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ALL ABOUT CARTELISATION

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The agreement between two or more enterprises or the association of establishments which says the establishments will not contest on products, price or customers, which confines the production or the supply, apportions market shares or bid-rigging in markets is known as cartels. Basically what is seen is the hike in prices and suffering to customers and economy.

How a market is seen is where competitors contest and perhaps the customers are benefitted but here the establishments clandestinely liaise to garble the market forces and distort the competition. Primarily the three components are seen to establish Cartel, first being the agreement which provides arrangements, second being the establishments, sellers or providers involved in the trade or service and third being the effort to rheostat or limit production, distribution or sale.

The script will include what are cartels and what constitute cartels. The anti-competitive agreements and how the competition act 2002 comes into picture. What the cartel will result into and how to find out the establishments are into cartel. Some of the Indian and international case laws will be discussed.

INTRODUCTION

The "anti-competitive agreements" as per the Competition Act, 2002 are of two kinds; namely [1]

1. i) Those agreements which are presumed to have appreciable adverse effect on competition (AAEC) in which case the burden of proof shifts on the enterprise or person against which the charge is levelled. These primarily include:

(a) Directly or indirectly fixing the prices;

(b) Limiting or controlling production, supply, markets, technical development, investment or provision of services;

(c) Sharing or allocation of geographical area of market, customers or in any other similar way; and

(d) Directly or indirectly resulting in bid-rigging or collusive bidding.

1. ii) those agreements which are to be judged by "Rule of Reason" i.e., the burden of proof in respect of which lies on the investigator/prosecutor. These include tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.

The Indian Competition Act 2002 under section 2 (c) defines the term "cartel" as including *"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*". What it can be termed as is malevolent violation under the competition law and must be subjected to starkest penalties. For a layman understanding, they are formed and executed in deep clandestineness and may not be in writing and is between firms which are in straight competition and thus they will have an undue advantage in the market resulting in to perverse increase in prices and exploitation of consumers [2].

For a layman understanding, what competition law seeks to promote is maintenance and upkeep of competition in the market and removing situations which are unhealthy in the market to consumers. Now in case of cartel, the producers or competitors agree not to compete on price, product etc and the direct competitors settle to relinquish the competition so prevailing in the market and decide an involvement. What happens is consumers and the market drops the doles so arising out of competition. Therefore, they are harmful intrinsically. Also the competitors know that these type of agreements will harm the market and are unlawful and thus are forced to keep them as top-secret resulting into unidentified and irrecoverable loss. They are not written generally as they are unlawful and are orally discussed and agreed to. The best evidence is served by the investigators of the enquiring authorities [3].

What the competition in business certifies is freedom of trade by promoting the economic democracy. To fulfill the said freedom under the economic democratic structure, the competition act 2002 was enacted to replace the MRTP 1969, which further provided

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establishment of competition commission of India to indorse the attention of the consumers and to create a sustainable competition for all the market competitors. The objective behind the framing of the act was to delimit the anti-competitive practices existing in the markets in India. These practices breed through factors like entry limitations, low technological improvements, and homogeneous products etc which were indeed responsible for the formation of cartels impeding the true market spirit and damaging the consumer welfare. Cartelization as a phenomenon exists in India as it exists in other countries too. It could be possibly traced in the fields like cement, steel, soda, bulk vitamins, petrol etc. The process of cartelization beehives giants subsequently side lining the smaller players and vice versa. To curb this menace, the competition commission of India is to be armed with greater powers and high standards of proof and procedures. As it is a mind-numbing task to punish every cartel formed, imposing of penalties, sentencing individuals to prison should be as a deterrent action [4]. The three ingredients to constitute 'Cartel' are [5]:-

a) An agreement which includes arrangement or understanding;
b) Agreement is amongst producers, sellers, distributors, traders or service providers i.e. parties are engaged in identical or similar trade of goods or provision of service, and
c) Agreement aims to limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

"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. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice." **[6]**

Talking about countries, Japan has assessed that contemporary cartels have raised the prices by almost 16 percent. Against the enforcement of asphalt cartels, Sweden and Finland found a drop of 20 percent in prices. There was a case of Football mockup kits in UK which the enforcement action's resulted in decrease up to 30 percent. Also, in Israel, their competition authority said that there was almost 40 percent decline after the bid rigging cartel of envelope producers was exposed. What the US has projected is that hard core cartels can increase the prices in the market by up to 60 percent [7]. There is also a difference in domestic and international cartels which affect the market at various stages and forms

INDIA

Talking about India, we have the Competition Commission of India (CCI) which is the body responsible for enforcing the Competition act in India. The chief objective of the CCI is to play an all-encompassing predominant role as a market regulator across all sectors with special focus on anti-competitive practices and to curb them. Also they see that the enterprise or producers are not distorting the competition in the market.

Now the investigating power is stretched to[8]

- Summon and enforce the attendance of any person;
- Examine him or her on oath;
- Receive evidence on affidavit;
- Issue commissions for the examination of witnesses; and
- Enter premises to seize information and documents,

And the act, mainly, regulates three types of practices

- Anti-competitive agreements;
- Abuse of dominant position; and
- Combinations (ie, mergers, acquisitions and amalgamations).

In Delhi, builders decided not to buy cement from Ultra Tech Cement Company and Lafarge India Pvt. Ltd because they made a cartel. The builders threatened the companies to complain to the watchdog of India because there was a shrill climb in price. Therefore the NCR unit, comprising of 220 members, decided not buy cement from them. Obviously the companies will face loss and they had made this cartel to have huge profits as NCR is the largest real estate market in the country which consumes around 13 million tons of cement every year [9].

There was a price parallelism among the players as the prices were ablsoute which stated clearly that there were cluster of prices which were moving in the same

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direction at each point of time in this cement industry. This concept is known as parallelism. [10]

Corporate Results – Key Financial Ratios: Major Cement Companies (2009-10) [11]

Name of the Company	***Operating Profit to sales***	***Net Profit to sales***	***Profit after Tax to Net Worth***
Ultratech Cement	**29.40%**	**15.30%**	**23.70%**
Grasim Industries	**35.80%**	**25.20%**	**30.10%**
Ambuja Cement	**29.60%**	**17.00%**	**18.80%**
ACC	**33.20%**	**19.60%**	**26.60%**
India Cement	**23.80%**	**21.10%**	**10.10%**

The Competition Commission of India, which is also known as the anti-monopoly Watch Dog, imposed a fine of 60 crore on some of the top most explosive makers because they made a cartel and muddled the market price. The Commission said that companies such as Gulf Oil Corporation, Ideal Industrial Explosives, Solar Industries India, Blastec India and Indian Explosives, were operating a cartel while they quoted bids. Their investigation was followed by a complaint which was brought up by Coal India and ten manufactures and suppliers of these explosives and also against the Explosive manufacture welfare association. According to Coal India, these companies account for 3/4th of the market and hence are cluttering the market price. "This has not only adversely affected business operations but also affected the interests of end customers in terms of higher price of final product and lower availability," said Coal India[12].

By two ways a cartel can be generated, either by explicit agreement or implicit collusion. The former occur when the members gather and decide on how to control the market or the price. The latters is a collusion and both are illegal and the companies/producers can be punished therefore it is highly secret and the surreptitious meetings are done in normal lunch congregations or parties. The decisions are taken on price control or on various factors to exploit the market [13].

OPEC-THE OIL CARTEL

OPEC [14] has, apparently, very unpretentious and precise aim. It has an eleven member country group, and it was formed in 1960 and these countries are responsible to almost all the countries in the world. The chief aim is to keep a specific international price of crude oil in market (current price 30.75 USD a barrel). Hence they have to control the export of crude oil and have to take into account that they do no flood the international market place. Also they must not squeeze the market. Surely, oil market is scandalous difficulty and to maintain a balance is appalling.

HAWKS AND DOVES

The states which are in OPEC do not ineludibly have similar interests when they have to export crude oil and hence they have snags in attaining an accord on stratagems. The Hawks are those countries which have small oil reserves like Iran and Nigeria and large population and hence they push for higher prices. The Doves are those which have huge reserves and small population and they fear that high prices will impact their economy as it will require technological advancements and crafting new deposits which will lessen the value of oil in the ground. Now in these situations, one country will always take a stand and therefore US has pressurized these countries and the major two countries are told to see the advantage. US has always maintained good relations and therefore US has been always a major part in price considerations. Also one important dispute is that whether actually these countries are striking a consensus on selling crude oil.

GREED

OPEC [15] is generally seen, in the West, as avaricious and treacherous cartel as they skeptically manipulate the prices of oil. In this, the crude oil is exported to world and they are the only countries possessing them and hence the cartel, if so formed, is to be accepted as we have no other resource to get oil. In 1998, the prices fell to 10 US dollars which had great impact on the world economies and affected the major economies of world. Tony Scanlan, of the British Institute of Energy Economics, says:

"In the US, OPEC is viewed as a cartel and therefore something to be smashed - which is not a helpful way of thinking about it. "The one thing the OPEC countries all

have in common is their absolute reliance on one product - oil."

So chiefly we have two categories of cartels, domestic and international cartel. In the former one, there is an agreement between the competitors of a definite sector in one country on marketing stratagems. In the latter one, the group of producers of a specific good who are in different countries, settle down to constrain the competition on sale, price, terms etc. Hence the conduct of cartel can be divided into four parts: • price fixing; • market sharing; • output restricting; and • bid rigging. Price fixing, market sharing and output restriction include almost all the firms in the market who, jointly, manage and coordinate their business on price, output etc so that they can effectively take control of the market and therefore share the monopoly and its benefits arising from their involvement. Bid rigging, famous cartelized behavior, includes the collaborating behavior of the competitors in a way which will restrict the competition while responding the tender and therefore affecting the market, price, consumers and practices [16]

By three evidences the existence of cartel can be established, direct evidence, indirect evidence which is also called the circumstantial evidence or the combination there of. Direct evidence, which is prima facie evidence of cartel in which there is written agreement amid the adherents. It is rarely found as generally the oral agreements are formed. The next form is indirect evidence which acts as supporting cast to direct evidence. It is imperative to be very vigilant in construing indirect evidence, though a cartel may be proved by indirect evidence [17].

There are some agreements which are deliberated as price-fixing, namely, agreement on [18]

- price fixing
- standard formula
- price computation
- static ratio on competing distinguishable goods
- establishing unvarying discounts
- giving credit terms
- limit the supply and keep high perimeter on prices
- even price on negotiations

And there are three necessary factors to institute a cartel

1. It must elevate the price above the non-cartel level
2. The gains anticipated must be more than punishment given while cartel is established
3. The budget for implementing that formed agreement must be less than anticipated gains

The nature of agreement is very important to find out whether the cartels so formed will perversely confine the trade in the market. Also the immediate circumstances are to be seen and inferred that are the parties tangled in some malign acts. What is to be determined is the explicit agreement which has to be there on sale or purchase of goods on a definite terms and conditions agreed on price. The agreement can be oral or written but what needs to be established is the existence of agreement. The best example is the Korean Fair Trade Commission (KFTC) which has proved time and again that the case of cartel can be based on circumstantial evidence. In their international guidelines, "Guidelines for Collaborative Acts", the case laws are also listed. Now, when the cartels may seem to exist is that ,first, when the price seems similar or identical even when there are fluctuations in market forces, second, when price changes are similar despite the production is done on discounted rates, and third, when large price hike does not appear in short period despite collective actions. They may also exist when producers or suppliers show similar acts or identical degree of product production or price structure.

Collusive manipulation in prices is the most significant constituent of Cartelization behavior shown by competitors. What is not entertained is the instantaneous drive of prices while seeing the identical products [19].

Some Case laws [20]

1. Collusive price fixing by boaters: In a very popular tourist town in combodia there were three means of transportation boat, road and air. Due to the penetrating competition between both companies the prices came down from 10 dollars to 5 dollars. The discussion between the boaters brought a conclusion that they will charge 10 dollars from nationals and 25 dollars from foreigners and agreed that they would not compete with each other. They also decided their schedules, departures and shared the ways. It was considered as a cartel agreement though

there was no written agreement but there was surely an understanding between the boaters.

2. Vitamins cartel: Leading producers of vitamins of Germany, France and Japan formed a cartel in which they divided the market of the world and there was a price fixing for various types of vitamins in the 90s. For almost 10 years this cartel existed and when it came to the US authorities the companies paid a fine of 500 million dollars and the collection exceeded to 1 billion dollars.
3. Cement Cartel: there was a cartel operating in almost 18 years in Argentina in which 5 cement companies were prosecuted in that cartel for which a total fine of 107 million was imposed.
4. Airline Cartel: Four airline companies in South Africa hiked fuel charges in similar amounts and in similar fashion in an investigation it was found out that they were operating a cartel and fine of 10% of the turnover of each company was imposed.
5. Soda Ash Cartel: Six American producers of soda ash in 1996 tried to send a consignment of soda ash to India at a price which was cartelized. Under the section 14 of the MRTP Act interim injunction was granted as the commission saw it *prima facie* a cartel agreement and exercised its powers but the SC was of a different view, *inter alia* and said that they don't have any extra territorial operation.

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[2] Cartels in India, Abir Roy and Nishchal Joshipura, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Researc h%20Articles/Cartels%20in%20India.pdf
[3]COMBATING CARTEL IN MARKETS – ISSUES & CHALLENGES, G.R. BHATI, http://www.competition-commission-india.nic.in/speeches_articles_presentations/GR.BhatiaArticle.pdf
[4] Competiton law and cartels, Edited by P. Satyanarayan Prasad, Chapter 7, G.R. Bhatia, Amicus publishes, Icfai University Press, Hyderabad India
[5]COMBATING CARTEL IN MARKETS – ISSUES & CHALLENGES, G.R. BHATI, http://www.competition-commission-india.nic.in/speeches_articles_presentations/GR.BhatiaArticle.pdf
[6]Adam Smith
[7]COMBATING CARTEL IN MARKETS – ISSUES & CHALLENGES, G.R. BHATI, http://www.competition-commission-india.nic.in/speeches_articles_presentations/GR.BhatiaArticle.pdf
[8]The Asia-Pacific Antitrust Review 2015, India: Cartels, http://globalcompetitionreview.com/reviews/69/sections/235/chapter s/2750/india-cartels/
[9] NCR builders allege cartelization, boycott UltraTech, Lafarge India, Live Mint, 17 January 2016, http://www.livemint.com/Companies/dhYZi6aAU7HVptpwDG1ibP/NCR-builders-allege-cartelization-boycott-UltraTech-Lafarg.html
[10] In antitrust cases, courts permit the fact of agreement to be established by circumstantial evidence, but they have required that economic circumstantial evidence go beyond parallel movement in price to reach a finding that the conduct of firms potentially violates section 3(3) of the Competition Act. The additional economic circumstantial evidence is collectively referred to as "plus factors" Section 3. Anti-competitive agreement, (3): Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services
[11] Economic Evidences to Detect Conscious Price Parallelism in the Indian Cement Industry, Hariprasad C G, 7 TH Annual Conference on Competition Law, Economics & Policy, 5th & 6th September 2013, WITS University, South Africa, http://www.compcom.co.za/wp-content/uploads/2014/09/7th-Annual-Conference-paper-16-08-2013.pdf
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[13] Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India, CUTS INTERNATIONAL & NATIONAL LAW UNIVERSITY, JODHPUR, http://www.cci.gov.in/sites/default/files/cartel_report1_2008081 2115152.pdf
[14] Organization of Petroleum Exporting Countries
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[16] Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India, CUTS INTERNATIONAL & NATIONAL LAW UNIVERSITY, JODHPUR, http://www.cci.gov.in/sites/default/files/cartel_report1_2008081 2115152.pdf
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[20] Competiton law and cartels, Edited by P. Satyanarayan Prasad, Chapter 7, G.R. Bhatia, Amicus publishes, Icfai University Press, Hyderabad India