

EXAMINATION OF FORMS OF PRICE FIXING AND CARTELS IN INDIA

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ABSTRACT

The Preamble to the Indian Constitution states that- "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political.

LIBERTY of thought, expression, belief, faith and worship.

EQUALITY of status and of opportunity and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."¹

It is a reflection of the core constitutional values and declares India to be a Sovereign, Socialist, Secular, Democratic, Republic committed to Justice, Equality and Liberty for the people. The objective of the Competition Act, 2002, also reflects the same core values as our Indian Constitution. It clearly states the following objectives:

- to prevent practices having adverse effect on competition.
- to promote and sustain competition in markets.
- to protect the interests of consumers.
- to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

It is here to be noted that prior to the Competition Act, 2002, the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, was the first piece of legislation to deal with antitrust law in India and to restraint the abuse of market power. However, at the wake of globalization, liberalization and privatization the MRTP Act, 1969 was considered as obsolete and was replaced by the Competition Act, 2002, on the recommendation of the Raghavan Committee.

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, or the MRTP Act, 1969, were however not the first piece of legislation to deal with the antitrust law globally nor did it first originate in India. The antitrust law was for the very first time developed in the United States in the late nineteenth C.E.².

In this paper we will be making a detailed comparison between USA and India with respect to Price Fixing, the related legislations and the agencies dealing with such issues in their respective jurisdiction.

INTRODUCTION

Before we deal with the topic: “Comparing price fixing in India and USA” lets enrich our minds about price fixing.

PRICE FIXING

Price fixing refers to an agreement between market participants to collectively raise, lower or stabilize price of products or service to control supply and demand. The practice benefits the individuals of firms involved in setting the price at the cost of the consumers³. In India, price fixing is prohibited under the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, and is presumed to cause an AAEC (Appreciable Adverse Effect on Competition). In the same way, under the US Competition Law, price fixing is considered illegal and is also deemed as anti- competitive. It states price fixing as an ability of a firm to deter away from market competition.

Here it is important to note that it is not illegal for firms to offer the same price, the issue of legality comes into play only when these firms enter into an agreement with each other to set prices.

In a recent decision involving five bearings manufacturers, the CCI adopted a different approach. The CCI found that the manufacturers met to decide prices quoted to original equipment manufacturers in the auto- motive bearings market. However, there was no evidence of any implementation of the exchanged information. The fact that the bearings manufacturers met to decide prices was considered sufficient by the CCI to establish a cartel violation⁴.

Sec. 3(3) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, defines price fixing as- “Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

³ [Price Fixing - Definition, Types, Legality, Examples \(corporatefinanceinstitute.com\)](http://www.corporatefinanceinstitute.com). As last visited 22.07.2024, 19:56

⁴ Suo Moto Case No. 5 of 2017.

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition⁵”

Sec. 1 of the Sherman Act, 1890, states that agreements among competitors to fix prices or wages, rig bids, or allocate customers, workers, or markets, are criminal violations. Other agreements such as exclusive contracts that reduce competition may also violate the Sherman Antitrust Act and are subject to civil enforcement⁶.

From the above discussions it is quite evident that price fixing is considered as an illegality in both US and India as it creates an AAEC thereby deterring the competition in the relevant market.

ENFORCEMENT STRUCTURE

INDIA:

The Indian Competition Law enforcement structure comprises of a single legislation and a single agency. The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, is the piece of legislation that deals with antitrust laws in India, the CCI is the executive branch responsible for enforcing and regulating proper competition and trade activities in the relevant competition market, and the COMPAT which has at present become NCLAT is the adjudicating body. The objective of the Act is to prevent practices having adverse effect (AAEC) on the market, to promote and sustain competition, to ensure freedom of trade and protect of the interest of the consumers.

UNITED STATES OF AMERICA (USA)

The US Competition Law enforcement structure comprises of two federal agencies namely the US Department of Justice (DoJ) and the Federal Trade Commission (FTC). The DoJ is responsible for enforcing the antitrust laws whereas the FTC is responsible to keep an eye over the trade and related activities. The former is a part of the executive branch of the govt. whereas the later is an independent administrative agency, similar to CCI. In order to regulate and ensure proper trade activities in the relevant competition market the DoJ and FTC independently enforce the Sherman Act, 1890, (primarily deals with anti- competitive agreements and monopoly exercised by firms) and the Clayton Act, 1914, (deals with merger, price discrimination and tying, exclusive supply, etc.). Violation entailing any form of criminal prosecution by the firms attracts the attention of the DoJ to prosecute such firms.

The maximum fee agreement, as price fixing agreements, have been held to be per se unlawful under Sec. 1 of the Sherman Act, 1890. The authority on the point is the US Supreme Court decision in *Arizona vs. Maricopa County Medical Society* [73 Led 2d 48: 457 US 332 (1981)]

⁵ [Section 3 in The Competition Act, 2002 \(indiankanon.org\)](#). A last visited on 22.07.2024, 20:34

⁶ [price fixing | Wex | US Law | LII / Legal Information Institute \(cornell.edu\)](#). As last visited on 22.07.2024, 20:34

FORMS OF PRICE FIXING

There are various types of price fixing existing in the field of Competition Law, however, following are the most prevalent types of price fixing in the present era of industrialization and globalization:

1. **Horizontal price-fixing:** This type of price-fixing happens when competitors of a particular product agree to set a minimum or maximum price for their products. For example, two or more competing fast-food chains agree to sell hamburgers for the same price.
2. **Vertical price fixing:** This involves an agreement between members up and down the supply chain, for example, an auto manufacturer and its dealers.
3. **Agreement to raise prices:** This involves competitors agreeing to raise the price of a product by a certain amount.
4. **Agreement to freeze, or lower, prices:** This involves participants, such as governments, agreeing to freeze prices in order, for example, to stop inflation and restore consumer's confidence in the economy. It is generally only used as a last resort when monetary policy, i.e., a central bank's actions that manage the money supply, fail⁷.

IN INDIA

Under the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, Sec. 3 broadly recognizes two main types of price fixing. Sec.3(3) deals with Horizontal Price Fixing whereas Sec. 3(4) deals with Vertical Price Fixing.

Anti- Competitive Horizontal Agreement: This is a form of agreement which takes place between firms or individuals engaged in the same level of production or are indulged/ trade in similar trade of goods and services. The following four categories of such agreements amongst competitors are presumed to have AAEC-

- ⁸agreement to fix price;
- agreement to limit production and/or supply;
- agreement to allocate markets;
- bid rigging or collusive bidding.

Anti- Competitive Vertical Agreement: This is a form of agreement which takes place between firms/ enterprises or individuals at different stages or levels of production, distribution, supply, storage etc. Such vertical restraints include:

- tie-in arrangement;
- exclusive supply/distribution arrangement;
- refusal to deal; and

⁷ [Price Fixing Competition Law - Definition, Types, Regulations, Examples | VinciWorks. As last visited on 23.07.2024, 10:20](#)

⁸ [Competition Commission of India, Government of India \(cci.gov.in\). As last visited on 23.07.2024, 10:20](#)

- resale price maintenance.

IN UNITED STATES OF AMERICA

Much like the Indian Competition Law, the Competition Law in US also considers price fixing illegal as the practice is deemed anti-competitive as it provides the firms involved in such anti-competitive activities the power to deter away from market competition. Sec. 1 of the Sherman Act, 1890, clearly states that,⁹“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.”

Most criminal antitrust prosecutions in USA involve price fixing, bid rigging, or market division or allocation schemes. Such collusion may be prosecuted criminally. In order to prove such a crime, it is not required to shown that the conspirators entered into a formal written or express agreement. Price fixing, bid rigging, and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries. Under the law, price-fixing and bid rigging schemes are per se violations of the Sherman Act¹⁰. The following are the types of price fixing agreements recognized by the US Competition Law-

- Establish or adhere to price discounts.
- Hold prices firm.
- Eliminate or reduce discounts.
- Adopt a standard formula for computing prices.
- Maintain certain price differentials between different types, sizes, or quantities of products.
- • Adhere to a minimum fee or price schedule.
- Fix credit terms.
- Not advertise prices.
- In many cases, participants in a price fixing conspiracy also establish some type of policing mechanism to make sure that everyone adheres to the agreement.

INVESTIGATION RELATING TO CARTELS

INDIA

Sec. 2 c of the Indian Competition Act, 2002, defines “cartel” as “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 service.” The CCI has been constituted by the Central Government to enforce the

⁹ [Sherman Anti-Trust Act \(1890\) | National Archives](#). As last visited on 01.08.2024, 10:30

¹⁰ [Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For \(justice.gov\)](#). As last visited on 01.08.2024, 12:00

provisions of the Competition Act. The CCI takes the assistance of the Director General (DG) to investigate into the matters relating to cartelization as the DG¹¹ is the investigation agency/ investigating body. The CCI can enquire on its own on the basis of information received or knowledge in its own possession and if the CCI is of the opinion that no prima facie case relating to cartel exists then it shall close the matter and pass orders but if there does exist a prima facie case in opinion of the CCI then it shall direct the DG to investigate into the matter and submit its report. If the DG reports that there exists no contravention, then the CCI shall call upon the parties making reference for objections, on the other hand, if the DG reports contravention to the provisions of the Act, then further investigation is to take place at the orders of the CCI.

IN USA

Once the Director of Criminal Enforcement has approved the opening of an investigation, the case is cleared with the FTC and when the Division learns of a potential antitrust violation, its first step is usually to convene a grand jury (an independent investigatory body) in question. The Division can use the grand jury to gather relevant documentary and testimonial evidence. Throughout the investigative process, the Division may also rely on the Federal Bureau of Investigation (FBI) to execute search warrants, conduct surveillance and interview witnesses. Once the Division has gathered sufficient evidence of the potential antitrust violation, it may present this evidence to the grand jury. If the grand jury determines that a probable cause exists to support criminal charges, they will issue an indictment charging the defendant and initiating formal criminal proceedings. Following the indictment, and assuming jurisdiction, the defendant must appear before a federal court to enter a plea of guilty or not guilty on the charges. If the defendant decides to plead not guilty, the case will proceed to trial, where the defendant has the right to be tried by a jury. If, after trial, the defendant is found guilty, the judge will issue a sentence according to the United States Federal Sentencing Guidelines. In many cases, defendants enter into negotiated pleas with the Division, which waive their right to the grand jury. In those cases, the Division does not have to seek an indictment from the grand jury and instead files an information charging the defendant. Plea bargaining is explained in question¹².

When investigating a cartel allegation criminally, the DOJ (through the grand jury's subpoena power, discussed further in question can order the production of specific documents or information as well as carry out compulsory interviews with individuals. Additionally, the DOJ can carry out unannounced searches of business and residential premises during which time they can seize information and documents (retaining and/or copying the same) as well as secure and seal off the premises for the duration of their search.

When investigating a cartel allegation civilly, the DOJ or FTC can issue a civil investigative demand (CID), a statutorily authorized device that allows the agencies to compel the production of information and documents. The agencies can serve a CID on any natural or juridical person whom the agencies have "reason to believe" might have material or information "relevant to a civil antitrust investigation". Using a CID, the agencies can compel the production of specific documents or information as well as demand written or oral testimony (in the form of

¹¹ Sec. 41 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

¹² [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](https://www.iclg.com). As last visited on 01.08.2024, 13.04

interrogatories or depositions). However, CIDs cannot be used to authorize searches of business or residential premises and the accompanying seizure, securing, and/or copying of materials on those premises.

As mentioned above, a number of entities aside from the DOJ and FTC can pursue civil actions for injuries resulting from cartel conduct. While these actions are not in themselves “investigations”, the civil process allows for extensive discovery that includes, among other things, requesting that an opposing party produce documents, answer interrogatories and make witnesses available for deposition, essentially allowing other entities similar access to the information that the DOJ or FTC would receive through a CID¹³.

INVESTIGATION POWER

INDIA

Sec. 36 of the Act deals with the powers of the CCI to regulate its procedure guided by the principles of natural justice and is not bound by the procedure laid down by the CPC, 1908. The Commission has the power to regulate its own procedure including the place of sitting, duration of oral hearing and times of inquiry. For the purpose of discharging its power conferred by the Act, the Commission has the powers of a civil court as provided under the CPC, 1908. The following are the powers that the Commission can exercise while discharging its functions-

1. The summoning and enforcing the attendance of any person and examining him on oath;
2. Requiring discovery and production of documents;
3. Receiving evidence on affidavits;
4. Issuing commission for examination of witnesses or documents;

The Commission can also call upon experts from fields of economics, commerce, accountancy, or any other discipline for its assistance to conduct an inquiry or proceedings. The Commission may also direct any person to produce before the DG or the Registrar or an officer authorized by it, books, accounts or other documents, in the custody or under the control of such person, or to furnish any requisite information.

USA

¹³ [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](https://www.iclg.com). As last visited on 02.08.2024, 17:24

In a criminal investigation, the Division must convene a grand jury, an independent body vested with the power to issue subpoenas. Through this subpoena power, the Division has broad ability to investigate alleged conduct. The DOJ has significant discretion, which it can (and routinely does) implement in carrying out an investigation. As a result, individuals (even those on the fringe of an investigation) may face substantial burdens in connection with sitting before a grand jury.

Documentary evidence and compulsory interviews: Grand juries can issue subpoenas to compel the production of documentary or testimonial evidence. If a witness refuses to cooperate with or testify before the grand jury, he or she can be held in contempt and subjected to fines or imprisonment.

Searches of premises: The Division must obtain a search warrant from a judge before conducting a search of company or residential premises or seizing documentary evidence. To obtain a search warrant, the Division must submit an affidavit stating facts that show probable cause that a crime has been committed, that evidence of the crime exists, and that the relevant evidence is on the premises to be searched. However, the government may take possession of documentary evidence even without a search warrant if the party being searched voluntarily hands over the evidence. The Division can also conduct, without a search warrant, surprise visits to individuals that are not represented by counsel. These individuals are not required to cooperate with the Division and do not have to permit the Division to search their property.

Informal witness interviews: The Division can interview an individual informally at any time if the individual is not represented by counsel. If the individual is represented by counsel, the Division must coordinate with counsel before conducting an interview. Usually, these interviews will occur either at the company's premises (such as in the course of executing a search warrant) or at the employee's home. The locus of the interview could impact who questions the witness. While both Division attorneys and agents from the FBI may conduct an interview at an employee's home, it is Division policy that attorneys may not be present on company premises while agents execute a search warrant¹⁴.

SANCTIONS IN RESPECT OF CARTELS

INDIA

In India, there is no criminal sanctions for cartel activities under the Competition Act (the Act). However, the Act does provide for civil sanctions in the form of leniency provision and cease-and-desist order. The leniency provision has proved to be a very effective tool in detecting and destabilizing cartels. This provision encourages the parties to the cartel to disclose the details cartelization to the competition authority. The CCI may pass all or any of the following civil sanction orders¹⁵:

¹⁴ [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](https://www.iclg.com/publications/cartels-and-lenieny-laws-and-regulations-report-2024-usa). As last visited on 02.08.2024,

¹⁵ Sec. 27 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

- Direct the enterprise to terminate the agreement and not to re- enter into such an agreement;
- Impose a penalty not exceeding 10% of the average turnover of the offender for the three preceding financial years;
- Impose upon each member of the cartel a penalty of up to three times the profit for each year of the continuance of the agreement, or 10% of turnover for each year of continuance of the agreement, whichever is higher;
- Direct modification of the agreement.

If any person fails to comply with the order of the Commission, the Act provides for imposition of the following penalty-

- Such person shall be liable to be detained in civil prison for a term which may extend to 1 year, unless in CCI directs such person's release;
- Such person shall also be liable to penalty not exceeding rupees ten lakhs.

USA

Sanctions for Companies¹⁶: Under the Sherman Act, 1890, the companies that commit antitrust violations are subject to fines of up to \$100 million. The company may also be subject to penalties based on the unlawful anticompetitive activity. Federal law provides for fines of up to twice the gross amount that the conspirators gained through the violation or twice the gross amount that the victims lost through such violation, whichever is greater. These alternative fines can exceed the \$100 million ceiling that the Sherman Act establishes, although the government is required to prove the amount of gain or loss in these cases beyond a reasonable doubt.

When imposing criminal penalties for antitrust violations, the courts assess antitrust-violation fines based on the formula and guidance set forth in the Guidelines. The court begins the analysis by calculating 20% of the total volume of commerce affected by the antitrust violation, which is then taken as the base fine. The court next assigns the corporate defendant a "culpability score" reflecting the circumstances involved in the particular case. The Guidelines outline various factors that may bear on the culpability determination, including the company's criminal history, the role those high-level personnel played in the conspiracy, the company's efforts to develop an effective compliance program, and the extent of the company's cooperation with the government's investigation. The culpability score correlates to minimum and maximum multipliers, which are then applied to the base fine to calculate a fine range. This range is merely advisory, however, and the court may upwardly or downwardly depart from the suggested range in setting the final fine. The DOJ, for its part, typically seeks a sanction that falls within the range the Guidelines suggest. In special circumstances, the DOJ may recommend a downward departure from the range suggested by the Guidelines in recognition of a defendant's cooperation or assistance. The DOJ also can, and usually does, seek discounted fines against defendants who cooperate immediately

¹⁶ [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](#). As last visited on 02.08.2024, 21.00.

following the leniency applicant. The DOJ's role in the sentencing process is only advisory, and the courts retain broad discretion in making the final determination as to the size of the penalty. In addition to these criminal fines, corporate defendants may be ordered to pay restitution to the victims of the conspiracy. Defendants with federal contracts may be subject to prosecution under companion criminal statutes, such as those prohibiting mail fraud or wire fraud, and any company may be disbarred from future participation in government contract work.

Sanctions for individuals¹⁷: The Sherman Act, 1890, provides for criminal penalties of up to \$1 million along with a 10 years' imprisonment for individuals who commit an antitrust violation. Individuals are also subject to alternative fine regime by which the DOJ may seek to impose monetary penalties of up to twice the losses or wrongful gains resulting from the conspiracy. Like corporate defendant penalties, fines against individuals are based in part on the volume of commerce affected by the unlawful activity, with typical individual fines falling between 1% and 5% of this figure. Individual sanctions are not multiplied by a culpability score, but the Guidelines provide that these fines should in all cases exceed \$20,000.

The volume of affected commerce also guides the court's determination regarding sentences of imprisonment. The DOJ may recommend that the court impose terms of imprisonment below the suggested Guidelines ranges for defendants who provide substantial assistance to the government's investigative efforts. The DOJ may also make such recommendations pursuant to plea agreements.

LENIENCY PROVISION

INDIA

The grant of lesser penalty under the Indian Competition Act has been dealt with under sec. 46 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 and Regulation 4 of the CCI (Lesser Penalty) Regulations, 2023.

Grant of lesser penalty¹⁸: Regulation 4 of the CCI (Lesser Penalty) Regulations, 2023 clearly states that-

Subject to the conditions laid down in regulation 3, the applicant and individual mentioned in sub-regulation 2 of regulation 3 shall be granted benefit of lesser penalty on the amount leviable under clause (b) of section 27 and section 48 of the Act, as the Commission may decide, in the following manner, namely:

(a) The applicant and individual mentioned in sub-regulation (2) of the regulation 3 may be granted benefit of reduction in penalty up to or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima facie opinion regarding the existence of a cartel which is alleged to have contravened the

¹⁷ [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](https://www.iclg.com/news-and-insights/cartels-and-lenient-laws-and-regulations-report-2024-usa). As last visited on 03.08.2024, 08:56.

¹⁸ [draft-lesser-penalty-regulations1697431514.pdf \(cci.gov.in\)](https://www.cci.gov.in/draft-lesser-penalty-regulations1697431514.pdf). As last visited on 03.08.2024, 10:30

provisions of section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion:

Provided that the Commission may also grant benefit of reduction in penalty up to or equal to one hundred per cent, to the applicant and individual mentioned in sub-regulation (2) of regulation 3, if the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of the provisions of section 3 of the Act, by a cartel, in a matter under investigation and the Commission, or the Director General did not, at the time of application, have sufficient evidence to establish such a contravention.

(b) The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case may be, to establish the existence of the cartel, which is alleged to have contravened the provisions of section 3 of the Act.

USA

The Division operates a Leniency Program for both individuals and companies. The Leniency Program underlies many of the Division's cartel investigations.

The Corporate Leniency Policy establishes two types of leniencies, Type A and Type B, which incentivize companies to report antitrust violations through reduced sanctions. Critically, the Division will grant only one corporate leniency application per cartel conspiracy; thus, the program may result in situations in which co-conspirators race to turn themselves into the government.

Type A and Type B leniency require that applicants confess fully to their participation in the conspiracy, take steps to terminate such participation, and agree to cooperate fully with the DOJ's investigative and enforcement efforts going forward. Successful applicants are awarded prosecutorial benefits, which vary depending on the form of leniency.

Type A leniency has traditionally been available under the following six conditions. The company must have:

- (1) voluntarily come forward before the DOJ became aware of any illegal conduct;
- (2) taken steps to terminate its participation in the illegal activity immediately upon its discovery of the conspiracy;
- (3) confessed fully and committed to providing complete, ongoing assistance to the DOJ's investigative efforts;
- (4) come forward as an entity, rather than through isolated confessions of executives;
- (5) made restitution to victims of the conspiracy where possible; and
- (6) not originated, led, or coerced others to participate in the illegal activity. A grant of Type A leniency confers automatic amnesty upon the company and its cooperating employees.

Type B leniency allows companies to apply for amnesty after the DOJ has become aware of illegal activity. The DOJ will grant this type of application only if it lacks the evidence to obtain a successful conviction against the applicant and it determines that leniency would not be unfair given the timing of the confession, the applicant's role in the conspiracy, and the nature of the illegal conduct. Additionally, companies must satisfy requirements (2) through to (5) of the above paragraph to qualify for the program. If the DOJ grants the application, the company's employees will be considered for immunity from prosecution¹⁹.

ADJUDICATING AUTHORITY

INDIA

The Competition Appellate Tribunal (COMPAT) is a statutory organization established under the provisions of the Competition Act, 2002 to hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission of India under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Competition Act, 2002. The Appellate Tribunal shall also adjudicate on claim for compensation that may arise from the findings of the Competition Commission of India or the orders of the Appellate Tribunal in an appeal against any findings of the Competition Commission of India or under section 42A or under sub-section (2) of section 53Q of the Act and pass orders for the recovery of compensation under section 53N of the Act²⁰.

As per a recent amendment, the Competition Appellate Tribunal (COMPAT) has ceased to w.e.f May 26, 2017. The appellate function under the Competition Act, 2002 (Competition Act) would now confer to the National Company Law Appellate Tribunal (NCLAT). These amendments were brought about under the provisions of Part XIV of Chapter VI of the Finance Act, 2017²¹.

USA

The Commission enforces various antitrust laws through its Bureau of Competition. The two most significant statutory provisions are Section 5(a) of the FTC Act and the Clayton Act. Section 5(a) of the FTC Act, 15 U.S.C. Sec. 45(a), prohibits, inter alia, "unfair methods of competition." **Unfair methods of competition** include any conduct that would violate the Sherman Antitrust Act or the Clayton Act. Among other things, the Clayton Act prohibits corporate **acquisitions that may substantially lessen competition** (Section 7, 15 U.S.C. Sec. 18) and also bars certain forms of price discrimination (Section 2 of the Robinson Patman Act, 15 U.S.C. Secs. 13-13b).

Even where the Commission determines through adjudication that a practice violates consumer protection or competition law, the Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation

¹⁹ [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](https://www.iclg.com). As last visited on 03.08.2024, 16:45

²⁰ [COMPAT Archives \(nclat.nic.in\)](https://nclat.nic.in). As last visited on 03.08.2024, 17:20

²¹ [All you need to know about NCLAT taking over COMPAT - iPLEaders](https://www.iPLEaders.com). As last visited on 03.08.2024, 17:40.

rules (discussed below). In this section, we discuss the Commission's ability to challenge a practice directly in court, without first making a final agency determination that the challenged conduct is unlawful.

Section 13(b) of the FTC Act, 15 U.S.C. Sec. 53(b), authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission." Whenever the Commission has "reason to believe" that any party "is violating, or is about to violate" a provision of law enforced by the Commission, the Commission may ask the district court to enjoin the allegedly unlawful conduct, pending completion of an FTC administrative proceeding to determine whether the conduct is unlawful. Further, "in proper cases," the Commission may seek, and the court may grant, a permanent injunction.

In the competition context, the Commission has used Section 13(b) primarily to obtain preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding. In addition, in some circumstances, the Commission may obtain permanent injunctive relief²².

CASES RELATING TO PRICE FIXING

INDIA

- **BEER CARTEL CASE²³ : In Re: Alleged anti-competitive conduct in the Beer Market in India**

The CCI imposed a penalty of \$102 million on Heineken-controlled beer giant United Breweries and \$16 million on the local unit of Denmark's Carlsberg in a case related to cartelization of beer prices in the country. The order comes after a long-drawn investigation that in 2018 saw Competition Commission of India (CCI) raiding the offices of the brewers. The raids happened after rival Anheuser Busch InBev informed the Commission to detected an industry cartel in India after it acquired operations of SABMiller Plc. A detailed CCI investigation, reported by Reuters last year, found that the companies collectively strategized in seeking price increases in several states, forging a cartel. In a final order published Friday, the CCI announced penalties of 7.5 billion rupees on United Breweries and 1.2 billion rupees on Carlsberg, after the amounts were lowered as the companies cooperated with the investigators. AB InBev was given a 100% exemption from penalties in the case as it alerted the CCI about the cartel, the order added. The order passed by CCI imposed a penalty of \$23,684 on Carlsberg India Managing Director Nilesh Patel and \$6,497 on United Breweries chief of sales Kiran Kumar, among others. Heineken said

²² [A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority | Federal Trade Commission \(ftc.gov\)](#). As last visited on 05.08.2024, 09.56.

²³ [SUO MOTU CASE NO. 06 of 2017]

United Breweries has recently become part of Heineken, which itself was not part of the CCI investigation. "We are currently reviewing the (CCI) decision and will consider our next steps, including the possibility of lodging an appeal," Heineken said.

- **Rajasthan Cylinders and Containers Ltd. Vs. Union of India²⁴**

The COMPAT upheld the findings of the CCI that the appellants/suppliers of Liquefied Petroleum Gas (LPG) Cylinders to the Indian Oil Corporation Ltd. had indulged in cartelization, thereby influencing and rigging the prices, thus, violating the provisions of Section 3(3)(d) of the Competition Act, 2002. The CCI imposed severe penalties in the form of fines under Section 27 of the Act. While maintaining the order of the CCI insofar as it found the appellants guilty of contravention of Section 3(3)(d) and also under Section 3(3)(a) of the Act, the COMPAT has reduced the amount of penalty. These suppliers have filed the instant appeals on the ground that there was no cartelization and they have not contravened the provisions of the Act. Out of these 45 companies one did not challenge the orders before the COMPAT and other 44 had filed appeals which have been decided by the COMPAT. In all, 44 opposite parties submitted their objections. The Director General found it unusual that unrelated firms had quoted identical rates in different States. It was found that only for Andaman and Nicobar Islands there was a single party who had quoted the L-1 rate and got the formal contract. The D.G. had found further that though the factors like market conditions and small number of companies were different, there was a large-scale collusion amongst the bidding parties. Thus, he came to the conclusion that the bids for the year 2010-11 had been manipulated by 50 participating bidders. In its impugned order, while determining the issue, the CCI, in the first instance, considered the common replies to the DG's report filed by as many as 44 opposite parties. Due to this reason, cutting and over-writing in the price bids for the tender in question was noticed by the Director General. It was further pointed out that there were only 62 qualified tenderers in the whole country, out of whom 12 bidders were classified as new parties, meaning thereby that they had not supplied Cylinders in last three years and were not required to bid in the tender. After consideration of these factors, the CCI came to the conclusion that it did suggest collusive bidding. However, the appellants could not deny the position that there was an association called Indian LPG Cylinder Manufacturers' Association. These common agents were instructed to keep a close watch on the price quoted by the competitors in a particular State. The CCI has referred to the evidence of Mr. Dinesh Goyal, who was an active member of the Indian LPG Cylinder Manufacturers' Association and noted that he had attended the meeting. The CCI also noted that he admitted

²⁴ 2018 SCC Online SC 1718, Civil Appeal No. 3546 of 2014

that in such meetings there were discussions on pre-bid issues. From this evidence, the CCI correctly deduced that pre-bid issues were discussed in that meeting. The COMPAT has approved the finding of the CCI that owing to the collusion, the IOCL could not get lower or the competitive prices. The rates quoted in 2010-2011 were higher as compared to the rate quoted in 2009-10. According to it, even where the rates are fixed, the bid rigging can still take place to keep the big amounts to a pre-determined level. She stressed that the conditions of monopsony/oligopsony prevailed. IOCL controls 48% of the market share.

USA

- **LYSINE CARTEL**²⁵

Lysine is an amino acid that stimulates growth and results in leaner muscle development in dogs, poultry and fish. It is also mixed with corns and is an input for feed products. Between 1992 and 1995, five producers belonging to Japan, Korea and the United States controlling more than 97% of the global capacity engaged in price fixing, allocation of sales quota and monitoring of volume agreements. The DoJ undertook searches with the cooperation of the FBI and on the basis of subpoenaed documents together with tape recordings of meeting of the conspirators could make out a strong case of colluding on lysine prices around the world for 3 years.

CONCLUSION

Under the Indian and United States Competition Law, price fixing is considered as illegal. The practice is not only deemed anti-competitive but also provides an undeterred power in the hands of the conspirators to influence the relevant product market for their own monetary benefits.

There are various types of price fixing agreements, amongst which the Horizontal and Vertical Price Fixing Agreements are the main type of price fixing agreement prevalent in the competition market.

Price fixing is quite difficult to prove as such agreements are made in secret and the conspirators often use code languages. However, both the countries have their respective investigating agencies (as authorized under the respective Competition Law) to look into the matter of cartelization.

Both Indian and US Competition Law provide for leniency provision which indirectly helps the Commission to unveil the conspiracy and the conspirators, thereby providing the parties to the disclosure a leniency of up to 100% upon fulfillment of conditions as mentioned in the Competition Law.

In this way, both the countries i.e. India and USA with the help of their respective Competition Law, administrative agencies and Adjudicating agencies keep a check over the cartelization relating to price fixing for the benefit of the public in general.

BIBLIOGRAPHY

The information relating to the topic “Comparing price fixing in India and USA” has been gathered from the following sources-

- 1) [Price Fixing - Definition, Types, Legality, Examples \(corporatefinanceinstitute.com\)](http://corporatefinanceinstitute.com)
- 2) [Section 3 in The Competition Act, 2002 \(indiankanoon.org\)](http://indiankanoon.org)
- 3) [price fixing | Wex | US Law | LII / Legal Information Institute \(cornell.edu\)](http://cornell.edu)

- 4) [Sherman Anti-Trust Act \(1890\) | National Archives](#)
- 5) [Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For \(justice.gov\)](#)
- 6) [Cartels & Leniency Laws and Regulations Report 2024 USA \(iclg.com\)](#)
- 7) [draft-lesser-penalty-regulations1697431514.pdf \(cci.gov.in\)](#)
- 8) [COMPAT Archives \(nclat.nic.in\)](#)
- 9) [All you need to know about NCLAT taking over COMPAT - iPleaders](#)
- 10) [A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority | Federal Trade Commission \(ftc.gov\).](#)