GLOBAL LEGAL INSIGHTS

Cartels

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India

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Overview of the law and enforcement regime relating to cartels

The Competition Act of 2002 ("**Act**"), brought into force on 20 May 2009, is aimed at preventing anti-competitive practices, promoting and sustaining market competition, protecting the interests of consumers, and ensuring freedom of trade carried on by market participants in India. It is also the primary legislation regulating cartels in India.

The Competition Commission of India ("**CCI**") is the statutory regulator, established under the Act, and entrusted with the responsibility of curbing anti-competitive practices in India. Apart from several other rules and regulations, the CCI (General) Regulations, 2009 ("**CCI General Regulations**") detail the procedures laid down by the CCI in terms of powers conferred by Section 64 of the Act.

Under Section 19 of the Act, the CCI is empowered to initiate investigations into all anti-competitive agreements and conducts, either *suo moto* or upon the receipt of information or reference (by Central or state government or statutory authority), or through the leniency programme (referred to as the "Lesser Penalty" regime under the Act). As per the Act, all anti-competitive agreements, especially cartels, are prohibited and void.

Section 2(c) of the Act defines the term "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*".

However, the proposed Competition Amendment Bill, 2020 ("**Competition Bill 2020**"), which is yet to enter into force, intends to widen the scope of "cartel" under Section 2 (c) to include buyer cartels as well. This amendment to include buyer cartels has been proposed in light of the developments and lacunas in cartel enforcement.

In terms of cartel enforcement, Section of 3 of the Act not only prohibits anti-competitive agreements between horizontal players, but also attaches a presumption of an appreciable adverse effect on competition ("**AAEC**") to such agreements. This presumption of AAEC under Section 3 is to be read in line with the factors stipulated under Section 19 (3) of the Act, i.e., *inter alia*: creation of barriers to new entrants in the market; driving existing competitors out of the market; and foreclosure of competition by hindering entry into the market. Upon satisfaction of the Section 19 (3) factors, the CCI may initiate an action against the parties in the manner stipulated under Section 26 of the Act and impose appropriate penalties under Section 27.

Upon arriving at a *prima facie* opinion against the anti-competitive conduct or practices of the parties, the CCI passes an administrative order under Section 26(1) of the Act, ordering the Director General's office ("**DG**") to conduct an investigation into such alleged practices/

conduct. As general practice, the *prima facie* orders passed by the CCI, especially relating to investigations into anti-competitive agreements, are not available in the public domain, i.e., not published by the CCI on its own website. The CCI alone publishes *prima facie* orders relating to investigations into abuse of dominance. Ironically, the newspapers generally cover and disclose investigations into anti-competitive agreements, even when the details are not officially made available to the public. The occurrence of news reports covering such (confidential) orders (in other words, when such orders are leaked) has been raised before the High Courts in various cases and is under adjudication. The CCI has stated that the orders were not leaked by them and therefore they are not obligated to investigate the same. The CCI's power of reviewing and recalling its *prima facie* orders is also subject to challenge before the Supreme Court of India.

The CCI has powers to pass interim orders under Section 33 of the Act.

As part of the investigation process, the DG does not have *suo moto* powers and can only act on the direction of the CCI. The CCI has powers to impose penalties for failure to comply with directions of the CCI and/or DG. The investigative process is dealt with separately hereunder.

After completing the investigation, the DG submits a report including all the material, evidence and documents, etc., collected during the investigation process. Subsequently, the CCI directs the circulation of the DG's report to all the parties, asking them to supply submissions in writing and fixing a date for a hearing. The parties may choose to examine and cross-examine the witnesses and their statements recorded by the DG, submit necessary applications, written submissions etc., and participate in a hearing before the CCI. Upon the conclusion of the final hearing, the CCI reserves its right to pass a final order. The nature of final orders passed by the CCI when finding violations of the provisions of the Act include the imposition of penalties and/or issuing appropriate directions against parties that are found to be cartelising and in violation of Section 3 of the Act. An order under Section 27 may also include a direction to cease and desist. Alternatively, in case the CCI is of the opinion that the DG report requires further investigation, the CCI is empowered to direct the same to be done. With respect to quantum of penalties, the Supreme Court of India has held that the penalties for cartelisation, in case of multi-product companies, must be levied on the basis of "relevant turnover", i.e., the turnover for which a multi-product company was investigated and was found in violation. It is also pertinent to note that not all information, etc. under Section 19 of the Act, filed before the CCI, may result in either a *prima facie* order or the imposition of a penalty and/or passing of orders establishing the contravention.

The CCI may either close a case by issuing an order under Section 26(2) of the Act if no *prima facie* case is made out, or pass an order according to Section 26(6) of the Act if it is convinced by the finding of the DG regarding the absence of any contravention.

The final orders passed by the CCI are appealable before the National Company Law Appellate Tribunal ("**NCLAT**") under Section 53B of the Act. An appeal against the orders of the NCLAT may be referred to the Supreme Court within a period of 60 days under Section 53T of the Act.

To date, there are several pending proceedings before various High Courts in India as well as the Supreme Court of India, challenging the arbitrariness of the orders passed by the CCI. The issues pending consideration range from the imposition of individual penalties under Section 48 of the Act to the degree of discretion enjoyed by the CCI while granting confidentiality, etc.

Furthermore, for investigations initiated on the basis of leniency applications, the procedure is provided for under the Competition Commission of India (Lesser Penalty) Regulations, 2009 ("**Leniency Regulations**"). Leniency applications may be filed by a party volunteering to provide vital information regarding the existence of a cartel. Such leniency applications are incentivised with lesser penalties if the leniency applicant is making a "full, true and vital" disclosure and is cooperating with the CCI during the investigations and proceedings.

Overview of investigative powers in India

Section 41 of the Act empowers the DG to carry out investigations in line with the directions of the CCI. The procedure to be adopted by the DG during an investigation is stipulated in Regulation 20 of the CCI General Regulations. In terms of Section 41(2) of the Act, the DG has the power to enforce and summon any person, examine him under oath, requiring discovery and production of documents, and receive evidence of affidavit.

Further, Section 41(3) of the Act also empowers the DG to conduct dawn raids after obtaining orders from the Chief Metropolitan Magistrate ("**CMM**"). Interestingly, under the Act, the power to conduct dawn raids is not automatically granted to the DG. The DG must first showcase and establish the need for a dawn raid before the CMM and then obtain a written order to do so. The scope of the dawn raid shall be governed by the order/warrant for the dawn raid as may be issued by the CMM. Although the CCI General Regulations mandate that the DG submit its report no later than 60 days from the date of receipt of directions from the CCI; however, the DG, upon making an application supported by "*sufficient reasons*", may seek an extension of the "reasonable" period from the CCI to submit its report. If the report of the DG contains "confidential" information, then the DG is mandated to submit the DG report in two parts.

In terms of Regulation 35 of the CCI General Regulations, the DG has also been granted the power to grant confidentiality to the data/documents on its own motion or when requested by the parties, based on the following: the extent to which the information is known to outside public; the extent to which the information is known to the employees, suppliers, etc.; the measures taken by the party to guard the secrecy of the information; and the ease or difficulty with which the information could be acquired by others.

Regulation 41 of the CCI General Regulations lays down the procedure for the taking of evidence by the DG as well as cross-examination of persons giving evidence (by parties) before the DG as well as the CCI. Furthermore, Regulation 43 of the CCI General Regulations provides that additional evidence (if within the knowledge and possession, but not disclosed/produced before the DG during the investigation) may be adduced before the CCI only if so permitted by the CCI.

The parties to an investigation before the CCI and the DG may seek legal assistance and representation through an advocate/authorised legal representative, subject to the provisions of Section 35 of the Act read with Regulations 46 and 46A of the General Regulations.

Overview of cartel enforcement activity during the last 12 months

During the last 12 months, the CCI, in imposing penalties on contravening parties, has taken note of the ongoing pandemic and decided not to impose penalties. In contrast, this has also been the year where the CCI has imposed one of its heftiest penalties so far, in a cartel investigation.

When no penalty is imposed, the likelihood of appeal is less. Accordingly, non-imposition of a penalty by the CCI could also be to ensure a higher rate of finalisation *qua* the CCI's final orders.

Most of the cases of cartel enforcement mentioned below pertain to the Lesser Penalty regime where all or most of the parties sought leniency and disclosed the nature of the cartel to the DG and the CCI. In order to avoid repetition, cases pertaining to leniency shall not be repeated under the relevant section.

The CCI, while deciding on the alleged cartelisation among beer manufacturers in *In re: Alleged anti-competitive conduct in the Beer Market in India*, imposed a cumulative penalty of approximately INR 8.73 billion on United Breweries Limited ("**UBL**"), Carlsberg India Private Limited and other parties (including individuals). SABMiller India Limited (now renamed Anheuser Busch InBev India Ltd.) was the first Lesser Penalty applicant, and was therefore granted a 100% reduction in the penalty; UBL was the second Lesser Penalty applicant and was granted 50% reduction in the penalty; whereas Carlsberg India Private Limited was the third Lesser Penalty applicant and was granted a 20% reduction in the penalty. The beer manufacturers were guilty of operating multiple cartels in relation to the sale and supply of beer in 10 states and union territories across India, as well as exchanging commercially sensitive information.

The CCI passed its final order in the case of *Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to the Original Equipment Manufacturers* in early 2022. Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines Ltd. and Nissan Motor Car Carrier Company being the first, second and third Lesser Penalty applicants, respectively, were granted 100%, 50% and 30% reductions in their penalties.

In *In re: Anti-competitive conduct in the paper manufacturing industry*, the CCI found the parties to be in contravention of Section 3 read with Section 3(3)(a) of the Act. The roles played by opposite parties in cartelising to fix prices of writing and printing paper remained unrebutted. Interestingly, this case was initiated based on a note received from the DG, which stated that during an ongoing investigation the DG had found the paper manufacturers to be manipulating prices through concerted action under the umbrella of a trade association. Despite clear and explicit evidence of cartelisation among the parties, the CCI did not impose a monetary penalty on account of the impact of COVID-19. However, a miniscule fraction of the penalty was imposed on the trade association under which the parties functioned.

In *Eastern Railway, Kolkata v. M/s Chandra Brothers and others*, the CCI found the opposing parties guilty of cartelisation in the supply of axle bearings and also of bid rigging, but relied on the *Composite brake blocks* case to refrain from imposing penalties. The CCI in this matter took cognisance of the prevailing market conditions and the fact that the opposing parties, all Micro Small and Medium Enterprises ("**MSMEs**"), were already under stress due to the pandemic. The CCI also noted that the opposing parties had fully cooperated during the course of the investigation. Due to the economically unviable impact of the imposition of penalties and the lack of awareness among the opposite parties, the CCI refrained from imposing any penalty and rather issued cease and desist orders.

Similar to the decision of the CCI in *Eastern Railways* (*supra*), the CCI in *Food Corporation of India v. Shivalik Agro Poly Products Ltd* ("***FCI case***") and in *In re: Rizwanul Haq Khan v. Mersen (India) Private* ("***Rizwanul Haq case***") confirmed the existence of a cartel to rig the bids that were floated, but refrained from imposing any penalty due to the economic situation and the prevailing market conditions. The CCI held this against the backdrop of the factual matrix, where in the *Rizwanul Haq* case both the opposing parties were Lesser Penalty applicants, and in the FCI case four out of six opposing parties were Lesser Penalty applicants – yet, the CCI deemed it appropriate not to impose monetary penalties on any of the opposing parties.

It is to be noted that there no guidelines for imposition of penalties by the CCI, including in cases of Lesser Penalty applicants; therefore, the discretion of the CCI is vast.

Key issues in relation to enforcement policy

Technology and competition law

In light of rapid technological advancement and the role played by such technology in furthering the anti-competitive conduct of parties, it is imperative that the Act and the allied Regulations are amended to effectively tackle the issues arising during investigations. Implementation/adoption of best practices around the globe to deal with investigations and cases is a must. As routine practice, the DG (during investigations) seeks email dumps dating back several years (of parties under investigation). The issue of "fishing and roving" investigations aside, both the DG and the CCI ought to rely on more efficient means of seeking information and data from parties under investigation.

Cross-border enforcement of competition laws

Please refer to the section on "*Cross-border issues*" below.

Jurisdictional challenges to the CCI

In the past, the CCI has faced several jurisdictional challenges. In one such ruling of the High Court of Delhi, it was argued that the CCI lacks the jurisdiction to entertain any complaints in relation to the exercise of patent rights as the same is governed under the Patents Act [*Monsanto Holdings Pvt. Ltd. v. CCI*]. The High Court of Delhi rejected the arguments advanced by Monsanto and upheld the jurisdiction of the CCI by distinguishing the standard established by the Supreme Court of India in *CCI v. Bharti Airtel Ltd*., which clarified the role of the CCI as opposed to other sectoral regulators and statutes.

Further, the subject matter jurisdiction of the CCI to direct investigations against officers of a company under Section 48 of the Act and simultaneous imposition of penalties against such officers on the basis of their personal incomes was challenged (as being *ultra vires*) in *Tranter India Pvt Ltd. & Ors v. CCI & Ors*, which is pending adjudication before the High Court of Delhi.

The restrictions on the right of representation and counsel before the CCI and the DG (as provided under Regulations 46 and 46A of the General Regulations) has also been challenged before the High Court of Delhi. Regulations 46 and 46A, which were brought into effect by way of delegated legislation, empowers the CCI to debar lawyers, which has since been established by the Supreme Court of India to be the sole jurisdiction of the Bar Council of India.

In *Sumitomo Chemical India Ltd v. CCI*, the imposition of interest on the delayed payment of a penalty under the CCI (Manner of Recovery of Monetary Penalty) Regulations, 2009 has been challenged, before the High Court of Delhi, for being *ultra vires* and contrary to the provisions of the Act.

The issue of "lack of jurisdictional threshold" and the interpretation of Section 3 are also under review before the Supreme Court of India in *Cadila Healthcare Ltd. & Ors v. CCI*. In *Cadila Healthcare* (*supra*) it is argued that the CCI is mandated to pass an order directing an investigation against parties under Section 26(1) of the Act, and the Act does not envisage that the CCI may delegate the power and responsibility for formation of an order under Section 26(1) of the Act to the DG. The Supreme Court of India will also examine whether an initiation of an investigation based on fabricated/false documents and statements is tenable under the law and whether the CCI has the power to recall its own orders.

Key issues in relation to investigation and decision-making procedures

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

Powers of the DG

The DG acts as a separate investigative wing of the CCI. Section 41 read with Section 36 of the Act provides the DG with the powers of a civil court under the Code of Civil Procedure, 1908, with respect to restricted matters like summoning and enforcing attendance of persons and examining under oath, requiring discovery and production of documents, receiving evidence on affidavit, issuing commissions for examination of witnesses or documents, and requisitioning public records.

The investigative methods exercised by the DG continue to face criticism on account of their being vague, arbitrary and resulting in the abuse of power. In several cases, different High Courts have opined on the limitations and scope of the powers of the DG, relating to extensive and exhaustive information requests (even beyond the scope of investigation), roving and fishing investigations, coercion during the recording of statements, lack of transparency as an investigative arm, confirmation bias (in several cases), non-compliance with due process and principles of natural justice, among others. These are the subject of several cases sub-judice before different High Courts and the Supreme Court of India and would ultimately demarcate the duties and powers of the DG.

Lack of clarity on imposition of penalties

Although, the CCI has been encouraging applicants to seek protection under the Leniency Regulations, the CCI's trend in imposing monetary penalties (including under the "Lesser Penalty" regime) has been irregular and arbitrary. The CCI in a recently held cartel working group under NICE stated that "*we are making use of the lesser penalty provisions to encourage enterprises to cooperate in uncovering the cartels*".

The cases detailed under "*Overview of cartel enforcement activity during the last 12 months*" (above) clarify that the CCI has chosen not to impose penalties despite a clear finding of the existence of cartels among parties (even when there were "leniency"/"Lesser Penalty" applicants, citing market conditions on account of COVID-19 and the state of the MSME sector in general. However, in a few other cases (e.g., the *Beer Market* case (*supra*)), instituted based on an application under the Leniency Regulations, the CCI imposed a penalty of INR 8.7 billion on the parties. The CCI has previously imposed much more severe and harsh penalties as in the *Cement Cartel* case (the CCI imposed a penalty of INR 67 billion, i.e., around USD 1 billion).

It is pertinent to note that in the *Excel Crop Care* case, the Supreme Court of India had categorically stated that the CCI should consider aggravating and mitigating factors while imposing the penalty. It also suggested that the CCI should come up with penalty guidelines to provide clarity to all the opposing parties. However, the CCI has still not issued any penalty guidelines.

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

Leniency/amnesty regime

Section 46 provides the leniency programme of the CCI and is regulated by the CCI's Lesser Penalty Regulations. The "Lesser Penalty" regime applies only in cases of Section 3, and to applicants that undertake full (complete), true and vital disclosures. The Leniency

Regulations set out the requirements for qualification of applicants, the procedure to be followed by Lesser Penalty applicants, and the benefits available.

Under the Leniency Regulations, applicants are afforded reduced penalties, up to a 100% waiver of the penalty, especially if such disclosure enables the *prima facie* opinion of the CCI. Subsequent applicants can be granted a penalty reduction of up to 50% and so on.

See "*Overview of cartel enforcement activity during the last 12 months*" (above) for details of cases pertaining to the "Lesser Penalty" regime.

Further, the procedures adopted by the CCI and the DG in leniency cases are sub-judice before various courts in India. In a recent decision in *CCI & Anr v. Forech India Pvt Ltd*, the Supreme Court of India refused to entertain the CCI's appeal with respect to resiling from the consent given before the High Court of Delhi to provide all non-confidential documents and orders granting confidentiality (after redacting confidential portions) to Forech in a leniency matter. In effect, the CCI, in accordance with its consent given to High Court of Delhi, was required to grant all non-confidential documents and orders granting confidentiality (after redacting confidential portions) to Forech.

As general practice in leniency matters, if a party seeks inspection of public records before the CCI under Regulation 37 of the CCI General Regulations, the CCI declines the request for inspection, stating that the entire file is confidential. While this arbitrary conduct of the CCI was sub-judice before courts in India, the CCI introduced Regulation 6A to the Leniency Regulations to legalise their non-granting of inspections to parties (especially in leniency cases). However, this has led to investigations wherein notices were issued and parties were directed to furnish data, information, evidence and email dumps without being told about the nature of investigation or the allegations under investigation.

In a writ petition filed by *Hindustan Rubbers Silvasa*, before the High Court of Delhi, the validity of the CCI order refusing to grant inspection of public files has been challenged. Further, the nature of the DG notice seeking exhaustive information/data including dumps of all personal email accounts has been challenged for being excessive and amounting to a roving and fishing investigation. Additionally, specific direction is sought from the High Court with respect to permission of legal representation before the DG and during the recording of statements.

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

It is likely that the CCI may receive more leniency applications, but it is important to settle the procedural flaws so as to avoid any undue coercion/harassment of other opposing parties. The CCI and DG ought to steer clear of "confirmation bias", and ensure a balance between the rights of parties to defend themselves fairly. The Constitution of India grants each and every party a right of defence, which ought not to be compromised, in any manner, especially not by the regulator or an arm of the regulator.

Administrative settlement of cases

There are no current provisions in the Act for settlement of cases for anti-competitive conduct.

Third-party complaints

The Act does not prescribe any strict *locus standi* requirement on who may approach the CCI by way of filing an information under the Act. The earlier order of the CCI, in *Shri Saurabh Tripathy v. Great Eastern Energy Corporation Ltd*., held that "*the Act does not necessitate any person approaching the CCI to be personally aggrieved by the alleged conduct*".

Later, the Supreme Court of India, in *Samir Agarwal v. CCI and Ors.*, while concurring with the decision of the CCI in this matter, categorically held that "*...information may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings in rem which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act*".

Therefore, effectively, any person/third party may file information before the CCI.

Civil penalties and sanctions

The CCI imposes civil penalties on parties for: contravening the provisions of the Act; failing to provide due assistance or information to the CCI; or failing to comply with the order/directions of the CCI or the DG, among others.

As prescribed in Section 27 (b) of the Act, the penalty imposed in case of multi-product companies held guilty of any anti-competitive conduct/practices cannot be more than 10% of the average turnover (clarified by the Supreme Court as "relevant turnover" in *Excel Crop Care Limited v. CCI*) of the contravening enterprise for the three preceding financial years.

In a recent order passed by the CCI in the *Beer Market* case (*supra*), a fine of INR 7.51 billion was imposed on UBL alone and further penalties were imposed on other individuals and beer manufacturers. UBL approached the NCLAT regarding the penalty imposed by the CCI, wherein the NCLAT admitted the said appeal and stayed payment of the penalty, subject to payment of a deposit of 10% of the penalty imposed (*United Breweries Limited v. CCI* and *Ors.*). UBL has argued that filing of the leniency petition before the CCI does not amount to deemed admission of participation in cartel activity.

In case of cartels, the CCI need not limit the penalty to 10% of the relevant turnover for the preceding three years. The CCI is empowered to impose penalties of up to three times the profit of the contravening enterprise or 10% of the turnover of the contravening enterprise for *each year* of the continuance of the cartel, whichever may be greater.

<u>Penalties for individuals</u>

The CCI may impose penalties on the individual income of officers of a company for violation of the provisions of the Act by such company under Section 48 read with Section 27 of the Act. Similar to the penalty imposed on contravening entities, i.e., up to 10% of the relevant turnover, the CCI, under Section 48 read with Section 27 of the Act, has been imposing penalties on the individuals in charge of such entities up to 10% of their average income for the three preceding financial years.

However, the CCI's interpretation of Section 48 and the power to impose penalties on officers of the company has been challenged (for being *ultra vires* of the Act) and is pending adjudication before the High Court of Delhi in the *Tranter* case and before the Supreme Court of India in the *Zydus Cadila* case.

Failure to pay the penalty imposed under Section 27 of the Act may result in such individuals being imprisoned for up to three years according to Section 42(3) of the Act.

Right of appeal against civil liability and penalties

There are statutory appeals provided against final orders of the CCI and orders of the NCLAT. The final orders passed by the CCI are appealable before the NCLAT under Section 53(A) of the Act, and any order passed by the NCLAT is appealable before the Supreme Court of India under Section 53(T) of the Act. However, there is a limitation period prescribed for each of the appeals – those before the NCLAT as well as before the Supreme Court of India. The Supreme Court of India, while taking *suo moto* cognisance of the difficulty amongst litigants and litigators to comply with limitation periods during the COVID-19 pandemic, decided to pass orders applying a moratorium on such limitations periods and in effect extended the period of limitation, which is applicable to all laws and all courts across India. The first such order was passed in March 2020, and the Supreme Court since then has continued to pass appropriate orders renewing the said order whenever deemed necessary. The last such order was passed in January 2022 when India was facing its third wave of COVID-19.

In terms of Section 53(O) of the Act, the proceedings before the NCLAT are judicial and the NCLAT may exercise all powers vested with a civil court under the Code of Civil Procedure, 1908.

Criminal sanctions

Currently, the Act does not stipulate a provision for criminal penalties. Even the question of individual penalties for the violation of Sections 3 and 4 of the Act is currently pending adjudication before the High Court of Delhi in *Tranter*. However, there are provisions for imprisonment as well as fines in respect of further contravention by the violators under Section 42 of the Act. The criminal sanctions against individuals, under Section 42 of the Act, are triggered only in the event that an entity does not ensure compliance with the order or direction passed by the CCI (including non-payment of penalties under Section 27 of the Act). Such criminal sanctions may then either be imprisonment, which may extend to three years, or a fine of up to INR 250 million, or both.

A similar provision of criminal sanctions for non-compliance with an order passed by the NCLAT is provided under Section 53Q of the Act, which may lead to imprisonment of up to three years or a fine of up to INR 10 million, or both.

Under both the provisions, i.e., Sections 42 and 53Q, the CMM may exercise discretion to levy the extent of imprisonment and/or fine, and not the CCI. However, the CMM does not have the authority to take cognisance of the offence *suo moto* – it may only be undertaken upon the filing of a complaint by an authorised officer of the CCI or the NCLAT, as the case may be.

Cooperation with other antitrust agencies

Section 18 of the Act permits the CCI to enter into arrangements (upon prior approval of the Central Government) with agencies from foreign countries. The CCI has continuously collaborated with various organisations around the world for advancement in competition law and its effective implementation.

In 2020, the CCI signed on for the extension of the BRICS Memorandum of Understanding ("**MoU**") on cooperation in the field of competition law and policy. Furthermore, in 2020 the CCI also participated in the "*Virtual Meeting of the Heads of the BRICS Competition Authorities*" and supported the joint statement by the BRICS Competition Authorities on consolidating efforts to combat the negative economic consequences of COVID-19, as well as the initiative of FAS Russia to include the issue of combatting cross-border cartels in the work of the intergovernmental group of experts on competition law and policy of the UNCTAD.

In 2021, the CCI signed a memorandum of cooperation with the Japan Fair Trade Commission to strengthen cooperation in the various areas of competition law and policy through exchanging information on developments in technical and enforcement cooperation and experience sharing.

In the latter half of 2021, the Prime Minister of India, Mr. Narendra Modi, approved the signing of an MoU between the Competition Commission of Mauritius and the CCI to strengthen cooperation in competition law and policy through the exchange of information.

Cross-border issues

Section 32 of the Act provides for the extra-territorial implementation of the provisions of the Act to protect Indian interests. By virtue of Section 32, the CCI is empowered to take cognisance of anti-competitive practices or conduct outside India, if the same is likely to cause an AAEC on the Indian market.

<u>Cross-jurisdiction collaboration in enforcement procedures</u>

Section 32 states that provisions of the Act (such as Sections 19, 20, 26, 29 and 30 of the Act) will be followed for the purposes of conducting investigations outside of India if there is an effect or likely effect on the relevant market in India. For a successful implementation of investigations involving invocation of Section 32, the CCI may need the support of regulators/courts of India as well as other jurisdictions. It becomes all the more relevant in cases wherein the impact of anti-competitive conduct in one or more nations is felt in other jurisdictions. It is essential that all antitrust authorities coordinate in execution and enforcement.

<u>Sharing of evidence</u>

In matters involving multinational entities, sharing of evidence between cross-border antitrust regulators could provide great assistance in making and strengthening claims of anti-competitive conduct.

<u>Enforcement</u>

While the CCI has the authority to direct or give orders pertaining to international entities, the means of enforcing the same are not as robust.

Reform proposals

The Competition Bill 2020 was proposed on the basis of the recommendations made by the Competition Law Review Committee in its report, suggesting substantial amendments to the extant Act, especially in regard to cartel enforcements. The Competition Bill 2020, however, remains to be implemented as yet.

Furthermore, the CCI, in April 2021, invited public comments and consultation on the proposed amendment to the prevailing confidentiality regime under Regulation 35 of the General Regulations. The proposed amendment seeks to introduce the concept of confidentiality rings and makes the granting of confidentiality a function of the discretion exercised by the CCI.

Under the present framework, the CCI *shall* maintain confidentiality over an informant's identity; however, the same has been proposed to be amended to "*may*", among other things. The CCI has completed the public consultation and discussion process in this regard and is in receipt of the comments and responses of all stakeholders. The revised amendment is yet to be floated by the CCI. It will be interesting to see the revised amendments to Regulation 35 (Confidentiality), including the adoption of "confidentiality rings" as part of the provisions of the law.

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Certain matters on which she has worked were nominated for the *Global Competition Review Awards* in 2013 and 2014. She has represented clients in several high-stakes matters, including the *Builders Association of India* (*Cement Cartel*), *Excel Crop Care Ltd.* (*Aluminium Phosphide* cartel matter, obtaining the judgment on "relevant turnover"), *Delhi Development Authority* (abuse of dominance), *Schott Glass* (abuse of dominance), *Cadila Healthcare Ltd.*, *RMG Polyvinyl Ltd.*, and *Forech Ltd.* She has advised on merger control provisions in several transactions including ONGC-HPCL, PFC-REC and Jabil-Ericsson. Anu is currently involved in the first private damage claim application that has been filed post-final order of the Supreme Court and is acting as a lead counsel for defendants.

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Rahul Goel is a partner at AnantLaw. His practice focuses on competition law and technology, media & telecommunications law. He also advises on international trade and WTO law. Rahul has over 19 years of professional experience in advising, assisting and representing clients on a wide variety of legal, regulatory and policy issues. He regularly appears before the Supreme Court of India, various High Courts, the NCLAT and the CCI.

Rahul has acted as lead counsel in a number of high-stakes matters and he has been involved in many landmark matters in competition law, including the Supreme Court's judgment on the imposition of a penalty on the basis of "relevant turnover".

Rahul has the distinction of being nominated at the GCR Awards (Washington, D.C.) for matters handled by him in 2013 (for representing the Builders Association of India in the *Cement Cartel*) and 2014 (for obtaining an order on imposition of penalty on "relevant turnover" in the *Excel Crop Care* matter).

Rahul holds an LL.M. with a focus on competition and TMT law from the University of Essex. He is a member of the Supreme Court Bar Association and also a Fellow of the UK-based Royal Society of Arts.

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