

CARTELISATION AND ROLE OF CCI IN INDIA

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Abstract : *Cartelization has proved itself to become one of the major issues faced by the Indian economy which acts against the basic crux of the Competition law, 2002 enacted with the purpose of ensuring competitive practices and ensuring welfare of consumers. Three essential factors establish existence of a cartel, namely agreement by way of concerted action suggesting conspiracy; fixing of prices; and the intent to gain a monopoly or restrict/eliminate competition. There is a very thin (and blurred line) of distinction between legitimate co-operation and illegitimate collusion. The most crucial ingredient of cartelisation behavior is collusive manipulation of prices by the competitors. However, determination of the existence of a cartel by direct evidence is a Herculean job for the competition authorities. Considering the fact that there are number of industry associations which have been formed to represent the industry and industry players before the regulators and government, it remains to be seen how the CCI treads the thin line between legitimate co-operation and illegitimate collusion for the determination of a cartel. Considering the fact that there are number of industry associations which have been formed to represent the industry and industry players before the regulators and government, it remains to be seen how the CCI treads the thin line between legitimate co-operation and illegitimate collusion for the determination of a cartel. While CCI was successful with regard to identification of cartels, there exist difficulties for it to go ahead with the presumption unless there is an informant who was initially party to such collusion. Despite the existence of leniency provision to encourage parties for such disclosure, there were many instances when CCI could not function effectively to discharge their duties. With its extraterritorial power and well planned method of investigation CCI has so far performed well in few sectors at least.*

Introduction

Adam Smith considered business collusion as an omnipresent enticement, a 'scheme against the general population' that was harmful to the activities of a market economy. Collusion and comparable courses of action has been an irrelevant collaboration for the business heads to keep up a vital separation from any risky test that is destructive to their associations and adventures. To legal authorities who must execute competition law, collusion is a continuous issue that sneaks among an enormous number of business transactions happening each year in an unpredictable developing economy, anyway isn't for each situation easy to find or even portray. Certainly, the vast majority of the writing pursues Adam Smith in accepting the sole objective of inter firm cooperation to be a connivance against the consumer. Recently, Irwin Stelzer¹ depicted it as 'a practice without defenders in the economics profession'. Cartels are the very antithetic of competition, to an effective free market and are unfair to consumers. They enable small and inefficient competitors to join to appreciate the easy life at the expense of their consumers. Though monopolies can sometimes produce more significant effectiveness, cartels, by definition, have no efficiency - enhancing potential at all.

¹ Irwin M. Stelzer is an [American economist](#) who is the U.S. economic and business columnist for [The Sunday Times](#) in the [United Kingdom](#) and [The Courier-Mail](#) in [Australia](#).

The Competition Act, 2002 clearly prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations via mergers and acquisitions that may hurt competition in India. Thus, the Act provides a formal and legal framework for ensuring competition and preventing abuse of market power and control in the Indian economy. Competition Commission of India (CCI), the statutory body established under the Act is also expected to protect the interests of consumers and ensure freedom of trade in the market in addition to elimination of practices that curb competition throughout India. The objective of CCI is to play an overarching role as a market regulator across all sectors with the focus on anti-competitive behavior of enterprises that may distort competition. In addition, it is mandated to work in tandem to carry out competition advocacy and to prevent any activities that have an appreciable adverse effect on the competition in India. In this globalized era, the business activities in any part of the world can impact the Indian market, and vice versa. This process of integration will only grow in the future. The Competition Act is devised in a manner wherein this process is given due consideration and therefore the Competition Commission of India (CCI) is empowered to take cognizance of such anti-competitive effects in the Indian market irrespective of the place where the agreement was actually formulated. As legislations with regard to specific sectors neither defines cartels or abuse of dominance nor provides the investigative mechanism to establish such economic irregularities, the Competition Act, 2002, has an overriding effect and envisages that it shall have jurisdiction in addition to and not in derogation of other laws.²

Legal Basis

The Competition Act's sections on cartels are fairly potent. Unlike the predecessor MRTP Act, it clearly defines a cartel. Also, while Section 2(a) of the MRTP Act defined an agreement to include "any arrangement or understanding", the corresponding definition in Section 2(b) of the Competition Act defines it to include any "arrangement or understanding or action in concert... whether or not such arrangement, understanding or action is formal or in writing". Section 3(3) lists the four most pernicious types of cartel agreements (agreements to fix prices, restrict supply, allocate markets or customers, or rig bids), and specifies that they will be presumed to have an appreciable adverse effect on competition.³ This obviates the need for the CCI to prove anticompetitive intent and effects - a requirement that had crippled the MRTP Commission. Furthermore, in addition to ordering discontinuation of 14 September 1, 2012 anticompetitive agreements, the CCI can impose substantial

² Sections 60-62, Competition Act, 2002

³ This presumption is rebuttable, and firms can attempt to use Section 19(1) of the Act to argue that their Agreement had certain beneficial effects, which are unlikely but not impossible to adduce in a cartel case. The commission does consider such arguments in cartel cases, but so far has not accepted them. As pointed out in Bhattacharjea (2010), the anti-cartel sections of the Act merely transfer to the firms the burden of showing that positive effects outweigh negative effects. They do not make cartelisation *per se* illegal, which is the standard approach in most competition laws at least for the most pernicious types of cartels. *Per se* illegality requires competition authorities to establish only that the firms entered into a cartel agreement, without going into its effects at all.

monetary penalties on participants in a cartel: up to three times its profits or 10% of turnover, whichever is higher, for each year that the cartel agreement was in effect.⁴

Cartel Enforcement by CCI

Since the provisions of the Competition Act, 2002 (the Act) governing anti-competitive agreements came into force on 20 May 2009, CCI has been active in the investigation and enforcement against cartels. All these decisions relating to cartels is based on various details such as the source of information, nature of allegations, evidence collected, arguments put forward by the parties to rebut the presumption of Appreciable Adverse Effect on Competition (AAEC), tools and methods of analyses used by the CCI to evaluate evidence and arguments, arguments rejected by the CCI, arguments accepted by the CCI, nature of the orders and nature of CCI intervention or remedy.



Table 1: Number of CCI orders relating to cartels by year

Year	Section 26(2)	Section 26(6)	Section 27	Total
2009	0	0	0	0
2010	2	1	0	3
2011	13	10	4	27
2012	6	4	13	23
2013	5	3	8	16
2014	10	2	8	20
2015	10	4	13	27
2016	7	2	3	12
2017	2	0	6	8

The table is from the ICN Special Project 2018 on Cartel Enforcement and Competition

Interventions made so far

In assessing the regime, the various methods/tools adopted by the CCI in cartel enforcement are critical. In the infringement decisions relating to violations of Section 3(3) of the Act, the CCI has:

- (a) imposed penalties on enterprises, trade associations and their office bearers;
- (b) passed cease and desist orders, the breach of which could be a criminal offence under Section 42 of the Act;
- (c) required trade associations to disengage from collecting price information;
- (d) disqualified office bearers of trade associations responsible for repeated contraventions;

⁴ vol XLVii NO 35 ■ Economic & Political WEEKLY This content downloaded from 111.93.136.226 on Thu, 28 Feb 2019 05:08:51 UTC All use subject to <https://about.jstor.org/terms>

- (e) ordered alteration of the infringing conduct; and
- (f) directed introduction of competition compliance procedures.

The CCI has consistently sought to make interventions through advocacy initiatives with government bodies as well as private enterprises. Further, with a view to identify elements in various government enactments and policies that can potentially restrict the ability of economic agents to effectively compete at the market place, the CCI has framed '***The Competition Commission of India (Competition Assessment of Economic Legislations and Policies) Guidelines, 2016***'

These Guidelines would facilitate an objective and transparent assessment of existing and upcoming economic legislations and policies made both at the central and at the state level, from a competition perspective.⁵

CCI Activity in Focus Sectors

Entertainment

The film and television sector has seen a significant amount of antitrust churn in India. The CCI has initiated and/or taken action against enterprises active in this sector on twenty (20) occasions. This sector has also seen one of the first substantive decisions on merits by the Supreme Court of India in *Competition Commission of India vs. Coordination Committee of Artists and Technicians of West Bengal Film and Television & Ors. (Bengal Artists Case)*⁶.

Public Procurement

The antitrust activities have mainly related to procurement in railways, healthcare and defence. It is estimated that the railways procure over INR 250 billion worth of goods and services annually. This sector has seen a substantive decision on merits by the Supreme Court in *Excel Crop Care Ltd. vs Competition Commission of India & Anr*⁷. The Supreme Court held that the defence of price parallelism being a general feature of oligopolistic markets does not hold good in bidrigging cases. While upholding the order of CCI, the Court also noted that parallel behavior is a strong evidence of cartelization unless the same corresponds to the normal market conditions.

In *Re Brushless DC Fans and other electrical items*⁸, the CCI conducted a qualitative analysis of documentary (bid documents), oral (recorded statements) and forensic (call data records and e-mails) evidence. For instance, it compared prices shared through e-mail and prices quoted in the bid documents and corroborated the recorded statements with the call data records. The CCI passed a cease and desist order along with different monetary penalties for different parties.

⁵ Cartel Enforcement and Competition ,ICN Special project ,Competition Commission of India,2018

⁶ (2017) 5 SCC 17 (India)

⁷ (2017) 8 SCC 47(India)

⁸ Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items (Suo Moto Case No. 03 of 2014), Order dated 18 January 2017

Ports

In *Cochin Port Trust v. Container Trailer Owners Coordination Committee (CTOCC) & Ors. (Cochin Port Trust Case)*⁹, it was alleged that the imposition of a 'turn system' by CTOCC was anti-competitive as it, (i) led to the unilateral fixation of prices, leading to unnecessarily high freight rates; (ii) restricted registered transporters from operating for Export-Import (EXIM) containers, affecting the supply of EXIM containers and raising rates for EXIM trade, and (iii) restrained outside transporters from lifting the containers which impeded the ability of users to hire container trailers of their choice.

The CCI held the opposite parties and ten (10) of their office bearers to be in contravention of Section 3(3)(a) of the Act as (i) they could not adequately justify the price fixing; (ii) the turn system was an excessively restrictive mechanism; and (iii) arguments that external factors had affected pricing were implausible. Accordingly, a cease and desist order was passed but no penalty was imposed.

Construction / Cement

In *Builders Association of India v. Cement Manufacturers Association & Ors.*¹⁰, Builders Association of India filed the information under Section 19 of the Act against eleven (11) cement manufacturers representing approximately 60 per cent of the market, alleging violations under Sections 3 and 4 of the Act. The data furnished by the cement manufacturers revealed that (a) price movements were similar across manufactures, indicating prior consultation on price movements; (b) cement manufacturers were not able to explain away their low capacity utilization even during the period when demand was high; (c) cement manufacturers were trying to take advantage of the demand situation to earn better margins on sales rather than producing at the competitive level and (d) there existed a system of exchange of price information among the members of association on weekly basis across the country, which enabled them to take collective decisions about future price changes. Consequently, the CCI concluded that the cement manufactures were controlling the supply of cement in the market by way of some tacit agreement and had indulged in collusive price fixing. Based on the DG report, the CCI passed an order holding the cement manufacturers and the Cement Manufacturers Association in contravention of the provisions of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act, and imposed a penalty of 0.5 times of the net profit for FY 2009-10 and 2010-11. On appeal, the COMPAT set aside the order on procedural grounds and remanded the matter to the CCI. However, a fresh hearing by the CCI yielded exactly the same result and a penalty cumulatively amounting to INR 63 billion was imposed.

In *Re Alleged Cartelisation by Cement Manufacturers v. Shree Cement & Ors*¹¹, it was alleged in the complaint that cement prices were stable between INR 125 and INR 145 per bag between 2003 and 2005, but started increasing in December 2005, reaching INR 210 to INR 230 per bag in January 2006.

Further, there was no corresponding increase in input costs, taxes or demand to justify this. It was also alleged that the cement manufacturers resorted to unfair trade practices by underproduction or choking up of supply in

⁹ Cochin Port Trust v. Container Trailer Owners Coordination Committee & Ors.(Ref. Case No. 6/2014), Order dated 1 August 2017.

¹⁰ Builders Association of India v. Cement Manufacturers Association & Ors (Case No. 29 of 2010) Order dated 31 August 2016.

¹¹ In Re: Alleged Cartelisation by Cement Manufacturers v. Shree Cement & Ors. (RTPE No. 52/2006) Order dated 31 August 2016.

the market, thereby raising the sale prices. The CCI *vide* its order dated 30 July 2012 passed under Section 27 of the Act *inter alia* imposed a penalty of INR 3.9 billion upon Shree Cement Limited (all the other parties in this case were also parties in Case No. 29 of 2010 where they were found to be in cartel and were penalized). The matter was tagged along with the main cement case on appeal and followed the same course.

In *Re Manufacturers of Asbestos Cement Products*¹², a complaint was made to the Serious Fraud Investigation Office (SFIO) alleging that the manufacturers of Asbestos Cement Sheets (ACS) had formed a cartel under the garb of their association and had restricted output by forcing members to close plants and increased price. A reference was made to the CCI by the SFIO and the CCI initiated a preliminary inquiry. The CCI, however, did not find sufficient evidence to hold collusion amongst the ACS manufacturers and closed the case under Section 26(6) of the Act.

In Cartelisation in sale of Sugar Mills by the Uttar Pradesh State Sugar Corporation Limited (UPSSCL) and the Uttar Pradesh Rajya Chini Evam Ganna Vikas Nigam Limited (UPRCGVNL) (Sugar Mill Sale case) the primary allegation against the opposite party was the lack of competition in bidding process of sugar mills. The CCI examined (i) the circumstances surrounding sale of sugar mills including interventions by the High Court of Delhi; and (ii) the policy of Government of Uttar Pradesh for sale of sugar mills to private players, in addition to relevant circulars/notifications/ notices, bidding method and process of sale, etc. to observe that the onerous and litigious nature of the property itself acted as deterrent for prospective purchasers from bidding. As a result, the CCI concluded that there was no contravention of Section 3(3) and the matter was closed under Section 26(6) of the Act.

CONCLUSION

The Indian experience shows that, in nascent and evolving competition regimes, cartels may not be concentrated only in well-known conventional hotspots. Of the sectors which are internationally regarded as hotspots of cartel activity, such as public procurement, construction/ cement and agriculture/ agro-processing have seen infringement decisions in India. Infringements have also been found in sectors which are not seemingly prone to cartel formation such as pharma distribution and entertainment. Majority of the infringement findings of the CCI reveal certain striking characteristics that may be common across transitional economies: (i) an extremely strong trade association forms the fulcrum of the cartel; (ii) the participants of these association are often small or micro enterprises or individuals with a low business turnover; and (iii) these participants operate in the informal sector, with a high degree of self-regulation. The association culture in large number of cases may be an attempt at increasing bargaining power and creating a collective insurance policy by small, unsophisticated service providers.

¹² In Re: Manufacturers of Asbestos Cement Products (Suo Moto Case No. 01/2012), Order dated 11 February 2014.