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THE EPISTEMOLOGY OF CARTELS IN THE INDIAN LEGAL SYSTEM

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Abstract

A cartel is an organisation made up of manufacturers or vendors of a thing or service that band together to deliberately control the supply and manipulate pricing of that good or service in order to get an unfair advantage over other rivals in the market. A cartel serves as a weapon to suppress current rivals and impede the entry of new players into the market. A wide range of alternatives and choices for customers often acts as a catalyst for businesses to provide better goods and services at more competitive pricing in an extremely competitive marketplace.

Such an incentive helps the economy expand and increases output in addition to the advantages to the customer. When these corporations or enterprises band together, it hinders the nation's economy from expanding and lessens competition.

This paper will explore the epistemology of cartels, study the history and working of a cartel. It will further talk about **the MRTP Act** and transition to ***the Competition Act of 2002***. It shall further discuss the problems related to Bid-rigging and Price Fixing, the problems that foster within cartels and the problems faced by the government in the detection of such cartels. Further this paper will also provide the investigatory and sanctioning remedies attached to the prosecution of cartels.

Keywords: Cartels, Epistemology, Competition

Introduction

The bulk of the people is expected to contribute and participate in the economy of a country without engaging in activities that might have the opposite impact. Yet, the previously suggested scenario may actually come true in a perfect society where everyone's thoughts function in perfect unison. In actuality, psychology reveals, every individual possesses a specific cognitive process that serves as the catalyst for a unique viewpoint on the world and oneself.

The entire idea of cartels and how it affects the economy will be the focus of this essay. However, putting cartels aside for the time being, what if we focused on the psychology of certain producers? It is implied that those who work as suppliers or producers would have a tendency to form a cartel in order to control pricing and limit output and guarantee a steady stream of income. But every person runs their firm for their personal gain and expansion, to have the most market demand and advance comparatively more quickly than their rivals. As a result, joining a cartel seldom leads to long-term personal development and the ability to conduct business independently.

Given the idea that people might readily break away from cartels, provide competitive rates, and boost their own consumer demand, why then is it so difficult to attain perfect competition?

This theory can only be supported by the fact that suppliers and manufacturers fear fierce competition and believe that sharing revenues equitably among cartel members is preferable to losing their own companies to dwindling and pointless revenue. However, the stability and security that these cartel agreements typically provide come at the expense of other rivals or recent arrivals who are not members of the cartel. This is against both **Article 19(1)(g)**¹—which deals with the concentration of economic power—and **Article 39 (b) & (c)**², which guarantee all citizens the freedom to engage in any profession or to carry on any trade, business, or vocation.

*By agreement among themselves, distributors, sellers, producers, or service providers who restrict control or attempt to control the production, distribution, sale or price of, or trade in, goods and services, are referred to as cartels under Section 2(c) of the Competition Act, 2002*³. The '**Monopolies and Restrictive Trade Practices Act of 1991**'⁴ and after its repeal the

¹ The Constitution of India, 1949, Art. 19(1)(g)

² The Constitution of India, 1949, Art. 39

³ Competition Act, 2002

⁴ Monopolies and Restrictive Trade Practices Act, 1969

'**Competition Act of 2002**⁵' serves as the legislation aimed at promoting competition and maintain freedom of business.

The **MRTP Act** was met with a number of objections and restrictions that limited its effectiveness. These included extensive government supervision and intervention, which further deterred expansion and investment prospects in emerging companies. Furthermore, the legislation ignored the effects of globalisation and the government's liberalization-promoting measures in favour of regulating monopolies and inspecting restrictive trade practices.⁶

In 1999, the Indian government established a committee with the aim of offering suggestions and serving as an advisor to the modernising Indian competition law. The objective was to bring the legislation into line with global economic practices and trends, and to establish a legislative framework and structure for amending **the MRTP Act**.⁷ In December 2002, '**the Competition Act of 2002**' was enacted by the parliament following extensive examination, survey, and deliberations. The country's economic development was to be supported and encouraged, the '**Competition Commission of India**' was to be established, trade freedom in domestic and international markets was to be strengthened, and consumer interests were to be protected.⁸

The Competition Act further acknowledged the existence of cartels and the ways in which they undermine an ideal market by expressly prohibiting businesses, individuals, or groups from entering into '**Anti-Competitive Agreements**' and designating such agreements and their operation as civil offences. The Act's Section 3(1) forbids any agreements that could have a significant adverse effect on competition (AAEC), and Section 3(3) lists the consequences of such anti-competitive agreements. Businesses, individuals, or associations that enter into such agreements and engage in a comparable trade of goods or services risk the following outcomes from their agreements:

- Price manipulation
- Reducing the amount of products produced or supplied
- Bid manipulation - Market division according to region

⁵ Ibid at 3.

⁶ Sharddha Jain, Competition Law in India, *iPleaders*, (last visited 02.03.2024), Available at - https://blog.ipleaders.in/competition-law-in-india-2/#Emergence_of_Competition_Act_2002

⁷ Sabapriya Ray, Emergence and Applicability of Competition Act, 2002 in India's New Competitive Regime, *IISTE, Journal of Law, Policy and Globalization*, ISSN 224-3259, Vol.1,2011.

⁸ *Supra* at 7 .

History of cartels

Throughout economic history, cartels have played a crucial role in shaping markets and undermining ideas of fair competition. Cartels have changed in form and function from antiquity to the present, having a profound effect on economies all over the world.

The origins of cartels may be seen in mediaeval guilds and other historical civilizations like the Roman Empire. Guilds governed a variety of trades and industries in these prehistoric cultures, setting standards for output, cost, and quality. By essentially establishing monopolies within their particular industries, these agreements reduced competition and consolidated economic power.⁹ European nations adopted mercantilist strategies from the 16th to the 18th century with the goal of building up their economies through trade. During this time, cartels were very important because governments gave chartered firms like the British East India Company and the Dutch East India Company exclusive trading rights. These businesses functioned as de facto cartels, monopolising trade channels and gaining control over large swaths of territory to dominate world trade.¹⁰ Cartels gained prominence in the 20th century and then fell apart. International cartels trying to control global markets rose to prominence in certain areas, such telecommunications, and pharmaceuticals, while other industries experienced an increase in regulatory scrutiny and legal challenges. To further encourage competition and stop anti-competitive behaviour globally, international organisations such as the European Union (EU) and the World Trade Organisation (WTO) were established.

Working of a cartel

The cartel is driven by a main aim, a desire to operate in concert and for each other's profit, and an unlawful agreement that has an 'appreciable adverse effect on competition (AAEC)' that allows the cartel to monopolise the market. Cartels are supported by the mutually trusting and dependent connection that has grown between them. This relationship is vital to their survival as co-perpetrators, as it allows them to enforce explicit and covert agreements that limit and control outputs, pricing, and market share. Thus, eliminating any potential for market competition by designating responsibilities and prescribing what each member must decide about pricing, production, bidding, location, and serving a certain customer base.

⁹ Chandler, Alfred D. Jr. *The Visible Hand: The Managerial Revolution in American Business*. Belknap Press, 1977.

¹⁰ Jones, Geoffrey. "The Growth of Cartels in Europe, 1900-1939." *European Review of Economic History*, vol. 1, no. 1, 1997, pp. 89-115.

The distinction between the two types of mechanisms—**Vertical Agreements** and **Horizontal Agreements**—on which a cartel operates may be made with the use of business and industrial relations.

Horizontal agreements are made up of groups of companies or organisations that sell similar goods or services or operate at the same level of production.

The Competition Act of 2002 defines **horizontal agreements** under 'Section 3(2)'. These corporate arrangements and coalitions, also referred to as cartels, deal with complimentary, homogeneous, and interchangeable goods. Such coordinated behaviour among competitor enterprises has the effect of restricting and impeding competition since it creates the same "market power" as would arise in a unilateral example of abuse of dominance. Prices are set by the cartel members for an absolute and predetermined market profit share. This is another example of collusive behaviour meant to foster common economic gains at the expense of the general public's interests and circumstances. The allocation of geographic territory to a cartelist or group of cartelists in order to divide market earnings and production demands at a predetermined and set rate is another one of these cartels' detrimental activities. Cartelists also engage in collusive behaviour while bidding when they consciously choose to take on non-competitive jobs and designate one member to pay competitive pricing in order to win the tender and split the proceeds.

Vertical agreements are typically made between companies and organisations that operate at various production levels and rely on one another's goods to run their own operations. These kinds of supply and production chain agreements typically hold true when one product is logically required for the proper operation of the other.

Furthermore, studies have shown that industries with high levels of population concentration are more likely to experience cartel formation. Comparably, cartels are also more common in smaller geographic areas since small marketplaces are less likely to have a small number of businesses that own a significant percentage of the corporation. Product homogeneity is also a prerequisite for cartelization, as companies find it more difficult to determine comparable prices when their products differ from one another. Every time a product is changed, a new, similar price needs to be established. Partner dishonesty is also easily detectable as a cartel only needs to consider one cost. Second, cartels form when members believe they would lose more money by joining than they would make. This mostly depends on the likelihood that an individual is believed to be

caught and the severity of the punishment they anticipate receiving. When there is a higher chance of getting caught and more severe predicted punishments, the expected profit from forming a cartel decreases. Therefore, in order to compute the overall benefits of cartel formation, participants must at least have an idea of the possibility of being found out in order to engage. Finally, even if a potential cartel managed to gradually raise prices without being discovered, it would fail if the initial costs of organisation and associated monitoring charges exceeded the expected profits. In order to prevent cheating, companies have to keep a close eye on one other's behaviour. Because this type of work may be costly, members may choose to establish a contributing plan to help with the costs. To have the lowest operational expenditures feasible, a cartel should only consist of a small and manageable number of businesses.

Bid-Rigging and Price-Fixing

Bid rigging, which is prohibited by the Competition Act, is considered to be the cause of AAEC. '**Section 3(3)(d) of the Competition Act**' genuinely covers all present and prospective bidders for any tender, irrespective of their involvement in the manufacture or sale of the products that are allegedly violating at the time of bidding. The allegation of a bid-rigging arrangement cannot be maintained if there is no evidence of collaboration between participating bids and non-participating enterprises, or if participating bidders knew in advance that other companies were not participating.¹¹

The "**Competition Commission of India**" oversees and monitors instances of bid manipulation, mainly involving public tenders, and serves as a watchdog in these circumstances. When it comes to Suo-moto investigations into possible bid-rigging incidents in India, the "CCI" has been aggressive. Because it is difficult to identify bid rigging, CCI depends on inferential evidence. As a result, the frameworks and procedures for circumstantial evidence that CCI uses to identify large-scale rigging are:

- The charges in previous bids were noticeably lower than those stated now.¹²
- The upsurge of phone calls and text messages between bidders preceding the actual bid.¹³

¹¹ <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-cartels>

¹² Director, Supplies & Disposals, Haryana v Shree Cement Limited and Ors (Case No. 5 of 2013)

¹³ Western Coalfields v SSV Coal Carriers Private Limited (Case No. 34 of 2015).

- The bidders exchanging confidential and sensitive information prior to the bidding procedure.¹⁴
- In spite of different production rates, taxes, and other factors, bidders are increasing their prices in a comparable manner.¹⁵
- Freight costs quoted in a comparable manner.
- The whole amount offered, which corresponds to the total amount jointly bid for by the bidders, as well as any communication included in the call detail logs, message screenshots, and any supporting documentation submitted with the bids.¹⁶

Another functional mechanism that powers a cartel is **price fixing**. This specific process is dependent on cartel decisions, which band together to manipulate market dynamics related to supply and demand and alter pricing. In the same way that bid-rigging causes AAEC, price-fixing does too. As a result, price-fixing entails cartel collaboration, which cannot be demonstrated in the absence of proof from the former. The CCI observed in a "fabric firms' case" that price parallelism in bid quotations did not always indicate conspiracy among the fabric industry. As a result, the CCI closed the case without offering any evidence of a consensus or agreement. The exchange of information is one of the additional criteria for establishing and demonstrating price fixing; in contrast, parallel behaviour alone is insufficient to establish collusion. Charges against many airlines were dropped by CCI when it was discovered that the airlines had used several software programmes that produced disparate pricing inputs based on certain algorithms.¹⁷ In actuality, this was in line with the CCI's rules, which state that while price parallelism alone cannot demonstrate collusion, other factors combined with unexplained price parallelism can help demonstrate deliberate and collusive agreements.¹⁸

Detection Of Cartels

It is a difficult undertaking for the competition authorities to provide tangible evidence of a cartel's existence.¹⁹ The procedure of locating and identifying cartels is quite strict. The growth

¹⁴ In re Cartelisation by Broadcasting service providers by rigging bids submitted in response to the tenders floated by Sports Broadcasters (Suo motu Case No. 2 of 2013)

¹⁵ Delhi Jal Board v Grasim Industries Ltd (Ref Case Nos. 3 and 4 of 2013).

¹⁶ Alleged Anti-competitive conduct in Beer Market in India (suo motu Case No. 06 of 2017)

¹⁷ Ms. Shikha Roy v Jet Airways (India) Limited and Ors (Case No 32 of 2016).

¹⁸ Builder's Association of India v CMA and Ors (Case No. 29 of 2010)

¹⁹ Abhir Roay And Nishchal Joshipura, "Cartels in India", *Competition Law Insight (January 12, 2010)*, <https://www.nishithdesai.com/Content/document/pdf/ResearchArticles/Cartels%20in%20India.pdf>

¹⁹ (1968) 3 ALL ER 721.

of globalisation has made it worse since financial transactions are now carried out digitally rather than on paper and across national borders, enabling various market players to produce, sell, and buy goods from counterparts in other countries. Distance is not a problem anymore. Average customers are more susceptible to exploitation since firms are now more powerful and better equipped to implement their cartel agreements. Almost every country with competition laws requires proof that an agreement even exists. Alternatively said, businesses involved in a partnership case cannot be convicted only on the basis of parallel pricing; however, parallelism is often used as an effective defence tactic, beating competing authorities with fewer resources for knowledge or investigation. Even when it is evident, cartel action can be difficult to spot and even then, it can be impeded by several countermeasures. **US and European courts** have adopted the "**parallelism plus**" strategy, which requires proving the existence of "**plus factors**" in addition to the firms' parallel activity in order to establish the existence of an antitrust violation.

'The Secretary of Economic Monitoring (SDE)' has been instrumental in creating a framework to oversee and consider matters pertaining to competition based on pricing trends and profitability. First, the profit ratio's trend is validated.²⁰ The complaint is abandoned in light of the interpretation that a steadily diminishing profit margin is proof of market competition. Second, it's critical to determine whether a gain in margin is linked to a narrowing of the price range. The complaint is withdrawn if not. Third, in the event that a margin increase takes place, it is necessary to verify if the margin's behaviour and the price's propagation throughout a state's geographic area follow the same pattern. If they do, the claim is dismissed. Therefore, investigations will only be conducted in cases where a drop in price range that deviates from the official price set by the State is related with a margin gain.²¹

Factors Determining the Existence of a Cartel

a) *Presence of Trade Unions* –

The organisational expenses of a cartel are significantly decreased in the presence of a trade association. Trade associations lower the cost of meetings and coordinate activity amongst companies in a market, which helps in the establishment and maintenance of cartels. According to a recent investigation,

²⁰ Paolo Buccirossi (2006). "Does Parallel Behaviour Provide Some Evidence of Collusion", LEAR – Rome <<http://www.bepress.com/cgi/viewcontent.cgi?article=1027&context=rle>>

²¹ DAF/COMP/GF/WD (2006). 37, "Contribution from Brazil", Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement, Global Forum on Competition

trade unions representing different transport truck owners, cement manufacturers, mill owners, grocery merchants, etc., may have conspired to create cartels operating under their auspices. Hence, the CCI will be closely monitoring these Business/Trade Unions and Associations. It is standard procedure to obtain whistleblowers from trade unions that experience cartelization by offering their members incentives and protection in exchange for disclosing information about how the cartel operates.

b) Public Policies and Cartels

Government policies also encourage cartel conduct, especially when they divide an industry into small subsectors or make prices readily available to all parties. The general assumption that most government policies are created and implemented with the intention of promoting competition is not always followed. The State Governments' practice and policy of giving local units priority when making procurement choices is one example that may be observed in India. Under such a plan, small-scale business sector units are given preference in pricing and/or buying in order to protect and promote these units. These could be better in the context of the state's overall development policy. However, issues arise when the scheme encourages the formation of a cartel of local producers that is solely dependent on public assistance.²²Midway through the 1980s, the Rajasthan government had issued an order requiring the purchase of a certain quantity of barbed wire from domestic manufacturers. As a result, the '**Rajasthan Barbed-wire Manufacturers Association**' is claimed to have been established as a "cartel." By tacit agreement, this group paid the expenses and divided the whole stock of barbed wire among its members. Collaboration stifled competition, which led to the creation of inferior barbed wire. But because of its policies, the Government was compelled to buy barbed wire at a price greater than what was available on the free market. These local producers were unable to compete because of their dependency on government assistance. Over time, local units were compelled to close due to changes in government procurement laws, and the group was dissolved.

²² Dayal, P and Agarwal, M (2006). "State Government Policies and Competition", Towards a functional competition policy for India, Pradeep S Mehta (Ed), CUTS International & Academic Foundation

c) Procurement Policies

Local contractors participate in a variety of government construction projects by means of tenders and bids. Project procurement tenders are typically given through a bidding procedure. This seemingly perfect process was unable to get the desired results because there are situations in which bidders collude and a contracting mafia exists. These inclinations suppress competition and make it impossible for the bidding process to produce useful results. In addition, there is a trend for contracts to be awarded in bigger packages, which precludes smaller contractors from bidding on the project, reducing competition and encouraging larger companies to work together.²³

d) Excise Policy

Alcohol distribution and marketing regulations that are not up to par have encouraged cartelization. Some countries put up for auction licences to sell alcohol across large geographic regions; this restricts competition to a small number of players who can afford and have the required financial resources to run their companies. It so eventually leads to cartelization, which diminishes consumer choice and reduces government revenue. A lottery system is being used by some state governments to issue liquor sales licences in an attempt to put an end to this conspiratorial activity. Because of this, it is now simpler to stop collusive activity.²⁴

Problems in Cartels

Understanding how cartels operate is essential to identifying them. Understanding the problems cartels face is particularly important since it often leads to the discovery of evidence of their existence. A cartel must overcome difficulties or problems in order to thrive. It must be able to raise prices above the level of competition and hold them there long enough to produce monopoly profits in order to be successful. To be successful, the cartel must first and foremost incorporate all significant and pertinent market players. Second, the cartel's members must agree on the terms of the pricing to be charged, the division of market share among them, or any other need. Thirdly, all parties involved must affirm that they would not try to trick the cartel into giving a little price

²³ Supra at 21.

²⁴ Ibid at 21.

cut in an effort to get a significant boost in sales. It's likely that each of these problems will reveal evidence of the cartel's existence.

a) Agreement of Cartelists on the Cartel Agreement-

If there are major competitors who do not meet the requirements to become members, the cartel will not be able to function as intended. Outsiders have the potential to sell for far less than cartelists. Because of this situation, the cartel members are under pressure to reduce their prices. If a cartel member competes more directly with an outsider than with other members, the outsider will put pressure on the member to reduce their pricing. This situation might lead to internal conflict within the cartel. As a result, the cartel has ample reason to seek to include all of its main competitors. It may be possible to show proof of the cartel in an attempt to include every enterprise. Initially, there can be documents from the cartel firms that indicate discontent with the outsider's decline to become a member of the cartel. Secondly, the cartel may be mentioned or made clear via letters or other documents sent to the outsider. Third, a non-member who has been contacted to join a cartel may reveal the details of the organisation that were given to them in an attempt to convince them to do so.

b) Reaching to a consensus

The cartel needs to come to an agreement on important terms. For example, a cartel that sets pricing must choose a price. This could not be an easy process because different firms might have different goals. Lower-cost corporations will want lower pricing, while higher-cost ones will seek very high cartel prices. The members of the cartel must agree on a complicated price plan when there are several items involved. If the products from several firms are not the same, they will have to make a compromise on the pricing ratio. It becomes more challenging to come to necessary agreements the more meetings or phone calls that are necessary. The more complicated the agreement is, the more likely it is that they have prepared paperwork explaining, recording, or implementing its terms. In a manner similar to this, a cartel that splits up bids, territories, or clients must agree on the split.

c) Internal Politics

Cartels are inherently unstable. To put it broadly, all of the participants are capable of producing and selling substantially more than is allowed under the cartel agreement. This is

because a cartel has to establish pricing in order to operate. Once the product's cost is raised, less of it can be sold. One way a cartel member may dramatically increase its revenues is by producing more of the item and selling it for a bit less than the agreed upon price. But if they all behave like this, the cartel will fall apart. Therefore, it is essential for the cartels as a whole to make sure that no member undercuts their prices. Members of the cartel may also fool the cartel in a variety of ways, such by offering hidden discounts, raising the calibre of their products, skipping out on shipping costs, and more. Cartels frequently engage in similar forms of cheating, and it is typical for them to look into this activity and either cease it entirely or recognise and address it.

Investigation and Penalties

The evidence that may be acquired to show a cartel agreement is primarily circumstantial due to the inherent secrecy of cartels. In most circumstances, even in the lack of direct agreement proof, it is legally possible to continue a cartel prosecution, despite the fact that doing so is risky. Failure is quite likely to occur. A cartel prosecutor often seeks more direct evidence; but, as previously said, this kind of evidence is difficult to get and calls for specific techniques and resources, such as dawn raids and leniency measures.

Typically, the initial information a government agency receives about cartel activity comes from an enemy who may not have been part of the cartel structure, or from a direct or indirect customer of the cartelized goods. However, information can also come from any member of the public who just so happens to learn about a problem or has reason to believe that there is cartel behaviour going on. Customers and disgruntled employees are frequent sources of information for agencies on possible cartel activity. Information that is not supported by law is swiftly identified by a stringent screening process.

In **re: Sugar Mills**, the CCI sought evidence of the alleged cartel members' meeting and determination to undertake coordinated action, evidence of the coordinated activity's implementation, and conclusive evidence of an exchange of the collective minds.²⁵

Furthermore, the CCI decided in the '**Gas Cylinder Manufacturers**' case that *the "balance of probabilities" and "liaison of intention"* standards should be applied to provide proof since

²⁵ In re: Sugar Mills, Case No. 1 of 2010 (CCI).

cartelization is not prohibited. Both unintentional and deliberate proof can be used to support these tests. The CCI noted that while direct evidence of a cartel is difficult to come by, one might utilise circumstantial evidence to support the validity of a cartel.²⁶

Market participants are suggesting that their actions and conduct cannot be explained "but for" a coordinated anti-competitive agreement and activity by employing the "balance of probability" test to determine an agreement. The Commission has even gone so far as to prosecute cartels based merely on circumstantial evidence, undermining the prior stance on the level of proof required to establish a cartel and contributing to the corpus of knowledge pertaining to competition law. Currently, the "**parallelism plus**" approach is employed by the government to ascertain the existence of cartels. This implies that specific similar behaviours among the market participants are necessary to provide proof of collusive activity by a cartel.²⁷

The Commission considered "**plus factors**" in the *Cement Cartel case*, such as a decrease in capacity utilisation and price adjustments after association meetings that provided a venue for dialogue and information sharing, in addition to the emergence of price parallelism.²⁸

Investigative Mechanisms

To properly understand the requirements of building a case against a cartel, one must have a thorough understanding of the Commission's investigation jurisdiction. **Section 26(1)**²⁹ must be followed by the *Director General* ("**DG**") when the Commission requests that the DG investigate any Act infractions. The DG needs to adhere to the guidelines set forth by the Commission. The evidence gathered during the investigation is only one factor the Commission takes into account to bolster its belief that a cartel is in place. Other factors include market share, cost of sales, the conduct of the participating companies, and other factors. Before making a decision, the Commission takes the DG's report into account. The results of the DG's investigation are included in this report, along with many additional elements that are regarded as circumstantial evidence. The dynamics of supply and demand, parallelism in price changes, and comparisons with other players in the relevant market are a few examples of these factors. There are parallels between competition law and the use of circumstantial evidence in the criminal prosecution system. When

²⁶ Suo Motu Case Against LPG Cylinder Manufacturers, In re, [2012] CCI

²⁷ All India Tyre Dealers' Federation v. Tyre Manufacturers, 2012 SCC CCI 65

²⁸ Builders Assn. of India v. Cement Manufacturers' Assn., 2016 SCC CCI 46

²⁹ Competition Act, 2002, S.26

considering a criminal case, the court considers all relevant factors and decides if any one element or point contradicts another or shatters the link. If all the evidence points to the accused's guilt, the court still maintains the conviction. In criminal law decisions, the court also takes public safety and interest into account. Similar to what happened in the **Cement Cartel case**, the Commission has said that it will penalise parties if there are convincing circumstantial evidence of a cartel and if the activity is anti-competitive for the market. The Commission has investigated anti-competitive behaviour and gathered evidence using a variety of tactics, including dawn raids and leniency legislation.

a) Dawn Raids

Unexpected visit to the workplace of a possible cartel operator with the goal of acquiring digital or paper documentation of a cartel agreement. Dawn searches are frequently effective and not too hard to do, particularly if the accused companies don't want to cooperate. A growing number of competition authorities worldwide are effectively employing the dawn raid tool. One might probably make the case that an anti-cartel operation cannot be completely successful if this evidence-gathering tool is not used. However, it is important to remember that "Section 220 of the Companies Act of 2013"³⁰ states that following the guidelines of the "Code of Criminal Procedure (CrPC)"³¹ is necessary in order to get a warrant. Following this, the legislation should have also been modified to comply with the present Companies Act, but this hasn't happened. Regarding the "Beer cartel case," morning raids were conducted on the headquarters of *Carlsberg, United Breweries, and Anheuser-Busch* following the discovery during this operation of an email exchange revealing discussions regarding price fixations.³² This was concrete evidence, the type that can't be found with a standard investigation. The amendment attempted to loosen the strict requirements of the court warrant and advised that the search and seizure procedure adhere to the CrPC by granting the Commission Chairman the power to authorise the DG to conduct raids on their own. The lengthy wait times associated with the current warrant application process allow businesses enough opportunity to destroy any evidence that may be used against them. The element of a dawn raid, which is a surprise break-in while individuals are searching for evidence, is

³⁰ The Companies Act, 2013, s.220

³¹ The Code of Criminal Procedure, 1973

³² Aditya Kalra and Aditi Shah, Exclusive: Carlsberg, United Breweries plead leniency in India Beer Cartel Probe – Sources, Reuters (Last Visited 13-2-2024, 7.10 p.m.), <https://www.reuters.com/article/india-regulator-brewers/exclusivecarlsberg-united-breweries-plead-leniency-in-india-beer-cartel-probe-sources-idINKBN1OC1QQ>

also removed.³³

b) *Leniency Regulations*

Referred to in the Act as the "*Competition Commission of India (Lesser Penalty) Regulations, 2009*," the leniency plan is to be followed. The applicant who reports the presence of a cartel may be entitled for a reduced penalty under these provisions, provided that the essential prerequisites are fulfilled. For example, in accordance with the Commission's requirements, the applicant must furnish all relevant details on the purported cartel and abstain from fabricating or altering any significant documents or data. The applicant must collaborate with the Commission in a timely and honest manner. It is important to keep in mind that being lenient is an elective solution. Despite the plan's assurances of confidentiality, the Commission has to build confidence in the leniency programme to encourage cartel members to come forward with important information and get in touch with the agency. These kinds of constraints have made it easier to get direct and compelling evidence against the participating firms.

Sanctions of Offences

Under *Section 27 of the Competition Act*³⁴, the CCI may impose on each cartel participant a fine equal to three times the income for each year the cartel runs, or up to 10% of revenue for each year the cartel operates, whichever is bigger. However, there are no guidelines for punishments that list the possible factors to examine when determining the seriousness of a specific cartel case, nor do they outline any aggravating or mitigating conditions.

To date, the CCI has penalised cartelization in a number of ways. The "**Aluminium Phosphide Cartel**"³⁵ penalised three manufacturers of aluminium phosphide with 9% of their average turnover, "**the Cement Manufacturers' Association**"³⁶ with 10% of their average turnover, the **48 "LPG manufacturers"**³⁷ with 7% of their average turnover, and "**the Shoemakers Cartel**" with 5% of their average turnover. These sanctions are but a handful of the many that the CCI has levied against cartelization.

³³ Avirup Bose, Circumstantial Evidence and Dawn Raids: A New Era of Antitrust Investigation in India (4-4-2013) Competition Law Reports, April 2013

³⁴ Competition Act, 2002, s.27

³⁵ Aluminium Phosphide Tablets Manufacturers, In re, 2012 CCI 23.

³⁶ Builders Assn. of India v. Cement Manufacturers' Assn., 2012 CCI 42.

³⁷ Suo Motu Case Against LPG Cylinder Manufacturers, In re, 2012 CCI 1

Conclusion

Over the years since the Competition Act went into effect, the CCI has investigated businesses involved in the cement, pharmaceutical, steel, real estate, shoe manufacturing, LPG cylinders, and tyre industries, among other industries. The CCI has also launched a number of competition advocacy programmes with a particular focus on cartelization. The CCI has been an aggressive regulator with a major focus on competition advocacy programmes meant to raise awareness about basic principles of competition. To incentivize cartel members to become informants and deter involvement in cartel operations, the CCI's leniency programme is extensively promoted. It is thought that greater public knowledge will incentivize informants to disclose instances of cartelization and other anti-competitive behaviour, which will facilitate the CCI's work of guaranteeing a competitive market. Enforcement in previous years has also amply illustrated how urgently the CCI needs to develop penalty guidelines. A competition compliance programme may serve as a mitigating factor in favour of the business under investigation, according to informal indications from the CCI. More clarification is nonetheless required about the aggravating and mitigating elements that the CCI considers when determining the maximum penalty—10% of turnover or three times the profit—that may be imposed on a business for each year the cartel remains in operation. It is evident that the CCI is going to have the complete backing of both the government and the industry given the growing sternness with which they view the importance and necessity for successful regulation of competition in India. This support will be used to combat the adverse impacts of cartels on Indian markets through the use of discouragement and education initiatives.

When it comes to executing dawn raids and handling confidentiality issues, the CCI still has a ways to go before reaching the same degree of expertise as the EC. But the former has come a long way in the short time it has existed, and it is obvious that the CCI will probably continue the fight against cartelization in the same manner that the EC has.