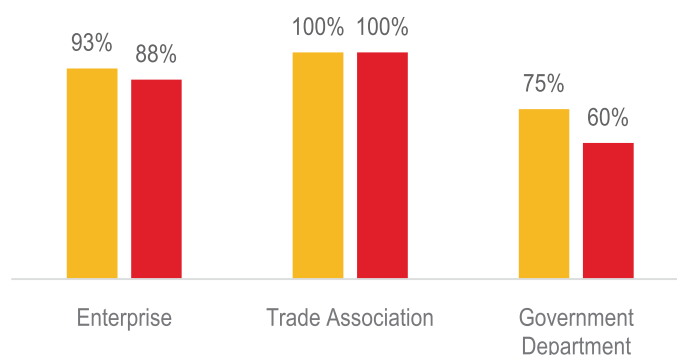


Figure 19 Awareness on Competition Act, 2002 and Cartels

However, the relatively lower level of awareness (75%) amongst the

government department/ministries emerges as an area of concern. This is despite the large number of targeted training and sensitisation programmes conducted by the CCI over the years for government bodies and the regular references that the CCI has received from government departments, especially in bid rigging cases. One possible reason for such an incongruous finding may be on account of frequent movement of officers between various government departments as part of the rotational transfer policy, which often limits the institutional memory and results in inadequate transmission of knowledge. Thus, the survey result highlights the need for continued advocacy aimed at government officials and institutionalisation of regular knowledge sharing with the government departments/ministries.

The respondents who reported awareness of the Act were also asked to specify as to how they became aware of the Act. In response, a majority of the respondents indicated print or other media reports (123) as the source of their awareness, while competition law

conferences and workshop (64) and advocacy programmes organised by the CCI(57) were cited as other major sources of awareness. Thus, the survey suggests that the media coverage of the enforcement actions of the CCI and the outreach programmes of CCI have contributed significantly to increase stakeholder awareness.

In keeping with the theme of the Special Project, a set of questions was specifically designed and addressed to the various stakeholders to assess their understanding of the various forms of cartels and the relevant provisions of the Act. When asked if they were aware of the concept of cartels under the Act, as the above chart depicts, 88% of the respondent enterprises, all the respondent trade associations and 60% of the respondent Government departments/ ministries responded in the affirmative. The relatively low awareness of cartels amongst the government departments, along with low level of overall awareness of the Act, reinforces the imperative of stepping up advocacy efforts with the government since low awareness amongst government officials makes it less likely that they will recognise cartels and bring them to the notice of the CCI.

To understand the awareness of various forms of cartels prohibited under the Act, the respondent enterprises were asked to select different kinds of agreements between competitors that would amount to a cartel.

While majority of the respondent enterprises were aware that fixing prices or margins, market sharing arrangements, limiting/controlling supply or production and bid rigging amounted to cartel, it cannot be disregarded that in case of each of the four given forms of agreements, nearly 25% of the respondents (though not the same set of respondents) were under the impression that these were not forms of cartelisation.

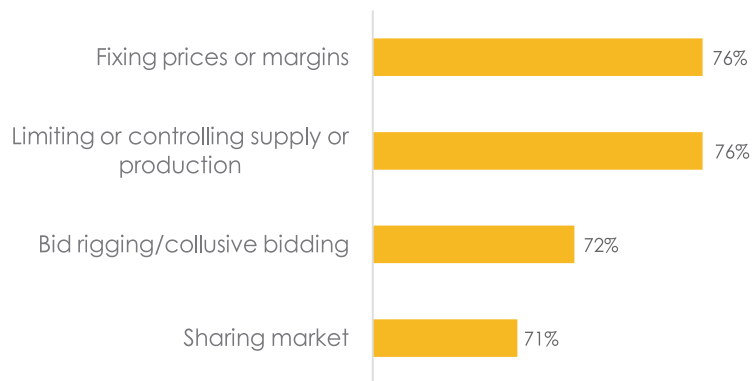


Figure 20 Awareness on different forms of cartel

To gauge the perception of enterprises and trade associations regarding the boundaries that circumscribe the interaction and exchange of information between competitors as per the Act, they were asked if discussion or exchange of future price, production, supply etc. amongst members of the association or employees of competing businesses would amount to breach of the Act. 53% and 43% of the respondent enterprises and trade associations respectively responded in affirmative. Astonishingly, the rest, comprising 47% and 57% of the respondent enterprises and trade associations, respectively, were of the view that such exchange of information was permissible. These results are extremely telling given that nearly half of the respondent enterprises and trade associations are ignorant of the fact that exchange of

competitively sensitive information could potentially attract the cartel provisions under the Act. The lack of awareness on part of the trade associations is one factor that demonstrates the significant number of infringement orders of the CCI relating to trade associations. As discussed in the review of cases, in a large proportion of cartel infringement decisions, presence of strong trade associations was observed. This, viewed in conjunction with the survey results, suggests that the legacy practices of trade associations are still deep-rooted and these ‘self-regulating’ bodies have been dictating market practices in total disregard of competition law. The result brings out in sharp focus an important and immediate action point for the CCI, i.e. to take focussed outreach measures on the minutiae of cartels and the related provisions of the Act, amongst trade associations and industry to bring deeper appreciation of competition law and to dislodge the entrenched anti-competitive legacies.

On the question of CCI being the forum of redressal for victims of cartelisation, the awareness level was found to be high with 87% of the respondent enterprises and 93% of the respondent trade associations having reported that they were aware they could

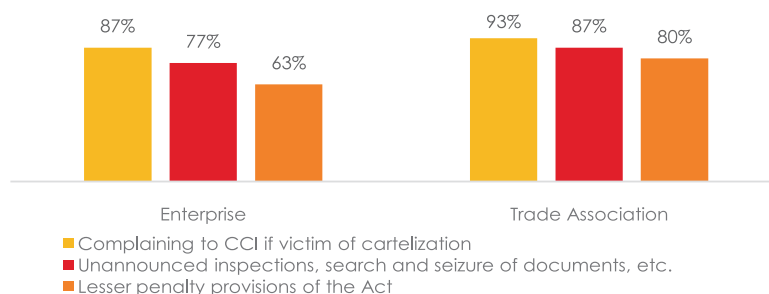


Figure 21 Awareness on leniency provisions, CCI powers of inspection, etc.

approach the CCI if they were a victim of cartelization. The respondents were also asked if they knew that the CCI had the power to conduct unannounced inspection on the premises of an enterprise to search and seize documents and to record statements on oath. The results reveal that 77% of the enterprises and 87% of the trade associations were aware. While fairly encouraging, the result highlights that there is significant room for improvement and the CCI will need to continuously engage with the stakeholders to generate awareness of the powers of the CCI. It is vital that the market participants have an understanding of the power vested in the CCI.

Section 46 of the Act empowers the CCI to impose lesser penalty on producer, seller, distributor, trader or service provider who makes a full, true and vital disclosure in respect of an alleged cartel. The lesser penalty provision helps penetrate the cloaks of secrecy and uncover evidence, which are vital for detection and conviction of a cartel. The law being relatively new, awareness of the provision amongst the stakeholders holds the key to its success in cartel enforcement. In this background, a specific question was addressed to the respondent enterprises and trade associations as to whether they were aware that the Act allowed for a reduction in penalties for enterprises who admit to their participation in a cartel and provide information and documents that helps the CCI investigation.

The survey reveals that 80% of the respondent trade associations were aware of the provision

regarding lesser penalty¹²¹ under the Act. However, the corresponding figure for enterprises was relatively low with 63% of respondents having provided an affirmative response. Thus, while 88% of the respondent enterprises understood the concept of a cartel, a number of them were unaware of the avenues to break out of a cartel and the benefits of being a leniency applicant. The low awareness about leniency provisions may be attributable to the nascency of the leniency regime in India given that the substantive provisions of the Act, including those prohibiting cartels, were enforced with effect only from 20th May, 2009. At the time of the survey, CCI had issued only one cartel order involving leniency application¹²². With the recent amendments to the Lesser Penalty Regulations and a number of leniency decisions on the anvil, the awareness in this regard is likely to pick up. The findings of the survey also demonstrate the need for the CCI to bolster its outreach initiatives to facilitate better and wider awareness of the lesser penalty provisions and the manner in which the enterprises, individuals and trade associations can benefit from them.

(ii) Compliance with the Act

Competition law compliance implies a systematic and active approach to run a business in compliance with the relevant legislation to minimize the risk of infringement of law. It has been the endeavour of the CCI to ensure effective enforcement along with compliance of the law. Being a relatively new law, it is felt that the stakeholders must be inspired to inculcate a culture of competition in their businesses and ensure that it permeates across all levels in their respective organizations. For a large and growing economy such as India, with dynamic markets and a growing private sector, the thrust of regulatory action is towards prevention of any form of anti-competitive conduct, followed by corrective and punitive measures, wherever required. The survey was an attempt to assess the state of compliance in India and the steps and measures adopted by the enterprises and trade associations to ensure compliance with the Act.

(iii) Competition compliance programme

The respondent enterprises and trade associations were asked whether they had a competition compliance programme in place in their organisations.

¹²¹ Section 46 of the Competition Act reads as under: The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations: Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure. Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section. Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission. Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,— (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or (b) had given false evidence; or (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

¹²² Order dated 18th January, 2017 in Suo moto Case No. 3/2014 (In Re: cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items). Available at www.cci.gov.in.

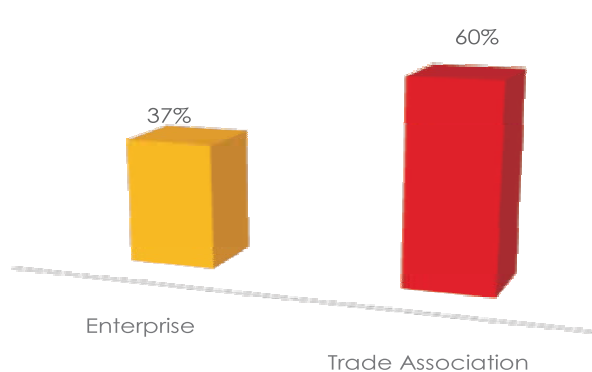


Figure 22 Enterprise/Association with a competition compliance program

37% of the respondent enterprises and 60% of the respondent trade associations reported that they had a competition compliance programme.

Of the enterprises, which had a compliance programme in place, majority cited ‘implementation of the global policies of the group’ as the primary reason for having the same. Evidently, most of the enterprises who have adopted compliance programme are Indian arms of multi-national companies

which have been present in countries that have had a competition law for a fairly long period of time. The knowledge of the needs and benefits of compliance programmes as well as the risks of not having one is transmitted from the parent companies to their Indian subsidiaries. A competition agency’s ability to successfully promote a compliance culture depends to a large extent on the stakeholders’ understanding and perceptions of the benefits of having a compliance programme. This finding of the survey clearly brings out the requirement of steering the advocacy efforts in espousing and explaining the benefits of compliance particularly to the domestic enterprises. Only 8% of the respondent enterprises adopted a compliance programme pursuant to CCI’s enforcement actions, which highlights the need to showcase the CCI’s enforcement and decisional practices on a wider scale and across various platforms amongst the stakeholders.

➤ **Training on competition compliance**

On being asked if the relevant employees were given training on the Act, the response though not satisfactory was relatively better in case of enterprises with 46% of the respondent enterprises confirming the same. The corresponding figure for trade associations was only 29%, leaving a lot to be desired.

Of the respondent enterprises who were providing training to employees on the Act, most conducted the same mainly for the senior and mid-level management. In case of trade associations, executive committee members were trained the most, followed by the office bearers.

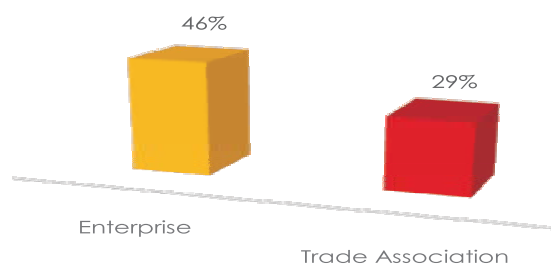


Figure 23 Training to employees on the Competition Act

➤ **Other compliance measures**

Among the other compliance measures adopted by the respondent enterprises, appointment of compliance officer (19%), competition audit of policies, practices, association activities (17%) and adoption of compliance manual (14%) were reported. Among the respondent

trade associations, 23% have adopted measures to prevent disclosure of competitively sensitive information, 18% of the respondents read out competition law dos and don'ts before association meetings and as many respondents ensure that association meetings have agendas and minutes that accurately reflect attendance and discussions. 14% have reviewed and modified their charter documents to bring them in alignment with the Act.

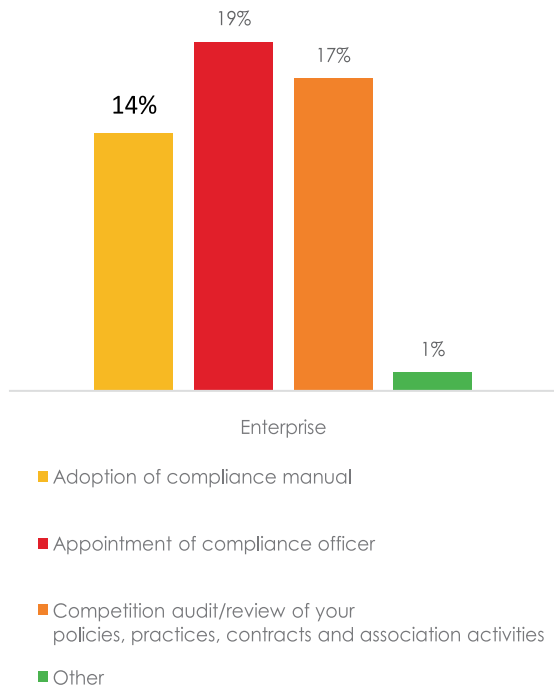


Figure 24 Compliance measures by Enterprises

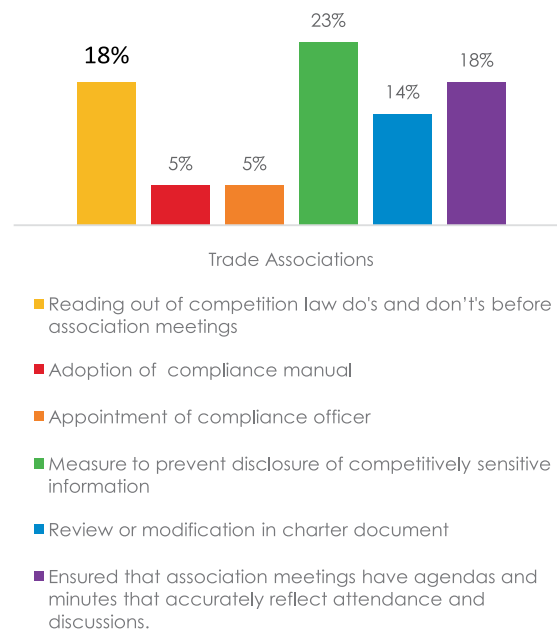


Figure 25 Compliance measures by Trade Associations

(iv) Past investigations and course corrections

The survey revealed that 21% of the respondent enterprises and 50% of the respondent trade associations respectively were proceeded against for cartel allegations under the Act. Of these, 80% of the enterprises and 71% of the trade associations respectively were aware of the Act when they were first proceeded against. 41% of the enterprises proceeded against by the CCI were found to be in contravention of the Act. The corresponding figure for trade associations was 43%.

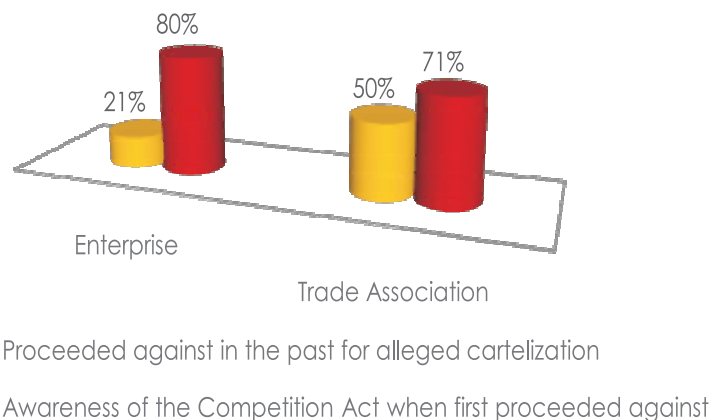


Figure 26 Respondents involved in CCI proceedings

28% of the respondent enterprises and 29% of the respondent trade associations who were proceeded against discontinued the alleged anti-competitive practices after the proceedings of the CCI. The less than satisfactory result on this count is explained by the fact that most cases have not completed the appellate process and thus are yet to bring finality on the decisions and directions of the CCI.

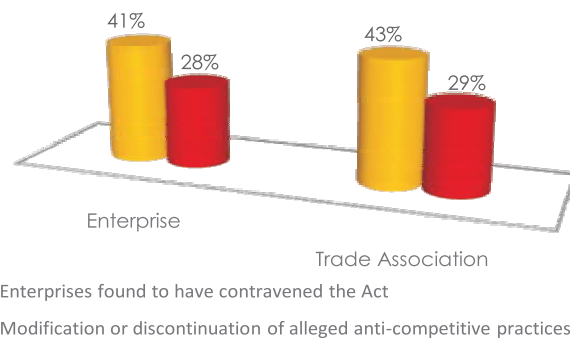


Figure 27 Respondents found to be in contravention of the Act

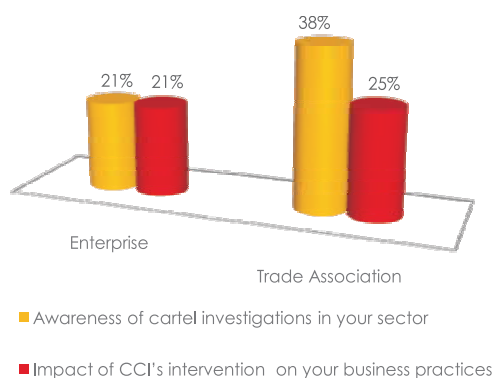


Figure 28 Cartel investigation and impact of intervention

The respondents were asked whether they were aware of cartel investigations in their sector and whether there was an impact of CCI's intervention on business practices in their sector. 21% of the respondent enterprises and 38% of the respondent trade associations were aware of the cartel investigations in their sector. On the impact of CCI's intervention, it was found that only 21% of the enterprises and 25% of the trade associations have acknowledged CCI's intervention on their respective sector.

(v) Public procurement

Public procurement makes up a significant proportion of the gross domestic product across economies. In India, it is estimated to account for around 30% of the GDP. Given its magnitude and expanse, public procurement is critical to economic growth, development, governance and welfare of citizens of a nation. It is imperative to ensure that public procurement is effective and efficient, which *inter alia* requires public procurement markets to have healthy and effective competition. Effective competition between alternative suppliers is the means to make sure that public entities, and ultimately the citizens, derive the benefit of the best deals in terms of price, quality and innovation of the goods and services purchased.

However, ensuring competition in procurement markets can be a challenge. The anticompetitive practice prevalent in these markets is 'bid rigging' in different forms in which bidders for a contract or tender collude to pre-arrange the outcome of the bid or more specifically to pre-determine the winning bidder. Competition is thereby eliminated or at least severely circumscribed. The enormity of the problem is evident from the fact that bid rigging in public procurement markets accounts for a substantial proportion of cases dealt with by competition authorities. In India, bid-rigging activities in the public procurement so far have accounted for around 25% of total number of cartel enforcement decisions.

Being a cartel hotspot, the CCI, through its targeted advocacy initiatives with the government over the years, has been impressing upon the benefits of procurement through competitive bidding. Continuous effort of the CCI has resulted in recognition of “competition” as one of the fundamental principles guiding public procurement in the Manual for Procurement of Goods 2017 (the Manual), which is the guidance document for public procurement in India, issued by the Ministry of Finance. The Manual devotes an exclusive chapter explaining the features and requirements of the Act (Appendix 2.5).

In the survey, the government departments/ministries were asked whether they were procuring products/services through competitive bidding. The survey brings out that 83% of the respondent government ministries/ departments procure products/services through competitive bidding. An attempt was also made to gauge the awareness of the government departments/ministries on prohibition of collusive bidding under the Act and also about the Manual. As mentioned earlier, 75% of the respondent government ministries/ departments were aware of the Act. Of these, 75% were also aware that collusive bidding was prohibited under the Act. The awareness of the Manual was relatively less with 47% of the respondent government departments/ministries indicating that they knew about the Manual. Around half of these respondents were aware of Appendix 2.5 in the Manual relating to the Act.

The respondent government departments/ministries were asked if they had in the past initiated action against colluding enterprises. Only 21% of the respondents reported in the affirmative. Amongst these departments/ministries, most reported to have initiated internal investigation and measures against the colluding bidders, while some referred the cases to CCI.

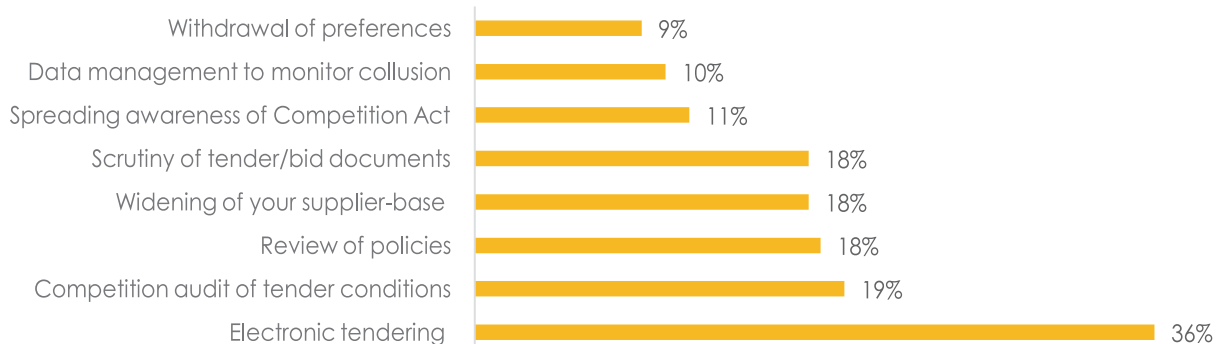


Figure 29 Measures to promote competitive bidding

CCI, over the years, has advocated pro-competitive reforms in the procurement processes amongst the government departments/ministries to prevent anti-competitive practices. To understand the actual implementation of such reforms by the government departments and ministries, the respondents were asked to highlight the measures adopted by them to this end. E-tendering came up as the most common measure being taken up. This is in consonance with the larger policy stance of the Government of India, which has been actively promoting the adoption of digital technologies as part of the strategy for India’s growth and

development. Competition audit of tender conditions, review of relevant policies, widening of supplier-base, scrutiny of bid documents and spreading awareness about the Act emerged as the other significant steps taken to facilitate competition and curb anti-competitive practices in public procurement.

(vi) Policies/ Regulations

The state intervenes in the market and the economy by (a) enacting legislations and subordinate legislations that define the contour of the freedom of economic agents and their rights and obligations, and (b) formulating economic policies relating to trade, commerce, industry, business, investment, disinvestment, taxation, IPR, procurement, etc. These interventions, despite best intentions and exercise of the best of the skills, care and due diligence, may inadvertently carry potential to restrict market participation and affect the ability of economic agents to effectively compete at the market place.

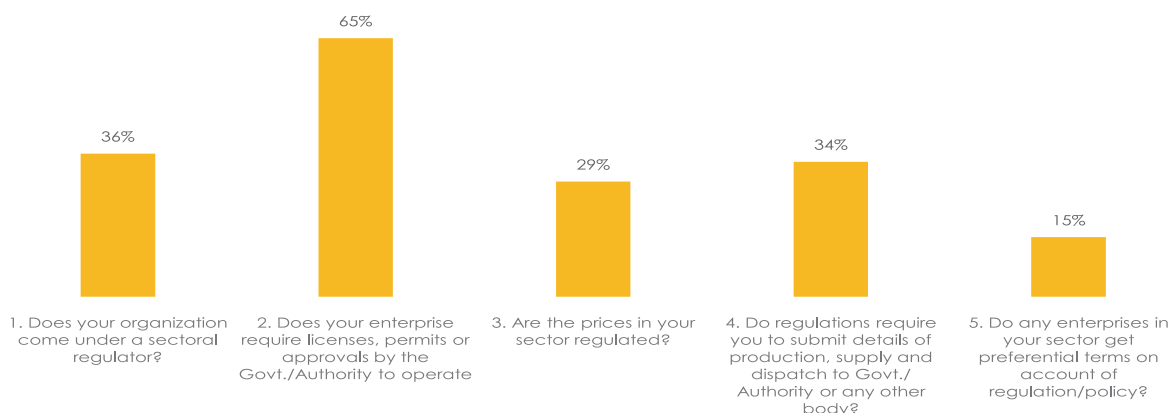


Figure 30 Regulation/Policies – Enterprises

India adopted a new economic order in the early 1990s. Over the past quarter century, many state controls over markets have been gradually withdrawn. With a view to understand whether state control by way of policies and regulations still exist in some sectors, information was sought from enterprises regarding licencing requirements, price control, policy preference and reporting requirements in their respective sectors. 63% of the enterprises informed about the requirement of licenses, permits or approvals by the government or any other authority to operate in their respective sectors. 29% of the enterprises informed that prices are regulated in their sector. These respondents were largely from agriculture, pharmaceutical, construction/cement industry. 34% of the respondent enterprises stated that there were regulatory requirements to submit details of production, supply and dispatch. In case of preferential policies, only 15% of the respondent enterprises reported that there were preferential terms in their sector on account of policy or regulations.

The government respondents were asked to highlight policy initiatives or regulatory reforms undertaken by them, in the last three years, to address structural rigidities and to promote competition in markets.

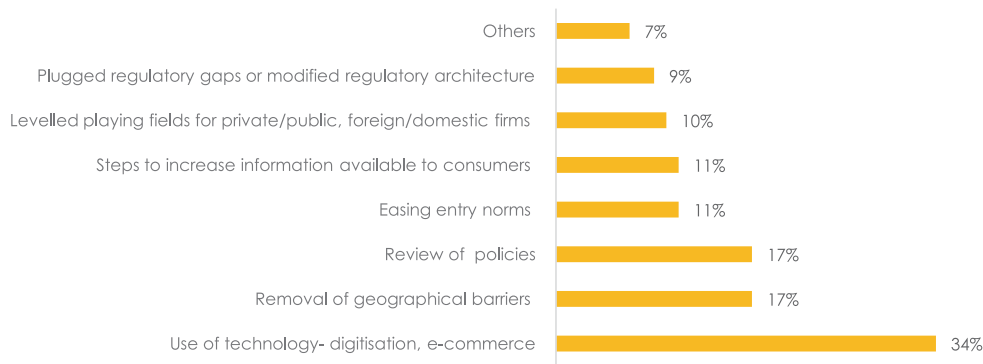


Figure 31 Policy Measures for Promoting Competition

Digitisation has been the most common measure indicated for promoting competition and address structural rigidities. The other measures included removal of geographical barriers, review of policies, easing entry norms, etc.

4.4. Final Observations

The survey results suggest that CCI has achieved a fair degree of awareness of the Act amongst trade associations (100%) and enterprises (93%). According to a large number of respondents, media coverage of CCI’s enforcement actions and its outreach programmes, significantly contributed to their awareness. The results further show that 100% of the trade associations and 88% of the enterprises were aware of the concept of cartel under the Act. However, the corresponding figure for government ministries/ departments was only 60%. The relatively less level of awareness amongst government ministries/ departments suggests the need for continued advocacy aimed at institutionalisation of regular knowledge sharing with government departments.

A large number of respondent enterprises were aware of different forms of cartel but 47% of them were unaware that it is illegal for competitors to exchange future price, production, supply, etc. Similarly, 37% of the respondent enterprises were unaware of lesser penalty provisions of the Act. This may be attributable to the newness of the compliance requirements and the nascency of leniency regime.

A review of the responses of enterprises who had competition compliance programme shows that training employees on competition law was the most common compliance measure adopted. Appointment of compliance officer, adoption of compliance manual, competition audit of policies, practices and association activities were the other compliance measures adopted by these respondents.

The survey of Government ministries/departments suggests that most of them realise the significance of competitive bidding in their procurement processes. Many of these respondents have adopted e-tendering process as a measure to promote competitive bidding. Competition audit of tender conditions, review of procurement policies, widening supplier base and scrutiny of tender/bid documents were also indicated as significant measures

to foster competition in public procurements. The responses of government ministries/ departments also indicate that they undertook policy initiatives or regulatory reforms to address structural rigidities and promote competition. Amongst all the measures identified, digitization was found to be the most common measure being taken up for promoting competition.

The overall assessment of the survey results is extremely positive with respect to awareness of the Act, achieved over the period of eight years of enforcement. However, a significant number of the enterprises were unaware of the leniency programme and prohibition on exchange of information on future price, sales and production. While this may be the case across young regimes, it is a clear signal for CCI to further accelerate its advocacy measures to build a competitive environment and dislodge entrenched anti-competitive legacies.

5. Focussed Advocacy

Competition law being a relatively new law in India, there is a need for sustained advocacy. Over the years, CCI has been engaging itself with important stakeholders through various advocacy initiatives like workshops, training programmes, competition assessment of economic laws, Focussed Group Discussion¹²³ (FGD) etc.

5.1. Strategy for Focussed Advocacy

Over the last eight years of enforcing competition law in India, trends have indicated that some of the sectors/activities are more prone for cartelisation. These sectors include Entertainment, Pharmaceutical Distribution, Public Procurement and Transport where matters related to anti-competitive agreements including bid-rigging, have been brought before the CCI on several occasions. While this may be partly due to the market structure of the given sector, lack of awareness was also a key factor contributing to the contraventions.

The survey results reinforced that a sizeable portion of the enterprises were unaware of certain forms of cartels and that it is illegal for competitors to exchange future price, production, supply, etc. Keeping these in mind as well as the enforcement experience of the CCI, focussed outreach measures were undertaken targeting sectors that were found vulnerable to cartelisation. In view of the low level of awareness amongst the Government Departments/ Ministries brought out by the survey, sensitizing State Owned Enterprises (SOEs) and government officials involved in public procurement was also taken up as a priority.

To reach out to the stakeholders spread across the nation, CCI made arrangements with apex chambers of commerce and industry such as Confederation of Indian Industries (CII), Federation of Indian Chambers of Commerce and Industries (FICCI) and the Associated Chamber of Commerce & Industry of India (ASSOCHAM). Advocacy programmes were organised at various locations addressing particularly the enterprises, associations and other stakeholders from the focus sectors. There has always been tremendous response and excitement amongst participants in these outreach programmes which shows that they are eager to come closer to the regime to show-case their concerns.

The CCI has also signed MoUs with professional bodies such as the Institute of Company Secretaries of India (ICSI), Institute of Cost Accountants of India (ICMAI), for organizing advocacy programmes. These bodies organized advocacy workshops through their regional offices and chapters in more than 70 cities. The target stakeholders in such advocacy

¹²³ Focused Group Discussion (FGD) encompasses an in-depth face to face interview/discussion with select focused group with the help of a facilitator. The discussions are primarily qualitative in nature and oriented towards obtaining the real feedback/perception of the stakeholders on the quality of enforcement and advocacy activities of the CCI. Important stakeholders identified by the CCI for FGD are: consumer associations, association of compliance professionals and trade associations.

programme were largely compliance professionals, working either in-house or practicing independently. These events aimed at building capacity of professionals like company secretaries, cost accountants & chartered accountants and sensitising them about the provisions of the competition law, its implications and consequences of non-compliance.

5.2. Advocacy measures undertaken

(i) Public Procurement

Public procurement is a key economic activity of the Government and as it entails huge expenses, it has a wide impact on competition in the market. To sensitise officials dealing with procurement matters in SOEs and project officials working on public private partnership projects, two targeted workshops were organised in collaboration with the World Bank. In both these workshops, officials across India participated. Specific focus was given to bid-rigging and integrity aspect of public procurement. Two sessions; one on General Overview of Competition Law and another on Public Procurement and Competition Concerns, were delivered by the senior officers of the CCI. The procurement officers were made aware of competition concerns through practical cases dealt by the CCI. They were made aware of the red flag indicators for bid-rigging in these workshops. Around 225 officials from more than 60 public enterprises were sensitized through this exercise. Most of the officials were from large SOEs having substantial expenditure on public procurement. The Members and senior officials of the CCI held interactive sessions with these participants clarifying queries specific to their area of work and also explained the provisions of the Act which relate to public procurement.

In addition to the World Bank, cooperation was also sought from the Standing Conference of Public Enterprises (SCOPE) which is the apex body of Central Government Owned Public Enterprises. SCOPE has all the Central Public Enterprises, a few State Government Enterprises and some nationalised banks as its members. SCOPE facilitates endeavours of its members in improving their overall performance, with a vision to make them globally competitive in a market driven environment. In order to promote legitimate aspirations of its members by strengthening their effective and sustained engagement with stakeholders, SCOPE organised several workshop/trainings for its members. An arrangement was made with the SCOPE to include a session on competition law in their workshops/trainings. The officers of CCI made a presentation on competition law to the officials of public enterprises in such training sessions. Through this effort, CCI reached out to around 60 senior level officers from 30 public sector enterprises.

The Council of the CII for SOEs also organised a meeting of heads of SOEs. The Chairperson, CCI addressed the participants and emphasised the need for SOEs to unlearn the past anti-competitive practices and be in sync with the need of working in a competitive ecosystem. He also explained that the Act is based on the principles of competitive neutrality and SOEs need to refrain from anti-competitive behaviour to avoid penalties. The heads of SOEs expressed their deep appreciation towards these initiatives of the CCI.

Public Procurement in State Governments (Provincial Government) are more prone for bid-rigging. In case of State Government, it was imperative to make the top most officials of State Government aware of the competition law so that the culture of compliance can be percolated within the State Government. For this purpose, Chairperson and Members of the CCI spearheaded the advocacy initiative with State Government. The State Governments were also requested to appoint a Nodal Officer at a senior level to act as a link between the State Government and the CCI. Following this, most of the State Governments have nominated their nodal officer in their respective States. The Chairperson and Member of the CCI visited States of Himachal Pradesh, Punjab, Haryana, Chhattisgarh, Goa and Telangana and sensitised its Chief Ministers, Chief Secretaries and other Secretaries of important ministries and departments about the Act. Some of these State Governments have taken advocacy to the next level sensitizing officers both from judiciary and administrative services.

➤ **Diagnostic Tool**

The feedback of the participants in the workshops emphasised the need for CCI to support procurement agencies and officials to assess their procurement needs along with highlighting competition law concerns. With the above concern, CCI expedited the preparation of its Diagnostic Tool – “Towards Competitive Tenders” to help officials improve the competitiveness of tenders and detect anti-competitive behaviour amongst the participants of the tenders. The Diagnostic Tool aims to facilitate the senior officers in collecting detailed information on past tenders, with a view to improve decision making and help build capacity amongst various levels of the officials dealing with procurement.

(ii) Pharmaceutical Sector

As has been seen in the desk review, CCI received several complaints concerning anti-competitive practices by pharmaceutical distributors. In many cases, it was found that the platform provided by their trade associations was used in an anticompetitive manner to intervene in stockist appointment by pharma companies. To increase the awareness of pharma companies, advocacy programme was organised in association with The Indian Drug Manufacturers’ Association (IDMA), which is one of the largest trade association in pharmaceutical sector having membership of more than 900 enterprises located across India. The Chairperson and senior officers of the CCI had opportunity to interact with top brass of around 30 pharma companies. They were made aware of the nuances of the Act and implications of conduct/behaviours that could attract the provisions of the Act. The programme saw enthusiastic response from the participants, who also apprised that the interventions of CCI had a perceptible impact in the market with the distributors’ associations now taking cognizance of the CCI orders and changing their conduct accordingly.

Further, officials from several pharmaceutical companies also participated in various advocacy programme organised by ICSI and ICAI.

(iii) Entertainment Sector

The entertainment sector in India is diversified and widely spread out. Cultural and languages preferences are so varied that almost every province has its own film and entertainment centre. Though the hub of Hindi language entertainment is Mumbai and Delhi, important regional language entertainment centres are located in the States of West Bengal, Maharashtra, Tamil Nadu, Andhra Pradesh, Telangana, Kerala, Karnataka, Assam, Bihar, etc. Therefore, it was considered appropriate to reach out to the stakeholders in these states using the platform of CII, FICCI and ASSOCHAM. Enterprises belonging to the sector were regularly invited in the advocacy programmes organised by apex chamber of commerce and by professional bodies. Further, during the meeting with Chief Secretary and other secretaries of Telangana State, competition issues related to the entertainment sector in the State were discussed at length and secretaries of the State government were made aware of the kinds of competition cases being filed in the CCI. They were urged to take pro-active steps wherever feasible and possible including advocacy in their State. Entertainment is the first sector where the CCI has ordered certain contravening associations to adopt compliance manual and undertake advocacy measures.

(iv) Transport Sector

Similar to the entertainment sector, transport sector is also spread across India. Apart from reaching this sector through apex chamber of commerce, few exclusive and focussed advocacy workshop on competition law were also organised for companies closely related to the sector. Two such programmes were organised in association with sectoral trade associations such as All India Tyre Manufacturing Association and All India Rubber Manufacturer's Association in New Delhi.

(v) General Advocacy Programme

Apart from focussed and targeted advocacy programmes for the identified sectors, more than 50 programmes were organised for the stakeholders belonging to various industry. Most of these programmes were organised by CII, FICCI, ASSOCHAM, etc., sector specific trade associations like Glass Manufacturer Association, Consumer Electronics and Appliances Manufacturing Association etc. and local trade associations like regional bodies of apex chambers of commerce. These programmes were organised in the industrial and business hubs of all the regions of India. Many advocacy programmes were also organised in association with professional bodies like ICSI, ICMAI and with education bodies like universities and institutes. More than 5000 individual professionals have been sensitised about basics of competition law and general competition concerns for enterprises. In all these programmes compliance manual and other advocacy materials were also distributed for easy reference by the participants.

5.3. Impact

In a relatively young jurisdiction such as India, sustained advocacy is expected to change anti-competitive legacies perpetuated due to sheer ignorance. Many positive outcomes of advocacy initiatives are already felt in India. Several large-scale companies have dedicated an officer for competition compliance. There is an increased demand for workshops on competition law from the trade associations. Few of the trade associations have also sought CCI's views as to how the competition aspects can be included in their Article of Association itself. With sustained outreach measures, it is believed that stakeholders will imbibe the culture of competition in every aspect of their work and build a fair and competitive environment, benefiting both businesses and consumers.

6. Drawing Conclusions

India's short cartel enforcement journey so far resembles a young evolving regime. Many of the underlying structural and other factors that lead to cartel formation in India are deeply rooted in the economic and regulatory landscape. The Special Project brings forth a number of trends, issues and lessons, which may be of particular relevance to the younger jurisdictions in optimising their cartel enforcement efforts through an appropriate blend of enforcement and advocacy.

6.1. Sectors Prone to Cartelisation

The Indian experience shows that, in nascent and evolving competition regimes, cartels may not be concentrated only in well-known conventional hotspots. Of the sectors which are internationally regarded as hotspots of cartel activity, such as public procurement, construction/ cement and agriculture/ agro-processing have seen infringement decisions in India. Infringements have also been found in sectors which are not seemingly prone to cartel formation such as pharma distribution and entertainment.

Majority of the infringement findings of the CCI reveal certain striking characteristics that may be common across transitional economies: (i) an extremely strong trade association forms the fulcrum of the cartel; (ii) the participants of these association are often small or micro enterprises or individuals with a low business turnover; and (iii) these participants operate in the informal sector, with a high degree of self-regulation. The association culture in large number of cases may be an attempt at increasing bargaining power and creating a collective insurance policy by small, unsophisticated service providers.

The trade associations may perceive self-regulation as a genuine necessity to address various inefficiencies associated with traditional judicial system and ineffective government regulation of informal economy. However, some of their legacy practices may overstep the boundaries stipulated by the newly introduced competition law. Lack of awareness of the minutiae of the law significantly contributes to their unlawful practices. For instance, the Stakeholders' Survey suggests that a sizeable proportion of the respondent enterprises in India were unaware that it was illegal to exchange information regarding future price, production and sales. This was alarming for the CCI to note that nearly half of the respondent enterprises and trade associations were ignorant of the requirements of the Act. This brings to fore the imperative of targeted advocacy with trade associations early on to enable a competition audit of their practices and to dislodge entrenched anti-competitive legacies.

6.2. Leniency

A major takeaway from the survey of foreign jurisdictions is that in advanced jurisdictions,

leniency applications have been an important source of information for initiating cartel investigations. Japan, for instance, receives nearly a hundred leniency applications a year. However, the Indian experience over a period of eight years of enforcement does not mirror this. The focus, as may also be the case in other new regimes, has been on ex-officio investigations. In the initial years, the investigations could unearth direct evidence, such as circulars issued to members of trade associations,¹²⁴ minutes of trade association meetings,¹²⁵ depositions of stakeholders¹²⁶ and resolutions passed under the charter documents of the trade associations¹²⁷. However, with passage of time and increased awareness, it may become difficult to discover smoking gun evidence. On the other hand, use of indirect evidence to establish cartels may suffer challenges at the appellate stage and may also concern the credibility of the infringement determinations. Therefore, it is important for young regimes to focus on an effective leniency system, which could be a significant source of information and evidence.

Defining a clear leniency policy, providing certainty on the application of the leniency programme and educating stakeholders on these aspects should form an integral part of laying foundation for an effective cartel enforcement regime. Reviewing the leniency processes and procedures, in line with international best practices and also accounting for the specificities of the jurisdiction, would help in diagnosing bottlenecks and addressing them. The CCI passed its first leniency order in 2017 and in a significant fillip to leniency, has recently amended its Lesser Penalty Regulations *inter alia* to address the practical difficulties, to provide clarity on certain provisions and to make it stakeholder-friendly. These are being supplemented with a focus on the leniency provisions of the Act during CCI's outreach programmes. With these, it is expected that leniency applications will become a much-valued source of information for investigations, thereby giving a stimulus to the CCI's cartel enforcement activities.

6.3. Advocacy

The Special Project has reinforced the well-known merits of focused and sustained advocacy to create awareness and promote compliance, thereby building a culture of competition in the economy. What has emerged as a recurrent underlying cause for non-compliance on part of the infringers as well as the victims of cartelisation is the lack of awareness of the nuances of competition law and the remedies it offers. Starting from what constitutes cartel to the benefits of leniency, a considerable portion of the respondents in the Stakeholders' Survey were found to be ignorant of the vital aspects of the cartel enforcement regime. This is a fall out of the nascency of the regime and similar concerns would prevail in other similarly placed or even younger regimes.

The Stakeholders' Survey further revealed that, in India, majority of the enterprises who had

¹²⁴ M/s Ashtavinayak Cine Vision Ltd. vs. PVR Picture Limited & Ors. (Case No. 71 of 2011) Order dated 28 July 2016.

¹²⁵ P. V Basheer Ahmed vs. M/s Film Distributors Association, Kerala (Case No. 32 of 2013) Order dated 23 December 2014.

¹²⁶ M/s Cinemax India Limited vs. M/s Film Distribution Association (Kerala) (Case No. 62 of 2012) Order dated 23 December 2014.

¹²⁷ Sajjan Khaitan vs. Eastern India Motion Picture Association & Ors. (Case No. 16 of 2011) Order dated 9 August 2012 and Manju Tharad & Ors. vs. Eastern India Motion Picture Association (EIMPA) Kolkata & Ors. (Case No. 17 of 2011) Order dated 24 April 2012.

a compliance programme in place, were implementing the global policies of their groups. Evidently, most of the enterprises who adopted compliance programme are domestic arms of transnational companies with presence in countries where competition law regimes have been in existence for long. The knowledge of the needs and benefits of compliance programmes as well as the risks of not having one is transmitted from the parent companies to their Indian arms. However, the domestic enterprises, small and medium scale, are yet to realise the same, which is also reflected in the review of the infringement decisions, which shows that the cartel participants in many instances are small or micro enterprises with low turnovers.

The lesson that emerges is that enforcement, without adequate awareness, can limit the effectiveness of the anti-cartel regime. A competition agency's ability to successfully instil a compliance culture depends to a large extent on the stakeholders' understanding and perceptions of the benefits of having a compliance programme. The survey result points towards the requirement of steering the advocacy efforts in explaining the benefits of compliance more towards the domestic small and medium scale enterprises.

6.4. Public Procurement

Public procurement makes up significant proportion of gross domestic product across economies. In India, it is estimated to account for around 30% of GDP. The economic and social significance of public procurement is more in the developing countries where government provision of essential services plays a critical role in the development agenda. It is thus imperative to ensure that public procurement is effective and efficient, which *inter alia* requires public procurement markets to have healthy and effective competition. However, ensuring competition in procurement markets can be a challenge. The anticompetitive practice prevalent in these markets is 'bid rigging' in different forms in which bidders for a contract or tender collude to pre-arrange the outcome of the bid or more specifically to pre-determine the winning bidder. The enormity of the problem is evident from the fact that bid rigging in public procurement markets accounts for a substantial proportion of cases dealt with by competition authorities. In India, bid-rigging activities in the public procurement so far have accounted for 25% of total number of cartel enforcement decisions.

The Indian experience in cartel enforcement in public procurement markets has two distinguishing features. First, online tendering is a relatively new practice in India, and many public authorities have not yet come to terms with efficiently designing the procurement process. In several Indian cases, the design of the process itself has been regarded as being conducive to collusion. This is, perhaps, due to the relatively low levels of awareness of the Act among the public procurement authorities, and of the good pro-competitive practices while specifying tender requirements and designing the bidding process, among government departments, arising mainly from the rotational transfer policy of the government that limits institutional memory and leads to imperfect knowledge transmission.

Second, there have been numerous allegations of strong personal networks between

vendors and the procuring officer, for the award of contracts. It is possible that some of these relationships endured even after online tendering was mandated, and vendors and procuring officers alike tried to find ways around the online tendering process to achieve their desired outcomes. However, the transparency imposed by online tendering has helped create a data and document trail that makes cartel detection easier.

A closer scrutiny of the bidding patterns is an important factor in the detection of bid-rigging. The CCI's analysis in these cases has been fact-based, focussing on documents, e-mails, call records and testimonies related to specific tenders. Evidence of actual or possible information exchange between bidders has also been an important factor.¹²⁸ The starting point in these cases has been a quantitative assessment of the bidding pattern. In almost all cases, the leading evidence has been identical or similar quotes for the respective tenders. Predictably, higher weightage has been given to identical bids when drawing an adverse reference.¹²⁹ Parallel pricing was typically accompanied with an increase in the prices quoted by the bidders. However, the CCI has not considered this alone as sufficient to establish a contravention. In various cases, the CCI has exonerated parties where the only evidence was parallel conduct.¹³⁰ In these cases, CCI also considered the increase in prices. Plausible justifications for the increase in price has led to conclusions of no contravention.¹³¹

Pursuant to the CCI's decisions in cases relating to public procurement such as that of the medical devices, an overhaul in the tender conditions for subsequent tenders has been observed.¹³²

The young agencies should thus adopt a multi-pronged strategy to curb anti-competitive practices in procurement markets: strict enforcement of competition law in public procurement markets to create sufficient deterrence and prevent collusion, competition advocacy to promote pro-competitive policies/regulations governing public procurement and capacity building of procurement agencies for detection and prevention of collusive bidding.

128 In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (Suo Moto Case No. 03 of 2014), Order dated 18th January 2017; In Re: suo-motu case against LPG cylinder manufacturers (Suo-Moto Case no. 03/2011), Order dated 24 February 2012.

129 In Re: Aluminium Phosphide Tablets Manufacturers (Suo-Moto Case No. 02 of 2011), Order dated 23 April 2012.

130 Chief Materials Manager, Integral Coach Factory, Chennai v. M/s Celtek Batteries (P) Ltd., Bangalore & Ors. (MRTP Case No. C-57/09/DGIR (26/28), Order dated 27th June 2011; Chief Materials Manager - I North Western Railway v. M/s Milton Industries Ltd. & Others (Reference Case No. 02 of 2014), Order dated 1 July 2015;

131 Id.

132 Foundation for Common Cause v. PES Installations Pvt. Ltd. & ors. (Case No. 43 of 2010), order dated 16 April 2012.

Annexure - 1

Questionnaire of Survey of Foreign Jurisdictions ICN Special Project 2018 :“Cartel Enforcement and Competition”

1. Name and address of the agency:
2. Age of the Agency:
3. How does your competition law define cartels (i.e. which practices are covered by the notion of cartels)?
4. Total number of cartels investigated in last ten years (young jurisdictions may provide this information since inception):
5. How many cartel cases were concluded with the finding of infringement(s) in past ten years (young jurisdiction may provide this informations since its inception):
6. Is cartel a criminal offence in your jurisdiction?
7. Top five sectors concerned by cartel cases/investigations in last 10 years :-
 - i.
 - ii.
 - iii.
 - iv.
 - v.
8. Do you have a leniency provision or policy in your competition law?
 - a. Yes
 - b. No

9. If yes, on average each year over the last ten years how many applications for leniency have been made and how many have been granted?
10. How many of completed cartel cases were commenced through a leniency application?
11. How many cartel cases were taken up by your agency on Suo Motu (own motion or ex officio) basis?
12. In how many cartel cases, monetary penalty was levied?
13. In how many cartel cases criminal sanction was imposed?

Annexure - 2

Number of cartel cases investigated and infringement found

	Total number of cartel investigated in last 10 years	Total number of cartel cases where infringement was found in last 10 years
Russia	Not Available	95 ¹
Zambia	10	4
Panama	87	11
Cyprus (since 2012)	Not Available	8
Malaysia	48	36 ²
South Korea	Not Available	618 ³
Spain	67	66
Ireland	Not Available	4
El Salvador	25	8
Denmark	Appx. 10-15 cases per year	55
Colombia	38	30
Greece	25	16
Japan	Not Available	140
Poland	382	183
Austria	557	77
Hungary	104	50
Brazil	89	56
Israel	40	23
Canada	212	35
Lithuania	61	34
Croatia	34	15
Singapore	17 cases are currently active	10
Australia	395	38
Ukraine	Not Available	2
Bulgaria	11 ⁴	8
Hong Kong	2 ⁵	-
Estonia	30	13
Sweden	144	12
EU	Not Available	61
Germany	139	136
France	308 (Cartel and Abuse of Dom.)	92
Portugal	20	12
Mauritius	13	2
India	81	55
Montenegro⁶	6	5
United States (DoJ)⁷	218 ⁸	Not Available
Netherlands	82	31

¹ Between 2009 and 2016, 95 cases regarding cartel/ anti-competitive agreements were opened.

² Includes cases where directive or warning was issued by the competition agency and cases concluded on the basis of undertakings.

³ Number of cartel cases where corrective measures were imposed.

⁴ Data provided is only for important cartel investigations.

⁵ Cases where cartel proceedings were initiated before the Competition Tribunal for adjudication.

⁶ Data since 2012 when the existing law came into force.

⁷ The number of cases filed in Federal District Courts is significantly higher (425) than cartel cases investigated because new grand jury investigation can encompass multiple defendants.

⁸ DOJ initiated 218 new grand jury investigation of antitrust and related crimes between fiscal years 2007 and 2016.

Top five sectors prone to cartelization

Countries	Sectors
Russia	Construction, Health Sector, Providing services for population, Repairs and others
Zambia	Services, Wholesale/Retail, agriculture, Livestock, Construction
Panama	Insurance Companies, Producers and marketers of Rice, Processing and marketing of Dairy products, Poultry Processing, Laundry mat
Cyprus (since 2012)	Telecommunications sector, Banking Sector, Production of raw milk, Automotive Spare Parts, Petrol Sector
Malaysia	Consumer goods, Steel industry, Logistics, Health & Pharmaceutical, Services
South Korea	Public construction projects, LPG suppliers, Auto parts manufacturers, Paper Manufacturers, Cement Suppliers
Spain	Manufacturing and car retailing, Civil Construction, Manufacturing and food retailing, Travel retailing, Paper Products(envelopes, notebooks and folders) retailing
Ireland	Vehicle Dealerships, Domestic Home Heating Oil Distribution, Waste Sector, Hedge Clearance, Commercial Flooring
El Salvadore	Wheat flour, Public procurement, Telecommunication, Insurance, Rice
Denmark	Not applicable
Colombia	Public Procurement Sector, Automotive Sector, Sugar Sector, Telecommunications Sector, Personal Care Sector
Greece	Construction, Luxury Cosmetics, Poultry products, Real estating, Driving/foreign languages school
Japan	Construction, Automobile parts, electric wire and cable, metallic products, chemical products
Poland	Commerce, construction, industrial processing, transport and storage, water supply and sewerage system
Austria	Food retail market, construction market, (online) retail of electronic goods, Transportation market , freight forwarding), elevators
Hungary	Medical device purchase, Building industry - road construction, bridge construction, railway construction, financial sector, newspaper distribution, mining industry
Brazil	Road Fuel, Health, Construction, Transportation, Provision of services (outsourced general services, banking services, telecommunication)
Israel	Education: Textbooks + Youth delegations to Poland, Basic commodities: Bread + Gas (LPG), Infrastructure construction, Computer servers

Countries	Sectors
Canada	Construction, Transportation, Information Technology, Industrial products and manufacturing, Food related industries
Lithuania	Building sector, Waste management, food sector, Bid rigging in public procurement, energy sector
Crotaia	Telecom, Bus operators, Driving schools, Betting and gaming industry, private security
Singapore	Financial Services, Manufacturing, Transport
Australia	Air and space transport, Supermarket and grocery stores, fuel retailing, Other auxiliary finance and investment services, Specialist medical services
Ukraine	Food retail, Wooden furniture
Bulgaria	Food Sector, Insurance sector, Bid-rigging
Hong Kong	Real estate & property Management, Construction & Infrastructure, Professional & Technical Services, Banking, Financial & Insurance, Apparel, Footwear, jewellery, watches & accessories
Estonia	Retail trade in alcohol, retail trade in consumer goods
Sweden	Construction, Transport, Healthcare, Waste, Telecommunications
EU	Automotive industry, Financial sector, Transport, Food, Computer and electronics industry
Germany	Rails, Coffee, liquid Gas, Beer, Ophthalmic optics
France	Telecommunications, Distributions, Transport, Healthcare, Services/Energy
Portugal	Transport, pharmaceutical, Banking and financial markets, facility services, Energy
Mauritius	Medical Insurance, Chicken Poultry, Medical Sector, Fertilizers, Beer Industry
United States	Financial Service, Automotive Parts, Real Estate Foreclosure Auctions, shipping and transportation, computer screens and memory
Netherlands	construction services, transport, food production, industrial manufacturing
India	Entertainment, pharmaceuticals, Transport, Public Procurement, Construction and Cement
Montenegro	Distribution of Newspapers, nonlife insurance services, footwear, port service and cargo handling services, public procurement of RTG Films and consumables-wet technology, radiographic films, X-ray developer. Fixed for X-ray recording

Stakeholders' Survey: Questionnaire for Enterprises
ICN Special Project for 2018: Cartel Enforcement and Competition

Section I: General Information

1. Name and address of the enterprise (Optional):
 2. Details of establishment/incorporation (Optional):
 3. Sector:
 - Entertainment (including Film, Television and Advertising)
 - Pharmaceuticals Distribution
 - Transport (excluding Railways but including Shipping, Ports, Aviation and Road Transport)
 - Construction / Cement
 - Agriculture / Agro-processing
 - Banking and Finance
 - Real Estate
 - Other (Please specify _____)
-

Section II: Awareness

1. Is your enterprise aware of the Competition Act, 2002 ("the Act")?
 - Yes
 - No
2. How did you become aware of the Act, please specify any of the following:
 - Advocacy programmes (conferences, workshop, etc.) conducted by the CCI
 - Other conference/ workshop
 - Party to a proceeding before the CCI
 - Print or other media

- Through interaction with a trade association
 - Other (Please specify_____)
3. Is your enterprise aware of the concept of 'cartels' under the Competition Act, 2002?
- Yes
 - No
4. If yes, which of the following, according to you, are in the form of a cartel? (You may tick more than one option)
- An agreement between competitors entered into for sharing the market
 - An agreement between competitors entered into for bid rigging/ collusive bidding
 - An agreement between competitors entered into for limiting or controlling production or supply
 - An agreement to fix prices or margins
 - Exchange of price, production, sales information with competitors through a trade association.
5. Is it illegal to attend a meeting with employees from other businesses where future prices, supply or production is discussed?
- Yes
 - No
 - Don't know
6. Are you aware that the lesser penalty provisions of the Act¹ allow for a reduction in penalties for enterprises who secretly admit to their participation in a cartel and provide information that helps the CCI investigation in detecting and establishing cartels?
- Yes
 - No
7. Are you aware that your enterprise can complain to the CCI if you are a victim of cartelization?
- Yes
 - No

¹ Section 46 of the Act empowers CCI to impose lesser penalty on producer, seller, distributor, trader or service provider who makes a full, true and vital disclosure in respect of an alleged cartel. For more details you may refer to Competition Act, 2002 and the Competition Commission of India (Lesser Penalty) Regulations, 2011, both available at www.cci.gov.in.

8. Are you aware that the CCI can conduct unannounced inspection on the premises of an enterprise as part of an investigation, and has the power to search and seize documents and record statements on oath during such an inspection?

Yes

No

Section III: Compliance

1. Does your enterprise have a competition compliance program in place?

Yes

No

Please answer the remaining questions in this section only if the answer to 1 is yes.

1. When did you adopt the compliance programme?

a. Please specify year (___)

2. Why did you adopt the compliance programme?

Party to proceedings before the CCI

Pursuant to CCI's enforcement actions in other cases

General awareness

Implementation of the global policies of the group

3. Which of the following measures are undertaken as a part of the compliance programme? You may tick more than one option.

Adoption of competition compliance programme

Adoption of any other compliance manual

Training (including e-learning) for relevant employees

Appointment of compliance officer

Competition audit/review of your policies, practices, contracts and association activities

Other (Please specify _____)

4. Are relevant employees given training on the Competition Act?

Yes

No

4a. If yes, which of the following levels are covered:

Senior Management

Mid-level management

Sales and marketing personnel

Others

Section IV: Policies/ Regulations

1. Does your organization come under a sectoral regulator?

Yes

No

2. Does your enterprise require licenses, permits or approvals by the Govt./Authority to operate?

Yes

No

2a. If yes, what is the rationale?

3. Are the prices in your sector regulated?

Yes

No

4. Do regulations require you to submit details of production, supply and dispatch to Govt./ Authority or any other body?

Yes

No

5. Do any enterprises in your sector get preferential terms on account of regulation/policy?
- Yes
- No

Section V: Past Investigations and Mid-Course Corrections

1. Has the CCI proceeded against your enterprise in the past as part of a cartel investigation under the Competition Act?
- Yes
- No

Please answer questions 2 to 5 only if the answer to 1 is yes. If the answer is no, please skip to question 6.

2. Were you aware of the Competition Act when your enterprise was first proceeded against under the Competition Act?
- Yes
- No
3. Did the CCI find your enterprise of being in contravention of the provisions of the Act?
- Yes
- No
4. Is there any pending appeal before any court or tribunal against a cartel decision of the CCI against your enterprise?
- Yes
- No
- Not applicable
5. Did your enterprise modify/discontinue any practices to comply with the provisions of the Competition Act during and after the course of the proceedings?
- Yes (Please specify _____)
- No

Please answer the following questions, regardless of whether your answer to 1 was yes or no.

6. Are you aware of other CCI cartel investigations in your sector?

Yes (Please specify _____)

No

7. Did CCI's intervention have an impact on business practices in your sector?

Yes

No

8. If yes, please elaborate.

Stakeholders' Survey: Questionnaire for Trade Associations
ICN Special Project for 2018: Cartel Enforcement and Competition
Questionnaire for Trade Associations

Section I: General Information

1. Name and address of the association (optional):
 2. Details of establishment/incorporation (optional):
 3. Organisational Structure:
 4. Membership base:
 5. Sector
 - Entertainment (including Film, Television and Advertising)
 - Pharmaceuticals Distribution
 - Transport (excluding Railways but including Shipping, Ports, Aviation and Road Transport)
 - Construction / Cement
 - Agriculture / Agro-processing
 - Banking and Finance
 - Real Estate
 - Other (Please specify _____)
 6. Please state the primary objectives of the Association
-
-
7. Please provide an illustrative list of activities pursued by your Association in the interest of Industry

Section II: Awareness

1. Is your Association aware of the Competition Act, 2002 (“the Act”)?
 - Yes
 - No

2. If yes, how did you become aware of the Act, please specify any of the following:
 - Advocacy programmes (conference, workshop, etc.) conducted by the CCI
 - Other conference/ workshop
 - Party to a proceeding before the CCI
 - Print or other media
 - Other (Please specify_____)

3. Is your Association aware of the concept of ‘cartels’ under the Competition Act, 2002?
 - Yes
 - No

4. If yes, which of the following, according to you, are in the form of a cartel? (You may tick more than one option)
 - An agreement between competitors entered into for sharing the market
 - An agreement between competitors entered into for bid rigging/ collusive bidding
 - An agreement between competitors entered into for limiting or controlling production or supply
 - An agreement to fix prices or margins
 - Exchange of price, production, sales information with competitors through the trade association.

5. If the association collects current/future prices and share this data with all members, will it amount to a breach of the Competition Act?
 - Yes
 - No
 - Don't know

6. Are you aware that your Association can complain to the CCI if your members are victims of cartelization?
- Yes
- No
7. Are you aware that the lesser penalty provisions of the Act allow for a reduction in penalties for enterprises who secretly admit to their participation in a cartel and provide information that helps the CCI in detecting and establishing cartel?
- Yes
- No
8. Are you aware that the CCI can conduct unannounced inspection on the association's premises as part of an investigation, and has the power to search and seize documents and record statements on oath during such inspection?
- Yes
- No

Section III: Compliance

1. Does your Association have a competition compliance program in place?
- Yes
- No

Please answer the remaining questions in this section only if the answer to 1 is yes.

2. When did you adopt the compliance programme?
- a. Please specify year (___)
3. Why did you adopt the compliance programme?
- Party to proceedings before the CCI
- Pursuant to CCI's enforcement actions in other cases
- General awareness

4. Which of the following measures are undertaken as a part of the compliance programme? You may tick more than one option.

- Reading out of competition law do's and don'ts before association meetings
- Adoption of any competition compliance manual
- Appointment of compliance officer
- Measures to prevent disclosure of competitively sensitive information (price, production, capacity, demand etc.) to or between individual association members
- Review and/or Modification in association rules/membership criteria/codes of conduct/bye laws in compliance with the Act
- Ensured that association meetings have agendas and minutes that accurately reflect attendance and discussions
- Discouraged private meetings between competitors under the pretext of association meetings
- Other (Please specify _____)

5. Are all members and relevant employees given training on the Competition Act?

- Yes
- No

5a. If yes, which of the following are trained

- Office Bearers
- Executive Committee Members
- Other Members
- All of the above

Section IV: Past Investigations and Mid-Course Corrections

1. Has the CCI proceeded against your Association in the past as part of a cartel investigation under the Competition Act?

- Yes
- No

Please answer questions 2 to 5 only if the answer to 1 is yes. If the answer is no, please skip to question 6.

2. Were you aware of the Competition Act when your Association was proceeded against under the Competition Act?

Yes

No

3. Did the CCI find your Association to be in contravention of the Act?

Yes

No

4. If yes, which of the following direction(s) were issued by the CCI for your Association to comply?

Cease and desist from anti-competitive conduct

Modifications of rules, regulations, byelaws etc.

Adoption of competition compliance manual

Organisation of competition compliance/awareness programmes

Disqualifications of office bearers

Direction to file an undertaking assuring compliance of the directions of CCI

Any other, please specify _____

5. Did your Association modify/discontinue any practices and/or amend rule, byelaws etc. to comply with the provisions of the Act during or after the course of the proceeding?

Yes (Please specify _____)

No

Please answer the following questions, regardless of whether your answer to 1 was yes or no.

6. Are you aware of other CCI cartel investigations in your sector?

Yes (Please specify _____)

No

7. Did CCI's intervention have an impact on business practices in your sector?

Yes

No

8. If yes, please elaborate.

**Stakeholders' Survey: Questionnaire for Government Ministries/Departments
ICN Special Project for 2018: Cartel Enforcement and Competition**

Section I: General Information

1. Name and address of the Ministry/Department:
 2. Sector :
 3. Names of Departments/Divisions within your Ministry/Department:
-

Section II - Awareness

1. Is your Ministry/Department aware of the Competition Act, 2002 ("the Act")?
 Yes
 No
2. If yes, how did you become aware of the Act, please specify any of the following:
 Advocacy programmes (conference, workshop, etc.) conducted by the CCI
 Other conference/ workshop
 Party to a proceeding before the CCI
 Print or other media
 Other (Please specify_____)
3. Are you aware of the concept of 'cartels' under the Competition Act, 2002?
 Yes
 No
4. If yes, which of the following, according to you, are in the form of a cartel? (You may tick more than one option)
 An agreement between competitors entered into for sharing the market
 An agreement between competitors entered into for bid rigging/ collusive bidding

- An agreement between competitors entered into for limiting or controlling production or supply
- An agreement to fix prices or margins
- Exchange of price, production, sales information with competitors through the trade association.

Section III - Public Procurement

1. Do you currently, or intend to in the future, procure any products / services through competitive bidding?
 - Yes
 - No
2. Are you aware of the Manual for Procurement of Goods 2017 published by the Ministry of Finance?
 - Yes
 - No
- 2a. If yes, are you aware of Appendix 2.5 of the Manual for Procurement of Goods 2017 relating to the Competition Act, 2002 (Act)?
 - Yes
 - No
3. Are you aware that the Act prohibits collusion in bidding?
 - Yes
 - No
4. Have you ever initiated action against enterprises which were colluding in your tendering processes?
 - Yes
 - No
5. If yes, what action was initiated?
 - Internal investigation and measures (including but not limited to blacklisting under the Integrity Pact)
 - Reference / Information to CCI for investigation
 - Other (Please specify _____)

6. Has the Competition Commission of India (“CCI”) in the past examined allegations of anti-competitive agreements in public procurement affecting your Ministry/ Department?
- Yes
- No
7. If yes, have you observed any perceptible impact of the intervention of CCI on your procurement processes?
- Yes
- No
8. Has your ministry / department undertaken any of the following measures in order to promote competition and facilitate competitive bidding? Please tick as many as applicable
- Competition audit of tender/eligibility conditions
- Measures to spread awareness of the provisions of the Competition Act, 2002 amongst procurement officials
- Review of policies relating to public procurement from competition perspective
- Widening of your supplier-base
- Withdrawal of preferential procurement policies
- Scrutiny of tender documents/statements of bidders etc. to identify warning signs of coordination amongst bidders
- Shift to electronic tendering
- Maintenance of bidding data to help monitor bidding patterns and detect bid rigging
- Other (Please specify _____)
- None of the above

Section IV- Regulation/ Policies

1. Do you control entry and exit into the market (by way of licensing norms)?
- Yes
- No

1a. If yes, what is the rationale?

2. Do you set or regulate the prices which may be charged by any enterprise which is operating in your sector?

Yes

No

2a. If yes, what is the rationale?

3. Do you set output norms for any enterprise which is operating in your sector?

Yes

No

3a. If yes, what is the rationale?

4. Do you require enterprises in your sector to submit details of production, supply and dispatch to the government/authority or to a third party?

Yes

No

4a. If yes, what is the rationale?

5. In your sector, do any enterprises, public (such as PSUs) or otherwise, get preferential terms?

Yes

No

6. Have you undertaken any policy initiatives or regulatory reforms in the last three years to address any structural rigidities and/or to promote competition in your industry/sector? An indicative list is provided below. Please tick the appropriate option(s). Please add any other initiative, if applicable.

- Eased entry norms (e.g., revision in FDI norms, removal/modification of license/permit/authorisation requirements, reduction in number of approvals etc.)
- Levelled playing fields for private/public, foreign/domestic firms (e.g. withdrawal of preferential policies/rules, exclusive rights etc.)
- Promoted use of technology (e.g. digitisation, e-commerce, support for technological upgradation)
- Removed geographical barriers to trade
- Reviewed policies/legislations/regulations/rules to facilitate transition to market-determined systems [e.g. withdrawal/modification of price control/regulation, autonomy to enterprises under your Ministry/Department to frame tariffs, user charges etc.]
- Plugged regulatory gaps or modified regulatory architecture (e.g. setting up or dismantling of regulatory bodies)
- Initiated steps to increase information available to consumers
- Other (Please specify _____)

6a. If yes, give details.



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