CARTELS AND COMPETITION: AN ADVERSE ASSOCIATION

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WHAT IS A CARTEL?

As early as the 483 AD, the Eastern Roman Empire punished price fixing in relation to clothes, fisheries, sea-urchins and other goods. In 1776, Adam Smith without defining a cartel stated, "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[2]

The Black's Law Dictionary defines a cartel as, "a combination of producers of any product joined together to control its production, sale, and price, and to obtain a monopoly in any particular industry or commodity. Also, an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or unfair competition and allocate markets, and to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products."[3]

Cartels are of two types: International Cartels and Domestic Cartels. As the names suggest, an international cartel is one which operates on a global level. It can be government controlled or can be between private global firms, i.e. those with members headquartered in two or more nations. International cartels tend to be larger, better publicized, more injurious to markets, and geographically more widespread than local cartels.[4] Domestic cartels on the other hand are those which involve an agreement among competing firms in a particular sector in the same country.

Some famous cartel cases around the world are the *International Vitamins Cartel* in which all leading manufacturers of vitamins located in Belgium, Canada, France, Germany, Japan, the Netherlands, Switzerland and the United States were included or *the Rockefeller*

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[2] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 80 (1776)
[3] BLACK'S LAW DICTIONARY, 270 (4th Ed., 1968); U. S. v. National Lead Co., D.C. N.Y., 63 F.Supp. 513
[4] John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 3 (AAI Working Paper No. 12-03, 2012)

Foundation, which influenced the U.S. and Europe in the early 20th century. After the U.S. Supreme Court ordered dismantling of Rockefeller-controlled Standard Oil Trust in 1911, the Rockefeller Foundation went on to control the US healthcare sector or finally, *the OPEC*, one of the best known cartel that is almost impossible to break, for the simple reason that it controls world's crude oil production and it can, at will, choose to cut output to get the desired price for its produce.

THE INDIAN POSITION REGARDING A CARTEL

Section 2(c) of the Competition Act, 2002 (hereinafter referred as 'the Act') defines a cartel as "an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions of services." The Act includes different class of persons to form a cartel. This makes the domain of cartels in India much wider than other jurisdictions like the European Commission which includes individual companies only.

Before the Act was passed by the legislature, cartels thrived mainly because of the MRTP Act, 1969, which could only pass 'cease and desist' orders and nothing more.[5] The act in 2003 formed the CCI which has much more powers than its predecessor, the MRTPC. The Commission has powers to pass inter alia any or all of the orders under section 27. These include directions to the parties to a cartel agreement to discontinue and not to re-enter such agreement or direct the enterprises concerned to modify the agreement and so forth.

Section 32 of the act gives extra territorial jurisdiction to the authorities. This essentially means that the universally accepted principle that even if the cartel affects the competition of a particular country, then it does not matter if any party to the agreement is outside the country, it can still be prosecuted, is also accepted in India.

Finally, as per Section 46 of the Act the commission is empowered with the power to grant leniency i.e., by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The scheme is designed to induce members to help in detection and investigation of cartels.

[5] The Monopolies and Restrictive Trade Practices Act, 1969, § 10(a)(i) with § 37

CARTELS AND APPRECIABLE ADVERSE EFFECT ON COMPETITION

Anti-competitive agreements are incorporated under section 3 of the act. The scheme of the act divides agreements into two categories: horizontal agreements and vertical agreements. The former, are those among competitors and the latter, are those relating to an actual or potential relationship of purchasing or selling to each other. Vertical agreements generally leniently dealt with than horizontal agreements, as *prima facie,* horizontal agreements are more likely to reduce competition. Cartels are one type of horizontal restraints of trade. In some jurisdictions, cartels are criminal violations, whereas other types of restraint of trade are civil violations.[6]

At the very onset it is pertinent to note that the Supreme Court has held that the Act is governed by the rule of reason and the per se rule as applicable in the U.S. has no application in India.[7] However, as per section 3(3), "any agreement entered…...shall be presumed to have an AAEC." It is submitted that there is confusion regarding the application of the per se rule in India. The main question that arises is that whether the per se rule similar to the term presumption as coded under section 3(3) of the act?

The Raghavan Committee on horizontal agreements stated that, "agreements are considered illegal only if they result in unreasonable restrictions on competition. Based on the U.S. law, this is tested on what is known as the "rule of reason" analysis. It is also required that the parties to the agreement are engaged in rival of potentially rival activities. A potential rival is one who could be capable of engaging in the same type of activity."[8]

On Presumption of illegality, the committee stated that, "the following kinds of horizontal agreements are often presumed to be anti-competitive:

a) Agreements regarding fixing prices. This would include all agreements that directly or indirectly fix the purchase or sale price.
b) Agreements regarding quantities. This includes agreements aimed at limiting or controlling production and investment.

[6] John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 3 (AAI Working Paper No. 12-03, 2012)
[7] Hindustan Lever Ltd. v. MRTP, AIR 1977 SC 1285
[8] Government of India [GOI], Report of the High Level Committee on Competition Policy and Law, ¶ 4.3.5 and ¶ 4.3.6, (May, 2000)

c) Agreements regarding bids (collusive tendering). This includes tenders submitted as a result of any joint activity or agreement.

d) Agreements regarding market sharing. These include agreements for sharing of markets by territory, type or size of customer or in any other way."[9]

Thus, section 3(3) of the act leads to a presumption that horizontal agreements, including cartels restrict competition and presumed to have AAEC. The concept of per se illegality is the prodigy of U.S. Anti-Trust Law and finds a parallel in similar legislations of other countries, such as, the Australian law which prohibits most price fixing arrangements, boycotts and some forms of exclusive dealing[10] and the U.K. law which presumes that certain agreements have an 'appreciable effect' on competition. Hence, such agreements are presumed to be illegal and the governing principle is that they have an 'appreciable' anti-competitive effect.[11]

Presumption in India in codified under the Evidence act. Presumption is of three types, (i) 'may presume', (ii) 'shall presume' and (iii) 'conclusive proof'.[12] The Supreme Court has stated that, 'may presume' leaves it to the discretion of the court to make the presumption according to the circumstances of the case. 'Shall presume' leaves no option with the court not to make the presumption. The court is bound to take the fact as proved until evidenced is given to disprove it. Such presumption is also rebuttable. 'Conclusive proof' gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to the combating that effect. This is irrebuttable presumption.[13]

Therefore, the words shall presume occurring in section 3(3) make the presumption rebuttable under Indian Law. Accordingly, two grounds can arise for the opposite party to rebut this presumption. Firstly, under section 3(3) itself where the opposite party may rebut the presumption by showing that none of its actions violate any of the clauses [(a) to (d)] of the sub-section. The other possibility is that the party may rebut the presumption by availing the grounds laid in section 19(3) of the act. Section 19(3) lists factors that have to be considered by the Commission while determining AAEC. These are: (a) creation of barriers to new entrants in the

[9] See *id*., at ¶ 4.3.8
[10] See generally, The Competition and Consumer Act, 2010 (Australia)
[11] See generally, The Competition Act, 1998 and the Enterprise Act, 2002 (United Kingdom)
[12] The Indian Evidence Act, 1872, § 4
[13] P.R. Metrani v Commissioner of Income Tax, (2007) 1 SCC 789

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 services and (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. The existence of first three factors would normally indicate AAEC while their absence would normally indicate no AAEC. The presence of the second three factors would normally indicate no AAEC as they are in nature of efficiency justifications. The absence of the second three factors alone can neither determine AAEC nor establish efficiency justifications in most cases therefore it is more prudent to examine all the above factors together to arrive at a net impact on competition.[14]

Elaborating through an example, the CCI in *FICCI- Multiplex Association of India* v. *United Producers/Distributors Forum*[15] found overwhelming justification in the report of the D-G to support the conclusion that the association operated in a market environment that is extremely conducive to cartelization and that its conduct, showcased some of the classic behaviour pattern of a cartel. The boycott of multiplexes by the association was as blatant an act of limiting or controlling of production, distribution etc. of films as can be. Similarly, the joint stand on fixing the revenue ratio was unarguably an example of joint price-fixing. Neither the fact of the boycott nor the joint efforts to fix the revenue ratio were disproved or even effectively contradicted. Thus, a penalty of Rs. 1 lakh each was levied on the respondents.

ARE ALL CARTELS BAD?

The aforesaid discussion brings us to the next question that whether all cartels affect competition and are harmful or not? One can argue that a cartel is the most pernicious form of anti-competitive activity. When rival companies which should ideally be competing for market share by offering better products at the most competitive prices get together to cooperate on output, prices and territories, consumers are denied choice. They are forced to pay higher prices

[14] Jindal Steel and Power Ltd. v. SAIL, (2012) 107 CLA (CCI) 278 (20/12/2011) ; Automobile Dealers Association v. Global Automobiles Ltd., Case No. 33/2011 (CCI) (03/07/2012); Neeraj Malhotra v. Deustche Post Bank Home Finance Ltd., (2011) 102 CLA (CCI) 181 (02/12/2010)
[15] Case No. 01/2009 (CCI) (25/05/2011) ('*Theatre Case*')

and sometimes even accept lower quality products.[16] *But* it is emphasized that all instances of sharp price increases cannot be attributed to cartelisation or collusive behaviour.

A plain reading of the preamble and statement of objects and reasons of the Act makes it clear that all competition is not harmful. The Act seeks to promote and sustain competition in the market and to ensure freedom of trade carried on by the participants.[17] According to section 3, persons or enterprises cannot enter into an agreement in respect of supply, storage, distribution of goods and provisions of services which create an AAEC and shall be void.

In some industries where there is a dominant player, the smaller players tend to follow the price strategy of the larger player. This is referred to as *price parallelism* in competition law. The consumer is hurt by such behaviour too, but since there is no agreement formal or otherwise between the players, it cannot be referred to as a cartel.[18]

Furthermore, in the *Theatre Case*, the CCI has recognized the permissibility of *collective bargaining* as a legitimate argument against cartelization. The commission held that, "collective bargaining may not be per se bad in law and may be resorted to for legitimate purposes in accordance with law. However, when the trade associations enter into agreements, as in the present case, in the garb of collective bargaining which is anti-competitive in nature, then no competition watchdog can countenance such act/agreement. Resultantly, the plea of collective bargaining, in the facts of the present case, is without any merit and the same is directed to be dismissed."[19]

PROVING A CARTEL

Proving cartelisation is tough. One does not simply decide unlawful things through lawful means. Thus, most cartels hardly leave behind any paper trail of an agreement that can be used against them. Direct evidence is scarcely found, as cartel members tend to agree orally

[16] Tina Edwin, *How can CCI tell what is a cartel*, ECONOMIC TIMES (Delhi) July 30, 2012 (Quoting Geeta Gouri, CCI member)
[17] The Competition Act, 2002, Preamble
[18] *Supra* Note 19
[19] *Supra* Note 18

instead of entering into an agreement. The law therefore supports the use of *Indirect (circumstantial) evidence* to prove the existence of a cartel.[20]

In *Builders Association of India* v. *Cement Manufacturer's Association*,[21] the DG found infringement of the provisions of section 3(3) of the Act based only upon economic analysis and market behaviour to prove some kind of meeting of minds and there was no direct evidence to support any cartelization or anti-competitive agreement among them and the CCI relied on the same while levying a Rs. 600 crore penalty on the respondents. Glancing through section 2(a) of the act, makes it clear that there is no need for explicit agreement' to prove a cartel. The same can be inferred from the intention or conduct of the parties.

Vis-à-vis the position of law in other jurisdictions, one can find that circumstantial evidences have been used in the Newspaper Cartel Case of Brazil[22] or the High Fructose Corn Syrup Antitrust Litigation of the U.S., [23] or the Atlantic Sugar Case of Canada[24] or the Hen's eggs case of Latvia.[25] Corroborating with the OECD working paper on 'Prosecuting Cartels without Direct Evidence of Agreement'[26] where it has stated that, "circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence. In order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreement," one can come to a final conclusion that Indirect (circumstantial) evidence to prove a cartel is an accepted proposition in law.

EXEMPTIONS FROM CARTELS

The scheme of the act under the proviso to section 3(3) exempts efficiency enhancing JVs from the, *shall be presumed* rule. Also, exempted is the right to restrain infringement, or impose reasonable conditions for protecting, rights (IPR) under Copyright Act, Patents Act, etc. and the right to export goods from India.

[20] Competition Commission of India [CCI], Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India, 7 (April 25, 2008)
[21] Case No. 29/2010 (CCI) (20/06/2012) ('*Cement Case*')
[22] See *id*., at 158 (quoting the Newspaper Cartel Case of Brazil)
[23] See *id*., at 158 (quoting the High Fructose Corn Syrup Antitrust Litigation of the U.S.)
[24] Sugar Refineries Co. v. A.G. Can., [1980], 2 S.C.R. 644
[25] *Supra* Note 24 at 158 (quoting the Hen's eggs case of Latvia)
[26] OECD, *Prosecuting Cartels without Direct Evidence of Agreement*, 17, DAF/COMP/GF(2006)7 (11 September, 2006)

CONCLUSION

The legislative intent behind the act as elaborated through its preamble makes it clear that the act promotes healthy competition. The main objective is to promote and sustain competition and thereby serve the interests of the consumers. It aims to enhance the efficiency levels within the economy, promote greater innovation in the market. The act seeks to achieve these objectives through its provisions, namely, to prevent the anti-competitive practices under sections 3 and 4. The act further punishes any violation through heavy penalties, cease and desist order and many other such measures.

According to Vinod Dhall, former CCI Chairman, cartels are viewed as the most pernicious form of violation of the competition law. All competition laws across the world reserve the most severe treatment for cartels and so does the Indian Law. Cartels are presumed to be anti-competitive and hence there is no need to gather further evidence on effects of competition. For cartelization, the punishment is most serious wherein the penalty imposed under the Act for each year is about 10% of the turnover of the last three years or three times of the profit made during the period of cartelization, whichever is higher.[27]

However, it is clear from the preceding discussion that all instances of cartelization cannot be regarded as void. The CCI in *All India Tyre Dealers Federation* v. *Tyre Manufacturers*[28] stated that, "there are some factors which may be conducive to cartelization but they may be diluted due to other factors. The fact that market concentration is very high with entry barriers and the product is homogenous which support cartel formation, but high bargaining powers of Original Equipment Manufacturers due to the volumes, options to replacement consumer to re-tread, increasing radialization and imports effectively being cheaper even in the brief period of anti-dumping duty go against sustaining a cartel structure." Thus, cartels can survive the test of legality if there are other reasons that explain their alleged illegality, which are generally accepted principles in competition law.

[27] Lex Witness, *CCI to work against Cartels*, available at http://www.witnesslive.in/view_story.php?id=19 (Last visited on March 3, 2013)
[28] MRTP Case RTPE No. 20/2008 (16/01/2013)