

# ANTI-COMPETITIVE AGREEMENTS UNDER THE COMPETITION ACT, 2002

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*A significant departure from the Monopolies and Restrictive Trade Practices Act, 1969, the Competition Act, 2002 revitalises protection against dominance, cartels and unfair trade practices. It employs anti-competitive measures to this end, the substantive and judicial exposition of which forms the subject of the present paper. The authors throw light on the legislative contribution to spreading awareness about competition law in India as well as on the loopholes present in the statute, consequently plaguing judicial verdicts with ambiguity. Given the nascent stage of development of competition law in India, it is argued that the performance of the Competition Commission of India can be significantly improved which will lend much required certainty and clarity in the understanding of the law.*

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## **I. INTRODUCTION**

The Competition Act, 2002 (the “Competition Act”) was brought into effect in stages from 2002 to 2011. The Competition Commission of India (the “CCI”) was established during this period to administer the Competition Act.

The Competition Act repealed the Monopolies and Restrictive Trade Practices Act, 1969 (the “MRTP Act”), and substituted for it, a new framework of competition law in India based on the wisdom of competition law in certain mature jurisdictions, including the European Union, and the perceived change in the economic and business landscape in India. In addition to there being significant differences in the substantive prohibitions of the Competition Act and the MRTP Act, the Competition Act also empowered the CCI with an enlarged role and extensive punitive powers as compared with the erstwhile Monopolies and Restrictive Trade Practices Commission.

The substantive provisions of the Competition Act relating to anti-competitive agreements and abuse of dominance were brought into effect on 20 May 2009, and on 4 February 2010, the CCI passed its first orders in relation to alleged violations of the Competition Act. The provisions of the Competition Act relating to combinations (i.e., the framework for scrutiny of mergers and acquisitions) were brought into effect on 1 June 2011.

This article focuses on Section 3 of the Competition Act which sets out the substantive prohibitions on anti-competitive agreements. Part I of this article provides an overview of Section 3 of the Competition Act and highlights certain differences between the provisions of the Competition Act and the competition regulation framework of the European Union. Part II analyses certain key orders of the CCI on issues relevant to Section 3 of the Competition Act.

## **II. OVERVIEW OF PROVISIONS OF THE COMPETITION ACT RELATING TO ANTI-COMPETITIVE AGREEMENTS**

Section 3(1) of the Competition Act prohibits agreements among enterprises or persons or associations in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Further, pursuant to Section 3(2), all such agreements are void.

The phrase “*appreciable adverse effect on competition*” is not defined in the Competition Act. Section 19(3) of the Competition Act sets out certain factors that must be taken into account when determining whether an agreement has an appreciable adverse effect on competition under Section 3.<sup>1</sup>

### Horizontal Agreements

Section 3(3) of the Competition Act provides that certain horizontal agreements<sup>2</sup> are presumed to cause an appreciable adverse effect on competition, including cartels. However, such presumption is rebuttable;<sup>3</sup> and the burden of proof to dislodge such presumption will fall upon the person accused of entering into the agreement in question. Accordingly, arguments based on counter-benefits of agreements could potentially be used to dislodge such a presumption, although this may be challenging in the case of cartels. Further, the Competition Act provides an exception to this presumption of appreciable adverse effect on competition in case of horizontal agreements entered into by way of joint ventures: such an agreement shall be presumed not to have an appreciable adverse effect on competition if it increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

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1 These factors are as follows: (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

2 Pursuant to Section 3(3) of the Competition Act, horizontal agreements, i.e., agreements entered into between enterprises or persons engaged in identical or similar trade of goods or provision of services, including cartels, are presumed to have an appreciable adverse effect on competition if such agreement:

- (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; or
- (d) directly or indirectly results in bid rigging or collusive bidding.

3 In the case of *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India & Ors.* MANU/CO/0052/2011 [Competition Commission of India] the CCI held that such presumption of an appreciable adverse effect on competition could be rebutted by the parties to such agreements or arrangements, if they are able to prove that their conduct has pro-competitive effects, or that it does not cause an appreciable adverse effect on competition in India.

## **Vertical Agreements**

Section 3(4) of the Competition Act prohibits vertical agreements, i.e., agreements between enterprises at different levels of the production chain in different markets for goods or services, which cause or are likely to cause an appreciable adverse effect on competition in India. These include tie-in arrangements,<sup>4</sup> exclusive supply agreements,<sup>5</sup> exclusive distribution agreements,<sup>6</sup> refusals to deal,<sup>7</sup> and resale price maintenance<sup>8</sup>, where such agreement causes or is likely to cause an appreciable adverse effect on competition in India. This standard of assessment corresponds with the “rule of reason” method of analysing anti-competitive agreements, which entails balancing the negative and positive competition-related effects of an agreement, and on this basis, concluding whether such agreement has, or is likely to have, an appreciable adverse effect on competition.

The categorisation of “resale price maintenance” as a practice to be assessed by a “rule of reason” analysis follows the American approach in this regard, and represents a departure from European competition law, under which “resale price maintenance” is treated as a “hardcore restriction” and is presumed to restrict competition.<sup>9</sup>

### **Standards of assessment under Section 3 of the Competition Act**

The Competition Act sets out two separate standards for assessment of whether an agreement is anti-competitive: first, it stipulates that certain horizontal

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4 “Tie-in arrangements” include any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. *See* Explanation to § 3(4), Competition Act.

5 “Exclusive supply agreements” include any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. *See* Explanation to § 3(4), Competition Act.

6 “Exclusive distribution agreements” include any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. *See* Explanation to § 3(4), Competition Act.

7 “Refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. *See* Explanation to § 3(4), Competition Act.

8 “Resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. *See* Explanation to § 3(4), Competition Act.

9 ¶ 223, European Union, ‘Guidelines on Vertical Restraints’, 2010 (2010/C 130/01).

agreements including cartels shall be subject to a rebuttable presumption of causing an appreciable adverse effect on competition, and second, all other types of horizontal agreements and all vertical agreements shall be assessed on the basis of a “rule of reason” analysis.

At this point, it is worth emphasising that the Competition Act follows an “effects” based approach based on the potential or actual anti-competitive effects of an agreement. It does not penalise agreements which merely have as their *object* the creation of anti-competitive effects, but which agreements are not likely to, or do not, result in such anti-competitive effects. Certain other jurisdictions, such as the European Union, impose a prohibition on agreements which have as their “object or effect” the prevention or distortion of competition (i.e., the creation of an adverse effect on competition).

Further, the prohibition on anti-competitive agreements under Section 3 of the Competition is not applicable to:

- (a) reasonable conditions for purposes of protection of intellectual property rights under certain specified laws; and
- (b) agreements that relate exclusively to the production, supply, distribution or control of goods or the provision of services for export.

### Relevant Market

The relevant market to be taken into account in the analysis of whether a practice creates an appreciable adverse effect on competition (where applicable) is to be determined by reference to the relevant product market<sup>10</sup> and the relevant geographic market.<sup>11</sup>

The Competition Act specifies certain factors to consider when determining the relevant product market, including physical characteristics or end-use of goods, the price of goods or service, consumer preferences and classification of industrial

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10 § 2(t), Competition Act defines relevant product market as “a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.”

11 § 2(t), Competition Act defines relevant geographic market as “a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.”

products. The factors to be taken into account when determining of the relevant geographic market include local specification requirements, adequate distribution facilities, transport costs, and consumer preferences.

## **Penalties**

In the event of a finding of an anti-competitive agreement, the CCI may: (a) direct the parties to discontinue, and not to re-enter into, the relevant agreement; (b) direct modification of the relevant agreement; and/or (c) impose a penalty not exceeding 10% of the average turnover for the preceding three financial years. In case of a cartel, the fine imposed on each party by the CCI may extend to: (a) 10% of its turnover for each year of continuance of such agreement; or (b) three times its profit for each of such years, whichever is higher.

The CCI has indicated that it will consider any aggravating or mitigating factors when determining the appropriate level of monetary penalty for infringement of the Competition Act.<sup>12</sup> It has also indicated that it may consider the establishment of an effective compliance programme as a relevant factor in determining the quantum of fines.<sup>13</sup>

The Competition Act does not provide for criminal sanctions for individuals participating in anti-competitive agreements (including cartels).

## **Leniency**

The CCI has established a leniency programme for participants of cartels under the Competition Commission of India (Lesser Penalty) Regulations, 2009 (the "Leniency Regulations"). The application for leniency must be received prior to the completion of the investigation report by the Director General, Competition (the investigative arm of the CCI).<sup>14</sup>

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12 See ¶ 13.5 of the CCI's decision in *Belaire Owner's Association v. DLF Limited and HUDA*, [2011] 104 CLA 398 [Competition Commission of India].

13 See generally, Q.5 in CCI's Advocacy Booklet, *Competition Compliance Program for Enterprises* available at <http://www.cci.gov.in/images/media/Advocacy/CCP2012.pdf> (Last Accessed on February 20, 2013).

14 Regulation 3(1) of the Leniency regulations state that to obtain the benefit of leniency under the Leniency Regulations, the applicant must satisfy certain conditions, including: (a) ceasing further participation in the cartel; (b) providing vital disclosure in respect of the cartel; (c) fully and continuously cooperating with the CCI and providing all relevant information as required by it; and (d) not concealing, destroying or manipulating relevant documents or evidence.

The Leniency Regulations contemplate the assignment of priority markers to applicants, marking their position in the “queue” for leniency among the members of a cartel. The Leniency Regulations state that subject to satisfaction of the conditions set out above, the CCI may grant reductions in fines to leniency applicants in the following manner:

- a. the first applicant to make a vital disclosure in connection with a cartel which enables the CCI to form a *prima facie* opinion, or which enables the DG to establish a contravention, may be granted a 100% reduction in fine, i.e., effective immunity from a fine;
- b. the second applicant to provide significant “added value” to the investigation may be granted a reduction of up to 50% of the monetary penalty; and
- c. the third applicant may be granted a reduction of up to 30% of the monetary penalty.

### III. CCI’S ORDERS IN RELATION TO ANTI-COMPETITIVE AGREEMENTS

#### A. General Matters

##### Scope of the Competition Act

A large number of the CCI’s initial orders under Section 3 of the Competition Act were dismissals of complaints filed with the CCI on the basis that the facts of such complaints did not constitute a *prima facie* case under the Competition Act. Several of such complaints were based upon an incorrect understanding of the scope of the Competition Act, and included individual commercial disputes, complaints under the MRTP Act and ordinary consumer complaints. The CCI clarified through its orders that such matters did not fall within the scope of the Competition Act, and the complainant’s remedy lay with other regulators.<sup>15</sup>

While these initial orders did not go far to elucidate the CCI’s view of the substantial prohibitions under Sections 3 and 4 of the Competition Act, they

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15 For instance, the CCI dismissed several complaints relating to “unfair terms” of contracts under § 4 of the Competition Act. § 4 prohibits the abuse of dominant positions, including by imposition of unfair or discriminatory conditions and prices in the purchase or sale of goods and services by a dominant enterprise or group. A large number of complaints filed with the CCI against “unfair terms” of contracts cited no evidence of dominance of the party imposing such unfair terms.

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contributed towards establishing the basic substantive framework within which the CCI operates, and set the ground for subsequent substantive orders of the CCI.

### Relief granted by the CCI

In addition to the CCI's powers to fine parties to anti-competitive agreements and order behavioural modifications (referred to in Part I above), the Competition Act enables the Competition Appellate Tribunal ("COMPAT") to grant compensation for a loss shown to have been suffered by any person as a result of a contravention of the substantive prohibitions of the Competition Act, on the basis of a determination of such contravention by the CCI or the COMPAT.

In this regard, the CCI has clarified that it is not empowered to grant damages for tortious liability for harassment, mental agony and torture.<sup>16</sup>

Further, in relation to its competence to examine government policy, the CCI has observed that in the event that anti competitive conduct arises pursuant to any policy of the Government, the CCI "*will still have jurisdiction to examine the impugned conduct and in case any violation is found, suitable orders can be passed under Section 27 and 28*".<sup>17</sup>

### Sectoral Overlap

The Competition Act envisages the possibility of an overlap between the jurisdiction of the CCI and sectoral regulators. It provides for statutory authorities and the CCI to mutually refer issues arising in each of their proceedings to the other for a reasoned opinion on issues relating to competition law. Further, Section 62 of the Competition Act clarifies that the provisions of the Competition Act shall be in addition to, and not in derogation of, the provisions of any other law.

Several complaints presented to the CCI have related to industries regulated by specific sectoral regulators. In general, the CCI has followed an approach of deferring to the relevant sectoral regulators policies on technical issues, and demarcating its jurisdiction on competition related issues across all sectors.

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16 M/s Abir Infrastructure Private Limited. v. M/s Emaar MGF Land Limited, 2012 ComplR 13 (CCI) [Competition Commission of India].

17 M/s Royal Energy v. M/s Indian Oil, MRTP Case No. 1/28 (C-97/2009/DGIR), at ¶ 7.10 at page 16, decided on 9 May, 2012 [Competition Commission of India].

In the case of *Neeraj Malhotra v. North Delhi Power Ltd. & Ors.*,<sup>18</sup> a complainant alleged that the three electricity distribution companies in Delhi were abusing their dominant position by installing meters that ran faster than the legitimate rate, and not permitting consumers to install meters of their own choice. The complainant alleged that this resulted in foreclosure of markets for meters, cartel behaviour among the electricity distribution companies and an unfair and discriminatory price determination based on faulty meters. The CCI referred to the Delhi Electricity Regulatory Commission (the "DERC") for its view in relation to the jurisdiction of the CCI to examine matters in the complaint. The DERC responded stating that while the CCI was not the correct forum to decide matters relating to the electricity tariff under the Electricity Act, 2003 and related legislations, issues pertaining to competition could be examined by the CCI. On the basis of the DERC's view, the CCI proceeded to deal with the competition issues raised in the complaint, and stated as follows in its final order in the matter: "*Sectoral regulators have necessary technical expertise to determine access, maintain standard, ensure safety and determine tariff. They set rule of game i.e. entry conditions, technical details, tariff, safety standards and have direct control on prices, quantity and quality. Thus sectoral regulators focus on the dynamics of specific sectors, whereas the CCI has a holistic approach and focuses on functioning of the markets through increasing efficiency through competition. In fact their roles are complementary and to each other and share the objective of obtaining maximum benefit for the consumers.*"<sup>19</sup>

Similarly, in the case of *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Ors.*,<sup>20</sup> the complainant alleged that a number of banks had decided in concert to levy prepayment penalties for early payment of home loans. The CCI, after examining the regulatory and commercial framework of pre-payment penalties observed that given the potential for overlap of jurisdiction of the CCI and sectoral regulators, the CCI needs to "*to adopt an approach of harmonious construction of the relevant provisions of the statutes and deal with issues before us in a manner which helps to bring greater clarity and consensus in the respective roles of CCI and other existing regulators/entities and not raise avoidable turf issues.*"<sup>21</sup>

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18 *Neeraj Malhotra v. North Delhi Power Ltd. & Ors.*, MANU/CO/0026/2011 [Competition Commission of India].

19 *Id.*

20 *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Ors.*, [2011] 102 CLA 181 [Competition Commission of India].

21 *Id.*

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In the case of *ISPAI v. DOT*,<sup>22</sup> the informant (ISPAI), an association of internet service providers (ISPs), alleged that the Department of Telecommunications (DoT) was abusing its dominant position by its policy of restricting the provision of internet telephony by ISPs, but permitting other licencees (including Unified Access Service Licensing and Cable Modem Termination Systems licencees) to provide such services. The complainant argued that since such service providers were not initiating the provision of such services, the consumer was being deprived of a cheaper alternative mode of communication. The informant also pointed to the DoT's interest in the matter by its affiliation with BSNL. The CCI found that the facts did not disclose a *prima facie* case for investigation. Further, it also referred to the fact that DoT was currently considering the Telecom Regulatory Authority of India's (TRAI) recommendations in relation to this matter. While the CCI left the decision making process to the DoT, it issued a communication to the DoT urging it to expedite its review of the TRAI's recommendations.

In the case of *Achintya Mukherjee v. Loop Telecom Pvt. Limited & Ors.*,<sup>23</sup> the CCI took a more proactive view in suggesting an amendment to the licence agreements between the DoT and service providers to permit operators to enter into roaming agreements with more than one operator.

As evident from the orders cited above, the CCI has made clear its intention so far to remain within the bounds of overseeing the promotion of competition in India, and not extend its jurisdiction to opine on technical matters under the domain of sectoral regulators. However, the line between a competition issue and a technical sectoral matter may not be clear in all cases.

#### Definition of "enterprise"

The CCI has generally taken a broad view of the term "enterprise" as defined in the Competition Act. It has held that public sector commercial undertakings, statutory bodies performing commercial activities and governmental departments procuring materials fall within the term "enterprise".<sup>24</sup>

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22 *Internet Service Providers Association of India v. Department of Telecommunications*, MANU/CO/0018/2010 [Competition Commission of India].

23 *Achintya Mukherjee v. Loop Telecom Pvt. Limited & Ors.*, 2011 CompLR 56 (CCI) [Competition Commission of India].

24 *See generally*, *Dish TV v. Prasar Bharti*, Case 44/2010 [Competition Commission of India] available at <http://www.cci.gov.in/menu/OrderDishTV170311.pdf> (Last Accessed on 20 February, 2013); *Pitambar Books Private Limited, Delhi v. Primary Education*

In the case of *Jindal Steel & Power Ltd. v. Steel Authority of India Ltd.*,<sup>25</sup> the CCI rejected the contention that Indian Railways was not an enterprise under the Competition Act since it performs sovereign functions.<sup>26</sup> Instead, it found that Indian Railways is engaged in the activity of “transport”, which is included in the definition of “service” in Section 2(u) of the Competition Act and accordingly, qualifies as an “enterprise”. Further, in the same case, the CCI rejected arguments that public policy could be used as a basis to support differential treatment of a public sector corporation such as Steel Authority of India Ltd.<sup>27</sup>

## B. Horizontal Agreements

### Cartels: The Cement Case

In the case of *Builders Association of India v. Cement Manufacturers' Association & Ors.*,<sup>28</sup> (the “Cement case”) the CCI found that 11 cement manufacturers had colluded to control and limit production and supply of cement in India, and had acted in concert to maintain prices of cement at a high level, and that the actions of the cement manufacturers, together with the Cement Manufacturers Association (“CMA”), satisfied the definition of a “cartel” under the Competition Act. The CCI based its finding upon the parallel movement of prices of cement in different geographical zones in India (despite a difference in the cost of production for each company), collection and distribution of data regarding production and capacity by the CMA to its members, and evidence of a concerted restriction in supply of cement at given points in time. Based upon the statements of executives from certain smaller cement companies who stated that they followed price trends set by the larger cement companies, the CCI found that the cement manufactures had indulged in price signalling practices resulting in coordination in prices across cement manufacturers.

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Department, Office of the Director, Andhra Pradesh Open School, Andhra Pradesh & Ors., MANU/CO/0096/2011 [Competition Commission of India]; *Jindal Steel & Power Ltd. v Steel Authority of India Ltd* [2012] 107 CLA 278 [Competition Commission of India].

25 *Jindal Steel & Power Ltd. v Steel Authority of India Ltd* [2012] 107 CLA 278 [Competition Commission of India] [Hereinafter, “Jindal Steel Case”].

26 *Jindal Steel Case*, *supra* note 24, at ¶ 42

27 *Jindal Steel Case*, *supra* note 24, at ¶ 41.

28 *Builders Association of India v. Cement Manufacturers' Association & Ors.*, 2012 ComplLR 629 (CCI) [Competition Commission of India] [Hereinafter, “Cement case”].

The CCI imposed a fine of an aggregate amount of about Rs. 6300 crores (approximately US\$1.2 billion at an exchange rate of US\$1= Rs. 50) upon the cement manufacturers in question, which amounted to 50% of their profits for the duration of the cartel after 2009, when the Competition Act came into effect.

While this decision is currently being considered in appeal by the COMPAT, a few significant points flowing from the decision are worth noting. First, the CCI took the view that circumstantial evidence could be sufficient to prove the existence of an anti-competitive agreement, i.e., there is no requirement to prove the existence of an explicit agreement between the relevant parties.<sup>29</sup> The CCI observed in its order that “[t]he concurrence of parties or the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.”<sup>30</sup> In general, this is consistent with the broad definition of the term “agreement” in the Competition Act. However, the order does not provide any guidance on the quality of circumstantial evidence that would be required to prove the existence of an agreement.

Second, the CCI applied its finding on the broad scope of the term “agreement” to the circumstantial evidence of “price parallelism” in the cement market. It held that: “[c]ircumstantial evidence concerning the market and the conduct of market participants may also establish an anticompetitive agreement and suggest concerted action. Parallel behaviour in price or sales is indicative of a coordinated behaviour among participants in a market.”<sup>31</sup> Specifically, the CCI held that where parallel behaviour “cannot be explained but for some sort of anticompetitive agreement and action in concert”,<sup>32</sup> this would indicate collusion. In the present case, the CCI based its adverse finding on the records of activities of the CMA and perceived correlation between meetings of its members and price increases, coupled with the overall low capacity utilisation by the cement companies.

Third, the CCI has considered the peculiar circumstances of the information sharing by the parties being carried out on the orders of the Department of Industrial Policy and Promotion, the Government of India (the “DIPP”), which required the collation of certain data by the CMA. The CCI rejected arguments that since the CMA was mandated to collate such information by the DIPP, and observed that “[t]he fact that it is being done under the instruction of DIPP does not absolve CMA or the cement companies engaged in this exercise from running afoul of the

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29 ¶ 6.5.3, Cement case, *supra* note 27.

30 Cement case, *supra* note 27.

31 ¶6.5.4, Cement case, *supra* note 27.

32 Cement case, *supra* note 27.

provisions of the Act".<sup>33</sup> However, the CCI has not specifically explained the reason for rejection of such arguments.

Further, the CCI did not adequately explain the quality and relevance of the data exchanged using the platform of the CMA. In addition, the CCI did not address the argument of the cement companies that the data collected and shares by the CMA was historical price data, and therefore, its significance was limited. In this regard, the order briefly refers to the fact that the information shared by the CMA contained "*details of production and dispatch*",<sup>34</sup> and that the minutes of the meetings of the CMA reveal that the cement companies were "*discussing the price of cement*"<sup>35</sup> to support its finding that the information shared among the members was sensitive.

On the whole, the CCI's order in the Cement case, while providing room for criticism, was significant in its signalling of the CCI's positive intent to deal with major cartels and its willingness to impose large fines for infringing behaviour.

#### Trade Associations

The CCI has imposed fines and behavioural directions upon various trade associations for violations of the Competition Act.<sup>36</sup> In the course of its orders, the CCI has found that trade associations could provide a cost-effective and convenient manner of coordinating commercial decisions among competitors.

Trade associations and their members should exercise caution in assessing compliance with Section 3 of the Competition Act, particularly with regard to proceedings of meetings and information disseminated to members. Collective decisions regarding matters such as pricing or supply policies of the members,<sup>37</sup> boycott of enterprises, and sharing of price sensitive information<sup>38</sup> are among the

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33 ¶ 6.5.19, Cement case, *supra* note 27.

34 ¶ 6.5.24, Cement case, *supra* note 27.

35 ¶ 6.5.31, Cement case, *supra* note 27.

36 See, e.g., FICCI - Multiplex Association of India v. United Producers/Distributors Forum & Ors., 2011 CompLR 0079 (CCI) [Competition Commission of India]; Vijay Gupta v. M/s Paper Merchants Association, Delhi & Ors., MANU/CO/0010/2011 [Competition Commission of India]; Vedant Bio Sciences v. Chemists & Druggists Association of Baroda, MANU/PIBU/1486/2012 [Competition Commission of India].

37 FICCI - Multiplex Association of India v. United Producers/Distributors Forum & Ors., 2011 CompLR 0079 (CCI) [Competition Commission of India].

38 Cement case, *supra* note 27.

possible violations of Section 3 that trade associations could be prone to violating. The CCI has also ordered amendment of the terms of constituent documents of trade associations, for instance where these lead to collective boycott of a single enterprise.<sup>39</sup>

### **C. Vertical Agreements**

#### Exclusive Arrangements under Section 3(4)

In the case of *Cine Prekshakula Viniyoga Darula Sangh v. Hindustan Coca Cola Beverages Pvt. Ltd. & Ors*,<sup>40</sup> the CCI considered whether an exclusive supply agreement between a cinema operator and Hindustan Coca Cola Beverages Pvt. Ltd (“HCC”) and the practice of specifying a higher maximum retail price for soft drinks in the cinema constituted an anti-competitive agreement, or abuse of a dominant position, or both. The CCI disagreed with the DG’s finding on the relevant market as the closed market inside the premises of the multiplexes owned by the cinema operator. Such an interpretation, in the CCI’s view, would lead to every exclusive supply agreement entered into by any retail outlet, restaurant or store being anti-competitive. However, while disagreeing with the narrow delineation of the relevant market by the DG, the CCI did not fully explain its interpretation of the relevant market in this case. Merely on the basis that the relevant market is broader than the DG’s definition, the CCI found that neither the cinema operator nor HCC were dominant in the relevant markets. Further, the CCI concluded that the exclusive supply agreement in question did not cause an appreciable adverse effect on competition in India on the basis that the term of the agreement was for a short period of four months, the agreement was terminable by either party by giving 30 days notice, and therefore the agreement cannot be said to have resulted in denial of market access to the competitors.

In the case of *Jindal Steel & Power Ltd. v Steel Authority of India Ltd*,<sup>41</sup> Jindal Steel alleged that the agreement between Indian Railways (“IR”) and Steel Authority of India Ltd (“SAIL”) for exclusive supply of rails by SAIL to IR contravened the Competition Act since it resulted in foreclosure of the market for such rails to new

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39 *Vijay Gupta v. M/s Paper Merchants Association, Delhi & Ors.*, MANU/CO/0010/2011 [Competition Commission of India].

40 *Cine Prekshakula Viniyoga Darula Sangh v. Hindustan Coca Cola Beverages Pvt. Ltd. & Ors.*, MANU/CO/0084/2011 [Competition Commission of India] [Hereinafter, “Coca Cola case”].

41 *Jindal Steel case*, *supra* note 24.

entrants. The relevant market in this case was found to be the market for supply of long rail steel, compliant with the relevant technical specifications throughout India. IR was found to be a monopsonist buyer of long rail steel, and SAIL was found to be the monopolist seller of such steel at the time the agreement was entered into, until Jindal Steel developed capacity to produce such long rail steel.<sup>42</sup>

The CCI considered whether the exclusive agreement was anti-competitive since it did not take into account new market participants (such as Jindal Steel). The CCI's economic analysis of the exclusive arrangement centred on the principle of a "complete contract" on the basis that a "long term price-and-quantity agreement, which is complete and is common knowledge among all potential market participants, is not inherently exclusionary in nature, even though the agreement is between bilateral monopolists (emphasis supplied)".<sup>43</sup> The CCI went on to set out certain essential conditions of a "complete" contract: (i) specific duration of the contract; (ii) review process of the contract; and (iii) an exit clause for either party.<sup>44</sup> In the present case, none of these three criteria were clearly satisfied and the contract was therefore incomplete.

However, the CCI then analysed the impact of the incomplete contract on competition "in terms of ground reality". The factors taken into account by the CCI include the following: Jindal Steel was not more efficient than SAIL, and that given the small proportion of SAIL's total sales constituted by its sales to IR, it seemed "more likely that SAIL had been persuaded to provide rail to IR".<sup>45</sup> Ultimately, the CCI based its analysis on whether the decision to enter into the exclusive arrangement by SAIL and IR was commercially rational; it concluded that the decision to enter into the agreement was "rational" on the basis of IR's concerns on steadiness of supply of long rails and safety standards, and SAIL being compensated for the investment in its forced shift to production of long rails in national interest.<sup>46</sup> It further concluded that the agreement did not lead to foreclosure of the market since Jindal Steel had not proved that it is a viable competitor to SAIL, and the market for supply of rails to non-IR private sidings (which accounted for 25% of the market for rails) was open to them.

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42 Jindal Steel case, *supra* note 24, at ¶ 116.

43 Jindal Steel case, *supra* note 24.

44 Jindal Steel case, *supra* note 24, at ¶ 125.

45 Jindal Steel case, *supra* note 24, at ¶ 134.

46 In this context, the CCI observed that the economic rationale for IR to enter into the agreement in question with SAIL was the assurance of ready supplies, and SAIL entered into the exclusive arrangement at the behest of the Ministry of Railways, in national interest.

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Accordingly, in its analysis of exclusive supply agreements, the CCI is likely to consider the factors stated in the Coca Cola Case, i.e., whether the agreement has an unduly long term, or whether the parties have sufficient options to terminate the agreement. The *Jindal Steel Case*, given the inconsistency in its theoretical and factual analysis, may be of limited assistance in any such analysis.

### Tie-in arrangements

In the case of *In Re: IELTS Australia Pty Ltd., IDP Education Pty Ltd., IDP Education India Pvt. Ltd. and Planet EDU Pvt. Ltd.*<sup>47</sup> The complainant was engaged in the provision of counselling services for students desiring to study in Australia, and alleged that IELTS which conducted the relevant tests for students to study in Australia, was providing such counselling services free, thereby affecting competition in the market for provision of counselling services. The CCI made the following observations in relation to tie-in arrangements under Section 3(4) of the Competition Act: *"In a 'tie-in' arrangement, as a condition of purchase, a purchaser is also made to buy some other good. The basic philosophy behind a 'tie-in arrangement' being treated as violative of competition law is that it harms the consumer as he is forced to buy a good (the tied one) which he may not necessarily want at the time of purchase of a good that he actually wants (tying good). So, the consumer may be better off if the products are sold separately. Another effect of 'tie-in' is that low quality product may achieve a higher market share than otherwise it would have on account of ridership."*<sup>48</sup> On the facts of the case, the CCI held that there was no anti-competitive conduct since there was a benefit arising to consumers and evidence to show an anti-competitive effect had not been led.<sup>49</sup>

### Market power in vertical arrangements

Certain mature jurisdictions specify a *de-minimis* threshold (typically based on the market shares of the parties to an agreement), below which an agreement will not be considered to be anti-competitive. No such thresholds have been specified under the Competition Act.

In certain of its orders, however, the CCI has indicated that for vertical agreements to have an appreciable adverse effect on competition, both parties to

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47 *In Re: IELTS Australia Pty Ltd., IDP Education Pty Ltd., IDP Education India Pvt. Ltd. and Planet EDU Pvt. Ltd., 2011 CompLR 49 (CCI) [Competition Commission of India].*

48 *Id.*

49 *Cement case, supra note 27, at ¶¶ 8-9.*

the agreement must have some market power. In the case of *Automobiles Dealers Association, Hathras, UP v. Global Automobiles & Ors. and Pooja Expo India Private Limited*,<sup>50</sup> the CCI observed as follows: “Normally the competition in the different level of production-supply chain may possibly be adversely effected when both entities to the agreement possess some market power in their respective spheres of market. This is probably the reason that in EU vertical agreements are not given much of a thought unless both parties possess at least 30 percent market share in respective markets.”<sup>51</sup> On this basis, the CCI concluded that since the two enterprises involved had “insignificant presence in the market in which they are operating and are fringe players (...) none of them is capable of causing any AAEC in any of the markets.”

While the reference to market power in the decisions cited above is a positive step from the CCI, it would be helpful if concrete guidelines were laid out in this regard.

#### IV. CONCLUSION

The Competition Act represents a significant departure in scope from the MRTP Act. The enactment of the Competition Act has substituted the MRTP’s feeble protection against dominance, cartels and unfair trade practices with a system focussed on the promotion of competition and prevention of anti-competitive practices and transactions.

Within this new framework of law, the CCI has made a significant contribution towards development of awareness of competition law in India, not least with its imposition of substantial fines on parties infringing the Competition Act. It has also identified and attempted to address complex issues arising under the Competition Act, such as those related to information sharing in the Cement Case.

As expected in the nascent stage of development of any body of law, there are several areas where the performance of the CCI could be improved, most significantly, in the matter of clarity in its decisions and reasons for rejection of arguments of parties. Due to the early stage of development of competition law in India, this is important not only for the relevant matter in question, but also to create a better understanding of the legal framework amongst the general public.

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50 *Automobiles Dealers Association, Hathras, UP v. Global Automobiles & Ors. and Pooja Expo India Private Limited*, 2012 ComplR 827 (CCI) [Competition Commission of India].

51 *Id.*

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Finally, it would be immensely useful if the CCI were to publish guidelines in relation to matters such as fining principles, *de-minimis* thresholds and specific guidance on commercial arrangements. Such guidelines can be expected in due course, once the CCI has established firm internal views on such subjects.