
THE COMPETITION COMMISSION OF INDIA'S ROLE IN PREVENTING CARTELIZATION: CHALLENGES AND EFFECTIVENESS

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ABSTRACT

Cartelization, often referred to as the most egregious form of anti-competitive conduct, undermines market efficiency, restricts consumer choice, and inflates prices. In India, the Competition Commission of India (CCI), established under the Competition Act, 2002, serves as the primary regulatory body to detect, investigate, and penalise cartel behaviour. This research critically examines the role of the CCI in combating cartelization by analysing its statutory framework, enforcement mechanisms, notable case decisions, and coordination with other regulatory bodies. It further evaluates the effectiveness of tools such as the leniency programme, dawn raids, and economic analysis in unearthing covert cartel activities. The study also explores significant institutional, procedural, and evidentiary challenges that impede robust enforcement. Through comparative insights from jurisdictions such as the United States, European Union, and Australia, the paper identifies best practices and formulates recommendations to enhance the CCI's deterrent and investigative capabilities. The analysis concludes that while the CCI has made notable strides in cartel enforcement, persistent challenges demand comprehensive reforms for sustained effectiveness in safeguarding market competition in India.

Keywords: Competition Commission of India (CCI), Cartelization, Anti-competitive practices, Competition Act 2002, Leniency Programme, Dawn raids, Market regulation, Cartel enforcement, Judicial interpretation, Comparative competition law, Collusion detection, Antitrust law, Price fixing, Regulatory challenges, Indian competition regime.

Introduction

The Competition Act, 2002 (the Competition Act) was enacted by the parliament of India for the establishment of the Competition Commission of India (CCI) 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. The Competition Act was brought in keeping in view the economic development of the country and replaced the Monopolies and Restrictive Trade Practices Act, 1969. CCI, a statutory authority under the Competition Act, is aided by the office of Director General (DG) which investigates anticompetitive practices and provides its report to the CCI.

Scope and Objective

This research paper aims to analyse CCI's role in tackling cartelization and identifying the changes brought in the Competition Act over the years to increase the effectiveness of CCI in countering cartelisation. The paper also aims to analyse the effectiveness of the Leniency Regime adopted by CCI over the years and whether the Lesser Penalty Regulations, as notified by the Ministry of Corporate Affairs on 20th February 2024, would actually further amplify CCI's role in not only detecting cartelisation but also finding an efficient, effective and speedy resolution to cases of cartelisation brought before it.

CCI's power to curb cartelisation under the Competition Act

The Competition Act provides for the CCI to regulate/prohibit certain types of agreements and conducts. They can be broadly divided into the following 3 types:-

1. Anti-competitive agreements (Section 3 of the Competition Act);
2. Abuse of dominant position (Section 4 of the Competition Act);
3. Combination including acquisition, merger, amalgamation (Section 5 and 6 of the Competition Act).

The Competition Act defines "cartel" under Section 2(c) as to include association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or

provision of services.

In other words, a cartel is essentially an agreement amongst competitors to fix prices or production quantities or allocate markets or customers, either by limiting supply in the market or otherwise altering distribution patterns. Additionally, Cartelisation is an anticompetitive act under Section 3 of the Competition Act and are assumed to cause appreciable adverse effect on competition (AAEC). Cartels are illegal in India, as outlined in Section 3(1) of the Competition Act, which is further detailed in Section 3(3). Essentially, Section 3 makes it clear that any agreements between businesses or individuals that affect the production, supply, distribution, storage, or control of goods and services are prohibited if they are likely to harm competition in a significant way.

Section 3(3) specifically prohibits anti-competitive agreements, which include cartels. It identifies the following activities as anti-competitive: -

- 1) Setting prices: This includes any agreement that directly or indirectly fixes the prices at which goods or services are bought or sold.
- 2) Controlling supply: Any attempt to limit or manage the production, supply, market reach, technical development, investment, or service provision falls under this category.
- 3) Market allocation: Agreements that divide up geographic markets or customer bases are also banned.
- 4) Bid rigging: Any form of collusion in bidding processes is strictly prohibited.

These types of agreements are presumed to have an appreciable adverse effect on competition (AAEC) and are therefore declared void. This means that they have no legal standing, emphasizing the seriousness with which anti-competitive behaviour is viewed in India. The aim is to promote fair competition and protect consumers from the negative impacts of such agreements. The Competition Act provides extensive power to the CCI and the DG to collect evidence, including the ability to search and seize documents, as well as conduct raids to ascertain anticompetitive practices, such as cartels. In fact, till date the CCI has carried out 14 search and seizure operations out of which 12 were cases specifically related to investigations of alleged cartelization. Section 41 of the Competition Act provides for the power of the DG to investigate. One of the most important features of the investigative power of the DG is to

conduct unannounced search and seizure activities called “dawn raids” which have been instrumental in the collection of evidence in several cases. Infact in the Beer artel case, dawn raids resulted in offices of major companies like Carlsberg, United Breweries, and Anheuser-Busch InBev being raided. During these raids the DG uncovered a trail of emails that revealed discussions about price fixing among these companies which ultimately proved instrumental for the CCI in deciding the case.

Standard of proof

The Competition Act does not specify the standard of proof for a cartel but since cartelisation is a civil offence the CCI has to apply the test of preponderance of probabilities, to establish existence of a cartel and anti-competitive practices, rather than the “beyond reasonable doubt” test.

Further, CCI in *All India Tyre Dealers Federation v Tyre Manufacturers (Tyre Cartel Case)* held that while it's important to demonstrate that an agreement exists, it's not always necessary to show that there was an explicit agreement between the parties. Instead, such agreements can often be inferred from the intentions or actions of the parties involved. This means that circumstantial evidence can be sufficient to demonstrate that an agreement exists, indicating that the parties were acting together in a coordinated anti-competitive manner.

Leniency Regime

Section 46 of the Competition Act provides the Leniency program i.e. the power of the CCI to impose lesser penalty. This was supplemented by Lesser Penalty Regulations of 2009 (the LP Regulations) which provide for the procedure as well as the extent to which the penalty can be reduced by the CCI. The CCI's leniency programme is designed to encourage members of cartels to come forward and disclose their involvement in practices that violate the Competition Act.

By doing so, they can break ranks with their fellow cartel members and provide crucial information to the CCI under the Regulations. As per the Leniency program under the Competition Act and the Regulations, an individual or a company that is part of a cartel can apply for leniency at any time before the DG submits its investigation report to the CCI.

The applicants can receive a reduction in their penalties in exchange for full, truthful and

significant disclosure of information of alleged anticompetitive practices such as details about the cartel's existence, its members, and how long it has been operating. The CCI has the authority to offer substantial reductions: the first applicant could receive up to 100% off their penalty, while the second applicant might get up to 50%, and any subsequent applicants could receive up to 30% if they provide new and valuable information that the CCI did not previously have.

It's important to note that this leniency programme specifically targets cartel violations. It does not cover other issues like abuse of dominance or vertical restraints, aligning it with similar programmes in more established jurisdictions.

The CCI in the case of *In re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and others*, made a significant move by issuing its first order under the leniency regime in a case involving bid rigging for supplying fans to Indian Railways. The CCI granted a leniency applicant a penalty reduction of up to 75%. This decision was groundbreaking for a few reasons:

- 1) The applicant was the first and only participant to acknowledge the existence of the cartel.
- 2) They provided the CCI with substantial evidence that unveiled the cartel's operations.
- 3) They made their application after the investigation had already started, even though the CCI and the DG had some evidence against other cartel members.

Following this decision, the CCI took steps to strengthen its leniency programme by amending the LP Regulations in 2017. These amendments broadened the programme's scope in the following ways:

- 1) The previous limit on the number of leniency applicants (which was set at three) was removed, allowing more participants to benefit from penalty waivers.
- 2) The DG was given the ability to share confidential information from leniency applications with other cartel members for investigative purposes, but only with the leniency applicant's consent or with the CCI's approval if consent wasn't granted.
- 3) Applicants were required to provide an estimate of the volume of affected business in India.

Lesser Penalty Subsequently in 2024, the CCI introduced the Regulations 2024 (LP Regulations 2024).

A notable addition in this update was the “lesser penalty plus” facility. This allows leniency applicants from existing cartels i.e. the first cartel to disclose information about new, unknown cartels i.e. a second cartel which they were a part of and has allegedly violated Section 3 of the Competition Act. The applicant sharing such information can receive up to the following reduction in penalties: -

- 1) An additional penalty reduction of up to 30% on their original penalty from the first cartel.
- 2) They may also be eligible for up to a 100% penalty reduction for the newly disclosed second cartel.

The LP Regulations represent a significant advancement in the regulation of anti-competitive cartels within the economy. They allow any entity or individual facing potential penalties from the CCI to seek a lesser penalty. The first applicant under this program is eligible for a more substantial reduction in their monetary penalty compared to those who apply later. Additionally, confidentiality provisions protect the identity of whistle blowers throughout the investigation process. The evolution of the leniency programme further reflects the CCI’s commitment to promoting efficiency and cooperation in tackling cartel activities in India.

These regulations also align with anti-trust laws in various jurisdictions. For instance, Leniency Plus programs are currently implemented in countries like the United States, the United Kingdom, Singapore, etc. The introduction of the new LP Regulations marks a pivotal moment in competition regulation in India. It is expected to enhance enforcement against cartels and anti-competitive agreements, serve as a deterrent to potential offenders, and promote greater market transparency by uncovering previously hidden cartels, thereby ensuring fair competition in the market.

Critical Analysis and recommendations

As discussed earlier the power of the DG to conduct dawn raids is a very effective and efficient power to collect evidence which otherwise might get destroyed. However, as per Section 41 of the Competition Act, for the DG to conduct dawn raids it has to take a warrant from the Chief Metropolitan Magistrate and follow the procedure under the Code of Criminal procedure, 1973.

This power should ideally be independently given to the DG so that no time is lost in getting a warrant and the element of surprise is not lost. This will lead to more effective raids and can prevent destruction of evidence which can be instrumental in deciding the case before the CCI.

CCI since its inception has significantly improved its investigative tools to uncover cartels in the market. It's continually adapting to keep up with the ever-changing landscape of our economy. To continue this important work, the CCI needs to be well-staffed and equipped with the necessary authority to safeguard both consumer interests and the overall well-being of the nation from the harmful effects of anti-competitive practices.

Conclusion

Competition law in India is ever evolving, but it has demonstrated a strong ability to identify and punish cartels. CCI has played a pivotal role in not punishing already existing cartels by imposing heavy penalties but also creating an environment where cartelisation has become difficult to flourish. The Lesser Penalty Regulations have over the years created an incentivised platform for whistle blowers to come out and give evidence not only against an existing cartel under scrutiny before the CCI but also a new, separate cartel which is allegedly involved in anti-competitive practices. All this augurs well for the economic development of the country and with further amendments/modifications in the existing law, as suggested above, India would move towards becoming an even more attractive destination for companies to come and take part in the growing economic landscape.

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