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Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



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CARTELIZATION IN THE INDIAN ECONOMY: AN EMPIRICAL AND LEGAL PERSPECTIVE

AUTHOR – NOOREEN FATMA* & DR. TARU MISHRA**

* STUDENT OF AMITY UNIVERSITY LUCKNOW

** ASSISTANT PROFESSOR AT AMITY UNIVERSITY LUCKNOW

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ABSTRACT

One of the main problems facing the Indian economy is cartelisation, which goes against the fundamental principles of the Competition Law of 2002, which was passed with the intention of guaranteeing both consumer welfare and competitive practices. With the emergence of privatization and globalization that arose in the nineties in India, a realization was triggered that the existing Monopolistic and Restrictive Trade Practices Act, 1969 ("MRTP Act") was not equipped adequately enough to tackle the competition aspect of the Indian economy. Three essential factors establish existence of a cartel, namely agreement by way of concerted action suggesting conspiracy; fixing of prices; and the intent to gain a monopoly or restrict/eliminate competition. There is a very thin (and blurred line) of distinction between legitimate co-operation and illegitimate collusion. Collusive price manipulation by rivals is the most important component of cartelisation behaviour. Cartelisation is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act.

Keyword: Cartelisation, Competition Act 2002, Consumer welfare, Anti-competitive practices, Horizontal agreements, Appreciable Adverse Effect on Competition (AAEC), Price-fixing, Collusion, Monopolistic behavior

1. Introduction : The Competition Act, 2002 (as amended), [the Act], follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti competitive practices by enterprises. The Act prohibits anti competitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The Act prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. Any such agreement is void. An agreement may be

horizontal i.e. between enterprises, persons, associations, etc. engaged in identical or similar trade of goods or provision of services, or it may be vertical i.e. amongst enterprises or persons at different stages or levels of the production chain in different markets. Cartelisation is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act.

2. What is Cartels : Cartel is defined in section 2, clause (c) of the Act: "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;

Cartels are agreements between enterprises (including a person, a government department and association of persons / enterprises) not to compete on price, product (including goods and services) or customers. The Act gives a detailed definition of an enterprise in section 2 (h). The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets. An important dimension in the definition of a cartel is that it requires an agreement between competing enterprises not to compete or to restrict competition.

An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.

An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Act, cartels meant exclusively for exports from India have been excluded from the provisions relating to anti-competitive agreements.

3. The three essentials of the cartel are:

- The existence of an arrangement or understanding between the competition
- The agreement is amongst producers, sellers, distributors, traders or service providers, that is, parties are engaged in identical or similar trade of goods or provision of service

- The agreement aims to restrict, limit, control or attempt to control the production, distribution, sale, price of, or, trade in goods or provisions of services.

4. Unfair Trade Practices in India:

Before the Competition Act no anti-competitive law in India had explicitly and comprehensively defined cartel, though it was implicitly covered under Section 33 (1) d of the Monopoly and Restrictive Trade Practices Act, 1969. A cartel is often described as a horizontal agreement that provides for price fixation, customer and territory allocation, set distribution of goods and services, bid rigging, restriction of supply etc. and may be formed by an association of persons or enterprises.

To understand the working of the law on unfair trade practices, one would need to examine specific provisions of the MRTP Act. Section 36 A of the Act lists unfair trade practices. This is the substantive ground on which the DGIR could start investigations and bring the matter before the MRTP Commission. The Commission could discontinue an unfair trade practice, under Section 36 D, if the practice is „prejudicial to the public interest or to the interest of any consumer or consumers generally.“ Section 36 A has five parts or sub-sections covering different themes.

- 1) False representation of products or services, including false description or guarantee, warranting performance of a product or service.
- 2) Advertisement of false bargain price.
- 3) Contests, lotteries, games of chance or skill for promotion of skill.
- 4) Sale of goods not in conformity with safety standards.
- 5) Hoarding or destruction of goods or refusal to sell goods.

Unfair Trade Practices (UTPs) encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret

misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement. UTPs can arise in any line of business and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement. Specific types of UTPs prohibited in domestic law depend on the law of a particular country. The World Bank (WB) and the Organization for Economic Cooperation and Development (OECD) Model Law

5. Challenges Faced by India

There are a number of issues that India, or any system of competition law worldwide, would have to deal with, such as how much the unilateral actions of companies with market power should be restricted, how much transactions can be changed, how much a new player or customer must pay to access a necessary facility, how intellectual property and competition law relate to one another, and how much a merger should be forbidden.

Now talking the worst part of cartels is its effect on consumers and economy every cartel is anti consumer but its effect on economy depends upon type of economy. Like oligopoly economy is worst effected by cartel but monopolistic economy is least effected by a cartel because of the number of manufacturers. Cartels injure consumers by raising prices and restricting supply and the market or the economic experiences. dead weight loss because of the inefficiencies related to cartelistic behavior among competitors.

The negative effects on consumers include:

1. Higher prices– cartel members can all raise prices together, which reduces the Elasticity of Demand for any single member.
2. Lack of transparency– members may agree to hide prices or withhold information, such as the hidden charges in credit card transactions.
3. quotas.
4. Restricted output– members may agree to limit output onto the market, as with OPEC and

its oil Carving up a market – cartel members may collectively agree to break up a market into regions or territories and not compete in each other’s territory

Another criticism of the Indian Competition law vis-à-vis cartels has been the shift from rule of reason as envisioned early in Section 38 of the Monopoly and Restrictive Trade Practices Act to the per se rule which does not allow for the fact that certain groups might be formed without prejudicing the public and are not necessarily in the nature of trade restriction or malpractice.

6. Historical Evolution of Cartel Regulation:

In the late 19th and early 20th centuries, industrialisation led to anticompetitive and monopolistic practices, which is when cartel regulation initially appeared. As worries about concentrated economic power and unethical business practices grew, several countries enacted early antitrust laws designed to promote competition and lessen monopolies.

One of the key pieces of legislation in this field is the Sherman Antitrust Act of 1890 in the United States. This landmark law established the foundation for modern antitrust enforcement by outlawing contracts, alliances, and plots that obstruct trade. The Sherman Act marked a significant departure from laissez-faire economic principles by announcing government intervention to preserve competitive markets and protect consumer interests.

Similar to this, cartel regulation developed in Europe as a result of national competition laws and directives that sought to prevent anticompetitive behaviour. However, the establishment of the European Economic Community (EEC) in the 1950s laid the groundwork for a uniform competition strategy throughout European member states. The 1957 Treaty of Rome, which prohibited the abuse of dominant market positions and anticompetitive agreements, set the foundation for the development of EU competition law.

Due to a variety of causes, including technological advancements, altering economic situations, and global market integration, cartel regulation has undergone significant change throughout time. The implementation of leniency programs to compensate cartel whistleblowers, the expansion of antitrust enforcement to include international cartels, and the increasing use of economic analysis to identify anticompetitive activity are significant turning moments. The historical evolution of cartel regulation generally reflects society's ongoing commitment to upholding free markets, encouraging economic efficiency, and safeguarding consumer welfare. By learning from the past and adapting regulatory frameworks to new problems, policymakers attempt to ensure that competition is robust and healthy in the face of shifting market dynamics.

6. legal implications of cartels

In India, cartelisation is illegal under the Competition Act of 2002 and is regarded as a civil violation. In accordance with Section 3(1) and Section 3(3) of the legislation, cartel formations are absolutely forbidden. When business partners enter into an agreement regarding the production, supply, distribution, storage, or provision of goods or services that are likely to have a significant negative impact on competition in India, Section 3 of the act unquestionably forbids and nullifies the agreement.

Additionally, Section 3 has the following clause, which essentially forbids anti-competitive agreements among cartel enterprises: determining the purchase and selling of products both explicitly and implicitly, restricting the authority over investment, sales, and manufacturing, regional market allocation, Taking part in collusive bidding. As a result, such agreements should be regarded as null and void.

Violations of Section 3 of the Competition Act of 2002 are punishable by civil law. Any business that participates in the cartel's formation faces

a fine of up to three times the agreed-upon collected profits or 10% of the overall turnover, whichever is greater.

act also involves cases with a criminal offence in the following cases namely:-

disregard for the competition commission's directives. violating a National Company Law Appellate Tribunal (NCLAT) ruling without a valid basis. Both businesses and individuals may face charges under the cartel laws outlined in the Competition Act of 2002.

The commission may issue orders against businesses that violate Section 3 of the Competition Act of 2002 in accordance with Section 27 of the act: -

must stop engaging in any anti-competitive behaviour. penalty payments of up to ten percent of turnover or three times the entire group earnings. Section 48 of the statute allows for the prosecution of individuals as well. Anyone implicated in the company's cartelisation would be held accountable and considered guilty.

7. Judicial Pronouncements

1. Builders Association of India vs. Cement Manufacturers Association and Ors [Case No. 29/2010 Date of Order: 20.06.2012]

The Builders Association of India v. Cement Manufacturers' Association case involves a complaint filed by a society registered under the Societies Registration Act, 1860, against the Cement Manufacturers' Association (CMA) and 11 cement manufacturing companies. The informant accused the cement manufacturers of engaging in monopolistic and restrictive trade practices to control the price of cement, violating the Competition Act, 2002. The informant argued that the cement companies increased prices across all geographical zones in India, indicating a concerted effort to manipulate the market. They also reduced capacity utilization from 88% in March 2009 to 82.46% in March 2010, despite an increase in installed production capacity. The informant also pointed out that despite various

government stimulus packages and concessions in 2008, cement manufacturers collectively increased prices from 2008 to 2010, indicating anti-competitive conduct. The cement companies failed to pass on the benefits of the free supply of "fly ash" to consumers, indicating a failure to act in the best interests of the market.

Penalty Imposed : The Central Board of Control (CCI) imposed significant penalties on cement manufacturers involved in the Builders Association of India v. Cement Manufacturers' Association case. The total penalties amounted to INR 350 crore (approximately £34 million). The CCI also directed companies to cease anti-competitive activities, including sharing sensitive pricing and production data.

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

The All India Tyre Dealers' Federation (AITDF) has filed a complaint against domestic tyre manufacturers, alleging anti-competitive activities and trade mal-practices. The AITDF claims that these manufacturers exploit the tyre trade by usurping excise duty reductions and working in union. Since independence, the AITDF has accused domestic tyre majors of anti-competitive, anti-consumer behavior, and engaging in pricing and trade malpractices that directly impact the state exchequer's revenue.

The AITDF has also accused domestic tyre majors of exploiting truck and bus operators, vehicle manufacturers like Tata Motors, and other domestic tyre majors. They have been informing Central Ministries about their anti-trade, anti-consumer, and restrictive trade practices. The Competition Commission of India was also approached about their anti-competitive behavior.

The MRTP Commission ordered an investigation into the matter, but the Director General (I&R) could not complete it when the MRTP Act, 1969 was repealed. After careful consideration, the Commission directed the Director General to

conduct an investigation and submit a report, specifically mentioning five major domestic tyre manufacturing companies: Apollo Tyres Limited, MRF Ltd., Ceat Tyre Ltd., Birla Tyre Ltd., and JK Tyre Ltd. The Department of Motor Vehicles (DG) conducted an investigation into a cartel among tyre manufacturers and the Automotive Tyre Manufacturers' Association (ATMA). All companies denied any price fixing or illegal activity in contravention of the Competition Act, 2002. The DG concluded that there was a cartel among tyre manufacturers and ATMA, acting together to distort the domestic tyre market, violating the Competition Act provisions.

8. Conclusion :

Even though cartelisation is a crucial new issue in the Indian corporate sector, the general public does not know much about it because it is frequently dismissed as a fiction that cannot be realised. More authority should be granted to the Competition Commission of India so that they can impose severe penalties on operating and running cartels; additionally, they ought to look into study for a cartel with stricter guidelines. It is commonly known that effective investigative tools, backed by agreements with other nations to exchange information on cartel operations and investigate such groups, are crucial in the battle against cartels.

Cartels are regarded as the most damaging anti-competitive behaviour that exists in the market today and are illegal in the majority of nations. They are also the most flagrant violators of competition law. The agreements contain cartels, which are seen to have a significant negative impact on healthy competition.

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