



ENFORCING SECTION 3 EXPERIENCES OF CCI

P.K.SINGH

Adviser

Competition Commission of India



Shades of competition

- Price competition
- Non-price competition
- Fair competition
- Unfair competition
- CA 02 seeks to prevent unfair methods of competition



Benefits of Competition

- Broad agreement that market competition leads to better outcomes for consumers.
 - Lower prices
 - Wider choices
 - Better quality
 - Higher Output
 - Better service
 - Improved efficiency
 - Innovation



PROHIBITED AGREEMENTS

No

- **Enterprise or Association of Enterprises or Person or Association of Persons shall enter into agreement which causes or is likely to AAEC (S 3(1))**
- **Contravening agreements void (S 3(2))**



Enterprise-2(h)

- Any activity relating to production, distribution of goods
- Any activity relating to provision of service
- Investment activity
- Business of acquiring or dealing in shares
- Does not include Sovereign Functions
- Functional or Institutional Approach?



COVERAGE OF AGREEMENT

- **Agreement is defined very widely**
- **Inclusive definition – includes any arrangement or understanding or action in concert**
- **Includes formal and informal, written or oral agreements**
- **Includes agreements not meant to be legally enforced**



ANTI-COMPETITIVE AGREEMENTS

- **Agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services**
- **That cause or are likely to cause appreciable adverse effect on competition within India**



HORIZONTAL AGREEMENTS

Agreements between enterprises engaged in trade of identical or similar products (including cartel) are presumed to have AAEC if they

- **Fix prices**
- **Limit output**
- **Share markets**
- **Indulge in bid-rigging or collusive bidding**



IPRs and EXPORTS

- **Agreements involving 6 IPR laws that impose reasonable restrictions are out of purview of the general prohibition**
- **However they will be examined under ROR**
- **Agreements exclusively for exports are excluded from the rigors of the law**



Joint Ventures

- Presumptive rule will not apply if
 - JVs increase efficiency in production, supply of goods or services
 - But amenable to ROR



VERTICAL AGREEMENTS

Agreement between persons/enterprises at different stages/levels of production chain in different markets including

- **Tie-in-arrangement,**
- **Exclusive distribution arrangement,**
- **Refusal to deal,**
- **Resale price maintenance,**

**Prohibited only if AAEC is established
(S 3(4))**



Two Modes of Analysis

- **Per se analysis**
 - No need to prove anti-competitive effects
 - Per se v Presumption- same or different ?
- **Rule of reason analysis**
 - Proof Chart
 - Evaluate pro and anti-competitive effects
 - Behavior is a problem only if anti-competitive effects outweigh pro-competitive effects.
 - **Quick look analysis** –Board of Regents case



The Key Questions in ROR

- What is the nature of the restraint?
- What is the effect on price and output?
- Are there potential benefits or efficiencies?
- Does a comparison of the anti-competitive effects and efficiencies suggest a likely harm to competition?



Proof Chart to assess AAEC [19(3)]

- | Negative effects | Positive effects |
|--|---|
| <ul style="list-style-type: none">• Creation of barriers to new entrants• Driving existing competitors out• Foreclosure of competition | <ul style="list-style-type: none">• Benefits to consumers• Improvement in production or distribution• Promotion of technical and economic development |



Inquiry by CCI

- Section 19(1) empowers the Commission to inquire into alleged anti-competitive agreements
- Ex- Officio
- On receipt of any information
- On a reference by Central or State Government or Statutory Authority



Suo moto inquiry by CCI

- On the basis of contents of any invalid information [regulation 15(5) of General Regulations]
- Information gathered through other investigations
- On the basis of media report/market study
- On the basis of leniency application by member of a cartel u/s 46



CARTELS

- **Regarded as most precious form of anti competitive behavior**
- **Hard core cartels is on top of the agenda of most competition authorities**
- **Leniency programs have resulted in higher rate of detection**
- **Vitamins cartel, electro-graphite cartel, etc.**
- **Loss to developing countries enormous**



Bad effects of Cartel

- **Discourages**
 - Innovation through complacency
 - Incentive to expand capacity
 - Enhancement in product quality
 - To deploy fund in research & development
- But export cartels play crucial roles in national economic development – thus exempted-section 3(5)



BID-RIGGING

- **Affects public procurement**
- **Overcharge of 15 – 20%**
- **Not an uncommon practice in India**



Ingredients to constitute cartel

- Existence of an agreement between competitors
 - Producers
 - Distributors
 - Traders
 - Service providers
- Agreement fixes price, limits output, allocates market or results into bid rigging



Factors conducive for cartel formation

- High concentration - Few players in the market
- Homogenous (similar) products
- Excess capacity
- High entry and exit barriers
- Similar production costs
- High dependence of consumers on the product
- History of collusion specially in industries like steel, cement, tyre etc.
- Existence of effective trade association in the industry



The manner and procedure of collecting evidence in cartel cases

- Commission directs DG to investigate under 26(1)
- Specifies time under regulation 20(2)
- DG submits report after collecting data, recording statements and carrying out necessary analysis
- Power of DG includes – Section 41 and 36(2)
- Summoning any person and examination on oath
- Discovery and production of documents
- Receiving evidence on affidavit
- Carrying out search and seizure operation after obtaining warrant from CMM Delhi
- Additionally the Commission is empowered to direct production of documents and other information related to trade – section 36(4)



Evidence/Information sources

- Complainants
- Competitors
- Suppliers
- Customers
- Investigation targets
- Government agencies
- Industry organizations
- Industry experts



Categories of information sources

- Documents
- Witness interviews
- Public sources
- Sworn statements
- Other related investigations



Standard of proof

- Beyond reasonable doubt or
- Preponderance of probabilities or
- Some standard falling in between ?



Evidence to nail the cartel

- **Direct evidence**

- Smoking gun

- **Circumstantial evidence**

- Inferring Agreements

- Price parallelism-whether sufficient?

- Hindustan Development Corporation case AIR1994 SC 988

- sufficiently precise and coherent



Types of Evidence

Economic evidence

- Shows the structure of the market was such as to make secret price-fixing feasible and suggests that parties were not in fact competing

Non-economic evidence

- Suggests that they were not competing because they had agreed not to compete



How to reign cartels

- **Stick**

- fines both corporate and individuals

- compensation to victims

- do we need bigger stick ?

- **Carrot**

- leniency



Behavioral Remedies – Section 27

- Cease and Desist Orders
 - Require violators to stop unlawful conduct
- Affirmative Actions
 - Require violators to change certain practices



Monetary Remedies

- Civil Penalties – Section 27
 - Fine upto 10% of turnover and in case of cartels 3 times of the profit
 - Fine based on various mitigating or aggravating factors
 - Deterrence
 - Harm to the public and competition
 - Span
 - Subsequent infringement.
 - Leadership role
 - Co-operation with Commission outside leniency notice – power transformers case.
 - Pro-competitive effect.
 - Limited participation.
- Individuals penalties – Section 48
- Compensation – Section 53N



Leniency Programme under CA 02

Why we require leniency programme?

- It provides a strong incentive for the firms to come forward and to co-operate.
- Firms which provide information on a secret cartel before the competition authorities get benefit/immunity from punishment.



Position in US and EU

- In the US, leniency regime is quite established.
- In 1993, the Department of Justice revised its leniency policy reducing its discretion and making leniency provisions more generous.
- In the EU, European Commission started leniency regime since 1996.
- It offered the possibility of fines not being imposed or being seriously or significantly reduced (possible reductions from 100-10 percent) in return for cooperation.
- It resulted in more than 80 applications in six years (1996-2002).
- However, it didn't guarantee full immunity (as did the US and Canadian policies).



Position in US and EU

- **In the year 2002, the European Commission adopted a new Notice (revised leniency programme).**
- **It aimed both to make easier for firms to receive total and guaranteed immunity in return for their cooperation and to provide greater legal certainty for cooperating firms.**
- **The European Commission committed itself to giving conditional immunity in writing (conditional because of the undertaking's ongoing requirement to cooperate).**
- **It remained extremely successful and firms have cooperated with the European Commission in a high proportion of cases. In four years since 2002 notice, the number of leniency applications went upto 165.**



Position in US and EU

- In the year 2006, the Notice for Leniency was again revised by the European Commission - further strengthened the dual concept viz. guaranteed immunity for the first undertaking to come forward; and for reduction for the subsequent applicants.
- It sets out more explicitly what type of information and evidence applicants need to submit to qualify for immunity.
- It further clarifies what applicants are and are not required to produce in their initial application.
- A “marker system” has been introduced whereby an applicant for immunity can reserve its place in the queue to be first by providing only limited information at first.



Leniency Programme under CA 02

- The Competition Act empowers the commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel – Sec (46)
- CCI notified lesser penalty regulations 2009
- It seeks to regulate the leniency program allowing a party to the cartel to apply for total or partial leniency, thereby providing an incentive to the whistleblowers.



Leniency Programme under CA 02

- **According to Regulation 2 (h) the “priority status” means the position of the applicant marked for giving the benefit of lesser penalty in the queue of the applicants.**
- **Similarly, as per Regulation 2 (i) “vital disclosure” means full and true disclosure of information or evidence by the applicant to the Commission, which is sufficient to enable the Commission to form a prima-facie opinion about the existence of a cartel or which helps to establish the contravention of the provisions of section 3 (which deals with prohibition of Anti-competitive agreements) of the Act.**



Leniency Programme under CA 02

Conditions for availing lesser penalty

- (a) cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
- (b) provide vital disclosure in respect of violation under sub-section (3) of section 3 of the Act;
- (c) provide all relevant information, documents and evidence as may be required by the Commission ;
- (d) co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and
- (e) not conceal, destroy, manipulate or remove the relevant documents in any manner, that may contribute to the establishment of a cartel.



Leniency Programme under CA 02

While exercising its discretion in regard to reduction in penalty the commission shall have due regards to

- (a) the stage at which the applicant comes forward with the disclosure;
- (b) the evidence already in possession of the Commission;
- (c) the quality of the information provided by the applicant;
- and (d) the entire facts and circumstances of the case.



Leniency Programme under CA 02

- First applicant can be granted reduction in penalty upto 100% if
 - Disclosure enables the commission to form a prima facie opinion regarding the existence of a cartel.
 - In a matter under investigation provides such evidence which establishes the contravention



Leniency Programme under CA 02

- Second applicant may be granted reduction upto 50%
- The Third applicant can also be granted reduction upto 30%
- provided the disclosure significantly adds value to the evidence already with commission
- Upon receiving application the priority status of the applicant is marked



Leniency Programme under CA 02

Confidentiality

Regulation 6 mandates that the Commission shall treat as confidential the identity of the applicant or the information obtained from it and shall not disclose the identity or the information obtained unless-

- (a) the disclosure is required by law; or
- (b) the applicant has agreed to such disclosure in writing; or
- (c) there has been a public disclosure by the applicant.



Leniency Programme under CA 02

Conclusion

- Leniency Programme is one of the most important tool to unearth cartels worldwide.
- Though conceptually, the principles remain the same, however, great degree of variance in different jurisdictions with regard to its applicability (from pure procedural/adjective law perspective).
- No leniency application filed so far before the CCI.

The background of the slide is a close-up photograph of a wooden gavel resting on a wooden surface. In the background, there is an open book and a pair of scales of justice. The lighting is warm and golden, creating a professional and legal atmosphere.

SOME CASES OF SECTION 3



Case No.4/2009 M.P Mehrotra v Jet Airways & Others

Allegations:

1. Agreement on host of factors like code sharing and with a view to limit supply
2. Allocating the market of passenger air transport service.

Findings:

- Agreement not given effect to
- Some agreements entered into did not have the effect of fixing price or limiting supply and common industry practice
- Hence no violation



Case No.33/2007

In re- Charging differential rate of interest by Banks

Allegations:

1. Not giving the benefit of falling rates of interest to the consumers, who opted for floating rates of interest by the Banks.
2. Lower rates were given to the new customers qua old customers.

Findings:

No agreement between various Banks as envisaged under Section 3(3).



In re- Suomoto by MRTPC against NDPL & Others.

Allegations:

1. Most of the meters installed in Delhi by three Discoms are running fast on + side but, within permissible limit of +/- 2.5 %.

Findings:

No evidence of any concerted action.



Case No.1/2009

FICCI Multiplex Association v UPDF

Allegations:

1. The producers and distributors of Hindi Films decided not to release any film in the Multiplexes till they are given favorable ratio in revenue sharing.

Findings:

1. The conduct of film producers amounted to acting in concert which limited the supply of Hindi Films in violation of Section 3 (3) (b).
2. It also resulted into the hike of rates of tickets, thereby, causing harm to the consumers.



Hurdles faced by the CCI In Enforcing section 3



Hurdles faced by CCI in enforcing section 3

- **Human resource crunch**
 - 59% vacancy in professional staff
- **Time constraints**
- In mature jurisdictions cartel investigation normally takes 2 - 5 years
- Strict time lines have been prescribed by Supreme Court in SAIL v Jindals case
- DG to complete investigation ordinarily in 60 days
- In contrast European Commission commenced its investigations in 1989 and delivered decision in 1994 in cement cartel -finally decided by ECJ in 2004



Hurdles faced by CCI in enforcing Section 3

Limited Jurisprudence

- Due to short span of time there is not sufficient jurisprudence available for the guidance of CCI
- Jurisprudence available in mature jurisdictions may be of limited help



Hurdles faced by CCI in enforcing Section 3

- Less teeth to DG
- No general power to make inspection of offices
- Section 240 of Companies Act-production of evidence
- Section 240A –relates to seizure of documents after taking search warrant –CMM Delhi



QUESTIONS





Food for thought

- Whether criminal sanctions are necessary to deter cartels?
- Whether provisions on the line of 'consent decree' are useful and should be incorporated?
- Whether only consumer welfare should be looked at or total welfare ?
- Whether Green-Field JVs are covered under section 5 & 6?
- You can write to me at pramod12singh@gmail.com



Thank You