

CARTEL REGULATION

India



Cartel Regulation

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Quick reference guide enabling side-by-side comparison of local insights, including relevant law and institutions; application of the law and jurisdictional reach; international cooperation; specifics of investigations and cartel proceedings; criminal, civil and administrative sanctions; private damage claims and class actions; treatment of cooperating parties; defending a case; getting any fine down; and recent trends.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

What is the relevant legislation?

Competition law is governed by the Competition Act 2002 (the Act), and related rules and regulations.

Law stated - 12 October 2022

Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Competition Commission of India (CCI) is the national competition law regulator. Upon direction from the CCI, the Office of the Director General (DG), the CCI's investigative wing, investigates cartel matters. The CCI then prosecutes and adjudicates these matters.

Appeals are heard by the National Company Law Appellate Tribunal (NCLAT) and a further appeal lies with the Supreme Court of India. In certain circumstances, the CCI's orders may also be challenged before the high courts under their writ jurisdiction.

Law stated - 12 October 2022

Changes

Have there been any recent changes, or proposals for change, to the regime?

The CCI recently amended the regulations pertaining to confidentiality. Pursuant to these amendments, the following applies:

- Parties may claim confidentiality over information and documents being filed with the DG or the CCI by self-certifying through an undertaking. A false undertaking can lead to penalties. Parties must support their claims for confidentiality with cogent reasons, and undertake that their claims are consistent with the requirements set out under the Act and applicable regulations. This includes certifying that public disclosure would result in:
 - the revelation of trade secrets;
 - the diminution of commercial value of any information; or
 - a reasonable expectation of causing serious injury.
- Materials and documents obtained through search and seizure – such as email dumps, call detail records, or any other document or material in the nature of personal information – shall be marked as confidential and separated from the public record.
- If the CCI considers it necessary or expedient, it may establish confidentiality rings, which will comprise of a limited group of authorised representatives of the parties who will have access to the entire case records in an un-redacted form.

Changes to the Act have also been proposed under the Competition (Amendment) Bill 2022 (the Amendment Bill). Key changes that will impact the cartel regime if the Amendment Bill is passed are:

- facilitators of cartels, including hub-and-spoke cartels, shall be presumed to be a part of an anticompetitive agreement and will be treated as infringing parties if they actively participate in the furtherance of the agreement;
- the introduction of a leniency plus regime, allowing an enterprise that files for leniency in relation to one cartel and also helps in exposing a separate cartel to receive a reduction in penalty for both the existing and the newly revealed cartel;
- the introduction of provisions that disincentivise leniency applicants against any failure to cooperate, providing false evidence or making non-vital disclosures as this could lead to the rejection of the marker and levy of penalties;
- the introduction of the ability for applicants to withdraw their leniency applications after they are submitted; and
- guidelines by the CCI to calculate turnover and income for penalty assessment will be published.

Law stated - 12 October 2022

Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 3 of the Act aims to prohibit agreements that cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India. Such agreements include horizontal agreements between competitors, including cartels. The term 'cartel' is non-exhaustively defined as an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in, goods or provisions of services. Group boycotts and information exchanges between competitors are forms of cartelisation.

The Act prohibits horizontal agreements that:

- directly or indirectly determine purchase or sale prices;
- limit or control production, supply, markets, technical development, investment or the provision of services;
- allocate, among others, markets, customers, sources of production or goods; or
- directly or indirectly result in bid rigging or collusive bidding if such agreements cause or are likely to cause an AAEC.

Once a horizontal agreement has been established, it is presumed to cause an AAEC. This presumption is however rebuttable by the parties to the agreement. In determining whether an agreement causes an AAEC in India, the CCI is required to consider a number of negative and positive factors. The negative factors are:

- the creation of barriers to entry;
- driving existing competitors out of the market; and
- foreclosing competition by hindering entry into the market.

The positive factors are:

- accrual of benefits to customers;
- an improvement in production or distribution; and
- the promotion of technical, scientific and economic development.

The term 'agreement' is broadly defined. It can include any arrangement or understanding or action in concert, whether such agreement is:

- formal or in writing; or
- intended to be enforceable by legal proceedings.

Since the nature of penalties imposed is administrative rather than criminal, the CCI applies a lower standard of proof than that of beyond reasonable doubt as required in criminal cases. The CCI and the NCLAT's current position, reaffirmed by the Supreme Court, is that the standard of proof is a preponderance of probability. Knowledge or intention are not necessary elements to determine a contravention of the cartel provisions. Where the actions of the parties fall foul of the law and the conduct is held to cause or likely to cause an AAEC, the parties will be liable.

Law stated - 12 October 2022

Joint ventures and strategic alliances

To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

Joint ventures that increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services are not presumed to cause an AAEC. The onus to prove that the joint venture agreement is efficiency-enhancing lies with the parties to the agreement.

Law stated - 12 October 2022

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Application of the law

Does the law apply to individuals, corporations and other entities?

The law applies to individuals, corporations, government departments and other entities. It does not apply to sovereign functions carried out by the government, which encompasses activities relating to atomic energy, space, currency and defence.

Law stated - 12 October 2022

Extraterritoriality

Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Section 32 of the Competition Act 2022 (the Act) empowers the Competition Commission of India to inquire into an agreement under section 3 of the Act even where it has been entered into outside India, any party is outside India, or any other matter, practice or action arising out of an agreement that is outside India, provided that the agreement has, or is likely to have, an appreciable adverse effect on competition (AAEC) in India.

Law stated - 12 October 2022

Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Export cartels are generally not subject to competition laws, except in certain circumstances where the conduct in question causes or is likely to cause an AAEC within India.

Law stated - 12 October 2022

Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

The Act applies universally to all sectors and there are presently no industry-specific infringements. However, the Act exempts the exercise of intellectual property rights conferred under the following pieces of Indian legislation:

- the Copyright Act 1957;
- the Patents Act 1970;
- the Trade and Merchandise Marks Act 1958 or the Trade Marks Act 1999;
- the Geographical Indications of Goods (Registration and Protection) Act 1999;
- the Designs Act 2000; and
- the Semiconductor Integrated Circuits Layout-Design Act 2000.

Law stated - 12 October 2022

Government-approved conduct

Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

Save for sovereign functions carried out by the government, and activities undertaken by the space, atomic energy, defence and currency departments of the central government, no other state action, government-approved activity or regulated conduct is expressly exempt from competition laws.

Law stated - 12 October 2022

INVESTIGATIONS

Steps in an investigation

What are the typical steps in an investigation?

The Competition Commission of India (CCI) can initiate an investigation into any alleged anticompetitive conduct either:

- on its own motion;
- based on a complaint filed by any person; or

- following a reference from the government or a statutory body.

The CCI may also initiate investigations following a leniency application. In the early years, the CCI's detection of cartels was heavily reliant on complaints received from private parties or government references relating to bid rigging in public procurement. In the past three to four years, the CCI has successfully used leniency as the basis for detecting cartels.

Based on the available evidence, if the CCI is prima facie satisfied that there is a contravention of the Competition Act 2022 (the Act), it will direct the Office of the Director General (DG) to investigate. If a prima facie case has not been established, the CCI will close the case at the threshold stage itself.

Once the CCI passes an order for investigation, the DG must investigate in a time-bound manner and submit a report containing its findings on the allegations (the DG Report). The DG typically conducts an in-depth and invasive investigation, including, if necessary, issuing summons to individuals to record their statement on oath, and search and seizure operations. The Act provides for penalties for failure to comply with the directions of the DG and for not furnishing information.

If the DG Report recommends that there has been no violation, the CCI can forward it to the concerned parties with an invitation to provide their objections or suggestions. After considering the parties' objections, the CCI may either agree with the DG's recommendation and close the matter, or conclude that further investigation is required and direct the DG to do so or itself proceed with further inquiry.

If the DG Report recommends that there has been a violation of the Act and the CCI agrees, it shall forward a non-confidential version of the DG Report to the concerned parties and proceed with further inquiry involving oral hearings and passing orders, as required.

Law stated - 12 October 2022

Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The CCI and the DG have wide powers, equal to those of a civil court, including powers to:

- summon and enforce the attendance of any person, and examine them on oath;
- require the discovery and production of documents;
- receive evidence on affidavit;
- issue commissions for the examination of witnesses or documents; and
- requisition, subject to certain other legal requirements, any public record or document, or copy of such a record or document, from any office.

Additionally, the DG has the power to conduct search and seizure operations (dawn raids) upon obtaining a warrant from the Chief Metropolitan Magistrate in Delhi, and can seize the books and documents of the company, including electronic evidence such as emails, computer hard drives and removable storage devices.

The DG's investigation is circumscribed by the prima facie order of the CCI, which directs it to investigate a case. However, the CCI words its orders flexibly to enable the DG to conduct more thorough investigations. The DG can conduct investigations into the role of other companies (including those not initially identified) or extend time periods before arriving at a final recommendation.

INTERNATIONAL COOPERATION

Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

The Competition Act 2022 (the Act) provides for cooperation between the Competition Commission of India (CCI) and foreign antitrust regulators. The CCI may enter into any memorandum or arrangement with any foreign agency with prior approval of the central government. The CCI has entered into memoranda of understanding with the following foreign agencies and regulators:

- the Competition Commission of Mauritius;
- the Japan Fair Trade Commission;
- the competition authorities of Brazil, Russia, India, China and South Africa (ie, the BRICS nations), including Russia's Federal Antimonopoly Service and Brazil's Administrative Council for Economic Defense;
- Canada's Competition Bureau;
- the European Union's Directorate-General for Competition;
- the Australian Competition and Consumer Commission; and
- the United States' Federal Trade Commission and Department of Justice.

Law stated - 12 October 2022

Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Engagement between the CCI and the regulators of other jurisdictions is not a matter of public record.

Law stated - 12 October 2022

CARTEL PROCEEDINGS

Decisions

How is a cartel proceeding adjudicated or determined?

The Competition Commission of India (CCI) adjudicates cartel proceedings based on:

- the report from the Office of the Director General (DG) containing its findings on the allegations;
- the oral arguments made by the parties concerned; and
- the written submissions of the parties.

The CCI is actively considering conducting market surveys and studies, undertaken by third parties, to identify

structural and behavioural screens to aid detection of cartels, which will help it to initiate ex officio or suo motu investigations. The use of screening has guided the CCI's decision-making process in a majority of its orders and the CCI has relied on this (such as the level of concentration in the market, the presence of trade associations, an abnormal increase in profits or evidence of information exchange) in nearly 80 per cent of its cartel cases.

Upon completion of the proceedings, the CCI can pass the following orders (other than imposing a penalty):

- requiring the parties to cease and desist the infringing conduct;
- modifying agreements to the extent necessary;
- requiring that parties comply with certain directions of the CCI; and
- any other order that it deems fit.

Law stated - 12 October 2022

Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden to prove the existence of an agreement among competitors to fix prices, limit output, share markets or rig bids rests upon the CCI. Subsequently, the evidentiary burden to disprove the presumption that the agreement has caused or is likely to cause an appreciable adverse effect on competition shifts onto the parties.

The standard of proof required to prove the existence of an agreement between competitors is one of a preponderance of probability.

Law stated - 12 October 2022

Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Yes. In the absence of direct evidence, an investigation may be undertaken and infringement can be established based solely on circumstantial evidence. In the context of cartel cases, the Supreme Court has noted that such cases typically involve parties operating under a cloak of secrecy and, thus, obtaining direct evidence of cartel-like conduct is often difficult. The CCI can thus rely on circumstantial evidence.

Circumstantial evidence such as call records, meetings between competitors, the timing of filing bids or documentation while making bids has previously been relied upon by the CCI to infer and establish the existence of cartels, even when no direct evidence of an agreement was found.

Law stated - 12 October 2022

Appeal process

What is the appeal process?

The right to appeal against orders of the CCI is not available in all cases. The orders that are appealable under the Act include:

- orders where the CCI closes a case at the prima facie stage;
- orders where the CCI finds parties guilty of contravention of the Act and imposes penalties or other directions, or both;
- orders where the CCI finds no contravention of the Act;
- interim orders passed by the CCI; and
- rectification orders.

Any party aggrieved by the CCI's orders may appeal to the National Company Law Appellate Tribunal (NCLAT) within 60 days (the NCLAT has the discretion to condone any delay based on sufficient cause) of the date of receipt of a copy of such an order.

After examining the case, the NCLAT has wide powers to pass orders confirming, modifying or setting aside the impugned order, or remand the case to the CCI or the DG, as it deems fit. The Act does not prescribe any defined timelines for the disposal of appeals but does state that appeals must be dealt with expeditiously (ideally within six months of the date of appeal).

Further, any party aggrieved by an NCLAT direction, decision or order may make an appeal before the Supreme Court within 60 days of the receipt of a copy of such an order.

Law stated - 12 October 2022

SANCTIONS

Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activities under the Competition Act 2022 (the Act).

Law stated - 12 October 2022

Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Competition Commission of India (CCI) may impose civil sanctions by:

- requiring the parties to cease and desist the infringing conduct;
- modifying agreements to the extent necessary;
- requiring that parties comply with certain directions of the CCI; and
- passing any other order that it deems fit.

The CCI may also impose a monetary penalty of 10 per cent of the average turnover for the three preceding financial years upon each individual or enterprise that is a party to an anticompetitive agreement. Alternatively, in the case of cartels, the CCI may impose a penalty of up to three times the profit for each year of the continuance of such an agreement or 10 per cent of the turnover for each year of the continuance of such an agreement, whichever is higher. This is higher than the penalties for other anticompetitive conduct.

Generally, sizeable penalties are imposed for entering into anticompetitive agreements. The CCI has made a few exceptions by considering the covid-19 pandemic and its impact on business as a mitigating factor, thus reducing the

amount of the penalty. It considers recidivism as an aggravating factor that justifies higher levels of penalty.

Law stated - 12 October 2022

Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

While the Act and its corresponding regulations do not contain any specific guidelines for the calculation of the penalty, the CCI applies the principle of proportionality when imposing penalties. Penalties are usually determined against the turnover of an enterprise that is relative to the market in which the cartel conduct took place, not the overall turnover of the enterprise. Penalties may extend to individuals or officials of an enterprise.

In *Excel Crop Care Limited v Competition Commission of India and Ors* (Civil Appeal No. 2480 of 2014), the Supreme Court laid down a non-exhaustive list of aggravating and mitigating factors that should be considered when determining penalty amounts, including:

- the nature, gravity and extent of the contravention;
- the role played by the infringer (ringleader or follower);
- the duration of participation;
- the intensity of participation;
- any loss or damage suffered due to such contravention;
- the market circumstances in which the contravention occurred;
- the nature of the product;
- the market share of the entity;
- any entry barriers;
- the nature of involvement of the company;
- the bona fides of the company; and
- any profit derived from the contravention.

More clarity on the calculation of penalties is expected as the Competition (Amendment) Bill 2022 proposes a requirement to publish guidelines on the methodology of calculating turnover and income.

Law stated - 12 October 2022

Compliance programmes

Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

Yes, internal compliance programmes may be seen as a mitigating factor by the CCI. However, a reduction in penalty is at the discretion of the CCI and assessed on the basis of the facts of each case.

Law stated - 12 October 2022

Director disqualification

Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

Individuals involved in cartel activity are generally not subject to orders prohibiting them from serving as corporate directors or officers.

Law stated - 12 October 2022

Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

Debarment from government procurement may occur as a discretionary sanction or on the basis of the conditions set out by the government for specific tenders, but such debarment is not an automatic consequence of an infringement decision.

Law stated - 12 October 2022

Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

The Act only contemplates civil penalties for cartel activities.

Law stated - 12 October 2022

PRIVATE RIGHTS OF ACTION

Private damage claims

Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any enterprise or person who has suffered loss or damage due to a contravention of the Competition Act 2022 (the Act), which has been proven before the Competition Commission of India or the National Company Law Appellate Tribunal (NCLAT) on appeal, may file a compensation claim before the NCLAT for compensation of such loss or damage suffered. The provisions relating to compensation have not, to date, been extensively used in India. Only four compensation claims relating to section 3 of the Act (anticompetitive agreements) are pending before the NCLAT and it is still too early to predict their outcome.

It is unclear whether damage claims are available to indirect purchasers. Similarly, there is no clarity on the ability of purchasers that acquired the affected product from non-cartel members to bring compensation claims based on alleged parallel increases in the prices paid by them. There is also no guidance on the level of damages and costs that

may be recovered.

Law stated - 12 October 2022

Class actions

Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Subject to the NCLAT's permission, class action suits for compensation may be made by one person on behalf of other interested parties or numerous persons with the same interest. Subsequently, a notice regarding the institution of the compensation claim is served on all interested parties, allowing them to either opt in to or opt out of the proceedings with the NCLAT's prior permission.

Law stated - 12 October 2022

COOPERATING PARTIES

Immunity

Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Competition Act 2022 (the Act) and the Competition Commission of India (Lesser Penalty) Regulations 2009 (the Lesser Penalty Regulations) set out the leniency programme in India. The Lesser Penalty Regulations provide for a reduction of penalties for companies and individuals who have applied for it and have satisfied various stringent conditions. It requires that a leniency applicant make full, true and vital disclosures to the Competition Commission of India (CCI) regarding the cartel. The CCI generally requires parties to formally admit to participating in the cartel. The CCI has considerable discretion in deciding the level of reduction with no guarantee of full leniency to any applicant.

The first party to apply and make a vital disclosure to the CCI may benefit from a penalty reduction of up to 100 per cent if the applicant:

- made a vital disclosure that enabled the CCI to form a prima facie opinion regarding the existence of a cartel, where the CCI did not previously have the evidence to form such an opinion or establish a violation of the Act;
- ceased further participation in the cartel, unless otherwise directed by the CCI;
- extended genuine, full, continuous and expeditious cooperation to the CCI throughout its investigation and other proceedings; and
- did not conceal, destroy, manipulate or remove any relevant documents that might establish the existence of a cartel.

The second applicant may obtain a reduction of up to 50 per cent, and the third and any subsequent applicants may get a reduction of up to 30 per cent if the applicants provided evidence that enhanced the ability of the CCI or the Office of the Director General (DG) to establish the existence of a cartel (significant added value). The second and any subsequent applicants are also required to satisfy the last three conditions discussed above.

Law stated - 12 October 2022

Subsequent cooperating parties

Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes, there is a formal programme for providing partial leniency to applicants coming forward after the first applicant. The second applicant may obtain a reduction in the penalty of up to 50 per cent, and the third and any subsequent applicants may get a reduction of up to 30 per cent if the applicants provided significant added value. Subsequent applicants will need to fulfil the following conditions:

- cease further participation in the cartel, unless otherwise directed by the CCI;
- extend genuine, full, continuous and expeditious cooperation to the CCI throughout its investigation and other proceedings; and
- not conceal, destroy, manipulate or remove any relevant documents that might establish the existence of a cartel.

Law stated - 12 October 2022

Going in second

How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

There is a sliding scale of leniency under the Lesser Penalty Regulations. The second cooperating party may receive up to a 50 per cent reduction in penalty, and the third and subsequent applicants may receive up to a 30 per cent reduction. Subsequent applicants may have their fines reduced on submitting evidence that provides significant added value to the evidence already in the CCI's or DG's possession. Applicants must also continuously cooperate throughout the investigation. It should be noted that the CCI enjoys discretion in deciding the level of reduction and there is no guarantee of full, or any, leniency to any applicant.

There is no provision for immunity plus or amnesty plus under the Act or the Lesser Penalty Regulations. The Competition (Amendment) Bill 2022 seeks to introduce provisions in this regard.

Law stated - 12 October 2022

Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

A leniency application is only entertained until the report from the DG containing its findings on the allegations (the DG Report) is submitted to the CCI. Leniency applicants can contact the CCI's Secretary either orally or in writing to file a marker application. The CCI's Secretary must place the marker application before the CCI within five working days, after which the applicant is granted an appropriate priority status. Subsequently, the CCI's Secretary acknowledges and communicates the priority status to the applicant (without mentioning their rank). After receipt of the acknowledgement, the applicant has 15 days to file a detailed leniency application, containing all relevant information and evidence of the cartel's activities. Failure to file the detailed application within 15 days, or such additional time as

granted by the CCI, leads to the applicant losing their priority status.

Law stated - 12 October 2022

Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

Leniency applicants are required to extend genuine, full, continuous and expeditious cooperation throughout the investigation and other proceedings before the CCI. They must respond to all information requests by the CCI and the DG with complete information, offer relevant information during the investigation by way of voluntary submissions, and ensure that they fully comply and cooperate with the CCI or the DG. The first leniency applicant seeking up to 100 per cent reduction in penalty should ensure that they:

- make vital disclosure by submitting evidence enabling the CCI to form a prima facie opinion regarding the existence of a cartel, where the CCI did not have the evidence to form such an opinion, or establish a violation of the Act;
- cease further participation in the cartel, unless otherwise directed by the CCI;
- extend genuine, full, continuous and expeditious cooperation to the CCI throughout its investigation and other proceedings; and
- not conceal, destroy, manipulate or remove any relevant documents that might establish the existence of a cartel.

Subsequent applicants must ensure that they satisfy the last three conditions discussed above. It may be noted that there are no differences in the requirements or expectations for subsequent cooperating parties that seek partial leniency.

Law stated - 12 October 2022

Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Confidentiality protection is accorded to the identity of the leniency applicants along with the information, documents and evidence provided by the applicants. Such confidentiality is not available if:

- disclosure is required by law;
- the applicant agrees to the disclosure in writing; or
- the applicant publicly discloses the information.

Subsequent leniency applicants are accorded the same level of confidentiality protection. During proceedings, all such information provided by leniency applicants will be confidential information.

On 8 April 2022, the CCI amended the Confidentiality Regime to introduce the concept of confidentiality rings. Under this, the CCI may set up confidentiality rings comprising of representatives of the parties to an investigation who are

given access to all confidential information (including the confidential version of the DG Report, etc). Accordingly, it is possible that the information, documents and evidence submitted by a leniency applicant could be shared with other parties involved in the investigation as part of a confidentiality ring set up by the CCI.

No information is made public during the pendency of the proceedings. However, a third party may be allowed access to case documents or information if sufficient cause is demonstrated and the DG deems that disclosure is necessary for the investigation.

Law stated - 12 October 2022

Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The Act does not allow the CCI to enter into a plea bargain, settlement agreement, deferred prosecution agreement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity.

Law stated - 12 October 2022

Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Current and former employees and directors will benefit from the leniency granted to an enterprise where they have been involved in the cartel on its behalf.

Law stated - 12 October 2022

Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An applicant seeking immunity must contact the CCI at the earliest possible time to make a full disclosure of the facts. Further, subsequent cooperating parties must genuinely, fully, continuously and expeditiously cooperate during the investigation and other CCI proceedings, irrespective of their marker status. Apart from responding to the information sought by the DG, the applicants should make voluntary submissions to provide additional and complete evidence to the DG.

Law stated - 12 October 2022

DEFENDING A CASE

Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The Office of the Director General (DG) may disclose any information or evidence to a defendant if it is deemed necessary for the investigation, subject to confidentiality claims. If the information or evidence is confidential and the party that has provided such information is not willing to waive the confidentiality request, the DG may still make such a disclosure, only after recording reasons in writing and with the prior approval of the Competition Commission of India (CCI). Parties to a case are given access to the non-confidential version of the report from the DG containing its findings on the allegations (the DG Report). Disclosure may also be made where:

- disclosure is required by law;
- the applicant agrees to the disclosure in writing; or
- the applicant publicly discloses the information.

Further, the CCI may set up confidentiality rings comprised of representatives of the parties to an investigation who are given access to all confidential information (including the confidential version of the DG Report). The parties involved in a confidentiality ring are required to submit an undertaking that their members will not disclose any confidential information outside the confidentiality ring. Accordingly, it is possible that certain pieces of confidential information and evidence could be disclosed to a defendant as part of a confidentiality ring set up by the CCI.

Law stated - 12 October 2022

Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

Counsel may represent employees under investigation in addition to their employer corporation. However, obtaining independent legal advice or representation may be required in cases where there is a conflict between the submissions of the (past or present) employees and the submissions of the corporation. Thus, while a defendant may elect their counsel of choice, counsel could claim a conflict of interest if it believes that there is a risk that the employee-employer relationship will interfere with counsel's independent professional judgement during the investigation.

Law stated - 12 October 2022

Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

There is no prohibition on counsel representing multiple corporate defendants, provided that there is no conflict or a conflict waiver has been granted by the corporate defendants in question.

Law stated - 12 October 2022

Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is nothing in the Competition Act 2022 (the Act) to suggest a prohibition on this. Consequently, a corporation may pay the legal penalties imposed on its employees and their legal costs, subject to its internal policies, and directors' and officers' insurance.

Law stated - 12 October 2022

Taxes

Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Fines and penalties imposed by the CCI are not tax-deductible. Similarly, private damages awarded would also not be tax-deductible.

Law stated - 12 October 2022

International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

There is nothing in the Act or decisional practice suggesting that sanctions imposed on corporations or individuals should account for the penalties in other jurisdictions.

It is unclear whether overlapping liability for damages in other jurisdictions is considered as no case dealing with damages has been decided under the Act to date.

Law stated - 12 October 2022

Getting the fine down

What is the optimal way in which to get the fine down?

The optimal way to reduce the fine is to file a leniency application before the CCI. Apart from this, mitigating factors can be pleaded for a reduction in penalties including:

- an economic situation that arose due to the outbreak of the covid-19 pandemic, especially for those enterprises that have a small annual turnover or an unstable financial position;
- the cooperation of the company during the investigation and its admission of guilt;
- if the anticompetitive conduct was discontinued long ago and the parties do not indulge in such behaviour any more; and
- the implementation of a robust internal compliance programme and voluntary corrective measures.

Law stated - 12 October 2022

UPDATE AND TRENDS**Recent cases**

What were the key cases, judgments and other developments of the past year?

[In Re: Anti-competitive conduct in the paper manufacturing industry \(Suo Moto Case No. 5 of 2016\)](https://www.cci.gov.in/antitrust/orders/details/642/0)

The Competition Commission of India (CCI) found that several paper manufacturers and the Indian Agro & Recycled Paper Association (the Association) had engaged in cartelisation to fix the prices of writing and printing paper. They had participated in meetings of the Association where they discussed prices and the roadmap for coordinated increases, and monitored the decisions taken in these meetings. The CCI noted that 'mere attendance' in meetings where commercially sensitive information such as prices was discussed 'influences and takes away the independent decision-making ability of participant competitors', resulting in them no longer independently deciding price-related policies in the market. The CCI rejected arguments that there was no appreciable adverse effect on competition (AAEC) in the absence of implementation or uniform implementation of decisions taken in the meetings. It stated that section 3 of the Competition Act 2022 (the Act) also extended to prohibiting agreements likely to have an AAEC. Where competitors met and discussed prices, there was likely to be an AAEC, which was sufficient for a finding of breach.

In deciding the penalty, the CCI noted that, because of the covid-19 pandemic, businesses were operating virtually, which had impacted the paper business. As a significant penalty might render the manufacturers economically unviable, the CCI imposed symbolic penalties of 500,000 rupees on each of them and 250,000 rupees on the Association. One of the opposite parties, Trident Limited, had filed for leniency during the investigation by the Office of the Director General and received a 100 per cent reduction in penalty. The CCI found no infringement by several parties investigated. However, it stated that, if they found themselves in meetings where activities prohibited by the Act had taken place, they were obliged to recuse themselves from such meetings and immediately bring the matter to the CCI's attention.

[In Re: Cartelisation in the supply of Protective Tubes to Indian Railways \(Suo Motu Case No. 6 of 2020\)](https://www.cci.gov.in/antitrust/orders/details/1036/0)

The CCI passed an order against seven enterprises for cartelisation in the supply of protective tubes to the Indian railways. The CCI found there was an understanding between the vendors regarding pricing for tenders, actions by the vendors controlling supply and market sharing through the allocation of tenders. The CCI rejected arguments that the vendors had been forced to indulge in these activities due to the market structure and the monopsonist position of the Indian railways.

In view of the nature of the cartel arrangements, mitigating factors and the fact that some of the vendors were micro, small or medium enterprises (MSMEs), the CCI imposed on the vendors a penalty of 5 per cent of the average of their turnover in the relevant product for the three preceding financial years. The CCI imposed the same level of penalty on certain individuals of the companies. However, it decided not to impose penalties on several other individuals who had already been penalised in an earlier matter involving a different product, since the period covered was similar and they were associated with MSMEs. One of the vendors, Jai Polypan Pvt Ltd, had sought leniency at the start of the process and was granted a 100 per cent reduction in penalty.

[In Re: Alleged Anti-competitive Conduct in the Beer Market in India \(Suo Motu Case No. 6 of 2017\)](https://www.cci.gov.in/antitrust/orders/details/682/1)

The CCI found that three beer companies – United Breweries Limited (UBL), Anheuser Busch InBev SA/NV (AB InBev) and Carlsberg India Private Limited (CIPL) – together with the All India Brewers Association (AIBA) were involved in cartelisation of the sale and supply of beer in various Indian states and union territories. The CCI held that the three companies engaged in:

- price coordination;
- collectively restricting the supply of beer; and
- market sharing.

It also found that UBL and AB InBev had coordinated in the purchase of second-hand bottles and the supply of beer to premium institutions. The CCI held that several individuals of UBL, CIPL, AB InBev and AIBA were also liable for anticompetitive conduct.

The CCI found that the cartel lasted from 2009 to at least October 2018, with CIPL joining the other two beer companies from 2012 and AIBA providing a platform for the cartel activity since 2013. In addition to a cease and desist order, the CCI, taking account of various mitigating factors, imposed on the three companies a penalty of 0.5 times their relevant profit or 2 per cent of their relevant turnover, whichever was higher, for each year of their participation in the cartel. AIBA, and various implicated employees of the companies and AIBA, were made liable to pay a penalty of 3 per cent of its average turnover or income for the three preceding financial years of the cartel.

The three beer companies had applied for leniency and the CCI granted them, and relevant individuals, certain reductions in penalty. As a result, the CCI imposed a total penalty of approximately 8.73 billion rupees on UBL, CIPL and AIBA and their respective individuals, which was later reduced to approximately 8.64 billion rupees after the CCI rectified its calculation of penalty for CIPL.

Law stated - 12 October 2022

Regime reviews and modifications

























Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The government of India recently introduced the Competition (Amendment) Bill 2022 before the Lok Sabha (the lower house of Parliament). The key proposed changes relating to the framework regulating cartels include the following:

- facilitators of cartels, including hub-and-spoke cartels, shall be presumed to be a part of an anticompetitive agreement and will be treated as infringing parties if they actively participate in the furtherance of the agreement;
- the introduction of a leniency plus regime, allowing an enterprise that files for leniency in relation to one cartel and also helps in exposing a separate cartel to receive a reduction in penalty for both the existing and the newly revealed cartel;
- the introduction of provisions that disincentivise leniency applicants against any failure to cooperate, providing false evidence or making non-vital disclosures as this could lead to the rejection of the marker and levy of penalties;
- the introduction of the ability for applicants to withdraw their leniency applications after they are submitted; and
- guidelines by the CCI to calculate turnover and income for penalty assessment will be published.

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Jurisdictions

	Australia	Allens
	Austria	Baker McKenzie
	Belgium	Strelia
	Brazil	OC ARRUDA SAMPAIO Sociedade de Advogados
	Bulgaria	Wolf Theiss
	Canada	McMillan LLP
	Cyprus	Trojan Economics Consultants Ltd
	Denmark	Bruun & Hjejle
	European Union	Dechert LLP
	Finland	Frontia Attorneys Ltd
	Germany	Glade Michel Wirtz
	Greece	KYRIAKIDES GEORGOPOULOS Law Firm
	Hong Kong	Linklaters LLP
	India	Shardul Amarchand Mangaldas & Co
	Japan	Nagashima Ohno & Tsunematsu
	Malaysia	Zaid Ibrahim & Co
	Mexico	Valdes Abascal Abogados
	Portugal	Gomez-Acebo & Pombo Abogados
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