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Cartel penalties v. Leniency programmes - Food for thought

By **Kritika Krishnamurthy**

Competition laws aim to promote fair trade and market efficiency with consumer welfare as the objective. The erstwhile Monopolies and Restrictive Trade Practices (MRTP) regime of India proved too ambiguous and lenient to put the fear of God in the deviants.[1] However, the pragmatic yet 'save the world' approach of the Competition Commission of India (CCI) has forced the market players to tread carefully. The CCI has taken *suo motu* cognizance over matters it considers important. This makes the existence of amnesty mechanism for cartels an important part of the competition regime. Leniency programs generally aim at reduction of fine or punishment for the entities, which cooperate with antitrust authorities by providing information about the existence of a cartel before commencement of an investigation or provide additional information during investigation.

Meaning of cartels

The Competition Act, 2002 regulates combinations, prohibits abuse of dominant position by an enterprise and anti competitive agreements including horizontal agreements such as cartels. Section 2 (c) of the Competition Act, 2002, 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;"

Literature dating back to Adam Smith (1776) chronicles the tendency of tradesmen in the same trade to conspire against the public or raise prices whenever they meet together.[2] In India, cartels and other related horizontal agreements[3] are *prima facie* presumed to have an appreciable adverse effect on competition.[4] The burden of proof lies on the defendant to prove the contrary.

Factors such as price parallelism, abnormal profits, allocation of markets and creation of barriers are factors that determine the existence of cartels.[5] Recently, the Competition Commission of India (Commission), imposed a severe penalty of INR 6000 crores (equivalent to 5 times of the profit of the companies at the relevant time) on a cement cartel and held that the cement companies displayed parallel and coordinated behavior in relation to price, dispatch and supplies in the market by under utilizing their production capacities in order to reduce supplies and raise prices in times of high demand. In other cases too, the Commission has imposed heavy penalties in cases of cartels. The stringent attitude of the Commission in this recent case has made the dormant leniency regulations of India an option worth serious consideration.

Leniency programs

Cartels are difficult to prove. The activity is so secretive that insider information is necessary to break the agreement.[6] Since organizations are driven by profit motive, it is commercially viable

1 The ambiguity and lack of mechanism has been discussed in Union of India vs. Hindustan Development Corporation, AIR 1994 SC 988.

2 Adam Smith, An Enquiry Into the Causes of the Wealth of Nations, 1776.

3 Section 3(3), Competition Act, 2002

4 In determining whether an agreement has 'appreciable adverse effect on competition', the CCI will take into consideration the factors enumerated in Section 19(3).

5 In Re : Glass Manufacturers of India, MRTP Case No. 161/2008

6 Massimo Motta, Competition Policy; Theory and Practice, (Cambridge: Cambridge University Press, 2004), at p. 193

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for members of the cartel to continue to operate as a cartel rather than face open market competition. Hence generally members of a cartel may not want to deviate. Further, such activities are devoid of written communication in any form and hence difficult to substantiate. To counter cartels, competition regimes generally provide for a carrot and stick approach- stringent punishment (fines and imprisonment) if the cartel is proven and a leniency program that provides a level of comfort and reassurance of lenient punishment to the informant. The Commission expects that it might be able to gain information about cartels through the leniency programs which may otherwise not be available. India provides for civil sanctions in the form of penalties to break cartels rather than criminal sanctions like imprisonment up to ten years prevalent along with civil sanctions in countries like United Kingdom[7] and United States of America.[8]

The Competition Commission of India (Lesser Penalty) Regulations, 2009

In India, the Competition Act, 2002 provides an amnesty provision for lesser penalty.[9] Section 46 of the Competition Act, 2002 provides that if any participant in a cartel makes a true and full disclosure about a cartel and such disclosure is vital then the Commission, if it is so satisfied on the same, *may* impose lesser penalty upon such enterprise.

Section 46 also provides that the lesser penalty regulations will not be applicable in cases where the DG Report in an investigation has been received by the Commission under Section 26 of the Competition Act, 2002. Therefore, even after the Commission finds a prima facie case of a cartel under Section 26 of the Competition Act, 2002, any participant of a cartel may file an application for leniency / lesser penalty. This would provide an opportunity to enterprises that are tied down to the cartel as a result of the enforcement mechanism that the cartel members adopt. Enterprises that may want to leave the cartel may find this provision a good opportunity to leave the cartel. Normally the DG, post the determination of the prima facie case by the Commission, issues notices to various enterprises operating in a market for collecting additional information. At this stage, the enterprises that wish to leave the cartel may provide information and claim confidentiality.

In addition, the Competition Act, 2002 has also provided that if the disclosure is found to be not vital, then the Commission may proceed to investigate such enterprise for the alleged contravention and impose penalty as would be otherwise applicable and not the lesser penalty under the leniency regulations.

The Competition Commission of India (Lesser Penalty) Regulations, 2009 (hereinafter Lesser Penalty Regulations) provide guidelines for complete disclosure of cartel related information to the Commission[10] on a condition of full anonymity to the informant.[11] It will be relevant to note that Section 46 requires full and true disclosure to be made of the contravention and further such disclosure should be vital. Therefore, two requirements need to be met viz. (a) full and truthful disclosure about the alleged contravention (b) the disclosure provided should be vital.

Under the Lesser Penalty Regulations, the term

[7] Section 188, Enterprises Act 2002

[8] § 1, Sherman Act, Also See Gerald F. Masoudi, Cartel Enforcement in the United States (And Beyond), Anti Trust Division, US Dept. of Justice (Feb. 16, 2007), http://www.justice.gov/atr/public/speeches/221868.htm

[9] Section 46

[10] Regulation 3

[11] Regulation 6

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'vital disclosure' has been defined as full and truthful disclosure of information or evidence which is sufficient to form a prima facie case or help establish the contravention.[12] The standard for determining a prima facie case under Section 26 has been laid down by the Supreme Court in the case of *CCI* v. *SAIL and another.*[13] The Supreme Court has held that the Commission should record its reasons for the prima facie case based upon the records, including the information furnished and the reference made to the different provisions of the Act. Furthermore, the CCI has held that the prima facie case has to be made on some foundation evidence,[14] cogent [15] and concrete material.[16] Therefore, apart from merely providing information, evidence has to be provided to demonstrate a prima facie case. The standard is subjective and more so in the case of cartels, as no documentary proof would be maintained, the conduct of the parties would be the key parameter for determining cartels. However, inside information like the dates of meetings, and how and when the cartel members coordinate would give sufficient indication for determining a prima facie case. In cases where a prima facie case is already found and if any participating member of a cartel wants to furnish information under the lesser penalty regulations, the standard that would be applied for vital disclosure would be that the disclosure should help to establish the contravention. This standard is much higher than the standard for determining a prima facie case. Smaller enterprises and efficient enterprises that desire to move out of a cartel and provide such information in the course of the investigation may be influenced not to provide such information.

Under the Lesser Penalty Regulations, the first applicant to provide vital information regarding a cartel shall be granted reduction in penalties upto 100%[17] while the subsequent applicants providing information to substantiate the case shall be granted reductions upto 50% and 30% respectively.[18] The Commission may also refuse to grant such reduction if it is of the opinion that the applicant has not made full and fair disclosure of all material information. The Lesser Penalty Regulations and appended schedules provide detailed guidelines regarding submission of applications for grant of lesser penalty.

Conclusion

Advocacy by the CCI of the leniency provisions would be useful in making these better understood by companies that would like to co-operate. Enterprises would want to blow the whistle about an existing cartel if the cartel is already disintegrating or if the member stands to gain by leaving the cartel and there would be no enforcement measures. It is unlikely that smaller enterprises or efficient enterprises may like to blow the whistle unless they are confident that they will be protected by the law.

The regulations also need to be clearly worded. While Section 46 of the Competition Act and the Regulations promise 'lesser penalty', the first informant may *au contraire* be granted full amnesty. Whether this full amnesty can be validly granted is yet to be seen. The Commission

[12] Regulation 2(1)(i)
[13] 2010 (10) SCC 744
[14] *C.S. Rathore* v *Superintendent Engineer, Irrigation Department, Government of UP* Case No. 32/2011
[15] *Arun Kumar Tyagi* v *The Software Engineering Institute and others* Case No. 19/2011
[16] *Cinergy Picture Ltd* v *ETC Networks Ltd* Case No. 2 / 2010
[17] Section 27(b), Competition Act, 2002
[18] Regulation 4

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also refuses to accept evidence provided by subsequent informants before evaluating the information of the first informant.[19] This can cause subsequent informants to back out. The specific criteria of vital information required for requesting lesser penalty has also narrowed down the scope of the leniency provisions. Since anti competitive agreements shall be rarely, if ever documented, the informant shall have little enough to be assured of getting favourable treatment from the Commission.

Furthermore, whistle blower protection is also not clearly detailed in the Regulations, leaving the informant in anxious uncertainty. An amendment of the regulations accordingly may lead to higher detection of the cartels along with positive participation of market entities. It can, however, be stated that the lesser penalty regulations is a step in the positive direction and with more practice and increased advocacy measures undertaken by the Commission, the leniency program may be a good option for enterprises that want to step out of cartels and compete effectively in the market.

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The CONCOR Case: Determining the limits and outer reach of Competition Law

By **Sundar Ramanathan**

The Competition Commission of India recently passed an order in the case of *Arshiya Rail Infrastructure Ltd (ARIL)* v. *Ministry of Railways (MOR) and Container Corporation of India Ltd.* (CONCOR) [Case No. 64/2010 along with Case No.12 / 2011 & Case No. 02/2011 – *KRIBHCO Infrastructure* v. *MOR and CONCOR*]. ARIL, a Private Container Train Operator (private operator), had levelled charges of abuse of dominance in the market for transportation of goods on the rail network by the Government Group – comprising of Ministry of Railways (MOR) and CONCOR.

The *principal allegations* in the matter by the private operator were:

(a) The relevant market was defined as the market for rail services in India.

(b) The MOR prohibited transportation of certain commodities such as ores, minerals, coal and coke on containers and thereby reserved these commodities only for transportation on railway wagons. This was alleged to be an abuse of dominant position by the MOR under Sections 4(2)(a)(i), 4(2)(b)(i)and4(2)(c)of the Competition Act as these prohibited goods constituted nearly 65% of the relevant market.

(c) The MOR through the Railways Rate Circulars increased haulage charges on nine notified commodities placing the private operators at a competitive disadvantage in comparison with the transportation of goods over MOR. This was alleged as an abuse of a dominant position by MOR under Sections 4(2)(a)(ii) and 4(2)(c) of the Competition Act.

(d) The MOR had allotted land to CONCOR prior to privatization and such allotment was based on the terms and conditions as entered into at the time of contract. Continuation of such contracts post privatization (based on the terms and conditions executed therein) was an abuse of a dominant position as it imposed unfair conditions and provided an unfair advantage to CONCOR over other private operators. Thereby,

[19] Regulation 5(6)

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it was alleged that such an action was an abuse of a dominant position by MOR under Sections 4(2)(a) (i) and 4(2)(c).

(e) The action of CONCOR in not allowing access to its own terminals (built pre-privatization) amounted to denial of essential facilities and was an abuse of the dominant position under Section 4(2)(c) by CONCOR as part of the MOR Group.

(f) The MOR has mandated maintenance of private railway rakes only through MOR and this has restricted competition in this market thus contravening Section 4(2)(d).

Order of the Competition Commission of India

Sovereign function

The jurisdiction of the Competition Commission of India (CCI) to inquire into the present matter was challenged as the actions involved delegated legislative functions and policy decisions undertaken by the MOR in exercise of its sovereign powers. Under Section 2 (h) of the Competition Act, any activity of the Government relatable to the sovereign function of the Government is excluded from the scrutiny of the CCI as a department of the government will not be an enterprise for the purposes of the Competition Act. The CCI vide an order dated 3-5-2011 had ruled that the activity of carriage of goods on the Indian Railway network cannot be considered as sovereign function and held that the CCI has jurisdiction in the present matter. The CCI has subsequently confirmed its rulings and held that nature of activity undertaken by MOR is commercial in nature. This has been affirmed by a judgment of the Hon'ble Single Judge of the Delhi High Court in *Union of India* v .*CCI and others* (AIR 2012 Del 66). This judgment is pending before a division bench of the Delhi High Court in Letters Patent Appeal No. 169/2012.

CONCOR not part of the MOR Group

It was argued by CONCOR that the abuse of dominant position by a group under Section 4 has to be a joint abuse of dominant position by the members of the group. The mere abuse of dominance by a holding company cannot be attributed on the subsidiary to constitute abuse of dominant position for the purposes of Section 4. It was also argued that the actions of CONCOR are independent and the decision making, day to day functioning are not influenced by MOR. The CCI held that day to day functioning and decision making of CONCOR is not influenced by MOR. There was no control by MOR over CONCOR and therefore it cannot constitute a part of the group of MOR for the purposes of Section 4. This is an interesting point which has not been previously addressed and may have significant implications in the days to come.

Relevant market

For the purposes of abuse of dominance under Section 4, it is essential as a first step to determine the relevant market (relevant product market and relevant geographic market) since the abuse of dominance is undertaken in a relevant market. The CCI held that the product market demands substitutability as revealed by consumer preference. It was observed that the type and characteristic of goods that can be carried on wagons and containers are different. Therefore, it was held that it will not be appropriate to classify wagons and containers in the same market. It was, however, held that both rails and roads are substitutable for movement of containers, and both rail and road compete with each other for moving traffic. Therefore, the relevant product market was the market for transportation of containers over rail and road. Furthermore, since the rails and road operate all over the country, the relevant geographic market

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was the entire country. Therefore, the relevant market was determined as the transportation of containers within the boundaries of India.

Dominance in the relevant market

It was held that MOR does not operate in the relevant market. Therefore, there was no question of abuse of dominance by MOR. Furthermore, it was observed that container freight is largely carried on roads and the transportation of container on rails was not dominant in the container freight market. Finally it was held that in this market for transportation of containers over rail, CONCOR did not enjoy any dominant position in the relevant market as it does not have the strength to influence the competitors or the market in its favour. Therefore, it was found that CONCOR was not dominant in the relevant market.

No abuse of dominance

It was therefore held that as neither MOR nor CONCOR is dominant in the relevant market, they do not and cannot have abused their 'dominant position'. In addition, and in the alternative, the Commission made certain obiter observations which may have significant ramifications in future cases. The same is analysed herein below:

Essential facilities

On the issue of the access to the terminals built by CONCOR, the CCI held that in the case of scarce natural resource (in the present case land), any company that is a pioneer will enjoy substantial cost benefits with the passage of time. Therefore, the CCI has implicitly observed that merely because an enterprise is a pioneer in a particular market / sector, it need not be mandated to provide the access to its scare resource to other enterprises. In this background, the CCI observed that the essential facilities doctrine wherein a dominant undertaking is mandated to grant access to its 'essential facility' can only be invoked in certain circumstances such as

(a) existence of technical feasibility to provide access,
(b) possibility of replicating the facility in a reasonable period of time,
(c) distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms

In the present case it was held that there was no requirement for CONCOR to share its terminals as there were no technical, legal or even economic reasons why the other private operators should not create similar terminals or facilities. It was highlighted that even the Indian Railways (Permission for operators to move container trains on Indian Railways) Rules envisaged that private operators would construct their own terminal.

The CCI held that there was no need to allow access to private operators to CONCOR terminals but laid down standards for the application of the essential facilities doctrine that are contrary to the established jurisprudence of essential facilities anywhere in the world. The US Supreme Court has rejected the application of the doctrine and has not felt the need to recognise it. The CCI has not, in the first instance, considered whether the essential facilities doctrine should be made applicable in India. Even, if the essential facilities doctrine is to be made applicable, the standards and thresholds that have been set in Europe are significantly high. The CCI on the other hand has preferred to adopt a vague standard such as distinct possibility of lack of effective competition, possibility of replicating the facility in a reasonable period of time etc. Therefore, it needs to be seen how this doctrine will evolve in the days to come.

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Safety considerations outside Competition Law

In relation to the issue pertaining to maintenance of rakes solely by the railways it was held that where the considerations in a market are governed or influenced by the grounds of safety it will not be a competition issue. Therefore, the Commission has observed that safety considerations will be kept out of scrutiny. This once again is an interesting observation and how this will determine competitive influences in India will only be determined by its subsequent application.

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RATIO DECIDENDI

Arbitration – Reference of non-signatory parties to agreement

The Supreme Court of India has held that even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 of Arbitration and Conciliation Act, 1996 read with Schedule I. It was held that expression 'person claiming through or under' in Section 45 would mean and take within its ambit multiple and multi-party agreements, though in exceptional cases reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible. The Court noted that because the mandate and purpose of the provisions of said Section is in favour of arbitration, the relevant provisions would have to be construed liberally to achieve that object. The Court further held that in this regard 'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties and that Court should examine the matter from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction.

On the facts of the case, the court noted that where the agreements were consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. It was also held that the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally. [*Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc.* - Civil Appeal No. 7134 and 7135-7136 of 2012, decided on 28-9-2012].

Government can also be a 'consumer' – Administrative decision to avail service from particular entity, not an 'anti-competitive agreement'

The Competition Appellate Tribunal has held that law does not bar the government from becoming a consumer when it has to secure the services and as a consumer it has choice to select the entity to provide such services. The dispute in question pertained to the government's memorandum which mentioned that whenever any govt. officer seeks to utilize the services of travel agent, it should be limited to two specified travel agents only. The appellant had argued that the govt., in

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order to protect the business of the two agents had entered into 'anti-competitive agreement'. The Tribunal however upheld the views of CCI that the govt. can be termed as consumer in the particular circumstances when it is seeking the services for securing air tickets on reasonable rates. The argument that government not being "person", cannot be a consumer was held as incorrect on the ground that the definition of "person" was an inclusive definition and the term suggested that a local authority or an artificial juridical person also can be included in the said term. Merely because the officials purchase large number of tickets, question of dominance did not arise, as per the order and government cannot be held as a dominant enterprise in the relevant market.

The Tribunal also endorsed the stand taken by the CCI that there was no vertical agreement between the Government of India and the respondents. It was held that the administrative decision to avail of the services of particular person was not an agreement; that it was not a trading activity and that such activity did not amount to distribution of state largesse. [*Travel Agents Association of India* v*. Balmer Lawrie & Co.* - Appeal No. 21/2010, decided on 26-9-2012].

Insider trading – Possession of unpublished price sensitive information

The Securities Appellate Tribunal has held that it is not obligatory under the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 that Unpublished Price Sensitive Information (UPSI) must be in the possession or knowledge of the company in whose securities the insider deals with. It was noted that as long as, an insider of 'the company' deals in the securities of 'a company' listed on any stock exchange while in possession of UPSI relating to that company, the provisions of Regulation 3(i) will get attracted. The Tribunal was of the view that the term price sensitive information used in Regulation 2(ha) is wide enough to include information relating directly or indirectly to 'a company' and that Regulation 2(e) which defines 'insider' makes a distinction between 'the company' and 'a company', when it refers to 'the company, the references is to the company whose Board of Directors is taking a decision and when it refers to 'a company', the reference is to a company to which the decision pertains. The Tribunal dismissed the appeals, upholding the penalty on the appellant while considering circumstantial evidences. The appellant in the present case had argued that the information relating to a third party investor seeking to buy shares of a listed company from the market cannot be treated as UPSI regarding the target company. [*V. K. Kaul* v. *Adjudicating Officer, Securities and Exchange Board of India* – SAT Order 8-10-2012 in Appeal No. 55/2012].

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