

COMPETITION LAW REGULATION OF TRADE AND PROFESSIONAL ASSOCIATIONS

*Aishwarya Gupta & Vivasvan Bansal**

Presence of trade and professional associations contributes significantly towards the development of market players in any industry. Since such associations have the power to influence the decisions of its member entities, many of their seemingly benign activities can be effectively unscrupulous under anti-trust law. However, Competition Commission of India's flawed, narrow and non-uniform interpretation of the Act has enabled the associations to take advantage of the lacunae in law. In this article, we examine the anti-competitive nature of the practices carried on by trade and professional associations. Thereafter, while scrutinising the extent to which such practices are regulated, we critique the position taken by the Competition Commission of India. Further, we argue for wide interpretation of the term 'enterprises' which should be adopted by the authorities to hold associations as enterprises under the Competition Act, 2002.

I. INTRODUCTION

An efficient legal framework regulating competition is imperative for a healthy economy. Competition leads to lower prices, better quality, innovation, wider choices and greater efficiency, thus increasing consumer welfare.¹ After enactment of the Competition Act, 2002, ('Act') the competition law regime in India has been strengthened.² However, due to lack of proper interpretation and enforcement of the provisions of the Act by the authorities, there have been certain areas which lack effective regulation.

One such area where authorities have failed to effectively enforce competition law is in regulating the activities of trade and professional associations. Trade and professional associations not only represent the interests of their members but also facilitate the interaction of their members with their

* 3rd and 2nd year students of the W.B. National University of Juridical Sciences, Kolkata. We would like to express our sincere gratitude to Mr. Aditya Ayachit and Mr. Shivam Bhardwaj for their valuable suggestions and guidance while writing this paper. All errors, however, remain solely ours.

¹ G.R. Bhatia, Abdullah Hussain & Ravisekhar Nair, *Law in Focus: Competition Law in India*, 1 IJIEL 182 (2008).

² Aditya Bhattacharjee, *India's New Competition Law: A Comparative Assessment*, 4(3) J.C.L. & E. 609-638 (2008).

peers.³ Further, they provide their members with information of technical, legal or commercial importance.⁴ Apart from benefiting the members, these associations help in the growth of the sector as a whole. However, due to this regulatory control, they seldom transgress the boundaries of competition law.⁵

In this paper, we focus on examining the activities carried on by the trade and professional associations in India. While doing so, we succinctly analyse how these practices are anti-competitive in nature and reason the need for effective regulation of the same. Part II of the paper defines and differentiates between trade and professional associations and discusses the importance of these associations. Further, while categorising trade and professional associations on the basis of the industry they operate in, we will attempt to analyse the legal status of each type of association to understand their source of power in their respective markets. In Part III, we will examine the restrictive conditions imposed by these associations on their members through their decisions and rules which can have potential anti-competitive effects and impede competition in the relevant market.

In light of the provisions of the Act, Part IV of the paper argues that these restrictive practices can be categorised under three types of anti-competitive practices. *First*, we argue that many of the decisions taken by the members of the associations often have the characteristics of a cartel under §3(3) of the Act. *Second*, we argue that these associations often enter into vertical agreements with their members or third parties within the course of their business which have adverse effect on competition. *Third*, we seek to demonstrate how many associations, being in a dominant position in their respective sectors, are abusing their dominance.

In Part V, we examine the current position of the competition enforcement authorities in regulating the anti-competitive practices of these associations. On scrutiny of the same, we shall conclude that the authorities have failed to effectively regulate anti-competitive practices indulged in by the associations other than cartelisation.

In Part VI of the paper we argue the need for associations to be considered as enterprises. While, examining the European Union ('EU') and United States of America ('USA') jurisprudence on the same, we further argue how these associations are actually enterprises under the Act. We also argue for a wider interpretation of §2(h) of the Act. Additionally, we analyse the pro-competitive effects of considering the same.

³ Trade Associations Forum, *Benefits of Trade Associations*, 3, available at <http://www.band-bassociation.org/TheBenefitsofTradeAssociations.pdf> (Last visited on December 23, 2015).

⁴ *Id.*

⁵ See generally OECD, *Policy Roundtables: Trade Associations*, 2007, available at <http://www.oecd.org/regreform/sectors/41646059.pdf> (Last visited on December 15, 2015).

II. TRADE AND PROFESSIONAL ASSOCIATIONS

Trade associations are established by competitor firms and organisations operating in the same market for promoting and representing them and providing them with services for furtherance of their commercial and professional goals.⁶ Members of the trade associations profit from the services provided by the trade associations as these associations are able to work more efficiently in the market than the members in their individual capacity.⁷ Trade associations also provide a forum to the market players for the discussion and exchange of views on issues pertaining to the common interests of the industry.⁸ These associations represent the interests of the industry before the government or other public institutions by supporting and promoting the consensual stance of the members regarding a public policy.⁹ Additionally, they protect and promote the interests of their members by issuing recommendations on commercial and non-commercial, legislative, regulation, policy and taxation matters.¹⁰ By taking such an active role, trade associations not only promote the interests of their members but also enable the efficient functioning of the market.¹¹ Thus, trade associations do have potential pro-competitive effects on the market in which they operate.

Professional associations represent self-employed individuals and usually have a training, disciplinary and regulatory function.¹² An organisation acting as a regulatory body of the profession can also be considered as a professional association.¹³ These associations play a key role in the development of that particular profession.¹⁴ For example, associations of lawyers, doctors or sportspersons can be considered to be a professional association. Even though

⁶ The Competition Authority, Dublin, *Guidance Notice on Activities of Trade Associations and Compliance with Competition Law*, November, 2009, 11, ¶ 3.1, available at <http://www.tca.ie/images/uploaded/documents/N-09-002%20Notice%20on%20Activities%20of%20Trade%20Associations%20and%20Compliance%20with%20Competition%20Law.PDF> (Last visited on December 15, 2015); Mark Boleat, *Trade Association Strategy and Management*, 1996, 1, available at http://www.boleat.com/materials/trade_assoc_strat_management_96.pdf (Last visited on December 15, 2015).

⁷ Mark Boleat, *Trade Association Strategy and Management*, 1996, 1, available at http://www.boleat.com/materials/trade_assoc_strat_management_96.pdf (Last visited on December 15, 2015).

⁸ OECD, *supra* note 5, 7.

⁹ *Id.*, 8.

¹⁰ *Id.*, 7.

¹¹ *Id.*, 7.

¹² Boleat, *supra* note 7, 8.

¹³ The Competition Authority, Dublin, *Guidance Notice on Activities of Trade Associations and Compliance with Competition Law*, November, 2009, 11, ¶ 3.5, available at <http://www.cpc.ie/sites/default/files/documents/N-09-002%20Notice%20on%20Activities%20of%20Trade%20Associations%20and%20Compliance%20with%20Competition%20Law.PDF> (Last visited on December 15, 2015).

¹⁴ OECD, *supra* note 5, 16.

the constitution of these two types of associations differs, the nature of their functions is similar.¹⁵ Based on this understanding, we will classify following associations into professional or trade associations.

A. MEDICAL ASSOCIATIONS

Medical associations can be classified as a trade association as well as a professional association on the basis of its constitution. Thus, if the medical association is an association of doctors or medical professionals, it would be considered to be a professional association as it comprises of self-employed professionals. However, if the medical association comprises of drug distributors, sellers, stockists, or wholesalers it would fall within the category of trade associations as it is a trade body managing the distribution and supply of drugs in the market.

The medical associations are not merely associations of enterprises or individuals but have a separate legal existence. The Assam Drug Dealers Association ('ADDA'), a State association of drug distributors and sellers in Assam and Barpeta Drug Dealers Association, a district association affiliated to ADDA in Assam are societies registered under the Societies Registration Act, 1860.¹⁶ All India Organisation of Chemist and Druggists ('AIOCD') is registered under the West Bengal Societies Registration Act, 1961.¹⁷ On the other hand, the Bengal Chemist and Druggist Association ('BCDA'), a State association of wholesalers and retail sellers is a company registered under §25 of the Companies Act, 1956.¹⁸ Approximately, BCDA comprises of more than 30000 wholesalers and retail sellers in the state of West Bengal.¹⁹ State associations like ADDA and BCDA are affiliated to AIOCD which acts as an association of associations.²⁰

B. FILM ASSOCIATIONS

Like the medical associations, film associations can also operate as either a trade or a professional association. In the event that a film association comprises of directors or actors, it would qualify as a professional association. If producers or distributors form an association for deciding upon the manner and rules of distribution in particular areas, it would be considered as a trade association.

¹⁵ See generally OECD, *supra* note 5; Boleat, *supra* note 7.

¹⁶ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 3.

¹⁷ *Id.*

¹⁸ Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 3.

¹⁹ Bengal Chemists & Druggists Association, *History*, available at <http://onlinebcda.org/History.html> (Last visited on December 15, 2015).

²⁰ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 3; Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 3.

India has been divided into numerous zones on regional basis, with respect to films.²¹ The distribution and exhibition of the films to be released in each zone are governed by a single film association, based in that region.²² Hence, the control exercised by these associations through their rules and regulations in a particular area gives them immense regulatory power that makes them capable of tilting market dynamics in their favour by resorting to anti-competitive practices. Generally, these associations are either registered under the Societies Registration Act, 1860 or under §25 of the Companies Act, 1956.²³ For example, the Eastern India Motion Picture Association which regulates the distribution of films in West Bengal, Assam and North East, is formed under the Companies Act, 1956.²⁴ The Telangana Film Chamber of Commerce, governing districts in Telangana and North Karnataka was, on the other hand, registered under the Societies Registration Act, 1860.²⁵

C. SPORTS ASSOCIATIONS

As mentioned earlier, sports associations are primarily professional associations. They play a major role in training the players and conducting sporting events. However, the pyramidal structure of sports associations²⁶ and rapid commercialisation of sporting events has raised many anti-trust concerns. Especially in the recent past, a lot of cases have come into light where sports associations or regulatory bodies have imposed restrictive conditions on the players under their control.²⁷

All India Chess Federation ('AICF') is the apex body which has been recognised by Federation Internationale Des Echess ('FIDE').²⁸ Additionally, it has also been recognised by the Union of India.²⁹ AICF is a society registered under the Societies Registration Act, 1860 and is regulated by the Tamil Nadu Societies Registration Act, 1975.³⁰ Among other things, it aims

²¹ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 1.6.

²² *Id.*

²³ *Id.*; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 1.2.

²⁴ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 1.8.2.

²⁵ *Id.*, ¶ 1.8.4.

²⁶ See International Olympic Committee, *Olympic Charter*, available at http://www.olympic.org/Documents/olympic_charter_en.pdf (Last visited on December 15, 2015).

²⁷ Hemant Sharma v. Union of India, 2011 SCC OnLine Del 4642 : 2012 Comp LR 1; Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543; Surinder Singh Barmi, v. Board of Control for Cricket in India, 2013 SCC OnLine CCI 8 : 2013 Comp LR 297.

²⁸ Hemant Sharma v. Union of India, 2011 SCC OnLine Del 4642 : 2012 Comp LR 1, ¶ 1.

²⁹ *Id.*, ¶ 1.

³⁰ All India Chess Federation, *The Constitution and Bye Laws of All India Chess Federation*, June 28, 2015, 2, ¶ 3, available at <http://assets.aicf.in/downloads/AICFconstitution.pdf> (Last visited on December 15, 2015).

at promoting chess culture, organising national and international championships and regulating the conduct of the players.³¹

Hockey India ('HI') is an internationally recognised body for training of the Indian hockey players, representing Hockey players in India and developing hockey as a sport³² and is affiliated to the Indian Olympic Association ('IOA'),³³ International Hockey Federation ('FIH')³⁴ and Asian Hockey Federation ('AHF').³⁵ Like most of the other associations, HI is a society registered under the Societies Registration Act, 1860.³⁶ It has also been recognised by the Union of India.³⁷ Additionally, it governs the conduct and participation of players in various championships by issuing various regulations such as the HI Code of Conduct (Players and Officials)³⁸ and HI Regulations Relating to Sanctioned and Unsanctioned Events.³⁹

Similarly, the Board of Control for Cricket in India ('BCCI') is a society registered under the Tamil Nadu Societies Registration Act, 1975.⁴⁰ According to its Memorandum of Association ('MoA'), it is the primary regulatory body of cricket in India.⁴¹

³¹ *Id.*

³² Hockey India, *Memorandum and Rules and Regulations of Hockey India*, May 31, 2015, available at <http://hockeyindia.org/images/stories/2012/09/Rules-Regulations-of-Hockey-India-31.05.2015.pdf> (Last visited on December 15, 2015).

³³ *Id.*

³⁴ Letter from Hon. Secretary General, International Hockey Federation to Hockey India dated June 14, 2009, available at <http://hockeyindia.org/images/stories/2012/09/Recognition-Letter-of-FIH.pdf> (Last visited December 15, 2015).

³⁵ Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 2.2.

³⁶ Hockey India, *Certification of Registration*, available at <http://hockeyindia.org/images/stories/2012/09/Certification-of-Registration-Hockey-India.pdf> (Last visited on December 15, 2015).

³⁷ Letter from the Ministry of Youth Affairs & Sports, Government of India to Secretary General, Hockey India dated February 28, 2015, available at <http://hockeyindia.org/images/stories/2014/03/Govt-of-India-Recognition-to-Hockey-India.pdf> (Last visited December 15, 2015).

³⁸ Hockey India, *Hockey India Code of Conduct (Players and Officials)*, January, 2015, available at <http://hockeyindia.org/images/stories/2012/09/Policy-Copy-HI-Code-of-Conduct-January-2015.pdf> (Last visited on December 15, 2015).

³⁹ Hockey India, *Hockey India Regulations Relating to Sanctioned and Unsanctioned Events*, available at <http://hockeyindia.org/images/stories/2014/04/Sanctioned-Unsanctioned.pdf> (Last visited on December 15, 2015).

⁴⁰ The Board of Control for Cricket in India, *Memorandum and Rules and Regulations*, September 15, 2012, available at <https://relaunch-live.s3.amazonaws.com/cms/documents/BCCI%20Rules%20and%20Regulations.pdf> (Last visited on December 15, 2015); Surinder Singh Barmi v. Board of Control for Cricket in India, 2013 SCC OnLine CCI 8 : 2013 Comp LR 297, ¶ 1.2.

⁴¹ The Board of Control for Cricket in India, *id.*

D. TRAVEL AGENTS ASSOCIATIONS

Travel agents associations are professional associations formed to harmonise relations in trade, promote the growth of the industry, provide for better representation on a collective platform, maintain the welfare of the professionals and safeguard the rights of the public.⁴² Travel Agents Federation of India is a society registered under the Societies Registration Act, 1860 and Bombay Public Trust Act, 1950.⁴³ Additionally, it is recognised by the Ministry of Tourism, Government of India.⁴⁴ Many other such associations are also registered as societies and governed by the rules framed in pursuance of their MoA.⁴⁵

E. TRANSPORT ASSOCIATIONS

Transport associations are trade associations having a separate legal identity. Transport associations like the Kiratpur Sahib Truck Operators Co-operative Transport Society Limited is a Co-operative society registered under the Punjab Co-operative Societies Act, 1961.⁴⁶ The abovementioned co-operative society operates as an association since it comprises of members who are truck owners and provides services of freight transport to various industrial units located in the particular area.⁴⁷ Another such association, the All India Motor Transport Congress is an apex body of road transporters representing approximately 75 lakhs truckers and 40 lakhs bus and tourist operators.⁴⁸ It is an association of associations having under its ambit 2500 districts, state level federations and transport associations.⁴⁹ It primarily aims at imparting scientific knowledge regarding the functioning of automobiles, fuel etc., promoting the interests of the people employed in the industry, analysing any legislation affecting the industry and representing the views of the industry before the government bodies.⁵⁰

⁴² FCM Travel Solutions (India) Ltd., In re, 2011 SCC OnLine CCI 77 : 2012 Comp LR 47, ¶ 2.2-2.4.

⁴³ *Id.*, ¶ 2.2.

⁴⁴ *Id.*, ¶ 2.1.

⁴⁵ Uniglobe Mod Travels (P) Ltd., In re, 2011 SCC OnLine CCI 63 : 2011 Comp LR 400, ¶ 15; FCM Travel Solutions (India) Ltd., In re, 2011 SCC OnLine CCI 77 : 2012 Comp LR 47, ¶ 2.3-2.4.

⁴⁶ Shivam Enterprises, In re, 2015 SCC OnLine CCI 27 : 2015 Comp LR 232, ¶ 3.

⁴⁷ *Id.*, ¶ 55.

⁴⁸ Indian Foundation of Transport Research and Training, In re, 2015 SCC OnLine CCI 35 : 2015 Comp LR 377, para ¶ 2.

⁴⁹ All India Motor Transport Congress, *About Us*, available at <http://www.aimtc.org/aboutus.php> (Last visited on December 15, 2015).

⁵⁰ *Id.*

F. OTHER ASSOCIATIONS

The Indian Jute Mills Association ('IJMA'), an apex association which represents 34 composite jute mills, is incorporated under the Companies Act, 1956.⁵¹ The association provides services to its members, promotes trade, research and product development in the industry and strives to provide a forum for discussion.⁵² Since jute is a mandatory packaging material for many commodities like cement, fertiliser, sugar, grains etc., the decisions taken by a body as significant as IJMA not only affects the jute industry but also other related industries.⁵³ Dumper Owner's Association, Odisha, a society registered under the Societies Registration Act, 1860, facilitates the employment of its member dumpers to the registered stevedores for transportation in the particular area.⁵⁴

III. RESTRICTIVE PRACTICES OF ASSOCIATIONS

Although the decisions and activities of the trade and professional associations can enable their members to earn high profits in the market, the same can potentially hinder the survival and growth of the competitors in the market, on arbitrary terms.⁵⁵ In the recent past, trade and professional associations have often taken undue advantage of the bargaining power they exercise over their members, and the industry in which they operate. In this Part of the paper we examine some of the restrictive practices commonly carried on by these trade and professional associations in India under the pretext of providing benefits to their members.

A. FIXING PRICES

In one of its meetings, BCDA decided that the drugs could be sold by the members only at their Maximum Retail Price ('MRP') and there was no scope for offering discounts on the same.⁵⁶ The MRP was determined as the sale price by the members of the association by concerted action.⁵⁷ In the event that the members did not abide by the MRP, penalties were imposed.⁵⁸ Many other medical associations also fixed trade margins for members and collected

⁵¹ Indian Jute Mills Association, *History*, available at <http://www.ijma.org/history.html> (Last visited on December 15, 2015).

⁵² *Id.*

⁵³ Indian Sugar Mills Assn., In re, 2014 SCC OnLine CCI 141 : 2014 Comp LR 225, ¶ 9(ii) & ¶ 3.

⁵⁴ Swastik Stevedores (P) Ltd., In re, 2015 SCC OnLine CCI 13 : 2015 Comp LR 212, ¶ 2.1-2.2.

⁵⁵ OECD, *supra* note 5, 8.

⁵⁶ Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 61; Anonymous, *Competition panel imposes ₹18-cr penalty on Bengal druggists body*, THE HINDU BUSINESS LINE (New Delhi) March 13, 2014.

⁵⁷ Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 61.

⁵⁸ *Id.*, ¶ 63.

Product Information Service Charges from the companies on the launch of new products.⁵⁹

Transport governing bodies and associations have been involved in imposing unfair prices for its services both directly and indirectly through its members.⁶⁰ These bodies impede competing enterprises from operating within their region. All India Motor Transport Congress, was instrumental in persuading its member associations through briefings and telephone calls to fix freight rates.⁶¹ It also provided a forum to its member associations to interact and discuss the increase in freight rates.⁶² Directions to act in accordance to its decision were issued.⁶³

Many other associations like Indian Jute Mills Association ('IJMA') and Gunny Trade Association ('GTA'), were involved in fixing sale prices of jute packaging material.⁶⁴ GTA had issued a daily price bulletin containing the prices of jute bags which had to be followed by the members of IJMA and GTA.⁶⁵

B. CONTROLLING SUPPLY AND DISTRIBUTION

Many medical associations directed their member pharmaceutical companies to stop supplying goods to particular distributors.⁶⁶ Additionally, these associations imposed a requirement of obtaining a No-Objection Certificate ('NOC') from them for being appointed as a stockist, wholesaler or distributor of a pharmaceutical company.⁶⁷ As these associations enjoy control over their members, they boycotted the member pharmaceutical companies not abiding by their rules and decisions.⁶⁸

⁵⁹ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 18.8; Anonymous, *CCI passes 'cease and desist' orders against AIOCD, others*, BUSINESS STANDARD (New Delhi) December 11, 2013.

⁶⁰ Shivam Enterprises, In re, 2015 SCC OnLine CCI 27 : 2015 Comp LR 232, ¶ 70 (Direct imposition of unfair prices); Indian Foundation of Transport Research and Training, In re, 2015 SCC OnLine CCI 33 : 2015 Comp LR 377, ¶ 44 (Indirect imposition of unfair prices).

⁶¹ *Id.*; SCC Online Blog, *All India Motor Transport Congress penalized for hike in truck freight rates across the country on account of increase in diesel price*, February 25, 2015, available at <http://blog.sconline.com/post/2015/02/25/all-india-motor-transport-congress-penalized-for-hike-in-truck-freight-rates-across-the-country-on-account-of-increase-in-diesel-price/> (Last visited on December 24, 2015).

⁶² Indian Foundation of Transport Research and Training, In re, 2015 SCC OnLine CCI 33 : 2015 Comp LR 377, ¶ 44.

⁶³ *Id.*

⁶⁴ Indian Sugar Mills Assn., In re, 2014 SCC OnLine CCI 141 : 2014 Comp LR 225, ¶ 8.

⁶⁵ *Id.*

⁶⁶ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 18.8; Anonymous, *CCI passes 'cease and desist' orders against AIOCD, others*, BUSINESS STANDARD (New Delhi) December 11, 2013.

⁶⁷ *Id.*

⁶⁸ *Id.*

In furtherance of promoting films made in the language of a state, the film associations of that state often impose unreasonable restrictions on the films made in other languages. For instance, the Karnataka Film Chamber of Commerce did not allow the release of non-Kannada films in more than 14 screens in the entire state.⁶⁹ Other film associations abstain from giving distribution rights to films produced outside the specific zone in which that association operates.⁷⁰ Members are made to sign undertakings that direct them to abstain from releasing the satellite, video rights etc. for a specific period from the date of release of the film.⁷¹

C. MANDATORY MEMBERSHIP

Sonipat Distributor Association, a medical association of distributors, stockists of drugs and pharmaceutical manufacturing companies mandated that each distributor and retailer in the region of operation of the association would become a member of the concerned association.⁷² Unless a stockist or distributor was a member of, and obtained an NOC from the association, it would not be eligible to be appointed by the drug and pharmaceutical companies.⁷³ Even manufacturing companies are required to obtain an NOC from the association before appointing any distributor in the region under the association's control.⁷⁴ BCDA mandated that members would not deal with non-members.⁷⁵

Majority of the film associations make it compulsory for the producers to become their members and register their films with them, before releasing the films in the area where they operate.⁷⁶ The members are not allowed to deal with the non-members.⁷⁷ Thus, in order to release their films in a particular zone, the producers are forced to become members of the association

⁶⁹ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 24; Press Information Bureau, *CCI imposes penalty upon Karnataka Film Chamber of Commerce(KFCC), Karnataka Television Association (KTV) and Kannada Film Producers Association (KFPA) for contravening Competition Law*, July 29, 2015, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=123907> (Last visited on December 24, 2015).

⁷⁰ Manju Tharad v. Eastern Indian Motion Picture Assn., 2012 SCC OnLine CCI 29 : 2012 Comp LR 1178, ¶ 5.15.

⁷¹ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 6.24; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 5.8.

⁷² Ghanshyam Dass Vij, In re, 2015 SCC OnLine CCI 174 : 2015 CCI 155, ¶ 56.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 62.

⁷⁶ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 6.24; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 5.8.

⁷⁷ *Id.*

governing that zone.⁷⁸ In the event that the by-laws, rules or directions imposed by the associations are violated, penalties are imposed on the members.⁷⁹ On non-payment of such penalties, the members are boycotted.⁸⁰

D. GROUP BOYCOTT

In the past, the travel agents associations have primarily been involved in making boycott calls to their members against international airlines. Many associations directed their members to boycott business and commercial dealings with Singapore Airlines and refrain from selling tickets of its flights to the customers.⁸¹ These decisions were taken on account of the shift from commission basis fee structure to transaction fee structure.⁸² Non-compliance by a member with this trade policy of the association would result in the boycott, suspension and expulsion of that member.⁸³

E. RESTRICTIONS IMPOSED BY REGULATORY BODIES

The AICF prohibited chess players from participating in any chess tournament or competition if it was organised by an association which did not have its approval.⁸⁴

Similarly, HI mandated its players to sign a Code of Conduct ('CoC') which stipulated that they would not participate in any unsanctioned events.⁸⁵ Additionally, the players were required to obtain a NOC before playing for any foreign team or club under an association other than HI or their registered member unit.⁸⁶ The CoC also had clauses for initiation of disciplinary action and disqualification in the event of participation in unsanctioned events.⁸⁷

The situation is not very different in the field of cricket where prior approval of the BCCI is required for the organisation and success of any

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ FCM Travel Solutions (India) Ltd., In re, 2011 SCC OnLine CCI 77 : 2012 Comp LR 47, ¶ 18.

⁸² *Id.*, ¶ 14.8.

⁸³ Uniglobe Mod Travels (P) Ltd., In re, 2011 SCC OnLine CCI 63 : 2011 Comp LR 400, ¶ 2; FCM Travel Solutions (India) Ltd., In re, 2011 SCC OnLine CCI 77 : 2012 Comp LR 47, ¶ 11.6; *See also* United States v. Assn. of Retail Travel Agents, (1995) 1 Trade Case (CCH) 70, 957.

⁸⁴ Hemant Sharma v. Union of India, 2011 SCC OnLine Del 4642 : 2012 Comp LR 1, ¶ 6.

⁸⁵ Hockey India, *supra* note 38, ¶ 1; Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 9.10.2.

⁸⁶ Hockey India, *id.*, ¶ 3; Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 9.10.2.

⁸⁷ Hockey India, *id.*, ¶ 1-2; Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 9.10.2.

private professional league.⁸⁸ BCCI had refused to approve the Indian Cricket League ('ICL'); it further refused to provide the league with cricket stadiums, which formed an integral infrastructural facility.⁸⁹ It was alleged that BCCI banned players associated with ICL from representing India.⁹⁰ BCCI went to the extent of introducing a clause in the media rights agreement which stated that it would not "organise, sanction, recognise or support during the rights period another professional domestic league that is competitive to the Indian Premier League."⁹¹ It was also alleged that if cricketers have to take part in any T20 foreign domestic cricket tournament other than IPL, they have to obtain an NOC from the BCCI.⁹²

The aforementioned examples depict only a small proportion of the overall restrictive practices that trade and professional associations engage in. Due to a general lack of awareness of anti-trust law in India, majority of the anti-competitive practices carried on by such associations still remain unreported.⁹³

IV. ANTI-COMPETITIVE NATURE OF THE PRACTICES

As examined in the previous part of the paper, associations impose numerous restrictive practices while performing their functions. Since all restrictive conditions are not anti-competitive in nature, this part aims to establish how certain activities fall within the categories of offences encompassed under the Act.

A. HORIZONTAL AGREEMENTS/CARTELISATION

Horizontal agreements, including cartels, are possibly one of the gravest anti-competitive practices under the Act.⁹⁴ These are agreements between competitors which directly or indirectly determines product prices, limits or controls production, supply or markets, shares the market by way of allocation, or directly or indirectly results in bid rigging or collusive bidding.⁹⁵

⁸⁸ The Board of Control for Cricket in India, *supra* note 40 .

⁸⁹ ANDRÉ LOUW, SPORTS LAW IN SOUTH AFRICA 401 (2010), ¶ 477.

⁹⁰ *Id.*; Press Trust of India, *BCCI sticks to its hardline stance on ICL*, THE ECONOMIC TIMES August 8, 2007.

⁹¹ *Surinder Singh Barmi v. Board of Control for Cricket in India*, 2013 SCC OnLine CCI 8 : 2013 Comp LR 297, ¶ 7.55.

⁹² ESPN Cricinfo, *Why Indians don't play in foreign T20 tournaments*, July 3, 2012, available at <http://www.espncricinfo.com/india/content/story/570934.html> (Last visited on July 13, 2016).

⁹³ CXOtoday News Desk, *Most Indian Firms Not Aware of Competition Law*, February 9, 2015, available at <http://www.cxotoday.com/story/80-pc-of-indian-firms-unaware-of-competition-law-ernst-young/> (Last visited on April 2, 2016).

⁹⁴ See VINOD DHALL, COMPETITION LAW TODAY: CONCEPT, ISSUES, AND THE LAW IN PRACTICE (2007).

⁹⁵ The Competition Act, 2002, §3(3).

Competition aims at working in favour of more efficient firms which increasingly produce goods at lower prices as opposed to less efficient firms.⁹⁶ However, horizontal agreements facilitate the growth of less efficient entities by wiping out the intra-brand competition.⁹⁷ Cartels, especially hard core cartels, are condemned as being highly trade distortive and working against the market forces.⁹⁸ These anti-trust offences not only include agreements entered into by enterprises or persons or associations thereof, but also the practices carried on or decisions taken by them.⁹⁹

Since trade and professional associations provide a forum to its members to meet and discuss various trade practices, the decisions taken by these associations can potentially affect competition in the market. This part attempts to illustrate this tendency of associations to form a cartel.

First, price fixing agreements directly or indirectly determining product purchase and sale prices are considered to be hard core cartels.¹⁰⁰ Such agreements are injurious to public interest as the price does not reflect the consumer side of the market as it is no longer determined by the free forces of demand and supply.¹⁰¹ Cases of price fixation by cartels are extremely common, and the same have also been recognised by the EC.¹⁰² These can be in the form of concerted price increases and fixation of target and minimum prices.¹⁰³ Other forms of such agreements are agreements on ‘recommended prices’, fixing of purchase prices, agreements to limit rebates and discounts, and agreements imposing fixed trade margins.¹⁰⁴

It has been examined that many trade associations have been involved in fixing prices. For instance, numerous medical trade associations have been involved in fixing trade margins payable to the members, which indirectly leads to the determination of prices.¹⁰⁵ The members of the BCDA had

⁹⁶ EIRIK OSTERUD, IDENTIFYING EXCLUSIONARY ABUSES BY DOMINANT UNDERTAKINGS UNDER EU COMPETITION LAW: THE SPECTRUM OF TESTS 93 (2010).

⁹⁷ D.P. MITTAL, COMPETITION LAW 95 (2003).

⁹⁸ VINOD DHALL, COMPETITION LAW TODAY: CONCEPT, ISSUES, AND THE LAW IN PRACTICE 4 (2007).

⁹⁹ The Competition Act, 2002, §3(3).

¹⁰⁰ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Report on Hard Core Cartels*, 11, available at <http://www.oecd.org/competition/cartels/2752129.pdf> (Last visited on October 30, 2015) (The preamble of Recommendation Concerning Effective Action Against Hard Core Cartels condemns hard core cartels – price fixing, bid rigging (collusive tenders), output restrictions, and market division (or sharing) – as the most egregious violations of competition law because they raise prices and restrict supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others).

¹⁰¹ *Id.*

¹⁰² Imperial Chemical Industries Ltd. v. Commission (I), 1972 ECR 619, ¶ 102; Cartonboard, OJ 1994 L243/1, ¶ 167.

¹⁰³ VAN BAEL & BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 353 (2010).

¹⁰⁴ *Id.*, 352-357.

¹⁰⁵ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 18.8.

collectively decided that drugs would not be sold at a discount.¹⁰⁶ Apart from affecting the intra-band competition, such fixation of MRP as sale price puts consumers at a disadvantageous position by denying discounts to them.¹⁰⁷ It is observed that this leads to appreciable adverse effects on competition under §19(3), as the retailers who depend on discounts and other services for their sales are affected, as a result of which they are driven out of the market. Moreover, there is no accrual of benefits to the consumers as possible discounts are eliminated as a market practice. Similarly, transport associations deciding on a uniform increase in freight rates also has the effect of determining prices, and such a decision is therefore restrictive of competition.¹⁰⁸ There can also be straightforward cases of price fixation, which lead to appreciable adverse effects on competition.¹⁰⁹

Second, agreements that limit or control production, supply or market, are the second type of horizontal agreements violating competition law.¹¹⁰ When production and supply are limited, an artificial scarcity is created in the market leading to a price rise.¹¹¹ Medical trade associations direct wholesaler members to not supply medicines to retailers who offer discounts.¹¹² Supply can also be limited when an association of distributors coerce manufacturers to discontinue supply through non-member distributors.¹¹³ This has the effect of driving out the market competitors who are non-members. There are instances where members of a medical trade association impose a requirement for obtaining an NOC for being appointed as a distributor.¹¹⁴ Such practices control and limit the supply of medicines in the market, thereby adversely affecting consumers. They also serve as a barrier to new entrants in the market and foreclose competition by driving out distributors who do not get the NOC.

Similarly, majority of the associations of film theatre owners and film distributors have formed cartels in their respective zones by entering into agreements for not supplying new releases to non-members.¹¹⁵ These agreements have the potential effect of limiting the supply of films, to the disadvantage of consumers who are located in areas where only non-member film

¹⁰⁶ Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 61.

¹⁰⁷ *Id.*, ¶ 64.

¹⁰⁸ Indian Foundation of Transport Research and Training, In re, 2015 SCC OnLine CCI 35 : 2015 Comp LR 377, ¶ 35.

¹⁰⁹ Indian Sugar Mills Assn., In re, 2014 SCC OnLine CCI 141 : 2014 Comp LR 225, ¶ 8.

¹¹⁰ Competition Act, 2002, §3(3)(b).

¹¹¹ MITTAL, *supra* note 97, 103.

¹¹² Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221, ¶ 63.

¹¹³ In re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd., Suo Motu Case No. 05/2013 ¶ ssss1.3.

¹¹⁴ Sandhya Drug Agency v. Assam Drug Dealers Association Co., 2014 Comp LR 0061, ¶ 18.8.

¹¹⁵ Kerala Cine Exhibitors Assn., In re, 2015 SCC OnLine CCI 99 : 2015 Comp LR 666, ¶ 2.3.

theatres exist. Film theatre owners who do not get access to new films due to decisions taken by film distributors belonging to a certain trade association might have to shut their operations, consequently foreclosing competition. Film associations can also limit and control the distribution and exhibition of films in the areas where such associations exist.¹¹⁶

Even a group boycott, if effected through a collective agreement by entities, is covered under this Section.¹¹⁷ A group/collective boycott can be defined as a concerted refusal by a group of competitors to deal or do business with customers or suppliers or with a competitor not part of the group.¹¹⁸ It is horizontal when there is an arrangement among competitors to not sell or buy from certain consumers.¹¹⁹ For instance, medical trade associations boycott or threaten to boycott entities to make them accept their demands¹²⁰ or travel agents association boycott against a particular airlines as a sign of non-acceptance of the latter's trade policies.¹²¹ As exemplified in the part III, associations also boycott members who engage in anti-associational conduct. Even group boycotts limit supply in the market by determining which market players will stay in the market thus indirectly controlling the products in the market. It drives existing competitors out of the market as boycott implies that competitors who do not accede to such demands of associations are forced to quit the market. Resultantly, it causes appreciable adverse effects on competition under §19(3) of the Act.

Third, by resolving to share the market or production source by way of allocation of geographical area of market or number of customers in the market,¹²² the members of trade associations establish quotas or agree to keep out of each other's territories.¹²³ Rules are followed by members of an association, which stipulate that a particular market be reserved for a set of manufacturers, and that nobody else can supply to the same territory.¹²⁴ There is an assignment of particular customers or markets to particular firms with respect to certain products. Competition is wiped out with respect to the customers and market of the other firm. Instances of this would be trade associations of distributors collectively deciding to share the market based on territorial division.¹²⁵ For example, a decision by an association of film distributors that each of the members will only supply films to theatres located in a particular region

¹¹⁶ Manju Tharad v. Eastern Indian Motion Picture Assn., 2012 SCC OnLine CCI 29 : 2012 Comp LR 1178, ¶ 5.15.

¹¹⁷ MITTAL, *supra* note 97, 103.

¹¹⁸ BAE & BELLIS, *supra* note 103, 378.

¹¹⁹ MITTAL, *supra* note 97, 104.

¹²⁰ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 18.8.

¹²¹ Uniglobe Mod Travels (P) Ltd., In re, 2011 SCC OnLine CCI 63 : 2011 Comp LR 400, ¶ 2.

¹²² Competition Act, 2002, §3(3)(b).

¹²³ MITTAL, *supra* note 97, 106.

¹²⁴ Quinine, OJ 1969 L192/5, ¶ 30; Peroxygen, OJ 1985 L35/1, ¶ 10; Cement, OJ 1994 L343/1, ¶ 45; Seamless Steel Tubes, OJ 2003 L140/1, ¶ 102.

¹²⁵ See generally BAE & BELLIS, *supra* note 103.

clearly constitutes as allocation of market. Similarly, an agreement entered into by the members of an association of medicine distributors to supply medicines to retailers based on territorial division of such retailers, is a horizontal agreement. Airlines coming together and allocating routes on the air transport market can also be seen as a horizontal market-sharing agreement, the object of which is restriction of competition.¹²⁶ On an examination of such agreements, it becomes clear that they result in appreciable adverse effects on competition. There are usually no pro-competitive effects of such horizontal agreements, such as accrual of benefits to consumers, improvements in production or distribution, or promotion of technical, scientific and economic development.¹²⁷ Moreover, barriers are created for new entrants as agreeing to such arrangements becomes a precondition for entering the market, and existing competitors who do not agree to such an arrangement are driven out of the market.

Fourth, agreements that directly or indirectly result in bid rigging or collusive bidding eliminate or reduce competition for bids or manipulates the process of bidding.¹²⁸ Bid rigging is considered by the European Commission as a form of price fixing, production limitation, or market sharing agreement, and is one of the most restrictive practices.¹²⁹ Firms forming cartels and quoting identical rates in order to reduce competition for bids and manipulate the process of bidding is common.¹³⁰ This works in favour of inefficient firms, who get tenders even though the price they would offer in the usual course of things would be higher than the prices offered by relatively efficient firms.¹³¹ There are instances where firms place identical price bids in not just one or two tenders, but several of them.¹³² This is reflective of a pre-concerted agreement between them. Members of a trade association coordinate their actions to get higher prices and appoint common agents on their behalf to submit identical bids.¹³³ It is observed that taking into account the factors mentioned under §19(3) of the Act, these result in appreciable adverse effects on competition. The conduct of the members of fixing bid prices serves as a barrier to new entrants in the market, as a new player would necessarily have to negotiate with the existing

¹²⁶ SAS Maersk Air and Sun-Air v. SAS and Maersk Air, OJ 2001 L265/15, ¶ 125.

¹²⁷ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 100.

¹²⁸ *Id.*, §3(3)(d).

¹²⁹ BAEL & BELLIS, *supra* note 103, 378.

¹³⁰ Alleged cartelisation in the matter of supply of spares to Diesel Loco Modernization Works, In re, 2014 SCC OnLine CCI 16 : 2014 Comp LR 170, ¶ 56; Director General (Supplies & Disposals), In re, 2013 SCC OnLine CCI 55 : 2013 Comp LR 714, ¶ 45; B.P. Khare, In re, 2013 SCC OnLine CCI 21 : (2013) 114 CLA 280, ¶ 41.

¹³¹ CUTS Centre for Competition, Investment & Economic Regulation, *The Basics of Bid Rigging*, available at <http://www.cuts-international.org/pdf/ccier-7-2008.pdf> (Last visited on April 28, 2016).

¹³² Excel Crop Care Ltd., In re, 2013 SCC OnLine Comp AT 149 : 2013 Comp LR 799, ¶ 35.

¹³³ *Suo motu* case against LPG cylinder manufacturers, In re, 2012 SCC OnLine CCI 12 : 2012 Comp LR 197, ¶ 14.69.

players.¹³⁴ The existing competitors who do not agree are driven out of the market, and there is foreclosure of competition. Due to collusion of bids, the cost of procurement goes up, thus, adversely affects the consumers with no accrual of benefits.¹³⁵ Additionally it does not lead to any improvement in production or distribution, or promotion of technical, scientific and economic development.¹³⁶

On examination of the nature of agreements, the decisions, and the practices adopted by various trade associations, it is apparent that more than often, they have the effect of distorting the market to the prejudice of the other market players and consumers in general.

B. EXCLUSIONARY PRACTICES/ VERTICAL AGREEMENTS

Another type of anti-competitive agreements recognised by the Act are vertical agreements between enterprises or persons at different stages with respect to production, supply, distribution or provision of services.¹³⁷ The person or enterprise imposing the vertical restriction should be in a position of dominance.¹³⁸ Further, the Act classifies these agreements into tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance.¹³⁹ The exclusionary nature of these agreements tends to impede competing market players from carrying businesses as it is based on considerations other than merits.¹⁴⁰

The study into the practices carried on by the trade and professional associations exhibits their tendency to impose vertical restrictions on entities. On a closer examination of the practices carried on by associations it can be inferred that entities include third parties and member of these associations. Consequently, it is our submission that a trade or professional association is capable of entering into two kinds of vertical agreements.

First, a trade or professional association, while carrying out its functions, can enter into an agreement with a vertically related enterprise or person i.e. either a distributor or a supplier in its own capacity as an association and not through its members. Such agreements might be entered into by the associations when they are directly involved in business or provision of services. These agreements may take the form of exclusive supply, exclusive distribution

¹³⁴ International Cylinder (P) Ltd., In re, 2013 SCC OnLine Comp AT 169 : 2014 Comp LR 184, ¶ 37.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ The Competition Act, 2002, §3(4).

¹³⁸ See generally Sonam Sharma v. Apple Inc., 2013 SCC OnLine CCI 25 : 2013 Comp LR 346.

¹³⁹ The Competition Act, 2002, §3(4).

¹⁴⁰ Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anti-Competitive Effect*, 70 ANTITRUST L.J. (372).

or a refusal to deal agreement depending upon the restrictions the association imposes. For instance, a medical association of distributors and stockists of drugs had an understanding that any manufacturing company had to obtain an NOC from the association before appointing any distributor in that region.¹⁴¹ Such an understanding qualifies as an agreement under the Act.¹⁴² By imposing this restriction of obtaining an NOC, the association intends to limit, restrict or withhold the output or supply of goods to the distributors which makes such an agreement an exclusive distribution agreement.¹⁴³ The association will have a tendency to enable the appointment of a member distributor by the company rather than a distributor who is not a member of the association.¹⁴⁴ By making it extremely difficult for non-member distributors to procure contracts from the manufacturing companies, the conduct of the association forecloses the competition for such class of distributors and might drive them out of market. It might also result in creation of entry barriers for the distributors who do not wish to be a part of the association. Additionally, this agreement does not accrue any benefits to the consumers, or lead to improvement in production or distribution of goods or promotion of technical, scientific or economic development.¹⁴⁵ It is thus concluded that such agreements entered into by the trade associations have appreciable adverse effects on competition under §19(3) of the Act.¹⁴⁶

Second, the associations being in a dominant position often impose restrictions on their members. We argue that this power to impose restrictions often enables the associations to enter into vertical agreements with their members. Regardless of the presence of a written agreement, any form of understanding or arrangement between the association and the members also amounts to an agreement.¹⁴⁷ Associations and its members qualify as persons under the Act.¹⁴⁸ Additionally, associations and its members are at different stages as the associations are involved in providing services to its members.¹⁴⁹ These services extend from providing a forum to the members for building consensus on policy, to promoting these policy interests with the public and private players.¹⁵⁰ Some of the associations even charge membership fee from the entities who wish to join them,¹⁵¹ while others collect Product Information Service

¹⁴¹ Ghanshyam Dass Vij, In re, 2015 SCC OnLine CCI 174 : 2015 CCI 155, ¶ 56.

¹⁴² The Competition Act, 2002, §2(b).

¹⁴³ See *id.*, §3(4)(c).

¹⁴⁴ See generally Ghanshyam Dass Vij, In re, 2015 SCC OnLine CCI 174 : 2015 CCI 155.

¹⁴⁵ See generally, The Competition Act, 2002, §§ 19(3)(d)-19(3)(f).

¹⁴⁶ See The Competition Act, 2002, §19(3). (The appreciable adverse effect is assessed by balancing the negative factors provided from Section 19(3) (a) to Section 19(3) (c) and positive factors provided from Sections 19(3) (d) to 19(3) (f)).

¹⁴⁷ *Id.*, §2(b).

¹⁴⁸ *Id.*, §2(1).

¹⁴⁹ *Id.*, §3(4)(c).

¹⁵⁰ Kerala Cine Exhibitors Assn., In re, 2015 SCC OnLine CCI 99 : 2015 Comp LR 666, ¶ 5.7.

¹⁵¹ Mehboob Productions (P) Ltd. v. Motion Pictures Assn., 1974 SCC OnLine Del 88 : (1974) 10 DLT 299, ¶ 3.

charges from member companies for launch of new products.¹⁵² It is observed that, in the recent past, there have been numerous instances, as discussed in the following paragraph, where the associations have entered into exclusive supply, exclusive distribution, refusal to deal or resale price maintenance agreements.

For example, ADDA directed the members to stop supplying goods to particular distributors.¹⁵³ Many film associations prohibit the members from dealing with non-members.¹⁵⁴ We argue that such conduct amounts to a refusal to deal under §3(4)(d) of the Act since it restricts certain persons or class of persons from procuring or selling the goods. Additionally, ADDA had entered into an exclusive distribution agreement with its members, since it restricts the output or supply of goods in the drug market. Similarly, the Code of Conduct of HI which players associated with it were required to sign,¹⁵⁵ amounts to an exclusive supply agreement as it prohibited the players from participating in any unsanctioned events. In this case, HI restricted the manner in which the players can participate in events other than the ones organised by it.

It is imperative to distinguish between a situation where associations impose conditions on its members and a situation where the members decide or agree upon a certain act. In the former case, the associations will be a party to the vertical anti-competitive agreements. In such circumstances, the associations would be acting independent of the decision of the members of the association. As mentioned above, these agreements would emanate solely from the dominant position of the associations over its members. On the other hand, the latter is a case of cartelisation. It might often happen that cartelisation may result from the vertical agreements imposed by the associations. For example, an association prohibits its members from supplying goods to a particular class of distributors. Later, if in a meeting of the members of the association, they agree upon the same, it would be considered as a case of cartelisation. Though one act might be a result of another, the two acts are very different and would constitute different offences under the Act.

C. ABUSE OF DOMINANCE

Another way in which the associations distort the market is by abusing their dominant position and tilting the dynamics of market in favour of their members. In light of the examination of activities in part III of the paper, it is observed that a number of associations are in a dominant position in the area they operate in. This area constitutes the relevant market for the

¹⁵² Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 18.8.

¹⁵³ *Id.*, ¶ 7.3.

¹⁵⁴ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 30; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 5.8.

¹⁵⁵ Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 9.10.2.

respective associations. While examining each type of association, this part seeks to analyse how these associations are in a dominant position in their relevant market, the manner in which these associations abuse their dominance and the effects of such abuse. For this purpose, we assume that these associations are enterprises within the meaning of §2(h).¹⁵⁶

A dominant position has been defined as a position of strength enjoyed by an enterprise in the relevant market which enables it to operate independently of the prevalent competitive forces, or affect its competitors or consumers to its advantage.¹⁵⁷ An enterprise or a group of enterprises is said to abuse its dominant position if it

“imposes unfair or discriminatory condition or price in purchase or sale of goods, limits or restricts the production of goods or services or market therefor, indulges in practices resulting in denial of market access makes conclusion of contracts subject to acceptance by other parties of supplementary obligations unrelated to the subject of such contracts, or uses its dominant position in one relevant market to protect another relevant market”.¹⁵⁸

However, for an enterprise to be held liable under this Act, it is not sufficient to prove that it enjoys a dominant position. An abuse of such a dominant position also needs to be necessarily proven.¹⁵⁹

As examined earlier in part III, medical associations of pharmaceutical companies control with whom their members shall deal and make it compulsory for distributors to obtain an NOC in order to carry on business.¹⁶⁰ The associations make it compulsory for entities to join them and non-compliance with the rules of the associations results in boycott of the members.¹⁶¹ Additionally, members are required to pay certain charges, and those not complying with the directions of the association are boycotted.¹⁶² These conditions are restrictive and can potentially force all the market players, including the unwilling ones, in the particular area to become members of the associations and follow all its directives. Due to the excessive control exercised by these associations over the market players in the area in which they exist, which is the relevant market, they are in a position of strength. This position of strength enables the associations to operate independently of the competitive forces and

¹⁵⁶ We are assuming that associations are enterprises only for this Part. In the Part VI, we will argue how these associations can be classified as enterprises.

¹⁵⁷ The Competition Act, 2002, §4 Explanation (a)(i) & §4 Explanation (a)(ii).

¹⁵⁸ *Id.*, §4(2).

¹⁵⁹ *Id.*, §4(1).

¹⁶⁰ Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061, ¶ 18.8.

¹⁶¹ *Id.*

¹⁶² *Id.*

manipulate the market to their advantage.¹⁶³ It is thus concluded that the medical associations imposing the abovementioned conditions are in a dominant position.

The requirement for obtaining a NOC is an unfair condition in the sale of goods.¹⁶⁴ Since members and non-members who do not abide by the rules imposed by the association are boycotted, access to the market is denied to them. Thus, we argue that these medical associations abuse their dominant position by imposing unfair or discriminatory conditions regarding the conditions in purchase and sale of goods, restricting the market of medicines and denying market access to players who do not want to be part of the association.¹⁶⁵ Such abuse leads to appreciable adverse effects on competition. The conditions imposed by the associations serve as barriers to entry as new entities which do not wish to comply with the conditions of the associations in these regions are not able to enter the market leading to foreclosure of competition. Also, as a result of boycott, members not accepting the demands of the association are driven out of the market.¹⁶⁶

Similarly, film associations enjoy a dominant position in their zone of existence¹⁶⁷ which they exploit in their favour. The film association of a particular zone regulates the release of films in that region. Just like medical associations, film associations make it mandatory for all producers to become their members and get their films registered in order to get them released in that zone.¹⁶⁸ Non-acceptance of associations' demands leads to boycott. On various occasions, film associations direct their members to not carry on business or deal with non-members.¹⁶⁹ All these practices grant film associations immense control over their respective zones and enables them to function independently of the competitive market forces, thus making them dominant in their relevant market.¹⁷⁰ Just as in the case of medical associations, these film associations abuse their dominant position by imposing unfair or discriminatory conditions in the purchase and sale of goods, restricting the market of medicines

¹⁶³ See The Competition Act, 2002, §4 Explanation (a).

¹⁶⁴ See *id.*, §4(2)(b)(i).

¹⁶⁵ See *id.*, §4(2)(a)(i) & §4(2)(c).

¹⁶⁶ See Sandhya Drug Agency, In re, 2013 SCC OnLine CCI 84 :2014 Comp LR 0061, ¶ 18.50.

¹⁶⁷ Manju Tharad v. Eastern Indian Motion Picture Assn., 2012 SCC OnLine CCI 29 : 2012 Comp LR 1178, ¶ 33.

¹⁶⁸ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 6.33; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 5.8.

¹⁶⁹ Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 6.24; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 5.8.

¹⁷⁰ See Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 Comp LR 269, ¶ 21; UTV Software Communications Ltd. v. Motion Pictures Assn., 2012 SCC OnLine CCI 34 : 2012 CCI 33, ¶ 15.

and denying market access to players who do not want to be part of the association.¹⁷¹ They distort these forces in order to benefit themselves and their members to the prejudice of other competitors. There are visible appreciable adverse effects on competition due to this abuse of dominance, such as creation of barriers to entry, as becoming a part of associations and accepting their demands becomes a precondition for entry. Additionally, the existing competitors not complying with the associations' bye-laws are forced to leave the market. Thus, the cumulative effect of the abovementioned results in the foreclosure of competition in the market.

In the past, transport associations have abused their dominant position by influencing the working of their members to a large extent. These associations do not allow non-member competitors to operate in the region in which they exist the region being the relevant market.¹⁷² They deal with the customers directly and the member freight transporting firms depend on the associations for their existence in the market.¹⁷³ The associations exercise control over the supply of freight transport services as they do not let the consumers deal with the member entities.¹⁷⁴ This control enables them to direct the supply side of the market, independent of the competitive market forces, giving them a dominant position. This dominant position is abused by them as they impose unfair prices for freight transport services. A uniform increase in freight rates can also be classified as the same.¹⁷⁵ Not allowing non-member competitors to operate in their region has the effect of limiting and restricting the market and denial of market access to such competitors. This abuse of dominance results in appreciable adverse effect on competition, as entry into the market becomes difficult due to the rules imposed by the associations, and existing non-member competitors have to shut operations leading to foreclosure of competition.

Likewise, sports associations and governing bodies also abuse their dominant position under competition law. Due to the pyramidal structure and the compulsory existence of only one regulatory body for each sport,¹⁷⁶ these sports regulatory bodies are in a dominant position and they are able to monopolise the relevant market, which is the organisation of sporting events.

The AICF by threatening to take action against players participating in events not authorised by it ensures that chess players do not participate in such events.¹⁷⁷ Similarly, HI does not allow hockey players to participate in

¹⁷¹ See The Competition Act, 2002, §4(2)(a)(i) & §4(2)(c).

¹⁷² Shivam Enterprises, In re, 2015 SCC OnLine CCI 27 : 2015 Comp LR 232, ¶ 55.

¹⁷³ *Id.*, ¶ 9.

¹⁷⁴ *Id.*, ¶ 9.

¹⁷⁵ Indian Foundation of Transport Research and Training, In re, 2015 SCC OnLine CCI 35 : 2015 Comp LR 377, ¶ 35.

¹⁷⁶ International Olympic Committee, Olympic Charter, available at http://www.olympic.org/Documents/olympic_charter_en.pdf (Last visited on December 15, 2015).

¹⁷⁷ Hemant Sharma v. Union of India, 2011 SCC OnLine Del 4642 : 2012 Comp LR 1, ¶ 6.

events not sanctioned by it.¹⁷⁸ As examined earlier in part III of the paper, for the organisation of any private professional cricket league, the prior approval of BCCI is required. As the regulator, it owns all the infrastructure necessary to carry on cricket activities. AICF, HI and BCCI are dominant in the market of conducting their respective sports events. Additionally, they also control the input i.e. services of sportspersons.¹⁷⁹ This facility is impossible to duplicate. The competitor seeking access to the facility deemed essential has been refused access to that facility by the dominant firm i.e. AICF, HI and BCCI.¹⁸⁰ This constitutes a huge barrier to entry of the new market players.

They operate independently of the competitive forces and affect the competitors in their favour. They abuse this dominant position as the market for the sports events is limited, and competitor associations organising such events are denied access to the market. Hence, this results in appreciable adverse effects on competition.

V. CURRENT REGULATORY FRAMEWORK AND ITS LIMITATIONS

In light of the above discussion, it is imperative to understand the extent to which the competition enforcement authorities have effectively regulated and penalised associations for such anti-competitive offences.

While placing reliance on the EU's decisions, the Competition Commission of India ('Commission') and Competition Appellant Tribunal have adopted an extremely strict approach in regulating horizontal agreements or cases of cartels. In *Manju Tharad v. Eastern Indian Motion Picture Assn.*¹⁸¹ it was held that trade associations are associations of enterprises.¹⁸² The Commission opined that the trade practices such as rules, regulations and bylaws of these associations are the manifestation of collective decisions of its constituent members and would be liable for examination under §3.¹⁸³ Similarly, in *Sandhya Drug Agency, In re*, ('Sandhya Drug Agency')¹⁸⁴ the Commission held that all actions of the trade associations including entering into various Memorandum of Understandings with other associations regarding NOC, fixation of trade margins and imposing Product Information Service charges would be considered as 'practices carried on' and 'decisions taken by' the association

¹⁷⁸ Dhanraj Pillay, In re, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 9.10.2.

¹⁷⁹ *Id.*

¹⁸⁰ See Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 ANTITRUST L.J. 443-462 (2002).

¹⁸¹ *Manju Tharad v. Eastern Indian Motion Picture Assn.*, 2012 SCC OnLine CCI 29 : 2012 Comp LR 1178, ¶ 5.15.

¹⁸² *Id.*, ¶ 5.5.

¹⁸³ *Id.*, ¶ 5.6.

¹⁸⁴ *Sandhya Drug Agency, In re*, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061.

in terms of §3 of the Act.¹⁸⁵ Additionally, the Commission held that fixation of trade margins, which is payable by the members of the association, indirectly determined the purchase or sale prices of drugs in the market and would amount to price fixing under §3(3)(a) of the Act.¹⁸⁶ The Commission further held that the imposition of NOC for being appointed as a stockist or wholesaler or a distributor of a pharmaceutical company and the boycott threat by the associations to coerce the members to follow its directives would constitute a violation of §3(3)(b) of the Act.¹⁸⁷ This stance of the Commission regarding price fixing and collective boycott has been crystallised by plethora of decisions in this regard.¹⁸⁸

It is observed that the Commission has failed to identify and penalise the trade associations for entering into vertical agreements with its members and the third parties. The Commission has held entities liable for vertical agreements only when they fall strictly within the definition of enterprises. For instance, in *Sonam Sharma v. Apple Inc.*¹⁸⁹ and *Ghanshyam Dass Vij, In re*¹⁹⁰ it was proven that the entities were engaged in economic activities mentioned under §2(h) of the Act making them enterprises, hence they were held to be involved in vertical agreements based on their practices.¹⁹¹ However, they were not held guilty under competition law as the vertical agreements did not result in appreciable adverse effects on competition.¹⁹² In *Santuka Associates (P) Ltd. v. All India Organisation of Chemists and Druggists Assn.*,¹⁹³ the Commission held that medical associations in question cannot be held liable for entering into vertical agreements.¹⁹⁴ The Commission reasoned that the associations are themselves not involved in any economic activity for them to be considered as enterprises under §2(h) of the Act.¹⁹⁵ It was further held that since these associations are not enterprises they cannot be said to be a part of a vertical chain

¹⁸⁵ *Id.*, ¶ 18.8.

¹⁸⁶ *Id.*, ¶ 18.40.

¹⁸⁷ *Id.*, ¶ 18.51.

¹⁸⁸ See generally Kannada Grahakara Koota, In re, 2015 SCC OnLine Comp AT 1094 : 2015 Comp LR 697; Kerala Film Exhibitors Federation v. Kerala Cine Exhibitors Assn., 2015 SCC OnLine Ker 22381 : 2015 Comp LR 179; FCM Travel Solutions (India) Ltd., In re, 2011 SCC OnLine CCI 77 : 2012 Comp LR 47; Kerala Cine Exhibitors Assn., In re, 2015 SCC OnLine CCI 99 : 2015 Comp LR 666; Cinemax India Ltd. v. Film Distributors Assn., 2015 Comp LR 81; Indian Sugar Mills Assn., In re, 2014 SCC OnLine CCI 141 : 2014 Comp LR 225; Bengal Chemist and Druggist Assn., In re, 2014 SCC OnLine CCI 38 : 2014 Comp LR 221; Cinergy Independent Film Services (P) Ltd., In re, 2013 SCC OnLine CCI 1 : 2013 Comp LR 284; FICCI-Multiplex Assn. of India v. United Producers/Distributors Forum, 2011 SCC OnLine CCI 33 : 2011 Comp LR 79.

¹⁸⁹ *Sonam Sharma v. Apple Inc.*, 2s013 SCC OnLine CCI 25 : 2013 Comp LR 346.

¹⁹⁰ *Ghanshyam Dass Vij, In re*, 2015 SCC OnLine CCI 174 : 2015 CCI 155.

¹⁹¹ *Sonam Sharma v. Apple Inc.*, 2013 SCC OnLine CCI 25 : 2013 Comp LR 346, ¶ 32; *Ghanshyam Dass Vij, In re*, 2015 SCC OnLine CCI 174 : 2015 CCI 155, ¶ 50.

¹⁹² *Id.*

¹⁹³ *Santuka Associates (P) Ltd. v. All India Organisation of Chemists and Druggists Assn.*, 2013 SCC OnLine CCI 16 : 2013 Comp LR 223.

¹⁹⁴ *Id.*, ¶ 28.12.

¹⁹⁵ *Id.*, ¶ 28.12.

under §3(4) of the Act.¹⁹⁶ Such decisions are erroneous as the Commission has failed to interpret §3(4) correctly. According to the §3(4), a vertical agreement stipulates any agreement amongst enterprises or 'persons' which are at different stages.¹⁹⁷ The Commission has overlooked the fact that according to §3(4) even persons can be held liable for imposing vertical restraints and person, includes an association of persons or a body of individuals.¹⁹⁸ Since associations qualify as persons under the Act, the rationale of the Commission exempting these associations from the purview of §3(4) on the ground that they are not enterprises is fallacious.

Further, it is argued that in the case of trade associations, the Commission has never acknowledged the vertical relationship between the association and its members. The Commission has overlooked the fact that a trade association is involved in the provision of services to its members which tantamount to a vertical relationship between the two. The Commission has also failed to consider trade associations as a legal entity separate from its members. Even though trade associations qualify as persons under the Act, the Commission has never identified them in a vertical chain, where they being in a dominant position can impose certain vertical restraints on its members. It has also failed to distinguish an instance where a trade association in its own capacity imposes certain anti-competitive restrictions on its members from an instance where the association as a collective through its members arrives at a particular decision. As elucidated in part IV of the paper, it is important to distinguish the two as they result in two different offences under the Act. However, the Commission has categorised both types of actions of these association as cases of cartelisation. For instance, in Sandhya Drug Agency case, the Assam Drug Dealers Association was involved in refusal to deal and exclusive distribution agreement, as argued in part IV of the paper. However, the offence of entering into vertical agreements was neither alleged by the Informant nor examined by the Commission. The Commission only limited itself to the analysis of cartelisation by the members.¹⁹⁹

The position of the Commission, however, is different in case of professional associations. In *Dhanraj Pillay, In re*,²⁰⁰ the Commission adopted a pragmatic approach and held that since HI is the buyer of the services of the hockey players for the organisation of any hockey event, they are at different stages of production.²⁰¹ The Commission further emphasised upon the strong market power enjoyed by HI which facilitates it to impose unreasonable

¹⁹⁶ *Id.*, ¶ 28.12.

¹⁹⁷ The Competition Act, 2002, §3(4).

¹⁹⁸ *Id.*, §2(1).

¹⁹⁹ *See generally id.*

²⁰⁰ *Dhanraj Pillay, In re*, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543.

²⁰¹ *Id.*, ¶ 10.13.2.

restraints.²⁰² However, HI was not held liable due to the application of inherence-proportionality principle.²⁰³

In cases where trade associations are alleged to abuse their dominant position, the CCI has been relatively uniform in its principle that associations are not enterprises within the meaning of §2(h) and thus cannot be held liable for abusing their dominant position under §4 of the Act. In *Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce*,²⁰⁴ the Commission in its majority order held that a film association comprised of producers, distributors or exhibitors of motion pictures and was not itself engaged in the business of production, distribution or exhibition of films.²⁰⁵ Further, the Commission argued that since the association was not an enterprise, it did not have any market share or economic strength and could not potentially influence the competitive forces in the market.²⁰⁶ According to the Commission, only if an association was directly involved in any economic activity as envisaged by §2(h) of the Act, could it be examined under §4 of the Act.²⁰⁷ Otherwise, a trade association is merely an association of enterprises but is not an enterprise itself.²⁰⁸ This principle has been uniformly accepted in a number of decisions.²⁰⁹ Since according to the Commission most of the trade associations are not enterprises, it has disregarded the presence of their dominant position in their respective market and abuse of the same.

The commercial aspect of the activities of the association was considered in *Shivam Enterprises, In re*²¹⁰ where the Commission decided to adopt a functional approach. This association consisted of members who were the providers of freight services.²¹¹ It was observed by the Commission that the association took contracts from consumers in its own name, and got them performed according to its own procedure.²¹² The customers were not allowed to deal directly with the members.²¹³ The payments were made by the customers directly to the association, which transferred them to the members after

²⁰² *Id.*, ¶ 10.13.2.

²⁰³ *Id.* (The discussion on this principle is beyond the scope of this paper).

²⁰⁴ *Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce*, 2012 Comp LR 269.

²⁰⁵ *Id.*, ¶ 6.5-6.9.

²⁰⁶ *Id.*, ¶ 6.5-6.9.

²⁰⁷ *Id.*, ¶ 6.5-6.9.

²⁰⁸ *Id.*, ¶ 6.5-6.9.

²⁰⁹ *Sandhya Drug Agency, In re*, 2013 SCC OnLine CCI 84 : 2014 Comp LR 0061; *Manju Tharad v. Eastern Indian Motion Picture Assn.*, 2012 SCC OnLine CCI 29 : 2012 Comp LR 1178, ¶ 5.5; *Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce*, 2012 Comp LR 269, ¶ 6.5; *Eros International Media Ltd. v. Central Circuit Cine Assn.*, 2012 SCC OnLine CCI 9 : 2012 Comp LR 20, ¶ 6.4-6.7.

²¹⁰ *Shivam Enterprises, In re*, 2015 SCC OnLine CCI 27 : 2015 Comp LR 232.

²¹¹ *Id.*, ¶ 3.

²¹² *Shivam Enterprises, In re*, 2015 SCC OnLine CCI 27 : 2015 Comp LR 232, ¶ 50.

²¹³ *Id.*, ¶ 50.

deducting its commission.²¹⁴ Based on these facts, it was held that the association was engaged in the economic activity relating to the provision of freight transport services, making it an enterprise within the meaning of §2(h) of the Act.²¹⁵ On assessment of the activities, it was concluded that the association was involved in imposing unfair sale prices and was therefore held to be liable for abusing its dominant position.²¹⁶

In case of professional associations, the Commission has adopted a wider definition of 'enterprises' and has examined such associations for their abusive conduct. In *Hemant Sharma v. Union of India*²¹⁷ the Commission opined that AICF, the internationally recognised association of chess players on the national level, was involved in the business of providing services to its member chess players for a registration fee.²¹⁸ Based on this rationale, the Commission held that the abovementioned association was involved in an economic activity and was thus an enterprise within the meaning of §2(h) of the Act.²¹⁹ In *Dhanraj Pillay, In re*, the Commission held that grant of franchisee, media, sponsorship and television rights by HI and Federation of International Hockey generates revenue.²²⁰ Thus, the associations fall within enterprises for carrying out such commercial activities.²²¹ Similarly, while focusing on the functional aspect of the BCCI, the Commission in *Surinder Singh Barmi v. Board of Control for Cricket in India*,²²² held that BCCI was an enterprise under §2(h) and imposed a fine of Rs. 52.24 crores on the regulatory body for abusing its dominant position under §4(2)(c) of the Act.²²³

Thus, it can be concluded that though the trade and professional associations have been involved in carrying out the three types of anti-competitive activities, as analysed in part IV of the paper, only cartels are properly regulated. Despite the fact that trade associations have been frequently involved in imposing vertical restraints and abusing their dominant position in their markets, leading to adverse effects on competition, they have not been held liable under §3(4) and §4 respectively. In contrast, professional sports associations have not only been identified as enterprises but have also been imposed with heavy penalties for abusing their dominant position. Essentially, the current approach adopted by the Commission has proved to be deficient in regulating

²¹⁴ *Id.*, ¶ 50.

²¹⁵ *Id.*, ¶ 51.

²¹⁶ *Id.*, ¶ 60.

²¹⁷ *Hemant Sharma v. Union of India*, 2011 SCC OnLine Del 4642 : 2012 Comp LR 1.

²¹⁸ *Id.*, ¶ 26.

²¹⁹ *Id.*, ¶ 26.

²²⁰ *Dhanraj Pillay, In re*, 2013 SCC OnLine CCI 36 : 2013 Comp LR 543, ¶ 6.1.1.

²²¹ *Id.*, ¶ 9.7.4.

²²² *Surinder Singh Barmi v. Board of Control for Cricket in India*, 2013 SCC OnLine CCI 8 : 2013 Comp LR 297, ¶ 104.

²²³ *See id.*

vertical anti-competitive agreements and abuse of dominance in so far as trade associations are concerned.

VI. ASSOCIATIONS AS ENTERPRISES

It is apparent from the above discussion that a key concern regarding the anti-competitive practices carried on by the trade associations remains unaddressed. Apart from the fact that the Commission has failed to comprehensively interpret and effectively apply the definitions under the Act on these associations, the root of the problem lies in the fact that the Commission has failed to consider associations as enterprises. In the majority of cases, the Commission adopts a strict approach in interpreting economic activities and enterprises under the Act. The approach of the Commission lacks uniformity when it comes to judging the economic activities of associations. This approach adopted by the Commission has resulted in many trade associations, which are involved in abusing their dominant position and indulging in vertical agreements, being exempted from any penalty under the Act.

The purpose of competition law is to regulate commerce by ensuring freedom of trade and preventing practices which have adverse effects on competition.²²⁴ Thus, even if an entity lacks profit motive and does not have any economic purpose, but affects the freedom of the market players to trade so as to distort competition, it should be considered as being against the foundations of competition law. Hence, the definition of ‘economic activity’ under competition law should not depend upon the type of entity or organisation. Rather, it should depend upon the type of activities conducted and nature of restriction imposed upon its subsidiary members by these entities.

On a comparative analysis, it is observed that the position of law regarding what constitutes an ‘economic activity’ is much sounder in EU and the USA. In numerous cases before the EU, competition authorities have held that only because an organisation lacks any profit motive²²⁵ or does not have an economic purpose, does not imply that it is not involved in an economic activity.²²⁶ The USA Supreme Court in its landmark judgment in *California Dental Assn. v. FTC*²²⁷ held that a professional association comprising dentists was carrying out economic activities.²²⁸ The apex court observed that the activities of the association like providing preferential financing arrangements for its

²²⁴ The Competition Act, 2002, Preamble.

²²⁵ *Van Landewyck v. Commission*, 1980 ECR 3125, ¶ 88; *P and I Clubs*, OJ 1999 L125/12; *Federation Francaise des Societes d'Assurance*, (1996) 4 CMLR 536, ¶ 21; *Albany International BV v. SBT*, (2000) 4 CMLR 446, ¶ 85.

²²⁶ *Italy v. Sacchi*, (1974) 2 CMLR 177, ¶ 13-14.

²²⁷ *California Dental Assn. v. Federal Trade Commission*, 1999 SCC OnLine US SC 51 : 143 L Ed 2d 935 : 526 US 756 (1999).

²²⁸ *Id.*

members resulted in accruing pecuniary benefits to its members.²²⁹ Further, it was held that the non-profit organisations which are formed on behalf of the for-profit member entities have the same capacity and incentives to engage in anti-competitive acts as its profit seeking members.²³⁰ Thus, while placing reliance on precedents²³¹, it was held that since a substantial part of the total activities of the association aims at providing pecuniary benefits to its members, it will fall within the jurisdiction of competition regulation authorities.²³²

These associations represent and compete with a number of for-profit entities.²³³ Thus, we argue that an association will be considered to be an enterprise in two scenarios. *First*, if the association imposes certain conditions on the members, which unfairly helps them financially at the expense of the non-members, and alters the natural market conditions, it will be considered to be an enterprise. We base this proposition on the argument that the interpretation of profit motive or economic purpose of the associations should differ from that of normal entities. It is not necessary that these associations will have to profit only directly. These associations can also derive their sense of profit from the pecuniary benefits accrued by their members. Hence, in such a situation, the association will be considered to be carrying out an economic activity as the entire industry is affected economically by the association's actions, which aims at benefiting its members financially.

Second, even if the members are not incurring any benefits, but the actions of the association have the effect of limiting any kind of supply or distribution or provision of services, the association will be said to be involved in an economic activity. This argument is based on the definition of enterprises incorporated in §2(h) of the Act. According to the particular provision, an enterprise means a person which has been engaged in any activity 'relating' to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind.²³⁴ We argue that the term 'relating' should be interpreted in a wide manner. A wide interpretation is necessary since any indirect method of limiting the supply or distribution in a market also results in these associations altering the market dynamics and having economic repercussions on the whole industry in question. Thus, if the association makes certain rules for how the goods in the market should be supplied or distributed or to whom the members can provide their services to, such rules made by the association would fall within the meaning of activity 'relating' to supply, distri-

²²⁹ *Id.*, 767.

²³⁰ *Id.*, 768.

²³¹ American Medical Association, 94 FTC 701, at 983-984; *See also* New England Motor Rate Bureau Inc., 112 FTC 200 (1989), at 270.

²³² *See generally* California Dental Assn. v. Federal Trade Commission, 1999 SCC OnLine US SC 51 : 143 L Ed 2d 935 : 526 US 756 (1999).

²³³ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 167 (2009).

²³⁴ The Competition Act, 2002, §2(h).

bution etc. Hence, if a film association limits the number of screens for release of any film in a particular area, it does not matter whether this condition incurs any benefit to the members or whether the association is directly involved in supplying or distributing films. The ability of the particular association to affect the manner of distribution of films in the market is sufficient to determine that it is actually involved in an economic activity.

Hence, we argue that an enterprise should be considered as any entity which not only carries on an activity to profit directly or through its members but also carries out economic activities having the power to alter the supply, distribution, acquisition and control of goods and provision of services. By interpreting enterprises as entities which are only involved in the supply, distribution directly, or aim at gaining financially by their activities, the competition authorities are defeating the purpose of competition law.

Currently, since the competition regulatory authorities have adopted an extremely narrow definition of enterprises, majority of the associations are not considered as enterprises according to the current standards. This leads to associations not being subject to §4 of the Act. If the authorities adopt the two abovementioned approaches, it will lead to the associations being considered as enterprises and will make them subject to §4 of the Act. Thus, the associations would no longer be able to abuse their dominance without incurring liabilities. Additionally, it will keep in check any form of restriction in market access by creating entry barriers, foreclosure of competition or driving out of competitors from the market. Apart from benefiting the market players, such control over the anti-competitive activities of the associations will help in incurring benefits to the consumers as well. Such benefits include presence of more choices in terms of goods or services and lower prices for the same. Thus, such regulation through adoption of a wide definition would help in fostering competition in the market and accruing benefits to the consumers.

VII. CONCLUSION

It cannot be denied that trade and professional associations, usually recognised under the law, have various advantages for their individual members and the industry at large. This does not take away from the fact that they may indulge in severely anti-competitive and trade-restrictive practices due to the immense power they enjoy. In this paper, we assert that the various anti-competitive practices carried on by such associations can be classified as anti-trust offences under the Act, such as horizontal agreements, vertical agreements and abuse of dominance.

The competition authorities have penalised associations in the past, and continue to do so, for horizontal agreements. The approach of these authorities has been uniform in this regard, and is the correct approach.

However, trade associations have largely remained unpunished for vertical agreements, on the ground that they are not enterprises, engaged in economic activities. This is an incorrect approach, primarily because associations can be classified as 'persons', and 'persons' can be held liable for vertical agreements under the Act.

Similarly, trade associations have got off scot-free against allegations of abuse of dominance. The absence of direct involvement in economic activities has prevented the Commission from holding associations liable for abuse of dominance. We argue that the commercial aspect of the activities of trade associations should be taken into account, and the functional approach should be adopted, as in the case of professional associations. This would lead to the anti-competitive activities of trade associations being penalised under the Act.

In the interest of furtherance of competition in the market, a wider interpretation of 'enterprises' is required. This is supported by the jurisprudence in the EU and the USA, where the lack of profit motive is not conclusive proof of absence of involvement in economic activities. The provision of services and financial benefits to members strengthens the status of associations as 'enterprises'. Additionally, such associations are involved in activities related to supply and distribution of goods, making them 'enterprises' as envisaged by the Act. The competition authorities have turned a blind eye to such a classification.

Therefore, to further the object of competition law, we propose that trade associations need to be seen by competition authorities as falling within the definition of 'enterprises' under the Act. Such an approach would prevent appreciable adverse effects on competition and promote free and fair competition in the market. More opportunities would be created on the supply side of the market, along with the accrual of benefits for consumers.

