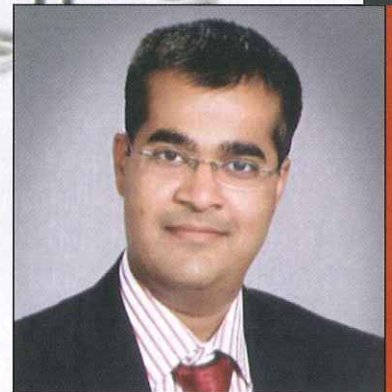




Cartels and Competition



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This article seeks to provide simple, yet pragmatic information about cartel practices and the treatment of the same under the Competition Act of India

Competition Regime In India

(a) Introduction

The Competition Act of India ("Act") was introduced in 2002 and the regulatory agency thereunder, the Competition Commission of India ("CCI"), was established in March 2009. The substantive provision dealing with cartels (Section 3 of the Act) came into effect from May 2009.

This article seeks to provide simple, yet pragmatic information about

cartel practices and the treatment of the same under the Act. The purpose of this article is to assist businesses and consumers in identifying possible cartel activities, such that the same may then be referred to the CCI.

(b) What is Competition Law?

The basic premise of any competition law regime, is that free and fair competition is the foundation for any efficient market economy. Absence of competition in the market relieves the businesses from the worry of consumers having other options

available, which in turn, reduces the incentive to lower costs and/or to innovate.

Competition laws regulate the agreements and the conduct that reduce competition. The Act, introduced with the intent that competition benefits consumers, prevents market distortion and results in the development of new and better products, accordingly, prohibits agreements or concerted practices between businesses that prevent, restrict or distort competition in India.

Cartelisation, by its very nature, challenges the basic premise of any competition law regime, in as much as, by way of forming a cartel, the members thereto, agree to forego competition and opt for collusion, thereby resulting in businesses and consumers, losing out on the benefits that are attributable to a free and fair competition in any market.

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Cartels and their Position under The Act

(a) What is a Cartel?

The Act defines a "cartel" as "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".

Simply put, a cartel is an agreement between competitors (whether producers or sellers of a product or service), to fix prices and/or to limit the production, distribution or sale of their product / service.

Cartel agreements could be written and formal (explicit agreements),

but are usually verbal, informal, and secretive (implicit collusion). A conspiracy to form a cartel can be international, national or regional in scope, with varied degrees of formality and secrecy. For instance, a cartel may consist of a loose oral arrangement entered into by a group of local businessmen during a dinner conversation. Alternatively, the collusion might take the form of a highly structured set of membership rules established by a trade association and administered through an elaborate monitoring and enforcement regime.

The Act provides for an 'inclusive' definition of agreements, and as such, also seeks to include agreements that are not meant to be legally enforceable. Basically, it does not matter to the CCI how the agreement was reached or whether it had been carried out. What matters is whether the competitors have agreed to conspire.

Cartel agreements are usually of the following nature:

- (i) *Price fixing* – involves competitors agreeing to fix, control or maintain the prices of goods or services. Price fixing may be 'direct' (i.e. where it involves an agreement to fix or maintain actual prices), or 'indirect' (for instance, agreements to offer / not to offer, the same discounts or warranties, or credit terms).
- (ii) *Bid rigging* – occurs when competitors collude amongst themselves at the time of bidding. The usual modus operandi is for the bidders to agree as to who should 'win' the bid / tender. To support the designated 'winner', the other cartel members may refrain from bidding, withdraw their bids, or submit bids with higher prices on unacceptable terms. The underlying intent behind any bid-rigging activity is to eradicate low bids and thereby affecting the inherent competition in the market.
- (iii) *Market sharing* – involves competitors agreeing to not sell

their products / services in each other's territory, or to each other's customers (within the same territory). Market sharing may also be practised by withdrawing concessions, imposing penalties, or by forcing the defaulting dealer to share his commission with the dealer whose area or market has been encroached upon. The effect of such agreements is that the customers are not able to shop around for the best deals, as they have fewer suppliers.

- (iv) *Limiting or controlling production, supply etc* – involves an agreement between competitors to limit the quantity of goods and/or services available in the market so as to create an artificial deficit, leading to maximisation of profits by the cartel members.

(b) Common characteristics of Cartels

From the various investigations and prosecutions of cartels across the world historically, some of the common characteristics of cartel activities that have emerged are:

- (i) Regular meetings amongst competitors
- (ii) Secrecy
- (iii) 'Agreement' guarded through stiff penalties and/or retaliation threats
- (iv) Using trade associations as a cover
- (v) Audits and other effective 'policing' mechanisms
- (vi) Stable demand

(c) Why are Cartels bad?

Cartels tend to distort competition in a market, since in such an arrangement, the cartel members have little or no incentive to lower prices or provide better quality goods or services through operational efficiency or making any innovations, whether in terms of products or processes. The result of such a competition in the market is that freedom of trade is adversely affected, thereby adversely affecting the customers as well.

Cartels may also affect the economy as a whole. Apart from consumers, firms at the end of the vertical chain may, due to higher costs or reliance on a product that is not as innovative as those in other countries, be less internationally competitive.

(d) How can the CCI spot a Cartel?

While cartelisation is undoubtedly against public interest, the existence of a cartel is very rarely proved by direct evidence. Generally, no express agreement showing its existence is ever found. It has to be proved by circumstantial evidence and by setting up and proving a chain of events leading to a common 'meeting of the minds'.

Without prejudice to, or impeding the CCI's discretionary authority to investigate any cartel arrangement in any manner, based on historical data obtained from previous investigations into cartels in other jurisdictions, there seem to be certain elements that are helpful to any competition regulator in determining the arrangement in greater detail.

Some characteristics of markets that are more susceptible to cartels are:

- (i) Few competitors – which makes it easier for the competitors to communicate with each other
- (ii) Products with similar characteristics – which makes it easier for competitors to monitor each others prices
- (iii) High entry / exit barriers – which makes it difficult for a new entrant to come into the market or an existing player from exiting the market
- (iv) Excess production capacity – which provides an incentive to competitors to price their product / service at a lower cost
- (v) Strong ability of competitors to exchange information – which usually happens in cases where the competitors are part of a trade association
- (vi) Weak enforcement – usually happens in markets / jurisdictions where the competing firms have less fear of detection and/or punishment

(e) What can the CCI do?

The CCI has adopted the traditionally known 'carrot and stick' approach to address any cartel-like arrangement. Under the 'carrot', the CCI has a leniency programme to encourage cartel members to come forward to provide information about cartels ("Whistleblowers"), whereby a *Whistleblower* who is the first to come forward and provide evidence of cartel activities (before commencement of formal investigations by the CCI), may be given full immunity from financial penalties prescribed under the Act.

However, to deal with cartels, the CCI also has the 'stick', whereunder the CCI has the power to pass any or all of the following orders:

- (i) Cease and desist orders
- (ii) Modification of agreement
- (iii) Compensation

In the case of cartels, in addition to the above, the CCI may impose on each member of the cartel, a penalty of up to three (3) times its profits or up to ten percent (10%) of its turnover, whichever is higher, for each year during which, the agreement was in force.

Conclusion

Cartels, across the world, are deemed to unequivocally damage competition and cause loss to the economy and to consumers, without having any redeeming virtue. Accordingly, cartels arrangements are typically considered unlawful and under the Indian statutory provisions, amount to a per se violation of the Act.

Kochhar & Co.'s competition law team has substantial experience in dealing with cases relating to anti-competitive agreement and have prior experience of advising firms on how to mitigate the effects of a breach of the competition law regime, such that the firm's interests are not adversely affected in the event of an investigation by the CCI. The team, led by Mr. Piyush Gupta, has advised clients on the merits of having a competition compliance policy in place and the advantages of a "Do's and Don't's" for the operational people and management of companies. The team has undertaken competition compliance audits and have advised clients on inconsistencies within their contractual framework from a competition law perspective.



Disclaimer – This article provides only an overview of the present arrangement under the Indian competition laws in relation to cartels and should not be relied upon as a substitute for the law itself. This article only seeks to provide a simple, pragmatic and hands-on approach towards cartels and their position under the Indian legal system, so as to make businesses aware, such that neither do they become victims of any anti-competitive practices, nor do they engage in such activities themselves.

Further, the averments under this article hold true as of the date on which it was written, and are subject to any amendments which may be made in the Competition Act 2002, at any time in the future.

