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'Cartel' as an anti-competitive agreement under the competition act, 2002: A critical analysis

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Abstract
In this article the researcher aims to explain certain questions such as how the concept and meaning of competition has changed with the change in the corporate landscape in India and how far the Competition Act, 2002 has been successful to serve this change. The focus of the article is upon the facts which are related to the enactment of the Competition Act and its actual implementation keeping in view the actual plethora of cases which though come under the scrutiny of Competition Act under the category of Anti-Competitive Agreements with special reference to cartelisation. The article conceptualizes the term cartel and explains the standing facts which establishes a cartel. The researcher emphasizes upon how cartel is also a kind of anti-competitive agreement though they might be formal, informal or secretly operated agreements. The Researcher aims to systematically deal with the different aspects of cartel as is required for it to be an anti-competitive agreement. A critical analysis of the famous cartels formed in India has been taken up by the researcher so as to bring about the technicality of such agreements and their harmful effects on market economy and consumer welfare.

Keywords: cartelisation, anti-competitive agreement, competition, competition commission of India, cartels, investigate

Introduction

Objectives of bringing anti-competitive laws

The objective of competition law might differ from nation to nation and the ideal and the ideal set up for perfect competition might be the economic model which is generally the economist's vision but the main objectives of competition law is:

1. To bring about economic efficiency in order to achieve the economies of scale.
2. To prevent anti-competitive practices which adversely affect free and healthy competition [1].
3. To promote and sustain competition in market.
4. Protection of consumer's benefit [2].
1. To ensure free and healthy competition in order to enhance the spirits of other market participants to carry out trade [3].

Objective to protect the consumers

The Competition Act 2002, or for that matter any modern competition law typically tries to ensure the methodology of free market rivalry keeping in mind the end goal to guarantee effective allotment of investment assets. It is usually accepted that rival law is at last concerned with the insurance of the enthusiasm of the consumers. Then again, it may be said that customer's harm is by and large obtainable when the focused methodology to protect the ultimate consumers is impeded or harmed [4].

Genesis of Indian Competition Law

The Indian corporate landscape has been dominated by two types of enterprises namely public and private corporations. Even after independence India was greatly influenced by the British socialist pattern of economy. The government of India post-independence implemented the command and control policies through five year plans.

Initially after independence the Industrial Development and Regulation Act 1951 [5] was in force. This Act regulated the economic policy framework. The Hazari committee was constituted in 1951 to study and prepare report of the licensing policies under this act.

The committee in its report condemned the fact that government control and undue interference prevailed in all areas of working of corporations and the corporate houses need license for every small affair. This license raj expanded to small things such as expansion of the corporation, setting up any other related enterprise, shifting office etc.

The committee in its report submitted to the government of India mentioned how this licensing mechanism instead of controlling monopoly, bringing about disproportion and subsequently monopolizing the bigger enterprises [6].

The committee also criticized that planned economic model being followed by the government and said that this is leading to concentration of power and position in the already established and secured corporations [7].

In view of all this the government appointed the monopoly inquiry commission, to further substantiate on the findings of Hazari Committee related to monopolistic trade practices. The committee pointed out the anti-competitive and restrictive trade practices and drafted a bill to deal with such problems. The bill was later converted into MRTP Act, after getting assent of the parliament. The act has its origin in the Directive Principle of State Policy which talks of maintaining social order in the society by bringing about social and economic justice [8]. The act originally prohibited and curbed only monopolistic and restrictive practices and did not include unfair trade practices, but later with the amendment of 1984 [9] unfair trade practices were brought under the scope of the Act.

The Act has a general social policy function as well as economic policy function [10]. The thrust of the Act was directed toward:

1. Prevention of the absorption of economic wealth and power such that it does not adversely effect common

good;
2. Control of monopolies;
3. Injunctions banning monopolistic trade practices;
4. Prohibition and protection of consumers from unfair trade practices [11].

The major amendments were brought about by in 1991 to keep in pace with the labialization and globalization reforms brought about in market economy. With this amendment the provision related to concentration of economic wealth single handedly were deleted and the thrust of the Act was on preserving fair competition in economy and also protecting the interest of the ultimate consumers. The Act also protected the consumers against misleading and unreliable or deceptive advertisements, or any such related practice.

The MRTP Act is often criticized as not efficient enough to tackle international competition, though it has sufficient provisions dealing with domestic competition [12]. It can be criticized that even after independence and decades after that India did not realize the threats form international competition and had no laws with regard to the protection seeked by domestic companies against international cartels and anti-competitive practices.

Unlike the competition laws in other countries such as U.K and U.S.A [13] which addressed the need of the hour to tackled anti-competitive practices, our Indian legislation failed squarely in many aspects to deal with these problems completely.

The Act was not efficient enough giving regard to the global economic reforms and developments. Therefore the Government of India constituted a high level committee under the chairmanship of S.V.S. Raghvan [14] to deal with the issues of competition policies and laws regarding competition [15].

The Competition Act 2002 was enacted finally on the basis of Raghvan Committee report.

The Competition Act, 2002

This is by far the first comprehensive and efficient at par with the other legislations of the world which is enacted keeping in view both domestic and cross border competition [16]. With the liberalisation of economic policies, the national borders diffused into each other, trade related rules became much flexible therefore such legislation was the need of the hour.

The Act was contemporary to and efficient as:

1. The Competition Act 1988 of U.S.A.
2. Enterprise Act 20002 of U.K.

However before moving on to the scheme of the Act and its comparative analysis, we must analyse the Raghvan Committee report.

1. The Report discussed in all details both policy and laws related to competition
2. It recommended (focusing specially on consumers) that the modern competition law should cover all consumers who buy any kind of goods, irrespective of the purpose for which such purchase of goods is made.
3. The committee focused primarily on three things [17]:

3.1 arrangements among enterprises with special focus on anti-competitive agreements

3.2 How the enterprise misuse their dominant position or overriding position in the market and rules regarding or prohibiting such abuse.

3.3 Combinations or say mergers and acquisitions and how it should be regulated to bring about healthy competition.

4. The Raghvan Committee also recommended on the formation and establishment of CCI [18] as a regulatory and controlling authority to implement competition laws and policies and check upon it being obeyed diligently.
5. And the most important of all recommendations was the idea of repeal of MRTP Act so that the stringent and rigid provisions enacted under it, are flushed out. The committee idea beneath it was the fresh inclusion of flexible and behavioural competition regime.

Based on all these recommendations the Competition law i.e. The Competition Act 2002 was enacted to widen the scope of anti-trust laws and to embrace within it all economic developments and global norms.

General concept of Cartels

Any formal or casual arrangements between different enterprises dealing in similar kind of business to control prices of product or sale of product might be generally called Cartel. This is probably a mode used by corporate houses to control market pricing or any other relevant factors that is required for free market competition and thus cartels adversely effects market competition [19].

Or in other words cartel is an agreement or a type of arrangement between the competitors related to a particular sector of the market, for not competing on price, consumers or in markets. It is considered as the worst form of anti-competitive practice as it reduces and eliminates benefits of competitive pricing, better quality products and options to the consumers, and thus acts against the objective and purpose of competition in the market.

Generally cartels include agreements between business representatives not to rival each other. Cartelisation can happen in any industry and can include products or administrations at the assembling, conveyance or retail level.

Here in this process companies come together and combine so as to regulate and control prices of goods, capacity to produce, and also sale of goods [20].

On a very generic level cartel can be explained from day to day activity that we witness in our surrounding every day. For example most of us have witnessed in an auto-stand that, auto drivers have set timings and number of trips that one auto can make in entire day. No driver breaks this causal understanding which is between them. If an auto from different area comes and picks up person residing in the area these local auto drivers will not allow him to do so. This practice though formally not given a name, explains us the basis of cartels.

Now as the small example given above explains the behavior of auto drivers and ties between them, similarly on large scale enterprises enter into such ties or say agreement whereby they agree on such terms and conditions which would overrule competition or rivalry between them and fix up profits or earning for them. So this is how the concept of cartel goes on.

Anti-competitive agreements as has been discussed include cartels, though section 3 does not specifically uses the term cartel anywhere. Cartel has specifically been defined under the Competition Act 2002 [21]. But before taking about the

concept of cartel under Indian law a brief history of the development of this concept is highlighted upon by the researcher. The history of cartel does not vary much from the general historical background of anti-competitive agreement.

Cartelisation can be for two purposes namely:

1. To exercise monopoly and control by companies in the field of trade in service [22].
2. Cartelisation of trade in goods.

Here in both the cases there is an agreement entered into secretly. In the case of cartel generally it is hard to trace out because there is a secret conspiracy against consumers and against competition.

Historical background of cartels

The Elizabethan era witnesses the Industrial Monopoly licensing in early 1951, even before the passage of Sherman and Clayton Act [23]. This licensing system can be said to have similarity with our Modern Patenting process. But this system could not stand for community good as Queen Elizabeth used it for favours to the throne [24].

The Statues of Monopoly was later passed in 1653, when the parliament came into power and this statute save the patent rights from un due restrictions. Later with the coming of Sherman Act the concept of modern Competition laws arrived and Clayton Act confirmed specifically that no merger must take place which adversely effects competition. Hence an exclusive protection against anti-competitive practices and cartels was extended in the Act [25].

Later most of the civilized nations followed U.S laws regarding competition and framed their own comprehensive legislations on competition. In India the MRTP Act was enacted in 1969 but it has no expressed provisions against cartel or anti-competitive agreement [26]. But the Competition Act 2002 specifically brought out these concepts and provided schemes to regulate them.

Concept under Indian Competition Act

Under Indian Competition Act section 2(c) defines cartel. It is an inclusive definition and not exhaustive definition [27].

The basic ingredients of the definition are:

1. It is an association of or we might say it's a linking of-

1.1 Manufacturers,

1.2 Suppliers or wholesalers or retailors or vendors or distributors or traders or service providers.

2. Who with the help of agreements entered among themselves either control the price of products, manufacturing limit, sale or purchase goods, distribution or supply or goods or attempts to do so.
3. The provision of law also includes any such control exercised upon business in goods or services by forming such association.
4. This definition is important for the applicability of section 3(3) of the Act.

It is established that if the ingredients stated above are fulfilled then the firms or companies which are rivals to each other will not compete with each other. Instead every speculative business deal would already be fixed and there will be no chance for free competition. This practice would also go against general consumer welfare and their right to bargain.

Classification of Cartel

Basically these types of agreements can be entered into by either two or more enterprises established in the same jurisdiction or nation, or enterprises form different nations can enter into agreements to strengthen their position globally. The latter is also called international cartel as companies from different jurisdiction participate in it.

Also the classification of cartel might be based on the field of business i.e to say if the cartelisation between enterprises occurs with the motive to import goods or services into a country then it would be called import cartel. Similarly if it's related to export of goods or service then it is named as export cartel [28].

Effect of Cartel

Under Indian Competition law, the scheme to control, cartels includes every cartel which takes place in India or even outside the nation but its effect is in India [29]. Therefore the Commission has extra-territorial jurisdiction under this Act.

Role of CCI

Section 3 includes cartels hence the provisions under the Competition Act which are operative of anti-competitive agreements would also be operative on cartels. The role of the Commission in this context had already been discussed in chapter V.

The penalty for infringing section 3 is listed out in Competition Act [30]. These have already been discussed in the last chapter. Also along with other powers vested in the Commission the commission has exclusive rights to investigate into alleged cartels. The penalty which would be fixed if the allegations stand true will be triple the profits earned out of such cartel each year, calculated from the inception when this association was formed, or ten of the total turnover from such as agreement [31].

The commission reserves all power to impose the amount whichever is higher among the two. Also if such an agreement has been entered into between two or more companies then any official or director or member of the company who have participated or acted in furtherance of the alleged cartel would be punished by the Commission [32].

The standing facts which establishes a cartel

For the establishment of a cartel generally the facts that are taken into consideration are:

1. The competition from firms or enterprises which are not the member of this cartel is considerably reduced.
2. Because of the alleged cartel the price of the product or service must rise to an extent, which is much more than the price prevailing in areas where there is no such cartelisation or price of the product as would have been if there existed no such cartel.
3. The gains arriving out the cartel must be much more than the amount spent on establishing such a cartel.
4. There must be secrecy clause in such an agreement which is an alleged cartel because practically in most of the cases cartels are informal agreements. Here the tactics of dividing the market or fixing the price through monopoly or abusing market dominant position might be involved secretly.

Cartels were not so known in India while the MRTP Act, 1969 was in force. More so, because of the silence of the

Act with respect to punishment for cartelisation, cartels were creeping in into the Indian market at faster rate. Also, cartels are enemies to competition as they have adverse appreciable effect on competition and distort demand and supply chain in the market.

The instances of cartels started becoming frequent in the Cement, Pharmaceuticals, Shipping, Steel, liquor and transport industries in the last two decades. Although, there were strict controls exercised through different permits by various state governments in the liquor and public transport sectors, there was negligent control for setting up of big industries which ultimately had adverse effect on competition in the Indian market [32].

Cartels: *Modus Operandi*

These cartels are the children of anti-competitive agreements being entered upon and acts being done by the companies, and acts as a mode for price fixing, collusive bidding and market sharing. Such cartels adversely affect the stakeholders in the market i.e. consumers as well as the competitors outside the cartels, thus adversely affecting the overall market and the economy.

The mode of their functioning is very simple, as competitors come together agreeing not to compete with each other, with the object of exploiting the consumers and their choices and thereby distorting the market conditions for the purpose of making undue profits.

Competition Act, 2002: A Savior!

In the year 2002, the Competition Act came as a savior for both these stakeholders and since then has tried to infuse ethical behaviour in the Indian market. This Act has established the CCI [33], which is the only market regulator with respect to competition issues in the Indian market. Further, the Act has expressly defined 'anti-competitive agreement' [34] and 'cartel' [35] in an exhaustive manner, thereby including all forms of malpractices under the Act, which are being practiced in the market by different companies and leading to cartelisation.

Under the Act, cartels have been made punishable under the Act by a deterrent penalty in the form of fine of three times the illegal profit or ten percent of the turnover on each of the members of the cartel agreement for the entire period of cartelisation, whichever is higher [36].

Further, along with a provision of deterrent nature, the Act also has a provision of reformatory nature wherein the Act has enabled the CCI to enforce 'lesser penalty' on those members of the cartel who provide 'full, true and vital disclosure' about the cartel [37]. The CCI has also been conferred upon adequate powers of investigation and extra-territorial mandate [38].

Study of cases on cartel: a critical analysis

The Commission under the Competition Act has wide powers to investigate into any alleged cartel. But in the new economic needs of the hours what is more important is how far the effect of such cartels has been market devastating and how CCI has come out with techniques to control such losses. To establish the fact that a cartel exists several evidences are required.

In cases where the agreements are not formal the option of documentary evidence such as the papers of the agreements and other related documents cannot be produced. Hence here a basic question as to which factors would constitute evidence to establish a cartel arises.

Under recent trends as extracted from the modern economic structure CCI follows the global norms and considers factors such as:

1. Economic evidence such as how far the alleged cartel has adversely affected the price or liquidity of market shares [39].
2. Nature based evidence i.e to say what was the nature of the cartel? Which type of market it affected? Here the whole conduct of such a cartel from inception is observer and evidences are collected [40].

There have been several instances in the Indian market in various sectors where companies have formed cartels, both, prior to the enactment of the Competition Act and post its enactment. The sectors, cases of which will be discussed now, are transport industry, cement industry and shipping industry.

Transport industry saw the dawn of cartelisation in the year 1980s itself i.e. prior to the arrival of the Competition Act, 2002. Fixation of the freight rates without negotiating it individually with the members of the truck operator union for the elimination of competition in the market is very common in the transport industry. In the year 1980, a *'cease and desist'* order was passed by the MRTP Commission against 'Goods Truck Operators Union, Faridabad' [41], 'Rohtak Public Goods Motor Union' [42] and 'Bharatpur Truck Operators Union' [43], though in the absence of penal provision under the MRTP Act no fines could be imposed.

In the year 1996, ANSAC [44], comprised of six American soda ash producers, attempted to ship a consignment of soda ash to India at catalysed price. The MRTP Commission held it to be a *prima facie* cartel, taking into consideration the ANSAC membership agreement and granted an interim injunction [45] under the MRTP Act. However, the Supreme Court reversed the order of the Commission, *inter alia* on the ground that it didn't have any extra territorial operation.

The cement industry was also not far from the curse of cartelisation as in the years 2005 to 2007 it saw a huge [46] price rise of cement. At that time the cement industry was controlled by the big five companies, namely ACC, Ambuja Cement, Grasim, UltraTech and India Cement, which helped them in dictating prices through anti-competitive agreements. Due to this price rise the MRTP Commission issued notices to 14 cement manufacturers asking for information related to price fixing.

Thereafter, the three-member MRTP Commission bench found the Cement Manufacturers Association (CMA) and members companies like ACC, Grasim, Laffarge etc. guilty of cartelisation. Then, the Commission issued a 'cease and desist' order directing the companies not to involve themselves in any kind of arrangement *via* CMA or fixing the selling price of the cement in the market.

There is an association of shipping firms which operate on the same route and thus are engaged in fixation of freight rates and regulation of capacity. These associations act as cartels and their adverse effects are different from the effects which cartels in other industries usually have. In the year 2007, the IPBCC [47] was alleged of fixing freight rates and thereby increasing the same with effect from 1st May, 1st July and 1st September, 2007.

IBPCC has its operation on India and Europe routes where it controls 75% of the traffic. Shipping Corporation of India is also an IPBCC member. As, 95% by volume of India's

global trade and 70% by value is sea home, the effects of cartelisation by IBPCC on the competition in the Indian exports and imports and their costs can be gigantic. In this case finally the CCI had asked the Shipping associations to discontinue such cartelisation and other such anti-competitive practices [48].

In Re: Cartelisation in Industrial and Automotive Bearings CCI [49] had taken suo moto action against the companies involved in cartelisation thereby showcasing its power and authority as a regulator to stop market abuse by strong players. The present case was initiated by the Commission suo motu, pursuant to receipt of an application [50]. The application disclosed that Schaeffler, alongwith four other companies, namely ABC Bearings Limited (now amalgamated with Timken India Limited, National Engineering Industries Ltd. , SKF India Ltd. and Tata Steel Ltd., Bearing Division. These companies were involved in cartelisation in the domestic industrial and automotive bearings market from 2009 to 2014 which led to the increase in steel prices since 2009. In this case the CCI interpreted section of Section 2 (c) of the Act [51], a „cartel" also includes an attempt to cartelise [52].

The Commission in this case keeping in mind the ends of justice directed the Opposite Parties NEI, Schaeffler, SKF and Tata Bearing and their respective officials who have been held liable in terms of the provisions of Section 48 of the Act, to cease and desist in future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3 of the Act, and might amount to cartelisation. The parties were asked to cease such cartel behaviour and desist from indulging in it in future [53].

Conclusion

This article discusses the general concept of cartel and also the concept of cartel being a form of anti-competitive agreement under Competition Act 2002. The critical analysis of recent cases of cartels highlights upon the vast powers vested with CCI to deal with any and every form of anti-competitive agreement. The article discusses the need of competition in global economic market, and why at all this concept of competition is of utmost importance to us. Also the objectives of bringing competition laws, the need for competition regime to regulate anti-competitive practices shall only be fulfilled if CCI is successfully in totally curbing the practice of cartelisation. If the process of cartelisation is not prohibited there would be monopolistic practices by dominant market players and the role of competition in economic development shall not thrive.

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2. Reg.12, 15, 16, 22, Competition Commission of India (General Regulations 2009).
3. Section 22, Powers of CCI, Competition Act 2002.
4. *Supra*, at note 2.
5. This act was basically passed in order to implement the Industrial policy resolution passed in 1948. The Act gave large powers to the government to interfere in cases of licensing of industries, they had to take clearance for every single activity of deciding the location, expansion of enterprise, also internal management and functioning was open to governmental restrains at every level.
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7. *Ibid*, Pg. 747-748.
8. Article 38, 39, Constitution of India, 1950.
9. MRTP act was substituted by MRTP (Amendment) Act 1991 post 1991 amendment and this amendment brought about major changes in the legislation with special focus on protection of the interest of the consumers.
10. *Supra*, at note 21, Pg.12.
11. *Ibid*.
12. Section 33, MRTP Act 1969.
13. The Sherman Act of U.S.A was enacted way back in 1890, when India had no laws at all, even after independence it took India nineteen years to come up with a legislation and this legislation was also not efficient to deal with current economic needs. A close study of the Hazari Committee and Raghvan Committee shows that both the reports had the same central ideas yet it took another yet it took us another thirty-two years to come up with a comprehensive legislation like the CA, 2002.
14. He was the chairman of the Public Sector Undertaking, BHEL (Bharat Heavy Electrical Limited).
15. The committee submitted its report to the Central Government on, 2000.
16. Talati P Adi, Mahala S Nahar. *Competition Act, 2002 Law, Practice & Procedure*, Commercial Law Publishers, Ed, 2006.
17. Talati P Adi, Mahala S Nahar. *Competition Act, 2002 Law, Practice & Procedure*, Commercial Law Publishers, Ed. Report of the High Level Committee on Competition Policy and Law, Annexure –D, 2006, 712.
18. The preamble to the Competition Act 2002 mentions the objective behind establishment of CCI, chapter IV of the Act deals with the powers and functions of CCI.
19. Dr. Naidu R. Y., *Cartels vis-à-vis Competition Law: Judicial Analysis*, NALSAR Law Review,7(1):165.
20. *Ibid*.
21. Section 2(c), Competition Act, 2002.
22. For example two Companies which provide similar services to consumers can enter into agreements to monopolize that particular service, or to restrain other companies providing similar service.
23. The Sherman Act was passed in 1890 and Clayton Act in 1914.
24. Dr. Naidu RY. *Cartels vis-à-vis Competition Law: Judicial Analysis*, NALSAR Law Review,7:(1):167.
25. Section 7, Clayton Act 1914
26. Section 2(o) of MRTP Act 1969 defined Restrictive Trade Practices and this included cartels and anti-competitive agreements. The term cartel was not separately defined in this Act.
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32. *Ibid.*
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34. Competition Commission of India.
35. Section 3, Competition Act 2002.
36. Section 2(c), Competition Act 2002.
37. Section 46, Competition Act, 2002, amended by Competition (Amendment) Act, 2007.
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41. *All India Tyre Dealers Federation v. Tyre Manufacturers,* Case No- MRTP Case RTPE No. 20/2008, Date of Order- 16/01/2013.
42. Order dated 13th December, 1989, RTP Enquiry No. 13-13-1987.
43. Order dated 25th August, 1984, RTP Enquiry No. 250/ 1983.
44. Order dated 24th August, 1984, RTP Enquiry No. 10/ 1984.
45. American Natural Soda Ash Corporation.
46. Section 14, the MRTP Act, 1969.
47. In March 2005 price was Rs. 150 per 50 Kgs. Cement bag, which rose to Rs. 165 a year later and sore to Rs. 223 in March 2007.
48. India Pakistan Bangladesh Ceylon Conference.
49. Kumar Naresh, *Curbing the Menace of Cartels under the Competition Act- Vital Issues,* [2011] 100 CLA (Mag.),2011:1:216.
50. Suo Motu Case No. 05 of 2017.
51. This application was received under Section 46 of the Competition Act, 2002 read with Regulation 5 of the Competition Commission of India (Lesser Penalty) Regulations, 2009 („LPR") filed on behalf of FAG Bearings India Ltd. (now, Schaeffler India Ltd.). („Schaeffler").
52. The Competition Act 20022, Section 2 (c):"cartel" includes 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 provision of services;
53. Supra note 52, Para 9.
54. Supra note 52, Para 34, 35.