

CARTELS AND COMPETITION  
LAW IN THE TIME OF ECONOMIC  
CRISIS: A REVIEW OF THE ORDERS  
PASSED BY THE COMPETITION  
COMMISSION OF INDIA

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***A**bstract—The Covid-19 pandemic had a significant negative impact upon markets across the globe. The imposition of restrictive measures by several States during the pandemic contributed to a negative supply shock since most production services came to a halt and faced several disruptions over a substantial period of time. These devastating consequences threatened not only businesses but also economies at large. A grave, problematic aspect of such an impact was that it enhanced the risk of anti-competitive behaviour on the part of suppliers and firms.*

*Nevertheless, it does not inevitably follow that collaboration among enterprises, even to the extent of cartel conduct, is anti-competitive or against the wider public interest during a crisis like the pandemic. In fact, collaboration has the potential to stabilise the unequal demand and supply of an industry and is in furtherance of pro-competitive and social welfare goals.*

*In response to the Covid-19 pandemic, the CCI, like other competition regulators, issued several orders granting*

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*exemptions to cartel conduct. The common factors considered by the CCI while granting such exemptions were the status and size of the industry, the theoretical inability to pay in context of hardships faced during the pandemic, the cooperation of the parties with the investigation and their admission of guilt, and the risk of exit of firms from the market due to paying of heavy penalties. Exemptions based on these factors seem to be in accordance with our developmental goals, as competition law is not just about achieving economic efficiencies, but fostering overall economic development and enhancing societal welfare, which may be achieved through suitable institutional frameworks and an optimal combination of competition and cooperation, during the economic crisis. However, a review of the orders passed by the CCI during, and shortly after the pandemic, reveal that the decisional practice of the CCI in granting such exemptions has been largely discretionary and inconsistent. In place of being a laudable first attempt to give explicit recognition to developmental goals, the orders passed by the CCI have, in effect, muddied the waters of anti-cartel law.*

*In this article, the author discusses the need for legitimising cooperation between competitors during an economic crisis. The paper then goes on to examine the legal framework of cartel regulation under the Competition Act, 2002, as also the larger policy objectives of the law. The third part of the article reviews the decisional practice of the CCI with respect to exemptions given to cartels during the pandemic period, to analyse whether such exemptions have been justified. The fourth and final part contains suggestions as to how the law in this regard can be made more coherent so that exemptions granted are not left to unfettered discretion, as this may undermine the core objectives of competition law.*

**Keywords:** Cartels, Competition Law, CCI, Economic Crisis, Exemptions

## I. INTRODUCTION

The Covid-19 pandemic had a significant negative impact upon markets across the globe.<sup>1</sup> The economic crisis that followed was largely the result

<sup>1</sup> Tanja Goodwin & Rodrigo Barajas, *Safeguarding Healthy Competition during COVID-19: Competition Policy Options for Emergency Situations*, WORLD BANK, [thedocs.worldbank.org/en/doc/497031588957886202-0130022020/original/SafeguardingHealthyCompetitionDuringCOVID19.pdf](https://thedocs.worldbank.org/en/doc/497031588957886202-0130022020/original/SafeguardingHealthyCompetitionDuringCOVID19.pdf) (last visited on Apr. 9, 2020).

of a cataclysmic exogenous shock on account of a large number of factors in relation to the outbreak of the virus.<sup>2</sup> The imposition of lockdown and other restrictive measures by several States during the pandemic contributed to a negative supply shock since most production services came to a halt and faced several disruptions over a substantial period of time.<sup>3</sup> Further, a negative demand shock also occurred owing to the fact that the ultimate consumers stayed in their homes during the lockdowns in the respective countries, and consequently firms were compelled to reduce their demand for inputs.<sup>4</sup> At the same time, there was a significant rise in demand for healthcare products like masks, sanitisers, vaccines and other medical appliances for treatment of the disease.<sup>5</sup>

These devastating consequences threatened not only businesses but also economies at large. A grave, problematic aspect of such an impact was that it enhanced the risk of anti-competitive behaviour on the part of suppliers and firms.<sup>6</sup> It is well-known that such crises may result in an increase in cartel activity as corporations struggle to maintain profit margins and strive to preserve stability. Nevertheless, it does not inevitably follow that collaboration among enterprises, even to the extent of cartel conduct, is anti-competitive or against the wider public interest during a crisis like the pandemic. In fact, collaboration has the potential to stabilise the unequal demand and supply of an industry.<sup>7</sup> There are competition law scholars who opine that regulatory authorities should view temporary cooperation arrangements as vital for securing the supply and distribution of essential items to all customers, in order to avert a shortage.<sup>8</sup> However, it is imperative that any such arrangement is temporary in nature and necessarily in pursuit of pro-competitive or social welfare goals.

There are two interpretations of the word “crisis cartel” in existing literature.<sup>9</sup> Firstly, crisis cartel may refer to a cartel that came into existence during a catastrophic sectoral, national, or global economic collapse without the authorisation of state authorities. The second usage of the word “crisis cartel” is with reference to instances in which the State authorities or the competition law prevalent in the jurisdiction, allows the establishment of cartels during

<sup>2</sup> Frederic Jenny, *Competition Law Enforcement and the Covid-19 Crisis: Business as (Un)usual?*, SSRN papers.ssrn.com/sol3/papers.cfm?abstract\_id=3606214 (last visited on May. 20, 2020).

<sup>3</sup> Goodwin & Barajas, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Jenny, *supra* note 2.

<sup>6</sup> Goodwin & Barajas, *supra* note 1.

<sup>7</sup> Organisation for Economic Co-operation and Development [OECD], Directorate for Financial and Enterprise Affairs: Competition Committee, *Global Forum on Competition: Crisis Cartels*, at 28, DAF/COMP/GF (2011) 11, (Oct. 18, 2011), <https://www.oecd.org/daf/competition/cartels/48948847.pdf> (last visited on Oct. 10, 2022).

<sup>8</sup> Philip Arnold & Dave Poddar, *Competitor Collaboration during the Covid-19 Pandemic: Not only Benign, but Procompetitive?*, 16(1) COMP. L. J. 47, 49 (2020).

<sup>9</sup> *Id.* at 20-21.

times of sectoral, national, or economic crises.<sup>10</sup> The focus of this article is on the latter.

As a result of the substantial impact of the Covid-19 pandemic upon global as well as domestic markets and supply chains, competition authorities across the globe adopted a number of flexible measures, including allowing cooperation in specific sectors, while insisting that the leeway granted by them was only temporary and did not imply an absolute weakening of the competition law framework prevailing in the respective countries.<sup>11</sup> Against this backdrop, this article shall attempt to analyse the response of the Competition Commission of India [“CCI”] with respect to cartelisation during the pandemic. The first part of this article contains an introduction to the subject of the discussion. The second part examines the Indian competition law on cartels, as also the larger policy objectives of the law. The third part of the article analyses the decisions of the CCI with respect to exemptions given to cartels during the pandemic period. Though other countries have also granted such exemptions and the same is mentioned, a detailed discussion on the practices followed by other jurisdictions on this issue is outside the scope of this paper. The fourth and final part contains the suggestions and conclusion.

## II. REGULATION OF CARTELS: INDIAN COMPETITION LAW AND POLICY

**The Legal Framework:** In India, the Competition Act, 2002 [“Competition Act” or “Act”] is the primary legislation pertaining to the regulation of competition in the market. Anti-competitive agreements are addressed by Section 3(1) of the Competition Act. While conducting business in India, commercial entities are forbidden from entering into anti-competitive agreements, which include agreements pertaining to “production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.”<sup>12</sup> Section 3(3) of the enactment lays down a list of certain anti-competitive agreements, including cartels, which are presumed to have an “appreciable adverse effect on competition” [“AAEC”].<sup>13</sup> However, the Act does not prohibit the execution of joint venture agreements which promote efficiency.<sup>14</sup>

The Competition Act does not explicitly recognise the concept of “crisis cartels.” Under §27(b) of the Act, the CCI has the power to impose penalties of up to three times the profit, or 10% of the turnover for each year of the persistence of a cartel agreement (whichever is higher). Since the passage of the law,

<sup>10</sup> *Id.*

<sup>11</sup> Jenny, *supra* note 2.

<sup>12</sup> The Competition Act, 2002, §3(1), No. 12, Acts of Parliament, 2003 (India).

<sup>13</sup> *Id.* §3(3).

<sup>14</sup> *Id.* §3(3)(d).

there has been no recognition in India of the concept of a “crisis cartel” and India does not have any law or regulation that grants exemption to cartels on the grounds of economic crisis.

However, after the outbreak of the pandemic in the country, the CCI issued an advisory on April 19, 2020,<sup>15</sup> permitting certain exemptions to the general prohibition against cartels. The CCI stated that the pandemic had given rise to exceptional and difficult circumstances for commercial operations. Considering the sudden disruption in supply chains caused by the pandemic, the regulator notified that, “*to cope with significant changes in supply and demand patterns arising out of this extraordinary situation, businesses may need to coordinate certain activities, by way of sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure, transport logistics, R&D, production etc. to ensure continued supply and fair distribution of products.*” However, the CCI in its notification, added that this cooperation between business groups should aim to improve the efficiency in the supply chain, keeping in mind the public interest and social welfare.<sup>16</sup> Thus, business enterprises must essentially demonstrate that their cooperation is important for the larger public benefit and societal welfare, and as a result of their cooperation, the consumers will receive a substantial share of the benefit.<sup>17</sup>

The relaxations offered by the CCI, however, do not suggest in any way that businesses can unfairly use the situation to maximise profits. In fact, the CCI expressly stated in the advisory that such coordination would be assessed in accordance with the factors listed in Section 19(3) of the Act.<sup>18</sup> However, the practice of the CCI in this regard, has been inconsistent and subject to debate. This brings the author to the second aspect of the discussion in this part, that is to delve into the policy objectives of the Act, in order to review whether a case can be made out justifying the legitimacy of crisis cartels.

**The Policy Objectives:** The competition law of any country should be consistent with the level of development in that country. Consequently, there cannot be a “one size-fits-all” competition policy followed by all jurisdictions. Similarly, Indian competition law also must not be regarded as mere transplantation of European or United States antitrust law. If we review the evolution of Indian competition law, it gives us insight into the broader policy goals of the legislation. At the outset, the author would like to point out that in India, adopting a developmental perspective towards the enforcement of competition law is particularly important as the ‘right to development’ is a penumbral

<sup>15</sup> Competition Commission of India, *Advisory to Businesses in Time of COVID-19* <https://www.cci.gov.in/images/publicnotices/en/advisorytobusiness1652118552.pdf> (last visited on Apr. 19, 2020).

<sup>16</sup> *Ibid.*

<sup>17</sup> Kunal Singh, *Understanding the Position of Competition Law in the Time of COVID-19: India & the EU*, 18 SUPREMO AMICUS 465, 466 (2020).

<sup>18</sup> Competition Commission of India, *supra* note 15.

right under Article 21 of the Constitution of India, 1950, as laid down by the Supreme Court.<sup>19</sup> Moreover, this right does not only extend to economic development but includes “*the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples’ wellbeing and realization of their full potential*”.<sup>20</sup> Hence, competition law cannot be focussed solely on achieving economic efficiency and must pay due regard to broader developmental goals.

If we look at the history of the enactment of the Competition Act, we find that post-1991, a series of economic reforms took place in various areas like foreign investment, industrial licensing and the role of the public sector.<sup>21</sup> The MRTP Act, 1969, was identified as a law ill-equipped to deal with the challenges of globalisation. An Expert Committee was set up to review the prevailing scenario and recommend an updated competition law, in light of international developments.<sup>22</sup> Accordingly, India’s new competition law, the Competition Act, was enacted in 2002. The Preamble of the Act is testimony to its developmental goals, as it declares that “*in view of the economic development of the country,*” the objectives of the Act are “*to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto*”.<sup>23</sup>

The objectives of developing competition regimes can be broadly categorised into primary, or “core competition” objectives, and secondary or supplementary objectives, the latter including fairness, equity, promotion of small businesses and other socio-political values.<sup>24</sup> The secondary objectives are ancillary to the primary objectives, and their adaptation within competition laws differs from country to country.<sup>25</sup> Scholars argue that focussing only on the core competition objectives set out in the Act, and ignoring the

<sup>19</sup> Samatha v. State of A.P., (1997) 8 SCC 191; AIR 1997 SC 3297; N.D. Jayal v. Union of India, (2004) 9 SCC 362 (2003) (India).

<sup>20</sup> N.D. Jayal v. Union of India, (2004) 9 SCC 362, 23 (2003) (India) (“...The right to development includes the whole spectrum of civil, cultural, economic, political and social process, for the improvement of peoples’ wellbeing and realization of their full potential...”).

<sup>21</sup> Ministry on Industry, *Statement on Industrial Policy*, 18-19 (Jul. 24, 1991), [https://dpiit.gov.in/sites/default/files/IndustrialPolicyStatement\\_1991\\_15July2019.pdf](https://dpiit.gov.in/sites/default/files/IndustrialPolicyStatement_1991_15July2019.pdf) (last visited on March 21, 2023).

<sup>22</sup> REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW (RAGHAVAN COMMITTEE), vol. I, 1.2-2, 7.1-3, 5.4-1. [theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf) (last visited on May. 25, 2022).

<sup>23</sup> The Competition Act, 2002, *pmbi*.

<sup>24</sup> See OECD, Centre for Co-Operation with Non-Members Directorate for Financial, Fiscal and Enterprise Affairs, *Global Forum on Competition: The Objectives of Competition Law and Policy* CCNM/GF/COMP (2003) 3, (Jan. 25, 2003), [www.oecd.org/daf/competition/2486329.pdf](http://www.oecd.org/daf/competition/2486329.pdf) (last visited on March 21, 2023).

<sup>25</sup> *Id.*

secondary objectives, could have a negative impact on developmental goals.<sup>26</sup> When we discuss the specific phenomena of cartels, it becomes evident that our Competition Act has included in its scope consideration of the secondary objectives. For instance, 19(3) of the Act lays down the various factors that the CCI may consider while evaluating whether an anti-competitive agreement has AAEC.<sup>27</sup> Here, the positive factors arising out of such agreements, such as “*accrual of benefits to consumers,*” “*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*” are to be weighed in by the CCI while deciding upon the legality of such agreements. These terms are wide, and in the opinion of the author, they give ample scope to the CCI to consider broader perspectives such as the overall economic development of the country, welfare of consumers, fairness, equity, and the interests of smaller competitors in the market. In the next part of this article, the author will elaborate on the decisional practice of the CCI to assess whether these objectives have found a place in the orders passed by the CCI, particularly in cartel cases decided during, and shortly after the pandemic.

### III. THE IMPACT OF THE PANDEMIC ON CARTEL ORDERS OF THE CCI

A unique trend that the CCI has shown in the time of the pandemic and shortly thereafter is the exemption of penalty for cartelisation despite guilty verdicts against players in the market. While these orders of the CCI may be linked to broader developmental objectives – as some of the firms involved were smaller players - nevertheless the orders have been criticised on grounds of inconsistency. According to law, once cartel conduct has been established, there can be no valid reason for exemption unless such conduct is excluded from the ambit of the Competition Act by a law passed to that effect, or by virtue of any exemption granted under the Competition Act.<sup>28</sup> Even the leniency provisions under the Act do not accord any special treatment to cartel members on grounds of economic crisis, or other such peculiar circumstances.<sup>29</sup> The cases decided by the CCI during this period are briefly discussed below:

<sup>26</sup> Shiju Varghese Mazhuvanchery, *The Indian Competition Act: A Historical and Developmental Perspective*, 3 (2) L. DEV. R. 241, 254-55 (2010).

<sup>27</sup> The Competition Act, 2002, §19(3).

<sup>28</sup> *Id.* §54 (“*Power to exempt.— The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification— (a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest; (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries; (c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government...*”)

<sup>29</sup> *Id.* §46 (“*Power to impose lesser penalty*”); The Competition Commission of India (Lesser Penalty) Regulations, 2009, Gazette of India, Extraordinary, pt. III, s. 4 (Aug. 13, 2009).

- 1. Industrial and Automotive Bearings Case (Suo Motu Case No. 05 of 2017) Order Dt. 05.06.2020<sup>30</sup>:** This case was started under whistle-blower provisions of the Competition Act. The CCI found that Schaeffler India Ltd., National Engineering Industries Ltd., SKF India Ltd. and Tata Steel Ltd., Bearing Division had fixed the prices of automotive and industrial bearings in India, in the domestic industrial and automotive bearings market, from 2009 to 2014. ABC Bearings Ltd. (Timken) was also investigated but due to lack of adequate evidence, the CCI did not find Timken to have contravened the Act. Here, the CCI found four of the five companies, as well as several of their employees, guilty of cartelisation, but did not impose any penalty on the same due to the “peculiar circumstances”<sup>31</sup> of the case, imposing only a cease-and-desist order on the parties, without citing any reasons for its leniency.

What is interesting to note is that though the order was passed in 2020, the cartel arrangement was from 2009-2014. The pandemic was not mentioned a single time in the order, nor were the parties alleged to be in dire financial straits. One can only guess what the “peculiar circumstances” of the case were, which may range from a lack of actual consensus on the price increases sought by the parties to the unique price-taking nature of the OEM industry, but the CCI itself provided no clarity in its order. It is also important to note that the European Commission, in its decision of 2014 also held SKF and Schaeffler liable for infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the European Economic Area (EEA) in the same product. The infringement was on grounds similar to India but fines were imposed in the matter.<sup>32</sup>

- 2. Multiple Railways Bid Rigging Cartel Cases (Ref. Cases No. 03 of 2016, 05 of 2016, 01 of 2018, 04 of 2018, and 08 of 2018) Order Dtd. 10.07.20<sup>33</sup>:** A more cogent reasoning was provided by the CCI in the matter of multiple railways bid rigging cartels, wherein the CCI clubbed similar allegations of bid rigging in different parts of the country into a single investigation. The cases dealt with tenders floated by various divisions/zones of the Indian Railways, for procuring of different types of Composite Brake Blocks, during the period 2009 to 2017.

All the parties involved were found guilty of cartel conduct. Again, it is interesting to note that the cartel conduct took place prior to the pandemic.

<sup>30</sup> Cartelisation in Industrial and Automotive Bearings v. ABC Bearings Ltd., 2020 SCC OnLine CCI 19, [www.cci.gov.in/antitrust/orders/details/698/0](http://www.cci.gov.in/antitrust/orders/details/698/0) (last visited on March 21, 2023).

<sup>31</sup> *Id.*, at 36.

<sup>32</sup> See, [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39922/39922\\_2067\\_2.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39922/39922_2067_2.pdf) (last visited on March 23, 2023).

<sup>33</sup> Chief Materials Manager, South Eastern Railway v. Hindustan Composites Ltd., 2020 SCC OnLine CCI 28, [www.cci.gov.in/antitrust/orders/details/694/0](http://www.cci.gov.in/antitrust/orders/details/694/0) (last visited on March 21, 2023).



However, the CCI expressed appreciation for the full cooperation of the parties during the investigation. The CCI also took into consideration their struggle during the pandemic, especially when they were SMEs and MSMEs with relatively small turnovers.<sup>34</sup> The CCI further acknowledged the measures taken by the Indian government to support MSMEs from the shock of the pandemic and felt that the interests of justice would be adequately served with a cease-and-desist order, and no further penalty need be imposed in this case. The parties were given a warning, however, to be careful in their future conduct, as they would be judged more harshly as recidivists if future allegations were substantiated.<sup>35</sup>

**3. Eastern Railway, Kolkata v. M/s Chandra Brothers and Others (Ref. Case No. 02 of 2018) Order Dt. 12.10.2021<sup>36</sup>:** This order was influenced by the case discussed above. Here, the parties were accused of rigging bids for high load-bearing axle bearings, by quoting similar prices, in response to three tenders floated by Eastern Railway, between August 2012 to August 2014.

The parties were found guilty. Once again, though the cartel conduct took place prior to the pandemic, the CCI, considered the cooperation extended by the parties in the investigation and their status as MSMEs. The CCI decided to impose no penalties in consideration of the hardships faced by the firms during the pandemic.<sup>37</sup> The CCI also stated that these firms may go out of business as a result of imposing penalties, which would lead to lack of competition in the already narrow government tender space.

**4. Food Corporation of India v. Shivalik Agro Poly Products Ltd. and Others (Reference Case No. 07 of 2018) Order Dt. 29.10.21.<sup>38</sup>:** A similar order was passed in the case of Food Corporation vs Shivalik, wherein parties were accused by the Informant, the Food Corporation of India, of cartelising to rig bids for Low-Density Polyethylene covers for food grain packaging, during the period 2005 to 2017.

The parties were found to have engaged in cartel behaviour. However, the CCI, in keeping with the earlier trend, imposed no financial penalty on the parties. The Commission noted that such exemption was warranted as four out of the six opposite parties had filed lesser penalty applications and had admitted their conduct. Further, all parties were MSMEs, and the MSME sector in India was already under stress and bearing the impact of the economic shock arising from the outbreak of the pandemic.<sup>39</sup>

<sup>34</sup> *Id.*, at 64-65.

<sup>35</sup> *Id.*

<sup>36</sup> Eastern Railway v. Chandra Brothers, 2021 SCC OnLine CCI 50, [www.cci.gov.in/antitrust/orders/details/677/0](http://www.cci.gov.in/antitrust/orders/details/677/0) (last visited on March 21, 2023).

<sup>37</sup> *Id.*, at 92-93.

<sup>38</sup> FCI v. Shivalik Agro Poly Products Ltd., 2021 SCC OnLine CCI 65, [www.cci.gov.in/antitrust/orders/details/654/0](http://www.cci.gov.in/antitrust/orders/details/654/0) (last visited on March 21, 2023).

<sup>39</sup> *Id.*, at 19.

- 5. Mr. Rizwanul Haq Khan v. Mersen (India) Pvt. Ltd. & Ors. (Reference Case No. 02 of 2016) Order Dt. 01.11.21<sup>40</sup>:** In 2021, in a case regarding supply of carbon brushes, the CCI found that two companies, one being the subsidiary of a relatively large multinational company, and the other being an MSME, had engaged in bid rigging by steadily hiking the rates of carbon brushes from 2010 to 2015, in tandem with each other, without any justification.

Both companies were held guilty of cartel conduct but were not ordered to pay penalties for their behaviour. The CCI stated that in consideration of the companies incurring serious losses during the pandemic, it was in the interests of justice not to burden them further with a monetary penalty. The companies were let off with a cease-and-desist order and a warning for the future, given that a financial penalty would probably make the ventures financially unviable entirely, which would result in the market itself becoming less competitive due to the exit of competitors.<sup>41</sup>

- 6. Chief Materials Manager, North Western Railway v. Moulded Fibreglass Products and Others (Reference Case No. 03 of 2018) Order Dt. 04.04.22<sup>42</sup> and Cartelisation in the Supply of Protective Tubes to Indian Railways (Suo Motu Case 06/2020) Order Dt. 09.06.22<sup>43</sup>:** These cases are somewhat different from the earlier cases. In July 2018, the Chief Materials Manager of the Northern Railways filed a complaint alleging cartelisation by several companies in getting tenders, floated by various Railways Zones, for SLPR Bushes/HPPA Bushes. The companies and their several individuals were eventually found guilty of cartel conduct between 2016 and 2020, and penalties were imposed on the same.<sup>44</sup> During the investigation, the parties filed Lesser Penalty Applications. The third of these applicants chronologically was Jaipal Ltd. In terms of the stage and even the value of information, Jaipal had little to add vis-a-vis the matter at hand that the previous applicants and the Director-General's own investigation had not revealed. Interestingly, however, they disclosed the existence of another cartel they were a part of,<sup>45</sup> one for acquiring tenders for the supply of Protective Tubing to the Railways, with many of the same parties involved. The CCI took suo motu cognizance of this new cartel. As a result of the order in the former case, where penalties were

<sup>40</sup> Rizwanul Haq Khan v. Mersen (India) (P) Ltd., 2021 SCC OnLine CCI 49, [www.cci.gov.in/antitrust/orders/details/651/0](http://www.cci.gov.in/antitrust/orders/details/651/0) (last visited on March 21, 2023).

<sup>41</sup> *Id.*, at 29-30.

<sup>42</sup> North Western Railway v. Moulded Fibreglass Products, 2022 SCC OnLine CCI 25, [www.cci.gov.in/antitrust/orders/details/648/0](http://www.cci.gov.in/antitrust/orders/details/648/0).

<sup>43</sup> Polyset Plastics (P) Ltd., In re, 2022 SCC OnLine CCI 31, [www.cci.gov.in/antitrust/orders/details/1036/0](http://www.cci.gov.in/antitrust/orders/details/1036/0) (last visited on March 21, 2023).

<sup>44</sup> See North Western Railway v. Moulded Fibreglass Products 2022 SCC OnLine CCI 25, [www.cci.gov.in/antitrust/orders/details/648/0](http://www.cci.gov.in/antitrust/orders/details/648/0) (last visited on March 21, 2023).

<sup>45</sup> *Id.*, at 82.

imposed, in the Protective Tubing cartel matter, some parties and individuals raised the objection that as they were already being penalised for cartelisation in the earlier case, they should not be further financially penalised in this case.<sup>46</sup> However, the CCI found that the cases were entirely separate and dealt with two different cartels altogether.<sup>47</sup> Even so, in consideration of the fact that some of the companies were MSMEs, the penalty itself was set at 05 percent of the turnover.<sup>48</sup> Some individuals representing the company were made exempt from the penalty, as they were attached to MSMEs and had already been penalised.<sup>49</sup> It is important to note that not all parties or individuals had their penalties forgiven, and it was only those that had already been penalised in the other case that did. This makes economic sense, as the capacity for individuals to pay lakhs in fines, especially when employed by MSMEs, may not be up to the mark. However, what is concerning is that no individual analysis of economic scenarios was done to ascertain the capacity of payment. This seemed to be an instance of purely discretionary consideration by the CCI, as nothing further was said by the CCI to justify such lenient treatment.

- 7. GAIL (India) Limited v. PMP Infratech Private Ltd. and Others (Case No. 41 of 2019) Order Dtd. 11.10.21<sup>50</sup>:** In non-leniency cases, such as the case of GAIL vs PMP Infratech,<sup>51</sup> which was also a case relating to bid rigging for government restoration tenders between 2015 to 2019, the CCI held the parties guilty of cartel conduct, yet again imposed a lower penalty on parties. Out of the two offending parties, one was a small enterprise that had stopped operating due to disputes between the partners, and the other had suffered serious losses as well, as it was in the construction industry, which had been particularly badly hit by the pandemic. The CCI took into consideration these factors and imposed a symbolic penalty of 25 lakhs for the larger company, and 5 lakhs for the smaller one.<sup>52</sup>
- 8. Paper Cartel Cases - Corrugated Boxes v. Gujarat Paper Mills (Case No. 24 of 2017) Order Dtd. 12.10.22<sup>53</sup> and Anticompetitive Conduct in the Paper Industry (Case No. 05 of 2016) Order Dtd.**

<sup>46</sup> Polyset Plastics (P) Ltd., In re, 2022 SCC OnLine CCI 31, at 50, [www.cci.gov.in/antitrust/orders/details/1036/0](http://www.cci.gov.in/antitrust/orders/details/1036/0) (last visited on March 21, 2023).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, at 51.

<sup>49</sup> *Id.*, at 53.

<sup>50</sup> GAIL (India) Ltd. v. PMP Infratech (P) Ltd., 2021 SCC OnLine CCI 57, [www.cci.gov.in/antitrust/orders/details/681/0](http://www.cci.gov.in/antitrust/orders/details/681/0) (last visited on March 21, 2023).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, at 15-16.

<sup>53</sup> Federation of Corrugated Box Manufacturers of India v. Gujarat Paper Mills Assn., 2022 SCC OnLine CCI 53, [www.cci.gov.in/antitrust/orders/details/1063/0](http://www.cci.gov.in/antitrust/orders/details/1063/0) (last visited on March 21, 2023).

**17.11.21**<sup>54</sup>: The paper industry also witnessed two cases of reduction of monetary penalty on account of the pandemic. In the case of *Corrugated Boxes v. Gujarat Paper Mills*, it was alleged that the various associations of Kraft paper mills, by way of periodic meetings and correspondences, were raising and fixing prices of Kraft paper. The CCI found all the parties guilty of cartel conduct to varying degrees, from 2011 to 2018. However, while deciding the penalty, the CCI considered the mitigating circumstances of the industry in light of the pandemic and lent credence to the argument of the parties that economic distress caused by the pandemic created an adverse market due to which several Kraft paper mills were forced to cartelise.<sup>55</sup> The CCI also noted that the parties had cooperated during the investigation and submitted lesser penalty applications.<sup>56</sup> No monetary penalty was imposed in this matter, and the parties were let off with a cease and desist order and a warning for future conduct.<sup>57</sup> This was in tune with an earlier case, *Anticompetitive conduct in the paper industry*, where the Parties found guilty were let off with a symbolic penalty of Rs 5 lakh in view of the devastating impact of the pandemic and consequent digitalisation on the paper industry.<sup>58</sup>

**Analysis of CCI's Orders:** On analysis, the common factors that have been considered by the CCI in the orders passed during this period are:

- i. Nature of the industry.
- ii. MSME status of the firms which engaged in the cartel conduct.
- iii. Theoretical inability of the cartel participants to pay in context of the hardships faced by them during the pandemic, though the cartel conduct, in most cases, pre dated the pandemic.
- iv. Cooperation of parties with the investigation and admission of guilt, usually through lesser penalty applications.
- v. Risk of exit of competitors from the market due to the burden of paying penalties, thereby making business unviable.

These factors seem to be in accordance with developmental goals, as the CCI has given due regard to the losses suffered by industries during the pandemic and has attempted to protect smaller players from exiting the market.

<sup>54</sup> *Anti-Competitive Conduct in the Paper Manufacturing Industry v. Banwari Paper Mills Ltd.*, 2021 SCC OnLine CCI 74, [www.cci.gov.in/antitrust/orders/details/642/0](http://www.cci.gov.in/antitrust/orders/details/642/0) (last visited on March 21, 2023).

<sup>55</sup> *Id.*, at 262, 360.

<sup>56</sup> *Id.*, at 360-361.

<sup>57</sup> *Id.*, at 361-362.

<sup>58</sup> *Anti-Competitive Conduct in the Paper Manufacturing Industry v. Banwari Paper Mills Ltd.*, 2021 SCC OnLine CCI 74, at 65, [www.cci.gov.in/antitrust/orders/details/642/0](http://www.cci.gov.in/antitrust/orders/details/642/0) (last visited on March 21, 2023).

According to the provisions of Indian competition law, once cartel conduct is proven, there can be no ground for condoning or reducing penalty, except by way of leniency applications. However, the CCI has been mindful of the hardships faced by smaller firms due to the pandemic and deliberately exempted cartel participants from paying penalties, going beyond the provisions of the statute. This is a commendable step, as competition law in India was completely unprepared to deal with an economic crisis like the pandemic, hence new remedies were required to be devised. However, what is concerning is that no cogent reasons have been provided by the CCI in any of its orders, except a mention of the pandemic and/or the MSME status of the companies. Neither has the CCI elaborated on the need for making exemptions for cartels during times of economic crisis, nor has it clarified the time period and conditions under which such exemptions can be made. Further, a review of the decided cases shows that the CCI has not made any sector/product specific exemption. The CCI has also not undertaken a detailed financial analysis of actual inability of the cartel participants to pay the penalties.

The decisional practice of the CCI has been discretionary and inconsistent. A glaring example of such inconsistency is the case of the beer cartel, wherein all parties found were, save lesser penalty applicants, hit with heavy penalties.<sup>59</sup> Considering the claim of United Breweries, that the beer market has also been negatively impacted by the pandemic,<sup>60</sup> it is justified to question why a certain level of empathy was not extended to the beer companies. A possible reason could, however, be that the turnover of the beer industry, though lower during the pandemic, has nevertheless been high in comparison to other industries. This may have led the CCI to believe that the beer industry did not need the benefit of any lenient treatment.

Situations of economic crisis calling for exemptional treatment to cartels, may not be limited to the pandemic. Had the law laid down by the CCI in this regard been coherent, the same would have served as valuable guidance for future situations of emergency. However, in the absence of cogent reasons for condoning cartelisation during the pandemic, the practice of the CCI, which could be regarded as a laudable first attempt to give explicit recognition to broader developmental goals, has in effect muddied the waters of anti-cartel law. Scholars argue that this approach also risks forgiving cartel behaviour that has been continuing long before the pandemic, and leaves an interpretive

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<sup>59</sup> Alleged Anti-Competitive Conduct in the Beer Market in India v. United Breweries Ltd., 2021 SCC OnLine CCI 53, [www.cci.gov.in/images/antitrustorder/en/0620171652430028.pdf](http://www.cci.gov.in/images/antitrustorder/en/0620171652430028.pdf) (last visited on Mar. 30, 2023).

<sup>60</sup> PTI, *Second COVID Wave Hits Indian Beer Industry, Outlook is Volatile: UBL*, THE ECONOMIC TIMES (Mar. 30, 2023, 09:12 AM), [economictimes.indiatimes.com/industry/cons-products/liquor/second-covid-wave-hits-indian-beer-industry-outlook-is-volatile-ubl/articleshow/84825063.cms?from=mdr](https://economictimes.indiatimes.com/industry/cons-products/liquor/second-covid-wave-hits-indian-beer-industry-outlook-is-volatile-ubl/articleshow/84825063.cms?from=mdr) (last visited on Mar. 30, 2023).

quagmire, where the scope of financial difficulties leading to mitigation of penalties, needs to be seriously considered by the regulator.<sup>61</sup>

A review of practices of other countries, also reveals exemptions granted during the pandemic. But these were made either in accordance with the existing laws, or by temporary reworking of competition law frameworks, by issuing guidelines and/or granting authorisation to specific industries for collaboration.

In New Zealand for instance, penalty exemptions were given in accordance with the law, during the Covid-19 crisis. In the case of “International Racehorse Transport New Zealand Partnership,” wherein the party, after investigation, was found to be so badly impacted by the COVID-19 pandemic that it was unable to pay the penalty and would risk going out of business if such was imposed, leading to a monopoly in the market.<sup>62</sup> The New Zealand High Court therefore imposed no penalty in the matter, stating however that “*none of these matters is determinative, and the Court might impose a pecuniary penalty regardless, particularly if a defendant’s conduct has been egregious and the Court considers a penalty required for deterrence purposes.*”<sup>63</sup> However, this exemption was made on the basis of expert evidence demonstrating a real inability of the party to pay the penalty without risking complete ruin, not merely on the basis of generalised hardships faced due to the pandemic. It is to be noted herein that the Commerce Act of New Zealand under Section 80(2) specifically empowers the Court not to impose a pecuniary penalty on parties if it thinks there is a good reason.

The European Commission (EC) on the other hand, approved cooperative activities among industry players through temporary guidelines, for ensuring that they engage in the production, and supply of “essential scarce products and services” as well as distribute them to the consumers, during the pandemic. The EC published a “*Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak*” (TAF) on April 8, 2020, to ease competitive practices and facilitate cooperation between industry players dealing in essential products.<sup>64</sup> Since the pandemic was an exceptional situa-

<sup>61</sup> Charanya Lakshmikumar & Neelambara Sandeepan, *CCI’s Changed Approach to Enforcement Amidst the Pandemic*, LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS, [www.lakshmisri.com/insights/articles/cci-s-changed-approach-to-enforcement-amidst-the-pandemic/#](http://www.lakshmisri.com/insights/articles/cci-s-changed-approach-to-enforcement-amidst-the-pandemic/#) (last visited on March 30, 2023).

<sup>62</sup> Commerce Commission v. International Racehorse Transport NZ, 2020 NZHC 1716 at 28-30, [comcom.govt.nz/\\_data/assets/pdf\\_file/0022/221791/Commerce-Commission-v-International-Racehorse-Transport-NZ-High-Court-Judgment-16-July-2020.PDF](http://comcom.govt.nz/_data/assets/pdf_file/0022/221791/Commerce-Commission-v-International-Racehorse-Transport-NZ-High-Court-Judgment-16-July-2020.PDF) (last visited on March 21, 2023).

<sup>63</sup> *Id.*, at 31.

<sup>64</sup> European Commission, *Communication from the Commission: Temporary Framework for Assessing Anti-trust Issues Related to Business Cooperation in Response to Situations of Urgency Stemming from the Current COVID-19 Outbreak* (Apr. 8, 2020), [ec.europa.eu/info/](http://ec.europa.eu/info/)

tion, a temporary reconstructed framework was necessary to support urgent activities which required collaboration. The EC In accordance with the TAF, the EC evaluated the degree of cooperation between industry players in the health sector, and permitted them to carry out their activities in a collaborative manner, over a limited period of time.<sup>65</sup> However, the EC also clarified that according to need, it could amend or supplement the TAF to cover other forms of cooperation, in other sectors.

In the US, the Federal Trade Commission (FTC) and DOJ issued a joint antitrust statement concerning antitrust issues.<sup>66</sup> The joint statement encouraged the coordination of activities with a view to facilitate the availability of coronavirus-related supplies, characterising these as “joint efforts” that are “limited in duration” as well as “necessary” to assist patients and consumers.<sup>67</sup> The US DOJ and FTC authorised medical suppliers to coordinate the distribution and manufacturing of medical supplies that are vital in the context of prevention and treatment of the Covid-19 virus, such as face masks, PPEs, and other essential medications for treatment of the virus.<sup>68</sup> The collaboration was primarily with respect to addressing supply chain issues during the crisis, monitoring demand, discovering new supply sources, and sharing distribution networks as well as crucial market data, that would facilitate the supply of essential items. However, the DOJ made it clear that it would pursue antitrust claims against enterprises that sought to earn exorbitant profits by way of executing agreements that hindered competition by increasing prices, lowering wages, or decreasing output or quality.<sup>69</sup>

However, in India, apart from a generally worded Covid advisory, there have been no sector-specific exemptions made, or guidelines/authorisations issued with respect to collaboration between firms during the pandemic.

#### IV. CONCLUSION AND SUGGESTIONS

There is general consensus that the purpose of competition policy is not just to create maximum competition in the market, but also to enhance economic and social welfare.<sup>70</sup> As an OECD Background Paper has pointed out, some

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sites/default/files/framework\_communication\_antitrust\_issues\_related\_to\_cooperation\_between\_competitors\_in\_covid-19.pdf [hereinafter “Temporary Framework”] (last visited on March 21, 2023).

<sup>65</sup> *Id.*

<sup>66</sup> Federal Trade Comm’n & U.S. Dep’t of Justice, *Joint Antitrust Statement Regarding Covid-19* (March 24, 2020), [www.ftc.gov/system/files/documents/public\\_statements/1569593/statement\\_on\\_coronavirus\\_ftc-doj\\_3-24-20.pdf](http://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj_3-24-20.pdf) [hereinafter “Joint Statement”] (last visited on March 21, 2023).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Joint Statement, *supra* note 66.

<sup>70</sup> Ajit Singh & Rahule Dhumale, *Competition Policy, Development and Developing Countries*, in *WHAT GLOBAL ECONOMIC CRISIS?* 122, 122 (P. ARETISETAL. ed., 2001).

crucial factors that may necessitate the promotion of cartels during periods of crisis, are (a) reducing or avoiding unemployment in the sector; (b) reduction of excess capacity in the sector; (c) promoting innovation and productivity improvements by encouraging and coordinating the cooperation between competitors; (d) stabilisation or control over prices; and (e) doing away with unnecessary competition that denies participants a stable business environment during some phases of existence.<sup>71</sup> To this end, the CCI is justified in being mindful of hardships faced by firms during the pandemic, and giving them respite during economic crisis. However, the as cases discussed above demonstrate, the decisional practice of the CCI suffers from lack of consistency and cogent reasons for condoning penalty. It is the submission of the author that periods of economic crisis may necessitate the granting of exemptions to cartel like conduct, the Covid-19 pandemic being one illustration of such a crisis. In order to make the grant of such exemptions more transparent, the following suggestions may be considered:

Firstly, under §54 of our Competition Act, the Central Government can exempt enterprises from the operation of the law. Under §3, this exemption has only been given to vessel sharing agreements.<sup>72</sup> Similar exemptions can also be made for crisis cartels. However, such exemptions must be granted during a real and existing crisis, the criteria of which should be formulated. This will do away with the subjectivities associated with the time frame of granting exemptions, particularly as the CCI has been criticised for exempting cartel conduct which took place much before the pandemic period.

Secondly, any such exemption granted to cartels should be for a limited period only and subject to renewal after review, after assessing the change in circumstances. The review process should take into account factors such as the efficiencies attained in terms of production and distribution of goods and services as a result of the collaboration and the extent to which the collaboration benefited the consumers and the industry.

Thirdly, the process of review should be a consultative process and views of diverse stakeholders should be considered, including the industries in question, the consumers and the CCI. Such a process of consultation will ensure that the renewal of exemptions is based on empirical evidence and a real need, and minimise the risk of permitting cartel activity disguised as collaboration.

Fourthly, in case a legislative exemption is not made, the CCI can issue guidelines on how and when it will exempt cartel conduct, in situations of economic crisis. An example that may be given here is the TAF guideline framed by the European Commission specifically to deal with collaborations in the

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<sup>71</sup> Competition Policy Roundtable, *supra* note 7.

<sup>72</sup> Ministry of Corporate Affairs, S.O. 3250(E) (Notified on July 4, 2018) (India).



health sector during the pandemic.<sup>73</sup> Unlike the one-page advisory issued by the CCI, the TAF, also a temporary measure, was a detailed document outlining the circumstances and reasons for making exemptions, identifying the industries in which such exemptions may be given, after examining the purpose of the collaboration during the pandemic.

Last but not least, as laid down in the Competition Amendment Act, 2023 (Amendment Act) it is important to have penalty guidelines in place. As discussed earlier, the imposition of penalties and the exemptions granted during the pandemic period have been criticised on grounds of subjectivity. The Amendment Act contains provisions empowering the CCI to issue guidelines on the calculation and imposition of penalty and it is the opinion of the author that the same be put in place at the earliest.<sup>74</sup>

In conclusion, the author submits that the grant of lenient treatment to cartels during periods of economic crisis, though necessary, cannot be subject to unfettered discretion. What could have been a valuable opportunity for the CCI to give explicit recognition to broader developmental goals, has been missed by the regulator, its decisions being marred by inconsistency and subjectivity. Hence, it is time that a specific framework is created to accommodate so-called “crisis cartels” within our competition law, to further the implementation of our developmental objectives.

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<sup>73</sup> See Temporary Framework, *supra* note 64.

<sup>74</sup> See The Competition (Amendment) Act, 2023, §64B, No. 9, Acts of Parliament, 2023 (India).