



CARTELS AND OTHER ANTI- COMPETITIVE AGREEMENTS

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What is a Cartel ?

Cartel similarly defined or understood in various jurisdictions:-

- *“Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits.”* European Commission, DG Competition, Glossary of Terms used in EU Competition Policy.
- *“A cartel is generally constituted to include conduct by two or more competitive businesses such as price fixing; market sharing including bid-rigging or customer sharing; and/or production or sales quotas.”* Australian Competition and Consumer Commission website.

Contd?...



What is a Cartel ? (Contd.)

- *“What is a conspiracy? When business competitors agree: on the prices that they will charge their customers; not to compete for certain customers; not to compete in a particular product or geographic market; or to prevent or impede other businesses from competing in a market.” Canadian Competition Bureau website.*
- *“What is a cartel? If several competing enterprises coordinate their market conduct for the purpose of eliminating competition, this is called a cartel.” Bundeskartellamt, The Bundeskartellamt and its tasks, Germany.*
- *“Cartels are secret agreements between firms to fix prices or share markets between them.” Irish Competition*

Contd....



What is a Cartel ? (Contd.)

Authority, Cartel Watch, *Guidelines on Cartels, Detection and Remedies.*

- “*Cartels mean express or tacit conventions, promises or agreements among firms to fix prices and limit volume of production and sales and selection of trading partners.*”
Japan Fair Trade Commission, *What practices are Subject to Control by the Antimonopoly Act?*
- “*Cartels are agreements between undertakings, such as agreements and decisions of concerted practices which restrain competition.....*” Netherlands Competition Authority website.



Harm Caused by Cartels

Cartels unequivocally damage competition and cause loss to the economy and to consumer without having any redeeming virtue.

- Mario Monti: “*Cartels are cancers on the open market economy*”;
- US Supreme Court: “*Cartels are the supreme evil of antitrust.*”
- Japan estimated recent cartels raised prices on average by 16.5%.

Contd.....



Harm Caused by Cartels (Contd.)

- Sweden, Finland: competition authorities observed price declines of 20% - 25% following enforcement against asphalt cartels.
- UK: long term price reduction in football kits upto 30% following OFT's enforcement.
- Israel observed price decline of 40% - 60% after uncovering bid - rigging cartels.
- US: estimates suggest that some hard core cartels can result in price increase of 60% -70%.

Contd....



Harm Caused by Cartels (Contd.)

- Average overcharge estimated at 20% - 30%, with higher overcharges for international cartels.

[Source OECD 2006: Hard Core Cartels: IInd Report]

- Developing countries particularly vulnerable to global cartels. World Bank: in 1997 developing countries imported US\$ 81.1 billion from industries that had price fixing conspiracies during 1990s representing 6.7% imports (8.8% in case of poorest developing countries).
- OECD Global Forum, 2001 lists 26 cartel and bid - rigging cases reported by 12 developing countries.
- OECD 2002 report on hard core cartels – in 16 large cartel cases investigated in US, harm likely over US\$ 55 billion.



History

- Adam Smith: (1776) “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”.

Eastern Roman Empire (483 AD): The Constitution of Zeno punished price fixing in relation to clothes, fisheries, sea - urchins and other goods.

- US antitrust law originated as a response against ‘trusts’.

Conditions Conducive to Cartels



- Homogenous product
- High concentration; few competitors
- High entry and exit barriers
- Low technological advancement
- Similar production costs
- Low demand elasticity
- Large number of small buyers making frequent purchases
- Strong ability of competing firms to exchange information, involvement of trade associations.
- Weak enforcement, less fear of detection/punishment.



Common Characteristics of Cartels

- Secrecy; members camouflage activities to evade detection.
- Conspiracy agreement guarded through retaliation threats e.g. temporary price cuts.
- “Compensation Scheme”: Deviant member made to compensate other members e.g. by purchasing sales overrun quantity from them.



Recent Examples of Cartels

- Lysine (global)
- Vitamins (global)
- Electro-graphite electrodes (global)
- Airlines (South Africa)
- Cement (Argentina)
- Industrial Bags (EU) – whistle blower case.
- Mobile Telephones (France)

Response of Competition Law to Cartels



- Stringent legal provisions, deterrent penalties.
- Penalties also for individuals.
- Cartel agreement broadly defined; formal, informal.
- Hard - core cartels regarded *per se* violations.
- In some countries regarded as criminal offence involving imprisonment.
- Tough investigative tools – ‘dawn raids’, power to summon witnesses/evidence, tap telephone conversations, surveillance of premises.
- Leniency / amnesty provision.
- International cooperation.



International Scene

- OECD at forefront: 1998 recommendations, periodic reports.
- UNCTAD Model Law of Competition prohibits agreements relating to fixing prices/terms of sale, collusive tendering, etc.
- ICN: special reports on hard - core cartels; international workshops.



India: Competition Act, 2002

- Sec.2(c): Cartel includes 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, or trade in goods or provision of services

Definition is wide inclusive not exclusive.

- Sec. 2(b): Agreement includes any arrangement or understanding or action in concert whether or not such arrangement, understanding or action in concert (i) is formal or in writing, or

Contd.....



Indian Law on Cartels, Competition Act, 2002 (Contd.)

(ii) is intended to be enforceable by legal action.

Agreement widely defined; includes ‘*gentlemen’s agreement*’.

- Sec. 3(1): Prohibits agreements having “Appreciable Adverse Effect on Competition (AAEC). Sec. 3(2) declares such agreements to be void.
- Sec.3(3): Horizontal agreement, practice, decision, including cartel, shall be presumed to have AAEC if:

Contd....

Indian Law on Cartels, Competition Act, 2002 (Contd.)

- a) directly or indirectly determines purchase or sale prices;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;
- c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- d) directly or indirectly results in bid – rigging or collusive bidding,

This rule similar to *per se* rule.



Remedies

- Cease and desist order.
- Penalty: 10% of turnover or 3 times the profit from cartel agreement, whichever is higher.
- Compensation.
- Modification of Agreement.
- Grant temporary injunction.
- Such other order or direction as the Commission may give, including payment of cost, if any.
- Commission may also pass such other orders as it may deem fit.
- A director or officer of a company is deemed to be guilty and liable to be proceeded against and punished in case contravention is deliberate or is attributable to neglect.



Leniency

- Sec. 46: If a party to a cartel makes full and true disclosure, and if such disclosure is vital, such party may be given lesser penalty.
- Leniency available only to first party that makes full, true and vital disclosure.
- Disclosure must be made before proceedings have been instituted and investigation directed under Sec. 26.

(As per Amendment Bill, a member can seek leniency before filing of investigation report by DG)

- Leniency will not protect party from compensation claim.
- Leniency existing in US, EC and its member states, Canada, Korea, Japan and Mexico; has proved effective tool in unearthing and punishing cartels.



Investigative Tools

- Commission and DG have powers of civil court, namely:
 - a) Summoning and enforcing attendance of any person, examining him on oath.
 - b) Requiring discovery and production of documents
 - c) Receiving evidence on affidavits
 - d) Issuing commissions for examination of witnesses /documents
 - e) Requisitioning, subject to Sec. 123. 124 of Evidence Act, any public record/document
- DG has ‘search and seizure’ powers under Sec. 240, 240 A of Companies Act (permission of Magistrate required)



Non-cartel Agreements

- Horizontal agreements not covered by Sec. 3(3) but covered by Sec.3(1), not subject to “shall be presumed” provision. Would be analysed under ‘rule of reason’.
 - Vertical agreements not covered by Sec.33. If falling under Sec.3(1), would be analysed under ‘rule of reason’.
 - Vertical agreements listed in Sec. 3(4) viz. tie-in arrangement, exclusive supply or distribution agreements, refusal to deal resale price maintenance. (Each defined inclusively under Act). Subject to ‘rule of reason’.
- Not necessarily linked to ‘abuse of dominant position’.



Exemptions

- Pro-viso to Sec. 3(3), efficiency enhancing JVs exempted, only from ‘shall be presumed’ rule .
- Exempted from Sec. 3: Right to restrain infringement, or impose reasonable conditions for protecting, rights (IPR) under Copyright Act, Patents Act, etc.
- Excluded from Sec. 3: Right to export goods from India.

Status of Competition Commission of India



- Commission established October, 2003.
- Has only one Member and small complement of staff.
- Provisions of Act relating to enforcement work (Anticompetitive agreements, Abuse of Dominant Position, Regulation of Combinations not yet notified).
- Competition (Amendment) Bill, 2006 under consideration of Parliament.
- Commission not undertaking inquiry work and regulation of combinations.
- Commission undertaking Competition Advocacy, preparatory professional work and capacity building.



Disclaimer

This presentation provides only an introduction to the competition law, and should not be relied on as a substitute for the law itself.

Further this presentation is subject to any amendments which may be made in the competition law at any time in future.



Thank you

Website: competitioncommission.gov.in