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Cartel; Competition and Commerce

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by

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ABSTRACT

*Healthy and sustainable competition is backbone of free and fair market. Cartel are anti-competitive. Cartelization is order of day in similar and dissimilar trade line. Cartel is an economic activity which is hard to trace and harder to bust. The Competition Act of India considers cartel anti-competitive and prohibits under section 3. Cartel damages free and fair opportunity available to consumers. It promotes anit-competitive and unfair trade practices. Most of traders have formed association which is their fundamental rights also and if these association are used to control market in terms of price, production or supply then it becomes very difficult for authorities to trace it. In this paper the author has attempted to find out legal contours of cartel and its interlinkage to competition and commerce.*

Keywords : Cartel, Competition, Commerce, MRTP, CCI, Whistle Blowing



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## I. INTRODUCTION

Dynamic efficiencies and resource allocation are important facets of competition. Anit-competitive practices and abuse of dominant position prevents free and fair competition in market. Economic Growth can be ensured only through free and fair competitive market. Competition Law is therefore an important institutional pillar for a thriving market economy as competitive pressures hone production efficiency and stimulate product and process innovation fundamental to competitiveness and economic growth. It ensures fair and healthy competition in the market. It provides level playing field for small and big entrepreneurs. It secures faster and inclusive growth, allocative efficiency, productive efficiency, dynamic efficiency.

Free and fair competitive market ensures the progress of society and takes care of all its stakeholders by providing keeping market forces regulated by sustainable and healthy competition which is unrestrained by external forces having vested interests. The benefit of free and fair competitive markets are many like product efficiency, better allocation of resources, choices availability to customers, genuine and affordable goods and services, technical development of society and removal of trade barriers. Anit-competitive agreements, abuse of dominance and huge corporate combination having appreciable adverse effect over competition are some of the biggest challenge before Indian Competition regime. The Competition Act was "passed to provide, keeping in view of the economic development of the country, for the establishment of a 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, and for matters connected therewith or incidental thereto."<sup>1</sup>

Cartel is anti-competitive, and it can cause appreciable adverse effect on

competitive. Competition Act, 2002 addresses the issue of cartel adequately in section 3 and 27. Cartel per se is anti-competitive.

## II. MEANING OF CARTEL

The idea to monopolize the market is not alien to human beings and it can be found in the civilization of India and Rome. Kautilya in his *locus classicus* Arthashastra mentions about urge of traders to rig and control market by forming cartels. He in his monumental work recommended heavy fines to contain such practices being deployed by traders. In Roman Empire 'guilds' and business practices of traders were reviewed by authorities and were penalized for cartelization. In Byzantium (Eastern Roman Empire)



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cartels were prohibited. Constitution of Zeno provided punishment for price fixing agreements of certain goods.

Cartel as per Webster Dictionary means, "*A combination of independent commercial or industrial enterprises designed to limit competition or fix prices. Organization of a few independent producers for the purpose of improving the profitability of the firms involved. This usually involves some restriction of output, control of price, and allocation of market shares*". Members of a cartel generally maintain their separate identities and financial independence while engaging in cooperative policies. Canadian Economy Online defines cartel as a '*Collusion among independent firms in the same industry to co-ordinate pricing, production or marketing practices in order to limit competition, maximize market power and affect market prices is referred to as a cartel.*'<sup>2</sup>

Cartels can either be domestic or international. In International cartel the players are based in multiple countries and their controlling and rigging practices affects multiple markets of multiple countries. The international cartels may be import and export cartels. Import cartel affects country of importing traders who come from same country. Export cartels may affect multiple countries at same time. In India 'Export cartels' are excluded from the provisions of anti-competitive agreement.

Supreme Court in *Union of India v. Hindustan Development Corpn.*<sup>3</sup> defined cartel as, "The cartel therefore is an association of producers who by agreement among themselves attempt to control production, sale and prices of product to obtain a monopoly in any particular industry or commodity. Analysing the object of formation of cartel in other words, it amounts to an unfair trade practice which is not in public interest."

The Competition Act of 2002 defines cartel. The language of section is inclusive and provides that '*cartels 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 of, or, trade in goods or provisions of services.*'<sup>4</sup>

Cartel is made to control and contain prices so that traders cannot entice customers by competitive pricing or sometimes they hamper free and fair competition by allocation of markets in terms of product and geography. In a cartelized market the customers do not have any contractual prowess. Cartel may limit output quotas of traders. Generally, cartel is a market and



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profit-sharing agreement. It creates exclusive market geography and provides for disbursement of profits amongst traders.

Cartel generally are secret but it may be open also. In cartel the members use price rigging, show scarcity of goods by mutual collusion and ensure the funds go in common pool for subsequent proportionate agreed sharing. This pool is also utilized to compensate those trade concern who did not perform on full quota by which fake demands could be created. In cartel sale outlets and geographical allocation are also used to contain and control free and fair market forces.

### III. CARTEL; COMPETITION & COMMERCE

Free and fair competition ensures that market is free from the clutches of unfair and restrictive trade practice and it promotes consumer welfare. Competition which is healthy and sustainable is not liked by traders, manufactures, suppliers and service providers as it curtails the freedom of traders to control the market and it also cuts heavily their profit margins. Traders have a natural monopolizing tendency to raise their collective and individual profits. This results in cartels.

Cartel results from agreements between enterprises, persons and department of government and association of person to control and contain prices, hamper demand and supply of goods and services and thereby manipulating markets. Cartel results in exorbitant pricing, sub-standard products and limited choices to consumers. Cartels are secret which is hard to trace and harder to bust. The members of cartel create a camouflage to avoid being busted by authorities. Members of cartel cannot dare to leave as they will be isolated by fellow members through price cuts which is 'retaliation threats.' Another method adopted is compensation scheme which is used to discourage cheating. If a member of cartel sells more than allocated share, then he would compensate fellow traders. These cartels are created during casual lunches and informal recreational club meetings in a covert manner.

Effective competition discourages cartels. Conducive conditions for creation of cartels are high concentration, high entry and exit barriers, homogenous market, similarity in production cost, high dumping capacity, dependence of consumers on market, tendency of collusion etc.

Economies and consumers are adversely affected by cartels. In Japan through cartels prices shot up by 16.5%, in Sweden and Finland due to action against Asphalt cartels a decline of 20-25% in prices were reported; in United Kingdom due to action by Office of Foreign Trade in *Football Replica Kit Case*, 30% decline in prices were reported; 40-60% decline in



prices were reported due to action by Israel Competition Authority against bid rigging cartel amongst envelope producers; data of US suggest that due to cartel prices can increase up to 60-70%. Due to hard core cartels average overcharge may be 20-30%. It may be even higher in International cartels than domestic cartels.<sup>5</sup>

European Union<sup>6</sup> in its report clearly says that *"They (cartels) diminish social welfare, create allocative inefficiency and transfer wealth from consumers to the participants in the cartel by modifying output and /or prices in comparison with market driven levels. Cartels are harmful also over the long run. Engaging in cartels to avoid the rigours of competition can result in the creation of artificial, uneconomic and unstable industry structures, lower productivity gains or fewer technological improvements and sustained higher price... Furthermore, the weakening of competition*

*leads to a loss of competitiveness and threatens sustainable employment opportunities".*

India is also a great sufferer of domestic and international cartels. International cartels have not been penalized hardly and India has been the worst sufferers of international cartels. 'A study done by Simon Evenett and Julian L. Clarke estimates that the overcharges in India, during the conspiracy period of the vitamins cartel, were US\$25.71mn. India has been severely affected by International cartel and shall be affected in future as well. The real question is that Indian Competition regime is really ready to deal with such cartels?'<sup>2'</sup>

Monopoly costs heavily upon society. Monopoly brings high dumping capacity which results in price raising tendency. It does not like free and fair markets which contains and controls market due to free and fair market forces. Adam Smith spoke of the wretched spirit of monopoly, the mean rapacity, and the monopolizing spirit in which the oppression of the poor must establish the monopoly of the rich.'<sup>8</sup>

These reasons compel the legal regime to curb the menace of cartels. T. Ramappa rightly observes that, "*Unless there is effective machinery for identifying and keeping track of activities of cartels and which has the*

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*authority and resources in terms of special skills enabling to collect credible prima facie evidence against them this will be a pious declaration."*<sup>2</sup>

#### IV. CARTEL AND LAW

With the growth of globalization, the market and its governing forces have also become stronger. In the country like India which has evolved into a very promising market, the competition between the market players has also increased substantially. This competition is directly going to benefit the consumer. If we broadly classify the benefit to consumer by the free and fair competition in the market, the consumer would be getting both the quality products at a very reasonable price. But the market players often indulge in certain anti-competitive agreements. The Competition Act, 2002 in its preamble provides to prevent practices having adverse effect on competition. By the competition in the market it would provide the stable and reasonable price to the consumer. But the objective with which the players or we can say, suppliers, work is to generate the maximum profit from the market. In pursuance to achieve this objective they form cartels.

The Act of 2002, in Section 2(c) defines cartel. The language of section is inclusive and provides that cartels 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 of, or, trade in goods or provisions of services.

The Act prohibits anti-competitive agreements and declares it void. Competition Act very boldly declares that, "*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*"<sup>10</sup>

Horizontal agreements applies to similar tradeline at backward and forward links of trade while vertical agreement applies to different markets at backward and forward links of trade. Cartel is a horizontal anti-competitive agreement prohibited under section 3 of the Act.. Cartels are agreements between enterprises (including a person,

a government department and association of persons/enterprises) not to compete on price<sup>11</sup>, product



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(including goods and services) or customers. The Act gives a detailed definition of an enterprise in section 2 (h). The objective of cartel is to control the prices and harm the consumers and it results in less choice to consumers, fishy products and astronomical pricing. Horizontal agreements including cartels, of four types specified in the Act are presumed to have an appreciable adverse effect on competition and, therefore, are anti-competitive and void. *'The presumption is that such horizontal agreements and membership of cartels lead to unreasonable restrictions of competition and may therefore be presumed to have an appreciable adverse effect on competition. This provision of per se illegality is rooted in the provisions of the U.S. law and has a parallel in most modern legislations on the subject.'*<sup>12</sup>

The 'anti-competitive agreements according to the Act are of two following types:

- i. One category covers those agreements which are presumed to have appreciable adverse effect on competition in which case the burden of proof shifts on the enterprise or person against which the charge is leveled. These include the following:
  - (a) directly or indirectly determines purchase or sale prices;
  - (b) limits or controls production, supply, markets, technical development, investment or provision of services;
  - (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
  - (d) directly or indirectly results in bid rigging or collusive bidding.
- ii. The Second category includes those agreements which are to be judged by rule of reason wherein the burden of proof lies on investigator. These include tie-in arrangement; exclusive supply agreement; exclusive distribution agreement; refusal to deal and resale price maintenance.<sup>13</sup>

Cartel is type one agreement. The three important ingredients of cartel are an agreement or arrangement; arrangement amongst producing and manufacturing class of homogenous business; and the arrangement or agreement aims at controlling market or outgoing or prices and thereby curbing the free market forces. Section 3(3) of the Act provides that price fixing, territory allocation or the supply or services, restricting supply, bid rigging or collusive bidding shall be presumed to have an appreciable adverse effect on the competition. Cartel is not that simple to be tracked, it can extend to



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different countries. It is never easy to locate from where these cartels are governed and who issues the directions, because there is no formal correspondence between the members of such cartels. It is hard to prove that the market players have concerted an anti-competitive act. The use of term cartel is always with reference to a sectoral market. Like, chemical suppliers form cartels or producers of TV and computer monitor tubes. Cartel can be found in any specific commodity market ranging from coffee producers cartel to banks forming cartels.

## V. CARTEL: COMPARATIVE OVERVIEW

Most of the progressive competition regimes curb the menace of cartels. In United Kingdom the main legislation Competition Act, 1998 and the Enterprise Act, 2002 is a supplementary Act. Section 2(1) subject to section 3 prohibits agreement between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. Section 188 of the Enterprise Act, 2002, UK also prescribes that a cartel offence is committed by one who dishonestly agrees with one or more other persons to make or to implement arrangements for price-fixing, limiting supplies or dividing the markets etc. relating to at least two undertakings.

In United States there are two anti-trust legislations Sherman Act and Clayton Act. Section 1 of Sherman Act provides that, *"Every contract or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal."* Whereas Section 2 declares that, *"Monopolizing or conspiring with any other person or persons, to monopolize any part of the trade or commerce among several States or with foreign nations is an offence."*<sup>14</sup> The Clayton Act also provides that, *"Any price discrimination the effect of which may be substantially to lessen competition or tend to create a monopoly in line of commerce is prohibited."*<sup>15</sup>

In European Union Article 81 of the European Commission Treaty lists the following concerted actions as prohibited as incompatible with common market: price fixing agreements; those that limit or control production, markets, technical development, or investment or share markets or sources of supply; agreements that impose dissimilar conditions to equivalent transactions placing trading parties at a disadvantage and agreement that place the other party to the contract under supplementary obligations commercially unrelated to the subject of the contract.<sup>16</sup>



## VI. TOUCHSTONE OF PROOF

Secrecy is one of the most crucial factors which escape the cartels from radar of authorities. *Lord Denning in RRTA v. W.H. Smith & Sons Ltd.*<sup>17</sup> observed *"People who combine together to keep up prices do not shout it from the housetops, they keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything in writing nor even into words. A nod or wink will do."* Parliament was well aware of this. So it included not only agreement properly so called but any arrangement however informal.

But Adam Smith gives us a hope by saying that, *"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary."*<sup>18</sup>

Active consensual participation in cartel is not necessary. Supreme Court<sup>19</sup> held that, *"The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct joint action. A price fixing combination is illegal even though the prices are fixed only by*

*one member and without consultation with others."*

Price parallelism cannot be the sole basis of cartel. Price parallelism plus is required to prove the cartel which makes the task of investigators a herculean task. Supreme Court in *Union of India v. Hindustan Development Corpn.*<sup>20</sup> held that, *"merely quoting identical prices in tender will not be sufficient to conclude that such parties have formed a cartel. In addition to price parallelism, there should be proof of agreement amongst such parties to act in concert. Of course, such agreements may be tacit or indirect which can be inferred from the facts established on record."*

Cartel agreements are basically horizontal agreements and vertical agreements are also anti-competitive as it has appreciable adverse effects on competition. The vertical agreement depends upon rule of reason. In *Telco v. Registrar of the Restrictive Trade Agreement*<sup>21</sup> dealing with exclusive dealership



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agreement the Supreme Court defined the 'rule of reason' which is a touchstone for any agreement to be anti-competitive. *"The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason. Whether a restraint promoted competition or suppressed competition? To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied? Second, what was the condition before and after the restraint is imposed. Third, what is nature of restraint and what is its actual and probable effect.* The Supreme Court held this agreement as restrictive trade practice as it was maintain the resale price but Telco was given benefit of section 38 of Monopoly & Restrictive Trade Practices Act (MRTP) as it was not having direct material effect on competition in market.

The term 'agreement' has been given very wide meaning in the Act. Agreement includes any arrangement or understanding or action in concert whether or not, such arrangement, understanding or action is formal or in writing; or whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.<sup>22</sup> Finding out concerted action is an uphill task. The Supreme Court has laid down that, *'The test is not whether they have actually acted in concert but whether circumstances are such that human experiences tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted acting. Each case must be decided on its own facts.'*<sup>23</sup>

The most crucial aspect of the cartels is that the associations are formed by the entrepreneurs in specific areas for promotion of their trade and profession. These trade associations often collusively concede on certain things which has tendency of controlling the competition in the market. In *Federal Trade Commission v. Indiana Federation of Dentists*<sup>24</sup> the association of dentists promulgated a work rule wherein the member dentists were asked not to submit x-rays for a pre-treatment review for the least expensive and adequate treatment. But the members treated it as a threat to their professional independence and economic well-being, so they stopped submission of x-rays for pre-treatment review and settlement of insurance claims. This was challenged under Sherman Act. The US Supreme Court declared that, *"rule of association forbidding the submission of X-rays to the patients was in restraint of trade under section 1 of the Sherman Act."*

The real question is what are parameters upon which the promotion of objectives by trade association turns into anti-competitive practice by cartelization? As the question

is of serious importance to those engaged in



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competition and concentrated professions and with emerging competition from abroad entering pursuant to GATS and who may not be subject to the rules of the profession amounting to a restriction on competition. The legal position should be made specific, ensuring that decisions of such professional associations do not go beyond what is necessary for their purpose and limit the ability of the members to compete.<sup>25</sup>

#### VII. CATCHING CARTELS: JAWS & CLAWS

The cartel is a civil offence only, so the level of proof required in the case shall be prima facie or preponderance of probability unlike criminal case where the prosecutor has to prove his case beyond all reasonable doubt. Cartels are secretive so busting it is a tough job for competition authorities. Cartel members knowing that it is illegal will not be willing to co-operate and their indifference will make the task of authorities very difficult. Obtaining relevant and admissible evidence needs an acumen on the part of authorities. The cartel may be proved by direct and circumstantial evidence, but we know that circumstantial evidence has a poor quality of proving anything. Because all circumstantial evidence must complete the cycle. Direct evidences are very hard to find in cartels. Direct evidences include, written agreement, memorandum, records of meeting and telephonic conversations etc.

Direct evidences are hard to find in cartels. The circumstantial evidences may be used for corroborating direct evidences. It may also be used for proving the existence of cartels. Conrath quoting Henery David Thoreau says that if you find a trout in milk. It means someone put trout in milk. If explanation is sought, then circumstantial evidence can be a great excuse. For example, is on a particular day if market players or traders raise the prices on exactly same amount it looks suspicious and smells fishy. One may sense a cartel being formed. Further investigations will reveal the real reason of doing so that whether the same happened due to free market forces or due to vested interests of traders through cartel. Conrath quotes Sherlock Holmes who said, "When you have eliminated the impossible... whatever remains is truth." Like wise when all possible logical explanation for price hike is eliminated then whatever is left as reason for price hike shall become logical explanation and it would lead to proof of cartel through circumstantial evidence."<sup>26</sup>

In India, Competition Commission of India (CCI) may inquire into the contraventions of the Act of 2002. Under Section 19, CCI may on its own



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motion also be able to initiate an inquiry. Apart from being a market regulator CCI is vested with inquisitorial powers,<sup>27</sup> Director General shall be directed by the CCI under section 26 and then he proceeds with the inquiry.

In exercise of powers vested under section 19 of the Act, the Commission may inquire into any alleged contravention under section 3(3) of the Act that proscribes cartels. Being satisfied that there is a *prima facie case* of cartel the Commission shall direct the Director General to investigate the matter and submit a report. The Commission and Director General for fact finding investigation are infused with powers of civil court like summon of person, procuring documents, examination on oath,



receiving evidence supported with affidavits. According to section 27 the Commission is can inquire the cartel and impose on each member of the cartel, a penalty of up to 3 times its profit for each year of the continuance of such agreement or 10% of its turnover for each year of continuance of such agreement, whichever is higher. if enterprise is a company then directors and officer is default who are guilty shall be liable and be proceeded against.

In addition, the Commission has the power to pass inter alia any or all of the following orders (section 27):

- i. direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- ii. direct the enterprises concerned to modify the agreement;
- iii. direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and pass such other order or issue such directions as it may deem fit.

Section 33 empowers the commission to restrain temporarily any party from continuing alleged contravention until completion of inquiry or passing of further order without giving notice if the commission deems it necessary. The CCI has also extra territorial jurisdiction in the matter of cartel if such cartels are producing appreciable adverse effect over competition<sup>28</sup>.

Section 53A of Competition Act provides for COMPAT the competition Appellate Tribunal which is a quasi-judicial authority established to dispose of appeals against the orders and decisions made by commission. The limitation period to file appeal is 60 days from date of order or direction of commission.



#### VIII. WHISTLE BLOWING/LENIENCY PROGRAMME

An increasing number of competition regimes operate leniency programmes as this is the finest tool to smell a rat. In the criminal justice system the accessory of prime accused is given certain relief in the form of approver in trial and conviction. On the same line in competition also members of cartel can be given a reprieve on whistle blowing of cartels. The Act unlike other regimes does not provide incentive to whistleblowers.

We know that busting a cartel is a tough nut to crack. It can be easily busted by an insider who may be threatened by fellow members. Therefore leniency may be exercised with any member of cartel who helps the authorities to bust the cartel. Clarity, certainty and fairness are crucial to leniency. For effective leniency programme the CCI has been empowered for making regulations. The leniency programme provided in section 46 of the Act mentions a lesser penalty for member of a cartel who provides full, true and vital information pertaining to cartel. The leniency programme is designed to bust and investigate hard-core cartels which often go undetected. Prosecution of cartel needs evidence which is very hard to procure in cartel as they are very informally created and often does not leave traces behind. The Competition Commission of India (Lesser Penalty) Regulations, 2009 deals with process and procedure of leniency to members of cartels who aid the commission to bust and prosecute cartels.

Office of Fair Trading in UK offers a leniency programme to whistle blowers for unearthing a cartel where under the Office of Foreign Trade can give total or partial

immunity from fines to companies who come forward with such information. Likewise the European Commission has provided for such immunity from fine on cartels on the conditions stated in the notice.<sup>29</sup>

#### IX. CARTEL & CONSUMER PROTECTION BILL 2018

Restrictive Trade Practices (RTP) and Unfair Trade Practices (UTP) have been anti-competitive. It has been price and market manipulative. Consumer Protection Bill 2018 very vigorously takes up both the issues and provides a very comprehensive framework for circumventing both the issues. Clause 2(41) of the Bill defines RTP to be a price manipulative practice which shoots up the price of goods by cutting supply or puts a condition precedent for buying another goods in order to buy intended goods. Clause 2(47) defines UTP very comprehensively. Simply unfair trade practices is meant to promote sale by false advertisements, misleading advertisement of qualities, warranties, guaranties, standards etc., misleading advertisement about bargain price, using offers, lotteries, gifts and scheme for promoting sale



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which is covered in prices already selling goods not confirming the standards of respective regulator of the sector, hoarding and refusal of sale for increasing prices of goods, making spurious goods and adopting deceptive practices, not issuing bill or invoice, refusal to accept defective goods and disclosure of personal information. Clause 10 provides for establishment of Central Consumer Protection Authority (CCPA) for protection of consumers against UTP and RTP. Clause 16 authorizes District Collector for investigation UTP. Clause 17 authorizes him for filing complaint. Clause 18 empowers CCPA for action against UTP and RTP. Currently we have a regulatory void regarding UTP which may be filled easily by Consumer Protection Bill 2018.

Unfair trade practice has been covered in MRTP Act and Consumer Protection Act and now in Competition Act and Supreme Court of India has dealt the issue seriously. Passing off one's product as another is unfair trade practice. Supreme Court held that if the general impression conveyed is false, the important punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true.<sup>30</sup> Any defect or deficiency in service would be unfair trade practice and would amount to denial of service.<sup>31</sup> Findings of MRTP Commission regarding unfair trade practice must be based on cogent materials.<sup>32</sup> Simple commendation of quality of goods by seller to gain purchases unless intended to be a warranty would not amount to Unfair Trade Practice.<sup>33</sup> Unfair trade practice is a question of fact.<sup>34</sup> Cancelling allotted plot arbitrarily by Development Authority is unfair trade practice<sup>35</sup>. The Supreme Court held that holding a person guilty of unfair trade practice is not equal to holding a person guilty of providing deficient service.<sup>36</sup> Car booking scheme wherein first 10000 cars would be delivered in a month failing which will attract 10% interest on booking amount was not held to be unfair trade practice.<sup>37</sup> Unfair trade practice does not apply to allotment of houses by development authority<sup>38</sup>.



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#### X. JUDICIAL RESPONSE TO CARTEL

In *United States v. Trenton Potteries Co.*<sup>39</sup> respondent companies dealing in

vitreous potteries combined to fix prices which they called 'reasonable' and to limit sales in interstate commerce to jobbers. This was challenged on price-fixing in Sherman Act. The Court stated, "*The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman law, the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.*"

In the, *United States v. Socony-Vacuum Oil Co.*<sup>40</sup>, the US Supreme Court said, "*any combination which tampers with the price structures is engaged in an unlawful activity. Even though the members of the price fixing group were in position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces*".

In the famous 'glass cartel' case the European commission in 2007 slapped fine to the tune of 486900000€ on Asahi Guardian, Pilkington and Saint Gobain for violating EC Treaty and EEA Agreement. These companies managed to raise or otherwise stabilize the prices of glass used in panes, doors and mirrors by illicit and secret meetings.

The case of *The Lombard Club*<sup>41</sup> is also one of the important case in which eight Austrian banks (the Lombard Club) were fined of € 124, 26 million for comprehensive price cartel. The cartel encapsulated entire Austria for fixing deposit and lending rates which was detrimental to bank customers. The cartel extended to all banking customers irrespective of private, industrial or commercial consumers. Any change in key lending rates by Austrian Central Bank were addressed by members of cartel and the same reciprocated in lending and deposit rates of Bank.



The European Commission<sup>42</sup> fined seven international groups of companies to the tune of € 1 470 515 000 for forming two distinct cartels in cathode ray tubes (CRT). These companies for ten years right from 1996 to 2006 price fixing, market sharing and customer allocating agreement to restrict output and affect competition. The entire European Economic Area was found to be affected by this. LG, Phillips, Samsung, Technicolor, Panasonic, Toshiba like companies were members of it.

Commission Vice President in charge of competition policy Joaquín Almunia said: "These cartels for cathode ray tubes are 'textbook cartels': they feature all the worst kinds of anticompetitive behavior that are strictly forbidden to companies doing business in Europe. Cathode ray tubes were a very important component in the making of television and computer screens. They accounted for 50 to 70% of the price of a screen. This gives an indication of the serious harm this illegal behaviour has caused both to television and computer screen producers in the EEA, and ultimately the harm it caused to the European consumers over the years".

The famous boat cartel case is related with Angkor Wat Temples. Siem Reap in

Cambodia is famous for Angkor Wat Temples. The Phnom Penh has connectivity to Siem via land, air and waterways. The fierce competition in boat companies brought down the fare from 10\$ to 5\$. The boaters unanimously fixed 10\$ from native and 20-25\$ from foreign nationals. They informally agreed that they would not compete amongst themselves.

In India the leading cases on cartels are related to 'cement cartel' wherein recently in December 2007, the MRTP commission has passed the cease and desist order against over 40 manufacturers of cement directing them not to indulge in any arrangement directly or indirectly through the instrumentality of Cement Manufacturers' Association or otherwise fixing the price of cement in concert or in follow up a concert.<sup>43</sup>

In 2008, the Commission (CCI) imposed Rs. 6307 Crore as fine on multiple cement manufactures for creating a cement cartel. CCI has successfully busted and investigated many cartel cases. The hard actions of CCI on hard-core cartels will give the right signal to cartelists who have sole agenda of profit maximization. However Indian Competition Regime has miles to go in the area of containing cartels.



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The natural soda ash is also a fine case on cartel. Supreme Court<sup>44</sup> held that, "A true and free market must have the full play of competition and any impairment to competition brought about by the arrangement of exporting through ANSAC distorted such market. Cartels and free markets are essentially antithetical to each other and cannot co-exist. While free market engenders competition, a cartel endangers competition. By its own admission and statement that the ANSAC was an instrument for promoting export sales of soda ash produced in USA and its concomitant statement that its individual members could not export soda ash to India, there was a prima facie conclusion, that ANSAC was a cartel."

In India Supreme Court and Competition Commission of India have been very tough on issues of cartel. Supreme Court<sup>45</sup> held that cartel must carry out restrictive trade practices in India or its actions must have effect of a restrictive trade practice being carried out in India. Supreme Court also held that Cartel is unfair trade practice.<sup>46</sup>

CCI Imposed fined to the tune of 2% of average turnover of companies for cartelization.<sup>47</sup> In 2011 CCI in the famous cement cartel case imposed fine of 50% of net profits for 2009-10 and 2010-11 in case of each cement manufacturer. CCI in *Cinemax India Ltd. v. Film Distributors Assn.*<sup>48</sup> imposed fine of Rs. 75315/- was imposed on opposite party at the rate of 5 % of the average of three years turnover for abuse of cartel in exhibiting films in theatres. In *Indian Sugar Mills Assn. v. Indian Jute Mills Assn.*<sup>49</sup> these bodies formed cartel to control prices of jute bags and sugar. The CCI imposed fines on them at the rate of 5% of the average income of the last three preceding years. In Suo Motu Case No. 02 of 2016 *Cartelisation in Respect of Zinc Carbon Dry Cell Batteries Market in India, In re*<sup>50</sup> CCI imposed 20% of net profits as fine in April 2018 for creating cartel and abusing in dry cell batteries market.

Recently Supreme Court in *Excel Corporation Care Ltd. v. Competition Commission of India*<sup>51</sup> referring a case of Southern Pipeline Contractors of Competition Appellate Court of South Africa, held that it needs to be repeated that there is a legislative link between the damages caused and profits which accrue from the cartel activity.



## XI. CONCLUSION & SUGGESTIONS

With the growth of the market it is obvious that the market players would engage into such anti competitive cartels, but it is very hard to track and locate such cartel. In a recent case<sup>52</sup> the Top management level meetings, dubbed 'green(s) meetings' by the cartelists themselves because they were often followed by a golf game, designed the orientations for the cartels. Cartel are not very easy to be tracked sometimes they can exercise in the disguise of normal managerial meeting, on a vacation, golf game etc. It is very difficult to prove that the cartelization took place, because the evidences are generally not conclusive. Whistleblowers in such situation can be of vital use as they can be very instrumental in detecting cartels. Some of the effective methods are recommended so as to prevent the competitiveness in the market, like by increasing the number of bidders, so that the cartel can dissolve in the presence of independent players. By dividing the requirement of a commodity into several small tenders or demand or by minimizing the bidder restriction and can also be done by rate running contracts. The competition authorities must keep a vigil eye in that relevant product market which has high tendency of forming cartels like cement and glass etc. Competition regimes of various countries on reciprocal and multilateral basis should form a cooperative association to fight against cartels by sharing confidential information about multinational corporations and coordinating the investigations in cases of international cartels. The best cure of cartel is healthy and sustainable competition so healthy culture of sustainable competition must be fostered by consumers and traders for optimum mobilization of resources.

The Competition Act is robust enough to deal soft or hard-core cartels. However, the Commission needs to formulate some functional guidelines for regulating cartels. CCI along with UNCTAD, OECD and International Competition Network needs to lead a synchronized and concerted action against domestic and international cartels for creating a free and sustainable market free from anti-competitive practices. Advocacy programme of CCI must be utilized to create a cultural paradigm shift wherein stakeholders of market unite for creation of healthy and sustainable market in India which meets the International standards without compromising Indian needs.

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<sup>1</sup> Preamble of the Competition Act, 2002.

<sup>2</sup> Canadian Economy online, available at <http://www.canadianeconomy.gc.ca/english/economy/cartel.html> accessed 10 August, 2018.

<sup>3</sup> (1993) 3 SCC 499 : AIR 1994 SC 988.

<sup>4</sup> S. 2(c) of the Competition Act, 2002.

<sup>5</sup> Hard Core Cartel: Third Report on the Implementation of the 1998 Recommendation of OECD 2006.

<sup>6</sup> XXXIInd Report on Competition Policy, 2002.

<sup>7</sup> Simon J. Evenett, currently a professor at the University of St Gallen, Switzerland, and the study, *International Cartel Enforcement: Lessons from the 1990's*, was prepared by him together with Margaret C. Levenstein and Valerie Y. Suslow. The study is available at <http://oecd.org/competition/GlobalForum> accessed 2/9/2018.

<sup>8</sup> D.P. Mittal, *Competition Law & Practice*, (New Delhi: Taxmann's, 2011) p. 7.

<sup>9</sup> T. Ramappa, *Competition Law in India, Policy, Issues and Developments*, (New Delhi: Oxford University Press, 2006) p. 22.

<sup>10</sup> S. 3(1) of the Competition Act, 2002.

<sup>11</sup> The term has been given very wide connotation in the S. 2(o) wherein it is said that "price", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing.

<sup>12</sup> The Report of High Level Committee on Competition Policy (Raghavan Committee).

<sup>13</sup> S. 3(4)(a) of the Competition Act, 2002.

<sup>14</sup> Ss. 1 & 2 of Sherman Act, 1890.

<sup>15</sup> S. 2 Clayton Act, 1914.

<sup>16</sup> Available on [http://ec.europa.eu/competition/legislation/treaties/ec/art81\\_en.html](http://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html) accessed 2/9/2018.

<sup>17</sup> LR 3 RP 122.

<sup>18</sup> Adam Smith, *The Wealth of Nations* 1776.

<sup>19</sup> *Union of India v. Hindustan Development Corpn.*, (1993) 3 SCC 499 : AIR 1994 SC 988.

<sup>20</sup> *Ibid.*

<sup>21</sup> (1977) 2 SCC 55 : (1977) 47 Comp Cas 520.

<sup>22</sup> S. 2(b) of the Competition Act, 2002.

<sup>23</sup> *CIT v. Jubilee Mills Ltd.*, (1963) 48 ITR 9.

<sup>24</sup> 1986 SCC OnLine US SC 111 : 90 L Ed 2d 445 : 476 US 447 (1986).

<sup>25</sup> The Report of High Level Committee on Competition Policy (Raghavan Committee), Ch. VIII.

<sup>26</sup> Craig W. Conrath, (2003), *Practical Handbook of Antimonopoly Law Enforcement for Economies in Transition or Development*.

<sup>27</sup> *Competition Commission of India v. SAIL*, (2010) 10 SCC 744.

<sup>28</sup> S. 32 of the Competition Act, 2002.

<sup>29</sup> Notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03).

<sup>30</sup> *Lakhanpal National Ltd. v. MRTP Commission*, (1989) 3 SCC 251 : (1989) 66 Comp Cas 519.

<sup>31</sup> *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243.

<sup>32</sup> *Nirma Industires v. Director General of Investigation & Registration*, (1997) 5 SCC 279.

<sup>33</sup> *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.*, (1999) 7 SCC 1.

<sup>34</sup> *Rajasthan Housing Board v. Parvati Devi*, (2000) 6 SCC 104.

<sup>35</sup> *Ghaziabad Development Authority v. Ved Prakash Aggarwal*, (2008) 7 SCC 686.

<sup>36</sup> *KLM Royal Dutch Airlines v. Director General of Investigation & Registration*, (2009) 1 SCC 230.

<sup>37</sup> *TELCO v. MRTP Commission*, (2015) 10 SCC 734.

<sup>38</sup> *Ghaziabad Development Authority v. Mithilesh Goel*, (2017) 14 SCC 300.

<sup>39</sup> 1927 SCC OnLine US SC 59 : 71 L Ed 700 : 273 US 392 (1927).

<sup>40</sup> 1940 SCC OnLine US SC 86 : 84 L Ed 1129 : 310 US 150 (1940).

<sup>41</sup> EC Press Release.

<sup>42</sup> EU IP/12/1317.

<sup>43</sup> *Director General of Investigation and Registration v. Cement Manufacturers Assn.*, 1991 SCC OnLine MRTPC 2.

<sup>44</sup> *Alkali Manufacturers Assn. of India v. American Natural Soda Ash Corpn.*, 1997 SCC OnLine MRTPC 8 : (1998) 92 Comp Cas 206.

<sup>45</sup> *Haridas Exports v. All India Float Glass Manufacturers' Assn.*, (2002) 6 SCC 600.

<sup>46</sup> *BSN Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548.

<sup>47</sup> *Alleged Cartelization in the Matter of Supply of Spares to Diesel Loco Modernization Works v. Stone India Ltd.*, 2014 SCC OnLine CCI 16.

<sup>48</sup> 2015 Comp LR 81.

<sup>49</sup> 2014 SCC OnLine CCI 141 : 2014 Comp LR 225.

<sup>50</sup> 2018 SCC OnLine CCI 5.

<sup>51</sup> (2017) 8 SCC 47.

<sup>52</sup> IP/12/1317.

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