CHAPTER 5

INVESTIGATION AND ENFORCEMENT PROCEDURE FOR ANTI-COMPETITIVE AGREEMENTS/ NON-COMPLIANCE

“The competitive struggle without effective antitrust enforcement is like a fight without a referee.” ¹

5.1 INTRODUCTION

Laws are legitimate only if the State can guarantee at least an average compliance of it. Enforcement is a way of communication. The methods and intensity of enforcement in a given field of law communicate the public commitment to the realisation of the goals laid down in legislation. Weak enforcement signals that the intention of the State is not serious regarding the legislation which in turn undermines the law’s legitimacy. On the other hand, a high level of enforcement signals strong devotion, but may result in other types of legitimacy problems, especially if the enforcement authorities are vested with a large margin of discretion. Legitimacy is important when competition law infringements are penalised. On a deeper level, fairness and justice in the imposition of penalties serve to assure public confidence in the system. Strong enforcement must consequently be combined with a strong legal focus in order to preserve legitimacy. These questions will be explored in this chapter.

This chapter is divided into two parts. It begins with an outline of the investigation and enforcement procedure under the Competition Act, 2002² which becomes the backdrop of the subsequent section. The later part of this chapter deals with the consequences for violating competition law specifically in case of anti-competitive agreement. In the light of the preceding chapter’s analysis of cases on healthcare dealt by CCI and COMPAT, the endeavour here is to scrutinize the effectiveness of the present enforcement and sanction system not only as envisaged under the Competition Act, 2002 but also awarded/applied by the competition authorities in various cases. The chapter further goes on to collate this with the civil enforcement and criminal sanctions under the competition laws of USA and EU

suggesting a relook or amendments to the present Indian competition law or its application. It is hoped such changes, if incorporated will lead to a more efficient mechanism for tracking anti-competitive behaviours within the Indian market generally along with the healthcare delivery services.

**5.2 INVESTIGATION PROCEDURE**

CCI derives its jurisdiction from Sec 19 of the Competition Act, 2002\(^3\) to inquire into the alleged contravention of Sec 3 relating to the anti-competitive agreements. The inquiry may be initiated in three ways i.e. by CCI on its own motion, on a receipt of a complaint from any person, consumer or their association or on a reference made to CCI by the Central Government/ State Government/ statutory authority.

The Secretary, after scrutinizing and removing the defects if any in the information or reference places the same before the CCI to form an opinion regarding existence of a *prima facie* case.\(^4\) The Commission then holds its first ordinary meeting to consider the existence of a *prima facie* case as far as possible.

Following is a diagrammatic representation of the initial steps before the determining the contravention under Sec 3 of the Act\(^5\).

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\(^3\) Id.


\(^5\) Id.
5.2.1 FACTORS FOR DETERMINING ‘APPRECIABLE ADVERSE EFFECT ON COMPETITION’ UNDER SEC 3

Once the Commission after making a *prima facie* case directs the DG to investigate and make a comprehensive report on the alleged contravention, if the DG is of the opinion that such contravention has occurred, then CCI goes forward with framing the issues and examining
the evidence. An integral part of this assessment is certain factors laid down under Sec 19(3) of the Act which CCI must give due regard to while determining whether an agreement has an ‘appreciable adverse effect on competition’. These factors are:

(a) Creation of barriers to new entrants in the market\(^6\)
These refer to certain obstacles existing in every industry whether created naturally or by government, without which the firms would have complete freedom to enter and exit the market. Government barriers or interventions may be in the form of regulations, legislative limitations for new firms, some forms of tax benefits etc. Natural barriers would include brand identity, loyalty of customers towards a brand, high customer switching costs and customer habits. Such barriers are structural barriers and not all are anti-competitive. Barriers created by enterprises within the industry to prevent competition amongst themselves or any potential competitor may be considered anti-competitive.

(b) Driving existing competitors out of the market\(^7\)
When larger firms in the market drive competitors out using favourable prices due to efficiency in their large scale production. Such exclusionary practices are done by way of price or margin squeeze making smaller firms in the market exit due to loss of sale.

(c) Foreclosure of competition by hindering entry into the market\(^8\)
This factor is in furtherance of the earlier one. Under it entry of new competitors in the market is prevented by the existing firms coming together. This is also known as collective foreclosure.

(d) Accrual of benefits to consumers
This factor is pro-competitive. When as a result of an anti-competitive agreement prices increase leading to enhancement of profit. The question is whether this is distributed equally across all key players. In case it is then such anti-competitive agreements may have a beneficial impact.

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\(^6\) See 19(3), Competition Act, 2002, supra note 2 at 221
\(^7\) Id.
\(^8\) Id.
(e) Improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.\(^9\)

Under this factor, the pro-competitiveness of the alleged anti-competitive agreement is considered from the perspective of in what manner and how much benefit has occurred to the consumer through improvement in production or distribution of goods or provisions of services or promotion of technical, scientific and economic development. Though Sec 19(3) is an important section yet ‘it remains indicative in nature and does not qualify for conclusive assessment of anti-competitive agreements under Sec 3.’ As reiterated earlier, there is a need to have a more detailed guideline required to be made by CCI to bring in clarity in the effective implementation of competition law.

5.2.2 INTERIM MEASURES

Sec 33\(^10\) empowers CCI to grant a temporary interim injunction restraining any party from carrying on an act that would contravene sub-section (1) of Sec 3 of the Act until the conclusion of the inquiry or until further orders. Such temporary injunction is granted with or without notice to the concerned party.

Regulation 31 of the General Regulations\(^11\) provide that where such interim orders are passed, they shall be signed and dated by the Members of the CCI, including a dissenting note by any dissenting note by any dissenting Member, and shall be made at the earliest. Additionally, in such cases where interim orders are passed by the CCI, it shall hear the party against whom such an order has been made at the earliest.

In case the Commission is of the opinion that there exists no \textit{prima facie} case then the matter is closed with passing of any other order that it deems fit and send to copy of the same to the concerned parties/ Central/State Government or statutory authority as the case may be. However, when the Commission is of the opinion that such a case does exists, the Secretary

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\(^9\) Id.
\(^10\) Competition Act, \textit{supra} note 2 at 221
\(^11\) General Regulation, 2009, \textit{supra} note 4 at 222
conveys the directions of the Commission within seven days to the Director General to investigate the matter.\textsuperscript{12}

The directions of the Commission along with all the documents are sent to the DG to investigate and send a report within sixty days from the date of receipt of the directions. If the DG finds no contravention of the provisions of the Act, then the Commission invites objections or suggestions to be filed by parties concerned on the report. If the Commission orders closure of the matter after the consideration of these objections or suggestions being in concurrence with the DGs report,

5.2.3 INVESTIGATIONS INTO CARTELS

Cartels are one of the most harmful forms of anti-competitive agreements and they derive their biggest strength through secrecy. This makes finding and investigating cartels especially difficult. It has long been recognised that attacking co-ordinated anti-competitive conduct raises particular problems for competition law enforcers.\textsuperscript{13} In other types of anti-competitive agreements investigation is limited to determining AAEC, in case of cartels the evidence is difficult to gather and mostly circumstantial evidence is relied upon.

Detection of cartel, as per Joseph Harrington\textsuperscript{14} is a multi-stage process involving screening, verification and prosecution. Through screening the authority identifies the markets where collusion is suspected so as to analyse it. During verification stage authorities try systematically ‘to exclude competition as an explanation for observed behaviour and to provide evidence in support of collusion.’

Though screening may entail looking at price patterns, verification requires controlling for demand and cost factors and any other variables necessary to distinguish collusion and competition. Finally, the task at the stage of prosecution is to develop economic evidence that is sufficient to persuade the courts that there has been a violation of the law. One may interpret this exercise as the same as verification though with a different set of standards.

\textsuperscript{12} General Regulation, 2009, supra note 4 at 222
\textsuperscript{13} Mark Furse and Susan Nash, the Cartel Offence, (2004).
The step of screening differs from verification as the prior identifies "suspicious" behaviour but does not provide ‘conclusive’ evidence of collusion. It may establish that behaviour is inconsistent with a class of competitive models though does not address the question of whether it is consistent with some collusive model. It may show that there has been a structural break in behaviour while leaving unaddressed whether it is due to the formation of a cartel or some other change. Like verification, screening can be intensive in terms of data, modelling, and estimation. In most antitrust cases, screening does not occur through economic analysis but rather through such avenues as three buyer complaints, upset competitors, and the corporate leniency program.\textsuperscript{15}

The method for detecting cartels generally involves economic analysis namely:

A structural approach identifies markets with traits conducive to cartel formation. For example, it has been shown that collusion is more likely with fewer firms, more homogeneous products, and more stable demand.\textsuperscript{16}

A structural approach is based on data about an industry which makes it more likely that a cartel will form. This is to be contrasted with a behavioural approach which uses data that is itself evidence that a cartel has formed. A behavioural approach

\textsuperscript{15} Id.

focuses on the market impact of that coordination; suspicions may emanate from the pattern of firms’ prices or quantities or some other aspect of market behaviour. Buyers could become suspicious because of a parallel movement in prices or an inexplicable increase in prices. A sales representative for a colluding firm may become suspicious because she is instructed not to bid for the business of certain potential customers (as part of a customer allocation scheme) or not to offer reasonable price concessions when business might be lost to competitors. For example, the European Commission investigated the stainless steel industry (and found collusion) because buyers complained to the Commission about a sharp increase in prices.17

The following four questions are parts of the methods for detecting collusion:

A) Is behaviour inconsistent with competition?
Under it the authorities first identify the properties of behaviours which are considered consistent with competition. It also further helps in finding out which firms in the market may be part of a cartel since their behaviour is inconsistent with competition.18

B) Is there a structural break in behaviour?
Another approach is to find a structural break in the behaviour of the firm. This may not only indicate a cartel in existence but also ending of firms. This requires methods from outside of the time of suspected behaviour and involves whether the average price has changed or the relationship between a firm’s price and cost changed? Or has the variance of price and market share changed? Such structural changes may be tested by using methods such as ‘Chow test’.19

C) Does the behaviour of suspected colluding firms differ from that of competitive firms?
This approach requires comparing the behaviour of firms suspected to collude with that of competitive benchmark of the market such as markets where firms are not suspected of collusion. However, in case the authorities have already identified the members of a cartel

17 Joseph E. Harrington Jr, Behavioural Screening and Detection of Cartels, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop, 2006
19 Id.
which is not all non-inclusive then, the firms which are not colluding become the benchmark.\textsuperscript{20}

D) Does a collusive model fit the data better than a competitive model?
According to Harrington under this approach, the general strategy is to specify structural competitive and collusive models of firms’ prices or bids and to estimate those using cost and demand shifters. There is evidence of collusion if a collusive model better fits the data.\textsuperscript{21}

Once the screening stage is over, the second stage of verification of the alleged collusion is done. Here the enforcement authorities try to collect evidence which may be sufficient to prove the anti-competitive behaviour of the cartel members. Being secretive in nature, this becomes a difficult task. Competition authorities worldwide use methods such as surprise or dawn ‘raids’ to unearth incriminating documents or meetings.

5.2.4 DAWN RAIDS

Dawn raids or surprise onsite inspections powers given to competition authorities helps in compiling sufficient evidence to establish proof of violating competition law. These include listening to telephonic conversation, surveillance of the office premises; inspect books and records as even seal premises.

i. Provisions relating to dawn raids in the EU
To perform its role expeditiously under Article 101 and 102 TFEU\textsuperscript{22}, the concept of dawn raids has also been incorporated in the EU competition regime. Under Article 20 of Regulation 1/2003\textsuperscript{23} the Commission has been authorised to request information from undertakings whether or not they are themselves suspected of infringing the competition law rules. It gives them the power by a written authorization to enter any premises, examine the books and records, to obtain copies, to ask for explanations on facts or documents relating to the inspections.

\begin{flushright}
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Treaty of the Functioning of the European Union , ( Oct 28, 2016), available at http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-
\end{flushright}
The Commission explains to the concerned undertaking in its decision to inspect; the subject matter and the purpose of the inspection along with the date on which the inspection is to begin and the penalties for non-compliance.\(^{24}\) This decision of the Commission is to be made after consultation with the concerned Member State’s competition authority. The Commission is also empowered to inspect any other premises where it has ‘reasonable suspicion’ that books or other record related to the subject matter of inspection is kept. This includes homes of directors, managers and other members of staff after prior authorisation from the national judicial authority of the concerned Member State.\(^{25}\)

The Commission in its ‘Explanatory note’ published in 2015 further describes who can carry out the inspection and what can be searched, seized, stored etc. It provides certain information technology (IT) items that can be searched and seized during these inspections; they include office computers, company servers, external hard drives, data from private smart phones and cloud computing services. The main highlight of this note is that the power to search has been extended to certain private devices and gathering of personal data of individual staff members such as names, telephone numbers and email address. It is worth noting that although personal data fall within the scope of EU Data Protection rules (Regulation No. 45/2001), the revised note suggests that the practice is aligned with these rules because EU antitrust rules only apply to companies, the personal data of individuals are not the target of antitrust investigations and inspections, and all personal data will only be used for the purposes of enforcing EU competition rules.\(^{26}\)

The note also describes the options available where, at the end of the dawn raid, the inspectors have not finished selecting the documents they wish to review. As a general rule, the data can be collected and secured in a sealed envelope, so that the inspection can continue at a later time. In the previous version of the note, two options were available: opening the envelope with the company present at the Commission’s premises, or returning the envelope as is. The revised version now adds a third option.

\(^{24}\) Id.

\(^{25}\) Article 21 Regulation 1/2003, supra note 23 at 229

allowing the Commission to request the company to store the data in a safe place, pending a future announced visit.\textsuperscript{27}

Hence, it is clear that European Commission has laid down detailed Guidelines and procedure for dawn raids being a part of cartel investigation. Though the compatibility of these powers in the hands of investigating authorities with the data protection rules remains a topic of much debate, yet, the present position provides not only a sense of clarity to the investigators but also opportunity for companies to prepare and familiarize themselves with the procedures along with keeping a dawn raid checklists ready accordingly. Various Member States have conducted dawn raids in the healthcare industry. For example, the Netherlands Competition Authority (NMa) carried out one at an association of health-care providers (Sigra) in Amsterdam along with two Amsterdam based hospitals The authority launched the investigation based on a tip-offs from patients and because of a broadcast of a Dutch daily radio program covering health issues that had featured a story on these two Amsterdam hospitals allegedly turning down patients on the basis of their zip codes.\textsuperscript{28} The NMa investigated whether these two hospitals had concluded mutual agreements regarding these practices, possibly under the umbrella of Sigra leading to market and client allocation. In another example, the Belgian Competition Authority in 2015 carried out dawn raids at several companies in the wholesale distribution of pharmaceutical and para-pharmaceutical products to pharmacies in the healthcare sector.\textsuperscript{29}

\textbf{ii Investigation powers and tools under US antitrust law}

In the US Federal Trade Commission (FTC) is the body which deals with the administrative investigation relating to antitrust laws. Since the American antitrust law investigations are divided into criminal investigation which is carried out by Antitrust Division of the Department of Justice and the administrative investigations which fall under the domain of FTC. It is empowered to undertake general sectoral inquires of different industries either on its own initiative or upon the request of government. It also has the power to start an

\textsuperscript{27} Id.
investigation on the basis of complaints, reports or studies by staff, congressional mandate, and referral by another government agency or Commission directive.\textsuperscript{30}

During the process of investigation there are various forms by which information may be gathered. Under the FTC Rules, it may request for voluntary furnishing of the information by an interview, surveys or questionnaires. It may also issue subpoenas (summoning for attendance or testimony of witness and production of relevant documents) or civil investigative demands (CID). The scope of a civil investigative demand is different from that of a subpoena. Both subpoenas and CIDs may be used to obtain existing documents or oral testimony. But a CID may also require that the recipient ‘file written reports or answers to questions’ (15 U.S.C. Sec. 57b-1(c) (1)).\textsuperscript{31} Another vital tool in the hands of FTC is that of ‘Access Order’ which a detailed letter is requesting the submission of the information or requesting access to the proposed respondent’s records.\textsuperscript{32} Before an FTC investigator can contact a potential respondent it must obtain clearance from DOJ signalling extensive cooperation between FTC and other federal/State institutions.\textsuperscript{33}

The tools mentioned above are the ones which have been employed for the antitrust investigations in US primarily; dawn raids have been more frequently used by the European Commission to gather evidence. Though the practice of dawn raids have been less frequent in the US, DOJ has employed the investigatory raid in the year 2017 itself by raiding the office of Perrigo Company Plc. regarding ongoing investigation of drug pricing in the pharmaceutical industry and by raiding the meeting of the world largest container shipping operators.\textsuperscript{34} These raids are generally carried out by the Antitrust Division of DOJ working closely with Federal Bureau of Investigation (FBI). In order to conduct search of the office premises and home a warrant authorising a search has to be issued for which the government must present evidence sufficient to convince the juridical officer that there exists a probable cause to believe (a) a crime has been committed and b) evidence of that crime is located at


\textsuperscript{32} 3.6.6.1, FTC Operating Manual


the place specified in the warrant to be searched.35 This shows a change in the investigation standpoint by the antitrust authorities in the USA.

### iii Investigation powers and tools under Indian Competition Law

Sec 41 of the Competition Act, 200236, powers the DG under the direction of the Commission to investigate into the contraventions of the provisions of the Competition Act. India’s first dawn raid was conducted by CCI in Sep, 2014 by entering and searching the premises of M/s JCB India Ltd for alleged non-co-operation with the ongoing investigation.37 Since its creation the CCI was required to comply with the requirements set out in the Companies Act 195638, with regard to dawn raids, which meant that the CCI had to obtain a warrant from the Chief Metropolitan Magistrate in Delhi before conducting a raid. In doing this, it needed to satisfy the Magistrate that material documents, evidencing anti-competitive conduct were likely to be destroyed, altered or falsified.39

35 Suzanne Rab, Indian Competition Law an international perspective, CCH, 1st Ed, (2012).
36 Sec 41 - Director General to investigate contravention
(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder. (2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36. (3) Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.
67[Explanation.—for the purposes of this section, -- (a) the words “the Central Government” under section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as “the Commission”; (b) the word “Magistrate” under section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as “the Chief Metropolitan Magistrate, Delhi”.

39 Sec 240 A-Seizure of documents by inspector.

(1) Where in the course of investigation under section 235 or section 237 or section 239 or section 247, the inspector has reasonable ground to believe that the books and papers of, or relating to, any company or other body corporate or any managing agent or secretaries and treasurers or managing director or manager of such company or other body corporate, or any associate of such managing agent or secretaries and treasurers may be destroyed, mutilated, altered, falsified or secreted, the inspector may make an application 2 to the Magistrate of the First Class or, as the case may be, the Presidency Magistrate, having jurisdiction for an order for the seizure of such books and papers.

(2) After considering the application and hearing the inspector, if necessary, the 3Magistrate] may by order authorise the inspector--

(a) to enter, with such assistance, as may be required, the place or places where such books and papers are kept;
(b) to search that place or those places in the manner specified in the order; and
(c) to seize books and papers he considers necessary for the purposes of his investigation.
Therefore, a combined reading of sec 41 of the Competition Act and Sec 240A of the Companies Act, 1956 indicates that DG after securing a warrant may conduct search and seize operation. Further, it also gives power to the DG to seize or make copies or take extract of books or documents which may be considered as evidence in the anti-competitive investigation. Since, the 1956 Act has been replaced by the new Companies Act, 2013; the previous sections have been replaced by Sec 217 and 220. The main difference between the earlier and present position relating to the dawn raids is that the new Act has done away with the requirement of a warrant from a judicial magistrate to conduct search and seizure operations.

While it may be argued that DG is no longer required to obtain a warrant from a Magistrate, the DG is not prohibited from doing so under the New Companies Act. Importantly, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (‘CRPC’) apply to every search and seizure operation under Section 220 of the New Companies Act. Notably, the reference to the provisions of the CRPC also appeared in the Old Companies Act. Presumably, DG obtained a warrant from the Metropolitan Magistrate, Delhi as a matter of best practice before conducting a raid on the premises of JCB. While not a settled position, it appears that DG will continue to obtain a warrant to conduct dawn raids consistent with the procedures of the CRPC.40

It would be useful for CCI to issue guidelines on when and how search and seizure operations may be conducted, as well as the terms of such an operation. For instance, there is a need for clarity on when a company can consult a legal advisor during the course of a dawn raid, the level of assistance a person must provide during a dawn raid, and whether a representative of the company must give an oral explanation on the spot in relation to the documents that are the subject matter of the search and seizure operation. The competition authorities in

(3) The inspector shall keep in his custody the books and papers seized under this section for such period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing agent, or the secretaries and treasurers or the associate of such managing agent or secretaries and treasurers or the managing director or the manager or any other person, from whose custody or power they were seized and inform the ¹ Magistrate] of such return:⁴ Provided that the inspector may, before returning such books and papers as aforesaid, place identification marks on them or any part thereof.

(4) Save as otherwise provided in this section, every search⁴ or seizure] made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches¹ or seizures[ made under that Code.

relatively mature jurisdictions across the world, as a matter of best practice, have issued
detailed procedures to be followed while conducting dawn raids. For example, in EU, the
‘Explanatory note to an authorisation to conduct an inspection in execution of a Commission
decision under Article 20(4) of Council Regulation No 1/2003\(^{41}\), issued by the EC on March
18, 2013, provide procedural guidance in respect of dawn raids, such as the types of premises
that can be inspected, the mode of delivery of a notice authorizing a raid, and the limits of the
investigator’s powers in relation to questioning employees of the target company.

In the absence of clear guidelines on the procedure of conducting dawn raids and given the
ambiguity in relation to judicial oversight at present, it is imperative that all companies doing
business in India implement a response strategy and adequately educate their staff to handle
such dawn raids. This is independent of whether DG comes knocking on the door with a
search warrant or not. The response team should ideally be the sole point of contact between
the investigator and the company. It is vital that this response team confirm the validity, legal
basis and scope of the investigation from the outset of DG’s search and seizure operation.

While it is necessary to co-operate with the investigation it is equally advisable for the
response team to create a record of all documents inspected, questions asked and answers
given for internal records, reference and perusal. The response team should ensure that, at all
times, the activities of the officials are monitored and make efforts to ensure that the
operation stays reasonably related to the scope and purpose of the investigation. Till further
guidelines are given by CCI, it is important for both the competition authorities and the
companies to observe caution while a dawn raid is carried executed.\(^{42}\)

5.3 LENIENCY PROGRAMME

One point that almost all competition authorities agree upon is that there is a requirement for
deterring cartel behaviour. Over the years different tools have been employed to effectively
curb them. There are certain prerequisites are essential cornerstones that must be in place
before a jurisdiction can successfully implement a leniency program. First, the jurisdiction’s
antitrust laws must provide the threat of severe sanctions for those who participate in
hardcore cartel activity and fail to self-report. Second, organizations must perceive a high risk
of detection by antitrust authorities if they do not self-report. Third, there must be
transparency and predictability to the greatest extent possible throughout a jurisdiction's

\(^{41}\) Regulation 1/2003, \textit{supra} note 23 at 229

\(^{42}\) \textit{AZB, supra} note 40 at 234
cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not. These three major cornerstones — severe sanctions, heightened fear of detection, and transparency in enforcement policies — are the indispensable components of every effective leniency program.43

Firms that participate in cartels are usually fully aware of the unlawfulness of their conduct. They know, therefore, that they should avoid the creation of incriminating documents that would be discovered by a competition authority when conducting surprise inspections (‘dawn raids’). They will often arrange to meet in jurisdictions where they are unlikely to be scrutinized by competition authorities and they may use code-names and resort to other practices to avoid detection. It follows that competition authorities may find it very difficult to compile evidence that will satisfy a court to the required standard of proof that there has been illegal behaviour. For this reason a lot of thought has been given to the question of what additional tools are needed to enable competition authorities to operate effectively.44

The adoption of whistle blowing and leniency has been of great use and has been implemented by both Department of Justice in USA and the European Commission in the EU for busting cartels. Whistleblower and leniency is of vital role to the competition authorities as gathering evidence of the existence of cartels is difficult, but the whistle blower provides substantive information to the authorities to further the investigation and gather or accumulate much needed evidence. He may provide informative data about meetings, contracts, the participants in the cartel and the anti-competitive practices covered by it. In exchange of this information, the whistle-blower is given immunity or reduction in penalty that might have been imposed if the competition authorities discovered the cartel before the relevant information was given by him.

The leniency programmes also known as amnesty (in the US) encourages member of the cartel to approach the competition authorities and break the silence on it. This leads to destabilising the dynamics of the cartel with his confession and implication of the co-

conspirators. For his cooperation, the whistleblower is offered immunity subject to certain conditions such as he was not a ringleader of the cartel.

In the OECD Cartel Report, the importance of leniency is further explained as:

The programs uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence is obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases.

A major advantage of it is complete avoidance of the cost of proceedings, the reasons being once the authorities have sufficient proof, the cartel participants realise that they do not have much chance of success when the proceedings are initiated. Leniency also helps ‘overcome jurisdictional obstacles associated with obtaining witnesses and evidence located abroad, as well as with investigating and ultimately sanctioning foreign cartel participants.’

5.3.1 LENIENCY POLICY UNDER US ANTITRUST LAW

The antitrust authorities in the US adopted leniency programme as early as 1978. The initial programme was not very successful as it ‘failed on the principles of transparency and certainty’. Further it was not an automatic immunity rather on the discretion of the DOJ. It was in the year 1993 that the programme was changed significantly. It bought in more clarity, widen the scope of amnesty. Presently in the US there are two types of leniency i.e. corporate and individual. The rationale behind this is the fact individuals found guilty may be subsequently punished with imprisonment.

Under corporate leniency/ corporate immunity/ corporate amnesty policy which were introduced in the year 1993, if a corporation reports its illegal antitrust activity at an early stage, then it is not charged criminally for the activities being reported. As per the corporate

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46 Versha Vahini, Indian Competition Law, Lexis Nexis
leniency policy\textsuperscript{48} floated by DOJ, leniency would be granted before the investigation has begun, if the following conditions are met:

1. At the time the corporation comes forward to report the illegal activity; the Division has not received information about the illegal activity being reported from any other source;\textsuperscript{49}
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;\textsuperscript{50}
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.\textsuperscript{51}

In case a corporation does come forward whether before or after the investigation has begun to report an illegal antitrust activity but does not meet all six of the conditions above, it may still be granted amnesty if the following conditions are met\textsuperscript{52}:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

\textsuperscript{48} DOJ, \textit{Corporate Leniency Policy}, (June 1, 2017), available at https://www.justice.gov/atr/file/810281/download
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering
the nature of the illegal activity, the confessing corporation's role in it, and when the
corporation comes forward.

The application of condition seven above depends primarily upon how early the corporation
comes forward and whether it coerced another party to participate in the illegal activity. In
case the corporation comes out before the investigation begins, the burden of satisfy this
condition would be low. The burden would increase the closer the division comes to having
evidence that is likely to result in a sustainable conviction.

Once a corporation qualifies for leniency all directors, officers, and employees of the
corporation who admit their involvement in the illegal antitrust activity as part of the
corporate confession will receive leniency, in the form of not being charged criminally for the
illegal activity, if they admit their wrongdoing with candor and completeness and continue to
assist the Division throughout the investigation.53

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and
employees who come forward with the corporation will be considered for immunity from
criminal prosecution on the same basis as if they had approached the Division individually.54

**Corporate Leniency Procedure**

Once the request for leniency is received by the Antitrust Division and it believes the
corporation qualifies for it, favourable recommendation is forwarded to the Office of
Operations. This includes reasons why leniency should be granted. ‘Staff should not delay
making such a recommendation until a fact memo recommending prosecution of others is
prepared.’55 Subsequently, the Director of Operations reviews the request and forwards it to
the Assistant Attorney General for final decision. However, if the division recommends
against leniency, corporate counsel may seek an appointment with the Director of Operations
to make their views known. Since the introduction of leniency programme, cartel detection
has increased drastically. The famous *Vitamin cartel* which affected number of countries was also busted with the help of leniency programme.

**Leniency Plus**

If it is too late for a company under investigation for one cartel to obtain leniency, there is an option for receiving additional credit for giving substantial information and assistance in a plea agreement of its involvement in a separate cartel. Number of factors are considered for this, including: (1) the strength of the evidence that the cooperating company provides with respect to the leniency investigation; (2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood that the Division would have uncovered the additional violation without the self-reporting, e.g., if there were little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Leniency Plus matter, then the credit for the disclosure will be greater. Of these three factors, the first two are given the most weight.  

**Leniency for individuals**

An year after the introduction of corporate leniency in the US, DOJ announced individual leniency policy for individuals who approach the antitrust division ‘on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware.’  

By giving leniency to the individuals, it means not charging him criminally for the activity being reported. Following are the conditions laid down for such individuals:


58  *Id.*
1. At the time the individual comes forward to report the illegal activity; the Division has not received information about the illegal activity being reported from any other source;
2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and
3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

The procedure for grant of leniency under individual policy is similar to that under corporate policy.

The Policy also provides an alternative to persons who do not qualify the above conditions. Such people would be considered for statutory or informal immunity from criminal prosecution. This immunity is based on the decision of the Division which exercises is ‘prosecutorial discretion’ on case to case basis.

In case a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation are considered for leniency only under the provisions of the Corporate Leniency Policy and not under individual’s leniency. Leniency policy in the US has gathered much momentum and success over the years with sufficient publicity and severity of sanctions. The Antitrust Division of DOJ had obtained ‘corporate fines at or above the former $10 million statutory maximum in 46 cases and fines of $100 million or more against seven corporations.’ More than ninety percent of cartel cases since 1999 have been assisted by leniency applicants. The fines in both corporate and individual leniency have been reviewed and increased over the years making them more burdensome for competitors to enter into cartels. In particular, parties have sought the benefits of the leniency programme in a number of notable recent cases, including the DOJ's investigations of a large number of auto parts cartels, the air


cargo case\textsuperscript{61}, liquid crystal display (LCD) panels\textsuperscript{62} which was investigated by competition authorities both in the EU and US, dynamic random access memory (DRAM\textsuperscript{63}) and numerous others.

5.3.2 LENIENCY PROGRAMME UNDER EU COMPETITION LAW

The European Union adopted leniency programme in 1996\textsuperscript{64}. The early version of it was narrow in scope and was revised in the year 2002 and then in the year 2006. The term ‘leniency’ refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case.\textsuperscript{65}

Under the EU law, leniency policy offers companies which are part of a cartel to self-report and hand over evidence leading to either total or partial immunity from fines which would otherwise be imposed on them if they would not have reported the anti-competitive behaviour. The rationale behind the programme remains the same which is to ‘not only pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.’\textsuperscript{66}

The condition to obtain total immunity (known as Type 1A and 1B) under the policy is that he should be the first member of the cartel to inform the Commission of an undetected cartel.

\textsuperscript{61} ABA Section of International Law, Air Cargo Cartel, (Aug 30, 2017), available at https://www.americanbar.org/content/dam/aba/events/international_law/2013/09/2013_aba_moscow_disputeresolutionconference/antitrust4.authcheckdam.pdf


The information must be sufficient for the Commission to launch an inspection of the premise of the companies allegedly involved in the cartel. In case the Commission already possesses sufficient information for inspection or has already been done, such company must provide which would enable the Commission to prove the cartelization. The cooperation with the Commission implies that the existence and the content of the application cannot be disclosed to any other company. The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel.  

Such an undertaking must provide the following information to the competition authority along with its application:

- The name and address of the legal entity submitting the immunity application;
- The other parties to the alleged cartel;
- A detailed description of the alleged cartel, including:
  - The affected products;
  - The affected territory (-ies);
  - The duration; and
  - The nature of the alleged cartel conduct;
- Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence);
- Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.

For companies which do not qualify for a full immunity, they may benefit from a reduced fine (known as Type 2) if they provide which represent ‘significant added value’ to the already in the possession of the Commission. By this it means that the information must be significant to reinforce Commission’s ability to prove the infringement. The company disclosing the information must have also terminated their participation in the said cartel.

European Commission has also provided a ‘model leniency programme’ (the European Competition Network (ECN) Model Programme), the purpose of which is:

67 Id.
68 Id.
..is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Programme therefore sets out the treatment which an applicant can anticipate in any ECN jurisdiction once alignment of all programmes has taken place. In addition, the ECN Model Programme aims to alleviate the burden associated with multiple filings in cases for which the Commission is particularly well placed by introducing a model for a uniform summary application system.\textsuperscript{71}

The ECN Model Programme sets out a framework for rewarding the co-operation of undertakings which are party to agreements and practices falling within its scope.

Procedure for immunity
An undertaking wishing to benefit from leniency has to apply to the competition authority and provide it with the information specified in the model programme. Before making a formal application, the applicant may on an anonymous basis approach the competition authority in order to seek informal guidance on the application of the leniency programme. Once a formal application has been made according to the model programme, the competition authority will, upon request, provide an acknowledgement of receipt confirming the date and time of the application. The competition authority then assesses the applications in relation to the same alleged cartel in the order of receipt so as to decide which undertaking would get the leniency.\textsuperscript{72}

Subsequently, when the concerned competition authority has verified the evidence submitted and that it is sufficient to meet the ‘evidential threshold for immunity’ it would grant the undertakings conditional immunity from fines in writing. In case the evidence is not sufficient then the authority would inform the concerned undertaking in writing the rejection of the application for leniency. The undertaking may request the competition authority to consider its application for a reduction of the fine.

The competition authority would take its final position on the grant of immunity at the end of the procedure. If after having granted conditional immunity, it ultimately finds that the

\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
immunity applicant acted as a coercer or that the applicant has not fulfilled all of the conditions attached to leniency, the competition authority would inform the applicant of this promptly. If immunity is withheld because the competition authority finds at the end of the procedure that the six conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any other favourable treatment under this programme in respect of the same proceedings. 

European Commission has laid down an explanation in its model leniency programme regarding what constitutes the evidential thresholds for immunity under both types of leniency options i.e. Type 1A or 1B and Type 2. Over the years due to the efforts by the National Competition Authorities under the aegis of European Commission, number of undetected cartels in European been stopped in different sectors such as agriculture, steel, construction, transport, electrical appliances and chemical. For example in the period from Feb, 2002 till the end of 2005 the Commission received 167 applications under the 2002 Leniency Notice. Of these applications, 87 were requests for immunity and 80 were requests for reduction in fines.

It is interesting to note, that to make the leniency policy more attractive towards potential whistle blowers in the Netherlands the Dutch Competition Authority launched a major initiative to bring an end to cartels in the construction sector by encouraging firms to admit their involvement and to seek leniency; the Dutch Government leant its support to the campaign. In its report for 2004 the Authority reported that 481 companies had decided to ‘come clean’ and to notify their illegal behaviour to it.

On similar lines, in the UK the OFT launched, in November 2005, a ‘Come Clean on Cartels Month’, in which it urged businesses, and in particular small and medium sized enterprises, to make a clean break with any anti-competitive agreements they may be involved in one. The advantage of initiatives such as this is that media attention, peer pressure and the threat of sanctions may lead firms to acknowledge the unlawfulness of their behaviour and to come to terms with the risks that they run by participating in cartel activity. The Dutch example is a

73 *Id.*  
75 *Id.*
striking illustration of what a campaign of this kind can achieve.\textsuperscript{76} Such innovative application of the programme is noteworthy and must be considered by the CCI as well.

\textbf{5.3.3 LENIENCY PROGRAMME IN INDIA}

The Indian policy on leniency stems out from Sec 46 of the Competition Act, 2002.\textsuperscript{77} Under it if the Commission is satisfied that ‘any producer, seller, distributor, trader or service provider’ who is part of a cartel in violation of Sec 3, has made a full and true disclosure in respect of the alleged violation which is vital. Such a producer, seller, distributor etc may be imposed a lesser penalty. For establishing a leniency policy, the Competition Commission formulated the Lesser Penalty Regulations (LPR) in 2009 which contains the substantive provisions regarding leniency in cases of violation of Sec 3.

The Indian LPR does not give a mandatory immunity. Under sub-regulation 4, there are the following lesser penalties that ‘may be granted’:

1. Reduction of penalty up to or equal to hundred percent, The applicant may be granted benefit of reduction in penalty up to or equal to one hundred percent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima-facie opinion regarding the existence of a cartel which is alleged to have violated section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion\textsuperscript{78}.

2. After the first disclosure is made, the penalty may be lessen for the subsequent applicant if they submit evidence which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General ‘to prove the existence of a cartel. The term ‘significant added value’ has been imported from the leniency policy of the European Commission. The order for monetary leniency for such applicants is to be in the following order:\textsuperscript{79}

\textsuperscript{76} Richard Whish, \textit{Control of Cartels and Other Anti-competitive Agreements}, (April 15, 2017), available at https://www.circ.in/pdf/RichardWhishCPS-03.pdf

\textsuperscript{77} The Competition Act, \textit{supra} note 2 at 221


\textsuperscript{79} Id.
the applicant marked as second in the priority status may be granted reduction of monetary penalty up to or equal to fifty percent of the full penalty leviable; and

- the applicant(s) marked as third in the priority status may be granted reduction of penalty up to or equal to thirty percent of the full penalty leviable.

Hence, the leniency to cartel participants may be granted in the Indian context only up to three applicants and may be total or partial.

**Meaning of the term ‘applicant’**

Under the Lesser Penalty Regulations the term ‘applicant’ means an enterprise, as defined in clause (h) of section 2 of the Act, who is or was a member of a cartel and submits an application for lesser penalty to the Commissions. Therefore, the Regulation talks about corporate leniency but no specific mention of an individual leniency has been made neither under LPR or Sec 46 of the Competition Act, 2002. It is presumed that it is includes both.

In this context, it is significant to consider that till date there has been only one case in which CCI has granted lesser penalty. In the case of *In re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items* leniency application was moved by one of the enterprises which was part of the bid rigging and its partner Sri Sandeep Goyal. The fact that CCI granted a reduction of 75% to both the applicant and its partner, suggests that any reduction of penalty for the applicant enterprise will result in a commensurate reduction of penalty for the responsible individual as well, assuming of course that the individual has cooperated with the CCI.

**Procedure for the grant of lesser penalty**

Under sub-regulation 5, the applicant or its authorised representative make application containing of the relevant information mentioned under the Schedule, or contact, orally or through e-mail or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within three working days, put up the matter before the Commission for its consideration. It is interesting

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80 The Competition Act, *supra* note 2 at 221
81 *Suo Moto Case No. 03 of 2014*
to note here that under the LPR, no leniency application can be entertained after the investigation report of the DG is received by CCI. In other words the applicant must make the disclosure after the investigation has started but before the report has been submitted on it by the DG. Another noteworthy point where the Indian position diverges from the EU is that in EU application for leniency may be made even for an undetected cartel which is not the case in India where only alleged contraventions under investigation can have applications made for lesser penalty.

The Commission gives the applicant a priority status and the designated authority conveys the same to the applicant either on telephone, or through e-mail or fax. In case the information receive is oral or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule within a period not exceeding fifteen days. The Commission also records the date and time of receipt of the application. If the application, along with the necessary documents, is not received within a period of fifteen days of the first contact or during the further period as may be extended by the Commission, the applicant may forfeit its claim for priority status and consequently for the benefit of grant of lesser penalty.

After a written acknowledgement by the Commission through its designated authority, the application is evaluated. Only after the first application has been evaluated that the next applicant is considered by the Commission. If the Commission is of the opinion that the applicant has not made full disclosure of the information and evidence, it may reject the application after providing the applicant an opportunity to be heard.

The Regulation also lay down certain conditions for lesser penalty which have to be adhered by the applicant, they are\textsuperscript{83}:

1. Cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
2. Provide vital disclosure in respect of violation under sub-section (3) of section 3 of the Act;
3. Provide all relevant information, documents and evidence as may be required by the Commission;

\textsuperscript{83} Lesser Penalty Regulations, supra note 78 at 246
4. Co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and
5. Not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of a carte.

In case the applicant does not comply with these conditions, ‘the Commission shall be free to use the information and evidence submitted by the applicant, in accordance with the provisions of section 46 of the Act.’ Other than these, the Commission may subject the applicant to any other restrictions or conditions as it deems fit.

Computation of lesser penalty—\textsuperscript{84}
Though there are no guidelines giving more clarity to the process by which the Commission would decide the lessening of penalty, sub-regulation 3 (4) lays down that the reduction of the monetary penalty is at the discretion of the Commission which is to be exercised with due regards to:
(a) the stage at which the applicant comes forward with the disclosure;
(b) the evidence already in possession of the Commission;
(c) the quality of the information provided by the applicant; and
(d) the entire facts and circumstances of the case.
Unlike the Guidelines by the European Union, there are no detailed factors, aggravating and mitigating circumstances which have been laid down for the exercise of discretion in deciding the monetary penalty under the Regulation. Another point to be considered is that whether an application is successful or not, the Regulation does not offer immunity from civil claims to the applicant, making him vulnerable for future civil actions by other members of the cartel.

5.4 CONSEQUENCES OF COMPETITION LAW VIOLATION
Law enforcement generally strives to fulfil various goals such as deterrence, restitution, punishment or prevention. Competition law enforcement is no exception to it. With the principle aim to promote and maintain competition in the market, the objectives of its enforcement for better understanding can be divided into ‘micro’ and ‘macro’ goals. ‘Micro’ goals are; putting the specific infringement to an end, compensating the victims, and curing

\textsuperscript{84} Id.
the particular problem as to competition, whereas the ‘macro’ goal are; putting incentives in place ‘so as to minimize the recurrence of just such anticompetitive conduct’ (preventive remedies or deterrence). Different remedial tools and sanctions may perform these various overlapping functions. These remedies may be either administrative, in the context of administrative law enforcement, or civil law remedies imposed by the courts.

There are certain basic forms of enforcement mechanisms which present within almost all competition law regimes. These include, financial penalties/fines, imprisonment and private enforcement. The assumption which underlines the economic approach to sanction is the same as the assumption which underlines the economic model of competition: firms are rational profit maximises and they will engage in an illegal practice if their expected benefit of such practices are sufficiently large compared to their expected costs.

The goal of law enforcement is to reduce the number of violations of the law. This is achieved by catching at least some violators and punishing them, thus increasing the ex post cost of the violation for these violators and reducing the expected profitability of such violations for would-be violators. The increase in the costs for some violators due to law enforcement and therefore the decrease in the ex-ante profitability of the violations for would-be violators will, in principle, reduce the number of violations by discouraging at least some would-be violators. For example, firms in an industry would contemplate engaging in a cartel activity because such a cartel, if successful, would allow them to increase their price and their profits. However If the would-be cartelists face a risk of getting caught and sanctioned, the expected benefit of their cartel activity may be less than the profit they will benefit from due to the increase in their price. If the sanction they can expect is sufficiently large and if the probability of their getting caught is sufficiently high, they may be discouraged from cartelizing the industry.

Law enforcement resulting in lesser violations reduces the cost to society of those violations, however, the enforcement process itself is costly as well as society has to pay the competition

86 Id.
authorities for carrying out their duties as well. Thus the society has to choose an optimal amount of law enforcement depending upon the ‘cost of violation to society and the social cost of enforcement.’ Mark Furse is of the opinion that in the field of competition laws, civil sanctions in the form of fines are more competent because companies take part in anti-competitive conduct to boost their profits, and if these profits are taken from them in form of heavy fines then they will no longer have the incentive to enter into such anti-competitive behaviour. However, the supporters of criminal sanctions argue that imprisonments have a more deterrent effect than the imposition of corporate fines even if they are a large sum. Another point of consideration is that civil sanctions such as penalties may be imposed upon both natural and artificial persons whereas criminal sanctions in form of imprisonment can be imposed only on natural persons. Following is the analysis of the various enforcement tools in the hands of competition authorities in US, EU and India for violation or non-compliance of competition law. This would help in understanding what steps can be taken by the Indian competition authority to make the enforcement mechanism more optimal and effective against anti-competitive agreements generally.

5.4.1 SANCTIONS UNDER THE US COMPETITION LAW

The United States relies on a combination of federal, state, and private enforcers to combat anticompetitive conduct. The three enforcement groups play different, yet complementary, roles. Federal and state competition law enforcers have similar missions – to protect the public from the harms flowing from anticompetitive conduct. Federal enforcement seeks to protect the interests of all consumers across the nation or within interstate commerce, while state enforcers focus their efforts on the consumers in their respective states. Private enforcers typically act on their own behalf or on behalf of an affected group of which they are a member, usually seeking damages for any antitrust harms resulting from anticompetitive conduct. The roles played by federal, state and private enforcers have evolved over the decades, with

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87 Mark Furse, *Competition law of the EC and UK* 135, New York :Oxford University Press, 2004
each enforcer generally complementing the others and focusing on what each is best positioned to do.\textsuperscript{89}

The enforcement institution within the United States antitrust regime has been primarily divided between the Antitrust Division of Department of Justice (DOJ) and the Federal Trade Commission (FTC). Though both share concurrent jurisdiction for enforcing civil antitrust law, it is the Antitrust Division which in most respects is the ‘prosecutorial arm of the federal government and prosecutes criminal violations of the antitrust laws.’ It is the most potent of American antitrust authority which acts in a quasi-administrative capacity in its merger review function. The Antitrust Division has not only civil but also full criminal investigator powers including calling upon Federal Bureau of Investigation (FBI) for assistance during investigation.

Federal Trade Commission (FTC) on the other hand is an independent federal agency which has a Bureau of Competition investigating ‘potential law violations and seeks legal remedies in federal court or before FTC’s administrative judges’\textsuperscript{90} It focuses largely on merger enforcement with the assistance of together Bureaus under the FTC such as Bureau of Economics. FTC uses investigation tools primarily to review pre-merger filings, subpoenas and civil investigative demands (CIDs).

After the investigation, both the authorities have not been vested with the powers to enforce the antitrust law directly. Instead, if once the investigation is done the two agencies find that there is harm being caused or likely to be caused to competition by an action, they sue to prevent that action from occurring. The case if filed with either a federal judge or administrative law judge who hears the arguments of both the government and the opponents and decided whether the alleged action is anti-competitive. Both the agencies usually do not issue fines. The concept of ‘consent agreement’ is very popular in enforcing competition law in the USA. Generally, if the FTC believes that a person or a company has violated the antitrust law or a proposed merger may, the agency may attempt to obtain the voluntary compliance by entering into a consent order with such person/company. Such a person or


\textsuperscript{90} About the Bureau of Competition, (Oct 15, 2017), available at \url{https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/about-bureau-competition}
company need not admit in the agreement to committing any violation of the law, but not agree to stop the disputed practices outlined in an accompanying complaint or take certain steps to resolve the anti-competitive aspects of its proposed merger.\(^{91}\)

If a consent agreement cannot be reached, the FTC may issue an administrative complaint and/or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge: evidence is submitted, testimony is heard, and witnesses are examined and cross-examined. If a law violation is found, a cease and desist order may be issued. An initial decision by an administrative law judge may be appealed to the Commission.

Final decisions issued by the Commission may be appealed to a U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court. If the Commission's position is upheld, the FTC, in certain circumstances, may then seek consumer redress in court. If the company violates an FTC order, the Commission also may seek civil penalties or an injunction.\(^{92}\)

There are some circumstances when FTC may directly approach the federal courts to either obtain a preliminary injunction or civil penalties. Where it has evidence of criminal antitrust violation, FTC may transfer the information to the DOJ for criminal sanctions. Following are the sanctions that are available under the US antitrust law for its violation:

**1. CIVIL ENFORCEMENT**

**a. Private civil suit/ private enforcement and class action**

A major part of the American antitrust enforcement is a private civil suit. Subject to certain requirements, private plaintiffs may bring civil actions for violations of the federal antitrust law. The Clayton Act\(^{93}\) provides substantial economic incentive for private enforcement by authorizing the award of treble damages, plus attorneys’ fees along with the litigation costs. According to the U.S. Supreme Court, ‘by offering potential litigants the prospect of a

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\(^{92}\) Id.

recovery three times the amount of their damages, the Congress has encouraged these persons to serve as private attorneys general.\textsuperscript{94} It has been considered a ‘crucial deterrent to potential violators for their injuries.’\textsuperscript{95}

Before trial, the parties in private antitrust cases may discover information from each other and from third parties that may be relevant to the claims or defences in the case. This ensures that all parties understand the nature and scope of the claims. The rules applicable to this discovery process in antitrust cases are the same rules of discovery applied in other civil cases. The parties gather information through mandatory disclosures under the Federal Rules of Civil Procedure, including written interrogatories, information production requests, requests for admissions, depositions, and expert disclosures. This process of discovery lays the foundation for the facts the parties will present to the court.\textsuperscript{96}

The Clayton Act provides further motivation by allowing a private plaintiff to use a judgement in a government action against a defendant as evidence of defendant’s liability. This collaterally estoppels the defendant from challenging the findings of liability.\textsuperscript{97} This greatly reduces the burden of the enforcement authorities to pass a form judgement against the defendants in case they accept the pleas.

In cases of cartel, such private civil suits become class actions, which allow the victims of antitrust violations to aggregate their claims in a single action. The procedure has been incorporated under the Federal Rules of Civil Procedure\textsuperscript{98}.

In cases where horizontal conspiracy is involved such as price fixing, customer or geographic allocation agreements, class actions have become the most appropriate form of action. These cases are filed by one or more representative parties filing a suit on behalf of a class of persons similarly situated. In the USA, a case can only proceed as a class action if a court has ‘certified a class action in response to a pre-trial motion usually filed by the plaintiff.’ The prerequisites of a class certification have been laid down in Rules 23(a) of the Federal Rules

\textsuperscript{94} Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972)
\textsuperscript{95} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).
\textsuperscript{96} Id.
\textsuperscript{97} 15 U.S. Code § 16
of Civil Procedure. Further the plaintiffs also required to establish whether the case meets the requirements of Rule 23(b) (3). Individual members have the right to opt out and pursue separate case. According to the Administrative Office of the U.S. Courts, private plaintiffs filed 844 antitrust cases in federal district courts in 2014; 10 the number of private cases filed each year has varied over the past decade from under 500 to over 1,300.

b. Nullity

Though not a common concept in the American antitrust law, the court may refuse to enforce a restrictive agreement because it restrains competition, the very activity the Sherman Act is intended to prevent, hence, making the contract void.

c. Damages

The antitrust law in America provides for mandatory treble damages as well as for an award of attorneys’ fees and the cost of the litigation to the prevailing plaintiff. This can get amplified by a class action allowing victims to aggregate their claims in a single proceeding. These damages may be claimed by either the consumers themselves or a case may be brought about by competitors suing for the lost profits in case of a cartel. There are various statistical models used to derive at the amount of damages. In the case In re Linerboard Antitrust Litigation, the court cited three different types of benchmarks that might be used:

[B]enchmarking, which uses competitive prices for other comparable products to estimate the pattern of prices but – for the alleged misconduct [,] could be effectively employed in this situation. Another proffered model would compare prices during non-conspiratorial periods with product prices during the alleged conspiracy, and yet a third approach would use revenue, production and profit data to derive prices that are consistent with ‘yardstick’ competitive performance levels.

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99 Id.
100 OECD, supra 89 at 251
101 The Clayton Act, Sec 15 (a)
103 305 F.3d at 154-155
d. Preliminary injunctions

Under the Clayton Act preliminary injunction relief is available\(^\text{104}\) to any person, firm, corporation or association in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate.

Hence, a party seeking such relief must show that it faces a danger of irreparable harm and a likelihood of success on the merits of the case. If the motion is granted, the plaintiff is required to post a bond covering the defendant’s losses resulting from the injunction in the event the plaintiff does not ultimately win. These are widely used in merger enforcement in the US.

e. Fines

Recommended fine amounts vary for individuals and organizations. Individuals may be fined from one to five percent of the affected volume of commerce but no less than $20,000. The fines for individuals are not affected by adjustments in the offense level that determine the recommended prison term. Calculation of the recommended fine amount for organizations is more complex. Fines for convicted organizations are determined by applying the guidance given in Chapter 8 (Sentencing of Organizations) of the Guidelines Manual.\(^\text{105}\)

The base fine (20 percent of the volume of affected commerce\(^\text{106}\)) is then subject to a minimum and maximum multiplier based upon the ‘culpability score’ of the organization. Generally, multipliers range from a low of .05 to a high of 4.00, but the antitrust guideline sets the minimum multiplier at 0.75, no matter the culpability score that would otherwise apply to the organizational antitrust offender.\(^\text{107}\) The culpability score is determined based

\(^{104}\) 15 U.S. Code § 26
\(^{106}\) USSG §2R1.1 (d). (1)
\(^{107}\) *Id.*
upon a number of factors, including the size of the organization, participation in the offense by high-level or substantial authority personnel, prior history of criminal conduct by the organization, violation of an order, obstruction of justice, implementation of an effective compliance and ethics program, self-reporting, cooperation and acceptance of responsibility.\textsuperscript{108} Courts may determine the appropriate fine amount between the minimum and maximum ranges resulting from application of the multiplier to the base fine. In addition, the court may depart up or down from the fine range due to various factors, including the risk presented by the offense to the integrity or continued existence of a market,\textsuperscript{109} if the organization is a public entity, \textsuperscript{110}or exceptional organizational culpability.\textsuperscript{111}

2. CRIMINAL ENFORCEMENT

Under the antitrust law of USA, criminal sanction forms a major part of the enforcement procedure. As the Antitrust Division puts it:

\begin{quote}
The Division’s long-standing belief is the holding culpable individual accountable by seeking jail sentences is the most effective way to deter and punish cartel activity. The Division’s enforcement statistics continue to demonstrate that individuals prosecuted by the Division are being sent to jail with increasing frequency and for longer periods of time.\textsuperscript{112}
\end{quote}

The former Deputy Assistant Attorney General of the US Department of Justice Scott Hammond summed up the US view as follows: ‘Cartels have no legitimate purpose and serve only to rob consumers of the tangible blessings of competition… participation in a cartel is viewed in the United States as a property crime, akin to burglary or larceny, and it is properly treated accordingly.”\textsuperscript{113}

Being a primarily criminal statute, the Sherman Act provides that every person who makes any contract or engages in any combination or conspiracy is declared illegal and is punishable by fine not exceeding hundred million dollars if a corporation or one million dollars if any

\begin{flushright}
\textsuperscript{108} USSG §8C2.5.  \\
\textsuperscript{109} USSG §8C4.5.  \\
\textsuperscript{110} USSG §8C4.7.  \\
\textsuperscript{111} USSG §8C4.11  \\
\textsuperscript{112} Langer, supra note 33 at 232  \\
\end{flushright}
other person, or imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.\textsuperscript{114} Hence America follows a two tier fine structure i.e. one for the corporations and the other for individuals.

There are overwhelming number of criminal cases brought by the federal government involving primarily ‘hard-core’ \textit{per se} violation i.e. cartel behaviour of price fixing, output restrictions, customer allocation and market allocation. The Sherman Act provides for penalties of up to ten years imprisonment under section one. Upto the years 2016, total forty four corporations and individuals were charged under criminal enforcement out of which almost $ 399 million was collected as criminal fines and penalties and twenty two individuals were sentenced to imprisonment for an average three thirty days in the year 2016 itself.\textsuperscript{115} To create further deterrence, the government pursues violation of cartels more aggressively by instituting legal actions of perjury, obstruction of justice and money laundering.

The sentencing of both individuals and organizations are done as per the United States Sentencing Commission Guidelines Manual.\textsuperscript{116}

The antitrust guideline recommends for the imprisonment component of the sentence, a base offense level of 12, with an increase of 1 level for bid-rigging\textsuperscript{117} and increases in two-level increments of up to 16 additional levels, depending upon the volume of commerce in goods or services affected by the violation. For example, if the volume of affected commerce is more than $1,000,000 and less than $10,000,000, the offense level is adjusted by an additional 2 levels; a volume of affected commerce of more than $1.5 billion results in the maximum increase of 16 offense levels. Accordingly, the recommended imprisonment range for an individual with no prior criminal history or other adjustments, 7 at the base offense level of 12 is 10-16 months. By contrast, if the increases for bid-rigging and the highest volume of commerce are applied to a similarly situated individual (with no prior criminal history or other adjustments), the

\textsuperscript{114} The Sherman Act, 1890 § 2
\textsuperscript{117} USSG §2R1.1 (b) (1) (“If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level”).

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imprisonment range is 87-108 months, which is close to the statutory maximum of 10 years imprisonment.\textsuperscript{118}

At the lower offense levels (i.e., 12 or lower), defendants are generally eligible to serve a portion of the sentence in community confinement or home detention. The Commission made clear its intent that ‘alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.’\textsuperscript{119} Consistent with the original 1984 Congressional mandate to develop the sentencing guidelines cognizant of the ‘fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense,’\textsuperscript{120} the Commission intended that antitrust offenders serve prison terms more often ‘and usually somewhat longer’ than typically imposed under pre-guidelines practice.\textsuperscript{121}

5.4.2 SANCTIONS UNDER THE EU COMPETITION LAW

The enforcement policy of EU relies more on financial penalties since 2006. The purpose of such a stand is twofold: to impose sanction on the infringing undertakings reflecting the seriousness of the violation and those penalties deters not only the infringer but also create a general deterrence. This enforcement strategy therefore involves high fines imposed by the Commission against the infringing undertakings as breaking the competition law is profitable if left unpunished.

Commission fining policy is based on the principles that some breaches cause more harm to the economy than others, that breaches affecting a high value of sales cause more harm than infringements affecting a low value of sales, and that long-running breaches cause more harm than short ones.\textsuperscript{122}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} USSG §2R1.1, comment. (n. 5). A base offense level of 12 places the offender in Zone C of the Guidelines Sentencing Table, requiring that at least half of the sentence be satisfied by imprisonment, under USSG §5C1.1(d)(2).
\item \textsuperscript{120} 28 U.S.C. § 994(m)
\item \textsuperscript{121} Beryl A. Howell, \textit{supra} note 105 at 256
\item \textsuperscript{122} European Commission, \textit{Fines for breaking EU Competition Law}; available at \url{http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf}
\end{itemize}
\end{footnotesize}
1. CIVIL SANCTIONS-

a. Fines

Though the Commission enjoys wide margin while determining the fines, it set in place as a part of the fining policy guidelines\(^\text{123}\) on its methodology for setting fines. It provides as mentioned earlier ‘transparency and impartiality’. The Guidelines of 2006 starts the determination of fine by setting the ‘basic amount’ for the fine, which is determined by reference to the value of the sales of the goods or services to which the infringement relates.\(^\text{124}\) The percentage which is applied to the value of the company’s relevant sales can be up to 30%, which depending on the seriousness of the infringement. This is done on case-by-case basis but generally where hard core cartels are involved the amount is the highest. In case of cartel the amount is then multiplied by the number of years of participation in the cartel. For example the in Organic Peroxides cartel, the evidence suggested it to last twenty nine years or the Animal Feed Phosphate cartel which lasted for almost 35 years.\(^\text{125}\) The point to be remembered here is though the cartel were in existence for a long time, the maximum fine levied cannot be more than ten percent of the undertaking’s worldwide turnover.\(^\text{126}\) The 10% limit may be based on the turnover of the group to which the company belongs if the parent of that group exercised decisive influence over the operations of the subsidiary during the infringement period. There is also a limitation period of five years from the end of the infringement until the beginning of the Commission’s investigation.\(^\text{127}\)

After determination of the basic amount of fine, the Commission takes into account the various mitigating and aggravating circumstances set out within the Regulation and accordingly increases or decreases it. For adjusting the fine on the higher side, Commission considers if the undertaking is recidivist and increase the fine up to hundred percent for each past finding of an infringement of Art 101. If the undertaking has a limited role in the infringement or terminates the infringing behaviour as soon as the Commission starts the

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\(^\text{124}\) Id.

\(^\text{125}\) Richard Whish and David Bailey, Competition Law, p 277, Oxford University Press

\(^\text{126}\) Article 23 (2), Regulation 1/2003

investigation, then the fine may be reduced. However, these conditions do not apply to cartels.

b. Interim measures

Under Article 8(1) of Regulation 1/2003\textsuperscript{128} in case of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative, may, on the basis of a prima facie finding of infringement, order interim measures. These cannot be claimed as a ‘right’ by the complainants. Such interim measures are to be in place for a specified tie and can be renewed from time to time. Generally, the Commission does not grant an interim measure that often rather prefers the third parties to seek interim reliefs in their domestic courts.\textsuperscript{129}

c. Commitments

This is a feature a unique feature under the EU competition enforcement. It has been infused by the US practice of ‘consent decree’. Under Article 9\textsuperscript{130} which formalised the procedure lays down that when an undertaking under investigation makes a legally binding commitment to the Commission that it will end such anti-competitive behaviour in future. Such a decision may be adopted for a specified time and the Commission closes its files without making a finding whether there has been or continues to be an infringement of the Competition law. Article 9 (2) provides that the Commission may reopen the proceeding against the undertaking if:

(a) where there has been a material change in any of the facts on which the decision was based;
(b) where the undertakings concerned act contrary to their commitments; or
(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.\textsuperscript{131}

\textsuperscript{128} Regulation 1/2003, supra note 23 at 229
\textsuperscript{129} Richard Whish, supra note 125 at 260
\textsuperscript{130} Regulation 1/2003, supra note 23 at 229
\textsuperscript{131} Id.
The Commission is not obliged to accept commitments and they are not considered appropriate in cases where the Commission plans to impose fines, this excludes hard-core cartels. Further, the Commission is entitled to impose fines and periodic penalty payments in case of breach of any commitment\textsuperscript{132}. This power was exercised by the Commission in the \textit{Microsoft} case where the undertaking was fined € 561 million. The fact that all commitments entered between the undertakings and Commission are published in the Official Journal makes the process transparent and formal. This has led to great success of the Commission in curbing anti-competitive behaviour in fields of energy, IT, transport and financial sector.\textsuperscript{133}

There have been many significant cases which have been closed by the Commission based on these commitments such as \textit{IBM} case\textsuperscript{134} and \textit{Microsoft} case\textsuperscript{135}.

In the case of \textit{Commission v Alrosa}\textsuperscript{136}, the ECJ explained that commitments provide rapid solution of some cases and is based on considerations of procedural economy. This method of competition law enforcement has gained much popularity and is a useful method implemented by the EU in public enforcement system. Commitment decisions are the product of a bargaining process which the Court of Justice accurately described in Alrosa as one in which companies “consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation” in exchange for an outcome which allows them to “avoid a finding of an infringement of competition law and a possible fine”.\textsuperscript{137}

d. Nullity

Under Article 101(2) TFEU\textsuperscript{138} provides that an agreement that restricts competition in the sense of Article 101(1) and that does not satisfy the terms of Article 101(3) is void. This declaration of nullity has been grown within the case laws of the ECJ. In the \textit{Béguelin} case, 

\textsuperscript{132} Articles 23(2) (c) and 24(1) (c) of Regulation 1/2003.
\textsuperscript{136} Case C-441/07 P [2010] ECR I-000
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} TFEU, \textit{supra} note 22 at 229
the ECJ explained that nullity as envisaged under the Article 101(2) ‘is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties.’

In another case the Court further clarified that ‘this principle of nullity ...is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned.’ Hence, the remedy of nullity has an *ex tunc* effect, that is, any given agreement would be declared void since the very moment of its inception. Even though the sanction of nullity is only provided for by the Treaty with respect to agreements contravening Article 101 TFEU, the Courts have also established that nullity applies equally to breaches of Article 102.

e. Disqualification of Directors

Part of individual compliance of the competition law is the imposition of individual sanctions on directors of an undertaking since it is understood that they are often responsible for initiating and perpetuating infringement of competition law. Though there is no express provision regarding it under the EU law, various Member States have adopted provisions relating to disqualification of directors. For example, in the UK, under Sec 204 of the Enterprise Act, 2002, a new section was inserted in to the Company Directors Disqualification Act 1986. Under this Act, company directors can be disqualified for up to fifteen years where the company is found guilty of violation of competition law. This disqualification is applicable to not only the offense of cartel but other violations under Art 101 and Art 102 TFEU. The detailed Guideline reading it has been published by the Office of Fair Trading.

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In deciding whether to disqualify a director (Competition Disqualification Order), following factors are considered by the OFT:

(1) Consider whether there has been a breach of competition law.
(2) Consider the nature of the breach and whether a financial penalty has been imposed.
(3) Consider whether the company in question benefited from leniency.
(4) Consider the extent of the director’s responsibility for the breach of competition law.
(5) Have regard to any aggravating and mitigating factors.\textsuperscript{145}

To help it consider these factors, the OFT or Regulator may use any or all of the information-gathering powers in sections 26 to 28 of Competition Act, 1998. This sanction server as deterrence for the officials in the undertaking from not infringing competition law.

f. Settlement

Through a Regulation\textsuperscript{146}, in the year 2008, the EU introduced a system of settling cartel cases. Under Article 10a of the Regulation, at a certain point in the investigation for a cartel, after parties have seen the evidences collected by the Commission, they acknowledge their involvement in it along with their liability for it. The Commission then reduces the fine which would otherwise be imposed. Reduced fines under the Settlement Notice are conceptually distinct from reductions granted for voluntarily providing information under the Commission’s Leniency Notice. There have been instances where undertakings were able to obtain cumulative reduction.\textsuperscript{147} The settlement is not negotiable on the issue of whether the infringement has occurred or on the level of penalty. Settlements reduce the administrative costs, and help the Commission deal more quickly with cartel cases, freeing up resources to devote to new investigations.

The Commission retains discretion regarding which cases may be suitable for settlement. Parties have no ‘right to settle’.\textsuperscript{148} Once the undertaking is willing to participate in the

\textsuperscript{145} \textit{Id.}
\textsuperscript{147} Whish, \textit{supra} note 125 at 260
\textsuperscript{148} Settlement Notice.
settlement process, the procedure is decided on the basis of bilateral contracts. Parties taking part in settlement discussions may be informed by the Commission of:

(a) The objections it envisages to raise against them.
(b) The evidence used to determine the envisaged objections.
(c) Non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel.
(d) The range of potential fines.

Subsequently once the procedure is initiated, the Commission asks the undertaking to submit its ‘settlement submission’, after receiving it the Commission sends the parties a statement of objectives; this will be able to take into account the views of the parties, as contained in their submissions. The Commission may then decide not to accept the parties’ settlement submission, and issue statement of objections in accordance with the standard procedure. The Commission then offers a reduction in the fine by ten percent from what would otherwise have been imposed. This reduction will be made after the ten percentage cap on the maximum fine payable has been applied, and any increase for deterrence will not exceed a multiplication of two. Such a reduced fine is a reward for the undertaking’s cooperation.

2. CRIMINAL SANCTIONS

The EU’s penalties system has been a subject of criticism as it is considered insufficient at being successfully deterring the undertakings from violating competition law. At the EU level there has still not been introduction of criminal sanction. The Regulation 1/2003 EC introduced a decentralised system of antitrust infringement, giving the European Commission and Member State national competition authorities the power to enforce EU competition law. However, what is to be noted is that the Regulation 1/2003 does not harmonise sanctions for violations of competition law.

Hence, both the European Commission and individual Member States can fine undertakings, but Member States remain free to introduce other penalties for antitrust infringements.

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149 Article 10a (2), Regulation 773/2004
150 Id.
Accordingly, the individual Member States have the ability (but are not required) to introduce individual sanctions for violations of competition law.

The EU competition law regime itself, unlike the US regime, and the regimes of a number of EU Member States... focuses solely on competition law infringements committed by undertakings and not by individuals and such investigations lead only to administrative and civil law sanctions. Consequently, only undertakings can be penalised and the EU legal framework does not provide for any individual criminal sanctions at EU level. Indeed, Article 23(5) of Regulation 1/2003 EC expressly provides that fining decisions taken by the European Commission in respect of infringements of EU competition law are not of a criminal law nature (albeit they can be quasi-criminal for some purposes).\(^\text{151}\)

However a number of EU Member Nations have added criminal sanctions as part of enforcement tool against cartels. It was in the year 2002, when the UK enacted the Enterprise Act that brought in criminal sanctions. The focus has been increasingly on individual liability for competition law infringement. Also, in Austria and Germany, individuals can be sent to prison for entering into bid-rigging arrangements and in France, individuals can face fines of up to EUR 75,000 and prison for up to four years. Some regimes have also created incentives for the individuals to whistleblower, or at least cooperate. For example, in the UK it is possible for an individual to obtain a no-action letter from the competition authority as part of the leniency system. This means that the authority will not criminally prosecute that individual provided that the conditions for leniency are satisfied. Similar systems also apply in other jurisdictions, such as Austria and the Slovak Republic.\(^\text{152}\)

Criminal sanctions within EU have taken various forms such as criminal penalties in cases of all forms of anti-competitive behaviours to specifically in bid-rigging (Austria, Germany, Hungary and Italy). There has been very less imposition of criminal sanctions on individuals within the EU Member States. A factor for this may be that ‘the mental element to the offence, be it fraud or dishonest, represents an additional hurdle on the enforcers, that is, it requires evidence of more than mere violation of competition law.’


\(^{152}\) *Id.*
Further, another official at the European Commission has previously indicated that enforcement becomes more complicated where the system involves individual sanctions, particularly custodial sanctions [31]. He suggests that criminalisation can only be effective if the criminal legislation is adequately enforced. This requires a number of criteria such as the need for adequate investigative powers; well-resourced and dedicated enforcement agencies; the willingness of judges to convict; and, in particular, the existence of an immunity or leniency programme for individuals\textsuperscript{153}.

Even if the criminal penalties are less it is noteworthy that a number of jurisdictions are slowly drifting towards increased use of criminal enforcement. It may be some time before Member States start using their criminal powers with the same zeal and confidence as their US counterpart and hence for criminalisation to be viewed as a truly effective form of deterrence.

3. PRIVATE ENFORCEMENT

Private enforcement provides a complimentary enforcement mechanism to public enforcement. Traditionally the enforcement has been in the realm of public law but in the past two decades the application has reshaped incorporating private enforcement. Since 2000, National Competition Authorities (NCA) can enforce EU competition rules in a parallel way, imposing fines, structural or behavioural remedies on companies which restrict, distort or hinder competition\textsuperscript{154}.

The importance of it was emphasised by the ECJ in the case of \textit{Courage v Crehan}\textsuperscript{155} where the Court held that the national courts must provide a remedy in damages for the enforcement of the rights and obligations created under Article 81(now Art 101 TFEU). Subsequently, Recital 7 of the Regulation (1/2003) explicitly envisaged the possibility of private actions for damages for breach of Community competition law. It provides as follows:

\begin{quote}
National courts have an essential part to play in applying the Community competition rules When deciding disputes between private individuals, they protect the subjective
\end{quote}

\textsuperscript{153} Id.
rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States.\textsuperscript{156}

This led to European Commission’s \textit{Green Paper on damages actions for breach of the EC Antitrust Rules}\textsuperscript{157} which laid down the problems and issues relating to private enforcement. Since 2003, private individuals can claim damages.

A notable change in the focus of the EU anti-trust regulator is evident. The consumer has been elevated to the status of a stakeholder in competition rules and is no longer regarded as the mere recipient of the effects of competition law and policy. The consumer, as the ultimate user of products and services in the market, has the power and the ability to strike back at the companies which intended to cause harm.\textsuperscript{158}

Enforcement through private actions has been relatively lesser in the EU Member States as compared to USA.

\textbf{5.4.3 SANCTIONS UNDER THE INDIAN COMPETITION LAW}

Under the Competition Act, 2002,\textsuperscript{159} the hierarchical structure for implementation of its provisions is broadly divided into two authorities. First is the Competition Commission of India, the quasi-judicial authority which has the original jurisdiction where a complaint alleging violation of competition law files a complaint or the Commission takes \textit{suo motu} action or on the reference of Centre/State Government or statutory body.

The second authority set up to fulfil the mandate of the Competition Act is the Competition Commission Appellate Tribunal (COMPAT). This serves as an appellate jurisdiction where appeals against the orders or decisions of CCI are made by the aggrieved parties. Subsequently against the decision of COMPAT, the party can move to Supreme Court which has the final appellate jurisdiction. Supreme Court also continues to enjoy the writ

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{158} Christopher H. Bovis, \textit{supra} note 154 at 267
\item \textsuperscript{159} The Competition Act, \textit{supra} note 2 at 221
\end{itemize}
jurisdiction under Article 32 of the Indian constitution and Special Leave Petition (SLP) under Article 142 of the Constitution. High Court also continues to enjoy its writ jurisdiction under Article 226 of the Constitution. Hence, the competition authorities specifically created to hear competition related cases are CCI and COMPAT under the Competition Act of 2002. As of May, 2017, the COMPAT has been merged with the National Company Law Appellant Tribunal (NCLAT). The stand of NCLAT and its functioning regarding competition law cases are yet to be assessed since till the writing of this work only two cases relating to competition law had been dealt with by NCLAT.

During the investigation, CCI has been given power to give interim relief. Under Sec 33 of the Competition Act, CCI can order to temporarily restrain any party from carrying on contravening act until the conclusion of such inquiry or until further order if it is satisfied that an act in contravention of Sec 3 has been committed and continues to be committed or such act is about to be committed. CCI has power to pass such orders if it deems fit without giving notice to such party. If after an investigation into an agreement, CCI finds that the concerned enterprise or persons have contravened the provisions relating to anti-competitive agreements under the Competition Act, then it has the following powers –

1. CIVIL SANCTIONS

CCI is empowered to pass the following order directing any enterprise, or association of enterprises or person to –

a. Discontinue or not to re-enter into such anti-competitive agreements.

CCI may pass in its order certain directions to the persons/ firms/ association engaging in an anti-competitive agreement to either discontinue such behaviour or in case the agreement has been made void, not to re-enter in any such subsequent agreements.

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161 Id.

162 Id.

163 The Competition Act, supra note 2 at 221.


165 The Competition Act, supra note 2 at 221.

166 Sec 27 (a), Id.
b. Direct modification of the agreement to remove the anti-competitive aspect of it.\textsuperscript{167} CCI may in it order also direct such persons/firms which are part of an anti-competitive agreement to modify the agreement in such a manner so as to remove the void, anti-competitive part of it leaving the remaining agreement legal.

c. Fines/penalty
CCI has a power to impose penalty as it deems fit on the parties that violated Competition Act, 2002. The amount of penalty that CCI may impose shall not be more than ten percent of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to such agreement. In absence of further explanation provided within the Act, there are certain questions that arise:

1. The appropriate ‘turnover’ in case of a multi-commodity/service business where violation has occurred in one of the many services or products.
2. Should the computation be done on the basis of ‘unit turnover’ or ‘total turnover?’
3. Should the ceiling be applied on the ‘unit turnover’ or ‘total turnover’ of the business?
4. Factors to consider in deciding the ‘proportional’ penalty.

Further, under the Act, in case of a cartel, once the existence of a cartel is proved, the Commission may impose upon each producer, seller, distributor, trade or service provider included in a cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of each agreement, whichever is higher.\textsuperscript{168} The imposition of triple damages in the cases where cartels have been proved initially was a mandatory enforcement power vested with CCI, however post amendment\textsuperscript{169} of the Act this power has become discretionary. This means that CCI may impose the maximum penalty of triple damages only in very harmful forms of cartels. This gravely reduces the deterrent effect of this penalty on creation and perpetuation of cartels in India as well as cross-border cartels effecting India.

It is vital to be mentioned here that the Indian competition law does not lay a clear guideline on computation of fine unlike EU which has a \textit{Guideline on the method of setting fines}.

\textsuperscript{167} Sec 27 (d), \textit{Id.}
\textsuperscript{168} Sec 27 (b), Competition Act, 2002
imposed pursuant to Article 23(2)(a) of the Regulation No 1/2003 and the USA which also has Sentencing Commission Guidelines Manual. This is more evident by the mere wording of the provision which states ‘imposition of such penalty as it may deem fit.’ Since no streamlined rules are there in place, the Bar suggested in the Excel Corp case that competition authorities borrow from the guidelines from the EU or the Office of Fair Trading, UK. To this the COMPAT responded:

[…] those guidelines [OFT] are undoubtedly relevant in arriving at the issue of deciding upon the turn over. However, those guidelines cannot be treated as be all and end all in the matter and would have to be considered in the light of the facts of each case.

It is noteworthy that in number of CCI’s order which have been appealed to COMPAT, the penalty imposed has been drastically reduced by COMPAT. Also, COMPAT has criticised CCI in number of cases for not considering relevant factors as mentioned under Sec 19(3) or the ‘relevant turnover’ in a ‘multi-commodity company’, thereby levy hefty penalties. In one of the cases, even permitted the parties to go back before the CCI with the arguments and ordered a re-assessment of penalty by the CCI. This creates confusion ‘among enterprises and competition law advisors about the likely financial impact of a proceeding before the competition authorities’. There is a requirement to bring in guidelines or adopt/ adapt Guidelines of USA or EU regarding calculation of fines so as to bring more transparency and certainty. Since an important aspect of penalty is that it must be a ‘just punishment’ COMPAT observed:

Supreme Court has time and again relied on the doctrine of proportionality” and has held that generally the award of penalty should be in proportion to the wrong done.

172 Excel Crop Care Limited v. Competition Commission of India, [ 2013] Comp AT 146
173 Id.
174 In Re: Mr Ramakant Kini v. Dr L.H. Hiranandani Hospital , Case no 39 of 2012 and In re: Suo Motu case against LPG cylinder Manufacturers, [2012] CCI 11
175 Id.
In a recent case too, the COMPAT has deprecated that the CCI has violated the “principle of proportionality.”

Hence, it is vital for CCI to settle the issue of the method of computation of fines at the earliest.

d. Disqualification of directors
In order to bring in greater compliance of the Competition Act, Sec 48 of the Act clearly lays down that any contravention is made under this Act by a company, then every person who at the time the contravention occurred was in charge of the company for the conduct of business will be deemed guilty of the contravention and shall be liable to be proceeded against and punishable accordingly.

Following this provision, Schedule V of the Companies Act, 2013 which states the ‘conditions to be fulfilled for the appointment of a managing or whole-time director or a manger without the approval of the central government’ has clearly placed the persons who have been sentenced to imprisonment, or to fine exceeding one thousand rupees under the Competition Act, 2002, shall not be eligible for appointment. Such positive reinforcement of the commitment towards competition law is welcomed and would be beneficial in the long run.

e. As a part of CCI’s residuary powers, it can:
‘Impose such penalty, as it may deem fit which shall be not more than ten percent. Of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse’

It is interesting to note that though the word ‘penalty’ has been used under Sec 27 of the Act, however, the provisions are mainly remedial in nature as these pertain to a remedy provided under the Act for contravention of Sec 3. Penal provisions are provided under Section 42-48 of the Act.

177 The Competition Act, supra note 2 at 221.
178 Id.
The Act also makes a difference in the penalty given for violation of substantive law under the Competition Act and procedural contravention. In case non-compliance of orders made by CCI under certain sections of the Act without any reasonable cause which are not dependent upon the size or paying capacity of the enterprise rather on the duration or gravity of the continued contravention following are the penalties and sanctions imposed –

a. Contravention of orders of the Commission—under Sec 42 the Commission has been vested with power to cause an inquiry into the compliance of its orders or directions. Though this power exists in the hands of CCI, it is difficult to infer whether this power has actually been exercised by CCI till now. As per the Right to Information application filed by the researches, requesting the said information, CCI replied that it has initiated since the provision came into force a total of five cases in which as per the power vested under the Section, imposed penalties.

This is more from the perspective of the Indian healthcare industry, since in previous chapter we analysed the series of cases that were bought before CCI relating to ‘No Objection Certificate’, ‘Product Information Service’ and trade margins. Repeatedly CCI pronounced such agreements ad practices as anti-competitive and ordered them to be discontinued; however, more cases were filed over the course of couple of years showing that the practices had not stopped. The case of bid rigging by public insurance companies is also a case where the actual implementation of CCI’s order and non-indulgence in subsequent bid-rigging remains in question. Under Sec 42(2), if CCI finds that any person does not comply with the orders or direction or fine imposed under Sec 27, 28, 32, 33, 42A or 43A without any reasonable cause, then such person be punishable with imprisonment for a term which may extend to three years or with fine which may extend to rupees twenty five crore, or with both, by the Chief Metropolitan Magistrate of Delhi on a complaint filed by the Commission or any authorised officer of CCI. Further non compliance under the Section is punishable with imprisonment discussed in the later part of the discussion.

179 Vahin, supra note 46 at 237
180 In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna, Suo Moto Case No. 02 of 2014
CCI reply in the RTI application on the same issue was that it has till date pursued criminal complaint under Sec 42 in three cases out of the ones discussed in the earlier chapter relating to the healthcare industry, namely, *CCI Vs All Kerala Chemists & Druggist Association, CCI vs Barpetta Drug Dealers Association and CCI Vs Chemist & Druggist Association, Goa.*

The power given under Sec 42 (1) can be of great advantage to CCI in implementing its orders and making the market fairer, however, lesser implementation of this section reduces the effectiveness of the powers vested in CCI. Such an oversight can lead to greater anti-competitive behaviour especially in a complex market such as healthcare delivery services.

When there is contravention of the order passed by COMPAT and such contravention is without any reasonable cause, such a person is liable under the Competition Act to a fine not exceeding one crore rupees or imprisonment up to three years, or both as the Chief Metropolitan Magistrate, Delhi deems fit.\(^{181}\)

In addition, if any person fails to comply without reasonable cause, with directions given by the Director General during the investigation under Sec 41(2) or CCI under Sec 36(2) and (4), then CCI may punish such a person with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore.

Under Sec 45, CCI may impose penalty of up to one crore on a person who either makes false statements or furnishes knowingly false documents, or omits to state any material fact knowingly or wilfully alters, suppresses or destroys any document which is required to be furnished.

**2. IMPRISONMENT**

Under the Indian competition law there is no criminal sanction directly for anti-competitive agreements. This is the enforcement process on similar lines as European Union. Unlike in US where a cartel attracts fine and imprisonment, the Indian law gives heavy financial penalty to each cartel member. However, criminal sanctions have not been completely ousted by the Competition Act, there are certain provisions where imprisonment may be awarded, and they are relating to violation of specified orders passed by CCI or COMPAT:

\(^{181}\) Sec 53Q, The Competition Act, 2002.
a. Contravention of orders by CCI\textsuperscript{182}

When CCI has passed any order relating to a) agreements or abuse of dominant position under Sec 27, b) division of enterprise enjoying dominant position, c) combinations, d) extra-territorial powers of the CCI, e) interim orders of CCI, f) compensation in case of contravention of orders of the CCI, and g) imposition of penalty for non-furnishing of information on combination and any person fails to comply with these orders without any reasonable cause then under Sec 42(2) CCI impose a fine for each day of non-compliance. This fine may extend to rupees one lakh each day for such non-compliance subject to a maximum ten crore.

Sec 42(3) of the Competition Act\textsuperscript{183} provides that if any person does not comply with such orders or direction or fails to pay fines imposed under Sec 42(2) of the Act then such persons shall be punishable with imprisonment for a term which may extend to three years or with a fine which may extend to twenty-five crore, or with both as the Chief Metropolitan Magistrate, Delhi may deem fit. The Chief Metropolitan Magistrate, Delhi shall take cognizance of such offence on a complaint filed by the CCI or any of its authorised officers.

b. Contravention of orders by COMPAT

Under Sec 53Q\textsuperscript{184} if any person contravenes without a reasonable ground any order of the COMPAT then he shall be liable for a penalty not exceeding rupees one crore or imprisonment for maximum three years or both as the Chief Metropolitan Magistrate, Delhi deems fit.

c. Power to punish for contempt\textsuperscript{185}- Under the Competition Act, COMPAT has been given similar power to the High Court in respect of contempt of itself. This power is exericsable as per the provisions of the Contempt of Court Act, 1971\textsuperscript{186}. There is ambiguity regarding whether this power has actually been exercised by COMPAT till now.

\textsuperscript{182} The Competition Act, supra note 2 at 221.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Sec 53U
\textsuperscript{186} The Contempt of Court Act, 1971, available at \url{http://doj.gov.in/sites/default/files/contempt.pdf}
3. Compensation

Under the Competition Act, 2002 CCI was initially given the powers to award compensation in appropriate cases, however as per the 2007 amendment, such powers have been withdrawn from CCI and vested in COMPAT. Sec 53N and Sec 42A are the provisions encompassing the provisions relating to it. The purpose of compensation is to recompense the victim of the violation of the law.

When there is a violation of any direction or order of the CCI in relation to either anti-competitive agreements, abuse of dominance or combinations, and if as a result, any person suffers any damage or loss, then such person may make an application to the COMPAT for an order of recovery of compensation from the relevant enterprise.

Further under Sec 53N, the Central Government or a State Government or a local authority or any enterprise or person may make an application to the COMPAT to adjudicate on a claim from compensation arising in the following cases:

i) from the findings of the CCI;
ii) from the orders under Sec 42A;
iii) from the orders of the COMPAT in an appeal against any findings of CCI; or
iv) from any person contravening orders of the COMPAT or any person delaying in carrying out the orders of the COMPAT.

After inquiring into the allegations, the COMPAT may pass an order directing the enterprise or person to make the payment of appropriate amounts determined by it as realizable from the enterprise or person, as compensation for the loss or damage caused to the applicant as a result of the contravention of the specified provisions.

Under Sec 53(N) (4) when a large number of persons have the same interest and have suffered the loss or damage, then any one or more of them may make an application for such compensation with the permission of the COMPAT. For such cases the provisions contained in Rule 8 of Order I of the First Schedule of the CPC will apply. As per the Rule, where there

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187 Id.
188 Sec 42 A, The Competition Act, 2002, supra note 2 at 221,
189 Id.
190 Sec 53Q (2)
191 Sec 53N (2)
are numerous persons having the same interest in one suit, one or more persons may sue or defend for the benefit of all other persons, with the permission of the Court or the Court itself may direct anyone or more of them to do the same. The Court may then issue notices to all other persons at the cost of the plaintiff or through public advertisement. If any other person is interested to participate in the proceedings, he may apply to the Court requesting to add him as a party.\textsuperscript{192}

However, it is to be kept in mind that such an application in the context of competition law is to be made to COMPAT only\textsuperscript{193} and only after CCI or the COMPAT has determined in any proceeding before it that violation of the provisions of Sec 42A or Sec 53Q (2) has occurred. Another vital point is that such enquiry into compensation under Sec 53N shall be for the purpose of determining the eligibility and quantum of compensation due to a person applying for the same and not for examination afresh the findings of the CCI or the COMPAT on whether any violation of the Competition Act has taken place.\textsuperscript{194} The application of this section is still unclear as the only case where compensation was claimed was in the case of \textit{MCX Stock Exchange Ltd}\textsuperscript{195}. MCX-SX filed an application with the COMPAT claiming damages of Rs 588.65 crore. The matter remains \textit{sub judice}.\textsuperscript{196} The fact that it has taken three years since the application for compensation made before COMPAT does not make this method of private enforcement very favourable to the consumers to come forward and claim compensation. In the famous \textit{DLF} case\textsuperscript{197} private damages litigation was initially drawn up, however, it was withdraw later. Further, the process of determining the amount of compensation that would be awarded has not been explained or laid down by CCI till now. This brings in more uncertainty towards effective implementation of competition law and curbing of anti-competitive practices. Since May, 2017 COMPAT has been merged with


\textsuperscript{193} Explanation to Sec 53N

\textsuperscript{194} Id.

\textsuperscript{195} Compensation Application No. 01/2014 (based upon the judgement dated 05.08.2014 in Appeal No. 15/2011), available at \url{http://compat.nic.in/compat-old-site/CAT-07-2013/upload/PDFs/feborders-2015/05-02-2015.pdf}


\textsuperscript{197} Belaire Owner's Assn. v. DLF Ltd., Case No. 19 of 2010
National Company Law Appellant Tribunal\textsuperscript{198}, it remains to be seen what standards regarding compensation are adopted by it.

5.5 ENFORCEMENT OF ANTI-COMPETITIVE AGREEMENTS IN HEALTHCARE DELIVERY SERVICES

In most of the cases studied in the previous chapters of this research which relates to the healthcare delivery services, the antitrust enforcement by the US, EU and Indian antitrust agencies have been different. USA having strong criminal antitrust enforcement has in several landmark cases awarded imprisonment. For example, in the Vitamin cartel case, the Antitrust Division prosecuted seven U.S and foreign executives who participated in the cartel. All these individuals are serving time in federal prison or awaiting potential jail sentencing along with heavy fines.\textsuperscript{199} In the USA majority of the cases have heavy financial penalty being awarded. Another important distinction in the antitrust enforcement of USA is that a number of cases after investigation have being settled through a consent order. This has been in almost all anti-competitive cases relating to collusion between physician and hospital associations. This method has the advantage that it speeds up the entire enforcement process with least publicity and expenditure. The American antitrust agencies have over the years been successful through their enforcement program at detecting and curbing a various anti-competitive practices.

EU which has only civil sanction for anti-competitive practices, have over the years has awarded heavy fines to the colluders as well. The fining policy of EU has changed a great deal since \textit{Regulation 17/62}.

No fines were imposed between 1962 and 1969, when the participants in the Quinine cartel were fined ECU 500,000, a figure reduced on appeal by ECU 65,000. Until the end of the 1970s the Commission’s fines were by today’s standards very modest. Most were imposed for parallel trade infringements. In 1980, another parallel trade case, the \textit{Pioneer} decision, was a turning point. The fines imposed by the Commission


\textsuperscript{199} DOJ, \textit{Antitrust Division selected criminal cases}, 1996, ( Sept 8, 2017), available at https://www.justice.gov/atr/selected-criminal-cases-antitrust-division
on five of the European subsidiaries and independent distributors of the Japanese hi-fi manufacturer Pioneer totalled nearly € 7 million: the first fine to exceed $ 10 million. The Commission announced that it “intended to reinforce deterrent effect of fines by raising the general level thereof in case of serious infringements.”

Such steps made the prohibitions in the TEFU more effective. Despite heavy penalties being awarded such as in case relating to collusion in public procurement in healthcare services, the Commission awarded a fine of € 1,30,00,000, many Member States have incorporated criminal sanctions within their national anti-trust framework.

Coming to the enforcement of competition law in India, CCI in most of the health care cases relating to Sec 3 of the Competition Act awarded financial penalty to chemist and drug associations and insurance companies. Most of the heavy penalties awarded by CCI when gone to COMPAT in an appeal have been reduced. Out of all the cases heard by CCI in only four cases individual office bearers or the members of the executive committee of the chemist and druggist association were given individual financial penalty. Drug companies which are very much part of the anti-competitive practices, in most cases were not made liable by CCI under the assumption that they were threatened by the chemist and druggist associations to adhere to their rules. Only in one case CCI awarded financial penalty to a drug company Lupin for its anti-competitive practices. No out of court settlement, compensation or criminal liability has been awarded by CCI in the healthcare sector cases till date. Even after heavy financial penalties, most of the practices for which CCI had order cease and desist, continued unchecked.

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201 European Competition Network Brief, The Italian Competition Authority imposes fines totalling € 1,30,00,000 for collusive behaviour in public procurement in healthcare services (Healthcare liability coverage), 28 September 2011, e-Competitions Bulletin September 2011, Art. N° 44197
202 Eight cases out of thirteen cases analysed in chapter four
203 In Re: Association of Third Party Administrators and General Insurers’ (Public Sector) Association of India, New India Assurance Co Ltd, National Insurance Co. Ltd., United India Insurance Co. Ltd and Department of Financial Services Ministry of Finance, GOI, Competition Commission of India Case no 107 of 2013
5.6 CONCLUSION

Effective investigation and enforcement is the bedrock for a successful application of competition law in any sector or jurisdiction. Indian competition law is relatively very new in its implementation. There are several changes and additions that may be made with the present legislative framework which would facilitate a more deterrent and enhanced enforcement of the Indian competition law which would bring not only bring certainty to the provisions and their application but also curb anti-competitiveness within various Indian market including healthcare delivery services.