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Cartels

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AZB & Partners competition team has the expertise to provide end-to-end support in behavioural cases, beginning with assistance at the time of ‘dawn raids’, to investigations by the DG, followed by oral and written submissions before the CCI, and finally in appeal before the National Company Law Appellate Tribunal, Delhi High Court and/or the Supreme Court. The team is comprised of a mix of seasoned litigators as well as competition law experts with formal qualifications in multiple jurisdictions and across law and economics, allowing the team to offer holistic, sound and practical advice on substance and strategy. The team also regularly carries out detailed competition compliance reviews and programmes for its key clients in a broad range of sectors, such as automobiles, consumer goods, chemicals, fertilisers and insurance and also routinely appears before the NCLAT and represent clients in competition related cases before various High Courts under their writ jurisdiction. The team carries out comprehensive competition compliance review exercises and audits, by devising document search terms, reviewing responsive documents, interviewing relevant business personnel, etc to ascertain the potential exposure to antitrust rules.

Authors

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1. Basic Legal Framework

1.1 Statutory Basis/Bases for Challenging Cartel Behaviour
The [Indian] Competition Act, 2002 (CA02) is the primary legislation on competition in India. A cartel can be challenged under two related provisions of the CA02. First, Section 3(1) of the CA02 restricts enterprises from entering into agreements that cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India. Agreements that cause an AAEC are declared void under Section 3(2) of the CA02. The second relevant provision under which cartels can be challenged is Section 3(3) of the CA02, which seeks to prohibit cartel agreements on the basis of the ‘presumption’ that they indeed cause an AAEC. Accordingly, once the Indian antitrust regulator, the Competition Commission of India (CCI), has established the existence of a cartel agreement, it need not engage in an assessment of whether the cartel indeed causes an AAEC and can directly proceed to prohibit the agreement. The parties to the cartel have the right to adduce counter-evidence to rebut the presumption of AAEC associated with cartels. In practice, rebuttal of this presumption is quite onerous and rarely successful.

1.2 Public Enforcement Agencies
The CCI is the statutory authority in charge of enforcing and administering competition law in India. The CCI is equipped to investigate anti-competitive practices and is aided by its independent investigative arm, the Office of the Director General (DG), in conducting inquiries into contraventions of any of the provisions of the CA02. The CCI can direct the DG to investigate into possible cartels (and also other forms of potentially anti-competitive conduct) either on its own motion or based on a reference from the Central or a State Government or a statutory authority. Similarly, any person, consumer or their association/trade association can file a complaint (referred to as ‘information’) which may form the basis for initiation of an inquiry.

Based on the evidence made available, if the CCI establishes the existence of a prima facie case, it directs the DG to carry out an in-depth investigation and submit a detailed report with the findings. If the CCI is not satisfied with the DG’s report, it may require the DG to conduct further investigation. Thereafter, the CCI typically invites the alleged cartelists’ views on the DG's report and offers them an opportunity for oral hearing. Finally, if the CCI finds that a cartel exists or an agreement is anti-competitive in nature, it may impose penalties and pass any other orders it deems appropriate. On the other hand, in the absence of a prima facie case being made out, the CCI will proceed to close the matter and communicate its decision to the informant.

Decisions of the CCI may be appealed to the National Company Law Appellate Tribunal (NCLAT). With effect from 26 May 2017, the former competition appellate authority, the Competition Appellate Tribunal (COMPAT), has been dissolved and replaced by the NCLAT, which is the new appellate authority for competition law related cases, among others.

Decisions of the NCLAT may be further appealed to the Supreme Court of India (SC). However, such appeals to the SC will only be entertained on a point of law and the SC will not re-examine the facts which have already been decided by the NCLAT. In parallel, the Indian judicial system also affords an opportunity to parties to contest the CCI’s decisions before High Courts, in limited situations, for example when the CCI’s decision infringes parties’ fundamental rights enshrined in the Constitution of India.

1.3 Private Right of Action for Challenging Cartel Behaviour
The CA02 is designed to prohibit anti-competitive agreements and other types of conduct in general. While any person (including an enterprise, a statutory authority or the Government) can inform the CCI about any potential cartel arrangement, the CA02 does not empower them to pursue a private right of action. The information received by the CCI can form the basis for an inquiry into the alleged cartel; the informant cannot pursue the claim as a private right of action. However, upon a definite finding of infringement, any person aggrieved by the anti-competitive conduct, including cartels, can initiate proceedings for compensation of losses suffered due to such anti-competitive conduct.

1.4 Potential Liability
The CA02 only prescribes civil liability for anti-competitive practices, including cartels. The sanctions for engaging in cartels include monetary penalties and ‘cease-and-desist’ directions. The monetary penalty can be imposed on both the erring enterprise and the individual office bearers of the errant enterprises who are found responsible for the cartel conduct.

The monetary penalty for cartels can extend up to the higher of three times the relevant profit or 10% of the relevant total turnover of the errant enterprise for each year of the duration of the cartel. Alternatively, the monetary penalty can be up to 10% of the average relevant turnover for the last three financial years of the errant enterprise (usually computed from the date of the finding of infringement by the CCI).

1.5 Statutes Indirectly Taking Account of Alleged Cartel Behaviour
The CA02 is a self-contained statute empowering the CCI alone to examine cartels.

1.6 Definition of “Cartel Conduct”
The CA02 defines the term “cartel” to include an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or
As stated in 1.6 definition of “cartel conduct” from scrutiny under statutes or precedent, industries, sectors or other activities exempt other forms of anti-competitive conduct.

Amine anti-competitive agreements, including cartels and other anti-competitive agreements, came into force on 20 May 2009, there is no limitation on the CCI’s jurisdiction to examine and prohibit by Section 3 of the CA02, which contains the discipline on cartels and other anti-competitive agreements, came into effect on 20 May 2009. While there has been some debate on whether the provisions of the CA02 can be applied retroactively, Indian courts have clarified that for an agreement or conduct, the CCI engages in a preliminary examination to ascertain whether the materials presented before it warrant the initiation of an investigation, usually referred to as ‘formation of prima facie view.’ At this stage, while the CCI does not have any legal obligation, if it deems necessary, it may call upon the informant or the party against whom allegations are made for a ‘preliminary conference.’ Neither the informant nor the opposite party(ies) has the right to seek a ‘preliminary conference.’ Once the CCI has formed a prima facie view that a case fit for detailed investigation by its investigative arm – the DG – exists, it issues a formal order directing the DG to conduct an investigation. The DG usually starts the investigation process by sending probe notices seeking information from the relevant parties, followed by deposition of relevant personnel and, on occasions, search and seizure operations to gather relevant information.

1.10 Limits on the Exercise of Personal Jurisdiction Over Alleged Cartel Participants
The CCI’s jurisdiction to examine a conduct is tied entirely to the question of whether the conduct causes or is likely to cause an AAEC in India. Accordingly, if a conduct that takes place entirely outside India has the potential to cause an AAEC in India, the CCI can, as it routinely does, assert jurisdiction over such conduct. The CCI is also empowered to examine the conduct of individual office bearers responsible for the adoption of anti-competitive conduct by the enterprises they serve, whether they are located in India or outside India, so long as the conduct causes an AAEC in India.

1.11 Principles of Comity
For the purpose of discharging its duties and performing its functions, the CA02 has granted authority to the CCI to enter into any memorandum of understanding or arrangement with foreign agencies, with the prior approval of the Central Government. Thus far, the CCI has entered into cooperation agreements with competition authorities in jurisdictions such as the European Union, the United States, Canada, Brazil, South Africa, China, Russia and Australia. The co-operation agreements, however, do not provide for extensive co-operation between the CCI and its counterparts, especially on cartel enforcement. The co-operation at this stage is limited to exchange of ideas, best practices and non-confidential information.

2. Procedural Framework for Cartel Enforcement - Initial Steps

2.1 Initial Investigatory Steps
On receipt of information on potentially anti-competitive agreements or conduct, the CCI engages in a preliminary examination to ascertain whether the materials presented before it warrant the initiation of an investigation, usually referred to as ‘formation of prima facie view.’ At this stage, while the CCI does not have any legal obligation, if it deems necessary, it may call upon the informant or the party against whom allegations are made for a ‘preliminary conference.’ Neither the informant nor the opposite party(ies) has the right to seek a ‘preliminary conference.’ Once the CCI has formed a prima facie view that a case fit for detailed investigation by its investigative arm – the DG – exists, it issues a formal order directing the DG to conduct an investigation. The DG usually starts the investigation process by sending probe notices seeking information from the relevant parties, followed by deposition of relevant personnel and, on occasions, search and seizure operations to gather relevant information.

2.2 Dawn Raids or Surprise Visits
The DG enjoys wide powers in conducting unannounced search and seizure inspections, more commonly known as dawn raids. The DG has the power to conduct a dawn raid
after obtaining a warrant from the Chief Metropolitan Magistrate, New Delhi.

The DG has conducted two publicly reported search and seizure operations so far. The first of these dawn raids was on the offices of JCB India Ltd. (JCB) on 22 September 2014 in an abuse of dominance case. After the raid, JCB challenged the DG’s dawn raid in the Delhi High Court on the ground that the warrant did not permit the DG to seize JCB’s documents and only authorised a search. The Delhi High Court held that the DG had misused its dawn raid powers and went beyond the directions stipulated in the warrant. The issue of whether the DG is permitted to use any of the material seized during the JCB raid is currently pending adjudication before the SC, where more clarity is expected on the DG’s powers in conducting dawn raids.

More recently, the second dawn raid took place when simultaneous search and seizure operations were carried out at the premises of Eveready Industries India Ltd. (Eveready), Indo National Ltd. (Nippo) and Panasonic Energy India Co. Ltd. (Panasonic) on 23 August 2016 and the DG obtained clinching evidence for prosecuting a cartel for zinc-carbon dry cell batteries in India.

The DG’s powers for search and seizure are quite extensive and the entities being raided have an obligation to cooperate with the officials during the search and seizure operation. All officers, employees and agents (including former persons) of the company being investigated are required to preserve and produce all books and papers in their custody relating to the company to the DG officials. These persons are also required to extend all assistance in connection with the investigation. While faced with a dawn raid situation, the best and the most advisable course of action is to extend all cooperation to the investigators. However, the party to the investigation has the right to require the presence of two independent witnesses for overseeing the search and seizure operation and also seek a written record of the entire operation, including an exhaustive list of documents and information seized by the investigators. If the investigators seek to record statements on oath, the relevant officials may assert their right to be accompanied by their counsel while their statements are being recorded. However, they are not allowed to consult with their counsel during the oral deposition.

2.3 Restrictions on Dawn Raids or Surprise Visits
The DG is required to exercise its powers to conduct dawn raids sparingly and only in cases where there are reasonable grounds to believe that the documents which are useful for evidentiary purposes may be destroyed, mutilated, falsified or secreted. To ensure that the DG does not exercise this power arbitrarily, it is required to secure a judicial warrant before conducting a dawn raid. The judicial warrant, issued for specific dawn raids, usually defines the scope of the raid and the DG’s otherwise wide powers are circumscribed by the terms of the warrant secured. Subject to the terms of the warrant, the DG is empowered to search and collect copies of both physical books and documents (including emails) as well documents stored on electronic devices, including computers and phones.

2.4 Obligations to Prevent or Avoid Spoliation of Potentially Relevant Information
The CA02 requires every direction of the DG, issued either during the course of a dawn raid or otherwise, to be complied with by the relevant person. The CA02 specifically prohibits alteration, suppression or destruction of any documents required to be furnished to the DG. Similarly, providing the DG with a false statement or document or omitting to provide any material fact intentionally is prohibited under CA02. Accordingly, any person who engages in such activity either during the dawn raid or otherwise or who does not comply with the directions of the DG could be subjected to a penalty which may extend to INR10 million.

2.5 Responding to Interviews/Questions During the Dawn Raid or Surprise Visit
The CA02 empowers the DG to examine on oath any person for the purposes of the investigation, including during the dawn raid. Procedurally, the DG is only required to secure a judicial warrant before conducting a dawn raid. Under CA02, any individual or employee whose statement is recorded on oath by the DG has the right to assert the presence of his or her counsel but may not consult or confer with him or her during the deposition. The notes of such deposition are recorded in writing and are required to be signed off by the person being examined. Thereafter, the statement on oath may be used as evidence in the proceedings.

Any refusal to submit to the deposition directed by the DG would likely be treated as failure to comply with the directions of the DG. Failure to adhere to the DG’s direction may attract significant penalties under CA02 which may extend up to INR0.1 million for each day during which such failure continues, subject to a maximum of INR10 million.

2.6 Companies/Interviewees Obtaining Copies of Documents
The party to the investigation has the right to require the presence of two independent witnesses for overseeing the search and seizure operation and also seek a written record of the entire operation, including an exhaustive list of documents and information seized by the investigators. The contents of the written record should primarily include:

- the details and ownership of the place being searched;
- names and designations of the DG officials;
- names and complete addresses of the independent witnesses;
• details of the items inspected and seized;
• duration of the search; and
• signatures of the authorised officer and independent witnesses.

As a matter of practice, the DG may provide a list of all documents seized during the investigation to the company.

2.7 Right to Counsel
Any person whose statement is recorded on oath by the DG has the right to be accompanied by an ‘advocate’ who is registered under the Advocates Act, 1960 (Advocates Act). Under the Indian law, an in-house counsel is not considered to be an ‘advocate’ per the Advocates Act and therefore does not enjoy right to represent the company or otherwise be present during the deposition.

While there are no expressly prescribed rules, regulations or guidelines measuring the extent to which external counsel may participate during the deposition, a division bench of the Delhi High Court has recently held that parties summoned by the DG have the right to be accompanied by advocates but cannot consult them during the deposition while the DG collects evidence. The Court has directed the DG to ensure that the counsel does not sit in front of the witness but is some distance away, and the witness should not be able to confer or consult with him or her during the deposition [CCI v Oriental Rubber Industries Private Limited, LPA 607/2016 dated 24 May 2018].

2.8 Requirement to Obtain Separate Counsel
The company officials are not necessarily required to obtain separate counsel and may very well seek legal advice and representation from the company's counsel. It is advisable though to engage separate counsels. At times, the interests of the individual employees and the company may not be aligned; for example, an employee who has engaged in an anti-competitive conduct in breach of his or her company’s code of compliance could face separate disciplinary proceedings at his or her workplace and may hence require representation by a separate counsel. Similarly, when an employee, without the consent of his or her company, files for leniency, he or she would likely engage a counsel separate from the company’s counsel.

2.9 Principal Initial Steps Undertaken by the Defence Counsel
The principal initial steps that defence counsel should consider taking include: (a) request the CCI for a copy of its order directing the DG to conduct an investigation; (b) examine the CCI’s order to ascertain whether the CCI’s decision to initiate the investigation is correct or whether there are grounds for seeking a recall of the order; (c) examine whether the CCI has exercised its jurisdiction appropriately; and (d) guide the client to start an internal investigation to ascertain the relevant facts which will be helpful in responding to the DG's request for information as the investigation progresses.

2.10 Obtaining Documentary Evidence or Testimony
For the purpose of investigation, the DG and the CCI have been vested with wide powers which include the powers of a ‘civil court’ under the Code of Civil Procedure, 1908 relating to:

• summoning and enforcing attendance of any person and examining them on oath;
• requiring the discovery and production of documents;
• receiving evidence by way of an affidavit;
• issuing commissions for the examination of witnesses or documents; and
• requisitioning any public record or document, or a copy of a public record or document from any office.

The CCI (General) Regulations, 2009 (General Regulations) framed under the CA02 further set out the procedure to be followed by the DG during investigation in taking evidence on record including issuance of commissions for examination of witnesses and documents.

Once an investigation begins, the DG typically issues notices to the informant and the enterprises accused of contravening the provisions of the CA02, directing them to furnish relevant information, including documents and copies of email correspondence. The DG may also send information requests to competitors, suppliers and customers of the parties to the investigation. Similarly, the DG is empowered to summon an individual or officials of the concerned parties for deposition and take their statement on oath.

2.11 Obtaining Other Types of Information
The DG and the CCI have the power to obtain oral testimony by examining individuals on oath. The oral depositions for key officials of the cartel participants, the informant and other third parties are typically conducted by the DG during the investigation process. The CCI may also call upon any experts from the fields of economics, commerce, accountancy, international trade or any other discipline in order to assist in its inquiry.

The CCI often examines economic evidence such as the nature of the industry, the number of players in the market, the level of market concentration, parallel movement in prices, trends in production and dispatch, capacity utilisation, cost structures, and variations in profit margins across firms, while carrying out cartel inquiries. The CCI also relies on conduct-based evidence, including evidence of meetings between competitors, similar or identical bidding prices, membership of trade associations, history of cartelisation, and information exchange practices.
2.12 Obligation to Produce Documents or Other Evidence
Given the CCI’s extra-territorial powers, the DG and the CCI have the power to compel an individual to produce documents in physical or electronic form notwithstanding the fact that the evidence sought may be located in another jurisdiction.

2.13 Principles of Attorney-Client Privilege
In India, professional communications between attorneys and clients are protected as ‘privileged communications’ under the Indian Evidence Act, 1972 (Evidence Act). This attorney-client privilege restricts attorneys from disclosing any communications exchanged with the client and stating the contents or conditions of documents in possession of the legal adviser in the course of, and for the purpose of, his/her professional employment with the client.

An in-house counsel, being in the full-time employment of a person as a salaried employee, is not recognised as an ‘advocate’ and thus, professional communications between an in-house counsel and officers, directors and employees of a company are not protected as privileged communications between an attorney and his or her client. In other words, to invoke the privilege, the communications must necessarily be made or received by an ‘advocate’.

2.14 Other Recognised Privileges
No other privileges are recognised in India, and the right against self-incrimination is available to individuals in criminal but not civil cases. There are no criminal sanctions for engaging in cartels and hence the privilege against self-incrimination is not available in cartel investigations.

2.15 Resisting Initial Requests for Information
Failure to appear for oral depositions or to provide information requested by the DG may result in the CCI initiating separate penalty proceedings for non-co-operation. The CCI have been quite strict in taking action and imposing penalties on entities and individuals who have failed to provide the required information sought in the investigation process through written questionnaires or in oral depositions. Non-co-operation with the DG or obstructing the DG from carrying out dawn raid operations may attract significant penalties under CA02 which may extend up to INR0.1 million for each day during which such failure continues, subject to a maximum of INR10 million as may be determined by the CCI.

2.16 Protecting Confidential or Proprietary Information

The CA02 provides an overarching protection in terms of confidentiality and states that no information relating to any enterprise that has been claimed confidential may be disclosed by the CCI without the previous written permission of such enterprise, otherwise than in compliance with the CA02 or any other law for the time being in force. Further, the General Regulations permit parties to request the DG or the CCI for confidential treatment of documents provided that they submit a statement setting out cogent reasons for the request as well as stipulate the term and expiry of such confidentiality claim.

Requests for confidentiality are permitted only if publicly disclosing the document or any part of it will result in the disclosure of trade secrets, lead to the destruction or appreciable diminution of the commercial value of any information, or can reasonably be expected to cause serious injury to the party submitting the information. In arriving at a decision regarding confidentiality, the DG and the CCI may consider factors such as the extent to which the information is public or known to employees, suppliers, distributors and others in the business, the measures taken to guard secrecy of the information and the ease or difficulty with which the information could be acquired or duplicated by others. The confidentiality protection is available to both the parties to proceedings and third parties.

Where confidential information forms a part of parties’ written submissions, they are required to file both a confidential and a public version (redacting the confidential information). The non-confidential version of the submissions will be a part of the public record of the proceedings and open to inspection by other parties.

2.17 Persuading the Enforcement Agency to Modify Its Enforcement Action

Pleadings regarding the factual and legal basis for an enforcement action are typically made by defence counsel after the CCI forwards a copy of the DG’s investigation report to the parties concerned. The CCI gives the parties concerned an opportunity to respond with written submissions followed by oral hearings, where defence counsel can present their arguments on the matter.

2.18 Leniency, Immunity and/or Amnesty Regime

The CCI’s leniency programme is aimed at inducing cartel participants to break rank and provide information against their fellow cartelists under the CCI (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations). The CCI has
the power to impose a lesser penalty on a member of an alleged cartel if such member has made a ‘full, true and vital disclosure’ in respect of the violations of the CA02. A leniency applicant would do this by admission of participation in such anti-competitive conduct and thereby benefit from the reduction of the penalty that could potentially be imposed on it. The first applicant for leniency may be granted up to 100% reduction in penalty. However, such immunity up to 100% will be granted by the CCI only if, at the time of application, it did not have enough evidence regarding the existence of a cartel contravention. There is a sliding scale of leniency and other applicants may have their penalty reduced on submitting evidence, which in the CCI’s opinion provides ‘significant added value’ and enhances the ability of the DG or the CCI to establish the existence of a cartel. The second and other subsequent applicants are eligible for penalty reduction of up to 50% and 30% respectively.

The CCI considers a number of factors on whether to grant leniency, and an applicant seeking to benefit from the provisions of the Lesser Penalty Regulations is required to:

- cease to participate in the cartel from the time of the disclosure;
- provide vital disclosure in respect of the contravention;
- provide all relevant information, documents and evidence as required by the CCI;
- co-operate genuinely, fully, continuously and expeditiously throughout the investigation and proceedings before the CCI; and
- not conceal, destroy, manipulate or remove documents which are relevant to the proceedings and may contribute to establishment of a cartel.

If, according to the CCI, the applicant fails to comply with any of these conditions, it may not grant any leniency.

On receipt of an application, the CCI will proceed to mark the priority status of the applicant and convey its decision about the same to the applicant. In the event that the information is received orally or through email/fax, the CCI will require the applicant to submit a detailed written application with all information and evidence within a period of 15 days. In the event the application is not received within this time or such extended time as agreed by the CCI, the applicant loses its priority status. The date and time of receipt of the application will be recorded and unless the evidence submitted by the first applicant has been evaluated, the next applicant will not be considered by the CCI.

The CCI passed certain amendments to the Lesser Penalty Regulations on 22 August 2017 aimed at streamlining and strengthening its leniency programme by attracting better-quality evidence through leniency applications, and ensuring that it expends less resources. The amendment broadly expands the scope of the Lesser Penalty Regulations by allowing individual whistle-blowers to approach the CCI with evidence of collusion. It brings in an additional requirement for an enterprise applying for leniency to also furnish details of individuals who have been involved in the cartel on their behalf. The amendment also abolishes the earlier cap on the number of leniency applicants who could benefit from the penalty waiver and allows the CCI to grant immunity to more than three applicants, each eligible for a penalty waiver of up to 30%.

Finally, the amendment has introduced significant changes to the provisions on confidentiality by allowing the DG to disclose information under the Lesser Penalty Regulations to other parties for the purposes of the investigation if it ‘deems necessary’. However, if the applicant does not consent to such disclosure, the DG will have to necessarily record its reasoning for disclosure in writing, and seek the approval of the CCI. The amendment appears to be intended to ensure that the parties against whom a negative finding may be made are afforded a fair opportunity to controvert evidence and allow the DG to test such evidence, or collect further evidence, by putting it across to other parties. Until now, the identity of an applicant seeking immunity, as well as the evidence submitted by it under the Lesser Penalty Regulations, was not permitted to be disclosed by the DG or the CCI unless such disclosure was required by law or was consented to by the applicant, or such information was publicised by the applicant itself. The amendment dilutes this provision, and grants the DG the flexibility to disclose such information to other parties. The amendment also allows for file inspections by parties to information submitted by leniency applicants, and this notably overrides the confidentiality provision of the Lesser Penalty Regulations. Accordingly, the non-confidential version, which redacts non-public commercially sensitive information and business secrets, becomes available for inspection by parties.

The CCI has passed three decisions so far relating to leniency applications filed before it:

- In January 2017, the CCI issued its first order in the "Brushless DC Fans" case, which involved bid-rigging for tenders relating to the supply of fans to Indian Railways. The CCI considered evidence supplied by Pyramid Electronics, one of the three parties, by way of a leniency application and granted a reduction in penalty of 75% for having assisted the CCI in coming to a conclusion that Section 3(3) of the CA02 was violated. The reason the leniency applicant did not get a full 100% reduction in penalty was because the investigation had already commenced by the time the leniency was filed and the CCI already had some evidence against the cartel participants. The CCI also imposed penalties on the individual officials in charge of the three parties, at the rate of 10% of their average income for the three
preceeding financial years, but granted Pyramid’s employee a 75% reduction in penalty.
• In April 2018, the CCI granted a relief of lesser penalty to three manufacturers for cartelisation of zinc-carbon dry cell batteries in India. While determining a penalty of 1.25 times the profits of the companies for each year of duration of the cartel, the CCI proceeded to reduce the fines based on the manufacturers’ priority in filing the leniency applications as well as their value addition to the investigative process. Accordingly, Panasonic was granted 100% immunity and a nil penalty whereas Eveready and Nippo were granted a penalty reduction of 30% and 20% respectively. The CCI also imposed penalties on individual officers at the rate of 10% of their average income for the last three preceding financial years and reduced their penalties in proportion to the respective company’s priority status.
• Most recently, in May 2018, the CCI found bid-rigging by six firms in relation to the tenders floated by Pune Municipal Corporation for the operation and maintenance of municipal organic and inorganic solid waste processing plant. During the DG’s investigation, all six firms filed leniency applications with the CCI. However, the CCI reduced penalties only for four firms and their individual officers (by 50% for two firms, and 40% and 25% respectively for the other two firms) and refused to grant leniency as there was no significant value addition by the remaining two firms.

3. Procedural Framework for Cartel Enforcement - When Enforcement Activity Proceeds

3.1 Seeking Information Directly from Company Employees

The DG enjoys wide investigative powers, including the power to seek information relevant for its investigation by directing either the company or its officials or both to submit information that it considers relevant to the investigation. The DG usually seeks information by sending notices, but in limited situations it can also gather information by conducting search-and-seizure operations. The DG is bound by the terms of the investigation set by the CCI in its prima facie order directing the conduct of investigation.

3.2 Seeking Information Directly from the Target Company or Others

Documentary evidence is also typically sought by issuing notices and directing the company(ies) to furnish relevant information, records or documents within a stipulated time period.

3.3 Seeking Information Directly from Companies or Individuals Outside the Jurisdiction

The DG usually contacts companies and individual officers outside India directly. Again, a notice is issued directing a company or an individual located outside India to furnish relevant information or documents directed by the DG within a certain time period. A copy of such notice may also be sent by the DG to the external legal counsel of the company.

3.4 Inter-Agency Co-operation/Co-ordination

While the CCI has entered into co-operation agreements with competition authorities in other jurisdictions, these agreements are limited to the exchange of ideas, best practices and non-confidential information and do not provide for any extensive co-operation especially on cartel enforcement.

3.5 Co-operating with Enforcement Agencies in Foreign Jurisdictions

As stated in 3.4 Inter-agency Co-operation/Co-ordination, the CCI has not entered into any extensive co-operation agreement with its counterparts specifically with regard to cartel enforcement.

3.6 Steps Taken to Issue a Complaint/Indictment Against a Criminal Case

The CCI has no jurisdiction to impose criminal sanctions on entities for cartel infringement.

3.7 Steps Taken to Issue a Complaint/Summons in a Civil Case

Complaints regarding a contravention of the provisions of the CA02 may only be brought before the CCI. The complainant is required to file an ‘information’ containing the statement of facts, details of contraventions along with documents, affidavits and evidence in support of this, a succinct narrative in support of the alleged contraventions and the relief sought in the matter.

On receipt of information on potentially anti-competitive agreements, the CCI engages in a preliminary examination to ascertain whether the materials presented before it warrant the initiation of an investigation, referred to as ‘formation of prima facie view’. At this stage, while the CCI does not have any legal obligation, if it deems necessary, it may call upon the informant or the party against whom allegations are made for a ‘preliminary conference’. However, neither the informant nor the opposite party(ies) has the right to seek a ‘preliminary conference’. Once the CCI has formed a view that a case fit for detailed investigation by the DG exists, it issues a formal order directing the DG to conduct an investigation. The DG usually starts the investigative process by sending probe notices seeking information from the relevant parties, followed by deposition of relevant personnel and, on occasions, search and seizure operations to gather relevant information. The DG will analyse this evidence and use the same in preparing its investigation report.

Subject to confidentiality restrictions, the DG’s report usually contains findings on each of the allegations made in the information together with all evidences, documents, state-
ments or analyses collected during the investigation. The CCI shares a copy of the DG’s report to the parties, inviting their views and seeking their responses. Parties always have an opportunity to inspect the CCI’s case file and obtain copies of documents and records submitted during the proceedings. Further, if considered as necessary or expedient, the CCI or the DG may grant an opportunity to parties to cross-examine persons whose statements may have been used to reach a finding of infringement.

3.8 Enforcement Actions Against Multiple Parties in a Single Proceeding
Cartel actions in India are against multiple parties and almost always brought in a single proceeding.

3.9 Definition and Application of Burden of Proof
The CA02 prohibits cartels on the basis of the presumption that they cause an AAEC in India. The presumption of AAEC associated with cartels is a rebuttable presumption, and parties to the agreement have the opportunity to prove that their agreement does not, or is not likely to cause, an AAEC. While the initial burden to prove a cartel agreement lies with the CCI, the burden to rebut the presumption of AAEC associated with a cartel agreement vests with the defendants. The shifting of burden of proof in cartel inquiries necessitates an evaluation of evidentiary threshold at two stages – first, when the CCI ought to establish the existence of a cartel agreement and second, when the defendants seek to rebut the presumption of AAEC associated with cartel agreements.

In determining whether an agreement causes an AAEC in India, the CCI balances the possibility of various ‘negative’ and ‘positive’ factors. The ‘negative’ factors include the creation of barriers to entry, driving existing competitors out of the market and foreclosing competition by hindering entry. The ‘positive’ factors include benefits accruing to consumers, improvements in the production or distribution and promotion of technical, scientific and economic development. Since cartel contraventions under the CA02 are civil in nature, the standard of proof applied by the CCI to demonstrate the existence of an anti-competitive cartel agreement is the ‘balance of probabilities’.

3.10 Finder of Fact in Enforcement Proceedings
As stated above, cartel proceedings are civil in nature. Accordingly, during the investigative process, the DG acts as a finder of facts and applies the law to those facts while submitting its investigation report to the CCI. However, the ultimate finder of facts and their assessment under the relevant legal provisions in cartel proceedings is the CCI. It may disagree with the DG’s findings, apply the law to the facts afresh and pass necessary orders as it deems fit.

3.11 Evidence Obtained in One Proceeding Being Used in Other Proceedings
The CA02 is silent on whether the CCI can share evidence gathered during the course of its investigations with other enforcement agencies. However, the CA02 contains an express provision, allowing “information” on potentially anti-competitive conduct to be provided by the Central or State Governments or statutory authorities. The CCI often receives “information” from the Central/State Governments and other statutory authorities, and has indeed initiated investigations on the basis of such information. Similarly, the CA02 also provides for a “reference” to be made by any statutory authority to the CCI and vice versa, where in the course of a proceeding, an issue is raised that any decision by such authority would be contrary to the provisions of the CA02 or the CCI may make a reference on any aspect of the CA02 whose implementation is entrusted to another statutory authority.

3.12 Application of Rules of Evidence
The proceedings before the CCI are in the nature of quasi-judicial proceedings. While the CCI has the flexibility to devise its own investigative procedure, being a quasi-judicial body, it is required to follow the general rules on evidence (contained in the Evidence Act). In general, the CCI can admit evidence, available in physical form (books, papers, etc), electronic form (emails and other types of electronically stored data) and also by way of sworn affidavits. As a quasi-judicial body, the CCI is required to share copies of evidence gathered by it with the parties to the investigation and shall extend the opportunity to controvert the evidence.

3.13 Role Typically Played by Retained Experts
The CCI may engage experts from the fields of economics, commerce, accountancy, international trade or any other discipline in order to assist in conducting an inquiry. Expert evidence in the form of economic studies, authoritative texts, analyses based on market surveys, etc are all admissible as material evidence for the purpose of an inquiry.

3.14 Recognised Privileges
Although not explicitly stated in the CA02, the Evidence Act recognises attorney-client privilege and this privilege can be asserted before the CCI in any proceedings before it.

3.15 Multiple or Simultaneous Enforcement Proceedings Involving the Same or Related Facts
The CCI typically clubs together similar complaints received against alleged contravening parties and examines such cases in a consolidated manner, unless there is a difference in the nature of allegations or a difference in the time period for the alleged contraventions.
4. Sanctions and Remedies in Government Cartel Enforcement

4.4 Sanctions and Penalties in Criminal Proceedings
The CCI has no jurisdiction to impose criminal sanctions on entities for cartel infringements.

4.5 Sanctions and Penalties in Civil Proceedings
In case of a cartel, the CCI can impose a monetary penalty extending up to the higher of three times the relevant profit or 10% of the relevant turnover of the errant enterprise for each year of the duration of the cartel agreement. With respect to any other anti-competitive agreements, the CCI can impose a penalty up to 10% of the average relevant turnover of the previous three financial years (usually calculated from the date of the finding of infringement by the CCI), on each party to the anti-competitive agreement. The monetary penalty can be imposed on the individual office bearers of the errant enterprises who are found responsible for the cartel conduct. The CCI will also pass ‘cease-and-desist’ orders directing the parties involved to discontinue the anti-competitive conduct. Further, the CCI may direct the modification of the terms or clauses of anti-competitive agreement and pass any other order, including directing the payment of costs to the complainant.

4.6 “Effective Compliance Programme”
In the past, the CCI has considered the existence of a competition compliance programme as a mitigating factor while determining the quantum of penalty to be imposed on infringing enterprises. However, it has not gone into significant detail as to the effectiveness of such compliance programmes in order to determine the extent of the violation.

4.7 Sanctions Extending to Mandatory Consumer Redress
Apart from imposing penalties, orders directing discontinuing the anti-competitive conduct and payment of costs, the CCI cannot order for compensation or mandatory consumer redress. A party aggrieved by a conduct found to be anti-competitive can approach the appellate tribunal, the NCLAT, seeking compensation for the harm suffered.

4.8 Forms of Judicial Review or Appeal Available from Decisions in Governmental Enforcement Proceedings
Decisions passed by the CCI can be appealed to the NCLAT and thereafter, a further appeal lies to the SC.

The NCLAT, being the first court of appeal, is empowered to examine both the questions of facts and law and has wide discretion while evaluating the CCI’s orders. For example, while the CCI may have dropped certain charges as being irrelevant and its order may not contain any specific finding on such charges, there is a risk that the NCLAT may consider such a charge to be relevant.

The SC, being the final court of appeal, usually does not consider questions of fact, and limits its review to questions of law alone.
Since the sanctions for cartels are quite significant, the guilty enterprises/persons usually contest the CCI’s decision before the NCLAT. Moreover, cartel enforcement in India is only about nine years old. There are several aspects of the CA02 that require clarity and more often than not, this lack of clarity provides ample basis to contest the CCI’s decisions before the NCLAT and then before the SC.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action to Seek Relief
Under the CA02, the Central or State Government, local authority or any enterprise or person is permitted to make an application to the NCLAT to seek compensation for any loss or damage shown to have been suffered as a result of cartel conduct. Further, an application may be filed against enterprises for the recovery of compensation when any loss or damage is suffered by an applicant as a consequence of such enterprise violating any order or direction of the CCI or the NCLAT. The NCLAT would inquire into such claims (it may also seek recommendations of the CCI) and then pass its compensation order.

5.2 Threshold Requirements
The NCLAT has the power to adjudicate on a claim for compensation that may arise from the findings of the CCI or the orders of the NCLAT, in an appeal against the CCI’s orders. It is important to note that an application for compensation can only be made after the CCI or the NCLAT, on appeal, has determined that a violation of the substantive provisions of the CA02 has indeed taken place.

5.3 Actions Styled as “Class Actions” or Other Forms of Collective Action
The CA02 provides for class action suits as a remedy in a situation where a group of persons have the same claim against the infringer and allows one or more persons to file an application on behalf of all the interested parties. The NCLAT must grant the applicant permission. Where permission is granted, the applicant must give notice of the application at their expense, by personal service, or, where by reason of the number of persons service is not practicable, by public advertisement (as directed by the NCLAT). Importantly, there is no limit to the number of persons to be represented and the application is maintainable on behalf of a fluctuating body but their interest must be common.

5.4 Handling Questions of Indirect Purchasers or “Passing-on” Defences in Private Actions
An enterprise or person claiming compensation is required to show that it has suffered loss or damage because of anti-competitive conduct by the infringing enterprise. While there is no precedent regarding the practice of the NCLAT, typically Indian courts only award damages to parties that have suffered a direct and consequential loss. Therefore, indirect purchasers may not be entitled to compensation unless they can establish that they have indeed suffered such loss.

5.5 Process for Hearing and Resolving Claims
As stated above, once a final decision has been passed on a matter by the CCI or on appeal by the NCLAT in regard to the violation of the provisions of the CA02, the NCLAT will examine the allegations made in a compensation application and then proceed to pass an order directing an enterprise to pay the realisable amount of compensation for the loss or damage caused to the applicant as a result of the cartel conduct. The NCLAT may also obtain the CCI’s recommendations before passing the order of compensation.

Please note that there have been no reported compensation claims thus far following cartel decisions and presently, there are only two compensation applications pending before the NCLAT in abuse of dominance cases. More clarity can be expected on the process applied for hearing and resolution of such private actions based on the outcome and the NCLAT’s decisions with respect to these claims. Further, it remains to be seen what standard will be adopted by the NCLAT to determine the amount of compensation, along with other forms of relief that can be legitimately granted to the claimant. Accordingly, these decisions, which are being keenly awaited, are expected to lay down the road map in India for private follow-on actions in competition cases.

5.6 Evidence from Governmental Investigations or Proceedings
In adjudicating compensation claims, the NCLAT will consider the evidence and findings of the CCI and will not examine the matter afresh. Its inquiry will only be limited to determining the eligibility and quantum of compensation due to an applicant.

5.7 Differences in Standards for Relief in a Private Civil Action and Governmental Proceedings
While monetary penalties have been prescribed under the CA02, compensation awarded to applicants by the NCLAT is subjective; it depends on the amount determined by the NCLAT as adequate for compensating the loss or harm suffered by the applicant because of the anti-competitive conduct.

5.8 Forms of Relief That Can Be Sought by the Claimant
The CA02 only provides for relief in the form of compensation for the loss or damage caused to the applicant as a result of a cartel contravention by an enterprise. In contrast to other jurisdictions, errant enterprises will not be liable to treble damages and damages in India do not typically include punitive or exemplary damages. Moreover, compared...
to other jurisdictions, Indian judges typically hesitate to award large damages claims.

5.9 Forms of Relief Commonly Obtained
There have been no reported compensation claims thus far following cartel decisions and it remains to be seen what sort of relief can be granted to the applicant.

5.10 Claims Proceeding to Completed Litigation as Opposed to Dismissal or Settlement
Since there have been no reported compensation claims, it is difficult to predict the timeframe for such claims.

5.11 Compensating Successful Attorneys
Advocates in India are not allowed to charge contingency fees and because of this prohibition, it is unlikely that successful attorneys for claimants can be compensated.

5.12 Obligation for the Unsuccessful Claimants to Pay Defence Costs and/or Attorneys' Fees
The NCLAT could order unsuccessful applicants to pay costs in proceedings in the event that it finds such compensation claims to be frivolous in nature or a waste of the NCLAT's time or resources.

5.13 Forms of Judicial Review or Appeal Available from Decisions Involving Private Civil Litigation
Appeals from the NCLAT's decisions on compensation claims lie to the SC.

6. Supplementary Information

6.1 Other Items of Information Pertinent to an Understanding of the Process, Scope and Adjudication of Claims
In March 2017, the SC issued its first substantive ruling on the provisions of the CA02 in the Dubbed Serials case. The SC held that trade unions comprising members engaged in economic activities are associations of such ‘enterprises’ and therefore, threats of boycott issued by these trade associations in the event that their demands were not fulfilled amounted to a violation of Section 3 of the CA02. Further, the SC noted that in every cartel case, the first step should be to define the relevant market, a practice which the CCI had not consistently adopted so far due to the presumption of AAEC for horizontal agreements. This is additional requirement is expected to increase the DG’s and the CCI’s burden while investigating cartel cases.

The CCI has also narrowed the scope of the ‘single economic entity’ defence in respect of which it had originally held that agreements between entities that are part of the same ‘group’ cannot be scrutinised under Section 3 of the CA02, since they are in the nature of ‘internal agreements’. In an interesting turn of events, the CCI departed from its previous approach in the Insurance Companies case and proceeded to penalise four public sector insurance companies that were all wholly-owned subsidiaries of the Central Government for bid-rigging. The CCI held that the insurance companies did not constitute a single economic entity as evidence suggested that each company had independently decided its business strategy while participating in the tender, and discussed each other’s proposed bid prices. More recently, in the Grasim Industries case, while rejecting a plea of single economic entity urged by Grasim Industries Ltd. and Aditya Birla Chemicals (India) Ltd., the CCI held that where two or more entities of the same group decide to separately submit bids in the same tender, they are not part of a single economic entity. Based on these decisions, the CCI appears to hold that in the context of bid-rigging, the entities involved would be treated as separate enterprises and would be expected to comply with the provisions of the CA02, even in respect of any agreements entered into by them inter se.

6.2 Governmental Authorities Publishing Written Guides
As part of its advocacy series, the CCI has published guides on:

- Bid-rigging (http://cci.gov.in/sites/default/files/advocacy_booklet_document/Bid%20Rigging.pdf),
- Leniency Programme (http://cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf), and
- Competition Compliance Programme for Enterprises (http://cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf)