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Original Article

Challenges of Cartels: A Business Perspective

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Abstract

Competitors are expected to compete with each others; competition creates efficiency, encourages innovation, improves quality, reduces costs and prices, gives choice to consumers at lower prices and so on and so forth. If competitors collude, it becomes cartel. Cartels are considered as the most harmful violation of competition law globally. Cartels may earn profits at monopoly levels; however, their losses to consumer, society, economy and business are enormous. This article discusses cartel, its harm on consumers, economy and business. It also highlights the quantum of penalties imposed in some of the major cartel cases in India. This article also suggests steps business should take to avoid being a party to cartels.

Keywords: Business; Cartel; Competition.

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People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

– Adam Smith [1]

Introduction

Profit maximization versus wealth maximization is a common and crucial dilemma in the management discipline [2]. According to conventional economists, profit maximization is the only objective of organizations, whereas, the modern approach focuses on maximization of wealth rather than profit.

Whatever may be the objective, business uses various methods to attain its objective. In their pursuit to eliminate competitors, business either adopt fair means (producing high quality products, being cost efficient, developing efficient systems, adopting advanced technologies, etc.) or indulge in unfair mean (carrying out restrictive business practices–such as predatory pricing, exclusive dealing, tied selling, abuse of dominant position, etc.). In addition, business generally detest competition, as it drives away profits and takes away their freedom over market activities, like, output and pricing from their control. In any market therefore, competing businesses have an incentive to coordinate their output and pricing activities, to mimic like a monopoly, in order to increase their collective and individual profits [3]. Such practices artificially decrease or even eliminate the natural level of competition in the market [4].

Researchable Questions

1. Are collusion happens amongst competitors?
2. What are the benefits and harms of collusion amongst competitors to business?
3. What measures business should take to avoid being a party to cartel?

Review of Existing Literature

The researcher examined a number of books, journals, reports, cases, newspapers and website dealing with subject of competition law from various angles. By surveying the existing literature, it is clear that cartels are widely prevalent in India. However, limited research has been done in India. Some of the books or articles relate to the similar work, but these have covered different aspects than the topic of current study.

Objectives of the study

The current study helps to understand and learn the cartels, their benefits and harms, measures a business should take to avoid being a party to cartel.

Research Methodology

The study is multi-dimensional in approach, doctrinal method adopted, depending mainly on the primary sources like Statutes, Committee Reports, important cases decided on subject matter; and also on the secondary sources like books, journals and websites, etc.

What is Cartel?

Cartel is collusion amongst businesses at horizontal level aiming to maximise profits by mimicking like a monopoly. Cartel conduct includes practices pertaining to price fixing, limiting output, market sharing and bid rigging [5].

Cartel is one of the most complex business phenomena. Cartels conceive and work in secrecy. Cartels conduct may be through any arrangement, understanding or action in concert, irrespective whether the same is formal/written or not [6]. Even a nod or a wink is enough to create cartels. Cartels use different mechanism to survive, like regular monitoring, use of sanctions against cheaters, etc.

What Do Not Constitute Cartel?

There are exceptions to the rule, agreements by way of joint ventures, if increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services not covered under the contours of cartel [7]. Further, use of intellectual property rights and any collusion meant exclusively for exports also has exemption from the provisions relating to cartel under the Act [8].

However, acts taking place outside India, but having an effect on competition in India are under the purview of Cartel [9].

Types of Cartel

Cartels exist at both domestic or at international levels. An international cartel consists of a group of producers of a certain commodity located in various countries. The agreement can be at the level of Governments [10] or between private producers/service providers. A domestic cartel on the other hand involves an agreement among competing firms in a particular sector in the same country. Cartels are ubiquitous, i.e. Industry specific, Procurement (Private or Government), Sectors specific–like cement, auto, insurance, films & television, pharmaceutical, transport, banking and finance, etc.

Conditions Conducive to Formation of Cartels

High concentrated markets with few competitors, high entry barriers, homogeneous and fungible products, similar production costs, excess capacity, constant conditions of supply and demand, the existence of collusion is easy to conceal, the players compete with each other repeatedly, high dependence of the consumers on the product, history of collusion, active trade association, low levels of penalties have an effectively low deterrent effect and lax enforcement of competition laws are some of the conditions which are conducive to formation of cartels [11].

Requirement of Competition Law

Where competitors restrain competing, the question arises whether the situation is likely to correct itself. Does the invisible hand of competition will work? If not, then there is a reason to have additional tools to encourage effective competition or to prevent socially acceptable outcomes. There comes the need for competition law, which provides a set of tools to prevent market failure and preserve a market environment in which competition can flourish [12]. The objective of competition law is to protect the process of competition and maximization of consumer welfare [13] by forcing sellers/

producers to, offer consumers a great choice of high-quality products and services at low prices.

Benefits of Cartels

Cartels help business to reach monopoly level, earn supra-normal profits, and its income shoots upwards.

Harms of Cartels

Cartels are anti-thesis to the objectives pursued by competition authorities' world over. For the consumers, they results in higher prices, poor quality and reduce choices to the disadvantage of consumers as well as to curtail the incentive for innovation and quality. They create an unfavourable effect on the market and are against the ethos of free and fair competition [14]. For a business, cartels create x-inefficiency, penalties are hefty and painful, and goodwill loss is difficult to measure. Cartels create loss to public exchequer. Cartels create deadweight loss, thus, detrimental to the growth of economy. Further, the impact of cartels is not limited to the boundaries of a country; sometimes impact is on many countries [15]. According to Organisation for Economic Co-operation and Development "OECD" [16], the average overcharge in cartels is somewhere in the 20 to 30 percent range, with higher overcharges for international cartels than for domestic cartels.

Seriousness Against Cartels

"The competitor is our friend and the customer is our enemy" was the motto of world famous lysine cartel [17].

Cartels are regarded as the most pernicious violation of competition law [18]. Mario Monti [19] described the cartels as cancer on the open market economy [20]. The US Supreme Court in a case [21] stated that cartels are 'the supreme evil of antitrust'. As per OECD [22], cartels are the most egregious of all competition law violations and it places them high on its agenda. In other words, cartels are nothing short of thefts.

For these reasons, the competition authorities world over impose higher penalties on cartels than other competition law violation, even in some countries, the cartels are considered as criminal offence.

Cartels and Indian Competition Regime

In India, cartels are not a criminal offence; however, they are presumed to have appreciable adverse effect on competition and are *per se* illegal [23]. Competition Law and Market Watchdog-Competition Commission of India (hereinafter referred as "the Commission") considered cartels as one of the major contemporary challenges.[24] Cartels are the most egregious form of competition law violation and their deleterious effect on markets, competition and consumer interest are well established [25].

Cartel Cases and Penalty Thereon

According to Competition Act, 2002, the Commission may impose on each member of the cartel a penalty of up to 3 times of its profit for each year of the continuance of such cartel or 10% of its turnover for each year of continuance of such cartel, whichever is higher [26]. In case an enterprise is a 'company', its directors/officials who are guilty are also liable to be proceeded against [27].

As on date, the Commission has issued final orders/decisions in more than 900 cases; it has passed around 150 orders that have contained substantive discussions on cartelisation under Section 3 (3) of the Act [28]. If we just see the quantum of penalties in some of the cases relating to cartels in India, we would be able to understand the gravity of problem [29]. The Commission have imposed more than Rs.17000 crores monetary penalties in cartel cases, however, a very meager amount has been realised [30]. It may be due to the reason that most of the orders of the Commission were/are under appeal before the National Company Law Appellate Tribunal "NCLAT" (it is worth noting that earlier the Competition Appellate Tribunal "COMPAT" was dealing with appeals in competition cases), or under challenge before various High Courts or at the Supreme Court.

Cartel Detection

There has always been a problem with regard to detection and prosecution of cartels. The beliefs that as few as one in six or seven cartels are detected and prosecuted (in advanced jurisdictions) gives a rough indication of their high incidence. In comparison, detection has been much lower in the developing world. This, arguably, was not due to the fact, that cartels are less common in the developing economies like India, but because the law enforcement agencies (competition authorities) have not been well equipped to tackle them, there is limited capacity of competition authorities to investigate and unearth evidence, difficulties in securing cooperation from the corresponding authorities in the advanced jurisdictions. The Commission uses various methods while detecting and prosecuting cartel conduct, i.e. leniency mechanism, dawn raids, screens [31], etc.

Leniency Mechanism

The Commission is empowered to grant leniency by levying lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The leniency scheme would be helpful in detecting and prosecuting cartels, if effectively and dynamically implemented. In advanced jurisdictions, leniency mechanism are very successful, however, India is exception. As of now, completing about 9 years of leniency mechanism in existence, Indian competition authority struggling to get whistle blowers, and has decided only 2 cases through leniency mechanism, the best method to detect cartels.

Suggestions to Business

Business should avoid any conduct, which may result into cartels. Some suggestions to business community are as under:

1. The business should not discuss, enter into any agreement or indulge in any joint activity with a competitor on any matter concerning the price or quantity of goods offered/supplied or the conditions on which they are offered.[32] The business should avoid arrangements in respect of:
   a. prices or quantities
   b. production/development
   c. marketing/distribution/supply
   d. sharing of market or customers,

   of goods or provision of services.
2. The business should also restrict itself to share the similar information with industry associations.
3. Before entering into any major business transaction with competitor(s), business should conduct due diligence exercise.
4. The business may develop a competition compliance programme to prevent violation of law.
5. It may also conduct training programmes on competition compliance for its officers.
6. The business may designate specially trained officers to keep an eye on competition law infringements.

Conclusion

The awareness of competition law and especially of cartel is very limited [33] despite having specific provisions on advocacy in the Act. However, ignorance of law is no excuse, and expected that the business should be well aware of the laws of the land.

The resultant losses of cartels are enormous than the benefits. Business must deter to enter into cartels, and work in line with ethos and comply with laws, to flourish itself, the economy, and the Nation.

References

1. Richard Whish. Control of Cartels and other Anti-Competitive Agreements. In: Vinod Dhall, Editor. Competition Law Today – Concepts, Issues and the Law in Practice. New Delhi: OXFORD University Press; 2007, Reprint 2015.p.41. Adam Smith (1723-1790) was a Scottish philosopher and economist, best known as the author of “An Inquiry into the Nature and Causes of the Wealth of Nations” popularly known as Wealth of Nations (1776), one of the most influential books ever written.
2. There may be some other objectives of an organisaiton, like, sales revenue maximization, managerial satisfaction level, minimum acceptable level of achievement, social entrepreneurship, etc.
3. CUTS International & National Law University, Jodhpur. Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India. A Report submitted to the Competition Commission of India, 2008.
4. Akanksha Soni. Effectiveness of Whistle Blower and Leniency Programme in detecting and preventing Cartels. [2012] 23 taxmann.com 250.
5. Section 3 (3) - “any agreement entered into between enterprises or associations of enterprises or persons or associations of persons between any person and enterprise or practice carried on, or decision taken by, any association of enterprise or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services,

which –

a. directly or indirectly determines purchase or sale prices;

b. limits or controls production, supply, markets, technical development, investment or provision of services;

c. shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or

d. directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition."

6. Organisation of Economic Co-operation and Development. Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by India (2017).
7. Competition Act, 2002 (Act 12 of 2003), proviso to sub-section (3) of section 3.
8. Competition Act, 2002 (Act 12 of 2003), sub-section (5) of section 3.
9. Competition Act, 2002 (Act 12 of 2003), section 32.
10. A good example is the Organisation for Petroleum Exporting Countries (OPEC).
11. Competition Commission of India. Provisions Relating to Cartels. 2015.
12. Versha Vahini. Indian Competition Law. Gurgaon : LexisNexis; 2016.p.9.
13. See, Preamble to the Competition Act, 2002.
14. Richard Whish and David Bailey. Competition Law. London: OXFORD University Press; 2015.p.547.
15. Some of the examples of International Cartels are Vitamin cartel, Lysine Cartel, Fertiliser Cartel.
16. Organisation for Economic Co-operation and Development. Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation. 2005.
17. Margare C. Levenstein and Stephen W. Salant. Cartels. Cheltenham: The International Library of Critical Writings in Economics; 2007.
18. Shweta Bharti, "Unraveling of Indian Cartels Legacy and challenges for CCI" in Madhav Mehra (ed.), Making Competition Law Work 43(International Academy of Law, 2010).
19. European Commissioner for Competition Policy in 2004.
20. Mario Monti. Fighting Cartels Why and How? Speech at the 3rd Nordic Competition Policy Conference, Stockholm, 11-12 September, 2000, available from: http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm.
21. See, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, available from: https://www.law.cornell.edu/supct/pdf/02-682P.ZO.
22. Organisation for Economic Co-operation and Development. Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998), available from: http://www.oecd.org/daf/competition/2350130.pdf.
23. In per se violations, onus lies on person or the enterprise to establish that the agreements do not fall under the prohibited category.
24. See Competition Commission of India, Annual Report 2009-10.
25. See, Competition Commission of India, Annual Report 2016-17.
26. Competition Act, 2002 (Act 12 of 2003), proviso to section 27 (b).
27. Competition Act, 2002 (Act 12 of 2003), section 48.
28. Competition Commission of India. Cartel Enforcement and Competition–ICN Special Project. 2018. New Delhi. The data pertaining to decisional trends expanded based on recent orders of the Commission.

Year	Section 26 (2)	Section 26 (6)	Section 27	Total
2009	0	0	0	0
2010	2	1	0	3
2011	13	10	4	27
2012	6	4	13	23
2013	5	3	8	16
2014	10	2	8	20
2015	10	4	13	27
2016	7	2	3	12
2017	4	1	9	14
2018*	1	1	3	5
Total	58	28	61	147

* Upto 30 April 2018.

29. Details of penalty (higher amount) in cartel cases imposed by the Commission are as under :

Sl. No.	Date of order	Case No.	Parties to the Case	Amount of Penalty (Rs. Lakh)
1.	19 April 2018	Suo-Moto 02/2016	Cartelisation in respect of zinc carbon dry cell batteries market in India Vs. Eveready Industries India Ltd & Ors.	21,381.00
2.	7 March 2018	30/2013	Express Industry Council of India Vs. Jet Airways (India) Ltd. & Others	5,436.00

3.	19 January 2017	Ref. Case No. 05/2013	Director, Supplies & Disposals, Haryana vs Shree Cement Limited & Ors	20,573.00
4.	18 January 2017	Suo moto 03/2014	In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items.	247.86
5.	31 August 2016	29/2010	Builders Association of India vs Cement Manufacturers' Association & Ors.	6,31,732.00
6.	31 August 2016	RTPE 52/2006	In Re: Alleged cartelisation by Cement Manufacturers vs Shree Cement Limited & Ors.	39,751.00
7.	17 November 2015	30/2013	Express Industry Council of India And Jet Airways (India) Ltd. & Others	25,791.00
8.	10 July 2015	Suo Moto 02/2014	In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojana And. National Insurance Co. Ltd. and Others	67,105.00
9.	5 February 2014	Suo Moto 03/2012	In Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab	6,231.00
10.	6 August 2013	01/2012	Director General (Supplies & Disposals) v. Puja Enterprises and others	625.43
11.	24 February 2012	Suo Moto 03/2011	In Re: LPG Cylinder manufacturers	1,658.60
12.	16 April 2012	06/2011	Information filed by Coal India Ltd. regarding Cartelization by Suppliers of Explosives	5,882.65
13.	23 April 2012	Suo Moto 2/2011	In Re: Aluminium Phosphide Tablets Manufacturers	31,791.00
14.	25 May 2011	01/2009	FICCI – Multiplex Association of India vs. United Producers/ Distributors Forum & Ors.	26.00

30. See Competition Commission of India. Cartel Enforcement and Competition – ICN Special Project. 2018, New Delhi.
31. A screen is an economic, statistical or behavioural test, which needs to be fulfilled in order to identify the existence of any anti-competitive behaviour to be established.
32. Competition Commission of India. Compliance Manual for Enterprises. 2017, New Delhi.
33. Competition Commission of India. Cartel Enforcement and Competition–ICN Special Project. 2018, New Delhi.