



Emerging Trends in Indian Competition Law: Special Reference to Cartel

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ABSTRACT: Competition law of every country is different with only one commonality between them that is, they all are condemn cartels. Globally, cartels are considered as the most harmful violation of competition law, because they may earn profits at monopoly levels; on the other hand, their losses to consumers, society, and economy are enormous. The modern Indian competition law (The Competition Act, 2002) is state of the art legislation at par with its contemporaries. It has challenged the cartel conduct prevalent in the market since time immemorial and has changed the market dynamics. The Competition Commission of India is the regulatory body to deal with competition issues in India; it has imposed hefty penalties against infringers that invited attention of people. However, due to disguising character of cartels, it is not easy for any competition authority to bust such conduct; it has to use different techniques and tools including leniency mechanism that is most successful in busting cartel. Apart from this, there are significant developments in this blossoming area of law. This article discusses developments in competition law in India with special reference to cartel.

Key words: Cartel, Competition Commission of India, Competition Law, Leniency, Rightsizing, Turnover.

"The business should [sic] desist from non-competitive behaviour. The operation of cartels by groups of companies to keep prices high must end. It is unacceptable to obstruct the forces of competition from having freer play. It is even more distressing in a country where the poor are severely affected by rising commodity prices. Cartels are a crime and go against the grain of an open economy. Even profit maximization should be within the bounds of decency and greed! If a liberalized economy has to succeed, we must give full play to competitive forces and the private sector should show some self-restraint in this regard."

- Dr. Manmohan Singh [1]

I. INTRODUCTION

As a general proposition, competition law (known as Anti-trust law in USA, Combines law in Canada) is a framework of legal provisions intended to sustain competitive market structures. It consists of rules intended to protect the process of competition in order to maximise consumer welfare. It is a branch of law that is concerned with the regulation of anti-competitive or restrictive trade practices, abuse of dominant position and combinations [2].

Competition laws of almost every country consider cartels as most pernicious violation of competition law. Even laws of some countries deem cartel conduct as a criminal offence, and provide imprisonment to individual perpetrators in addition to hefty monetary penalties on corporate.

India, being a relatively younger jurisdiction in competition law, it took benefits of adopting and incorporating elements of relatively *matured jurisdictions* [3], and framed a state of the art competition law, i.e. the Competition Act, 2002 (hereinafter referred as 'Act'). The objectives enshrined in the Act are mainly to discourage, bust, curb and punish anti-competitive practices and indicate and suitably punish the perpetrators. Section 3(3) of the Act deals mainly with cartel conduct as a civil offence, not criminal as is in some advanced jurisdictions.

The Act casts a duty on Competition Commission of India (hereinafter referred as 'the Commission') to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India [4].

The Commission has completed 15 years in existence and 10 years of anti-trust enforcement [5]. This paper intends to collate the emerging trends and developments in competition law in India during these years with special emphasis on cartel dealt by the Commission.

A. Researchable Questions

- A. How the Commission dealt with cartel conduct?
- B. What are emerging trends in competition law in India?
- C. Is the competition law jurisprudence evolving?

B. Review of Existing Literature

The researcher examined a number of books, journals, reports, cases, newspapers and websites dealing with subject of competition law from various angles. By surveying the existing literature, it is clear that cartel conducts are widely prevalent in India and Indian competition law is sufficient to deal with cartels. However, there is limited research on this emerging legal phenomenon.

C. Objectives of the study

The current study helps to understand and learn the emerging trends in competition law in India with special reference to cartel.

D. Research Methodology

The study is multi-dimensional in approach, doctrinal method adopted, depending mainly on the primary sources like Statute, Regulations, cases decided on subject matter; and on the secondary sources like books, journals, newspapers and websites, etc.

II. EMERGING TRENDS IN CARTEL CASES IN INDIA

Since its inception, the Commission has taken a direct fight against cartel. Cartels are high on Commission's priority [6]; it is spending most of its time in dealing with these infringements [7].

The Commission uses various tools and techniques to detect cartel conduct. To detect such cartel conduct, it uses Screens [8] for identifying sectors that are vulnerable to cartelisation. It uses direct, circumstantial and economic evidences while deciding cartel cases. In addition to this, the Director General during investigation uses various advanced tools, like, dawn raids, obtaining phone records, capturing data from computers, etc.

The seriousness with which the Commission dealt with cartel cases, one can easily understand from the cases trends with following data:

A. Number of Cases

As of 31st March 2019, the Commission has passed 169 orders that contained substantive discussions on cartel conduct under Section 3(3) of the Act. A breakdown of the 169 cases, by the type of order, is shown in Figure 1.

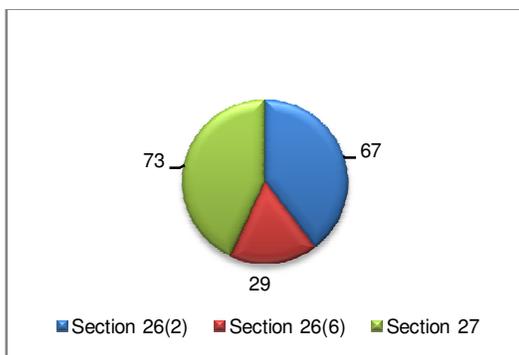


Fig. 1. Number of orders passed by the Commission relating to cartels.

Fig. 1 presents that seventy-three orders have been passed under Section 27 of the Act against cartelists, where infringements were found after a detailed investigation, which is more than forty-three percent. Twenty-nine orders passed under Section 26(6) of the Act, where the Director General conducted detailed investigation due to *prima facie* concerns, but there were no infringement found. In addition, there were sixty-seven orders passed under Section 26(2) of the Act, where the Commission set aside the allegations at the *prima facie* stage itself.

B. Decisional trends

The table below provides the year-wise breakdown of these abovementioned orders. Table 1 reflects that the Commission has maintained a consistent pace in resolving cartel cases.

The years 2011 and 2015 have the highest number of orders. There was a considerable dip in number of cases in 2016, since only three cases dealt under Section 27 in that year. Further, more than forty-three percent of the orders found cartel infringements.

Table 1: Number of Commission's Orders relating to Cartel by Year.

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	14	24
2013	5	3	8	16
2014	10	2	8	20
2015	10	4	13	27
2016	7	2	3	12
2017	5	1	9	15
2018	7	2	12	21
2019*	2	0	2	4
Total	67	29	73	169

C. Sources of Information

The Commission receives information pertaining to cartel conduct from different sources, i.e. the Govt. agencies or through informants. It has also initiated proceedings in few cases on *suo motu* basis. It also inherits some cases of the erstwhile Monopolies and Restrictive Trade Practices regime.

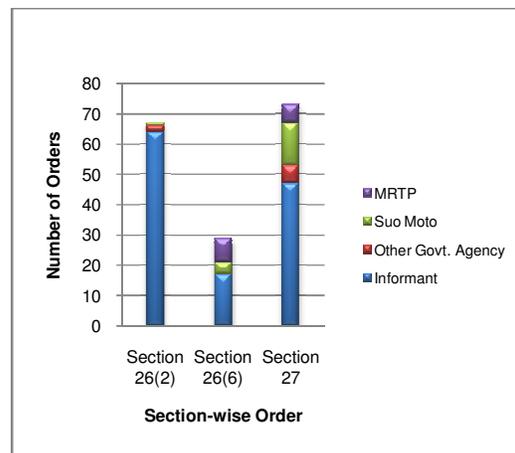


Fig. 2. Relevant orders by Source of Information.

The Fig. 2 depicts that in orders issued under section 26(2), except three orders, where the information was received from Govt. agencies in two cases and one case was taken on *suo motu* basis, all other orders were based on information provided by informants. In Section 26(6) orders, more than one-fourth have been transferred from Monopolies and Restrictive Trade Practices Commission (MRTPC) under section 66(6) of the Act, here again; the majority of source of information is from informants, and none from Govt. agencies. It is worth noting that the Commission initiated investigation on *suo motu* basis in four matters, but had to close after detailed investigation. In Section 27 orders, less than one-fifth matters were taken on *suo motu* basis, majority was again of informants. Same number of cases were received from Govt. agencies or transferred from MRTPC.

D. Nature of Contraventions

Section 3(3) contains four types of infringements presumed to have appreciable adverse effect on competition in India. These infringements mainly are as under:

- a) Price determination
- b) Limiting or controlling output, markets, technical developments or investments
- c) Market sharing
- d) Bid rigging.

Cartel members camouflage their activities; the nature of contraventions in some cases is of one nature or a combination of more than one nature. Further, in bid rigging cartels the riggers use prior methods [as given from a) to c)], i.e. price determination, limiting or controlling output etc. or market sharing for the purpose of cartel.

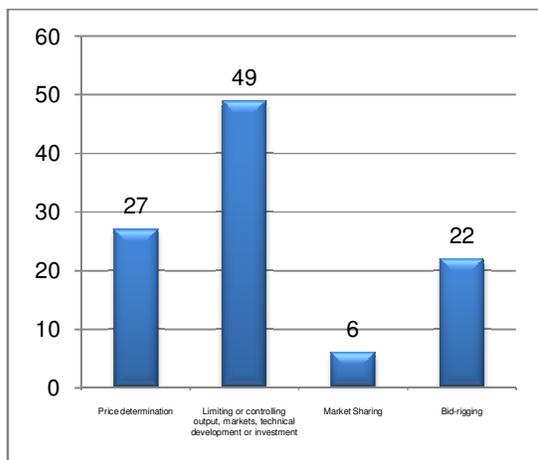


Fig. 3. Nature of Contraventions.

The Fig. 3 represents the nature of contraventions that infringement orders under Section 27 of the Act have identified. These contraventions are of any one nature, or a combination of more than one nature. From the figure, it is clear that in majority of orders the infringements are pertaining to section 3(3)(b), i.e. limiting or controlling markets, followed by price determination and bid rigging; only six orders are pertaining to market sharing.

E. Monetary Penalty

The Commission imposes monetary penalty in 58 cases, out of the 73 infringement orders under Section 27 and in 23 cases under Section 48 on office bearers. The total quantum of monetary penalties imposed by the Commission under section 27 in these orders was around Rs. 15,792.51 crores, the total penalty imposed under Section 48 is amounting to Rs. 20.90 crores. However, the penalties oddly distributed between cases. In some cases, the penalty amount was small and in others high. In some cases, the Commission did not impose monetary penalty, since the erring parties was already punished in other cases [9], Whereas, on one party same penalty for same period in two orders was imposed [10].

F. Sectors covered

In every economy, some sectors are prone to cartelisation, like cement, transport, public procurement, etc. and India is no exception. The Commission uncovered the existence of cartel in different industries

like entertainment, public procurement, transport etc. A sector level analysis is as given hereunder:

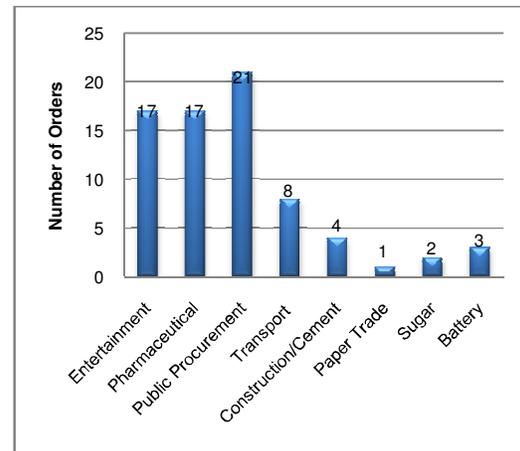


Fig. 4. Cartel Infringement Orders in Key Sectors.

The Fig. 4 reflects that out of 73 cartel infringement orders, most of the orders (around 30 percent) are apposite to public procurement, which includes, varied sectors like, medicine, railways, ordnance factory, chemicals, etc. There is equal number of orders 17 each (totalling to around 46 percent) in entertainment and pharmaceutical industry, most of the orders are pertaining to their association's actions. More than ten percent orders are from transport sector. Four cases are from construction industry. Two orders are from sugar and three from battery industry, and only one order pertaining to paper trade.

G. Interventions made so far by the Commission

In cartel cases, where infringement relating to violations of Section 3(3) proved, the Commission has:

- (a) Imposed penalties on enterprises, trade associations and their office bearers;
- (b) Passed cease and desist orders;
- (c) Required trade associations to disengage from collecting pricing and other information;
- (d) Disqualified office bearers of trade associations accountable for repeated contraventions;
- (e) Ordered modification of the infringing conduct;
- (f) Directed the erring parties for introduction of competition compliance manual;
- (g) Directed creation of awareness of competition law through advocacy; and
- (h) Demands the parties to file a compliance report with the Commission.

III. RECENT DEVELOPMENTS IN COMPETITION LAW IN INDIA

Competition jurisprudence is in evolving stage in India. After the notification of provisions dealing with cartels, the judicial and quasi-judicial authorities resolved many interpretational issues. Some of the recent developments in competition law are as under:

A. Amendment in Competition Commission of India (Lesser Penalty) Regulations, 2009 [11] and its effect

The leniency schemes are considered as one of the most successful methods to detect cartel. In leniency, any of the perpetrators came out to the competition authorities informing its/his involvement in cartel conduct, provides vital information and gets pardon from penalties.

Upto 2017, after completion of 8 years of leniency scheme in India, the Commission solved only one case with this mechanism. To encourage individuals to approach the Commission in such infringement, the leniency regulations amended in 2017. With this amendment, an individual who has been involved in the cartel on behalf of an enterprise can be an applicant for lesser penalty. Where the applicant is an enterprise, it is required to provide the names of individuals who have been involved in the cartel on its behalf and for whom lesser penalty is sought by such an enterprise. Further, earlier, only three applicants in the priority status granted reduction of penalty; now every subsequent applicant are also granted reduction of similar penalty available to third applicant. Time frameworks prescribed to put the matter up for consideration of the Commission is within five working days, and for applicant to submit a written application containing all the material information is fifteen days from the date of communication of direction of the Commission on this behalf. The non-confidential version of the information, documents and evidence furnished by the applicant are now available for inspection, after the Commission forwards a copy of the report containing the findings of the Director General to the party(ies) concerned [12].

This amendment have many positive points including right of individuals to contact the Commission for leniency, lenient penalty to all subsequent parties, etc. The fruits of this amendment started reaping, so far the Commission has resolved three more cases through this mechanism.

B. Appeals shifted from Competition Appellate Tribunal (COMPAT) to National Company Law Appellate Tribunal (NCLAT)

The Finance Act, 2017 amended the Competition Act, 2002 and, the COMPAT had ceased to exist with effect from 26th May 2017. With this amendment, the appellate function under the Act conferred to the NCLAT.

It is now more than two years since the transfer of appeal powers to NCLAT, the competition matters seems like gone with the winds, hardly a couple of cartel cases have been finally resolved by the NCLAT. This might be due to the reason that the matters pertaining to company law or insolvency are taking the centre stage at NCLAT and competition issues are in sideline. There might be chances of less experience of handling competition issues, which are not straightforward legal in nature, but a blend with economic principles.

Reconsidering cases and passing of orders

The Commission while dealing with competition infringements has adopted different approaches in different cases/issues. This was due to teething problems one faces during nascent stage. In some earlier cases, the principle of natural justice was not followed in letter and spirit. The Commission had imposed huge amount of fines in number of cases on enterprises for contraventions of the provisions of Competition Act.

However, the erstwhile COMPAT had set aside or reversed the orders, or lowered the penalty, or remanded the matter back to the Commission to reconsider. The Commission has reconsidered the cases remanded back by the appellate authority, like, cement cartel & fuel surcharge case, heard the parties, as per the directions/orders of the COMPAT, due procedures are followed and passed appropriate orders.

C. Turnover: Relevant or Total

With time many issues are getting resolved, in Indian competition law, turnover is one of them. The definition of 'turnover' as contained in Section 2(y) of the Act, has not clarified the term 'turnover', whether it is 'total turnover' or 'relevant turnover'. The Commission could not be able to develop a consistent approach on imposition of penalty on 'total or relevant turnover'. The erstwhile COMPAT had opined that the basis of imposing penalty should be 'relevant turnover', which was subsequently endorsed by the Supreme Court in *Excel Crop Care* case [12]. This judgement on turnover leads to clarity in relation to imposition of penalties under section 27 of the Act. Certain observations of the Supreme Court will also lay down grounds on how penalties are to be imposed under section 27 of the Act. Justice N.V. Ramana in his supplementary and concurring judgment suggested steps to calculate penalty under section 27 of the Act, first on determination of relevant turnover and followed by determination of appropriate penalty based on aggravating and mitigating circumstances.

D. Defining Relevant Markets is not necessary in cartel cases

On the issue of pre-condition to determine relevant market while deciding cartel cases, the Supreme Court has made a clarification on its earlier observations in its Judgment in *Coordination Committee* case [14], to the limited extent that the determination of 'relevant market' is not a mandatory pre-condition for making assessment of the alleged violation under Section 3 of the Act.

E. Venturing into divergent Sectors

The competition law is now days applied to many economic activities that were once regarded as natural monopolies or the preserve of the state. In the era of technology, where markets can be disturbed from remote locations, the competition law has the powers to capture such infringers, even if they are from other countries.

In India, the commission so far majorly detected cartels in some sectors where oligopoly is prevalent, like, the airline, cement, entertainment, sugar and pharmaceutical sectors, etc. in addition to bid rigging cartel by public sector insurance companies. In addition to these, the Commission also busted three cases from dry cell batteries.

F. Rightsizing of the Commission

On 4th April 2018, the Union Cabinet has given its approval for rightsizing the Commission [15] from One Chairperson and Six Members (totalling seven) to One Chairperson and Three Members (totalling four). So an amendment in section 8(1) of the Act is expected whereas, the Commission is working with a chairperson and two members presently. With such limited number of persons at helm, the Commission's fight against cartel is affecting.

IV. CONCLUSION

The Indian competition law takes cartel very seriously, a plethora of cases so far dealt in by the Commission; represent its quest to create competition culture. It is using various methods to detect anti-competitive practices prevalent amongst Indian corporate. The time has come that the Commission should be equipped with

human and technological resources, and use various advanced tools to detect anti-competitive practices.

The journey has just started, still miles to go. The competition law in India is venturing into new, different and wide areas, where consumer interest is to be kept at priority.

With fewer numbers of members, the Government expects from the Commission a faster turnaround in hearings and resolving competition issue, thereby stimulating the business processes of corporate, which is a herculean task. Here, the commission may take help of experts from different fields who would work like *amicus curiae* (in courts) to resolve the competition issues.

To conclude, over the last decade, Indian competition law has travelled a significant path. This, however, is just a tiny step, and there are many milestones yet to be achieved in terms of achieving goals of competition law. As quoted by Robert Frost [16]:

*The woods are lovely, dark, and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.*

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