



COMPETITION ACT, 2002

**ANTI-COMPETTIVE
AGREEMENTS**

INCLUDING

CARTELS

PRESENTATION

TO

CENTRAL GOVERNMENT OFFICIALS

By

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At

India International Centre, Annex

26-11-2008



COMPETITION ACT, 2002

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- **CA, 2002 notified in January, 2003. However enforcement delayed due to legal issues raised in courts**
- **With the passage of Competition (Amendment) Act, 2007, the Act is now ready for enforcement**
- **Act is modern based on international norms**
- **It is “close to state-of-the-art” (OECD, Economic Survey of India Report 2007)**
- **It 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” (WTO Trade Policy Review of India, 2007)**
- **India is currently the only major developing country in the world without an enforceable modern competition law.**



DUTIES OF COMPETITION COMMISSION

Competition Act, 2002 notified in Gazette in January, 2003. Preamble's stated objective is to establish the Commission which has the duty to:

- Eliminate practices having adverse effect on competition;
- Promote and sustain competition
- Protect consumers' interests
- Ensure freedom of trade carried on by other participants in markets, in India



MAIN FEATURES OF COMPETITION ACT - 1

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, except when engaged in discharge of sovereign functions and Currency, Atomic Energy, Space and Defence
- Extra-territoriality (Sec. 32)
- Provision to enter into MOUs with foreign competition authorities



**ANTI COMPETITIVE
AGREEMENTS
INCLUDING
CARTELS**

Anti-competitive Agreements



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**

Anti-competitive Agreements



UNDERSTANDING SUFFICES

- Siem Reap in Cambodia - popular tourist town, housing the famous Angkor Vat 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.

AGREEMENT

- **Existence of agreement has to be established**
- **Agreement between**
 - **Persons**
 - **Person and Enterprise**
 - **Person and AoP**
 - **AoP and AoP**
 - **Persons and AoE**
 - **AoEs**
 - **AoP and AoE**

AGREEMENT

- Agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services
- Anti-competitive agreements are those **which cause or is likely to cause Appreciable Adverse Effect on Competition (AAEC) within India**
- **Anti-competitive agreements are prohibited by law and are VOID**

Anti-competitive Agreements

PRESUMPTION RULE AND RULE OF REASON

- Agreements having appreciable adverse effect on competition in market in India are void

Presumptive logic

- Agreements between competitors - including 'Cartels'- (**horizontal agreements**) *presumed* to have *appreciable adverse effect* on competition: **Burden of proof on the defendant**
 - price fixing
 - sharing of market
 - limiting production, supply
 - bid rigging/collusive bidding
- *Presumption Vs per se*
- *Treatment of JVs; efficiency enhancing JVs:*
- *Treatment of Production for Exports*

(Section 3)

Anti-competitive Agreements

PRESUMPTION RULE AND RULE OF REASON (contd.)



‘Rule of reason’

- (i) Other Horizontal Agreements
- (ii) Vertical Agreements: Agreements between enterprises at different stages of the production, distribution etc. chain

(burden of proof of appreciable adverse effect on competition lies on the prosecutor).

- These include:
 - tie-in arrangement,
 - exclusive supply agreement
 - exclusive distribution agreement
 - refusal to deal
 - resale price maintenance
- List not exhaustive
- Treatment of IPRs in Section 3 on Agreements (3.5.1)

FACTORS FOR ASSESSING



APPRECIABLE ADVERSE EFFECTS ON COMPETITION FOR AGREEMENTS

- (a) Creation of barriers to new entrants in the market;
- (b) Driving existing competitors out of the market
- (c) Foreclosure of competition by hindering entry into the market;
- (d) Accrual of benefits to consumers;
- (e) Improvements in production or distribution of goods or provision of services;
- (f) Promotion of technical, scientific and economic developments by means of production or distribution of goods or provision of services



CARTELS

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

SOME CASES: UNDER MRTPA



SODA ASH CARTEL

- In September, 1996, American Natural Soda Ash Corporation (ANSAC) comprising of six American producers of soda ash attempted to ship a consignment of soda ash at cartelized price to India.
- Based on the ANSAC membership agreement, the M.R.T.P. Commission held it as a prima facie cartel and granted interim injunction in exercise of its powers in terms of Section 14 of the M.R.T.P. Act. The Supreme Court, however, overturned the order of the Commission inter alia, on the ground that it did not have authority to prohibit imports

CARTELS

SOME CASES: UNDER MRTPA



TRUCKING CARTEL

- Eliminating competition in the market by fixing the freight rates without liberty to the members of the truck operator union to negotiate freight rates individually is common in the trucking industry.
- The M.R.T.P. Commission passed 'Cease & Desist' order against Bharatpur Truck Operators Union, Goods Truck Operators Union, Faridabad, and Rohtak Public Goods Motor Union.
- In the absence of any penalty provision, however, no fines could be imposed.

CARTELS

DETECTING CARTELS NOT EASY

- **Cartels being secretive and cartelists taking pain to conceal it necessitates the Competition Authorities to undertake great efforts to detect concealed cartels;**
- **Competition Authority needs extraordinary powers and skill to collect sufficient evidence to mount a viable case against uncooperative defendants;**
- **Cartels are conspiracies and to destabilize them, Competition Authority needs to heavily bank upon “Leniency Programme”**

CARTELS



DETECTION: CCI POWERS

- Competition Commission of India (CCI) has **powers of a civil court**
- After *prima facie* determination CCI can ask DG to investigate
- Director General (DG) 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}

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**

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



THANK YOU

