

IMPACT OF CARTELISATION AND ANTI-COMPETITIVE AGREEMENTS IN RECENT TIMES

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ABSTRACT

This paper provides a detailed understanding of the impact of Cartelisation and anticompetitive agreements. The author will be dealing with the given title conferred cartelisation and difficulties faced by the formal market through cartelisation and anti-competitive agreements. And the author will place reliance on situation and cases laws which appropriate related to the impact of cartelisation. Moreover, the author puts comparison through other countries on the impact of cartelisation. At last, the author concludes with the provisions dealing with penalties compare to the old and new amendment of Competition Act. And also, investigation techniques which compared with other countries. And following the powers of competition commission over the cartelisation and anti-competitive agreements.

KEYWORDS *Cartelisation, Anti-competitive agreements, investigation techniques.*

INTRODUCTION

The paper provides the detailed understanding of the cartelisation. The authors will be dealing with the given title cartelisation and discussed throughout the provisions and the difficulties around the cartelisation. The following paper will be dealing with the widespread introduction of cartelisation, provisions relating to the cartelisation. Moreover, which is compared to all the country where they are dominant against the cartelisation and anti-competitive agreement. On the final part of the paper were the author deals with the MRTPC [Monopoly Restrictive Trade Practice Commission] over cartelisation were the commission tend to make legal implication on cartelisation and by coming to part of India were the procedure and legal status is ambiguous, the author will be dealing with concern investigation techniques which are compared to other external countries other than India following powers will deal in this paper.

WHAT IS CARTEL?

According to the amendment by the competition Act 2007 deals with prohibition of agreement which causes, or likely to cause an appreciable adverse effect on competition in the markets. That such agreement is consider to be void. It is an agreement between companies and following institution not to compete and do not come in preview of transaction between competitors. Those agreements are called cartels. The main objective of a cartel is to make the price as highly competitive level and creates a bias between the consumers. Thus, creates a monotonous market between consumers. Further the consumer results in higher price of goods and poor quality and deficiency in service. Which lead to the outrage of consumers in the market. A cartel is said to continue when two or more companies enter into any agreement, i.e. explicit or

implicit, to fix prices, to limit production and supply, to assign market share or sales quotas, or to involve in collusive bidding or bid-rigging in one or more markets. Cartel is defined in section 2, subsection(c) of the Act, which states:“Cartel” includes an association of producers, sellers, distributors, traders or service providers who by an agreement among themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions in services¹. This definition in the bare Act which gives a wide angle of understanding of cartel. And thus, this section extent not to compete or restrict the competitor.

ANTI-COMPETITIVE AGREEMENTS AND CARTELISATION

Before the implementation of competition Act and there was no Anti- competitive Act in India had explicitly and comprehensively defined cartel, though it was implicitly covered under Section 33 of the Monopoly and Restrictive Trade Practises Act, 1969. A cartel is often described as a horizontal agreement that provides for restriction of consumers by following ways, price fixation, customer and territory allocation, set the distribution of goods and services, bid rigging, restriction of supply etc. and may be formed by an association of persons or enterprises. It may be said that it is one of the more malevolent forms of violation of competition law as it unequivocally damages competition and causes loss to the market economy and free competition, and it is owing to this seriousness of cartels they are subject to the *per se* rule in United States, United Kingdom and even in India. This basically means that cartels violate the law simply by the reason that they are in nature of restraint of trade and nature of buyers and it is immaterial whether they actually harm someone. The cartel is defined in section 2(c) and Section 3(3) says that any sort of price fixation, bid rigging and allocation of territory will be presumed to have an adverse effect on competition. Section 3(3) of the Indian Competition Act is in tandem with the UNCTAD’s [United Nations Conference on Trade and Development] Model Law of Competition. The definition of a cartel is very broad and inclusive covering both trade and competition and covers any and everything that may try to limit competition, restrict or inflate prices, control production and make arrangements that bar entry of new players or cause them a hindrance. The Competition Commission of India (CCI), while inquiring into the alleged contraventions of section 3(1) or 4(1) may, if it opines that there exists a prima facie case order an investigation by the Director General (DG). The cartels are facing heavy litigation since the MRTP Act, 1969 and then the competition Act 2002 took place. It has been ruled in *Alkali Manufacturers Association of India v. Sinochem International Chemicals Co. Ltd*². that in any economic field a greater dimension has to be given to the word “cartel” to include all sort of combinations, which are anti-competitive. The Supreme Court has defined the word cartel in *Union of India v. Hindustan Development Corporation*³ saying that “cartel, therefore is an association of producers who by agreement among themselves attempt to control production, sale, and price of the product to obtain a monopoly in any particular industry or commodity. It

¹https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

²*Alkali Manufacturers Association of India v. Sinochem International Chemicals Co. Ltd.*, [1999] 98 Comp. Cas. 333(CLB).

³*Union of India v. Hindustan Development Corporation*, (1994) AIR 988 (SC).

may be any combination the object of which is to limit or control trade or production, distribution, sale or price of the goods or services.”A cartel may be formed for a variety of reasons which are reflected in the definition itself but for the sake of elucidation it may be stated that the main driving factors behind the formation of a cartel are avoiding price wars, selling at a uniform price, dividing territories where each enterprise can practice local monopoly, restricting production by having fixed quotas, creating impediments to entrance of new players and even distributing profits among themselves. Even attempt to control is deemed to be a part of cartelisation i.e. if some entities have an intention to achieve monopoly by combination or the probability of monopolization of a relevant market and makes an attempt to control any part of the trade in the goods or provision of services then it shall be treated as an attempt to control. This principle has also been stated in *Copperweld Corp v. Independence Tube Corp*⁴.

ISSUES FACED BY INDIA

After the independence of government of India, the government ensures policy regarding the improvement of trade and development. And on certain period there is degrading of consumers and they totally exploited. Through the implementation of MRTP Act 1969, they could not complete the whole extent of competition in the market. And there is no penalize provision relating to unwanted trade and business in the following MRTP Act. And Competition Act 2002 came into the play for more distinctly provide secure play in the market for the market. And they brought many regulation and prohibition act to abolish and prevent from unrestricted activities among the competitors. There are many issues which India or for that matter any system of competition law in the world would face; like the extent to which the unilateral conduct of firms with market power should be controlled, the extent to which transactions can be modified, the price which a new player or customer should pay to access an essential facility, the relationship between intellectual property and competition law and to what degree should a merger be prohibited. One-point solutions of all these problems would be to scrutinize and keep an eye on agreements between independent firms which smell of restriction and establish a hierarchy and severity of cartelization involved and set up penal provisions accordingly which may amount to imprisonment for the more serious offenses. Some other policy questions include whether sanctions should be available against individuals as well as companies and the extent of leniency which can be given to whistle-blowers from within the cartels.

CEMENT CARTELIZATION IN INDIA

The cement cartel will come under price cartel which is one among types of the cartel. In India, cartels have been alleged in various sectors like cement, tyres, trucking, steel, family planning devices (Copper T) and the like. India is the second largest manufacturer of cement in the world after China and so the existence of cement cartels in India does not come as a surprise. Ever since liberalization and decontrol, cement manufacturers have been accused of cartelization and recently in 2007 the Monopolies and Restrictive Trade Practices Commission, New Delhi ruled

⁴*Copperweld Corp v. Independence Tube Corp.*, 467 US 752, 754-756 (SC 1984).

that cement manufacturers have indeed been acting in a manner attracting Section 33 1 (d) of the MRTP act and passed a cease and desist order against the manufacturers. The Director-General brought a case against the Birlas, ACC and JK group houses alleging that they control 50 percent of the total cement production and have an arrangement that allows them to control cement market, prices, distribution etc. However, there was no direct evidence of an arrangement and the court relied on the ruling given in *Union of India v. Hindustan Development Corporation*⁵ saying that there has to be proof of an agreement among the concerned parties to act in concert and that such agreement may be tacit or inferred. Recently in 2012, the Builders Association of India filed a case against the Cement Manufacturers' Association alleging a violation of Sections 3 and 4 of the Competition Act and setting up of the cartel which was anti-competitive in nature. The court held that an existence of written material was not necessary to prove a common understanding or agreement and it is sufficient if the activities of the companies imply the existence of such an agreement. The fact that production and dispatch of the companies were fluctuating in a similar manner was considered critical evidence. It was held that the act of limit and control of production and supplies in the market caused upward movement in the price of the cement and that the deliberate act of shortage in production and supplies by the cement companies and the almost inelastic nature of demand for cement in the market resulted in higher prices in the cement. Thus, it was held that the cement companies acting together had actually limited, controlled and also attempted to control the production and price of cement in the India market. The act was held not only detrimental to the cause of the consumers but also to the whole economy since cement was a crucial input in construction and infrastructure industry vital for economic development of the country and the appropriate penalty was imposed. The buck did not stop here and on further complaints the Competition Commission of India (CCI) ordered further probe by the Director General (DG) who submitted his report on May 30, 2011, and in which he stated that the prices of cement had risen in an eerily similar way although the cost of sale had increased only marginally. An article published in the *Business Standard* stated that major cement producers along with Cement Manufacturers' Association (CMA) divided the whole market into five zones, which enabled them to control the supply and fix prices by forming a cartel and that according to the DG's investigation report, CMA formed a high-power committee and the prices of cement were discussed in its meetings⁶.

THE 2012 TYRE CARTELISATION CONTROVERSY

In the year 2011, it appeared that another major cartel in India is soon to be busted and this came to light in the backdrop of consumers having to face steep price hike on tyres, increasing the costs of maintenance of their vehicles. It was alleged that the major players of this industry had conspired together to create an artificial price hike of tyres and charges were levied against the Automotive Tyre Manufacturers' Association (ATMA) and the major players in the market which

⁵Union of India v. Hindustan Development Corporation, (1994) AIR 988 (SC).

⁶Sushmi Dey, *Busted: 'Cartelising' cement firms*, Business Standard, http://www.business-standard.com/article/companies/busted-cartelising-cement-firms-11206260067_1.html (last updated February 25, 2014).

included Apollo Tyres Ltd, MRF Ltd, JK Tyre and Industries Ltd, Birla Tyres and Ceat Ltd and it was alleged that they control 95 percent of the industry. A much publicised litigation took place in the case of *All India Tyre Dealers' Federation vs. Tyre Manufacturer⁷s* in which the commission observed that “certain industries provide a structural basis that is conducive for cartelization and that that tyre industry in India, being highly oligopolistic and concentrated in nature, having entry barriers and a homogenous product, is conducive for cartelization but there are other factors that dilute the above structure and create conditions which do not sustain the maintenance of a cartel.” The Commission was of the opinion that price parallelism *per se* may not violate the provisions of the Act and that in certain cases price parallelism could have been dictated solely by economic reasons and that it was not a violation of the Competition Act if it does not result from the alleged concerted action. The Commission also weighed various parameters and held that the presence of other mitigating factors such as the bargaining power of the Original Equipment Manufacturers known as the OEMs, who constitute a majority of the customer base, and the options to replacement consumer to retreat, diluted the factors suggesting collusive actions. It also held that the levy of anti-dumping duty on the imported tyres suggested that cheaper options were available and hence the existence of cartel cannot be established.

INDIA AND INTERNATIONAL CARTELISATION

Another issue which India faces is lack of tie-ups with other governments or signing up international treaties to handle international cartels that have effects in many different countries, given that national laws apply only to harm that occur in national jurisdiction, and some countries have no anti-cartel laws at all, case in point being Information Technology cartels and Vitamin cartels. International price fixation if done by a multinational company is bound to hit India because of the simple reason that there are Indians who are buying the goods of that company and if that company is minting profit out of the cartel it is because there are Indians who are paying higher prices for their goods. In 2005 Samsung, the South Korean giant had pleaded guilty and paid a criminal fine of more than the US \$300 million for its role in the dynamic random-access memory (DRAM) industry which is the second largest criminal antitrust fine in history (second only to the Vitamin cartel case). Three companies and five individuals were charged in a fine totaling more than the US \$646 million. The relevance of this case is that its ramifications were felt all over the world but somehow Samsung got away by paying damages only in the USA, perhaps a well drafted International Competition Law or the signing of a multilateral treaty would prevent the occurrence of such events in future. The world was shocked when consumer goods giants Unilever and Proctor and Gamble were fined £ 280 million for setting up soap and washing powder related multi-national cartel. It has to be noted that Surf, Tide, and Lux are some of the leading brands in India which are produced by these MNCs. Another estimate which comes from a study done by Simon Evenett and Julian L. Clarke says that Indians in total paid excessive money amounting to over US \$ 25.71 million but India was not able to bring such cartels to justice nor could it get any money from the settlement amount due to absence of proper laws and international agreements. Although the new Competition Act has incorporated the effects doctrine

⁷*All India Tyre Dealers' Federation vs. Tyre Manufacturers*, (2013) Comp. L.R. 92 (CCI).

where the competition commission can make an enquiry into events happening outside India and negatively affecting Indian economy, but the practical application of this provision and how properly can such investigation be done is something which we will come to know over time. It is an established fact that the developed world is coming to all guns blazing against cartelization and is pushing for the maximum when it comes to establishing deterrence and the US \$ 646 million fine on Samsung bears testimony to the fact. What it means is that Multi-National Companies will now push to establish cartels in the developing world where there is an absence of competition law or where it is not well drafted. The absence of proper deterrence is an invitation to enterprises to form cartels. As of now the institutions engaged in battling cartelization internationally include the Organization for Economic Co-operation and Development, International Competition Network, United Nations Conference on Trade and Development and the World Trade Organization. For India, cooperation with these organizations and entering into multilateral and bilateral agreements is the need of the hour.

THE VITAMINS CARTEL CASE

This case involved the top players of vitamin industry like Rhone-Poulenc of France, Takeda Chemical of Japan, Roche AG and BSF of Germany who all formed a cartel dividing up the world market and fixing price all over the world in the 1990s. Of these producers, the French giant Rhone-Poulenc defected and exposed the entire cartel under the US leniency laws but not before the cartel had enjoyed a free run of ten years during which they duped the entire world out of millions of dollars and the worse hit were developing nations. Roche paid a fine of US \$ 500 million and the total fine collected exceeded the US \$ 1 billion in the US alone. It was estimated that the developing world paid an awe-inspiring total of US \$ 2700 as overcharge during the 1990s and that regimes with a weak system of competition law suffered more. India alone suffered a loss of US \$ 25 million.

POWERS OF THE COMMISSION:

The Monopoly Restrictive Trade Practice Act does not empower any penalties for the wrongdoer. Under section 27 of competition Act which gives power to the Competition Commission of India which they can impose strict orders and fines on the wrongdoer cartel activities. According to this section 27, Competition Commission of India can impose a penalty which is equal to three times amount of profits made out of the cartel agreements or 10% of the average turnover for the past three financial years, whichever is higher. Monopoly Restrictive Trade Practice Act does not confer any appropriate jurisdiction to Monopoly Restrictive Trade Practice Commission. If goods are imported to India and such in case the Indian party is affected only the penalty can only be imposed on such anti-competitive agreements. After the new amendment enforced by the commission that the new law has the extra-territorial reach and its provision is based on the 'effects doctrine'. Under Section 32 of this Act states that the Competition Commission of India has the power to inquire to any restrictive agreement which has an anti-competitive effect or appreciable adverse effect on Indian markets irrespective of where the involved parties are located.

PENALTIES

Before the enactment of competition Act 2002, the Cartel activities were monitored with the help of Monopoly Restrictive Trade Practice Act failed to levy severe punishments and procedure to restrict unfair practice to the offenders involving cartel activities. At the same time, the competition Act laid lenient practice which did not affect the cartel activities in any manner. Under Section 46⁸ of Competition Act laid down following, the commission may if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this act or the rules or the regulations. Provided that lesser penalty shall not be imposed by the commission in cases where proceedings for the violation of any of any of the provisions of this act or the rules or the regulations have been instituted or any investigation has been directed to be made under section 26 before making of such disclosure. Provided further that lesser penalty shall be imposed by the commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who first made the full, true and vital disclosures under this section. Provided also that the commission may if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, –

- 1) Not complied with the condition on which lesser penalty was imposed by the commission or
- 2) Had given false evidence: or
- 3) The disclosure made is not vital;

And thereupon such producer, seller, distributor, trader or service provider and be tried for the offense with respect to which the lesser penalty was imposed and shall also be liable to the imposition of the penalty to which such person has been liable, had lesser penalty not been imposed⁹. Section 46 deals with lenient punishment, on the other hand, the European competition Act takes a strict and rigid punishment and action on the conduction of such cartel activities. European commission imposes a heavy fine on violators where the caution of the action takes place either within the state or in overseas. To calculate fine or any penalty in cartel activity, the commission takes account of the gravity of the violation and it is related to circumstances. The commission also takes account of the market share held by the companies so the commission can look over each company's participation in infringement and which causes damages to the consumers. So, these made a perception for legislators to change these flaws by making an

⁸<https://www.cci.gov.in/sites/default/files/faq/competitionact2012.pdf>

⁹Ibid

amendment in 2007 as follows:Section 46¹⁰ stated the commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violation and such disclosure is vital, impose upon such producer, seller,distributor, trader or service provider a lesser penalty as it may deem fit, then leviable under this act or the rules or the regulations. Provided that lesser penalty shall not be imposed by the commission in cases where the investigation directed under section 26 has been received before making of such disclosure.Provided further that lesser penalty shall be imposed by the commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.Provided also that the commission may if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, -

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And thereupon such producer, seller, distributor, trader or service provider may be tried for the offense with respect to which the lesser penalty was imposed and shall also be liable to the imposition of the penalty to which such person has been liable, had lesser penalty not been imposed¹¹.

NEED FOR BETTER INVESTIGATION TECHNIQUES IN INDIA

Sherman antitrust law which criminalizes the cartel activities in the USA and also many other countries in the world implied the concept of criminalizing the cartelisation as it eventually affects the countries economic status. The important point for relying on the Sherman Act is that the Department of justice of United States of America laid down certain enhanced investigation tools to bring down cartel activities. The legislative drafters of this Act drafted very effectively and the intention of the Act to include strong enforcement tools.

(1) Powers of Search and Seizure

To carry out investigation effectively the investigating authorities should be provided with the power of search and seizure. The investigating authorities are required to gather evidence to connect the suspect in the crime and so they are supposed to have the power of search and seizure to track down the members involving in cartelisation. The main reason for this power is to minimize the chances of evidence getting destroyed.

¹⁰http://www.mca.gov.in/Ministry/actsbills/pdf/Competition_Amendment_Act_2007.pdf

¹¹Ibid

(2) Power to Search Private Homes

Irish competition authorities believe that individual member plays an important role in the cartel activities. So, bring down these offenders the authorities treat all the abetting members equally for the commission of their offense, and so to establish their link in the crime activities should be given the power to raid the private places. And this will help the authorities to gather evidence and go forward through the investigation easily.

(3) Powers of General Detection

The investigating authorities need secondary evidence to substantiate their point in the investigation and for that, they need to obtain evidence such as evidence such as telephone records to link those communicated with each other, Bank records to link those transferred or obtained money regarding cartel activity. So, these types of sources can help investigators to investigate the case in an effective manner.

CONCLUSION

Cartels being an anti-competitive agreement which gives an appreciable adverse effect and indirectly affects the consumer. The author concludes by given understanding of provision of competition Act and impact on Indian society and overseas through a comparative analysis. The competition Act which eliminates the unrestrictive competitors and creates fair play market over consumers. Moreover, there must be a participation from the general public for the abolish awareness throughout the market. The consumer must give freedom over the market to have accessibility. On the whole, the above topic "CARTELISATION" is extensively dealt with the impact of cartelisation and the anti-competitive agreements in India and issues and penalties faced by India. Hence, it is clearly inferred at this present juncture that India must adopt better investigation techniques for a better economy.

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