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# The Legal 500 Country Comparative Guides

## India

# CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in India.

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## INDIA CARTELS



### 1. What is the relevant legislative framework?

The Competition Act, 2002 (Act) together with its allied regulations and notifications constitute the applicable rules that govern anti-competitive agreements, abuse of dominant position and merger control in India.

Section 3 of the Act prohibits anti-competitive agreements including horizontal and vertical anti-competitive agreements which cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India.

Section 3(3) of the Act specifically prohibits select horizontal agreements entered into between competing enterprises, or persons, or associations of enterprises / persons including 'cartels'. Section 3(3) of the Act prohibits horizontal anti-competitive agreements for:

- a. Determining purchase or sale prices, or
- b. Limiting or controlling the production, supply, markets, technical development etc., of goods or services, or
- c. Sharing the market or source of production in terms of geography or customers, or
- d. Bid rigging or collusive bidding.

The term 'cartel' is specifically defined under Section 2(c) of the Act, and it includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services.

The prohibitions set out under Section 3(3) of the Act, (set out above), are not applicable to joint venture agreements where such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

### 2. To establish an infringement, does there

### need to have been an effect on the market?

Section 3 of the Act prohibits all anti-competitive agreements which cause or are likely to cause AAEC in India. Under the Act, once the existence of a horizontal agreement is established, existence of an AAEC in India is presumed and the same is not required to be proved by the Competition Commission of India (CCI).

However, it is relevant to note that the said presumption of AAEC is rebuttable in nature. Therefore, the cartel participants can discharge a burden of proof to establish the absence of any AAEC to not fall foul of the Act.

### 3. Does the law apply to conduct that occurs outside the jurisdiction?

The Act follows the effects doctrine. As such, Section 32 of the Act provides that regardless of the jurisdiction where the agreement is forged or entered into, if the agreement causes or is likely to cause AAEC in India, the CCI will have jurisdiction to scrutinize the conduct and take punitive action where contravention is found.

### 4. Which authorities can investigate cartels?

The CCI is the sole authority empowered to investigate and penalize cartels under the Act. The cartel investigation process is undertaken by the office of the Director General of the CCI (**DG**), which is the investigative arm of the CCI

### 5. What are the key steps in a cartel investigation?

**Information - Step 1:** A cartel investigation may be initiated either based on (i) an information received from an enterprise / person / association of an enterprise or person, or (ii) a reference received from the Central or State government, or a statutory authority. The CCI also

has the authority to take a suo motu motion of any conduct that may be in violation of the Act. Notably, leniency applications are taken up as suo motu cases.

**Prima Facie Finding - Step 2:** The CCI undertakes a preliminary assessment of the information / evidence placed before it to form a prima facie view. If the CCI finds a prima facie violation of the Act, it directs the DG to conduct an investigation into the alleged anti-competitive conduct. However, if the CCI is of the opinion that there is no prima facie case, then the case is closed by the CCI.

It is pertinent to note that only the prima facie rejection of a case is appealable to the National Company Law Appellate Tribunal (NCLAT) i.e. the appellate tribunal under the Act. Once the CCI forms a prima facie view of alleged contravention then such orders are only appealable statutorily once the final finding is made by the CCI on merits of the case.

**DG Investigation - Step 3:** Once the CCI directs the DG to undertake an investigation, it sets out the period (ordinarily 60 days) under which the investigation report must be submitted. This period is generally extended upon request(s) by the DG to the CCI. In practice, a DG investigation may take around 1.5 years to 3 years. Upon completion of the probe, the DG completes its investigation report and submits the same to the CCI (DG Report).

It is pertinent to note that, under the Act there are no specific milestones for the investigation process. However, during the investigation, it is common for the DG to seek exhaustive information from the parties, third parties as well as the informant (complainant) through the issuance of notices. In addition, the DG routinely summons parties' representatives and officers in-charge to record their statements on oath.

**Consideration of the DG Report - Step 4:** Upon receipt of the DG Report, the CCI sends a copy of the report to the opposite parties, defendants, complainants (where applicable) to seek their response / objections on the DG Report. However, if the CCI finds that the DG Report is lacking in material aspects, it may undertake further investigation on its own or direct the DG to undertake further investigation and submit an additional report. The CCI may or may not send the DG Report to the parties before directing the DG to conduct further investigation. Further, the parties may, by an application, request the CCI to allow conducting cross examination of the witnesses whose statements have been relied upon in the DG Report. The CCI may or may not allow the request and pass suitable orders.

**CCI's Hearing and Final Order - Step 5:** Post receipt

of responses / objections of the parties to the DG Report, the CCI typically allows the parties to make oral submissions before it. Upon conclusion of the oral hearings, the CCI may either find that there is a contravention of Section 3(3) of the Act or exonerate the parties. If a contravention is found, the CCI may impose appropriate penalties on the parties as well as the individuals responsible for the infringement of the Act. The CCI also has the powers to pass a cease-and-desist order, direct modifications of agreements, or any other order as it deems fit based on the facts and circumstances of the case.

The order of the CCI is appealable before the NCLAT. The order of the NCLAT can be appealed before the Supreme Court of India which is the final authority under the Act.

## 6. What are the key investigative powers that are available to the relevant authorities?

For the purposes of conducting an investigation, the CCI and the DG are allowed to:

- a. summon and enforce the attendance of any person and examine him on oath,
- b. require the discovery and production of documents,
- c. receive evidence on affidavit,
- d. issue commissions for the examination of witnesses or documents,
- e. requisition any public record or document or copy of such record or document from any office per the provisions of the Indian Evidence Act, 1872, and
- f. call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as necessary.

The DG also has powers to conduct surprise search and seizure operations (dawn raids) to collate evidence of an anti-competitive conduct if there are grounds to believe that the parties may not produce the documents as required for the investigation or may alter, hide or destroy those documents.

It is relevant to note that the DG is required to secure a warrant from the Chief Metropolitan Magistrate in New Delhi before conducting any search and seizure operations and does not have the authority to conduct search and seizure operations on its own. The search and seizure operations can be undertaken both at the commercial locations of the parties and/or in domestic premises of relevant employees / personnel of the

parties.

### **7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?**

The legal position involving privilege is not explicitly set out under the Act. However, the broad position under the Indian Evidence Act, 1872 remains applicable. Typically, legal communications made confidentially between an advocate and his client with a view to obtain professional legal advice is privileged. Based on practice, we understand that while the DG may seize privileged communications while conducting a dawn raid, however, the extent to which the DG can rely on these documents is unknown.

### **8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?**

Under Section 46 of the Act the CCI has the power to impose lesser penalty on any party for the violation of Section 3(3) of the Act provided that such party makes full, true and vital disclosures in relation to the alleged violation under the Act.

Detailed conditions for the imposition of lesser penalty or leniency are set out in the CCI (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations). The Lesser Penalty Regulations provide for a 'first past the post' mechanism where only the first applicant is allowed up to 100% reduction in penalty. A 100% reduction in penalty is typically allowed in the following two situations:

- a. Where the vital and true disclosure made by the first leniency applicant allows the CCI to form a prima facie opinion regarding the existence of a cartel, and the CCI at the time of the leniency application did not have sufficient evidence to form such an opinion, or
- b. Where the first leniency applicant furnishes vital disclosure and evidence which allows the CCI to establish the existence of a cartel in case of an ongoing investigation, and the CCI or the DG at the time of the leniency application did not have sufficient evidence to establish such a contravention.

To qualify for a 100% reduction in penalty, the first applicant is also required to:

- a. Cease to participate in the cartel, unless directed otherwise,
- b. Provide vital disclosures, and relevant information or evidence as directed by the CCI,
- c. Fully cooperate - genuinely, continuously, and expeditiously with the investigation and the proceedings before the CCI, and
- d. Not conceal, destroy, manipulate, or remove any relevant documents that may help establish the existence of the cartel.  
(Leniency Conditions)

However, it is reiterated that the first applicant may receive up to 100% leniency on the penalty. Based on the disclosures made and the co-operation provided by the leniency applicant, it is also likely that the CCI may provide lesser reduction in penalty. The conditions considered by the CCI for determining the quantum of leniency are set out below:

- a. The stage of the investigation at which the disclosure is made to the CCI,
- b. The evidence already in possession of the CCI at the time of the disclosure,
- c. The quality of information provided by the leniency applicant, and
- d. The general facts and circumstances of the case.

It is pertinent to note that a lesser penalty is not afforded to parties where the disclosure is made after the submission of DG Report.

Generally, the CCI requires the leniency applicant to formally concede to and admit its participation in the cartel.

### **9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?**

To remain eligible for reduction in penalty, all subsequent leniency applicants are required to abide by the Leniency Conditions.

Further, as per the Lesser Penalty Regulations, the second leniency applicant is allowed up to 50% reduction in penalty, and the third leniency applicant and all other subsequent leniency applicants are allowed up to 30% reduction in penalty.

Please note that leniency applicants subsequent to the first applicant, are allowed reduction in penalty only if the disclosures made by them are vital, and provide significant added value (i.e., evidence over and above

what is already available with the CCI or the DG) to establish and further corroborate the existence of the cartel.

#### **10. Are markers available and, if so, in what circumstances?**

A leniency applicant can place a marker / mark its priority status with the CCI either orally or by way of a written communication through email or fax.

Upon the application of the marker / priority status, the same is put up for consideration within five working days and the priority status is thereafter communicated to the applicant. Thereafter, the leniency applicant has up to 15 days to submit the complete leniency application in the prescribed format under the Lesser Penalty Regulations.

#### **11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?**

The Leniency Conditions set out above provide the details relating to the co-operation required from leniency applicants.

Continuous cooperation with the DG and the CCI throughout the course of the investigation is an essential part of the cooperation required from the applicants.

It is relevant to note that the CCI has sufficient leeway in determining the quantum of reduction in penalty afforded to each applicant. Therefore, if a leniency applicant stops its co-operation with the CCI or the DG, the CCI may allow a lesser reduction in penalty compared to what is otherwise permitted under the Lesser Penalty Regulations. Lack of continuous cooperation can also result in loss of priority status.

#### **12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

The Act does not provide for criminal prosecution for contravention of the cartel provisions.

The benefits under the leniency regime that are provided to companies for contravention of the Act are generally also available to the employees of the company who are found responsible for the contravention of the Act.

#### **13. Is there an 'amnesty plus' programme?**

The Indian competition law regime does not currently provide for an 'amnesty plus' program.

#### **14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

The Indian competition law regime does not currently provide for a 'settlement agreement' or a 'plea bargain' arrangement.

#### **15. What are the key pros and cons for a party that is considering entering into settlement?**

As set out above, the Indian competition law regime does not provide for a 'settlement agreement' or a 'plea bargain' arrangement.

#### **16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The Act allows the CCI to enter into a memorandum of understanding (MoU) with foreign competition regulators for the purposes of discharging its duties and functions. To this end, the CCI has signed MoUs with the competition regulators in Australia, Brazil, Canada, China, the European Union, Russia, South Africa, and the United States.

In theory, the MoUs are meant to facilitate co-operation between the CCI and its foreign counterparts in all competition related matters including co-operation and co-ordination in enforcement activities when investigating the same or related competition matters.

#### **17. What are the potential civil and criminal sanctions if cartel activity is established?**

If an enterprise is found in violation of Section 3(3) of the Act, the CCI is empowered to:

- a. Issue a cease and desist order to direct the cartel participant to discontinue its participation in the cartel, and

- b. Impose on each cartel participant a penalty of:
  - i. Up to three times of the profit made by the cartel participant for each year of the continuance of the cartel, or
  - ii. Up to 10% of the turnover of the cartel participant for each year of the continuation of the cartel,

Whichever is higher.

- c. Or any other order that the CCI may deem fit.

In addition to the above, where the cartel participant is a company, the CCI can also impose penalty on every person who at the time of the contravention of the Act was in charge / responsible for the conduct of business of the company. However, the Act provides that no penalty is to be imposed if it can be proved that:

- a. the contravention was committed without the knowledge of said person, and
- b. said person exercised all due diligence to prevent the contravention.

Further, the CCI is also empowered to penalize any and all directors, managers, secretaries or other officers of the cartelizing enterprise, if it is proven that the contravention took place with the consent or connivance of such person or was attributable to any neglect on the part of such person.

Typically, the cartelizing enterprise and its employees / personnel are penalized at the same rate / percentage. For individuals, the income tax returns for the relevant years are considered to identify the base turnover / profit figure, to calculate the penalty.

The Supreme Court of India in the case of Excel Crop Care Limited v. the Competition Commission of India, noted that the base turnover for calculating the penalty should only be the turnover attributable to the product or service which is the subject of the infringement. As such, the total blanket turnover of the cartelizing enterprise cannot be considered to calculate the penalty amount.

As stated above, there are no criminal sanctions for violation of cartel provisions under the Act.

## 18. What factors are taken into account

### when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The Indian competition law regime does not provide for any fining guidelines for calculating the quantum of penalty.

However, while imposing penalty, the CCI does take into consideration:

- a. Aggravating and mitigating factors,
- b. The financial health of the company and the sector,
- c. Nature of the sector,
- d. Repeat defaulter; and
- e. The competitive landscape.

The year 2020 majorly affected the functioning of the CCI due to COVID -19. As such, no significant penalty was imposed on the cartel participants in the year 2020. However, in earlier years CCI has fined at the rate of 10% of the average relevant turnover or 3 times the relevant profit for each year of continuance of the cartel.

Till date, the largest penalty that has been imposed was on cement manufacturers participating in the cement cartel. In the said cartel, the CCI imposed a penalty of INR 6,300 crores and the same was upheld by the NCLAT. Currently, the appeal is *sub judice* before the Supreme Court of India.

### 19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

Under the Act, a parent company can be held liable for the infringements undertaken by its subsidiary.

### 20. Are private actions and/or class actions available for infringement of the cartel rules?

The Central Government or a State Government or a local authority or any enterprise or any person who has suffered damages or loss due to contravention of the Act can make an application to the NCLAT for seeking compensation for the loss incurred, so long as, the contravention is established by the CCI or the NCLAT.

It is relevant to note that an order of contravention by the CCI or the NCLAT against the erring parties is a *sine qua non* for the initiation of private actions or

compensation claims.

The Act also specifically allows for compensation claims by way of a class action where the loss or damage is suffered by numerous persons. One or more persons forming part of the class can file for compensation on behalf of the entire class after obtaining due permission from the NCLAT.

### **21. What type of damages can be recovered by claimants and how are they quantified?**

Compensatory damages can be claimed in a private action litigation.

Given that the compensation claims jurisprudence is yet to develop and the first set of compensation claims are sub-judice, it is difficult to ascertain the basis that will be considered by the NCLAT for the quantification of damages.

### **22. On what grounds can a decision of the relevant authority be appealed?**

Various orders of the CCI can be appealed before the NCLAT however, there are certain orders of the CCI which are final in nature and are not appealable under the Act. An order of the NCLAT can be appealed before the Supreme Court of India.

An appeal from the order of the CCI can be preferred on questions of both facts and law.

### **23. What is the process for filing an appeal?**

An appeal to the NCLAT from the order of the CCI can be preferred within 60 days from the date when the copy of the direction or decision or order of the CCI is received by the appealing party.

Please note that an appeal made after the said 60 days may be entertained by the NCLAT, if the appealing party can satisfy that there were sufficient grounds for not filing the appeal within the 60-day period.

### **24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?**

As stated, the functioning of the CCI was impacted due

to the lockdown imposed by the Government of India from March 2020 to June 2020 owing to the COVID-19 pandemic. Further, the CCI also took a lenient view in light of the global pandemic and did not impose a penalty in either of the cartel cases decided this year.

The first case was with respect to a cartel in the automotive and the industrial bearings market in India. The case was initiated pursuant to a leniency application filed by one of the participants. The CCI held that cartel as defined under the Act was established as two meetings between competitors were proved to exist. However, the CCI did not impose a penalty and merely passed a cease-and-desist order against the participants in light of the peculiar facts and circumstances of the case. Whilst, the CCI did not impose any monetary penalty, the CCI in its order did record the fact that the parties failed to rebut the presumption of AAEC and there was also nothing on record to establish any mitigating factors.

The second case was with respect to a cartel in the supply of composite brake blocks to the Indian Railways, Government of India. The case was initiated based on various complaints received from different departments of the Indian Railways. Interestingly, this was the first case where the CCI considered COVID-19 as a factor while determining the quantum of penalty and decided not to impose a monetary penalty on the participants. For the avoidance of any doubt, please note that the CCI found clear evidence of cartelisation against the participants.

### **25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?**

As stated above, the functioning of the CCI was impacted due to COVID-19 and there were not many major cartel decisions passed by the CCI in the year 2020. There is also a slow-moving appeal process for the same reason.

There was an initial slowdown in the investigation process however, since mid-2020, the investigations in the existing cases picked up and virtual hearings also resumed.

The trend of 2020 is difficult to establish since there were only two cartel cases in the year 2020 i.e., one in the automotive and industrial bearings industry and one in the supply of composite brake blocks for locomotives. Further, the CCI did not impose any monetary penalty in both of these cases for reasons stated above.

We expect a lot more cartel decisions in the year 2021 as the functioning of the CCI has resumed and it is actively trying to finish the backlog caused due to COVID-19.

This is clear from the fact that the CCI conducted dawn raids on various cement companies in December 2020.

## 26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

Competition Amendment Bill, 2020

The Government of India through Ministry of Corporate Affairs had sought public comments on the draft Competition Amendment Bill, 2020 (Bill) in February 2020. With regards to cartels, the Bill provides for the following.

1. Deposit of Penalty for Appeal - The Bill proposes that any party that wishes to file an appeal against the order of the CCI has to deposit 25% of the amount of penalty levied on it or any other prescribed amount. This is a stark change from the current position where no such deposit requirements are in vogue.
2. Recognition of Buyers' Cartels and Hub and Spoke Cartels - The Act currently does not recognise buyers' cartels and hub and spoke cartels. However, the Bill proposes to include

hub and spoke cartels, and buyers' cartels within the scope of prohibited horizontal agreements.

3. Initiation of a Leniency Plus Regime - The Bill proposes to enable leniency applicants in an existing cartel investigation to disclose the existence of a second cartel in lieu of further reduced penalty in the original cartel investigation. The additional reduction in penalty in the original cartel investigation is independent of the reduction in penalty that can / will be granted in the newly disclosed cartel. To benefit under this leniency plus regime, the information divulged vis-à-vis the new cartel, should allow the CCI to pass a prima facie order directing the DG to conduct an investigation into the newly disclosed cartel.
4. Commitments and Settlement Provisions - The Bill provides for a system for settlements and commitments. Pertinently, under the proposal, a settlement mechanism will be allowed only for violations relating to vertical anti-competitive agreements and abuse of dominance. Therefore, cartel violations are outside the scope of the proposed commitment and settlement provisions.

The Bill is expected to be passed by the Government of India during this year. Please note that our comments set out above are based on the language set out in the draft Bill. The exact bill proposed to be considered by the Parliament is not available in the public domain.

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