

Competition Commission of India



ANTI-COMPETITIVE AGREEMENTS

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Then and Now

“ *People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or 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. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.*”- Adam Smith, 1776, *The Wealth of Nations*



Do these names ring a bell?

● Saint-Gobain

Pilkington

● Schindler

ThyssenKrupp

● Boost

Complan

● Zincovit

● Vitamin C Tablets

● Ponds Cold Cream

Asahi Glass

Soliver

Otis

Kone

Bournvita

Horlicks

Multivit



Record Fines

- Saint-Gobain - € 896 m (repeat offender)
- Pilkington - € 370m
- Asahi - € 113.5 m
- Soliver - € 4.4 m
- Met at Airports/Hotels in Frankfurt/Paris/ Brussels to share sensitive information
- Anonymous tip off
- “These companies cheated the car industry and car buyers for five years in a market worth €2 billion in the last year of the cartel,” — Neelie Kroes, EU CC, Nov 08



Previous Record

- € 992 m on lift makers Otis, Schindler, ThyssenKrupp and Kone (Feb. 07)
- € 855 m on 8 pharma companies (Vitamin), 2001
 - Hoffmann-La Roche – € 462 m
 - BASF - € 296.1 m
 - Merck KgaA, Solvay Pharmaceuticals BV, Aventis SA and others
 - From cereals, biscuits, and drinks to animal feed, pharmaceuticals, and cosmetics all have them
 - A, E, B-1, B-2, B-5, B-6, C, D-3, biotin (H), folic acid (M), beta carotene, and carotenoids



Does it Hurt?

- Alleged worldwide cartel involving more than 30 airlines
- Japan Airlines (JAL) agreed to pay \$110 m to DoJ related to its role in fixing international cargo rates
- DoJ statement- JAL netted nearly \$ 2 billion on US-Japan routes
- JAL statement – gave full cooperation – set aside a reserve of nearly \$113.6 m for potential penalty- and continue to reinforce compliance programme
- Quantas, BA and Korean Air already pleaded guilty



Other Airlines involved

- BA fined \$ 300 m by DoJ and \$ 246 m by OFT
- Korean Air Lines (KAL) fined \$300 m by DoJ
- ACCC sought information from KAL
- KAL approached federal court – lost
- Investigation by ACCC on
- Lufthansa fined SA R 8.5 m for colluding with SA Airways to fix the price of air tickets to Frankfurt by CC South Africa (SA Airways filed consent terms for R 55 m)



BA & Virgin

- Fuel surcharges rose from \$10 to about \$ 120 a ticket for a round trip long-haul flight on BA and Virgin- in collusion period
- Investigation by DoJ & OFT began since June 2006
- BA & KAL also involved in conspiracy with Lufthansa to fix charges on International Cargo Shipments
- Virgin and Lufthansa – informed authorities-no fines



Refund of Overcharge

- Those flew with BA/Virgin Atlantic between 11-8-2004 and 23-3-2006 – eligible for refund – class action suit by Cohen-Milstein – if ticket bought in UK or US
- Refunds between £ 2 to £ 10 (Virgin); £ 1 to £ 11.50 (BA)- per flight
- Is collusion profitable ?



Consequential Effects

- In April 2003, Korea Fair Trade Commission decided to take up and recover more than \$ 3 m in total from 6 vitamin producers belonging to Switzerland, Germany, France, Japan and Netherlands who participated in the Vitamin International Cartel
- The conspiracy affected Korean economy throughout 90s and behavior of firms affected all Korean citizens
- What about India?



Harm to Developing Nations

- Import of \$ 81.1 bn from industries in price fixing during 90s... WB background paper
- Represents 6.7% of imports and 1.2% of GDP in the developing counties
- Larger proportion of trade in the poorest developing countries where 16 products in question represented 8.8% of imports



Is India at a Disadvantage?

- Do we have no recourse for the suffering of loss?
- Present system could not cope with vitamin cartel
- Is Indian customers/consumer not at the receiving end?
- Immediate enforcement of Competition Law only answer



Early Stages

- Planned economic development since early 1950s
- Commanding heights in public sector
- Industrial (development & regulation) Act, 1951 and
- Monopolies and Restrictive Trade Practices Act, 1969
 - Comprehensive control over direction, pattern and quantum of investment
 - Extensive reservations and concessions in favour of small – scale industry
- Despite industrial growth/diversification – complex network of controls/regulations fettered freedom of enterprises



Transition

- Industrial policy statement of 1980
 - focused attention on need for promoting competition in domestic market, technological up gradation and modernization
- Reforms since 1991- on a much broader scale and scope
- Industrial policy statement of 1991
 - emphasized attainment of technological dynamism and international competitiveness
 - Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment



Wave of Liberalization

- Starting from 1991 – further liberalization of industrial licensing, dispensing with the requirement of prior governmental approval before effecting expansion of undertakings registered under MRTP Act, 1969
- Progressively diluting the monopoly of public sector except for security and statutory concerns
- Abolition of levy and non-levy price system
- Reducing purchase preference for PSUs



Strengthening of Reforms

- Further reforms of trade policy substantially reduced the barrier to domestic industries
- Common thread running through the economic reforms-since 1991 – has been to free the economy from governmental controls and allow market forces to determine economy activity



Expert Group

- Singapore ministerial declaration in 1996 – followed by setting up of an expert group by Union Ministry of Commerce in Oct. 1997
- To study issues relating to interaction between trade and competition policy, including anti-competitive practices and the effect of mergers and amalgamations on competition in order to identify areas that may merit consideration in the WTO framework
- Expert group, in Jan. 1999 report, suggested enactment of new Competition Law



Raghavan Committee

- FM on 27-2-1999 declared in budget speech that MRTPC has become obsolete in the light of international economic developments relating to competition laws
- High level committee on competition policy and law constituted in Oct. 99
- Inter-alia, the committee noted
 - in conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers' demand at the lowest possible cost



Need for Overhaul

- The Department Related Parliamentary Standing Committee on Home Affairs, to which the Competition Bill 2001 was referred for examination concluded that the rigidly structured MRTP Act also necessitate its repeal in view of government policy being a facilitator rather than a regulator



Law Enacted

- In mid term appraisal of 9th five year plan, Planning Commission recognized the need of a National Competition Policy
- Enactment of Competition Act 2002, pursuant to Raghavan Committee's Report
- National Common Minimum Programme 2004 (UPA) desired to strengthen all regulatory institutions to ensure that competition is free and fair



Broad Provisions of CA 02

- Prohibits anti-competitive agreements (S 3)
- Prohibits abuse of dominant position (S 4)
- Regulates combinations (S 6)
- Mandates competition advocacy and awareness (S 49)



Present Status

- Competition Act, 2002 passed in January 2003
- Competition Commission of India established in October, 2003
- Full constitution of Commission and enforcement could not be taken up due to legal challenge leading to process of amendments
- Competition (Amendment) Act, 2007 passed in October 2007
- Process for full constitution of the Commission is on



Indian law in global context

- WTO : *“Law is broadly comparable to those of other jurisdictions with effective laws in this area and, for the most part, embodies a modern economics - based approach” (Trade Policy Review of India 2007)*
- OECD : *“close to state-of-the-art” (Economic Survey India Report 2007)*



Duties of the Commission

- Prevent practices having adverse effect on competition
- Promote and sustain competition in markets
- Protect the interests of consumers
- Ensure freedom of trade carried on by other participants in markets, in India
 - *[Preamble and Section 18]*



Coverage

- All enterprises, whether public or private
 - [S 2(h)/expln (l)]
- Departments of government except activities relatable to sovereign functions including Atomic energy, Currency, Defence and Space
 - (S 2(h))
- Extra-territoriality
 - (S 32)
- Provision to enter into MOUs with foreign competition authorities
 - (S 18)



Agreement

- Agreement defined very widely.
- Inclusive definition – includes any arrangement or understanding or action in concert
- Includes formal or informal, written or oral agreements
- Includes agreements not meant to be legally enforced
 - (S 2(b))



Agreement Interpreted

- *“People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do. Parliament as well is aware of this. So it included not only an ‘agreement’ properly so called, but any ‘arrangement’, however informal”*

Lord Denning in the case of RRTA v. W.H.Smith and Sons Ltd.,

Prohibited Agreements



● No

- Enterprise or
- Association of Enterprises or
- Person or
- Association of Persons

● Shall enter into agreement which causes or is likely to cause

● AAEC

- (S 3(1))

● Contravening agreements void

- (S 3(2))



Agreement

- It has to be an agreement
- Different possibilities

- Person and person
- Person and enterprise
- Enterprise and enterprise
- Person and AOP

- AOP and AOP
- Person and association of enterprises
- Associations of enterprises
- AOP and association of enterprises



Enterprise (2(h))

- A person or a dept of the government,
- Who is, or has been,
- Engaged in any activity,
- Relating to production, storage, supply, distribution, acquisition or control of articles or goods, or
- The provision of services, of any kind, or
- In investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities or any other body corporate,
- Either directly or through one or more of its units or divisions or subsidiaries,
- Whether such unit or division or subsidiaries is located at the same place where the enterprise is located or at a different place or at different places,

Enterprise...contd..



- But does not include any activity of the government relatable to
- The sovereign functions of the government
- Including all activities carried on by the department of the central government dealing with Atomic Energy, Currency, Defence and Space
 - Explanation
 - (a) 'Activity' – includes profession or occupation
 - (b) 'Article' – includes a new article and
'Service' – includes a new service
 - (c) 'Unit' or 'Division' – in relation to an enterprise, includes—
 - i. A plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods
 - ii. Any branch or office established for the provision of any service



Person (S 2(I))

- Includes:
 - an individual
 - a Hindu undivided family
 - a company
 - a firm
 - an AOP or a BOI, whether incorporated or not, in India or outside
 - any corporation established by/ under any central/state or provincial act
 - any body corporate under laws of a country outside India
 - a co-operative society
 - a local authority
 - every Artificial Juridical Person, not following in any of the previous sub-clauses
- Being inclusive definition, can be widened



Agreement for what ?

- In respect of production, supply, distribution, storage, acquisition or control of goods or provision of services



Presumption of AAEC

- Any agreement entered into ... or practice carried on, or decision taken by, any AOE or AOP, including cartels engaged in
- Identical or similar trade of goods or provision of services which-
 - Fixes price – directly or indirectly
 - Limits or controls production/supply/markets/ technical developments/ investments or provision of services
 - Shares market or source of production in any way
 - Results in bid rigging /collusive bidding – directly/indirectly
- Presumed to have an AAEC S 3(3)

Exemptions



- Efficiency enhancing JVs to be examined based on '*rule of reason*'
 - Proviso to S 3(3)
- Reasonable conditions, necessary for protecting any of rights which have been or may be conferred under the following Intellectual Property Rights
 - Copyright
 - Patent
 - Trade mark
 - Geographical indicators
 - Industrial designs
 - Semi-conductor Integrated Circuits Layout Designs
 - (S 3(5)(i))
- Agreements for exports
 - (S 3(5)(ii))

Vertical Agreements



- Agreement between persons/enterprises at different stages/levels of production chain in different markets **including**
 - Tie-in-arrangement,
 - Exclusive supply arrangement,
 - Exclusive distribution arrangement,
 - Refusal to deal,
 - Resale price maintenance,
- Prohibited only if AAEC is established
 - Preponderance of probability
 - Onus on the Commission
 - (S 3(4))

Cartel



- “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”
 - (S 2 (c))
- Cartels are in the nature of prohibited horizontal agreements and presumed to have *AAEC*



Cartel in MRTPC and CA 02

- Not defined
- Only cease and desist
- No Penalty
- Powers of investigation also limited
- Passed 'Cease & Desist' order against
 - Bharatpur Truck Operators Union,
 - Goods Truck Operators Union, Faridabad, and
 - Rohtak Public Goods Motor Union
- No fines in law



Lysine Cartel

- Lysine is an amino acid that stimulates growth and results in leaner muscle development in dogs, poultry and fish. It is also mixed with corns and is an input for feed products.
- From 1992 to 1995, 5 producers of Japan, Korea and US having over 97% of the global capacity - price fixing, sales quota allocation and monitoring of volume agreements. DoJ investigated.
- Search with help of FBI. Documents and tape recordings of meeting of the conspirators could make a strong case of colluding on lysine prices around the world for 3 years.



Price Fixing amongst Boats

- Siem Reap in Cambodia, housing Angkor Vat temples, is a popular tourist spot
- 3 means of transport from Phnom Penh– boat, road and air
- The intense competition between boat companies brought prices from \$ 10 to \$ 5
- They agreed to charge \$ 10 from locals and \$ 20-25 from foreigners, and
- To share departure schedules
- No written agreement; only an understanding
- Was held to be cartel agreement



CCI and ACA

- Powers of a civil court
- After *prima facie* determination CCI shall direct DG to investigate
 - (S 26(1))
- Director General is empowered to investigate and has the powers of a civil court for this
 - (Section 41(1) & (2))



Director General

- DG has powers as are vested in the 'Inspector' in terms of Section 240 & 240 A of the Companies Act, 1956.
- These powers inter-alia include seizure of documents with the approval of the Chief Metropolitan Magistrate, Delhi, when there is reasonable ground to believe that books, papers or documents may be destroyed, mutilated, altered, falsified or secreted.
 - (S 41(3))



Interim Orders

- CCI empowered to pass following orders against anti-competitive agreements (including cartels)
 - Temporary restraint orders— during inquiry (S 33)
 - Cease and desist order - directing parties to discontinue and not to repeat such agreements (S 27)



Powers of CCI in ACA

- Modification of agreement - directing parties to modify the agreements to the extent and in the manner as may be specified in the order
 - (S 27 (d))
- Heavy penalty – imposing on each member of cartel, a monetary penalty of up to three times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher
 - (S 27 (b))



Harm by Cartels

- Worldwide consensus that Cartels harm consumers and damage economies
- Japan estimated that prices went up on average by 16.5 percent by recent cartels
- Sweden and Finland competition authorities observed price declines of 20-25 percent following enforcement action against asphalt cartels
- The football replica kits case in UK resulted in long-term price reduction to the extent of 30 percent following enforcement action by OFT

(Source - Hard Core Cartel: Third Report on the implementation of the 1998 recommendation © OECD 2006)



Harm by Cartels...contd.

- Israel competition authority observed that prices declined by nearly 40-60 percent after it uncovered a bid rigging cartel among envelope producers
- US estimates suggest that some hard core cartels can result in price increases of up to 60 or 70 percent.
- Based on a review of a large number of cartels, it is estimated that the average overcharge is somewhere in the 20–30 percent range, with higher overcharges for international cartels than for domestic cartels

(Source - Hard Core Cartel: Third Report on the implementation of the 1998 recommendation © OECD 2006)



Bid-rigging/collusive bidding

- Affects public procurement
- Overcharge of 15-20% according to a study in the US covering 1988-93
- Not an uncommon practice in India
- Several government sector buyers have reported – e.g. Railways, Coal India



THANKS

Competition Commission of India
www.cci.gov.in