



Competition Compliance Policy
Of
Fertiliser Association Of India

INDEX

S. No	Chapter	Pg. No
1.	Introduction	3
2.	Need for Competition Compliance Policy	3
3.	Objectives of Competition Act, 2002	5
4.	Objectives of Competition Compliance Policy	5
5.	Applicability and Scope of the Policy	6
6.	The Policy Statement	6
7.	Competition Law in India and Trade Associations	7
8.	Competition Law And Its Impact	8
9.	FAI and Member Compliance Issues	14
10.	Best Practices for FAI and its Members	22
11.	Enforcement	28
12.	Dawn Raids	30
13.	Penalties	32
14.	Appendix –A: Provisions of the Act	33

This publication is being brought out only for guidance and reference. Although every effort has been made to accurately produce statutory and other provisions, however, the possibility of mistakes inadvertently creeping in or omissions taking place cannot be completely ruled out. FAI does not own any responsibility for any loss or damage to any member or person on account of any action taken on the basis of this publication.

Introduction

Fertiliser Association of India (“FAI”) is a non-profit and non-trading company limited by guarantee, incorporated under Section 26 of the Companies Act, 1913 representing mainly fertiliser manufacturers, distributors, importers, equipment manufacturers, research institutes and suppliers of inputs.

FAI was established in 1955 with the objective of bringing together all concerned with the production, marketing and use of fertilisers with a view to:

- Ensure food security through balanced and efficient use of plant nutrients in the agricultural sector;
- Find solutions to the problems being faced by the Fertiliser industry and the agriculture sector;
- Promote balanced and efficient use of fertilisers so as to maximize yields to benefit farming community and maintain ecological balance;
- Encourage the use of more and better plant foods for greater yields and sustainable development;
- Promote consideration and discussion on issues which have bearing on agricultural practices; and
- Assist the industry in improving its operative efficiency.

FAI endeavors to meet the challenges being faced by the fertiliser Industry through various functional divisions/depts., namely; technical, environment & safety, marketing, statistics, information and communication, economics, agricultural sciences, documentation, accounts and administration, arbitration and public relations.

FAI with its four Regional Offices located in Mumbai, Chennai, Kolkata and Delhi focuses primarily on the aforesaid paradigms, local issues and have continuous interface with the fertiliser manufacturers operating in said respective regions, central government and its various departments and regulators, the state governments and other local authorities.

Need for Competition Compliance Policy:

FAI being a non-profit making organization, its activities are dedicated towards betterment of Fertiliser Industry and farming community.

Fertiliser output and prices have direct impact on the agriculture sector and farming community and has indirect but significant impact on every individual of the country. It is evident that since fertilisers impact farmers who constitute majority of population of the country and at the same time significantly contribute towards maintaining food security, therefore, Fertiliser Industry is subject to greater control and regulation by the government and since fertilisers are critical to agricultural output, the said Industry also comes within the ambit of Essential Commodities Act, 1955 (“ECA”). It is apparent that Fertiliser Industry which directly impact agriculture is still subject to major control and regulation by the government and the said Industry is not completely subject to free play of market

forces. Although, the government has taken initiative to de-regulate part of Fertiliser Sector by introducing Nutrient Based Subsidy Scheme for phosphatic and potassic fertilisers, however, it is clearly evident that government regulation is all pervasive.

FAI, *inter alia*, plays a significant role in bridging the gap between the Government and the stakeholders of the Fertiliser Industry by discussing and taking up issues of subsidies, overall cost of import of raw material and semi finished materials, production issues, efficiency mechanisms and such other issues at industry or macro level to facilitate availability of fertilisers. FAI thereby endeavors to create an amicable environment to meet the legitimate demands of Fertiliser Industry and farming community.

The Fertiliser Industry being heavily subsidized and subject to the provisions of ECA, therefore, FAI is sometimes required in public interest to facilitate the government decision making on matters which have bearing on Fertiliser Industry which *inter alia* includes determination of subsidies and ensuring compliance with the provisions of ECA,.FAI also assists and coordinates with government bodies and government departments to collect, collate and provide information at macro level on matters such as cost of raw material, quantity of production of fertiliser and prices thereof, and such other information which is required to effectively deliberate and discuss various Fertiliser Industry level issues having impact on the sustainability of the Fertiliser Industry as a whole.

Further, production through public sector companies, who are also FAI Members, are entities in which government holds substantial stake and are, therefore, also subject to greater vigil.

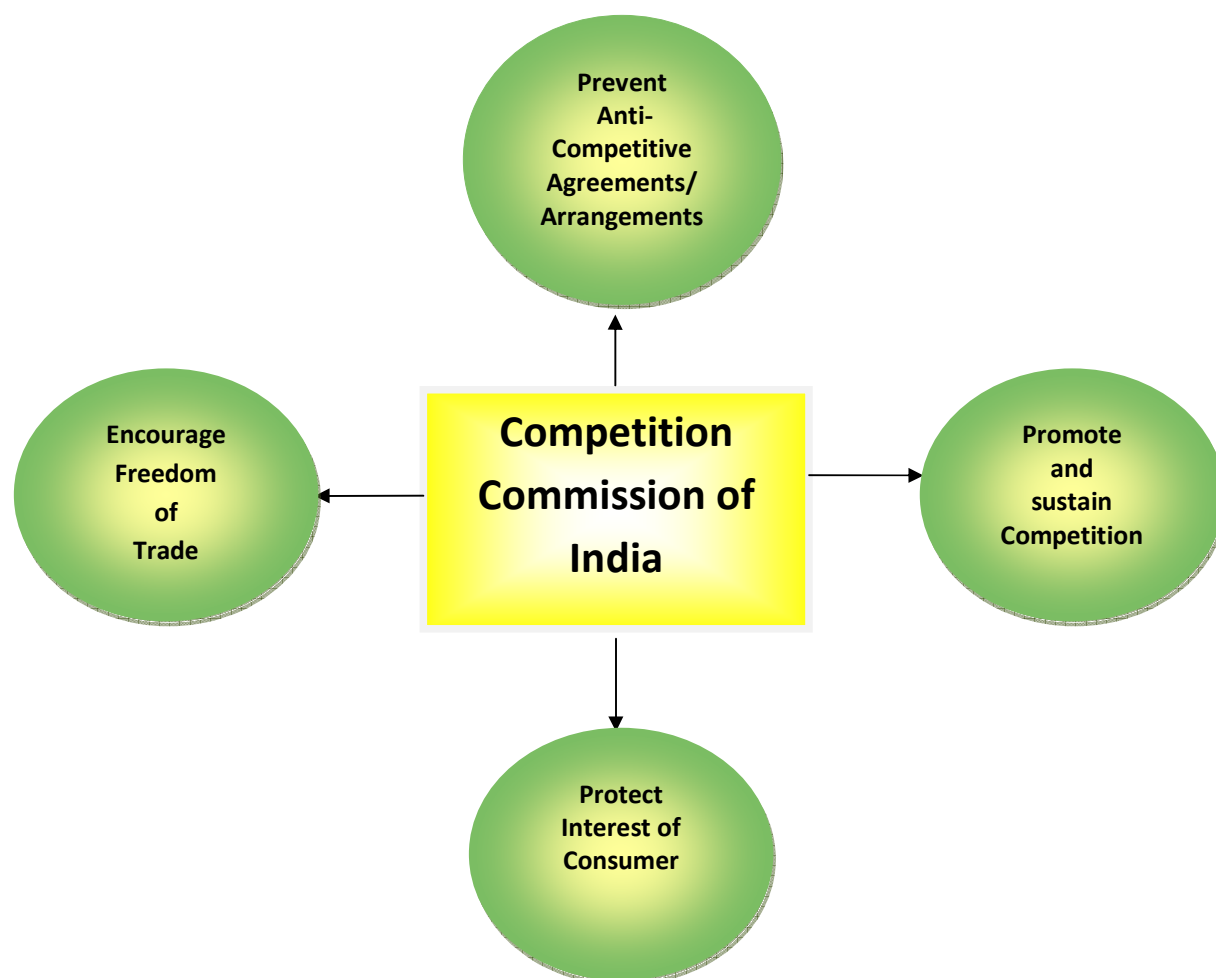
FAI believes that although the Fertiliser Industry is fettered with government regulations, however, with de- regulation of “Nutrient Based Fertilisers”, the need to maintain transparency, accountability, public interest and compliance with laws is not only imperative but need of the hour.

With the coming into existence of the Competition Act, 2002 (“Act”) and its Rules and Regulations, FAI endeavors to adopt best practices which are in conformity with the Act so as to ensure transparency and accountability in its functioning and management not only for its Members, but also for the government along with various other sections of the society. Ensuring that FAI becomes competition law compliant is a step towards ensuring transparency in its management and operations. The philosophy behind taking such steps is to educate and sensitize its employees, Members and other stake-holders about the need to be compliant with the Act, to promote free and fair competition and to enable consumers to harness benefits from the fair play of the demand and supply side forces which have bearing on the Fertiliser Sector.

The contents of this Policy, the compliances referred hereto and best practices mentioned herein are not exhaustive and may be to a certain extent construed as subjective in nature and therefore, judicious approach is required while interpreting and applying them in conduct and practices by FAI employees and its Members.

Create awareness of acceptable and unacceptable behavior of the Employees, members and all other stake holders of FAI under the Act

Objectives of Competition Act, 2002



Objectives of Competition Compliance Policy

The Competition Compliance Policy has the following objectives:

- Propagate knowledge of what constitutes unacceptable behavior under the Act.
- Facilitate early detection of contraventions and take corrective steps such that FAI and its members remain compliant with the provisions of the Act and minimize any liabilities arising from contraventions, whether advertent or inadvertent.
- Create a compliant and transparent culture in accordance with the provisions of the Act.
- Stimulate good corporate governance and adoption of best practices.

Applicability and Scope of the Policy

All FAI directors, officers and employees and FAI Members and their representatives, must act in accordance with this Compliance Policy. All individuals, entities, enterprises, formal and informal associations are required to become familiar with the Policy and adhere strictly to its letter and spirit.

This Policy is not intended to be a comprehensive description of the Act. It focuses on anti competitive situations, arrangements and agreements, collaboration by and among competitors which is per se detrimental to free play of competitive forces which may have bearing on FAI in view of it being, *inter alia*, an industry association. Each Member bears its own responsibility for ensuring its full compliance with the Act.

The Policy is relevant for:

- FAI membership activities;
- Formal and informal, meetings, communications, by and under FAI;
- FAI membership documents;
- Internal and external communications by FAI.

The perusal and understanding of this Policy is must for all the stakeholders and in case of any interpretation or applicability issue, the stake holders must seek appropriate legal advice.

It is advisable that each of the FAI Member sensitizes its own management, decision making board and such departments which share Commercially Sensitive Information (“*defined hereinafter*”) and its implication thereof such that the Members are compliant with the Act and adopt best practices to ensure and promote free competition.

The Policy Statement Entails:

- Conduct which is forbidden under the Act;
- Permitted and acceptable conduct;
- Best practices- recommendatory in nature.

Competition Law in India and Trade Associations¹

Trade Associations (also known as industrial associations or business associations or chambers of commerce or federations) are unique forums, in which competitors from the same industry or sector meet to discuss issues of common interest, find common solutions and further interests of the industry. Their activities have, however, been subject to close scrutiny by competition jurisdictions across the world. In India also, the Act treats the activities of trade associations much like any other form of co-operation between competitors. The trade association operations and conduct is also subject to provisions of the Act.

Trade Associations fall within the definition of ‘person’ under Section 2 of the Act. Sub-section (D)(V) of Section 2 of the Act provides that the word ‘person’ includes “an association of persons or a body of individuals, whether incorporated or not, in India or outside India”. Furthermore, trade association is explicitly mentions in Section 19(1)(a) of the Act. A trade association may also be considered as an “association of enterprises’ under Section 3(3) of the Act. Section 4 of the Act does not state anything about trade association nor does the term person finds mention therein.

It is plausible to assume that under the Act the legislature has granted powers to the Competition Commission of India to undertake investigation in to the operations of trade associations which provide platform to competitors of the same industry or trade as a whole and also to check, prevent and penalize actions and conduct of the trade association and their members in the event it is found that they are indulging in anti-competitive conduct under the banner of trade associations.

Every decision, direction or recommendation, whether in agreement form or informal; any practice or any conduct indicating meeting of mind amongst the members engaged in identical or similar trade of goods or provision of services is considered anti-competitive under Section 3(3) of the Act. A conduct of the nature covered by Section 3(3) is considered pernicious conduct and is presumed to have appreciable adverse effect on competition unless proved otherwise.

It may be pertinent to note that the conduct of trade associations which may be in contravention of the provisions of the Act includes cartelization and the Act provides for stringent penalty for cartel behavior as per Section 27 of the Act.

The Act rewards producers/sellers/distributors etc. who are part of a cartel if they give full and true information which is vital to the Competition Commission of India while the matter is under investigation. Under Section 46 of the Act the Competition Commission of India will consider such producers/sellers/distributors etc. for imposition of a lesser penalty. A producer/seller/distributor can also seek confidentiality to protect his/her identity.

¹ The provisions of Competition Act, 2002 are annexed herewith as Appendix- A

Competition Law And Its Impact

The present Chapter discusses various aspects of anti competitive behavior which comes under the scanner of provisions of the Act. The Act looks into anti competitive agreements, dominance and its abuse and combinations which may have appreciable adverse effect on competition in India and are subject to regulation under the Act.

A. General observation on Anti Competitive Agreements

It may be noted that Section 3 of the Act discusses anti competitive agreements which causes or are likely to cause appreciable adverse effect on the competition within India.

- I. Section 3(3) of the Act provides that all agreements/ arrangements/ conducts are not prohibited or void per se under the Act, except the following agreements which shall be presumed to have appreciable adverse effect on competition:
 - a) Directly or indirectly determines purchase or sale prices;
 - b) Limits or controls, production, supply, markets, technical development, investment or provision of services;
 - c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services or number of customers in the market or any other similar way; allocation of geographical area of market, product allocations;
 - d) Directly or indirectly results in bid rigging or collusive bidding.

The aforesaid agreements are presumed to have an appreciable adverse effect on competition (i.e. are per se anti competitive) unless proved otherwise.

- II. Other agreements such as (a) tie in arrangements, (b) exclusive supply agreement, (c) exclusive distribution agreement, (d) refusal to deal, and (e) resale price maintenance agreements **could be** construed as anti competitive **if** such agreement causes or is likely to cause “appreciable adverse effect on competition in India (Section 3(4).

Hence, it can be said that not all the agreements are prohibited under the Act, unless they

- a. Fall in the category I mentioned above; or
 - b. Pass the test of **appreciable adverse effect on competition** within India.
- III. It is also relevant to mention that joint venture agreements which increase the efficiency in production, supply, distribution, storage, acquisition, or control of goods or provision of services etc will not be deemed to have appreciable adverse effect on the competition.

The following actions by any entity, enterprise or associations, whether undertaken individually or collectively, could be qualified as anti competitive and may lead to investigation by CCI under the Act.

- Price Fixing/ Price Maintenance
- Customer Allocation

- Geographic/ Product Market Allocation
- Group Boycott
- Standard Setting
- Information exchanges,
- Agreement to limit/ control production, supply/ technical development
- Joint purchasing/ tendering
- Joint commercialization
- Bid Rigging/ collusive bidding
- Cartels
- Abuse of Dominance

1. Price Fixing and Price Maintenance

Agreements among competitors, directly or indirectly, on the price and any aspect thereto which may lead to distortions in market or any understanding as to the price at which the competitors of same industry will sell their products or services is called “price-fixing”. Any agreement between or among competitors with the purpose of increasing or affecting the price of a product or service may violate the provisions of the Act.

Price fixing could be direct or indirect, a formal agreement or understanding among competitors on issues including price ranges, pricing formulas, commission rates, the size of price spreads, discounting policies, kickbacks, rebates, credit terms, common list or dealer price, etc.

Agreement on factors of cost of production such as costs of labor, salary, equipment, overhead, etc and other matters impacting price may also be considered as price fixing.

Some examples are illustrated herein below:

- Agreement on current or future prices and determination of ‘fair profit level’
- Agreement on a standard formula, according to which prices will be computed;
- Agreement to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreement to eliminate discounts or to establish uniform discounts;
- Agreement on credit terms that will be extended to customers;
- Agreement to remove products offered at low prices from the market so as to limit supply and keep prices high;
- Agreement not to reduce prices without notifying other cartel members;
- Agreement not to sell unless agreed price terms are met;
- Agreement to use a uniform price as starting point for negotiations; and
- Standardization of credit and trade terms.

2. Customer Allocations

Any agreement to divide or allocate customers among competing entities is illegal, whether based upon specific customers or classes of customers.

For example, an agreement pursuant to which the competitors divide and allocate customers among themselves in such a way that they arrive at a tacit understanding not to pursue group of customers allocated to a particular competitor. “X” competitor agrees that it shall not deal with customers allocated to “Y” competitor and vice versa.

3. Geographic / Product Market Allocations

Agreement or arrangement among competitors in relation to allocation of market on the basis of specific area or product, where in normal circumstances they are expected to compete with one another, is construed as unlawful under the Act.

For example, agreements among enterprises in different regions of the country not to enter each other’s geographic territories, agreements with competitors allocating certain products among themselves may be construed to be illegal.

4. Group Boycotts

A group boycott exists when a group of competitors agrees to take some form of joint action to exclude or drive out a competitor, supplier from the market, this may include refusal to deal with competitors, suppliers, etc. This is generally a concerted action, aimed at isolating either a competitor or class of competitors or suppliers.

Members of an association should not use trade association as a tool to suppress competition by refusing to deal with non-members, or refusing to deal with those who deal with non-members.

5. Standard Setting

Standard setting refers to the process of identifying and agreeing upon a specific well laid out set of criteria to which a particular type of product would conform.

Such standard setting may create anti competitive environment and it may in effect prevent certain entities or competitors from competing in the sale of that product, or features are added to a product for no reason other than to increase the price of the product.

6. Information Exchanges

Information which is competitively or commercially sensitive, can raise competition questions. Some examples of “Commercially Sensitive Information” are mentioned herein below:

- prices, price changes, future prices, price lists or offers;
- terms of sale, credit terms, terms of purchase, discounts, allowances or rebates;
- profit margins, costs or other information related to costing or pricing;
- allocation or restriction of territory, clients, products or markets;

- channels or methods of distribution;
- quantity or quality of production and their projections;
- content of bids, and intent to bid or not to bid;
- selection or exclusion of customers;
- entering or exiting geographical or product markets;
- commercial decisions or activities in the marketplace.

While some types of information exchange, such as stock quotes and spreads which are published information, may raise no concerns and could be construed as pro competitive, whereas other types of information sharing could raise questions as to whether the exchange of information indicates an anti-competitive agreement.

7. Agreement to control production/ Supply

Agreements among competitors to increase or restrict services or production levels are always frowned upon and are seen with lot of suspicion. The same is true of agreements among competitors to limit the quality of production, restrict the products or services sold to a particular customer, refrain from introducing new products and services or eliminating old ones, or accelerate the introduction or withdrawal of a product or service.

Agreement amongst competitors to stop production, or to limit or control production supply/technical development to a certain level, rather than allowing normal competitive forces to determine their independent production decisions is generally seen as anti- competitive practice under the Act.

8. Joint purchasing

Joint purchasing agreements are in nature of agreements whereby competitors may restrict or limit the other party's freedom to supply and/or prevent other suppliers from supplying goods or other raw materials to the competitors and thereby distort the market and create artificial entry barriers.

9. Joint commercialisation/ tendering

Agreements between competitors to jointly sell, distribute or promote their products may raise competition law concerns where such agreements limit the individual participants in their freedom to determine their own commercial policy and to advertise individually.

10. Bid – Rigging or Collusive Bidding

"Bid rigging" is explained in Section 3(3) of the Act. It is an area closely related to price fixing and is frowned upon under the Act. The objective of bid – rigging is to eliminate or reduce competition, or to assure that, over time, each competing bidder receives a "fair share" of the total business awarded. This is also construed as fixing the market.

Bid –rigging takes many forms, but bid–rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression – One or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor’s bid is accepted.

Complementary Bidding – Also known as “cover” or “courtesy” bidding. It occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the purchaser. The intent is to give the appearance of genuine competitive bidding in order to conceal secretly inflated prices.

Bid Rotation - In bid rotation schemes, competitors submit bids but take turns in being the lowest bidder.

Subcontracting - Subcontracting arrangements are often part of a bid rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder.

Almost all forms of bid-rigging schemes have one thing in common, namely, an agreement or meeting of mind among some or all of the bidders (competitors) which predetermines the successful bidders and thereby limits or eliminates competition among the vendors.

11. Cartels

Cartel is a conduct where more than one person/enterprise agree to do something or to abstain from doing something falling within sub-clauses (a) to (d) of Section 3(3) of the Act having appreciable adverse effect on competition.

The most serious example of an anti-competitive agreement is a cartel, where companies agree not to compete with each other e.g., price-fixing, bid rigging, or allocation or division of markets or territories. Cartel arrangements are usually secret and not in writing. Typically, cartel arrangements may cover one or more of the following

- prices;
- discounts;
- credit terms;
- customers to be serviced ;
- geographical division of market; and/or
- bidding arrangements.

B. Abuse of Dominance

Dominant position means a position of strength enjoyed by an enterprise. The position of strength enables the enterprise to act independent of competitive forces or affect competition/consumers in its favour. The dominant enterprise is not affected by market

forces and keeps operating irrespective of the market mood/force. Further that, the word “Dominant” implies ‘having authority or control’. Hence, a dominant entity would mean having authority or control over the market. Therefore, a dominant entity can restrict new entry in the market or foreclose the commercial opportunity of weaker traders or create barriers in economic freedom of its possible competitors.

In other words, a dominant entity adversely affects existing as well as future competition in the market. And when dominance is established, its abuse is identified and investigated. Under the erstwhile MRTP Act, dominance per se was considered bad, however, under the Competition Act it is the "abuse of dominance" that is considered.

Some of the abuses by dominant association are:

- charging unfair prices
- price discrimination (charging different prices which adversely effect free play of competitive forces and introduce imperfections inhibiting free competition)
- predatory pricing, i.e., a practice of a dominant entity selling its product at very low prices, generally below cost, so as to drive competitors out of a market or to prevent a new entry and then to successfully control the market. This kind of practices is condemned because it may lead to reduced output and higher prices in the future)
- refuse to deal,
- denial to market access,
- Leveraging dominant position to gain dominance on another market.

FAI and Member Compliance Issues

In view of the peculiarities of the Fertiliser Industry, the following discussion broadly provides suggestions for possible compliances which may be kept in mind by FAI and also its Members. In the light of provisions of the Act, FAI should ensure that its conduct, deliberations and discussions are in accordance with provisions of the Act. The following discussion touches upon FAI and its Members compliance issues under the Act. This section is divided into

- i. FAI compliance issues; and
- ii. FAI Member compliance issues.

I FAI Compliance Issues

The sphere of activity of FAI should generally be limited to interactions with government policy makers, government relations and public education, joint promotion/marketing of the industry, and development and promotion of legitimate industry standards in accordance with and along with full compliance of the applicable laws. To ensure that FAI is compliant with the provisions of the Act, it should refrain from indulging in any activities which are unacceptable under the Act.

1. Government Interactions

- One of the core functions of FAI is to make representations to regulators, local bodies and the government with respect to government policies and decisions having bearing on the industry. It is essential that any discussions and conduct of FAI as an association is focused on government policy impacting the industry only and does not transgress into discussions or coordinated activity with respect to commercial matters or individual Member's interest. The discussions in the board meeting or any meetings of any groups under the umbrella of FAI must bear the aforesaid in mind while deliberating or discussing any issue.
- FAI should bring to the notice of the CCI, any anti competitive practice and any activity or conduct of its Members or non members which may create anti competitive situation and create distortion in the market. Further, in this regard FAI must provide all possible assistance to CCI in upholding the provisions of the Act.

2. Membership

- It should be ensured that amendments which may perpetuate anti competitive practices are not introduced in the charter documents of FAI. Further, any amendment to the Charter Documents shall be in conformity with the provisions of the Act. The discretion of the Board should be applied judiciously and objectively in a manner which confirms with the provisions of the Act in the letter and spirit.

- Rules of admission to membership of FAI should ideally be transparent, non discriminatory and based on objective standards. Membership should be open to all satisfying membership requirements.
- Procedures for expulsion from membership may have an appreciable adverse effect on competition if they are not based on reasonable and objective standards and if the charter document does not provide a recourse to proper appeal in the event of denial of or expulsion from membership.
- FAI should not, directly or indirectly, restrict Members from dealing with non-members.
- FAI provides effective, efficient and less expensive arbitration and conciliation facilities for resolution of disputes between members and between members and non-members.
- FAI should not prevent non-members from obtaining access to information which, if denied would limit the ability of the applicant to compete effectively with other Members. It may, however, be noted that any proprietary information of a Member of FAI should not be circulated unless such member gives a prior consent with respect to such circulation.
- FAI should also not disseminate or circulate any information of a Member which it may obtain and retain in confidentiality, unless the same is permitted by the Member to whom such information belongs. However, the information so received by FAI may be circulated, provided the same is anonymised and becomes historical in time. Further, FAI ought to keep the interest of the Industry and tenets of Competition Act in mind while dealing with Commercially Sensitive Information.
- Also FAI should not deny services to non-members if those services confer important competitive or economic advantages which would impair the ability of non members to compete with Members.

3. Meetings

- FAI meetings should have an agenda which should specify the purpose of the meeting and the topics to be discussed. The purpose or the agenda should not include any matter which touches upon any Commercially Sensitive Information or include any aspect of decision making which is anti competitive in nature.
- If any Member proposes a topic that may raise a potential Competition Act concern, or if such a topic appears on the agenda, care should be taken that no discussion take place in the meeting on the said agenda item.
- All minutes, documents and notes relating to meetings should indicate the specific purpose of the meeting and topic. All agendas, minutes and notes should be retained.

- There should be no discussion of Commercially Sensitive Information or topics or sharing of such information before, during or after FAI meetings.
- Meetings should begin with a reminder of the FAI Competition Law Compliance Policy, and attendees should be reminded that Commercially Sensitive Information or topics cannot be discussed which are directed for the benefit of or to curtail or restrict any Member or non member thereby qualifying for any anti competitive practice or conduct.
- Meetings should be restricted to discussing topics within the appropriate sphere of FAI activities as outlined above. Discussions and agreements should be kept on an industry-wide level, as opposed to company specific, and should not involve discussion on commercial market matters unless the same is in public interest and is to uphold the objects of FAI and tenets of Competition Law.
- If any matter is taken up by FAI and the same is specific to a Member or non member or does not effect the industry as a whole, such discussion should be promptly terminated. If anyone seeks to discuss Commercially Sensitive Information for any purpose other than industry specific issues and/or to discuss issues which are “per se” anti competitive, such discussions or topics at any FAI meeting, activity or social event, others in attendance should immediately terminate the discussion.
- Members should be vigilant at all FAI meetings and activities and should refrain from discussing and deliberating on any Commercially Sensitive or price sensitive Information.

4. Communications

- FAI may state its position on various issues through external communications to its Members, government or regulatory entities or other parties. However, such communications should not involve sharing of any Commercially Sensitive Information unless an objective and justifiable reason such as government interface or policy discussion is present.
- In order to avoid even the appearance of anti-competitive behaviour, FAI employees should to the extent such information has or is potential to have any anti competitive effect, avoid any language which could be misconstrued as suggesting a lessening of competition, sharing of Commercially Sensitive Information or any anti-competitive activity or intent. For instance, references to "controlling" supply, demand or markets, immediately raises concerns, as do references to "eliminating" competitors or "driving them out of the market" or "controlling/cornering the market".
- FAI should not sensationalize or exaggerate and should not use legal terms or offer legal conclusions unless the same is permitted by the Charter Documents and to the extent such conclusions do not further any anti competitive practice or may have an impact on anti competitive practice. (example "that would be illegal").

- FAI will not inadvertently suggest or infer that FAI has discussed or shared Commercially Sensitive Information or discussed inappropriate topics or reached inappropriate agreements which in circumstances would lead to contradictions of the provisions of the Act.
- All documents should be prepared by FAI indicating the objectives of the FAI and that they should be in compliance with the provisions of the Act, in such a manner that in the event they are read by an investigator, FAI is able to demonstrate conduct which is in accordance with the provisions of Act and is also pro competition.

5. Defining Standards

- Any standards or rules such as product standards, industry terminology or other industry rules proposed or established by FAI which are in addition to the government defined and mandated rules and regulations, should be reviewed to ensure they do not unreasonably restrict competition in any manner.
- It is important to create and apply reasonable codes, standards, certification criteria, and other industry measures, to ensure they are aimed at maintaining legitimate, level playing field and not giving commercial advantage or causing disadvantage to a particular member or group of members and/ or non members.
- It is particularly important to avoid any rule or standard that could be construed as a direction or agreement to not to deal with certain competitors, suppliers or customers.
- Standards must be related to specific legitimate objectives and no more detailed or restrictive than necessary.

6. Statistical Data

- Statistical data raises particular challenges for FAI, because collection and dissemination of such data is in some respects related to the legitimate role, but at the same time, may raise a doubt about its wrongdoing.
- Statistics and data, unless otherwise publicly available, should be anonymized and presented in aggregated and historical form. Since the Fertiliser Industry receives subsidies and the determination of subsidies requires collection of data which may be commercially sensitive, it is crucial that confidentiality is maintained and data is disseminated to further the objectives of FAI and to promote public interest.
- It should be borne in mind that generally the distant the data is from current non-public prices and costs, and the less company-specific the information is, the less likely that collecting or sharing the information will raise any competition law concerns.

- If public information is being used, its source as publicly available should be identified.
- Projections of future prices or costs should not be the subject of data collection or discussion by FAI or at FAI meetings.

7. Monitoring And Reporting

- All members of the FAI Board, executive, staff, member company representatives participating in FAI activities, and all members, individually and collectively share the responsibility for ensuring that this Policy is enforced at all times.
- The Policy cannot refer to every conceivable situation or issue that may arise, and therefore members and staff are responsible for adhering to both letter and spirit of this document. If there is ever any doubt or concern then to seek advise.
- Breaches of the Policy cannot be tolerated or ignored. Delays in reporting any perceived breaches may compromise FAI's ability to effectively deal with the situation and protect the legal rights of FAI, its board, staff and member companies. Any inappropriate discussion or written communication, or suggestion of same, should be reported.
- Any act which may be perceived or understood as anti-competitive behaviour should be immediately stopped and if possible, measures be taken to restore the market to its normal functioning.

8. Issue Competition Policy Statement

FAI to Issue a statement of FAI's intention to comply fully with the Act:

- All board of directors of FAI receive a copy of the Competition Compliance Policy which details what may and may not be done.
- The board updates Members concerning competition problems periodically.
- FAI's meeting are regularly scheduled, agenda is prepared for each meeting, and competition sensitive issues should be avoided.
- The minutes of all board of directors' meeting should reflect the FAI's guideline of complying with the Act.

II FAI Member Compliance Issues:

1. Permissible Agreements/Activity

Generally speaking, in addition to the exceptions mentioned in the Act and discussed above, the following agreements may be construed as permissible, subject to the condition that they do not either directly or indirectly create barriers to entry into the relevant market, thereby giving some Members a competitive advantage over others, or excluding competitors from the market. There are limits to be observed but, generally, areas of permissible collaboration are:

- Induction into FAI and expulsion of members from FAI and incidental decisions;
- Self-regulation codes pertaining to the industry;
- Government relations – interaction and discussion on policy framework;
- Exchange of trends and other statistics (with appropriate safeguards);
- Defining product standards;
- Definition of terminology;
- Co-operation in research and development;
- Measures to protect the environment;
- Measures to protect the public.

2. Compliance with the provisions of Act in letter and spirit

FAI Members should not indulge in any activity which may be construed as anti competitive in nature and contrary to the provisions of the Act. It must be every FAI Member onerous responsibility to sensitize their management and all the concerned officials of the need to create and induce an environment which is in compliance with the provisions of the Act.

FAI Members should not use FAI platform to ,directly or indirectly, further any activity or exchange any Commercially Sensitive Information which may lead or qualify to be an anti competitive practice. The Members should bear in mind that anti competitive practices enumerated in the foregoing sections are only inclusive in nature. Each Member participant should endeavour to have a compliance programme to educate their board, departmental heads, employees and stakeholders of the provisions of the Act and implications of its non compliance

3. No discussion on commercial and price related aspects

- FAI Members should not use FAI forum to discuss individual business or commercial interests and decisions, nor should these be discussed at FAI events (or at any other occasion with competitors). FAI Members should not discuss market or commercial activity or decisions, or intended commercial activity or decisions which have an anti competitive impact.
- Since anti competitive agreements or arrangements need not be express or clearly spelled out, or in writing, such agreements could also be construed through an

implicit understanding or arrangement arrived at by and among the competitors. They may also be assumed or inferred from exchanges of information and/or parallel conduct. Agreements/ understanding might be inferred from surrounding circumstances if the conduct is suspicious. *For example, if there is an interaction between competitors and/or its associates with one another at social events, gathering or other meetings, and then there are subsequent price changes or modification in terms of sale or change in the market demand- supply conditions detrimental to competition, it may lead to a suspicion and inference that there was an agreement or understanding.*

4. Communications

- Usage of words and documentation of reports and communication, whether written or oral, carries a lot of weightage and forms cornerstone of any investigation and enquiry. FAI Members and their employees, should be vigilant about usage of words and should not make such statements which even give a hint of being an anti competitive statement. Endeavour should be made to avoid any anti competitive situation and language which could be misconstrued as suggesting a lessening of or tampering with competition, sharing of Commercially Sensitive Information or any anti-competitive activity or intent. Words such as "control" supply, demand or restrict" markets, "eliminating" competitors or "driving them out of the market" or "controlling/cornering the market" should be evaded.
- FAI Members should not advertently or inadvertently suggest or infer that FAI or its Members have discussed or shared Commercially Sensitive Information or discussed arrangements or arrived at any understanding which is prohibited under the Act or may lead to distortion of competition and is detrimental to free play of market forces thereby leading to contravention of the provisions of the Act.

5. Exchange of Commercially Sensitive Information

- Discussions or exchanges of any Commercially Sensitive Information by FAI Members at FAI meetings or activities, or at any other time, which could be construed as anti competitive and prohibitive under the Act and will be a breach of this Policy, apart from being subject to inquiry under the provisions of the Act.
- It is essential that FAI Members' activities remain clearly within the permitted scope and stay clearly away from inappropriate competitor collaboration.
- If there are contacts or exchanges of customer information, and subsequently FAI Members' do not compete for certain customers or in certain geographic areas, it may be inferred that there had been an agreement to allocate customers or markets.
- Members should avoid communication outside the umbrella of the FAI. If the communication between Members concerns FAI matters, such communications should go through FAI and not directly between Members.

6. Abuse of Dominant Position²

Although abuse of dominant position is usually restricted to conduct of a single entity, there is a concept of joint abuse of dominance, whereby two or more companies jointly coordinate activity to abuse their dominance against other competitors. Examples of possible abuse of dominance include:

- Imposing lopsided, excessive or discriminatory terms on customers or suppliers;
- Offering predatory prices with a view to excluding competitors;
- Limiting or restricting production or technical development either in relation to a particular product or geographic location;
- Discrimination between traders in relation to supply of scarce resources or methods of delivery and refusing to supply.
- Compelling customers with restrictions on products they need and cannot buy elsewhere;
- Tied selling, etc
- Using dominant position in one market to enter/ establish in another market.

These topics should not be discussed as between Members in the course of FAI meetings.

² The concept of joint dominance is yet to be introduced in the Act, it may be noted that same is pending as a Competition (Amendment) Bill, 2012 and is yet to be passed by the Parliament.

Best Practices for FAI and its Members

1. FAI DO'S AND DON'TS



- FAI is allowed to exchange information on technical and promotional issues relevant to the industry, including issues relating to technology in general, health, safety and environmental matters, technical standards, transportation hazards and regulations, quality control issues and new and proposed legislation which is material to the industry as a whole and beneficial to all the stake holders.
- With respect to the members and directors' meetings, it is ideal to ensure that a clear un-ambiguous written agenda is circulated to all the concerned before meetings such that any reservation on the agenda items be discussed and necessary action is taken to ensure proper and full compliance with the Policy and the Act.
- Do ensure that FAI board meeting minutes are recorded and reviewed by board personnel.
- Objections must be raised to improper board or association discussions (e.g., in relation to commissions, prices, marketing, dividing markets or clients or refusing to deal with competitors). If such a conversation continues, object (ensuring that the objection is noted). If the conversation continues, FAI Members are advised to leave the meeting while ensuring that the objection is placed on record and in the event that it is deemed to be a serious issue, the Members and/ or employees of FAI may consider contacting competent legal counsel and/or your local board or association.
- Further, care must be taken in drafting internal documents (emails, letters, faxes, memos, reports and evaluations, minutes, briefing papers, meeting notes, business plans, etc.) and in any formal or informal contacts or communications with third parties, such as competitors, press releases, advertisements and promotional material. Attempts should be made to avoid language which exaggerates the market position or which may be misconstrued as suggesting an improper purpose. It must be borne in mind that a poor choice of words can make a perfectly legal activity suspicious. Hence, any document exchanged by FAI should clearly reflect and demonstrate that actions and deliberations by FAI and its Members have been taken with the aim to uphold the legitimate interest of the Industry as a whole.

- Care should be taken that any issue, if it includes discussion on Commercially Sensitive Information, come within the purview of the public interest. However, efforts must be made to avoid any such situation.
- At the time of initiation of the compliance programme, an internal audit of procedures, systems, policy documents, including email, may be introduced. This may be repeated at intervals to ascertain proper working of the Competition Policy.
- A Compliance Officer should preferably be an independent professional with expertise and core competency in compliance and compliance management be appointed. He should be a focal point and in charge of designing a program, motivating officers, Members and employees, managing any accompanying administrative/ organizational issue, preparing compliance manual, and auditing compliance.
- FAI should have a guidance or clearance procedure for situations where there may be doubt about possible course of action by employees for fear of contravention of competition law provisions. Agreements should be vetted in consultation with the legal department to ensure that the provisions therein are consistent with the provisions of the Act
- Self regulation is key to compliance and should be a tenet and principle of FAI and each of its Members and employees.



The don'ts

- FAI should not collect and disseminate information which is Commercially Sensitive such as discussion on prices, discounts, conditions of supply, profit margins, cost structures, calculation practices, distribution practices, territories or customers, etc., unless otherwise required to further the objects of the Industry, provided however, the same is in public interest.
- FAI should not use language or phrases which could be construed as anti competitive. FAI should not:
 - Use words that may suggest illegal or secretive behaviour, e.g. “please destroy after reading”, or “I should not tell you this, but....”
 - Use language that falsely suggests Members have collaborated amongst themselves e.g. “industry agreement” or “industry policy”.
 - Accept, exchange or discuss, Commercially Sensitive Information.
 - Use words suggesting collective decisions detrimental to fair functioning of market.
- Informal gatherings must not be portrayed as being sponsored / sanctioned by FAI if that is not the case.
- Statistics and data must be ensured to be appropriately anonymized and aggregated.

- Do not establish programs or guidelines with the purpose of harming certain competitors, or which may involve boycott of competitors, suppliers or customers, members or non-members.
- Do not discriminate against competitors when developing product or intellectual property standards, specifications, environmental requirements or other programs.
- Do not inappropriately refuse or revoke membership indicating anti-competitive practice.
- Do not create records including overtly aggressive or vague language suggesting unintended anti-competitive objectives or results.
- Do not use ambiguous language that could be misinterpreted to suggest FAI is condoning or involved in anti-competitive behaviour.
- Analysis and recommendations accompanying the data are kept to a minimum. The concern here is that such additional wording may be seen as some form of recommendation from the FAI encouraging particular common responses from Members. In other words, the information or statistics should be left to “speak for themselves”.
- FAI shall not directly or indirectly be involved in or facilitate execution or consensus on any anti competitive agreement by and amongst its Members.

2. FAI Members’ Do’s and Don’ts



- It should be ensured that objections should be made by Members against any deviation from the agenda during the meeting which strays into prohibited areas. Every Member should be vigilant as to what is being discussed;
- It should also be ensured that if a FAI Member seeks to initiate a discussion on an improper subject, objections should be raised, notably by saying that it is FAI’s strict policy not to discuss such topics and by requesting such Member to stop the discussion immediately. If such member persists, he may be allowed to withdraw from the meeting;
- Make sure that the reason for leaving and at what juncture you left are recorded in the minutes. In addition, the incident should immediately be reported to concerned authority;
- Self regulation is key to compliance and should be a tenet and principle of FAI and each of its Members;
- There should be a time table for review of the status of the agreement from competition law perspective. There must be proper systems for reminding the concerned officials regarding the same.
- Every Member should comply with the Policy and also act in accordance with the provisions of the Act and should not undertake any actions which create distortions in market place.

- The information disseminated by FAI is used only for legitimate purposes and to further efficiency of fertiliser industry and associated market.



a. Pricing and cost related issues

- In no event shall there be a co-ordination between Members of FAI or the use of FAI as a platform to determine the prices or manufacturing costs related to fertiliser.
- The FAI Members shall not facilitate the following activities:
 - Joint determination of purchase or sale price;
 - Joint determination of price increases or decrease;
 - Joint fixation of specific minimum or maximum price;
 - Agreement on rebates, discounts and other terms or conditions of sale;
 - Exchange of price related information with Members unless it is completely historical.
 - Discuss any other conduct which may indicate determination of price directly or indirectly.
 - Discuss what constitutes a 'fair profit level'
 - Discuss the actual costs of production of individual Members
 - Discuss market information peculiar to each member.

b. Limiting production, supply etc.

FAI Members are prohibited from holding any discussion, understanding, plan or facilitating agreements between the Members that may lead to restriction or limitation on the production or supply of fertiliser. In particular the FAI Members shall not facilitate discussions or agreements:

- concerning the freezing, limitation or closing down of production capacity;
- for non-use or employment of certain technology;
- for not selling a certain type of fertiliser equipment;
- any other conduct which may limit or control supply, production, etc.

c. Market sharing

In an FAI meetings, Members shall be prohibited from discussing or sharing information on allocating the market. In particular, FAI shall not encourage the following activities:

- Any discussion on information sharing on share or allocate markets among competitors in respect of specific territories;
- Any discussion on products, customers, or sources of supply;

- Fix production, buying or selling quotas among competitors;
- Bidding prices for projects;
- Collusive tendering.

d. Boycotts

- Refusal by Members to deal with one or more customers or suppliers in order to hinder such supplier or customer to do business which is prohibited under the Act.
- The FAI Members shall not facilitate the following activities in their association meetings:
 - Mutual agreement amongst Members not to sell to certain customers or not to purchase from certain suppliers;
 - Mutual agreement amongst Members to make the supply or purchase of goods subject to certain conditions.

e. Collection and dissemination of information

- FAI Members shall not collect and disseminate information about prices, discounts, conditions of supply, profit margins, cost structures, calculation practices, distribution practices, territories or customers. The publicly available information must also be dealt with cautiously.
- FAI Members should not:
 - Use words that may suggest illegal or secretive behaviour, e.g. “please destroy after reading”, or “I should not tell you this, but....”
 - Use language that falsely suggests Members have collaborated amongst themselves e.g. “industry agreement” or “industry policy”.
 - Accept, exchange or discuss, Commercially Sensitive Information.
 - Use words indicating collective decision detrimental to fair functioning of competition in the market.
- If any person or Member seeks, shares or discusses Commercially Sensitive Information or topics at any FAI gathering, efforts should be made to break off the discussion and point out that it cannot continue and leave the setting if necessary.
- General market conditions and general industry problems, including industry pricing policies or patterns, price levels, or industry production; capacity, or inventories (including planned or anticipated changes regarding those matters), except to the extent necessary to achieve legitimate objectives of FAI;
- FAI Members should not agree with competitors to fix commission rates, splits (fixed commission splits, as opposed to negotiated ones on a particular sale), discounts, rebates or any other aspects of fees.
- FAI Members should not make statements implying that commission rates have been fixed or that a particular member or non-member or Association has been or will be boycotted.
- FAI Members should not discuss other types of “competitively-sensitive information” with competing Associations (e.g., current or future marketing plans, business plans, etc.)

- FAI Members should not discuss refusing to deal with competing Associations.
- Even silence can be construed as approval, so if you receive commercially sensitive information or if it is raised in discussion with competitors, immediately break the discussion.
- FAI Members should not accept documents or information, including e-mails, from competitors containing commercially sensitive information or topics. If you receive such an e-mail or document, immediately bring it to the attention of legal counsel for appropriate response.
- If FAI Member obtains competitor information from a public source and retain it, and proper note on its source should be made.
- FAI Members should not accept information from competitors, even if it is otherwise publicly available. The fact that it came from a competitor might indicate or infer ongoing discussions or agreement. Therefore, only publicly available information should be used, but only when not obtained from a competitor, and its source must be documented. It is best to avoid contact with competitors, except in specific monitored settings, because even meeting can give rise to suspicion.
- The information disseminated by FAI to its Members should not be used for any anti competitive activities or which may create an anti competitive environment detrimental to public interest.
- As far as possible members should not indulge in informal commercial discussions of any kind before or after meetings.
- Members should not either individually or collectively use FAI forum for any oblique purpose which is detrimental to FAI or to the industry or its stakeholders.

f. Topics of discussion that should be avoided by Members in meetings of the FAI:

- Past, current or future prices;
- Pricing policy and actual costs of individual companies;
- Possible increases or decreases in prices;
- Bidding prices for projects;
- Standardization or stabilization of prices;
- Collusive tendering (bid – rigging);
- Standardization of credit and trade terms;
- Control of production;
- Control of Supplies;
- Division or allocation of markets or customers;
- Select customers to deal or refuse to deal with because of the above reasons.

Enforcement

In India, there are two enforcement agencies responsible for adjudicating issues pertaining to the Act. They are as follows:

- a. Competition Commission of India (CCI); and
- b. Competition Appellate Tribunal.

Competition Commission of India

- Competition Commission of India (hereinafter referred to as the “Commission” or CCI) is an expert body which functions as a regulator for preventing anti-competitive practices in the country and enjoys advisory, advocacy and quasi-judicial functions. It is a body corporate.
- The Commission can make references to a statutory authority or receive references from statutory authority. Further, wherein, during the course of a proceeding before any statutory authority an issue is raised by any party, that any decision which such statutory authority has taken or proposes to take, is or would be contrary to the provisions of this Act, then such statutory authority can make a reference in respect of such issue to the Commission. The statutory authority can also make the reference suo motu to the Commission.
- The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on receipt of any information, (accompanied by such fee as may be prescribed by regulations, from any person, consumer or their association or trade association) or a reference made to it by the Central Government or a State Government or a statutory authority. The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under Section 3 or Section 4 shall have due regard to the factors mentioned in Section 19 of the Act.

Director General

The Central Government appoints a Director General for assisting the Commission in conducting inquiry into contravention of any provisions of the Act or to perform other functions as provided by or under the Act. The Director General, when so directed by the Commission, assists the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made there under. The Additional, Joint, Deputy and Assistant Director General or such officers so appointed shall exercise their powers and discharge their functions, subject to the supervision and direction of the Director General. The Director General has all the powers as are conferred upon the commission under Section 36(2) of the Act.

The Director General, under the Competition Act, does not enjoy any suo-moto powers to investigate any matter/ alleged contravention.

Competition Appellate Tribunal (CAT)

Competition Appellate Tribunal (hereinafter referred to as the “COMPAT”) is a judicial body and consists of a Chairperson and not more than two other members appointed by the Central Government. The proceedings before the COMPAT are judicial proceedings and appeals against the orders of the Commission are filed before the COMPAT. COMPAT has the requisite authority to hear and dispose of appeals against the orders of the Commission and adjudicate on claims for compensation and pass orders for recovery of compensation. The provisions with respect to the same are provided in Sections 53A to 53U of the Act and compensation can be claimed under Section 42A or 52 Q(2) of the Act.

The appeals may be filed by the Central Government, State Government, local authority or an enterprise or any person who is aggrieved by the decision, direction or order of the Commission passed under the provisions/sections mentioned or referred in Section 53(A)(a) of the Act, within sixty (60) days from the date on which a copy of such decision, direction or order made by the Commission is received by the Central Government, State Government, local authority or an enterprise or any person who is aggrieved by the decision, direction or order of the Commission.

COMPAT shall, upon giving an opportunity of being heard to the other party, pass the appropriate order and a copy of such order will be sent to the parties to the appeal as well as the CCI. COMPAT has the authority to review its own decisions. In case of contravention of the order of COMPAT, without reasonable grounds, punishment of imprisonment up to three (3) years and penalty up to Rs. one(1) crore can be imposed by Chief Metropolitan Magistrate, (“CMM”) New Delhi.

Appeals against the order of COMPAT can be made to the Supreme Court within sixty (60) days from the date of communication of the decision or order of the COMPAT.

Dawn Raids

- In India, the Director General of the Competition Commission of India is authorized to carry out search and seizure in the event any information/application is filed before the Commission by aggrieved person seeking adjudications for alleged contradictions under the Act.
- Members as well as employees of the FAI should be educated about the proper use of language while communicating, whether it be verbal or written.
- Special care should be taken to ensure that the language used in email communication is appropriate. Ensure a proper system of recording/ minutes of meetings and other events that may serve as evidence of non-participation in anti-competitive practices by FAI or its employees.
- It is advisable to integrate the Competition Compliance Programme into the overall compliance programmes of the FAI.
- The authorities may have powers to listen to telephone conversations; to maintain surveillance, for example, of office premises, with a view to monitor persons attending meetings; and even to require staff to attend meetings of a cartel and to report back to the competition authority of such meetings.

Manner in which these raids are to be carried out by the Director General (DG), namely:

- Investigation begins only after a prima facie case is established by the Competition Commission of the contravention of the Act. Section 41³ of the Act empowers the DG to carry out search and seizure and the powers of DG are analogous to the powers mentioned and provided in Section 240 and 240A of the Companies Act, 1956.
- On receipt of the case, the DG is first required to send a questionnaire to the accused party with documents and evidence. The DG is vested with the powers of a civil court in carrying out the investigation and therefore it is essential that the accused party/association must provide correct information to the DG. Any contravention of the orders of the DG may result in imposition of penalty to the tune of Rs. 1 lakh for each day subject to a maximum of Rupees one crore under Section 45 of the Act.
- The search and seizure can be undertaken by the DG, when he has reasonable grounds to believe that records of an association/organization may be mutilated or destroyed. The term “reason to believe” is stronger than the term “is satisfied”.

The rights of the Trade Association facing Raid

- The Members of the organization can ask for reasonable time from the DG in case of raid, for the arrival of the in-house counsel or the external counsel. However, it is not obligatory upon the investigator to wait for the arrival of the counsel.
- The Members or any representative of the trade association can ask for the order of the CMM and the scope of the raid.
- Take necessary steps to preserve the documents and prevent any interference.

³ Competition (Amendment) Bill, 2012 proposes modifications in section 41(3) of the Act which is yet to be passed by the parliament.

- Keep full copies of all the questions asked and all the documents copied by the officials during the raid.
- Further, it is essential to keep in mind that the investigating agency cannot use force on any person, cannot take copies of documents or examine such documents which are not relevant for the purpose of the raid..

Obligations on the Association Facing Raid

- The association is under an obligation to furnish true and correct information to the investigating authority and furnish location of the relevant documents and electronic information to the DG.
- DG can only seize those mails which are relevant to the investigation and all the personal mails must be returned.
- Also, there should be no obstruction by any member/representative of the association and no attempt should be made to falsify or conceal the documents required for production during the raid.
- After the DG leaves, it is essential to prepare a report of the documents and the electronic evidence seized and conduct a meeting with either the in-house legal counsel or an external counsel to review the potential issues and risks and to further analyse and assess the scope of inquiry.

Penalties

The penalties for violation of the Commission's orders including failure to furnish information or furnishing of incorrect information have been substantially stepped up vis-a-vis those provided under the old MRTP Act. Under the Act, the Competition Commission of India is empowered to impose penalty in the event of indulgence into anti competitive agreements or abuse of dominant position.

As per Section 27b of the Act, in the event that abuse of dominant position is ascertained by the Commission, the non-compliant enterprise may be subject to penalty ***upto ten per cent of the average turnover for the last three preceding financial years.***

The proviso to Section 27b of the Act provides for penalty on cartels. The penalty provision in respect of anti-competitive agreements which are in the nature of a "Cartel" is extremely stiff as it leaves no discretion with the Commission, in as much as the law provides that it shall impose upon each enterprise which is party to Cartel, ***a penalty equivalent to 3 times of the amount of profits made out of such agreement or 10% of the average turnover of the Cartel for the last three preceding financial years, whichever is higher.***

As per Section 42 (2), if any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under Sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may ***extend to rupees one lakh for each day during which such non compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.***

As per Section 42 (3), in the event of failure of a person to comply with the orders of the CCI or upon non-payment of fine, he could even be ***punishable with imprisonment for a term which may extend to three years, or fine which may extend to rupees twenty five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit.***

There is also a penalty provision for making false statement or omission to furnish material information, which ***shall not be less than rupees fifty lakhs but which may extend to rupees one crore (Section 44).***

There is also a whistle-blower type provision for lesser penalty (Section 46) on a party to a cartel that comes clean with full and true disclosure, yields vital information and cooperates with the Commission. Though, a provision for imposition of lesser fine on a party which renders assistance to the Commission exists, but the party desirous to take shelter of this provision has to proceed with care as conditions precedent to avail of the concessions are:

- full and true disclosures are made before initiation of Investigation/Enquiry;
- the disclosure is essential to burst the "Cartel";
- however, the benefit of lesser penalty is limited to the party who made disclosure first ; and
- benefit would not be available in case of non-compliance of conditions subject to which lesser penalty was imposed.

Appendix –A: Provisions of the Act

Section 3-Anti-competitive agreements

3. (1) No enterprise or association of enterprises or person 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.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding 6(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);

- (b) the Patents Act, 1970 (39 of 1970);
- (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
- (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
- (e) the Designs Act, 2000 (16 of 2000);
- (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
- (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Section 4- Abuse of dominant position

4. (1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position 4[under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access [in any manner]; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[c]"group" shall have the same meaning as assigned to it in clause (b) of the

Explanation to section 5.]

Section 19-Inquiry into certain agreements and dominant position of enterprise

19.(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

- (a) market share of the enterprise;
 - (b) size and resources of the enterprise;
 - (c) size and importance of the competitors;
 - (d) economic power of the enterprise including commercial advantages over competitors;
 - (e) vertical integration of the enterprises or sale or service network of such enterprises;
 - (f) dependence of consumers on the enterprise;
 - (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
 - (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
 - (i) countervailing buying power;
 - (j) market structure and size of market;
 - (k) social obligations and social costs;
 - (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
 - (m) any other factor which the Commission may consider relevant for the inquiry.
- (5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".
- (6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—
- (a) regulatory trade barriers;
 - (b) local specification requirements;
 - (c) national procurement policies;
 - (d) adequate distribution facilities;
 - (e) transport costs;
 - (f) language;
 - (g) consumer preferences;
 - (h) need for secure or regular supplies or rapid after-sales services.
- (7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—
- (a) physical characteristics or end-use of goods;
 - (b) price of goods or service;
 - (c) consumer preferences;
 - (d) exclusion of in-house production;
 - (e) existence of specialised producers;
 - (f) classification of industrial products.

Section 27- Orders by Commission after inquiry into agreements or abuse of dominant Position

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

- (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.]

- (c) [Omitted by Competition (Amendment) Act, 2007]

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) [Omitted by Competition (Amendment) Act, 2007]

(g) pass such other [order or issue such directions] as it may deem fit. [Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause(b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]

Section 42-Contravention of orders of Commission

1)The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

(2) If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit: Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.]

Section 42 A -Compensation in case of contravention of orders of Commission

Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.]

Section 43. Penalty for failure to comply with directions of Commission and Director General

If any person fails to comply, without reasonable cause, with a direction given by—

(a) the Commission under sub-sections (2) and (4) of section 36; or

(b) the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission]

Section 43A.Power to impose penalty for non-furnishing of information on combinations

If any person or enterprise who fails to give notice to the Commission under subsection(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent. of the total turnover or the assets, whichever is higher, of such a combination.]

DISCLAIMER

This Competition Compliance Policy is specially designed to address key aspects of competition issues of FAI. This Competition Compliance Policy may stand alone, or a part of FAI's overall legal compliance strategy to assess and minimize risk. However, it cannot give legal advice, and does not purport to do so. When a specific issue arises, legal advice should be obtained.

The generic nature of this Compliance Policy means that it is only an educative and indicative document and will not, by itself, constitute the optimum compliance program for FAI. The document contains best practices which are recommended as the baseline for the development of an effective competition compliance program for FAI. The information contained herein is not exhaustive but only illustrative in nature. This compilation has been made to educate all the stakeholders of FAI and to create awareness about the provisions of the Act, anti competitive practices, violations and consequences thereof and best practices to be adopted to avoid any possible transgressions or violations.

The compilation has been prepared after extensive research on the subject and on the basis of information available on the Competition Commission website, advocacy forums and on other electronic and print media.

It may be noted that applicability of provisions of Act and exemption there under differ from case to case and therefore an activity which may be perceived as anti competitive in nature could be granted benefit of Section 54 of the Act. This document does not propose or lend any gateways or legitimacy or exemption to any act or conduct. The contents of the document and advice mentioned therein are personal views of the draftsman and should be relied upon after proper legal consultation. The matters and exemptions shall be discussed and decided by adjudicating authority.

Exchange of Commercially Sensitive Information and its use thereof could be construed as a contentious issue and therefore utmost care must be taken to ensure that its use and dissemination is only for educative purposes and to create awareness which leads to and create efficiency in the market and promotes legitimate cause of the Industry within the framework of the Law.

Since the subject matter of the Policy is dynamic, it is recommended that legal assistance may be taken for interpretational guidance such that the conduct and compliance are in accordance with the provisions of Act not only in letter but also in spirit.