In Re: Cartelisation in Industrial and Automotive Bearings[1]

Through this quarterly publication, CUTS International intends to undertake an independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt with in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

[1] *In Re: Cartelisation in Industrial and Automotive Bearings*, Suo Motu Case No. 05 of 2017, http://www.cci.gov.in/sites/default/files/05-of-2017.pdf.

Introduction

"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."

– ***Adam Smith, The Wealth of Nations***

The competition authorities all over the world have been agile and active in penalising cartels, including in India, since cartels restrict competition, misallocate resources, and harm consumer welfare. In furtherance of the same, the Competition Commission of India (CCI) has been successful in employing the leniency provisions of the Competition Act, 2002 (hereinafter referred to as Act) to induce cartel participants into breaking rank and whistleblowing about their fellow cartelists. The corporate leniency programme for India is specified under the CCI (Lesser Penalty) Regulations, 2009 (hereinafter referred to as LPR). The present case is a prime example of the same.

The CCI found Schaeffler India Ltd. (Schaeffler), National Engineering Industries Ltd. (NEI), SKF India Ltd. (SKF), Tata Steel Ltd., Bearing Division (Tata) (collectively OPs), to have collusively fixed the prices of automotive and industrial bearings in India, by determining prices of bearings sold to Original Equipment Manufacturers (OEMs). ABC Bearings Ltd. (Timken) was also investigated, however, in the absence of any sufficient evidence to affirm its role, the CCI did not find Timken to have contravened the Act.

The case was initiated by CCI, *suo motu*, after receiving a leniency application from Schaeffler in 2017. During the pendency of the investigation, NEI also filed a leniency application disclosing its participation in the cartel. The conduct of the OPs tantamounted to an infringement of Section 3(3)(a) read with Section 3(1) of the Act.

The OPs controlled nearly 75 percent of the domestic automotive and industrial bearings market between 2009 and 2011 when steel prices (the key raw material in bearings) were fluctuating sharply. Under the cartel arrangement, the OPs agreed on the percentage increase in steel prices that each OP would represent to the OEMs to seek a price increase from them. The rationale was to simultaneously send out price increase letters to the OEMs and distributors.

Remarkably, the CCI decided not to levy any penalty on the OPs and their respective officials and directed them to cease and desist from their collusive behaviour and ensure that their future conduct is strictly in accordance with the Act.

It must also be noted, that the European Commission (EC), in its decision dated 2014, also held SKF and Schaeffler (among others) liable for infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the European Economic Area (EEA) in the sector of automotive bearings.[2] The infringement was on similar grounds as India, relating to price coordination between bearings manufacturers.

Relevant Provisions

Sr. No.	Law	Provision
1	Section 2(c), Competition Act, 2002	**Cartel**: Entities, who by agreement amongst themselves, limit, control, or attempt to control, the production, distribution, sale of the price of goods or services.
2	Section 3(1), Competition Act, 2002	**Anti-competitive agreements**: No entity shall enter into any agreement which can cause or is likely to cause an appreciable adverse effect on competition within India.
3	Section 3(3)(a), Competition Act, 2002	**Horizontal agreements**: Any agreement (including cartels) between enterprises, engaged in similar or identical goods or services, which directly or indirectly determines purchase or sale prices, shall be presumed to have an appreciable adverse effect on competition within India provided that such agreements do not lead to increased efficiencies.
4	Section 19(3), Competition Act, 2002	**Factors to determine appreciable adverse effect on competition (AAEC)**: The following factors shall be given due regard by the Commission when

[2] Cartel Procedure, Council Regulation (EC) 1/2003, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39922/39922_2067_2.pdf.

Sr. No.	Law	Provision
		determining whether an agreement has caused an AAEC under Section 3: (a) Creates barriers to entry for new entrants in the market; (b) Drives existing competitors out of the market; (c) Forecloses competition by hindering entry into the market; (d) Accrues benefits to consumers; (e) Improves the production or distribution of goods and/or services; (f) Promotes technical, scientific, and economic development through production or distribution of goods and/or services.
5	Section 27(a), Competition Act, 2002	**Orders by Commission**: When after inquiry the Commission finds the enterprise to have contravened Section 3 or 4, it may direct any enterprises involved in such contravention (agreement or abuse of dominance) to cease and desist such practices.
6	Section 46, Competition Act, 2002	**Power to impose lesser penalty**: Any member of the cartel can file a leniency application seeking a reduced penalty in exchange for full, true, and vital disclosure of information and evidence of substantial value.

Issues & Findings

1. **Whether meetings, as alleged between competitors, took place?**

   The meetings in contention were as held on November 03, 2009, January 31, 2011, and April 22, 2011. The Director General (DG) in its investigation found enough evidence – through e-mails, phone records, and travel details – to establish the first two meetings. However, the DG could not establish the meeting was held on April 22, 2011, and neither could it find any evidence of cartelisation

against Timken. Further, the DG also concluded in its investigation that consensus for concerted price increase in the aftermarket segment could not be established. The Commission, after considering all the evidence and statements of all the parties, concurred with the DG.

2. **Whether price-sensitive information was exchanged, and any anti-competitive decisions taken?**

   With the help of e-mails, the DG and the Commission concurred that during the first meeting held on November 03, 2009, pricing strategies to be adopted by the OPs for seeking new price increases from industrial and automotive OEMs were discussed and an agreement was reached to in that regard. Subsequently, in the second meeting dated January 31, 2011, the OPs discussed and agreed to send letters to the OEMs regarding price increases.

3. **Whether cartelisation between the parties is established?**

   Subsequent to the findings relating to the establishment of meetings, exchange of price-sensitive information, and anti-competitive decisions, the Commission concurred with the DG's view and found that a 'cartel' as defined under Section 2(c) of the Act, is established between the OPs. The same was established by way of two meetings wherein price revisions along with a minimum percentage of price increase was discussed which would be quoted to the OEMs.

4. **Whether the cartelisation affected the prices of bearings in the market or caused AAEC in the market?**

   As per the Act, once a cartel agreement has been established by evidence as per Section 3(3), such a cartel is presumed to have an AAEC. Thus, the DG in its report, having established a cartel between the OPs, presumed AAEC to have been caused in the automotive and industrial bearings market in India. The OPs contended that no AAEC was caused as was evident from the price analysis undertaken by the DG. They also contended that the OEMs exerted significant countervailing buying power and did not perceive any instance of cartelisation amongst the OPs.

   However, the Commission concurred with the DG and found that a bare reading of Section 3(1) of the Act makes it clear that not only agreements which cause AAEC, but also agreements which are likely to cause AAEC, will be considered to

contravene the law. Thus, the Commission found that the impugned conduct of the OPs has in fact resulted in AAEC within India.

Analysis

With this Order, the CCI has demonstrated that while establishing AAEC as a result of cartelisation is important, all cartel agreements are *per se* construed to result in AAEC. In other words, it is not only agreements that have been found to cause AAEC that is prohibited, but also agreements that are likely to cause AAEC, that will amount to a contravention of the law.

Even though the OPs met and discussed the percentage price increases to be asked from the OEMs, the DG did not find any indication of actual concerted price increases or prices moving in tandem with each of the OPs, except in a few instances. However, the CCI reiterated that once a cartel under Section 3(3) of the Act is established, an AAEC within India is presumed, and the plea of the OPs that no AAEC has been caused as a result of the alleged cartel is not tenable in law. The impugned conduct of the parties, in fact, resulted in AAEC within India.

However, this presumption is rebuttable, with the onus on the parties to rebut such a presumption. The CCI relied on the Supreme Court's judgment in *Rajasthan Cylinders and Containers Ltd. v. Union of India and Others*,[3] which stated that Section 19(3) of the Act mentions factors that the CCI is supposed to examine when determining whether an agreement has an AAEC under Section 3 of the Act.

However, this inquiry will not be needed for cases that are covered by Section 3(3)(a) to Section 3(3)(d) of the Act. The rationale behind this is, that any agreement under Section 3(3) is presumed to have AAEC and therefore the CCI need not do any further exercise once an agreement is proved to fall under any one of those categories. However, it was also clarified that such presumption can be rebutted as these agreements are not conclusive proof of the fact that it would result in AAEC. This means that the burden will shift to the parties to rebut the presumption by adequate evidence.

[3] 2018 (13) SCALE 493.

Consequently, the CCI, in the present case, iterated that the parties failed to demonstrate as to how their impugned conduct resulted in any:

(i) accrual of benefits to consumers;

(ii) improvements in production or distribution of goods and/or services; or

(iii) promotion of technical, scientific, and economic development through production or distribution of goods and/or services, as per Section 19(3) of the Act.

Thus, it was held that the meetings held between the OPs itself compromised their independence and enabled them to quote different price revisions to the OEMs than they would have if quoted independently. The CCI held that simply because the price revisions quoted by OPs to the OEMs were not according to what was decided between the OPs, would not rebut the presumption of AAEC.

Along with investigating the companies, the CCI also investigated the role played by the respective officials of the OPs and identified 11 current and former employees of the OPs who were vicariously liable for their conduct. These officials were unable to prove that the contraventions committed occurred without their knowledge or that they had exercised all due diligence to prevent such contravention.

Interestingly, in this case, the CCI refrained from imposing any penalty, despite arriving at a finding of cartelisation. In the absence of any penalty guidelines, it is not clear why the CCI took a liberal stance in this case, which clearly warranted a heavy fine. In this regard, a key recommendation from the Report of the Competition Law Review Committee (CLRC), published in July 2019, must be taken into consideration regarding the issuance of guidelines on the imposition and computation of penalties under the Act.

In a prior decision of the CCI in *In Re: Alleged Cartelisation in Flashlights Market in India*,[4] the CCI did not find any violation of Section 3(3)(a) of the Act, even though a leniency application was filed to the contrary. It held that the mere exchange of commercially sensitive information in the absence of determination of prices was insufficient to establish a cartel.

[4] *In Re: Alleged Cartelisation in Flashlights Market in India,* Suo Moto Case No. 01 of 2017, https://www.cci.gov.in/sites/default/files/SuoMoto-01-of-2017.pdf.

The present case marks the 12th leniency decision passed by the CCI and signals maturity in its assessment while dealing with cases pertaining to cartels. However, the Order to not penalise the OPs takes away from such progress in the CCI's approach. The OPs hold substantial market power and are capable of influencing prices and output if they work in tandem. Even though in the Indian market the OEMs have greater buying power, the fact that the OPs could collectively decide on price increases to influence what is passed on to the consumers shows the ability of the OPs to abuse their dominant position through cartelisation. This could also lead to fewer leniency applications, setting a precedent for escapism through a cease and desist order.

Why would an enterprise voluntarily disclose its participation in a cartel, if doing so will not warrant any added advantage to it? This would forfeit the purpose of inducing whistle-blowers and curbing anti-competitive practices in India. The mandate of the CCI is to ensure consumer welfare and a competitive environment in the market. If the competition agency does not penalise entities who threaten that mandate, what then, is the purpose after all?

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