

# Competition Commission of India



## ANTI-COMPETITIVE AGREEMENTS & ABUSE OF DOMINANCE

*by :*

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**Symposium on Competition Policy and Competitiveness**

**SBS COLLEGE , Delhi 26-02-2009**



# ANTI COMPETITIVE AGREEMENTS



# Conspiracy To Raise Prices

“ *People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.*”

- Adam Smith, 1776, *The Wealth of Nations*



# Harm to Developing Nations

- Import of \$ 81.1 bn ( Rs. 4,05,500/- Cr at present exchange rate) from industries in price fixing during 90s...  
WB background paper
- Represents 6.7% of imports and 1.2% of GDP in the developing countries
- Larger proportion of trade in the poorest developing countries where 16 products in question represented 8.8% of imports



# Impact of Enforcement

<b>Continent</b>	<b>Nations without active enforcement</b>	<b>Nation with active enforcement</b>
<b>Western Europe</b>	<b>52.1%</b>	<b>17.4%</b>
<b>Latin America and Caribbean</b>	<b>53.0%</b>	<b>38.1%</b>
<b>Asia</b>	<b>40.1%</b>	<b>-13.9%</b>

**\*Source : Dr. Simon J. Evenett, World Bank Background Paper**



# Other Findings

- The study identified 39 cartels
- 24 cartels lasted at least 4 years
- Diverse membership: 31 economies; including 8 developing economies
- Price falls of 20 - 40% after cartel break up
- Cartel formation triggered by substantial price falls
- After enforcement actions, many mergers, acquisitions, strategic alliances, JVs etc. amongst cartel members
- Post enforcement monitoring needed



# Any Familiarity ?

- Saint - Gobain  
Pilkington
- Schindler  
ThyssenKrupp
- Boost  
Complan
- Zincovit
- Vitamin C Tablets
- Ponds Cold Cream

- Asahi Glass
- Soliver
- Otis
- Kone
- Bournvita
- Horlicks
- Multivit



# Car Glass Cartel

- Saint - Gobain - € 896 m (repeat offender)
- Pilkington - € 370m
- Asahi - € 113.5 m
- Soliver - € 4.4 m
- Met at Airports/Hotels in Frankfurt/Paris/ Brussels to share sensitive information
- Anonymous tip off
- “These companies cheated the car industry and car buyers for five years in a market worth €2 billion in the last year of the cartel,”
  - *Neelie Kroes, Competition Commissioner, EU*





# Elevator Cartel

● € 992 m on lift makers Otis, Schindler, ThyssenKrupp and Kone (Feb. 07)

“It is outrageous that the construction and maintenance costs of buildings, including hospitals, have been artificially bloated by these cartels”

“The national management of these companies knew what they were doing was wrong, but they tried to conceal their action and went ahead anyway. The damage caused by this cartel will last for many years”

***-Neelie Kroes, Competition Commissioner, EU***



# Vitamin Cartel

● € 855 m on 8 pharma companies (Vitamin), 2001

- Hoffmann-La Roche – € 462 m
- BASF - € 296.1 m
- Merck KgaA, Solvay Pharmaceuticals BV, Aventis SA and others
- From cereals, biscuits, and drinks to animal feed, pharmaceuticals, and cosmetics all have them
- A, E, B-1, B-2, B-5, B-6, C, D-3, biotin (H), folic acid (M), beta carotene, and carotenoids



# Lysine Cartel

- Lysine is an amino acid that stimulates growth and results in leaner muscle development in dogs, poultry and fish. It is also mixed with corns and is an input for feed products.
- From 1992 to 1995, 5 producers of Japan, Korea and US having over 97% of the global capacity - price fixing, sales quota allocation and monitoring of volume agreements. DoJ investigated.
- Search with help of FBI. Documents and tape recordings of meeting of the conspirators could make a strong case of colluding on lysine prices around the world for 3 years.



# Airlines Cartel

- Alleged worldwide cartel involving more than 30 airlines
- Japan Airlines (JAL) agreed to pay \$110 m to DoJ related to its role in fixing international cargo rates
- DoJ statement- JAL netted nearly \$ 2 billion on US-Japan routes
- JAL statement – gave full cooperation – set aside a reserve of nearly \$113.6 m for potential penalty- and continue to reinforce compliance programme
- Quantas, BA and Korean Air already pleaded guilty



# Other Airlines

- BA fined \$ 300 m by DoJ and \$ 246 m by OFT
- Korean Air Lines (KAL) fined \$300 m by DoJ
- ACCC sought information from KAL
- KAL approached federal court – lost
- Investigation by ACCC on
- Lufthansa fined SA R 8.5 m for colluding with SA Airways to fix the price of air tickets to Frankfurt by CC South Africa ( SA Airways filed consent terms for R 55 m)



# BA & Virgin

- Fuel surcharges rose from \$10 to about \$ 120 a ticket for a round trip long-haul flight on BA and Virgin- in collusion period
- Investigation by DoJ & OFT began since June 2006
- BA & KAL also involved in conspiracy with Lufthansa to fix charges on International Cargo Shipments
- Virgin and Lufthansa–informed authorities-no fines



# Overcharge Refund

- Those flew with BA/Virgin Atlantic between 11-8-2004 and 23-3-2006 – eligible for refund – class action suit by Cohen-Milstein – if ticket bought in UK or US
- Refunds between £ 2 to £ 10 (Virgin); £ 1 to £ 11.50 (BA)- per flight
- Is collusion profitable ?



# Harm

- Worldwide consensus that Cartels harm consumers and damage economies
- Japan estimated that prices went up on average by 16.5 percent by recent cartels
- Sweden and Finland competition authorities observed price declines of 20 – 25 percent following enforcement action against asphalt cartels
- The football replica kits case in UK resulted in long - term price reduction to the extent of 30 percent following enforcement action by OFT

*(Source - Hard Core Cartel: Third Report on the implementation of the 1998 recommendation © OECD 2006)*





# Harm ...contd.

- Israel competition authority observed that prices declined by nearly 40-60 percent after it uncovered a bid rigging cartel among envelope producers
- US estimates suggest that some hard core cartels can result in price increases of up to 60 or 70 percent.
- Based on a review of a large number of cartels, it is estimated that the average overcharge is somewhere in the 20–30 percent range, with higher overcharges for international cartels than for domestic cartels

*(Source - Hard Core Cartel: Third Report on the implementation of the 1998 recommendation © OECD 2006)*



# Bid-rigging/Collusive bidding

- Affects public procurement
- Overcharge of 15-20% according to a study in the US covering 1988-93
- Not an uncommon practice in India
- Several government sector buyers claim to be victims – e.g. Railways, Coal India



# Broad Provisions of CA 02

- Prohibits anti-competitive agreements
  - (S 3)
- Prohibits abuse of dominant position
  - (S 4)
- Regulates combinations
  - (S 6)
- Mandates competition advocacy and awareness
  - (S 49)



# Present Status

- Competition Act, 2002 passed in January 2003
- Competition Commission of India established in October, 2003
- Full constitution of Commission and enforcement could not be taken up due to legal challenge leading to process of amendments
- Competition (Amendment) Act, 2007 passed in October 2007
- Process for full constitution of the Commission is on



# Indian law in global context

- WTO : *“Law 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” (Trade Policy Review of India 2007)*
- OECD : *“close to state-of-the-art” (Economic Survey India Report 2007)*



# Duties of the Commission

- Prevent practices having adverse effect on competition
- Promote and sustain competition in markets
- Protect the interests of consumers
- Ensure freedom of trade carried on by other participants in markets, in India
  - *[ Preamble and Section 18]*



# Coverage

- All enterprises, whether public or private
  - [S 2(h)/expln (l)]
- Departments of government except activities relatable to sovereign functions including Atomic energy, Currency, Defence and Space
  - (S 2(h))



# Agreement

- Agreement defined very widely
- Inclusive definition – includes any arrangement or understanding or action in concert
- Includes formal or informal, written or oral agreements
- Includes agreements not meant to be legally enforced
  - ( S 2(b))





# A Nod or Wink will do

● *“People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do. Parliament as well is aware of this. So it included not only an ‘agreement’ properly so called, but any ‘arrangement’, however informal”*

- Lord Denning in the case of RRTA v. W.H.Smith and Sons Ltd.,



# Prohibited Agreements

## ● No

- Enterprise or
- Association of Enterprises or
- Person or
- Association of Persons

## ● Shall enter into agreement which causes or is likely to cause

## ● AAEC

- (S 3(1))

## ● Contravening agreements void

- (S 3(2))



# Enterprise (S 2(h))

- A person or a dept of the government,
- Engaged in any activity, relating to production, storage, supply, distribution, acquisition or control of articles or goods, or
- The provision of services, of any kind, or
- In investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities or any other body corporate,



# Enterprise...contd..

- But does not include any activity of the government relating to
- The sovereign functions of the government
- Including all activities carried on by the department of the central government dealing with Atomic Energy, Currency, Defence and Space



# Person (S 2(I))

## Includes:

- an individual
- a Hindu undivided family
- a company
- a firm
- an AOP or a BOI, whether incorporated or not, in India or outside
- any corporation established by/ under any central/state or provincial act
- any body corporate under laws of a country outside India
- a co-operative society
- a local authority
- every Artificial Juridical Person, not following in any of the previous sub-clauses

Can be widened being and inclusive definition



# Agreement for what ?

- In respect of production, supply, distribution, storage, acquisition or control of goods or provision of services



# Presumption of AAEC

- Any agreement entered into ... or practice carried on, or decision taken by, any AOE or AOP, including cartels engaged in *identical or similar trade of goods or provision of services* which-
  - Fixes price – directly or indirectly
  - Limits or controls production/supply/markets/ technical developments/ investments or provision of services
  - Shares market or source of production in any way
  - Results in bid rigging /collusive bidding – directly/indirectly
- Presumed to have an AAEC
  - S 3(3)
- Efficiency enhancing JVs to be examined based on ‘*rule of reason*’
  - Proviso to S 3(3)



# Exemptions

- Reasonable conditions, necessary for protecting any of rights which have been or may be conferred under the following Intellectual Property Rights
  - Copyright
  - Patent
  - Trade mark
  - Geographical indicators
  - Industrial designs
  - Semi-conductor Integrated Circuits Layout Designs  
(S 3(5)(i))
- Agreements for exports
  - (S 3(5)(ii))





# Vertical Agreements

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

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

● Prohibited only if AAEC is established

- Preponderance of probability
- Onus on the Commission

(S 3(4))



# Cartels

- “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, or, trade in goods or provision of services”

(S 2 (c))

- Cartels are in the nature of prohibited horizontal agreements and presumed to have *AAEC*



# MRTPC and ACA/Cartels

- Not defined
- Powers of investigation also limited
- Only cease and desist
- No Penalty



# CCI and ACA/Cartels

- Powers of a civil court
- After *prima facie* determination, CCI shall direct DG to investigate
  - (S 26(1))
- DG empowered to investigate with powers of a civil court
  - (S 41(1) & (2))



# Interim Orders

- CCI empowered to pass following orders against anti-competitive agreements (including cartels)
  - Temporary restraint orders— during inquiry (S 33)
  - Cease and desist order - directing parties to discontinue and not to repeat such agreements (S 27)



# Remedies for ACA

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

- (S 27 (d) )

- Penalty

- Not more than 10% of average of turnover for last 3 preceding FYs on parties to such ACA or Abuse;

- 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

- (S 27 (b))



# ABUSE OF DOMINANCE



# Should AOD be Prohibited?

- Who should be protected ?
  - Competition; or
  - Competitor
- Does prohibition of AOD amount to protection of competitor?
- CA 02 prohibits AOD





# AOD Prohibited

- No enterprise or group shall abuse its 'dominant position'(S4(1))
- Existence of dominant position is not frowned upon
- Conduct of dominant enterprise ,if it falls in 'Abuse', is prohibited under the Act



# 'ABUSE'(S4(2))-I

- Imposing unfair or discriminatory price or condition in purchase or sale, including predatory pricing (a)
- Limits or restricts production of goods or provision of services or market therefor (b)
- Limiting scientific development to the prejudice of consumers (b)



# 'ABUSE'(S4(2))-II

- Denial of market access in any manner (c)
- Conclusion of contract subject to supplementary obligations (d)
- Use of dominant position in one relevant market to enter into or protect other relevant market (e)



# ‘Dominant Position’

● Position of strength enjoyed by an enterprise in the relevant market which enables it to: ( Expl S 2(a))

(i) Operate independently of competitive forces prevailing in relevant market, or

(ii) Affect its competitors or consumers or the relevant market in its favour



# Two Elements of Dominance

- An ability to prevent *effective competition* and
- Ability to behave *independently* of three sets of market actors namely:
  - Competitors
  - Customers
  - Consumers



# Factors for Dominance- 1

## ● 13 listed factors (S19(4))

- Market share – no threshold
- Size and resources of the enterprise (b) – size technological lead – capacity
- Size and importance of the competitors (c)
- Economic power of the enterprise including commercial advantage over competitors (d)
- Vertical integration of the enterprise or sale or service network of such enterprise (e)
- Dependence of consumers on the enterprise (f)



# Factors for Dominance - 2

- Dominance created by statute or government authority –public sector monopoly (g)
- Entry barriers – regulatory barriers – high sunk cost – technical entry barriers – economies of scale (h)
- Countervailing buying power (i)
- Market structure and size of the market (j)
- Social obligation and social costs (k)
- Relative advantage of the dominant firm to economic development-having or likely to have AAEC (l)
- Any other factor – discretion of CCI – residual factors (m)



# 'Predatory price'-I

## ● 'Predatory price' (Expl 2(b))

means the sale of goods or provision of services at a price which is below cost with a view to reduce competition or eliminate competitors (Expl. (b) to S 4)





# ‘Predatory price’-II

## ● Predatory pricing

- Intent to oust and selling below “cost” necessary for a successful charge of predation
- Spare capacity to absorb additional demand
- What “cost” to take
- Is predatory pricing ‘good’ for the consumer?
- What time period should be looked at ?



# Two Stage Process

## ● Two stage procedure:

- Determining the relevant market; and
- Determining whether the firm is dominant



# Dominance-where?-I

- Dominance is relative and cannot exist in the abstract – it exists in relation to a market (relevant market) Continental Can (1972)
- Light Metal Containers (LMC)
- Whether competition is possible from substitute (such as glass and plastic) products



# Dominance-where?-II

- 'A dominant position on market for LMC for meat and fish cannot be decisive as long as it has not proved that competitors from other sectors of the market for LMC are not in a position to enter this market by a single adaptation, with sufficient strength to create a serious counterweight'
- ECJ annulled EC decision



# Relevant market

- Dominance must be established in the relevant market
- Determination of the relevant market first
- Relevant market has two aspects
  - Relevant product market
  - Relevant geographic market



# Relevant Product Market

- Commission to consider:(S19(7))
  - (a) Physical characteristics or end-use of goods
  - (b) Price of goods or service
  - (c) Consumer preferences
  - (d) Exclusion of in-house production
  - (e) Existence of specialised producers
  - (f) Classification of industrial products



# Relevant Geographic Market

- Commission is required to consider:  
(S19(6))
  - (a) Regulatory trade barriers
  - (b) Local specification requirements
  - (c) National procurement policies
  - (d) Adequate distribution facilities
  - (e) Transport costs
  - (f) Language
  - (h) Consumer preferences
  - (i) Need for secure or regular supplies or rapid after-sales services



# Concept of Abuse

- Not necessary for the firm to use its market power
- It is an 'objective' concept – the behaviour of a dominant firm may be such to influence the structure of the market and thereby weaken competition [Hoffman La Roche 1979]





# Remedies for AOD

- Cease and desist order
  - S (27(a)) Discontinue and not to re-enter such agreement or AOD
- Imposition of penalties
  - S 27(b))  
Not more than 10% of the average of the turnover for the last three preceding FYs
- ‘Division of enterprise enjoying dominant position’
  - S 28 (1)
  - S 28(2) – consequential details to be included in order u/s 28(1)
- Such other order or directions as may be deemed fit by Commission
  - S 27(g)



***THANKS***

*Competition Commission of India*  
[www.cci.gov.in](http://www.cci.gov.in)