

Cartelization as an Emerging Issue under Competition Law in India: An Analysis

Raunak Das Sharma¹, Dr. Vijay Srivastava²
Corresponding Author: Raunak Das Sharma

Abstract: The advent of LPG (liberalization, globalization, privatization) brought about a wave of change in the Indian markets and thus changed the way we do business completely. New business laws were needed to tackle these situations so Government established the SEBI Act, Foreign Exchange Act and the Monopolistic and Restrictive Trade Practices Act, 1969(MRTP Act). With the emergence of privatization and globalization that arose in the nineties in India, a realization was triggered that the existing Monopolistic and Restrictive Trade Practices Act, 1969 ("MRTP Act") was not equipped adequately enough to tackle the competition aspect of the Indian economy. Indian enterprises started facing competition from domestic players as well as from global giants, which called for level playing field and investor-friendly environment. Hence, need arose with regard to competition laws to shift the focus from curbing monopolies to encouraging companies to invest and grow, thereby promoting competition while preventing any abuse of market power. The Competition Act, 2002, replaced the Monopolies and Restrictive Trade Practices Act, 1969, as the same had become obsolete on account of international economic developments relating more particularly to competition laws and a need was felt to focus on competition.

This article is divided in five parts, viz. conceptualization of cartels in India, unfair trade practices in India, challenges faced by India on the face of cartelization, evolution of competition law in India and the enforcement of competition law with regard to cartel formulation.

Key Words: Advent of LPG (Liberalization, Globalization, Privatization), Establishments of new enactments, Curbing monopolies, Healthy competition, Prevention of Anti-competitive agreements.

Date of Submission: 11-03-2019

Date of acceptance: 28-03-2019

I. INTRODUCTION

*"People Of The Same Trade Seldom Met Together, Even For Merriment And Diversion; But The Conversation Ends In A Conspiracy Against The Public Or In Some Contrivance To Raise Prices"*³

Cartel or cartelization can be defined as collusion of companies to fix prices, manipulate bids as to share customers. 'Cartel' is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. It amounts to an unfair trade practice which is not in the public interest. The Competition Act, 2002, as amended by the Competition Act, 2007, prohibits any agreement which causes, or is likely to cause appreciable adverse effect on competition in markets India. Any such agreement is void. The agreements between companies not to compete on price, product or customers those agreements are called Cartels. The main objective of a cartel is to raise price above competition levels, which ultimately results in injury to the consumers and to the economy. For consumer's, cartelization results are higher prices, poor quality and less or no choice for goods and services.

¹ B.B.A.L.L.B, final year student, Law College Dehradun, Uttaranchal University, Dehradun, U.K.

² Assistant Professor, Law College Dehradun, Uttaranchal University, Dehradun, U.K.

³ Adam Smith in "The Wealth of the Nations".

⁴ <https://ijlss.wordpress.com/2016/12/21/cartels-in-indian-market-measures-and-standard-for-its-enforcement-by-cci-and-its-effect-on-economy-and-consumers-by-harsh-varadhan-dhanik/> (Visited on 6th March, 2019).

Section 2, sub section(c) of the Act, states:

“Cartel” includes an association of producers, sellers, distributors, traders or service providers who by an agreement among themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions in services.⁵

The three essentials of the cartel are:

- The existence of an arrangement or understanding between the competition
- The agreement is amongst producers, sellers, distributors, traders or service providers, that is, parties are engaged in identical or similar trade of goods or provision of service
- The agreement aims to restrict, limit, control or attempt to control the production, distribution, sale, price of, or, trade in goods or provisions of services.⁶

The antithesis of competition is monopoly, which is generally achieved when a few producers instead of competing with each other come together and forms an association or a cartel. The monopoly created by the cartels is as such, not conducive to progress. It retards growth and impedes the improvement the level of the living of the people.⁷

Unfair Trade Practices in India

The Constitution of India, in its essay in building up a just society, has mandated the State to direct its policy towards securing that end. Articles 38 and 39 of the Constitution of India, which are part of the Directive Principles of State Policy, mandate the state to direct its policy towards securing: that the ownership and control of material resources of the community are so distributed as to best sub serve the common good; and that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment.

Before the Competition Act no anti-competitive law in India had explicitly and comprehensively defined cartel, though it was implicitly covered under Section 33 (1) d of the Monopoly and Restrictive Trade Practices Act, 1969. A cartel is often described as a horizontal agreement that provides for price fixation, customer and territory allocation, set distribution of goods and services, bid rigging, restriction of supply etc. and may be formed by an association of persons or enterprises. It may be said that it is one of the more malevolent forms of violation of competition law as it unequivocally damages competition and causes loss to the market economy and free competition, and it is owing to this seriousness of cartels they are subject to the *per se* rule in United States, United Kingdom and even in India. This basically means that cartels violate the law simply by the reason that they are in nature of restraint of trade and it is immaterial whether they actually harm someone.

To understand the working of the law on unfair trade practices, one would need to examine specific provisions of the MRTP Act. Section 36 A of the Act lists unfair trade practices. This is the substantive ground on which the DGIR could start investigations and bring the matter before the MRTP Commission. The Commission could discontinue an unfair trade practice, under Section 36 D, if the practice is ‘prejudicial to the public interest or to the interest of any consumer or consumers generally.’

Section 36 A has five parts or sub-sections covering different themes.

- 1) False representation of products or services, including false description or guarantee, warranting performance of a product or service.
- 2) Advertisement of false bargain price.
- 3) Contests, lotteries, games of chance or skill for promotion of skill.
- 4) Sale of goods not in conformity with safety standards.
- 5) Hoarding or destruction of goods or refusal to sell goods.

Unfair Trade Practices (UTPs) encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement. UTPs can arise in any line of business and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement. Specific types of UTPs prohibited in domestic law depend on the law of a particular country. The World Bank (WB) and the Organization for Economic Cooperation and Development (OECD) Model Law, for example, lists the following trade practices to be unfair:

⁵ Ibid

⁶ <https://www.legalbites.in/cartels-concept-meaning-competition-law/> (Visited on 6th March, 2019).

⁷ Ibid

- Distribution of false or misleading information that is capable of harming the business interests of another firm.
- Distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, and suitability for use, or quality of goods; false or misleading comparison of goods in the process of advertising.
- Fraudulent use of another's trade mark, firm name, or product labeling or packaging;
- Unauthorized receipt, use or dissemination of confidential scientific, technical, production, business or trade information.⁸

Challenges Faced by India

There are many issues which India or for that matter any system of competition law in the world would face; like the extent to which the unilateral conduct of firms with market power should be controlled, the extent to which transactions can be modified, the price which a new player or customer should pay to access an essential facility, the relationship between intellectual property and competition law and to what degree should a merger be prohibited. A one point solution of all these problems would be to scrutinize and keep an eye on agreements between independent firms which smell of restriction and establish a hierarchy and severity of cartelization involved and set up penal provisions accordingly which may amount to imprisonment for the more serious offences. Some other policy questions include whether sanctions should be available against individuals as well as companies and the extent of leniency which can be given to whistle-blowers from within the cartels.⁹

Now talking the worst part of cartels is its effect on consumers and economy every cartel is anti-consumer but its effect on economy depends upon type of economy. Like oligopoly economy is worst effected by cartel but monopolistic economy is least effected by a cartel because of the number of manufacturers. Cartels injure consumers by raising prices and restricting supply and the market or the economy experiences dead weight loss because of the inefficiencies related to cartelistic behavior among competitors.

In India CUTS (consumer utility and trust body) is another organization looking for working of cartels. CUTS consider that an agenda to discipline cartels would provide multiple benefits both to the agency/government and consumers. Cartels steal billions of dollars from businesses, taxpayers and ultimately from consumers. Consumers benefit from competition through lower prices and better choice and quality products and services.

The negative effects on consumers include:

1. *Higher prices*– cartel members can all raise prices together, which reduces the **Elasticity of Demand** for any single member.
2. *Lack of transparency*– members may agree to hide prices or withhold information, such as the hidden charges in credit card transactions.
3. *Restricted output*– members may agree to limit output onto the market, as with **OPEC** and its oil quotas.
4. *Carving up a market* – cartel members may collectively agree to break up a market into regions or territories and not compete in each other's territory.¹⁰

Grey Areas

The whole purpose of research on this subject boils down to awareness of the masses about this phenomenon. The people should know about the activities the big corporations are often indulged in, they should have knowledge as to the protection of their rights in comparison to the rights and liabilities of such big corporations. These market influencers should not abuse their stature and their activities should be regulated in compliance with public policies and welfare. The corporates should not be able to hide behind the corporate veil and exploit the people. For the consumers, competition in the economy is a crucial factor in determining benefits, appropriate prices and the variety of choice to choose from. The aims of competition or antitrust laws are to ensure that consumers pay the most efficient price coupled with the highest quality of goods and services they consume. This research paper will also deal with legal aspect of cartels and challenges faced by CCI (Competition Commission of India) for its enforcement and this paper will try to suggest measures required to

⁸ <http://www.legalservicesindia.com/article/1861/Unfair-Trade-Practice-in-India.html> (Visited on 6th March, 2019).

⁹ <http://ijlls.in/cartelisation-recent-trends-and-issues-faced-by-india-pranav-pathak-iv-year-b-a-ll-b-hons-nalsar-university-of-law-hyderabad/> (Visited on 6th March, 2019).

¹⁰ <https://ijlss.wordpress.com/2016/12/21/cartels-in-indian-market-measures-and-standard-for-its-enforcement-by-cci-and-its-effect-on-economy-and-consumers-by-harsh-varadhan-dhanik/> (Visited on 6th March, 2019).

improve the competition act and will uncover the loop holes in it and its enforcement on anti-competitive agreements.¹¹

Though the Indian Competition Act has provided for a comprehensive law to deal with anti-competitive conduct there are certain areas which need consideration. One issue in point may be certain enterprises which are being deregulated particularly those which are new and involve information technology like telecommunication services. The definition of predatory price is unsatisfactory in that the level of cost of production of goods or the provision of services below which a price would become a predatory price should not have been left to be determined by regulations made by the commission, leaving the principle unknown and therefore uncertain. The principle on which a relevant cost of production is determined and the factors considered should be known to the industry and acceptable so that the defense of mistake of fact and absence of any regulation is not taken by any enterprise which is trying to abuse the economy by misusing its dominant position or by setting up of cartels.¹²

Another criticism of the Indian Competition law vis-à-vis cartels has been the shift from rule of reason as envisioned early in Section 38 of the Monopoly and Restrictive Trade Practices Act to the *per se* rule which does not allow for the fact that certain groups might be formed without prejudicing the public and are not necessarily in the nature of trade restriction or malpractice.¹³

Evolution and Development of Competition Law in India

India adopted its first competition law way back in 1969 in the form of Monopolies and Restrictive Trade Practices Act (MRTP). The Monopolies and Restrictive Trade Practices Bill was introduced in the Parliament in the year 1967 and the same was referred to the Joint Select Committee. The MRTP Act, 1969 came into force, with effect from, 1 June, 1970. However, with the changing nature of business, market, economy on the whole within and outside India, there was felt a necessity to replace the obsolete law by the new competition law and hence the MRTP Act was replaced with the Competition Act of 2002. The enactment of MRTP Act, 1969 was based on the socio – economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India. The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. The amendments introduced in the year 1982 and 1984 were based on the recommendations of the Sachar Committee, which was constituted by the Govt. of India under the Chairmanship of Justice Rajinder Sachar in the year 1977.

The Sachar Committee pointed out that advertisements and sales promotions having become well established modes of modern business techniques, representations through such advertisements to the consumer should not become deceptive. The Committee also noted that fictitious bargain was another common form of deception and many devices were used to lure buyers into believing that they were getting something for nothing or at a nominal value for their money. The Committee recommended that an obligation is to be cast on the seller to speak the truth when he advertises and also to avoid half truth, the purpose being preventing false or misleading advertisements.

However, as the times changed, the need was felt for a new competition law. With introduction of new economic policy and opening up of the Indian market to the world, there was a need to shift focus from curbing monopolies to promoting competition in the Indian market. As pointed out by the then Finance Minister in his budget speech in February, 1999 –

“The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions.”

In October 1999, the Government of India constituted a High Level Committee under the Chairmanship of Mr. SVS Raghavan [‘Raghavan Committee’] to advise a modern competition law for the country in line with international developments and to suggest legislative framework, which may entail a new law or suitable amendments in the MRTP Act, 1969. The Raghavan Committee presented its report to the Government in May 2000. The committee inter alia noted: In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers’ demand at the lowest possible cost. On the basis of the recommendations of the Raghavan Committee, a draft competition law was prepared and presented in November 2000 to the Government and the Competition Bill was introduced in the Parliament, which referred the Bill to its Standing Committee. After considering the recommendations of the Standing Committee, the Parliament passed December 2002 the Competition Act, 2002. Hence, the Monopolies and Restrictive Trade

¹¹ Ibid

¹² T. Ramappa, Competition Law In India, Third Edition published in 2014

¹³ Ibid

Practices Act, 1969 [MRTP Act] was repealed and was replaced by the Competition Act, 2002, with effect from 1 September, 2009.¹⁴

Enforcement of Competition Law in India

The main objective of competition policy is to promote efficiency and maximize welfare. The ultimate goal of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. Hence for ensuring this right of the consumer there is a need of supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods and these are the institutions responsible for enforcement of Competition law in India. In India basically there are three enforcement institutions namely:

- (1) Competition Commission
- (2) Director General
- (3) Competition Appellate Tribunal.¹⁵

The Competition Act has also created a new enforcement authority, the Competition Commission of India (CCI), which is solely responsible for the enforcement and administration of the Competition Act. The CCI comprises of a chairperson and not fewer than two and not more than six other members to be appointed by the Government of India. The CCI may initiate an inquiry in relation to an anti-competitive agreement or abuse of dominant position either on its own, on the basis of information or knowledge in its possession, or on receipt of information or on the receipt of a reference from the government or a statutory authority. Any person, consumer or their associations can file a complaint/information relating to anti-competitive agreements and abuse of dominant position. With respect to combinations, the CCI may initiate an inquiry either on its own or on the basis of the notification by the firms proposing to enter into the combination. The CCI and its investigative wing, the Office of the Director General (DG), is entrusted with extensive powers of investigation with respect to anti-competitive practices, which include powers to summon and enforce the attendance of any person, examine them on oath, receive evidence on affidavit and other similar provisions. If the CCI is of the opinion that there is a *prima facie* case, it shall direct the DG to investigate the matter and report its findings. The DG is also empowered to carry out "dawn raids" for the purpose of its investigation. Late last year, in a case involving allegations of abuse of dominance, the DG exercised this power for the first time. The CCI may rely upon the recommendations made by the DG in its report and, after giving the concerned parties a due opportunity to be heard, pass such orders as it may deem fit, including an order to cease and desist and impose penalties. Under the Competition Act, there is a provision for appeal to the Competition Appellate Tribunal (COMPAT) against certain orders of the CCI. A further appeal from the decision of the COMPAT may lie before the Supreme Court of India.¹⁶

Judicial Pronouncements

1. Builders Association of India vs. Cement Manufacturers Association and Ors [Case No. 29/2010 Date of Order: 20.06.2012]

Recently in 2012 the Builders Association of India filed a case against the Cement Manufacturers' Association alleging violation of Sections 3 and 4 of the Competition Act and setting up of cartel which was anti-competitive in nature. The court held that an existence of written material was not necessary to prove a common understanding or agreement and it is sufficient if the activities of the companies imply the existence of such an agreement. The fact that production and dispatch of the companies were fluctuating in a similar manner was considered critical evidence. It was held that the act of limit and control of production and supplies in the market caused upward movement in the price of the cement and that the deliberate act of shortage in production and supplies by the cement companies and the almost inelastic nature of demand of cement in the market resulted into higher prices in the cement. Thus it was held that the cement companies acting together had actually limited, controlled and also attempted to control the production and price of cement in the India market. The act was held not only detrimental to the cause of the consumers but also to the whole economy since cement was a crucial input in construction and infrastructure industry vital for economic development of the country and appropriate penalty was imposed.¹⁷

In this case, the Commission came up with the concept of 'parallelism-plus'. The Commission observed that "Parallel behavior in prices, dispatch, supply, accompanied with some other factors indicating coordinated

¹⁴ <https://blog.ipleaders.in/competition-law-evolution/> (Visited on 6th March, 2019).

¹⁵ <http://www.legalservicesindia.com/article/392/Enforcement-Of-Competition-Law-In-India:-A-Comparative-Analysis-With-U.K-&-EU.html> (Visited on 6th March, 2019).

¹⁶ <https://blog.ipleaders.in/competition-law-india/> (Visited on 6th March, 2019).

¹⁷ <http://ijlljs.in/cartelisation-recent-trends-and-issues-faced-by-india-pranav-pathak-iv-year-b-a-ll-b-hons-nalsar-university-of-law-hyderabad/> (Visited on 6th March, 2019).

behavior among firms may become a basis for finding contravention or otherwise of the provisions relating to the anti-competitive agreement of the Act.¹⁸

2. Alkali Manufacturers Association of India vs. Sinochem International Chemicals Co. Ltd., [1999] 98 Comp. Case. 333(CLB)

It has been ruled in Alkali Manufacturers Association of India v. Sinochem International Chemicals Co. Ltd that in any economic field a greater dimension has to be given to the word “cartel” to include all sort of combinations, which are anti-competitive.¹⁹

3. Union of India vs. Hindustan Development Corporation

The Supreme Court has defined the word cartel saying that “cartel, therefore is an association of producers who by agreement among themselves attempt to control production, sale and price of the product to obtain a monopoly in any particular industry or commodity. It may be any combination the object of which is to limit or control trade or production, distribution, sale or price of the goods or services.”²⁰

4. All India Tyre Dealers’ Federation vs. Tyre Manufacturers, (2013) Comp. L.R. 92 (CCI)²¹

In the year 2011 it appeared that another major cartel in India is soon to be busted and this came to light in the backdrop of consumers having to face steep price hike on tyres, increasing the costs of maintenance of their vehicles. It was alleged that the major players of this industry had conspired together to create an artificial price hike of tyres and charges were levied against the Automotive Tyre Manufacturers’ Association (ATMA) and the major players in the market which included Apollo Tyres Ltd, MRF Ltd, JK Tyre and Industries Ltd, Birla Tyres and Ceat Ltd and it was alleged that they control 95 per cent of the industry. The commission observed that “certain industries provide a structural basis that is conducive for cartelization and that that tyre industry in India, being highly oligopolistic and concentrated in nature, having entry barriers and a homogenous product, is conducive for cartelization but there are other factors that dilute the above structure and create conditions which do not sustain the maintenance of a cartel.” The Commission was of the opinion that price parallelism *per se* may not violate the provisions of the Act and that in certain cases price parallelism could have been dictated solely by economic reasons and that it was not a violation of the Competition Act if it does not result from the alleged concerted action. The Commission also weighed various parameters and held that the presence of other mitigating factors such as the bargaining power of the OEMs²², who constitute a majority of the customer base, and the options to replacement consumer to retreat, diluted the factors suggesting collusive actions. It also held that the levy of anti-dumping duty on the imported tires suggested that cheaper options were available and hence the existence of cartel cannot be established.²³

II. CONCLUSION

Cartelization, although a very integral emerging issue in the Indian business market, is not a very well-known subject among the masses as it is often regarded as a myth that cannot be manifested into reality. Competition Commission of India should be vested with more power so that they can charge a heavy penalty on running and operational cartels; moreover they should investigate research for a cartel with more stringent ways. It is well to recognize that in fighting cartels, what is important is strong investigative machinery, supported by mutual assistance agreements with other countries in investigating such organizations and sharing information of the operations of cartels.

Cartels are most egregious violations of competition law, and are widely considered the most harmful anti-competitive conduct prevalent in the market today, and are prohibited in most jurisdictions. Cartels are included in the agreements which are considered to cause an appreciable adverse effect on healthy competition.

¹⁸ <https://www.legalbites.in/cartels-concept-meaning-competition-law/> (Visited on 6th March, 2019).

¹⁹ <http://ijlljs.in/cartelisation-recent-trends-and-issues-faced-by-india-pranav-pathak-iv-year-b-a-ll-b-hons-nalsar-university-of-law-hyderabad/> (Visited on 6th March, 2019).

²⁰ <http://ijlljs.in/cartelisation-recent-trends-and-issues-faced-by-india-pranav-pathak-iv-year-b-a-ll-b-hons-nalsar-university-of-law-hyderabad/> (Visited on 6th March, 2019).

²¹ CCI – Competition Commission of India.

²² OEM is the abbreviation of Original Equipment Manufacturers.

²³ <http://ijlljs.in/cartelisation-recent-trends-and-issues-faced-by-india-pranav-pathak-iv-year-b-a-ll-b-hons-nalsar-university-of-law-hyderabad/> (Visited on 6th March, 2019).