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Role of Cartel in Market Manipulation: Case Studies and Impact on Consumers

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ABSTRACT

This article provides an overview of how cartels manipulates the market and what are the problems that are being faced by the consumers. Cartels are said to be formed when two or more business enterprises makes an agreement formally or informally to promote their own interest which distorts the free and fair competition in the market by controlling the prices of goods and services.

When it comes to the enforcement of anti trust law in India there are certain core areas in the Competition Act, 2002. The Competition Act increases the possibility of dealing successfully with the cartels and any anti- competitive agreement. Although, Competition Commission of India needs further strengthening with the operational and functional guidelines for its activities.

The paper begins with an introduction to a cartel after that the authors explores about the origin of the cartels and types of cartels. It is also very important for us to understand a cartel so a chapter is being dedicated to it. The study also highlights the affects of cartelization in the market and an analysis of Competition Act, 2002. Furthermore, we've attached few renowned case studies.

In conclusion to this paper we have understood that cartel is a very dangerous phenomenon in the business alliance and how CCI has brought a drastic change in last few years in the market.

Keywords: Cartels, Consumers, Cartelization, Anti- competitive agreement, etc.,

INTRODUCTION

Cartels play a crucial role in market manipulation by limiting the competition and controlling the prices globally. Cartels are the collaboration of companies[1] of the same sectors who are competing among them. So, they form a cartel to reduce the competition and maximize the profits in the market. The most common strategies that cartels uses are price fixing arrangements, market fixing arrangements, output quotas and coordinated actions.

Cartels distort the market mechanisms by reducing the competition in the market, efficiency and ultimately it harms the consumers because it leads to higher prices, poor quality and less innovation. Government and regulatory authorities often takes steps to detect any cartel behaviour to protect the integrity of the market and for consumer's welfare.

The policymakers and the public are highly concerned about the adverse affects of monopsy power in the wide range market because they are bound to maintain fair competition and protect the interest of the consumers. The competition legislation not only allows fair entry in the market but it also makes sure

[1] Competition Act, 2002, (12 OF 2003)S.2(c)

that the competition in the market is healthy and the consumers are well served both the parties should be benefited and satisfied.

Law recognizes many unfair practices that disturbs the economic situation in the country and cartelization is one of such unfair practices[2].

With the ever changing market conditions a regulation was required in our country.

In a market consumer doesn't have much idea about the products or the substitutes that are being sold so it leads to the distortion of the fair competition in the market. The free and fair competition needs to be protected hence the regulation is being passed and to regulate the act an authority was established.

Objectives

1. To observe how cartels manipulate the competition in the market.
2. To research about the formation of the cartels and its strategies.
3. To specifically analyse the adequacy of the provisions of The Competition Act, 2002.
4. To study the role of Competition Commission of India (CCI) for enforcing the prohibition on cartels.
5. To compare the statutory framework for protection of the privacy of individuals relating to their personal data in cyberspace in various countries.
6. To conclude the paper on the basis of what I've understood about the cartels.

LITERATURE REVIEW

Karn Gupta (2019): The author of this paper analyses the problems of the cartels detection and prosecution. He has suggested ways to improve cartel control measures in light of the the leniency programme. This paper majorly throws light on the cartel control of India comparing the cartel control provisions in different jurisdictions like US, EU, Germany and Japan.

Himanshu Sindhwani & Shivali Bharadwaj (2021): Cartel is said to be formed when two or more enterprises comes into an agreement formally or informally to meet their own interest which leads to unfair competition in the market. This paper focuses on the analysis of price cartels and role of competition law in regulating the cartels so the enterprises can't practice unfair competition in the market and consumers can get more options at better price.

Jeffrey Fear (2006): This article gives an overview on the rise and fall of cartels since late 19th century. Until the 1980s the global story of big business man should be told in conjunction with cartels rather than without them. They affected technological development, corporate strategy and organizational change. Viewing cartels only as a conspiracy against the public raises many questions and obscures the great variations in objectives, type and services provided by cartels.

Tilottama Raychaudhari (2021): This research paper majorly focuses on investigating the rationale for acknowledgement with crisis cartels in India. This paper doesn't argue in favour of crisis in any cartels in India or seek to justify cartel conduct in a specific case. It argues for a comprehensive approach to cartels formed in crisis, with special emphasis on cartels that maybe form with approval from the state authorities.

Shaurya Aron & Shweta Maruka : The primary agenda for antitrust authorities are to detect cartels in free market economies. This article analyses various factors relating to the market and the firms that are

[2]Cartelisation is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act

operating within which the competition authorities can bring under their microscope during cartel investigation.

Research Methodology

Due to limited time, the methodology of this research is doctrinal. This paper is an analysis of the formation of cartels and how it distorts the integrity of the market which harms the consumers globally. This paper will be carried out through doctrinal research as it includes analysis of various legislations and case laws.

This article would be completely based on the collection of data from primary and secondary sources. The primary sources of data would include statutes, bills, case laws whereas, secondary sources would include books, journals, newspaper articles, online resources, etc. which are available relating to the concerned study.

ORIGIN OF CARTELS

Cartel is not a new concept we've seen about the cartels in Kautilya's book "Arthashastra" in which he has mentioned that heavy fines should be imposed if any cartel is being formed[3]. In the late 19th century cartels became more organized and widespread the cartels were formed as a way for companies to work together and set prices for their products. The most relevant example is the Oil industry, companies like Standard Oil and Royal Dutch Shell have formed agreements to control the price and supply of the oil.

Every country has its own anti trust law but there is a common factor which unites all is the cartelization[4]. Policymakers around the world have made different approaches to stop unfair practices like cartels some have strict laws and the others have relied on market forces to breakup these groups.

India has passed its first anti trust law in the year 1969, i.e., Monopolistic Restrictive Trade Practices (MRTP) Act, 1969. Until 1991 this act didn't had any fruitful outcomes since the Indian Economy was highly restricted and was mostly regulated by License Raj. After the establishment of New Economic Policy it marks the year of economic liberalization for the Indian Economy. The new policy removed various market controls like restrictions on the price of the product, restriction on the production and product diversification as well. After the globalization our closed economy made open for the world to come and do business on our land. There was a report where MRTP Commission decided seven cartel cases between the period of 1991-2007. But most of the cases were dismissed by the commission due to lack of resources to conduct proper investigations. Therefore, MRTP Act fails miserably at identifying and punishing unfair practices in the relevant market in India. The failure of MRTP Act in controlling led to the enactment of better equipped legislation i.e. Competition Act 2002. This act establishes Competition Commission of India (CCI), vested wider powers and better tools to investigate and prosecute cartels.

UNDERSTANDING CARTELS

To understand cartels we need to analyze it through different point of view from the perspective of the big industries it is to maximize profits by controlling the market and setting the prices higher which will eliminate the competition and increase their revenue and on the other hand the formation of cartels is

[3] Vijay Kumar, "Cartels in the Kautiliya Arthasastra", 6 *Czech Economic Review* 59 (2012)

[4] Cartelisation is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act

disastrous for the consumers because the price of the products or services are higher with fewer choices and less innovation. There is an another view in which there should be competition and at the same time the enterprises should not bring appreciable adverse affect in the market they should always do what is best for the economy and a society as a whole. Cartels have been considered very problematic and disastrous alliances in the business world because it decrease the competition in the market which leads to higher prices of the goods and services ultimately the consumers suffers in the end[5].

In this paper we'll take a closer look on what cartels are, how they operate and how they impact the economy and a society as a whole. It is very important for us to understand that how these organizations operate and how they impact in a society as a whole. For many it seem like a successful business strategy but it often comes with a higher cost for the consumers and it negatively impacts our economy.

Free and fair competition must be protected at any cost so competition regulation is required to protect the interest of the consumers. People are becoming more aware about the competition in the market how it improves the innovation, promotes efficiency, improves quality, vast choice , reduce cost and as the market is so competitive the buyers gets the best deal with less price.

The most critical ingredient of the cartelization is the collusive manipulation of the prices by the competitors. Competition ensure freedom of trade and reduces the domination in the market .

When we talk cartels in Indian context it is defined under Section 2(c) of the Competition Act, 2002. We can have a look at Section 3 of the act where it talks about the Anti Competitive agreements there are many components in this section which will give us a clear picture as to what anti competitive agreement means with reference to cartels.

TYPES OF CARTELS

A research was published by CUTS International where cartel is being categorized into four types[6]:-

Price fixing:- When the competing business enterprises comes into an agreement for fixing price, controlling the price unreasonably high for the goods and services. Price fixing eliminates the competition in the market and it is considered to be unfair practice.

Market Sharing:- The existing competitors divide and allocate the market geographically[7] to minimize the competition in the market

Quantity Limiting:- This is a type of cartel where the business enterprises makes an artificial scarcity of the products and later makes maximum profit from it by controlling the prices of goods and services[8].

Bid Rigging:- In this type of cartel two or more enterprises makes an agreement that they will not fight for a tender and help the other participant of the bid to win the particular tender, it is also known as collusive tender[9].

LENIENCY SCHEME

Section 46 of the Competition Act, 2002 authorizes the commission to grant leniency by imposing a lesser penalty on a member who provides vital information regarding the cartel. This scheme was designed to help in detection and investigation of the cartels. Leniency scheme has proved to be very

[5] Understanding cartels and the competition commission of ...Finshotshttps://finshots.in

[6] Competition Act, 2002 (12 of 2003) S.3(3) (https://cuts ccier.org/pdf/Study_of_Cartel_Case_Laws_in_Select_Jurisdictions-Learnings_for_the_CCI.pdf)

[7] Competition Act, 2002 (12 of 2003) S.3(3)(c)

[8] Competition Act, 2002 (12 of 2003) S.3(3)(d)

[9] The explanation to sub-section (3) of Section 3 of the Act

helpful to the competition authorities of foreign jurisdictions in successfully proceeding against cartels. The Commission has notified the CCI Lesser Penalty Regulations, 2009 where the process, procedure and methodology are being laid down for granting leniency to the cartel members who gives the information which is helpful to the commission and instrumental in busting the alleged cartel.

HOW DOES CARTELIZATION AFFECTS THE MARKET

Cartels are considered as the dark alliances in the business world because it a very dangerous disruptive practice. The formation of cartels reduce the competition among the produces and affects the economic performance of the market in the long run. There isn't much expenditure in the innovation as the cartel guards its member from the market force which leads to increase in the prices and it limits the choice of consumers[10]. The cartels doesn't allow the consumer to buy the products at the competitive level because the cartels forms an agreement and the prices are high hence the consumers are left with no choice either they buy the products at high price or not buying the product at all.

The consumers are the one who suffers the most when any cartels are formed because they have to buy the products at high prices since cartels eliminates the competition from the market which leads to less innovation. Sometimes the cartel members creates an artificial scarcity of the goods and later they sell the products at higher prices.

This also leads to lack of variety and innovation as the dominant company has no incentive to create a new innovation nor improve the older ones. When companies are forced to compete they come up with more innovative ideas and they invest in research and development to bring new products with better version or improve the older ones.

Government around the globe has implemented anti trust laws but there are many industries still continues such practices. The consumers should also be aware of unfair trade practices and support free and fair competition in the market[11].

The manipulation of price , ineffective of production and lack of competition leads to inefficiency of the market. There are certain restrictions on the production level which limits their ability to produce higher amount of goods even if they are capable of producing. Finally the cost of the goods and services remains higher due to the cartels and eventually the consumers are being exploited.

CRITICAL ANALYSIS OF COMPETITION ACT, 2002

The primary purpose of any anti trust law in any country is to prevent practices which have adverse effect on competition to protect the interest of the consumers with this any competition law regime should seek to prohibit any anti competitive agreements, provide regulation for combinations and for matters associated with it and restrict the abuse of dominance by a business enterprise[12].

The Competition Act identifies the difficulties of MRTP Act, 1969 and replaces it. Also, the word cartel has been defined explicitly in this act for the first time[13]. This act not only act in case of domestic cartels

[10] UNCTAD, Measuring the Economic Effects of Cartels in Developing Countries, https://unctad.org/Topic/Competition-and-Consumer-Protection/Research-PartnershipPlatform/Economic-Effects-of-Cartels

[11] OECD, Hard Core Cartels- Harm and Effective Sanction, https://www.oecd.org/competition/cartels/21552797.pdf

[12] India has its own set of provisions dealing with the aforementioned aspects in the form of section 3 which provides for anti competitive agreements, section 4 which provides for abuse of dominance, section 5 which provides for combinations and section 6 which provides for regulation of combinations

[13] Competition Act, 2002 (12 of 2003) S. 2(c)

but it also can pass an order against a foreign entity if it indulges in any activity that has appreciable adverse effect on competition (AAEC) in India[14].

In India Cartelization is considered as civil offence and it is prohibited under the Competition Act, 2002. Section 2 (c) of the act defines cartel which includes 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, or, trade in goods or provision of services.The prohibition of cartels are strictly prohibited under Section 3 (1) read with Section 3 (3).

The Competition Commission of India (CCI) is responsible for the regulation and enforcement of the act. It has an investigative wing which consist of Director General who conducts the investigations[15]. Section 3 of the act prohibits all the agreements which are likely to cause appreciable adverse affect in the market. The penalty for the formation of cartels has been prescribed in the Section 27 of the act which could amount to three times or ten percent of the profit in the year of agreement, whichever is higher and the commission has the power to initiate an investigation under Section 26 of the act.

This act also empowers the CCI with extra territorial jurisdiction, thereby giving power to inquire any cartel operation outside India, which causes or is likely to cause an AAEC within India under Section 32 read with Section 19 (1) of Competition Act, 2002.

Any decision that is given by the Commission regarding a particular case can be challenged and appealed[16] to National Company Law Appellate Tribunal (NCLAT) and further to the Supreme Court of India.

The criminal liability arises in the act only when there is a non- compliance with the orders of the CCI and breaking an order of the National Company Law Appellate Tribunal (NCLAT) without any reasonable grounds.

CASE LAWS

Builders Association of India vs. Cement Manufacturer's & ors

The cement cartel case is one of the renowned case in India and it is observed as one of the biggest cartel penalties in the country. In the year 2016, the competition commission of India imposed a penalty of Rupees 63.2 billion rupees against CMA[17].

A complaint was filed by the Builder's Association of India against Cement Manufacturer's Association alleging that 11 cement manufacturing companies had limited the production and supply and they were engaged in fixing the price of cement. After the investigation, the Commission confirmed that the CMA has indeed used as a platform to fix prices and therefore, penalties were imposed on the 11 companies. Later, the companies challenged the order before the Competition Appellate Tribunal (COMPAT), and appealed the decision of the commission.

The order of the commission was set aside by the COMPAT on the grounds of due process and on the violations of principles of natural justice. The matter was then remanded to CCI for fresh adjudication. Subsequently, heard the opposite parties and passed an order finding that the cement companies had fixed cement prices, limiting and controlling the production and market supply of cement. Once again

[14] Competition Act, 2002 (12 of 2003) S. 32
[15] Competition Act, 2002 (12 of 2003) S. 19(1)
[16] Competition Act, 2002 (12 of 2003) S. 53A
[17] Builders Association Of India vs Cement Manufacturers, (Competition Commission Of India, Case No. 29 of 2010) < https://indiankanoon.org/doc/71270492/>

CMA appealed against the CCI's decision to the National Company Law Appellate Tribunal (NCLAT). Later, NCLAT dismissed the CMA's appeal and had upheld the CCI's decision.

Faridabad Industries Association (FIA) vs. M/s. Adani Gas Limited (AGL)

In this case, the informant were the FIA's members who have suffered due to abuse of dominant position by by AGL, approximately 90 members under FIA were consuming natural gas which was supplied by AGL in order to meet their fuel requirements. It was alleged by the FIA that the AGL has abused its dominant position in the relevant market by enforcing the terms and conditions under the Gas Supply Agreement (GSA) and also, it is assumed to be arbitrary in favor of AGL.

The Competition Commission of India levied a penalty of more than Rs. 25 crores on Adani Gas Limited because they had infringed the provisions of Section 4 (2)(a)(i) of the Competition Act, 2002 by implementing unfair conditions upon the buyers under the Gas Supply Agreement.

AGL has challenged the order of CCI under Section 27 of the act. Then the informant (FIA) had presented a piece of information against the appellant before the Commission, it was alleged that they were abusing its dominant position while supplying the piped natural gas to the industrial customers in Faridabad. As per the information it is presumed to be arbitrary, unreasonable, unilateral and lopsided and being titled in favor of AGL, thus, leaving no scope to the members of FIA, who are solely dependent on AGL for the supplies[18].

Therefore, the appellant was clearly abusing its dominant position by using unfair and discriminatory conditions in GSA. The informant complained before the CCI for the alleged violations of Section 4 of the act, seeking various reliefs and by imposing the penalty within the ambit of Section 27(b) of the act.

CONCLUSION

Cartel is a very dangerous phenomenon which is very hard to detect and when a cartel is being formed the welfare of the society is being compromised. Since, last few decades a data is being suggested that business are still involved in forming cartels but the stringent provision in the Competition Act, 2002 gives us a hope that law will act as a deterrence to the formations of cartels and anti- competitive agreements.

Studying cartels opens up numerous questions like what is the nature of the market, strategic behaviour, economic thought, comparative law, economic development etc.

If the modern peers truly believed that cartelization would bring a revolution in economic condition and business in the country than this would alone contribute in the stabilization of cartels unlike the criminalization of cartels today[19].

However, Competition Commission of India has taken measures in levying penalties over the past few years, they also ensured the vigilance into cartel formation by continuing to pass cease and desist orders by undertaking several dawn raids.

CCI has also published the findings of its market especially on the pharmaceutical sector in India. The market study that has been published which suggests to address concerns relating to collusion on trade margins, information asymmetry and the role of the trade associations. Competition Act along with the amendment of 2006 has made a stringent process as compared to the old act.

[18] Competition Commission of India, Antitrust AntitrustCompetition Commission of Indiahttps://www.cci.gov.in › antitrust › orders › details

[19] Jeffrey Fear, Cartels and Competition: Neither Markets nor HierarchiesHarvard Business Schoolhttps://www.hbs.edu › ris