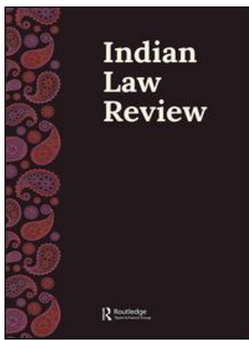

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Chilling competition? Trade associations & the Indian competition regime

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ABSTRACT
This paper explores the competition implications of trade associations in modern India. The paper posits that like competition regimes elsewhere in the world, the Competition Commission of India ("CCI") may distinguish between anti-competitive practices of trade associations and practices that facilitate and support competition in the country, including the use of the platform of a trade association for certain types of information exchange among competitors. The paper recommends that the CCI adopt guidelines to obviate the "chilling" effect on competition for both entities and individuals.

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1. Introduction

In a tribute to India's long-standing history of business, business organization and trade association, Professor Vikramaditya Khanna focuses on *sreni* – an organizational entity normally composed of people of similar trade (but not necessarily caste).[1] Whilst these *srenis* were bound by *sreni dharma*[2] i.e. binding internal governance rules, at the time that Professor Khanna discusses the *sreni*, it was probably too early to explore competition law implications of such trade associations. This paper explores the competition law aspects of such *srenis* or trade associations in modern India. The paper posits that like comparable jurisdictions, in terms of the Indian Competition Act, 2002,[3] trade associations that facilitate information exchange among competitors and reduce uncertainties in the market are anti-competitive.

To this end, the paper is organized as follows. Section 1 introduces the topic and the core hypothesis of this paper; section 2 deals with comparative aspects of Indian, European and American competition laws and explores types of information exchange agreements that decrease uncertainties; section 3 discusses the comparative law and other aspects related to trade associations; section 4 addresses the role of trade associations in facilitating information exchange and discusses the provisions and decisions of the

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[1]Vikramaditya Khanna, "Business Organization in India Prior to the British East India Company" in Harwell Wells (ed.), *Research Handbook on the History of Corporate and Company Law* (Edward Elgar 2018) 37.
[2]Ibid 38.
[3]The Competition Act, 2002 (12 of 2003).

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Competition Commission of India ("CCI" or "Commission") that may be relevant in understanding the pro-competitive and anti-competitive impacts of the trade associations; section 5 concludes with recommendations and suggested guidelines.

2. Understanding Information Exchange

Competition law focuses on forms of conduct that grant an advantage to specific players in a market. To this end, the cartelization of competitors and collusion for mutual benefit are prohibited.[4] It is in this context that the question of how one must treat information exchanges arises. In this section, we conduct a comparative analysis of the treatment of information exchanges across India, the European Union ("EU") and the United States of America ("US"). This background is significant because certain agreements that may be entered into by trade associations, could be pro-competitive. A useful instance of such pro-competitive agreement would be a joint venture agreement to augment R&D facilities during a public health emergency such as the COVID-19 pandemic. Note that this paper is concerned about anti-competitive agreements that may infringe the Act (and, not such pro-competitive agreements).

As per the Organization for Economic Co-operation and Development ("OECD"),[5] an information exchange can be defined as an exchange of information between competitors that falls between outright cartelization and tacit collusion, and is generally legal.[6] The benefit that arises out of information exchanges is greater economic certainty, which increases efficiency and profits. There is also a benefit to purchasers and consumers in some cases, where they are able to compare and select offers easily due to the increased transparency. Regulators have recognized that such communications and exchanges between competitors are essential for a competitive market, and that information exchanges do have certain pro-competitive effects. However, while reducing uncertainty, an information exchange may also facilitate collusive behaviour. Information that facilitates collusive behaviour has been termed "*sensitive information*". Competition laws then are required to regulate those exchanges that have anti-competitive effects on the market and grant an unfair advantage to certain participants. Therefore, exchanges of *sensitive* information are considered to be in violation of competition law in most jurisdictions.

2.1 India

The Indian Competition Act, 2002 ("the Act") does not define an information exchange. The Act does, however, possess a provision on "anti-competitive agreements". Section 3 of the Act prohibits any enterprise or association from entering into any agreement

[4]In terms of the Competition Act 2002 "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale, or price of, or trade in goods or provision of services.

[5]The Organization for Economic Co-operation and Development is an intergovernmental economic organization, founded in 1961 to stimulate economic progress and world trade. It has 37 member countries. See OECD, "History" <https://www.oecd.org/about/history/> accessed 5 October 2020.

[6]See OECD 'Policy Roundtables: Information Exchanges Between Competitors under Competition Law 2010 (Directorate for Financial and Enterprise Affairs Competition Committee, DAF/COMP(2010)37, 2011) <http://www.oecd.org/competition/cartels/48379006.pdf> accessed 5 October 2020.

which causes or is likely to cause an appreciable adverse effect on competition ("AAEC") within India. The Act states that an agreement which is in contravention of Section 3(1), prohibiting anti-competitive agreements, shall be void.[7] Section 2(b) of the Act, defines an agreement as including "*any arrangement or understanding or action in concert*". Therefore, information exchanges may be captured by this wide definition, as an "understanding in concert".

However, not all kinds of agreements are prohibited under the Act. The *sine qua non* for an anti-competitive agreement is that of an AAEC in India, the requirements for which are outlined in Section 19(3) of the Act. Section 3 divides anti-competitive agreements into two categories. First, Section 3(1) and (2) read with Section 19(3) of the Act state that an agreement likely to have an AAEC in India is void. Second, an agreement satisfying the criteria under Section 3(3) of the Act (agreements which primarily relate to a cartel) is *presumed* to have an AAEC. Therefore, the exchange of sensitive information may be brought under these provisions, depending on the kind of agreement being entered by the participants through the exchange of information. Although the *presumption* in terms of Section 3(3) of the Act is rebuttable, it acts as an analytical short-cut for CCI in terms of proving anti-competitive agreements.[8]

European Union

The European Commission ("EC") has treated such information exchanges as "concerted practices" within the scheme of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").[9] In addition to this, the EC has also issued the Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements.[10]

The European jurisprudence in this area is cognizant of the advantages of information exchanges and follows a three-step process to gauge whether they should be prohibited. First, there must be evidence of concertation; second, subsequent conduct on the market; third, a relationship of causation must exist between the concertation and the conduct.[11] As per the EC, those exchanges that have the ability of reducing uncertainty about prices and output are deemed to have an anti-competitive object.[12] Information exchanges can also be captured as "decision by associations of undertakings" under Article 101(1). This element also requires some element of coordination. However, the undertakings in this regard must be distinct, which would mean that group companies under a single economic unit would ostensibly not be caught by this provision.

[7]Interestingly, the CCI has interpreted this broadly to mean an omnibus provision which captures *all* agreements regardless of whether these agreements could be economically characterized as horizontal agreements or vertical agreements. See *Shri Suprabhat Roy v Shri Saiful Islam Biswas* (Case No 36 of 2015) (Competition Commission of India, 12 March 2020) [21.16].

[8]Andriani Kalintiri, "Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises and Presumptions" (2020) Journal of Competition Law and Economics 1.

[9]See for instance, Case 48–69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECLI:EU:C:1972:70.

[10][2011] OJ C11.

[11]Case C-8/08 *T-Mobile Netherlands BV & Others v Commission* ECJ [2009] ECLI:EU:C:2009:343.

[12]Bernd Meyring, 'T-Mobile: Further confusion on information exchanges between competitors: *Case C-8/08 T-Mobile Netherlands and others [2009] ECR 0000*' Journal of European Competition Law & Practice (2009) 1(1) 30.

Cases on information exchanges in the European Union have arisen since the 1970s. One of the earliest cases pertained to cartelization amongst the European manufacturers of glass containers.[13] In this case, the "fair trading rules" followed by the manufacturers were *prima facie* pro-competitive in that they prohibited discriminatory pricing and departures from publicly available price lists. However, an examination into the cartel revealed a price-coordination system enabled by an exchange of information on prices and sale terms. The EC accordingly condemned such information exchanges and rejected the request for exemption.[14]

In deciding what information would be anti-competitive to exchange, the EC accounts for age, individualization, market coverage and frequency.[15] In another case, the European Court of Justice also accounted for factors such as the structure of the market, the goods covered and the goals of the arrangement.[16] However, a more contested question in the EU is whether such exchanges must cause any actual anti-competitive effects.[17] The leading case in the EU on information exchanges is the *UK Agricultural Tractor* case.[18] In this case, the agreement in question did not pertain to pricing or such other anti-competitive concerns. Instead, the EC found that the information exchange and collection of data by members in a highly concentrated market created barriers to entry and had a potential anti-competitive impact. Here, the importance of market structure and hidden competition was emphasized upon.[19]

United States of America

In the United States, information exchanges are assessed under Article 1 of the Sherman Act. This provision prohibits any contract or *conspiracy* which unreasonably restricts trade. There are two elements of this provision that are necessary to understand. First, there must be some form of an agreement or conspiratorial understanding between two or more parties. Second, this agreement must have an unreasonable restrictive impact on trade. With respect to the standard of treatment, courts have held that information exchanges must be evaluated on the *rule of reason basis*, in light of the pro-competitive potential of such exchanges.[20] This is true even in cases where the line between price-fixing and information exchanges may be thin.[21] However, when information exchanges facilitate price-fixing and such other anti-competitive conduct, they are found to be in violation of the Sherman Act.

In addition to the Sherman Act, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") in the US have jointly issued the Antitrust Guidelines for Collaboration Among Competitors in 2000. These guidelines state that "*other things being*

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[13] *Agreements between manufacturers of glass containers* (Case IV/400) Commission Decision 74/292/EEC [1974] OJ L 160/1.

[14] Lennart Ritter and Braun David, *European Competition Law: A Practitioner's Guide* (Third Edition, Kluwer Law International 2005) 180.

[15] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11, [2.2.3(ii)].

[16] Case C-67/13 *Groupement des Cartes Bancaires v Commission* [2014] ECLI:EU:C:2014:2204.

[17] *Hungarian BankAdat* case [2016] Hungarian Competition Authority Vj/08/2012/1751.

[18] *UK Agricultural Tractor Registration Exchange* (Case IV/31.370 and 31.446) Commission Decision 92/157/EEC [1992] OJ L 68/19.

[19] Judgement of the Court of First Instance (Case T-35/92 *John Deere v Commission of the European Communities* [1994] ECR II-957 [51]) supported by the ECJ in Judgement of the European Court of Justice (Case C-7/95 P *John Deere Ltd v Commission of the European Communities* [1998] ECR I-3111 [88–90]).

[20] *United States v United States Gypsum Co* 438 U.S. 422, 441 n.16 (1978).

[21] *Maple Flooring Mfrs. Association v US* 268 U.S. 563 (1925).

equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables".[22] The 2000 Antitrust Guidelines for Collaborations Among Competitors also recognizes the relation between an increase in market power and the exchange of competitively sensitive information. However, in cases where a finding of anti-competitive harm is made, an examination into the degree of market power is usually not made.[23]

Enquiries into information exchanges in the United States are not novel. Cases such as *American Column & Lumber v United States* date back to the 1920s, and are the first instances of courts examining the exchange of competitive information. In this case, the members of a trade association were exchanging information pertaining to sales, production and inventories. The court penalized such information exchanges, placing a particular emphasis on the exchange of price and output information such as "*suggestions as to both future prices and production*."[24] In another case, the court found fault with an exchange of price lists, variations and the details of buyers who received special prices.[25] The court noted that the access to such information was restricted to the members of such association, which disadvantaged customers by denying them full information and thereby impacting their bargaining power.

Even so, the courts in the United States have recognized the pro-competitive effects of information dissemination as well. For instance, in *Maple Floorings*, the court held that:

> It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise.[26]

However, it is important to note that this case was distinguished from previous cases on information exchanges by the Court due to the fact that the data in the programme was "aggregated", i.e. it did not identify a particular firm. This was augmented due to other factors: the data pertained to past prices, and not present or future information which could potentially impact competition; further, access to data was not restricted to simply the members of the association, but given to customers as well, thereby lowering the risk of anti-competitive harm.

3. The Nexus between Trade Associations and Information Exchange

Trade associations occupy a unique place in competition law. They do not carry out economic activities of their own, hence cannot be grouped with enterprises as defined in Section 2 of the Act. However, associations provide a forum to facilitate communication between players in the same market and may influence their decision-making.[27] The term "trade associations" finds no definition under the Act. However, trade associations can be

[22]See Antitrust Guidelines for Collaborations Among Competitors 2000, Section 3.31(b).
[23]Ibid, Section 3.31.
[24]*American Column & Lumber Co. v United States* 257 U.S. 377 (1921).
[25]*United States v American Linseed Oil Co* 262 US 371 (1923).
[26]*Maple Flooring Manufacturers Association* (n 21).
[27]See OECD 'Policy Roundtables: Trade Associations 2007 (Directorate for Financial and Enterprise Affairs Competition Committee, DAF/COMP (2007)45, 2008) <http://www.oecd.org/regreform/sectors/41646059.pdf> accessed 5 October 2020.

generally understood as an association created by firms operating in the same market for the representation and promotion of their interests and goals.[28]

The logic of examining the activities of a trade association from a competition law perspective is simple – to ensure a level playing field, no group should possess the power to foreclose or manipulate the market.[29] Trade associations provide an *opportunity* for competitors to gather and determine outcomes within the market to their own advantage. Even though such associations may serve other functions, such as providing representation, often the anti-trust authorities focus solely on their *facilitative* role, particularly in cases of collusion.

It is noteworthy that a trade association may play both an anti-competitive and a pro-competitive role. In the modern day context, it is instructive to consider the case of a standard-setting organization that would facilitate agreements, which would be pro-competitive. In the historical context, an emblematic example would be *srenis* referred to in the introduction of this paper. As Professor Khanna notes, these *srenis* were bound by *sreni dharma* i.e. binding internal governance rules which generally facilitated trust between the members and enforcement of contracts with outsiders.[30] It is plausible that these *srenis* enabled collusion, too. But ancient India did not have a competition regime. A modern-day understanding of trade associations will remain incomplete without an appreciation of the role played by competition law.

For instance, in certain contexts, the structure of and entry into a trade association may itself deliver a competitive advantage to the members. In these cases, access to and the requirements of membership would invite scrutiny, as would any restrictions on membership. This membership may depend on several factors – the industry, the function within the industry, geographical location, issues concerned with and the services to be provided.[31] These cases often involve an analysis of the *business advantage* that has been conferred by virtue of membership, and whether such advantages and opportunities would be available outside the association.[32]

The role of trade associations in collecting information and conveying it back to the members cannot be understated, because the same kind of information collection may be impossible on their own. In many ways, the issues associated with cartelization may also arise in the context of trade associations. It is important to consider what types of information exchanges are illegal and what is the effect on competition of such exchanges. This section examines these issues from a comparative perspective.

India

Trade associations present legal issues across both horizontal and vertical competitive relationships. The association may enable cartelization amongst member competitors, which may then lead to anti-competitive outcomes such as price-fixing and barriers to

[28]Ibid.

[29]"Antitrust: Trade Association's Refusal to Deal as per se violation" 1961(2) Duke Law Journal (1961) 302 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1757&context=dlj> accessed 5 October 2020.

[30]Khanna (n 1).

[31]John Bodner, Jr., "Antitrust Restrictions on Trade Association Membership and Participation" (1968) 54(1) American Bar Association Journal 27.

[32]*Associated Press v United States*, 326 U. S. 1 (1945).

entry.[33] The association, in exercising its influence, may also control the vertical agreements that its members enter into, leading to exclusive supply and distribution agreements with specific players in the market.[34] Therefore, Section 3(3) and 3(4) violations are likely to arise out of a strong trade association operating in a specific industry.

European Union

Article 101 of the TFEU also recognizes that the decisions of associations which restrict competition fall foul of the TFEU. This means that activities of trade associations causing an *indirect* anti-competitive impact on competition are prohibited. The EC has also taken issue with trade associations regulating the conduct of members through mandate while influencing their decisions.[35] Trade associations acting as a front of cartelization and collusive activity are also not permitted.[36] The EC has also penalized unions in breach of Article 101 of the TFEU for creating eligibility rules that further their own commercial interests and foreclosing access to service providers.[37] The EC has looked at information exchanges through trade associations and has sought to penalize the same.[38]

Moreover, the EC has also taken issue with intermediaries and organizations that *facilitate* collusion amongst competitors and exchange of sensitive information.[39] In its *AC- Treuhand* judgement, the EC placed emphasis on how the sole purpose of a particular organization was facilitating the achievement of anti-competitive objectives by cartels, and thus sought to penalize the same.[40] The animating theme which arises from the European context is that trade associations are a fertile ground of anti-competitive agreements.

United States of America

In the United States, trade associations are generally considered to be pro-competitive. However, an association controlling and suggesting prices to members, for instance, is likely to be sanctioned by the FTC.[41] Anti-competitive activities that invite the FTC's scrutiny include unreasonable and anti-competitive restrictions,[42] price-fixing, group boycott,[43] geographic allocations and information exchanges. Article 1 of the Sherman

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[33]In *Re Bengal Chemist and Druggist Assn*. (2014) SCC OnLine CCI 38.
[34]Eleanor M. Fox, 'What is Harm to Competition? Exclusionary Practices and Anti-Competitive Effect (2002) 70 Antitrust L. J. 372; *Kerala Cine Exhibitors Assn., In re* (2015) SCC OnLine CCI 99.
[35]Case C-49/07 *Motoe* [2008] ECR I-4863.
[36]Alan Reid "EU Competition Law and Trade Associations" in Justin Greenwood (ed.) *The Challenge of Change in EU Business Associations* (Palgrave Macmillan London 2013) 74 <https://doi.org/10.1057/9780230523234_6> accessed 5 October 2020.
[37]*International Skating Union's Eligibility rules (*Case AT. 40,208) Commission Decision C/2017/8240 [2017] OJ C 148/9.
[38]Eugenio F. Bissocoli "Trade Associations and Information Exchange under US Antitrust and EC Competition Law" (2000) 23(1) World Competition 79.
[39]Gianni De Stefano, "AC-Treuhand Judgment: A Broader Scope for EU Competition Law Infringements?" *Journal of European Competition Law & Practice* 6(10) (2015) 689.
[40]Case C-194/14 P *AC-Treuhand AG v European Commission* [2015] ECLI:EU:C:2015:717.
[41]"Spotlight on Trade Associations" (*Federal Trade Commission: Protecting America's Consumers*) <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade> accessed 5 October 2020; Antitrust Guidelines for Collaborations Among Competitors 2000.
[42]*In the Matter of National Association of Animal Breeders Inc*. FTC 151–0135 (18 August 2017).
[43]*Northwest Wholesale Stationers v Pacific Stationery & Printing Co*. 472 U.S. 284, 294 (1985).

Act declares conspiracies and combinations in restraint of trade to be void, which would arguably capture trade associations and their activities as well.[44]

The exclusion of companies from a particular association or cooperative, even in the absence of any fixing or boycott, has also resulted in penalties. In *Northwest Wholesale Stationers v Pacific Stationery*, the US Supreme Court noted that members of a cooperative were given access to goods that would be unavailable on short notice otherwise.[45] According to the court, a finding of market power or unique access to certain elements is necessary to find violations in such cases.

The FTC is concerned with associational activities such as boycotts. For instance, in *United States v Association of Retail Travel Agents*, the ARTA encouraged members to refrain from dealing with providers that did not meet its price system and terms. This was understood to be an "invitation" to engage in price-fixing. Another activity that is likely to cause concern is by-laws of trade associations and chambers of commerce which restrict competition in the market. For example, the US Supreme Court upheld the DOJ's challenge to a society's rule that prevented members from competitive bidding in order to ensure competition would reduce quality in the industry.[46] Similarly, restraints on price or output, or activities that facilitate or enforce the same would also fall foul of the legal framework.[47]

Given this framework, there may also be significant competition-related risks attached to membership of such associations. This also impacts any specific information related programmes of such associations, which may by nature give rise to concerns regarding collusion. In such cases, mere participation in such programmes may be considered anti-competitive and require caution on the part of members.[48]

4. Competition, Trade Associations and Information Exchanges

The Statutory Position

Like the majority of other competition authorities, CCI treats decisions or recommendations of trade associations as agreements between its members. As has been noted earlier, the Competition Act 2002 does not define trade associations. However, in Section 2(k)(v), the Act defines the term "person" as including an association of persons or a body of individuals. Further, "association of enterprises" referred to in Section 3 of the Act may also be deemed to be a reference to trade associations. The phrase "trade association" has also been used in Section 19(1) of the Act.

The collective legislative intent that emerges from these references veers towards curbing anti-competitive conduct of trade associations. Since the membership of trade associations comprises of competitors, every decision, direction or

[44]Murray S. Monroe "Practical Antitrust Considerations for Trade Associations" (1969) Utah L. Rev. 622.

[45]*Northwest Wholesale Stationers* (n 43).

[46]*National Society of Professional Engineers v United States* 435 U.S. 679 (1978).

[47]*FTC v Superior Court Trial Lawyers Ass'n* 493 U.S. 411, 433 (1990); *Wilk v American Medical Ass'n* 719 F.2d 207, 221–22 (7th Cir. 1983), *cert. denied* 467 U.S. 1210 (1984). *NCAA v Board of Regents*, 468 U.S. 85, 109–110 (1984).

[48]*Todd v Exxon Corp* 275 F3d 191, 198 (2d Cir 2001) ("Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement"); *United States v Airline Tariff Publishing Co*, 836 F Supp 9 (DDC 1993) (approving consent decree barring airlines from exchanging information where exchange allegedly used to facilitate collusion); and In *re Petroleum Prods Antitrust Litig*, 906 F2d 432, 445–50 (9th Cir 1990) (noting that exchanging price information is treated as a plus factor from which a jury could infer an agreement among rivals to fix prices).

recommendation of an association is generally required to be arrived at by consensus amongst the members. This meeting of minds amongst competitors may be construed as an "agreement" within the meaning of Section 2(b) of the Act, and thereby attracting provisions of Section 3 of the Act, in case the agreement relates to prices, production, distribution, bidding etc. on the part of the members.[49] A large part of the prohibited conduct of trade associations falls into the category of cartelization. In terms of Section 27(b) of the Act, the penalty for such conduct is ten per cent of the turnover or three times the profits of the entity found to be in contravention of the Act, whichever is greater. However, if a party to a cartel makes full and true disclosure to the CCI and cooperates with the CCI in investigating the cartel, it may be entitled to a lesser penalty under Section 46 of the Act and regulations made thereunder.[50]

The *Bengal Chemist and Druggist Association ("BCDA")* case,[51] was the first case where the CCI not only penalized the trade association but also levied fines on its office bearers and its executive members who were responsible for running the day to day affairs of the trade association.[52] Also in that decision, CCI noted that the provisions of Section 27 of the Act were sufficient to make office bearers liable for contravention without the aid and assistance of the provisions of Section 48 of the Act. Post its decision in the *BCDA* case, this has become CCI's normal approach for cases relating to trade associations. Hence, not only are the trade associations exposing themselves to liability by facilitating information exchange, but even its office bearers are exposed to liability for violation of competition laws. In a number of its orders, CCI has required trade associations found in breach of Section 3 of the Act to amend their by-laws etc. to remove anti-competitive clauses. Therefore, the CCI has exercised its powers to ensure that trade associations do not continue to engage in practices that violate competition laws.

Review of the Emerging Jurisprudence

Like competition agencies in other jurisdictions, the CCI has in several cases imposed liabilities on trade associations (under Section 27[53]). Interestingly, unlike other competition agencies, the CCI has extended such liabilities to individual members as well (under Section 48[54]). The nature of activities of trade associations that the CCI has found to be in violation of the Act include activities such as fixing prices, controlling supply and distribution, collection and dissemination of market information, etc. which may be treated as arrangements amongst competitors.

[49]Section 3 of the Competition Act 2002 reads that "no association of enterprises or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition, or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India".

[50]The Competition Commission of India (Lesser Penalty) Amendment Regulations 2017 (No. 1 of 2017).

[51]In *Re Bengal Chemist and Druggist Assn*. (2014) SCC OnLine CCI 38.

[52]Ibid.

[53]Section 27 empowers CCI to impose penalties for anti-competitive agreements and/or abusive conduct, upon "*each of such person or enterprises which are parties to such agreements or abuse*".

[54]Section 48(1) provides that where a person committing contravention of any of the provisions of the Act is a company (including a firm or an association), every person who, at the time the contravention was committed, was in charge of, and was responsible for the conduct of the business of the company/association, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

In India, there is a large body of case law, dealing with trade associations and their effect on competition dating back to the early days of the Monopolies and Restrictive Trade Practices (MRTP) Commission, which had been established under the Monopolistic and Restrictive Trade Practice Act, 1969.[55] In its very first case regarding the activities of trade associations, *FICCI–Multiplex Association of India Federation House v United Producers/Distributors Forum*,[56] the CCI had imposed a nominal penalty of Rs. One hundred thousand each on twenty-seven film producers who were members of a trade association, for colluding to exploit multiplex owners through the association.[57] CCI was of the view that by restricting market access to multiplexes, the respondent association had adversely impacted competition in the market. One of the arguments made by the aggrieved parties before CCI was that the petitioner association had itself withheld information on the number of shows, the number of screens and their locations etc. from producers thereby affecting competition in the market. Although CCI did not decide this issue, it shows how participants of a market may utilize the platform of trade associations to bargain better deals from their suppliers.

The activities of trade associations that directly affect competition in the market have been held to violate Section 3 of the Act. In *Reliance Big Entertainment*,[58] and *UTV Software against Film Chambers of Commerce and Motion Picture Associations*,[59] CCI has held that compulsory registration of films before release and prohibiting members of the association from engaging in business with non-members, chamber or society, is anti-competitive and in violation of the Act. CCI also noted that compulsory registration also decreases competition in the market by allowing access to information on film release to all the members of the association. Although information exchange was not the primary issue in these cases, CCI penalized trade associations for anti-competitive practices, such as fixing prices,[60] fixing trade margins,[61] compulsory membership,[62] price determination, commission and discounts,[63] and imposition of arbitrary rules.[64] The orders of the CCI in respect of associations have clearly established that trade associations must further the legitimate interests of their business community and consumers and not indulge in anti-competitive activities.

One of the early cases where the CCI extensively discussed information exchange as a marker of anti-competitive practice was *Builders' Association of India ("BAI") v Cement Manufacturers' Association*.[65] In this case, CCI cited the decision of the European Court of Justice in *T-Mobile & Ors. v Commission*,[66] and noted that every economic operator must independently determine its own policy in the market. The ECJ had observed that European competition laws strictly preclude any direct or indirect contact between

[55]Monopolistic and Restrictive Trade Practice Act (Act No. 54 of 1969).
[56]*FICCI – Multiplex Association of India v United Producers* (2011) SCC OnLine CCI 33.
[57]Ibid.
[58]*Reliance Big Entertainment Private Limited v Tamil Nadu Film Exhibitors Association* (now known as Tamil Nadu Theatre Owners Association) (2013) Indlaw CCI 60.
[59]*UTV Software Communications Ltd. v Film Chambers of Commerce and Motion Picture Associations* (2012) SCC OnLine CCI 34.
[60]In *Re Bengal Chemist and Druggist Assn*. (n 51).
[61]In *Re: M/s Sandhya Drug Agency* (2013) Indlaw CCI 62; In *Re: Vedanta Bio Sciences, Vadodara* (2019) Indlaw CCI 4.
[62]In *Re Shree Ghanshyam Dass Vij v M/s Bajaj Corp Ltd. and Ors* (2015) SCC OnLine CCI 174.
[63]In *Re Bengal Chemist and Druggist Assn*. (n 51).
[64]*Indian Jute Mills Association* (2015) SCC OnLine Comp AT 560.
[65]*Builders' Association of India v Cement Manufacturers' Association & Ors* (2012) SCC OnLine CCI 43.
[66]*T-Mobile Netherlands BV & Others* (n 11).

market players by which a player conveys to its competitors its decisions, and thus affects the normal conditions of the market in question. The ECJ had therefore concluded that if trade associations act as a platform for the players to convey their market position and strategies, this might lead to reduction or removal of uncertainty in the market, which in turn adversely affects competition in the market.

More importantly, the CCI in *Builders' Association* case[67] specifically endorsed the observation of the ECJ that when an exchange of information, according to its content and objectives in that particular legal and economic context, is capable of resulting in the distortion of competition within the market, it is not necessary for there to be an actual distortion of competition or a direct link between the concerted practice and consumer prices. A concerted practice between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings. Thus, when trade associations facilitate such an information exchange among competitors, they are deemed to have committed a violation of European competition law by indulging in a concerted practice having an anti-competitive object.[68]

In the particular case, CCI did not conclude that a mere exchange of information would constitute a violation of Section 3 of the Act, as it did find evidence of parallel conduct between the players in the market. However, it did observe that sharing of "Executive Summary-Cement Industry" and "Cement Statistics-Interregional Movement of Cement" gave details of production and dispatch of each company which was problematic as it facilitated anti-competitive conduct. CCI further observed that the sharing of such sensitive information makes co-ordination easier amongst the players in the market. It also noted that collection of prices by the trade association at the behest of the government or otherwise, was in itself not anti-competitive. But, given that such information was being shared with or otherwise disseminated or published to the cement companies, the fact that the trade association possessed sensitive commercial information which could facilitate anti-competitive outcomes and it was actively shared among competitors was held to be problematic. In view of these observations, CCI imposed a penalty in the sum of Rs. Seventy-three lakhs on the trade association for contravening Section 3 of the Act. It also imposed penalties on individual members of the association. The association appealed to the National Company Law Appellate Tribunal ("NCLAT").[69] However, the NCLAT upheld the penalty imposed by CCI.[70]

The case of *Rajasthan Cylinders and Containers Ltd. v CCI*[71] is also interesting in this regard because it went all the way up to the Supreme Court of India. CCI's order in this matter had been appealed to the erstwhile COMPAT (predecessor of NCLAT). COMPAT, in its order dated 20 December 2013, affirmed the findings of CCI, and upholding its order held that the existence of an association and further holding of the meetings just one or two days prior to the last date of making offers and the fact that the

[67] Ibid.
[68] *T-Mobile Netherlands BV & Others* (n 11).
[69] The National Company Law Appellate Tribunal (NCLAT) is the appellate forum for competition matters in India. It has succeeded the erstwhile Competition Appellate Tribunal ("COMPAT").
[70] *Cement Manufacturers Association v Competition Commission of India* Appeal No. 105 of 2012 (National Company Law Appellate Tribunal) [93].
[71] *M/s. Rajasthan Cylinders & Containers (P) Ltd. v Competition Commission of India & Ors.* Appeal No. 59/2012 (Competition Appellate Tribunal, 20 December 2013).

parties had admitted to having appointed common agents with instructions to keep watch on the prices quoted by the competitors would go a long way in providing plus factors in favour of finding an anti-competitive agreement between the parties. All these factors would form a backdrop, in the light of which, further evidence about agreement would have to be appreciated.[72]

The order of the COMPAT was appealed to the Indian Supreme Court. The Supreme Court, however, disagreed with the observation made by COMPAT in view of various judgements and guidelines on cartels/bid rigging from several foreign jurisdictions. In arriving at its conclusion, the Supreme Court went beyond the conventional legalistic outlook adopted by CCI (in which it more or less avoids the economic aspects of market realities) and emphasized the need to evaluate the market structure and market conditions before arriving at a finding of a cartel.[73]

In the case of *Cartelization in dry cell battery market*,[74] CCI held that the members of All Indian Dry Cell Manufacturers ("AIDCM") had facilitated cartel activities by providing a convenient platform for sharing/discussing prices and other commercially sensitive issues on the pretext of discussing the market conditions. Further, by circulating such granular and detailed information relating to production and sales among the competitors on a regular basis, the trade association provided information that assisted the manufacturers in monitoring the cartel implementation. The CCI imposed a penalty of Rs 185,450.00 i.e. 10% of the average of its gross receipts for three years on the parties for contravening Section 3 of the Act.

The CCI's observation with regard to unilateral receipt of sensitive information is relevant while commenting on the role of trade associations in facilitating information exchange. The CCI in *Anticompetitive conduct in the Dry-Cell Batteries Market in India*[75] used the reasoning given in the Guidelines of European Union on the applicability of Article 101 of the TFEU to Horizontal Co-operation Agreements, 2010,[76] to observe that even if one competitor discloses strategic information unilaterally to the competitor it reduces strategic uncertainty in the market. It upheld the Director General's ("DG") findings and held that the parties were involved in price-fixing in violation of Section 3 of the Act. Geep Industries (India) Private Limited, which was a recipient of pricing information, chose to enter into the agreement with knowledge about the primary cartel and continued parallel pricing in line with the members of the primary cartel, thus it was considered to be an active participant of the ancillary cartel with Panasonic India. Thus, trade associations should be aware of the consequences of the information exchanges that they facilitate, even if it is a unilateral exchange of information, it can implicate the participants for violation of Section 3 of the Act.

Although CCI had considered information exchange in the *Cement* case and the *Dry Cell Battery* case as a factor in reducing strategic uncertainty in the market, CCI departed from its earlier tough stand on cartelization in its order *In Re: Alleged Cartelization in flashlights market in India*.[77] This case involved three flashlight manufacturing companies, namely,

[72]Ibid [26].
[73]*Rajasthan Cylinders and Containers Limited v Union of India* (2018) SCC OnLine SC 1718 [103].
[74]In *Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India v Panasonic Corporation* (2018) SCC OnLine CCI 81.
[75]Ibid.
[76]See n 10.
[77]*Alleged Cartelization in Flashlights Market in India v Eveready Industries India Ltd.* (2018) SCC OnLine CCI 98.

Eveready Industries India Limited, Panasonic Energy India Co. Limited and Indo National Limited, that were exchanging information regarding sale and production of flashlights amongst themselves. This was disclosed to CCI by Eveready under Section 46 of the Act, by filing a lesser penalty application before the CCI. In this case CCI concluded that:

> [T]he exchange of data relating to production and sales of a product only indicates possibility of collusion and can be considered as a 'plus factor'. The mere fact that certain information was exchanged amongst the parties does not constitute enough evidence for the Commission to conclude that the parties were acting in a coordinated manner contrary to the provisions of the Act. Such evidence has to be considered in conjunction with other evidence in the matter to establish contravention of the provisions of the Act.[78]

Although CCI concluded in this matter that there is evidence of exchange of production/sales data, draft press release and price information amongst the parties indicating possibility of collusion, it held there is hardly any evidence to show that such activities did in fact result in determining the prices of flashlights.[79] It is pertinent to note that CCI observed that the email exchange and aforesaid statements of the concerned persons disclosed that the parties had *arrived to an agreement* amongst themselves to increase prices with respect to flashlights, but concluded that there is no violation of Competition Act as the agreement was not implemented.[80] This stand is contrary to earlier decisions of CCI where mere finding of an agreement was considered a violation of Section 3(1) of the Act.[81] CCI's finding in this regard was also a significant departure from the EU position, and multiple ECJ decisions on information exchange cited by the CCI in earlier cases. The CCI's insistence on actual evidence of implementation, in spite of clear evidence of agreement among parties and sharing of granular strategic information among the parties, was clearly a departure from its own earlier practice and decisions.

In spite of this decision, it would be prudent for trade associations to not indulge in sharing of such sensitive information because CCI did consider this to conclude an "anti-competitive" agreement between the parties. Hence, in light of the aforesaid case law, we can conclude that trade associations should avoid facilitating exchange of strategic information that can decrease uncertainty in the market, which could lead to a conclusion of an anti-competitive agreement among them. However, exchange of non-strategic information may not be a problem from the perspective of competition enforcement in India.

5. Conclusion and Recommendations

The CCI's approach in determining the effect of exchange of information on the market amongst competitors through trade association depends on the same factors which have been accepted as best practices by global competition agencies. CCI has over time, evolved its own mechanisms for dealing with the question of exchange of market information among competitors through collection and dissemination of such information by trade

[78]Ibid [92].
[79]Ibid [100].
[80]*Alleged Cartelization in Flashlights Market in India* (n 77) [97].
[81]*Alis Medical Agency and others v Federation of Gujarat State Chemists and Druggists Associations and others* (2018) Indlaw CCI 54.

associations, and resulting into pro-competitive or anti-competitive effect in the relevant market. It has also sought to lay down some guidelines on the extent of culpability in the exchange of strategic business information amongst competitors. Whilst CCI has published a general advocacy literature,[82] it has not yet to formally issued any guidelines for the release or exchange of information among competitors. Given the pro-competitive effects of certain types of information, it is desirable that trade associations in India draw up their own data-release mechanisms and also draw inspiration from guidelines prevailing in Europe and elsewhere, and calibrate these according to their own needs, to ensure that they continue to prevent exchange of sensitive information which may assist cartelization.

From an analysis of the cases on trade association and information exchange and lessons from competition authorities in the European Union and United States practices and case law (on what kind of information exchange has the effect of decreasing competition in the market), it may be concluded that the following points ought to be kept in mind while drawing up guidelines for trade associations.

Firstly, sufficiently old information which has no impact on current market trends, may be used by trade associations for their research and market analysis and may be shared among its members.

Secondly, the data and information exchanged should not be individualized and specific. Aggregate data usually have little impact on competition in the market, as observed in *Cement Cartelization* case[83]whereby collating and providing regular information on production/sales data of the member companies, the trade association provided information that assisted the manufacturers in monitoring the cartel implementation. Hence, individual strategic and price-sensitive information should not be shared with the members of the trade association.

Furthermore, it may be prudent to involve third parties in processing of the information, as sharing of information directly between competitors can also lead to competition concerns. In *Cartelization in dry cell battery market* case,[84] the CCI held that the members of All Indian Dry Cell Manufacturers ("AIDCM") had facilitated cartel activities by providing a convenient platform for sharing/discussing prices and other commercially sensitive issues on the pretext of discussing the market conditions. Thus, direct interaction between competitors through trade associations has been held to be in violation of the Competition Act. Therefore, a firewall must exist between the association and the members while handling sensitive information.

That said, there is a need to interpret *Cartelization in dry cell battery market* precedent with care. This precedent involved an actual agreement between competitors. A convenient heuristic is – contexts involving information exchange between competitors ought to undergo greater scrutiny of in-house lawyers and external counsels.

In *Cement Manufacturers' Association* case,[85] the CCI cited the ECJ in *T-Mobile & Ors. v Commission*,[86] and observed that while analysing whether a particular market is open to

[82]Competition Commission of India, *Introduction to Competition Law: Part 3-Trade/Industry Associations* (Advocacy Division, August 2016) <https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Part%203%20CCI%20Trade%20Association.pdf> accessed 5 October 2020.

[83]*Builders' Association of India* (n 65).

[84]In *Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India v Panasonic Corporation* (2018) SCC OnLine CCI 81.

[85]*Builders' Association of India* (n 65).

[86]*T-Mobile Netherlands BV & Others* (n 11).

influence by trade associations acting as platforms for information exchange due regard must be given to the nature of products or services, the volume of products involved, the size and value of the market. Hence, in a highly concentrated oligopolistic market, exchange of information between competitors can significantly affect the nature of competition in the market. Thus trade associations should be cognizant of the market in which they are operating, The relevance of the structure of the market was outlined by the Supreme Court in *Rajasthan Cylinders and Containers* case.[87] Hence, it is evident that the trade associations operating in markets like telecom, airlines, infrastructure, cement etc. which tend to be oligopolistic, should be cautious while facilitating any kind of information exchange among competitors.

Furthermore, CCI should through its advocacy efforts ensure that the pro-competitive aspects of trade associations are promoted. They should be encouraged to furnish requisite information before CCI, against suspected cartelization amongst providers of raw materials and manufacturers of intermediate goods, as was seen in the *Cement Manufacturers' Association* case,[88] where the pro-active efforts of the Builders Association helped bring forth the anti-competitive practices in the cement industry. Furthermore, they can highlight any anti-competitive effects resulting from laws or government policies before the CCI, which further can take up the same with the government. They can leverage the benefits of scale by filing class action law suits before various form like NCLAT for losses suffered by their members. They can come up with model competition compliance codes for their respective markets and encourage CCI in its advocacy efforts, such guidelines and codes are being conceptualized by trade associations all across the world. Such pro-active role is likely to ensure that trade associations encourage competition in their respective markets and do not become a platform facilitating the formation of cartels.

These steps are particularly significant due to the possibility of personal, individual penalty which the CCI levies on officers of the trade association. For instance, in *PK Krishnan v Alkem Laboratories* case,[89] the CCI besides imposing monetary fines on the entities, also effectively disqualified two officers from associating themselves with trade association's "affairs including administration, management and governance in any manner for a period of two years". Accordingly, a serious approach towards engendering guidelines for information exchange as delineated above is likely to obviate the "chilling" effect on competition for both entities and individuals.

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Disclosure statement

No potential conflict of interest was reported by the authors.

[87] *Rajasthan Cylinders and Containers Limited v Union of India* (2018) SCC OnLine SC 1718, 88, [103].
[88] *Builders' Association of India* (n 65).
[89] *PK Krishnan v Alkem Laboratories*, Case No. 28 of 2014 (Competition Commission of India, 1 December 2015).