

**ANTI-COMPETITIVE
AGREEMENTS & ABUSE OF
DOMINANCE
(UNDER COMPETITION ACT, 2002)**



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WHAT IS MEANT BY 'COMPETITION' ?



- Is the market competitive ?
- The issue is that of 'effective competition' and not 'perfect competition' in the text book sense
- Effective Competition is seen in terms of:
 - Rivalry among firms
 - Absence of restraints
 - Where no firm can influence the market place
- In reality, however, the existence of 'effective competition' has to be defined in terms of **outcomes** or the **effects** for/on the consumers/competition
- Absence of 'effective competition' results in '**market power**' which is likely to be abused to the detriment of consumer interest.

WHAT IS MEANT BY 'COMPETITION' ?



- Market power may be due to:
 - Agreement among enterprises
 - Mergers/acquisitions/
amalgamations
 - Organic growth through sheer
efficiency

MAIN FEATURES OF COMPETITION ACT



With the above objective, the Act:

- Prohibits Anti-Competitive Agreements.
- Prohibits Abuse of Dominant Position.
- Provides for Regulation of Combinations, and
- Enjoins Competition Advocacy

[Sections 3, 4, 5, 6 and 49(3)]

COVERAGE OF THE ACT



- **All enterprises, whether public or private**
- **Government Departments covered (in CA, 2002), except when engaged in discharge of sovereign functions and Currency, Atomic energy, Space and Defence**
- **Extra-territoriality (Sec. 32)**
- **Provision for CCI to enter into MOUs with foreign competition authorities**

ANTI COMPETITIVE AGREEMENTS



Horizontal Agreements, including cartels

Four types presumed to have appreciable adverse effect (AAEC) on competition:

- **Price fixing**
- **Quantity/supply limiting**
- **Market sharing**
- **Bid rigging/collusive bid**



AGREEMENT DEFINED

- **Agreement includes any arrangement or understanding or action in concert**
- **Agreement need not be formal or reduced to writing**
- **Agreement need not be enforceable**

UNDERSTANDING SUFFICES

- **Siem Reap in Cambodia - popular tourist town, housing the famous Angkor Wat temples.**
- **There are three means of transportation from Phnom Penh, capital of Cambodia to Siem Reap – boat, road and air.**
- **8 boat companies: The price for one-way travel is 40,000 Riels (about US \$ 10). Because of competition prices plummeted to as low as 20,000 Riels, below profitable level.**
- **The boaters entered into an ‘understanding’ to fix prices at 40,000 Riels. They further agreed that they would not compete with each other and would share their departure schedules.**
- **There was no written agreement but only an understanding.**
- **The understanding constitutes a cartel agreement.**

WHAT ARE CARTELS ?



As per Competition Act, 2002:

- “ ***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, trade in goods or provision of services”***
Sec. 2 (c)
- Cartels are in the nature of prohibited horizontal agreements and are **presumed to have appreciable adverse effect on competition**

CARTELS



DETECTION: CCI POWERS

- Competition Commission of India (CCI) has **powers of a civil court**
- After *prima facie* determination CCI has to ask DG to investigate
- Director General is empowered to investigate into cartels and has the **powers of a civil court** for summoning and enforcing attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavits; issuing commissions for the examination of witnesses or documents; requisitioning any public record or document or copy of such record or document from any office. {Section 41(1) & (2)}

CARTELS DETECTION



- Director General of CCI 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.
{Section 41(3)}

CARTELS

DETERRENCE & PENALTY



- CCI is **empowered to pass following orders** against anti-competitive agreements including cartels :
- **Pass temporary orders**– during the pendency of inquiry. {Section 33}
- **Cease and desist order** - directing offending parties to a cartel to discontinue and not to repeat such agreements.

CARTELS

DETERRENCE & PENALTY



- **Modification of agreement** - directing offending parties to modify the agreements to the extent and in the manner as may be specified in the order.
- **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.**

{Section 27(a) (b) (d) (e) & (g)}

DETECTING CARTEL LENIENCY PROVISION



- Cartels are conspiracies (generally entered into in secrecy) and to destabilize them, Competition Authorities need to heavily bank upon “Leniency Programme”
- When a member of a Cartel breaks the rank and **makes full, true and vital disclosures which results in bursting the ‘Cartel’**, the Commission has been empowered to levy lesser penalty.
- The scheme is designed to induce member(s) of a Cartel to defect from the cartel agreement.
- The party making disclosure will, however, be subject to other directions of the Commission as per provisions of the Act.
- **Clarity, certainty and fairness** are critical to make leniency programme effective and, for this, Commission can take suitable measures including **formulation of Regulations** etc.

{Section 46}

CASE - 1

MARKET SHARING AGREEMENT IN SEAMLESS STEEL TUBES: EC - 1



- **8 companies (4 European and 4 Japanese) were fined by EC in 1999 for an illegal market sharing cartel**
- **British Steel Ltd; Vallourec SA; Dalmine SpA; Salzgitter Mannesmann GmbH (4 European companies) and Nippon Steel Corp; Sumitomo Metal Industries Ltd; Kawasaki Steel Corp; NKK Corp (4 Japanese cos).**
- **Total fines € 99 million**
- **The Europe -Japan Club requiring that the domestic markets of the different producers should be respected**
- **Commission found it to be a very serious infringement of Art 81 (1) of EU Treaty**
- **7 of these 8 cos appealed to the Court of First Instance, which upheld Commission's decision in substance, but reduced fees by 13 million on appealing cos as Commission had not produced sufficient evidence covering the entire duration of the infringement**

CASE - 1

MARKET SHARING AGREEMENT IN SEAMLESS STEEL TUBES: EC - 2



- **Four cos appealed this decision**
- **In January 2007 the European Court of Justice (joined cases C-403/04 P and C-405/04 P, Case C-407/04 and Case C-411/04 P) confirmed the existence of cartel and participation of the appealing parties therein**
- **Court confirmed European Commission's approach as regards the calculation of the fines imposed on the companies.**
- **The court also confirmed that in the case of cartels there is no need to prove the actual existence of harm to intra Community trade, since it is sufficient to prove that an agreement is potentially capable of producing such an effect**

CASE - 1

MARKET SHARING AGREEMENT IN SEAMLESS STEEL TUBES: EC - 3



- **The following fines were confirmed:**

Name of Company*	Fine (€ millions)
Sumitomo Metal Industries Ltd	10.935
Nippon Steel Corp	10.935
Dalmine SpA	10.080
Salzgitter Mannesmann GmbH	12.600
* All four companies had to pay Commission's cost of the appeal	

CASE - 2



PROSECUTING CARTELS

WITHOUT DIRECT EVIDENCE - 1

- **Brazilian case of price fixing cartel in flat rolled steel products**
- **Until 1992 these products were subject to price controls , which were administered in part by SEAE**
- **In July 1996 representatives of the Brazilian Steel Institute met with officials of SEAE and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day**
- **On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of competition law and illegal.**
- **Nevertheless, the three producers each increased price of these products in early August that year. The increases were approximately as those given to SEAE by the Steel Institute.**

CASE - 2



PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE - 2

- Aside from the presentation to the SEAE by the Institute there was no direct evidence of concerted action
- Respondents made two interesting points:
 - Steel market is an example of market with “price leadership”, which would explain the “apparent” concerted behaviour of the Respondents;
 - Whenever a case deals only with indirect evidence, a condemnation would only be acceptable if no rational explanation for the fact were available

CASE - 2



PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE - 3

- CADE's decision that parties were guilty was based on the "parallelism plus" theory, because in addition to the economic evidence, some circumstantial event was associated to the price parallelism
- The first issue taken into account was the fact that price increase of the companies at similar rates and dates could not be explained just by referring to it as oligopoly's interdependence
- Although CADE did not consider the meeting as direct evidence of collusion, the Commissioners understood that it constituted a strong indication that there had been previous meeting among the companies to discuss matters before actually taking them to the government

OTHER HORIZONTAL AGREEMENTS & VERTICAL AGREEMENTS

- Other horizontal agreements and Vertical Agreements
 - >> Assessed based on *'rule of reason'*

Vertical agreements include:

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



EXEMPTIONS

- Joint Ventures (JVs)
 - Efficiency enhancing joint ventures to be examined based on *'rule of reason'*
- Intellectual Property Rights (IPRs)
 - Copyright
 - Patent
 - Trade mark
 - Geographical indicators
 - Industrial designs
 - Semi-conductor Integrated Circuits Layout Designs
- Nothing in sec. 3 would restrain an IPR holder from imposing reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under the above IPRs

DOMINANCE DEFINITION



- Position of strength enjoyed by an enterprise in the **relevant market** which enables it to:
 - Operate independently of competitive forces prevailing in relevant market; or
 - Affect its competitors or consumers or the relevant market in its favour
- Ability to prevent effective competition *and*
- Ability to behave independently of two sets of market actors, namely:
 - Competitors
 - Consumers

DOMINANCE - 2

FACTORS TO BE CONSIDERED IN DETERMINING...



Dominant position linked to a host of factors

- Market share of enterprise
- Size and resources of enterprise
- Size and importance of competitors
- Commercial advantage of enterprise over competitors
- Vertical integration
- Dependence of consumers
- Dominant position as a result of a statute
- Entry barriers
- Countervailing buying power
- Market structure and size of market
- Social obligations and costs
- Contribution to economic development
- Any other factor

DOMINANCE - 3

ABUSE OF DOMINANCE



- Imposing **unfair** or discriminatory price or **condition** in purchase or sale, including predatory pricing
- **Limits or restricts production** of goods or provision of services or market therefor
- Limiting scientific development to the prejudice of consumers
- Denial of market access in any manner
- **Conclusion of contract subject to supplementary obligations**
- **Use of position in one relevant market to enter into or protect other relevant market**

ABUSE OF DOMINANCE

PER SE PROHIBITION

- Abuses are broadly of two types:
 - > Exploitative (predatory pricing, e.g.)
 - > Exclusionary
(interference with competitive process)
- **No enterprise or group of enterprises shall abuse its dominance position (sec. 4)**
- Act envisages **per se prohibition** of abuse of dominant position
- No provision for rebuttal
- **IPRs, as such, do not enjoy exemption**: unreasonable exercise of IPR to be caught under this provision

ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANCE REMEDIES



- Cease and desist order
- Specifying future terms and conditions
- Imposition of penalties
- Structural remedies include ‘division of enterprise’
- Such other order as may be deemed appropriate by Commission

CARTELS

EFFECTIVENESS OF CCI



CCI will be effective at addressing the cartel menace because of:

- The availability of explicit **definition of 'Cartel' in the Act**
- **Adequate powers of investigation**
- **Leniency programme** for members of a cartel to defect
- **Power to impose deterrent penalty** linked with profits or turnover on each member of the cartel during the continuance of cartel
- **Effective extra-territorial reach:** Explicit provisions to exercise jurisdiction in respect of overseas acts having adverse effects on competition in India, coupled with provisions to enter into cooperation agreement with contemporary overseas competition agencies
- Efforts to build **strong competition culture** including **encouragement to public to submit information by ensuring confidentiality**

THANK YOU

