

# CARTELS AND OTHER ANTICOMPETITIVE AGREEMENTS

14 MARCH 2007

UDAI S MEHTA, CUTS INTERNATIONAL  
SANJAY PANDEY, NATIONAL LAW  
UNIVERSITY



# INTRODUCTION

## □ Understanding Cartels

What are Cartels?

- An explicit agreement among rival firms not to compete, restrict output and to raise the price of their products is called a “Cartel”.

Types of Cartels:

- Price Fixing: collusive attempt by suppliers to control prices and thus fix prices at a level close to what one would expect from a monopoly.
- Market Division Agreements: Competitors agree to divide the customers, territories or the products that each will make and sell
- Concerted refusal to deal: Competitors may agree not to deal with others or to do so only on collectively determined terms, with the intention of reducing competition in the market.
- Bid Rigging: Agreement among competitors as to who should win the bids.

# INTRODUCTION

## □ Factors facilitating Cartels

- Three factors necessary to establish a cartel:
  - cartel must be able to raise price above the non-cartel level without inducing substantial increased competition from non-member firms
  - cost of establishing, enforcing a cartel agreement and the expected punishment, must be low relative to the expected gains out of such agreements
- Government Policies:
  - government policies, especially those that make prices readily available to all interested parties or those that divide markets into small segment, facilitate cartel activities.
  - government procurement policies also facilitate cartel activities.
- ◆ Weak Enforcement:
  - low level of penalties have an effectively low deterrent effect and lax enforcement of competition laws also facilitate cartels

# TOOLS TO UNDERTAKE INVESTIGATIONS

## SEARCH AND SEIZURE

### ☐ USA

- Search Warrants have a benefit of surprise, it requires witnesses to produce documents and information
- DOJ has powers to use informants, wire trapping methods, hidden microphones and video cameras to gather relevant information

### ☐ Brazil

Complimentary Law empowers the investigative authorities:

- to undertake search and seizure, provided 24 hours notice is given to the party
- to undertake search and seizure, without prior notice, provided a judicial order is granted.

### ☐ India

- MRTP Act, 1969 empowers the Commission to authorise any of its officer to undertake entry, search and seizure for recovery of documents (Sec.12.5)
- Competition Act, 2002 does not empower the CCI with search and seizure powers

# TOOLS TO UNDERTAKE INVESTIGATIONS

## LENIENCY PROGRAMME

### □ USA

Corporate – Amnesty Programme:

- Before the start of investigation
- After the start of investigation

Individual – Leniency Policy:

When the individual (not the ring leader) comes to Division, that has no prior information and cooperates fully in the investigation

### □ Brazil

- The application has to be made by only one member, who is not the “ring leader” and information was not yet known to the authorities
- If authorities have prior knowledge, depending on the cooperation and good faith of the applicant, fines may be reduced by between 1/3<sup>rd</sup> and 2/3<sup>rd</sup>.

### □ India

- Application is made by the 1<sup>st</sup> party who could be the ring leader before the start of investigation
- Competition Amendment Bill allows any other party to make the application before the DG submits his report to the CCI

# PENALTIES

## □ USA

- Corporations – \$ 100 million or twice the total gain to the conspirators or twice the total loss to the victims, whichever is greater and/or probation from 1-5 years as result of conviction
- Individual - \$ 1 million or twice the total gain to the individual or twice the total loss to the victims, whichever is greater and/or imprisonment up to 10 years

## □ Brazil

- Corporations - Fine ranging from 1% to 30% of the annual net billings of the defendant in the year before the start of investigation
- Imprisonment of 2-5 years for managerial staff

## □ India

Penalty upto 300% of the amount of profits made out of such agreements by the cartel or 10% of the average turnover of the cartel for the last three preceding financial years, whichever is higher.

# INDIAN COMPETITION LAWS

## MRTP ACT, 1969

- Cartels covered under Section 2(o) i.e. Restrictive Trade Practices – practices that have an effect on prevention, distortion and restriction of Competition
- MRTPC vested with the powers:
  - to impose cease and desist orders
  - search and seizure powers

## COMPETITION ACT, 2002

- Cartels covered under Section 3 i.e. Anticompetitive Agreements – agreements that cause appreciable adverse effect on competition by way of creating barriers to entry, driving out existing competitors, etc.
- Competition Commission of India (CCI):
  - Investigation – *suo moto* or on basis of a complaint
  - Leniency Provision
  - Penalty

# CASES AND LEARNINGS

## Modi Alkali and Chemicals Ltd

### □ Brief Details

Anonymous complaint – Cartel formed for hiking the prices of chlorine gas and hydrochloric acid by 277% and 200% respectively

### □ Features

- MRTPC directed DG to conduct investigation and DG submitted its Preliminary Investigation Report that no action is needed to be taken.
- Yet the MRTPC felt the need to enquire and issued Notice of Enquiry (NOE)
- Defendants raised objection that the NOE was based on anonymous complaint
- The investigation lacked relevant necessary information to prove a cartel – thus the case was dropped.

### □ Learnings

- Cartels not defined in the MRTP Act but understanding of cartels could be drawn from RTP
- Key factors and information required to prove a cartel
- Acceptance of anonymous complaint to initiate an investigation



# CASES AND LEARNINGS

## Alkali & Chemical Corp. of India and Bayer India Ltd

### □ Brief Details

Companies were engaged in the manufacture and sale of rubber chemicals and possessed a dominant share in the market. They were charged for having identical prices on 5-6 occasions

### □ Features

MRTPC observed, “in the absence of any direct evidence and the circumstantial evidence not going beyond price parallelism, we find it unsafe to conclude that the respondents indulged in any cartel activity”

### □ Learnings

Price Parallelism used as a defence against cartelised price fixation.

# CASES AND LEARNINGS

## Sirmur Truck Operators and Truck Operators Union, Haryana

### □ Brief Details

In both the cases, the respondents acted in concert while fixing freight rates for rendering transport services and not allowed non-member trucks to operate

### □ Features

- Fixing of freight rates and not allowing non-members to operate, comes within the ambit of being an RTP
- Haryana Case – DG sent a probe letter but the respondents did not reply, so an on the spot investigation was carried out
- In both the cases, the investigation revealed that they were not allowing non-members to operate, comes within the ambit of being an RTP and issued cease and desist orders.

### □ Learnings

- MRTPC not empowered to impose penalties
- Non-cooperation on the part of the defendant

# CASES AND LEARNINGS

## American Natural Soda Ash Corporation vs. Alkali Manufacturers Association of India

### □ Brief Details

ANSAC, a joint venture of 6 soda ash producers in the USA attempted to ship a consignment of soda ash to India. AMAI, complained to MRTPC against ANSAC for cartelised exports to India

### □ Features

- Commission passed a temporary injunction on ANSAC and held it to be a cartel
- ANSAC appealed to SC, which overturned the order of the Commission
- The Commission had no power to stop import, did not have extra territorial jurisdiction, action could be taken if the activity involved an Indian party and that too if the goods were actually imported into India

### □ Learnings

- MRTPC not empowered with extra territorial jurisdiction powers
- Action could be taken if the activity involved an Indian party and that too if the goods were actually imported into India

# CASES AND LEARNINGS

## Sumitomo Corporation, Japan and Others

### □ Brief Details

Japanese companies along with their Indian agents colluded and quoted identical prices in respect of input material required by SAIL.

### □ Features

- Restriction of competition is to be seen with SAIL having 90% market share.
- Placement of order for supply of 18 out of 228 rolls, is a very insignificant order and would have no effect on competition in the market.
- Commission held that it was a cartel, however in lieu of a gateway available under Section 38 (1)(d), the said charge was dropped.

### □ Learnings

- Order of supply so small that it had virtually no effect on competition in the market
- Justification for forming a cartel to achieve a level playing field, as the accuser is a dominant player in the market

# LEARNINGS FROM MRTP ACT

## Definition of Cartel

- Cartels not defined in the MRTP Act but understanding of cartels could be drawn from RTP

The Competition Act, 2002 explicitly define Cartels under section 2(c) of the Act , “Cartels 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”.

- Key factors required to prove a cartel

The Competition Act lists certain factors to prove a cartel:

- directly or indirectly determines purchase or sale price,
- limits or controls production, supply, markets, technical development, investment, and
- shares the markets or source of production or provision of services

# LEARNINGS FROM MRTP ACT

## Defence against Cartelisation

### □ Price parallelism as a defence against cartelised price fixation

It is shown in the study that price parallelism is often used as an effective defence. US and Brazilian courts have adopted a “*parallelism plus*” approach, which requires showing the existence of “plus factors” beyond merely the firms’ parallel behavior, in order to prove that an antitrust violation has occurred.

### □ Order of supply so small that it had virtually no effect on competition in the market

Cartel activity is ‘presumed’ to have an appreciable adverse effect on competition. The onus would be on the accused to justify that the practice did not have any adverse effect on competition in the market.

# LEARNINGS FROM MRTP ACT

## Defence against Cartelisation

- ❑ Justification of one's own activity of cartelisation on the basis that the accused is itself a dominant player in the market

CCI needs to impress upon the supplier firms, should the buyer firm abuse its dominant position, then instead of entering into a cartel agreement, they could approach the CCI. Establishment of an anti-competitive agreement to counter another potential anti-competitive practice should be discouraged.

- ❑ Acceptance of anonymous complaint to initiate an Enquiry

Section 19 empowers the CCI to start an investigation on the basis of a reference from the Central Government or the State Government or a statutory authority or on its own knowledge or information. CCI is empowered to accept an anonymous complaint to form a basis for further investigation.

# LEARNINGS FROM MRTP ACT

## Powers of the Commission

- ❑ The MRTPC was not empowered to impose penalties  
Section 27 – CCI is empowered to impose penalty equivalent upto 300% of the amount of profits made out of such agreements or 10% of the average turnover of the cartel for the last three preceding financial years.
  
- ❑ Extra-territorial jurisdiction and action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods have been imported into India
  - Section 32 - any enterprise abusing a dominant position, or any combination or party to combination is outside India, the CCI has the power to inquire into it, if it has an anti-competitive effect within the relevant market in India. (Effects Doctrine)
  - Sub-section 33(2) allows CCI to grant a temporary injunction restraining any party from importing goods, if it can be established that such imports would contravene the Act's substantive provisions.



# LEARNINGS FROM MRTP ACT

## Powers of the Commission

### □ Non-cooperation on the part of the Defendants in the investigation

The Competition Act empowers the CCI to penalise a person for making false statement or for not cooperating in the investigation. This could prove as a sufficient disincentive for not cooperating.

# RECOMMENDATIONS

- Complaints acts as important source to trigger cartel investigations. CCI should encourage submission of complaints by injured parties.
- CCI being a new authority, should take up cartel cases in sectors (cement, tyres, chemicals) which are repeatedly reported by the Media. Successful convictions would help in building the image and the in-house capacity of the CCI officials.
- CCI's regulations imposes fees of Rs.50,000/- for making complaints. This could act as a barrier for getting relevant information regarding suspected cartels. CCI should do away with this clause, however, it could impose fines on frivolous complaints.
- CCI needs to be equipped with the powers to conduct search and seizure.
- International efforts such as ICN, UNCTAD,OECD, etc have been studying and reporting cartel cases. CCI should participate and establish cooperative arrangements with them.
- Need to develop a competition culture i.e. an understanding by the public of the benefits of competition and adverse impacts of cartels
- CCI should publish reader friendly books and pamphlets to create awareness about cartels and other anti competitive practices, in the society.
- CCI needs to create a specialised Cartels division within the organisation.

# OPERATIONAL GUIDELINES

## ❑ Build relationships with Business Houses

- CCI needs to educate business houses/associations on cartels.
- CCI should encourage companies to report cartel activities and get amnesty
- CCI should keep a watch on the activities of trade associations

## ❑ Capacity Building of CCI officials

Its important to build in-house capacity on the understanding towards cartels. There is not much experience that could be gained from the past and hence the officials in CCI, who would be interacting with business houses, association etc, so as to gain a sound understanding.

## ❑ Studying Past Orders of the MRTPC and Supreme Court (SC)

MRTP Commission's decisions were challenged in the SC and orders passed by SC have set a precedent. Defendants to defend their activity, would use these precedents. CCI should study such precedent-setting orders in depth and prepare its strategy/arguments accordingly to deal with them should such a situation arise in the future.

## ❑ Tie – ups with Media Houses and Consumer Organisations

CCI should build relationship with the Media and Consumer organisation, which could act as informers and provide the CCI with vital information on cartels.

# OPERATIONAL GUIDELINES

## ❑ CCI undertake study of Cartel Cases of other Jurisdictions

CCI should undertake study of Cartel cases as decided in other jurisdiction to get a better learning of cartels, improve their investigative and analytical skills.

## ❑ Action against existing cartels

In recent times, various media houses have reported the existence of cartels, such as the Airlines Cartel. In this particular cartel, airlines recommended to fix the floor price, which is clearly an attempt of cartelisation. CCI can undertake in-depth study of such cartels and come out with their own analyses. This would help the CCI in better understanding of cartels.

## ❑ Government Policy

As mentioned, there have been cases where government policies or its implementation created incentives for formation of cartel. Hence, while investigating a case, the CCI should keep this factor in mind. It is important to create an environment that discourages formation of cartels rather than continue to detect and prosecute cartels without doing much about the root causes.

THANK YOU