



CPI Antitrust Chronicle

February 2013 (1)

Cartel Enforcement in India: Standard and Burden of Proof

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I. LEGAL FRAMEWORK

The Competition Act, 2002 (“Act”) is the principal legislation dealing with competition law in India and Section 3 of the Act (which came into force from May 20, 2009) deals with anticompetitive agreements, including cartels. Section 2(c) of the Act defines “cartel” to include an association of producers, sellers, distributors, traders, or service providers who, by agreement among themselves, limit, control, or attempt to control the production, distribution, sale, or price of, or trade in, goods or provision of services. In other words, a cartel is essentially an agreement among competitors to fix prices or production quantities or allocate markets or customers, either by limiting supply in the market or otherwise altering distribution patterns. The Competition Commission of India (“CCI”), which is the regulatory authority established under the Act, has investigated around 21 cartel cases to date and, in ten of those cases, the CCI came to the conclusion that the industry members were engaged in cartelization and imposed a penalty.

II. ELEMENTS OF A CARTEL

The definition of cartel under the Act therefore mandates that any conclusion of cartelization can be arrived at only upon proof of:

1. an agreement;
2. among producers, sellers, distributors, traders, or service providers;
3. to limit, control, or attempt to control the production, distribution, sale, or price of, or trade in, goods or provision of services.

III. AGREEMENT: PROOF OF EXISTENCE

In order to prove the existence of a cartel, it is first essential that the existence of an agreement be proved by the alleging/investigating body. However, the term “agreement” is very widely defined under the Act to include any arrangement or understanding or action in concert, whether or not such arrangement, understanding, or action in concert is formal or in writing; or whether or not the same is intended to be enforceable by legal proceedings.² Accordingly, evidence of an agreement is neither necessary nor will it, in general circumstances, be readily available as such conspiracies are often hatched in secrecy. To a great extent, circumstantial evidence such as market trends, along with the conduct of the alleged cartel members and the profit and business motives fuelling a potential cartel must be relied on to infer the existence of an agreement.

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² Section 2(b) of the Act.

In fact, the CCI in its order in the case of *All India Tyre Dealers' Federation v. Tyre Manufacturers*³ ("Tyre Case"), has held that the existence of an explicit agreement is not required and the same can be inferred from the intention or conduct of parties. Further, in the case of conspiracy, proof of a formal agreement may not be available and can be established by circumstantial evidence alone.

IV. BURDEN OF PROOF

Once the existence of an agreement tending to give rise to a cartel-like situation is established, the burden of proof shifts upon the alleged cartel members to prove that either:

1. there is no such agreement; or
2. that the agreement is not one that has the intent to or has the effect of performing any of the actions mentioned in sections (i) to (iv) below; or
3. that the agreement does not cause an appreciable adverse effect on competition ("AAEC") in India.

Section 3(3) of the Act provides that agreements entered into or practices carried on or decisions taken by persons or associations of persons (including cartels), engaged in identical or similar trade of goods or provision of services (i.e. horizontal agreements) which:

1. directly or indirectly determine purchase or sales prices;
2. limit or control production, supply, markets, technical development, investment, or the provision of services;
3. allocate markets in terms of the geographical area of the market, type of goods or services, number of customers in the market, etc.; or
4. directly or indirectly result in bid-rigging or collusive bidding,

are *presumed* to have an AAEC in the relevant market in India unless such agreements are entered into by way of joint ventures which increase efficiency in production, supply, distribution, storage, acquisition or control of goods, or provision of services.

Therefore, the burden is on the parties (proposing to enter into such arrangement) to prove that the arrangement does not cause, or is not likely to cause, an AAEC in the relevant market in India.

V. STANDARD OF PROOF

Neither the Act nor any accompanying regulations provide guidance in relation to the standard of proof in regard to investigations and enquiries relating to contraventions of Section 3. Nevertheless, this question has been dealt with by the CCI in cases under Section 3 of the Act.

As cartels have been categorized as a civil offense under the Act, the standard of proving the violation "beyond reasonable doubt" does not apply to Section 3 violations. The CCI has also acknowledged the fact that, given the very nature of a cartel, it is difficult to obtain "well-documented" proof. Hence, in the absence of evidence of a written agreement, the CCI has held

³ RTPE No. 20/2008.

that reliance can be placed on other sources of credible circumstantial evidence. For instance, in relation to bid-rigging, identical pricing in bids despite varying cost structures of the parties, and common entries in the visitors' register for all of the three parties when submitting bids, were held to be sufficient evidence to establish the existence of an understanding between the parties.

Interestingly, the approach adopted by CCI towards the requisite standard of proof required to sustain an allegation of cartelization has changed over the course of the various cartel cases investigated and adjudicated upon by the CCI. In its order in the case of *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Ors*⁴ (“*Neeraj Malhotra*”) the CCI noted that:

The word “agreement” for the purposes of the Act has wide connotations as defined under Section 2(b). However, it is imperative that existence of such an “agreement” is unequivocally established. The European Court of Justice has clearly laid down this principle with respect to infringements of Article 81 (1) of the EC Treaty in... *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission* wherein that Commission has said that precise and coherent proof must be produced by the party or authority alleging infringement...

However, in *Neeraj Malhotra*, while the majority preferred a “meeting of minds” or concerted approach, the minority was satisfied with the factual existence of a common (though not “concerted”) approach.

Thereafter, the CCI in its decision in *In re: Sugar Mills* (“*Sugar Mills*”),⁵ required that:

1. there must be evidence of the fact that the alleged cartel participants met and decided to take concerted action;
2. such concerted action must have been implemented; and
3. there must be conclusive evidence of meeting of minds.

However, the CCI diluted this standard of proof in its subsequent orders. For instance, in *Builders Association of India v. Cement Manufacturers' Association & Ors*⁶ (“*Cement Case*”), the CCI held that, in the absence of direct evidence, existence of a cartel can be concluded on the basis of circumstantial evidence alone. In addition to establishing price parallelism by taking into consideration the increased cement prices, timed after two meetings of the Cement Manufacturers' Association (“CMA”), the CCI considered various other “plus” factors to establish cartelization in the cement industry, such as decrease in capacity utilization, production, and dispatch parallelism, etc.

In the *In Re: suo-motu case against LPG cylinder manufacturers case*,⁷ the CCI held that cartelization not being a criminal offense, the test for proof to be employed should be the “balance of probabilities” and “liaison of intention” test, which can be established with the support of indirect and circumstantial evidence.

⁴ Decision dated 2 December 2010 in Case No. 5/2009. The case related to levying of pre-payment penalties on homeowners for foreclosure of loans, thereby engaging in alleged cartelization.

⁵ Case No. 1 of 2010.

⁶ Case No. 29 of 2010.

⁷ Case No. 03 of 2011.

VI. THE “BUT FOR” TEST OF EVIDENCE

The CCI, in its most recent cartel case, i.e. the *Tyre Case*, re-emphasized the approach that it is appropriate for the CCI to inquire into cartel cases on the basis of evidence which establishes that a particular set of acts and conduct of the market participants cannot be explained “but for” some sort of anticompetitive agreement and action in concert among them. Consequently, the existence of an anticompetitive agreement can be inferred from the intention or conduct of the parties and may be established by circumstantial evidence alone in the absence of any alternate explanation.

The CCI also held that the standard of unequivocal evidence set in *Neeraj Malhotra* is correct. However, the CCI has clarified that this does not imply that an agreement can be established only through direct evidence. Circumstantial evidence is of equal value as direct evidence as the law makes no distinction between the two. The CCI held that “...if direct evidences are not present, but circumstantial evidences do indicate harm to the competition at a market place, the Commission will certainly take cognizance of the same...”

Interestingly, although in the *Cement Case* the CCI ignored certain factors/arguments that were advanced by the cement companies to negate the allegation of cartelization—such as significant capacity expansion, loss of market share by incumbent cement companies to new entrants, mixed trends in capacity utilization level, etc.,—these factors were given due weight and consideration by the CCI in the *Tyre Case* to hold that there is no cartelization in the tyre industry in India.

The *Cement Case* is, however, pending in appeal before the Competition Appellate Tribunal (“CAT”) and whether there exist sufficient countervailing factors⁸ which justify a parallelism of sorts between cement companies remains to be seen.

VII. SMOKING-GUN EVIDENCE

The term “smoking gun” evidence essentially refers to evidence of a conclusive kind which does not leave scope for any alternate explanation. It is extremely difficult, if not impossible, to obtain such evidence when it comes to clandestine cartel activities. However, in cases of collusive bidding, the concerted conduct of cartel members may provide evidence of the type that conclusively points to the existence of cartelization. For instance, identical bids submitted by three bidders, along with a common entry for all three firms in the visitor’s register at the time of submitting the bids, and common price reductions post negotiations, were held by the CCI to be conclusive proof of cartelization among these three entities.⁹ Similarly, in another case, the e-mails sent by a travel association to its members to collectively boycott an airline were considered to be conclusive proof of cartelization.¹⁰

VIII. TRADE ASSOCIATIONS UNDER CCI’S SCANNER

The CCI has already dealt with at least two cases where trade associations had a substantial role to play as facilitators of a potential cartel. For instance, in the *Cement Case*, the

⁸ For instance, the link between price increases and increases in input costs.

⁹ In Re: Aluminum Phosphide Tablets Manufacturers case. (Suo-motu Case No. 02 of 2011).

¹⁰ Uniglobe Mod Travels Private Limited v. Travel Agents Federation of India & Others (Case no. 03 of 2009)

opportunity to discuss and determine prices through the CMA, which was already engaged in collecting retail and wholesale prices for benchmarking purposes, was held to be sufficient evidence to suggest cartelization. Accordingly, the CCI is increasingly focusing on the activities, by-laws, and conduct of industry associations to ensure that they function within the realm of competition law and do not act contrary to the provisions of the Act.

Data collection and dissemination exercises by a trade association may give rise to a hub-and-spoke form of a cartel, and the practice of taking collective business decisions through a trade association may also constitute cartelization based on the nature of the collective decisions taken. Therefore, particular care is required to be taken in dealings with trade associations, including the exchange of confidential information through a trade association or its members.

As competition law in India is fairly nascent, awareness regarding the all-encompassing nature of competition law is gradually increasing and different aspects of doing business in India, including dealings and interactions as part of a trade association, are being re-evaluated in line with competition law compliance best practices.

IX. PENALTIES

The CCI has the power to impose upon every cartel participant a penalty of up to three times its profit for each year of continuance of the cartel, or up to 10 percent of the turnover for every year of the continuance of the cartel, whichever is higher.¹¹ The CCI has yet to frame guidelines in relation to the quantum of penalties or factors to be considered while deciding penalties and also has not provided clarity on this aspect in case law. Set out below is the tabular representation of the time taken by the CCI to pass a final order in the cartel cases investigated by it and the quantum of penalties levied by the CCI, respectively:

Cases initiated in the CCI Regime¹²		
Minimum time taken¹³	Maximum time taken¹⁴	Average time taken¹⁵
351 days	850 days	536 days
Cases initiated under the MRTP Regime and transferred to the CCI under the Act¹⁶		
Minimum time taken¹⁷	Maximum time taken¹⁸	Average time taken¹⁹
735 days	850 days	793 days

¹¹ Section 27 of the Act.

¹² We have taken into consideration the ten major cases where a final order was passed by the CCI.

¹³ From the date of the complaint until the date on which CCI passed its final Order.

¹⁴ From the date of the complaint until the date on which CCI passed its final Order.

¹⁵ From the date of the complaint until the date on which CCI passed its final Order.

¹⁶ We have taken into consideration the two main cases where a final order was passed by the CCI; the timeline is considered from the date on which the matter was transferred to the CCI or the CCI took cognizance of the matter.

¹⁷ From the date of the complaint until the date on which CCI passed its final Order.

¹⁸ From the date of the complaint until the date on which CCI passed its final Order.

¹⁹ From the date of the complaint until the date on which CCI passed its final Order.

Penalty levied by the CCI as a % of the perpetrator's turnover or net profits for the time during which cartelization persisted ²⁰		
Minimum Penalty	Maximum Penalty	Average Penalty ²¹
0.5% of net profit	10% of turnover	6.6% of turnover

Thus far, the penalties levied by the CCI have varied from Rs. 100,000²² each on 27 film producers in the *FICCI-Multiplex Association of India v. United Producers Distributors Forums & Others*²³ case to a total penalty of Rs. 63 billion²⁴ on 11 cement companies in the *Cement Case*, without there being any rationale for the differences in the quantum of fines imposed.

Other directions that can be issued by the CCI include:

1. direct any enterprise or person or association of persons, as the case may be, to discontinue and not re-enter into such agreement;
2. direct modification of the agreement or pass any other order as it may deem fit; and/or
3. impose additional monetary penalties and/or criminal penalties on any person for non-compliance with its directions or orders and, in case of a contravention by a company, the CCI can proceed against every person in charge and responsible for the company²⁵ (including directors, managers, secretaries or other officers) at the time of contravention.²⁶

Apart from the above, the Act also provides for claims for damages to be filed with the Competition Appellate Tribunal against enterprises guilty of cartelization for any loss or damage shown to have been suffered by the applicant as a result of contravention of the Act. However, thus far, no claims for compensation have been made by any person.

Interestingly, the CAT, in the *In Re: Aluminum Phosphide Tablets Manufacturers case*,²⁷ ordered the appellant to deposit 10 percent of the penalty imposed by the CCI at the time of granting stay to the levy of penalty and, in the case of *M/s DLF Limited v.CCI and Others*,²⁸ ordered that the appellant make an undertaking to pay 9 percent interest per annum (from the date of CCI's order until the date of actual payment) on the penalty amount that may ultimately be held as payable by the CAT. Such a payment or undertaking is not mandated by any law but the CAT appears to be employing this mechanism to avoid the filing of frivolous appeals from orders of the CCI.

²⁰ Post 20 May 2009 i.e. the date on which Section 3 of the Act came into force.

²¹ We have taken into consideration the nine main cases in which a penalty was imposed by the CCI.

²² Approximately USD 0.1 million.

²³ Case No. 01 of 2009.

²⁴ Approximately USD 1.2 billion.

²⁵ For the purposes of Section 48, the term "company" means a body corporate and includes a firm or other association of individuals, and the term "director," in relation to a firm, means a partner of the firm.

²⁶ Section 48 of the Act.

²⁷ Suo-motu Case No. 02 of 2011.

²⁸ Appeal Number 22 of 2011, before the Competition Appellate Tribunal.

X. LENIENCY PROGRAMS

Given the very nature of a cartel, and the substantial penalties attached to cartel activities, detecting and conclusively proving the existence of a cartel is a difficult task for competition regulators. Members of a cartel necessarily employ complicated means to thwart detection and ensure the absence of a paper-trail, making it increasingly difficult for competition regulators to prove a cartel. However, competition regulators the world over have attempted to tackle this problem of lack of evidence by creating incentives for cartel members to seek immunity from stringent penalties in exchange for information and evidence on the existence of the cartel.

Accordingly, the Government introduced the Competition Commission of India (Lesser Penalty) Regulations, 2009 (the “Lesser Penalty Regulations”) on August 13, 2009. The Lesser Penalty Regulations govern the procedure and extent to which leniency (reduced penalties) can be granted to applicants who make vital disclosures²⁹ on cartel activity; however, the provisions of these regulations have not been availed of by any alleged cartel members to date.

To claim leniency under the Lesser Penalty Regulations, an applicant is required to submit all material information and evidence relating to the establishment or existence of a cartel. The applicant should also not have any further participation in the cartel, from the time of making disclosures, unless the CCI directs otherwise and the applicant should co-operate to the best of its ability with the CCI in a genuine, fully continuous, and expeditious manner, *inter alia*, by providing all relevant information, documents, and evidence as required. Such co-operation is required throughout the investigation and other proceedings before the CCI. Further, relevant evidence should not be concealed, destroyed, manipulated, or removed by the applicant.

The CCI can grant up to a 100 percent penalty reduction to the first applicant, up to 50 percent to the second applicant (for a disclosure of evidence that provides significant added value to the evidence the CCI already possesses), and up to 30 percent to the third applicant. It is pertinent to note that any information submitted under the Lesser Penalty Regulations is treated as confidential (including the identity of the applicant) unless such information is already in the public domain, or is required to be disclosed by law.

However, the reduction of penalty is the sole prerogative of the CCI. Leniency being a discretionary relief, it is imperative that industry be first convinced of the efficacy of the leniency program before any cartel member can develop the courage to be forthcoming and approach the regulator.

XI. WAY FORWARD

The CCI has initiated various competition advocacy programs with a special focus on cartelization. The leniency program is being actively publicized in order to encourage cartel members to turn informants and discourage cartels. Increased public awareness, it is believed, will encourage people to report instances of cartelization and other anticompetitive practices.

²⁹ The term “vital disclosure” has been defined under the Lesser Penalty Regulations to mean full and true disclosure of information or evidence by the applicant to the CCI, which is sufficient to enable the CCI to form a *prima facie* opinion about the existence of a cartel or which helps establish the contravention of the provisions of Section 3 of the Act.

Further, the Competition Amendment Bill, 2012, proposes to permit search and seizure powers to the Director General (“DG”), i.e. the investigation officer under the Act, similar to those provided under the Code of Criminal Procedure, 1973, after obtaining proper authorization from the Chairperson of the CCI. The proposed amendment would make it easier for the DG to swiftly conduct dawn raids and investigations in relation to matters before the CCI, without the procedural requirement of approaching a judicial authority for approval. Although there have been no dawn raids to date, once empowered by amendments to the Act the CCI is expected to actively use its dawn raid powers for cartel investigations, creating a fear of quicker detection among cartel members.

Given the initiatives discussed above, and the increased seriousness with which both the Government and the industry is viewing the scope and need for an effective competition regulator in India, it is clear that the CCI will continue to have full support in its use of deterrence and public awareness to combat the evil effects of cartels having an effect on the markets in India.