

**Study of Cartel Case Laws  
in Select Jurisdictions  
—Learnings for the Competition  
Commission of India**

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**CUTS**  
International



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## **EXECUTIVE SUMMARY**

In 1990s, there were about 30 countries with a competition law. At present there are over 100 countries in various stages of enactment of competition law. Competition laws across the world differ in various aspects; however, as said, there is one feature that unites them i.e. condemning cartel agreements. Cartels are the most egregious of all competition law violations. They are most prevalent in markets for consumer goods or inputs and services essential to other sectors of the economy. 90 years of the last century, in particular, saw a global resurgence of international cartels, which was evident thanks to the numerous efforts to uncover them by competition authorities. It is believed that, the US and EU authorities have prosecuted about 100 international cartels during this period.

This considered in conjunction with the fact that some believe that as few as one in six or seven cartels are detected and prosecuted, and also that other cartels may have been discovered and prosecuted in countries other than the US and EU, gives a rough indication of their high incidence. The record, however, has been much lower in the developing world. This, arguably, was not due to the fact that cartels are less common in these developing economies, but because the law enforcement agencies there were not well equipped to deal with them.

The experience in dealing with cartels in India so far has not been quite satisfactory under the MRTP Act 1969. Nevertheless, it would be relevant to study the strengths of the Indian Competition Act, 2002 with reference to the cases that were brought under the MRTP Act as well as study the experience of enforcement in select jurisdiction such as USA and Brazil, to derive operational guidelines for the Competition Commission of India (hereinafter referred to as “CCI”). However, the Competition Act, together with its subsequent Amendment Bill, 2006, has made strident progress as compared to the old Act, in areas such as: institutionalised and clear definition of cartels, wider power and better tools to CCI to investigate and prosecute cartels (leniency, penalties, interim relief, etc).

Similar situation has been found in other countries as well, including large economies like Brazil & US, where competition authorities have overcome and remedied past

problems by adopting new tools and good practices, such as penalties with high deterrent effects, elaborate leniency programmes, effective use of dawn raids and parallelism 'plus' factors for identifying cartels.

The Competition Act 2002 increases the possibility of dealing successfully with cartels. The CCI needs further strengthening, with 'functional' operational guidelines for its activities. In addition to that, CCI should work out guidelines for implementing the leniency programme. There is also a need for the CCI to participate in international efforts against cartels such as, UNCTAD, OECD, ICN, etc.

However, most importantly CCI should undertake advocacy activities to create a competition culture and awareness about cartels, which could help to promote cartel detection and prosecution in India.

## 1. 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. 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. – Adam Smith*

1.1. In any market, firms have an incentive to coordinate their production and pricing activities to increase their collective and individual profits by restricting market output and raising the market price. An explicit agreement among rival firms not to compete and to restrict output and raise the price of their products is called a “cartel”. The elimination of rivalry by firms that formerly competed is accomplished not by integration of production activities, as would happen in the case of a merger. Instead, the former rivals maintain separate firms but act jointly in fixing prices or dividing the market, or even both.

1.2. There are typically four types of cartel conducts:

- price fixing
- market sharing
- output restricting
- bid rigging

1.2.1 The three former types of conducts usually include all firms in a market, or a majority of them, coordinating their business, whether vis-à-vis price, geographic market, or output, to effectively act like a monopoly and share the monopoly profits accrued from their collusion. The fourth and last type of cartelised behaviours usually involves competitors collaborating in some way to restrict competition in response to a tender and might be a combination of all the former practices. Alternatively, one can also categorise cartels differently as private international cartels, import cartels, export cartels, domestic cartels, or even sovereign cartels like the Organisation of the Petroleum Exporting Countries (OPEC).



1.3. But for some exceptions, most cartels are unanimously condemned by economists and authorities as the worst of all antitrust abuses, especially those engaged in price fixing, because no expert has satisfactorily established that consumers will benefit from price fixing. On the contrary, economic analysis has shown that cartels are inefficient and lessen consumer welfare. It is, therefore, not surprising that competition authorities around the world have the closest meeting of minds on the baleful influence of cartels.

1.4. Many experts consider anti-cartel activity the most important function of a competition agency. They feel that, because hard-core cartels cause the greatest harm to consumers, finding and prosecuting these agreements should be a top priority of competition officials. Prosecuting cartels may be the most difficult of the tasks assigned to competition authorities as cartels are conceived and carried out in secret. Cartel operators, knowing that their conduct is unlawful, do not willingly cooperate with competition officials in the course of investigations. Thus obtaining evidence to prove the existence of cartel agreements requires special investigative tools and skills.

1.5. In the beginning of the 1990s, there were about 30 countries with a competition law. At present there are over 100 countries in various stages of enactment of competition law. Competition laws across the world differ in various aspects; however, as said, there is one feature that unites them i.e. condemning cartel agreements. 90 years of the last century, in particular, saw a global resurgence of international cartels, which was evident thanks to the numerous efforts to uncover them by competition authorities. It is believed that, the US and EU authorities have prosecuted about 100 international cartels during this period.<sup>1</sup> This considered in conjunction with the fact that some believe that as few as one in six or seven cartels are detected and prosecuted,<sup>2</sup> and also that other cartels may have been discovered and prosecuted in countries other than the US and EU, gives a rough indication of their high incidence. The record, however, has been much lower in the developing world. This, arguably, was not due to the fact that cartels are less common in these developing economies, but because the law enforcement agencies there were less equipped to deal with them.

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<sup>1</sup> Connor, John (2003), "Private International Cartels: Effectiveness, Welfare and Anti-Cartel Enforcement", Purdue Agricultural Economics Working Paper No. 03-12, available at <[http://agecon.lib.umn.edu/cgi-bin/pdf\\_view.pl?paperid=11506&ftype=.pdf](http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=11506&ftype=.pdf)>

<sup>2</sup> OECD (2002), "Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes", OECD, Paris

1.6. Sadly enough, this is no reason for cartelists to cause less harm to the vulnerable consumer in developing countries, as well as these economies. Of the international trade flows identified in 1997 that best matched the products sold by sixteen international cartels, which operated during the 1990s, developing countries' imports of these goods that year amounted to US\$81.1bn, an amount that represents 6.7 percent of these countries' imports and 1.2 percent of their national incomes. With an estimated increase in prices of between 20 and 40 percent, one can then calculate a range of estimates for the overcharges paid by developing countries in 1997; had all sixteen of these cartels been in operation during that year. These overcharges are in the range of US\$16-32bn, which are equivalent to between one third and two thirds of the total annual multilateral and bilateral aid, received by developing countries in the late 1990s.<sup>3</sup> Thus, there is a strong case for strengthening the enforcement activity of competition authorities in developing countries vis-à-vis cartels. This, however, continues to be straddled by inadequate legal frameworks or tools, lack of information or information asymmetries, or worst, human resource handicap. Such is the situation in countries like India.

1.7. In 2002, India enacted a new competition law, called 'The Competition Act' 2002 (hereinafter referred to as "Competition Act") to replace the Monopolies and Restrictive Trade Practices Act 1969 (hereinafter referred to as "MRTP Act"). Subsequently, CCI was established in October 2003 under the Competition Act. The Competition Act has provisions to take action against anti-competitive agreements, including cartel, which is presumed to have an appreciable adverse effect on competition.

1.8. Arguably, the Indian experience in this regard has been far from satisfactory, and the CCI may not have much to draw from past experience within the country. Nevertheless, it would be relevant to study the strength of the Competition Act in a broad manner with reference to the cases that were brought under the MRTP Act. As well as analyse the experience of enforcement against cartels in select jurisdiction such as USA and Brazil, to derive operational guidelines for CCI.

1.9. This report begins with a theoretical discussion on general characteristics of cartels, followed by a brief review of the various instruments used for cartel investigation around the world, such as leniency, whistleblower protection, and dawn raids. Sanctions are also

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<sup>3</sup> Levenstein, Margaret and V. Suslow (2001), "Private International Cartels and Their Effects on Developing Countries", Background paper for the World Bank's *World Development Report 2001*. World Bank, Washington.

discussed in this regard, as an effective tool to prevent the formation of cartel, due to their deterrent effects when used appropriately. Next, the old MRTP Act is analysed, together with some select cases, which have been tried under this Act. Based on this, some analytical inductions of factors that allowed or encouraged the formation of cartels in India, including any policy, regulatory or legislative factors by the government, and/or signals that suggest their existence in certain industries/sectors are drawn to derive experience for future cartel prosecution activities in the country.

1.10. Subsequently, description of the Competition Act is given, as well as its various provisions, which would be assessed to see whether the present competition law overcomes the difficulties inherent under the MRTP Act. Where and when possible, references are made to the experiences of two other large economies, the US and Brazil, drawn from two country papers prepared by consultants engaged in this project, within the framework of this study, by way of comparison as well as for deriving appropriate learnings. The paper ends with few recommendations vis-à-vis policy and operational guidance for the CCI for implementing its mandate under the Competition Act with respect to cartel cases in India.

## **2. Understanding cartels**

2.1. The most common practice undertaken by cartels is price-fixing. This is the term generically applied to a wide variety of concerted actions taken by competitors having a direct effect on price. The simplest form is an agreement on the price or prices to be charged on some or all customers. In addition to simple agreements on what price to charge, the following are also considered price-fixing:<sup>4</sup>

- Agreement on price increase;
- Agreement on a standard formula, according to which prices will be computed;
- Agreement to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreement to eliminate discounts or to establish uniform discounts;
- Agreement on credit terms what will be extended to customers;
- Agreement to remove products offered at low prices from the market so as to limit

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<sup>4</sup> Raj, Qureshi & Saroliya (2003), “Restrictive and Unfair Trade Practices – Where Stands the Consumer?” CUTS, India, p. 16

supply and keep prices high;

- Agreement not to reduce prices without notifying other cartel members;
- Agreement to adhere to published prices;
- Agreement not to sell unless agreed price terms are met; and
- Agreement to use a uniform price as starting point for negotiations.

2.2. Next on the list are cartel agreements that divide markets by territory or by customers among competitors. If anything, such arrangements are even more restrictive than the most formal price-fixing agreement, since they leave no room for competition of any kind, and hence are often held illegal *per se* by competition laws around the world.

2.3. Under the third category of cartel behaviour: output restriction, enterprises producing/supplying the same products/services agree to limit their supplies to a lower proportion of their previous sales. The ultimate objective of limiting supplies is to create scarcity in the market and subsequently raise prices of products/services.<sup>5</sup>

2.4. The fourth type, bid-rigging cartels, as mentioned in the preceding section, involves coordinated actions of firms vis-à-vis tenders and auctions. Bid rigging, as all other cartel-type behaviour, can be difficult to detect and prosecute. However, as most competition laws broadly prohibit anticompetitive agreements and concerted practices between competitors, there need be no legally binding or formal agreement or any punishment or other enforcement mechanisms envisaged for a bid rigging offence to be established. Often, the mere exchange of information between competitors before the award of a tender is enough to establish an irrefutable presumption that bid rigging has occurred.<sup>6</sup>

2.5. So clear as it may sound, cartel behaviour is difficult to detect, and even when detected, might be countered by various defences, (which shall be subsequently discussed). To make it worse, cartels can occur in almost any industry and can involve goods or services at any levels along the line of manufacturing, distribution or retail. However, there

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<sup>5</sup> CUTS (2001), "Competition Policy and Law Made Easy", p.8

<sup>6</sup> Competition LawGram (3/2006), "Constructing the Olympics: Why Colluding for Contracts May Land You in Jail", Lawrence Graham LLP, London, Vol I, p.2, at [http://www.lawgram.com/servlet.cgi?page\\_id=resources/publications/CompetitionLawgram1.pdf;section=publications](http://www.lawgram.com/servlet.cgi?page_id=resources/publications/CompetitionLawgram1.pdf;section=publications)

are some sectors, which are more prone to cartels than others because of the industrial structure, and the way in which firms operate.

2.6. Many characteristics of markets and firms that contribute to successful price-fixing conspiracies have been identified by studying cartels that have ended up in court. These characteristics may roughly be divided into those that allow a cartel to raise the market price in the first place and those that prevent the cartel agreement from breaking apart due to cheating.

2.7. Large firms may decide independently to behave as though they had a cartel arrangement without a formal meeting; that is, each one can cut its output and hope that the others will do the same. Inevitably, in markets with an oligopolistic structure, firms take their rivals' actions into account. When firms in an oligopolistic market coordinate their actions despite the lack of an explicit cartel agreement, the resulting coordination is sometimes referred to as tacit collusion or conscious parallelism, which is not actionable under most competition laws.<sup>7</sup> In almost every country with a competition law the existence of an agreement must be proved. In other words, the sole existence of parallel prices is not sufficient to convict firms in a cartel case, but unfortunately parallelism is often used as an effective defence tool, beating the competition authorities with less investigative power, or experiences.<sup>8</sup>

2.8. US and European courts have adopted a “*parallelism plus*” approach which requires showing the existence of “plus factors” beyond merely the firms' parallel behaviour, in

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<sup>7</sup> The determination whether cartels unreasonably restrain the trade depends on the nature of agreement and on the surrounding circumstances that give rise to an inference that the parties are involved in some pernicious activity. There has to be an *explicit* agreement to purchase or sell the goods only at price or on terms or conditions agreed upon between the sellers or purchasers on which the goods are to be sold. Existence of an agreement (oral or written) is one of the essential conditions to be fulfilled to establish a cartel.

<sup>8</sup> The Korean Fair Trade Commission (KFTC), for example, has many a time proved a cartel case based on circumstantial evidence related to price. They even enlisted some model cases in their internal guidelines - “Guidelines for Collaborative Acts”. Accordingly, cartels may exist when parallel behaviours of enterprises in questions cannot be explained by market forces: (i) when price is identical or remains rigid despite changes in supply & demand, differences among suppliers of raw materials, and geographic distance between suppliers and consumers; (ii) when price changes are identical even when production costs vary due to differences in raw material costs, production processes, wage increases, and bill discounting rates; and (iii) when large price increases cannot occur in a short period of time without collaborative actions, given market conditions. Cartels may also exist when parallelism in actions among enterprises is almost impossible without an agreement, considering structure of the industry in question, for example when prices of each enterprise are identical, even with significant degrees of product differentiation; or when suppliers show identical actions, even when it is hard for them to do so.

order to prove that an antitrust violation has occurred.<sup>9</sup> This has been adopted in some cases in Brazil as well. In all these jurisdictions, yet, there is an inclination to consider parallel behaviour as a first clue pointing to the presence of collusion. Even though parallelism does not suffice to prove unlawful conduct, it may contribute to forming a suspicion of illegality.

2.8.1. In a leading case in Brazil, the Administrative Council for Economic Defence (CADE) adopted the “parallelism plus doctrine”<sup>10</sup> to prove the occurrence of a collusion amongst the three biggest Brazilian steel companies in order to raise plain steel prices to the same level at the same time.<sup>11</sup> CSN readjusted its prices in August 1<sup>st</sup>, 1996 (3.63% for hot plated steel sheets and 4.34% for cold plated steel sheets), while Cosipa readjusted its prices in August 5<sup>th</sup>, 1996 (3.59% for hot plated steel sheets and 4.31% for cold plated steel sheets), and Usiminas readjusted its prices in August 8<sup>th</sup>, 1996 (4.09% for hot plated steel sheets and 4.48% for cold plated steel sheets).

2.8.2. The new prices were preceded by communiqués sent to buyers in July 17th, 1996 (CSN) and July 22nd, 1996 (Cosipa and Usiminas). Besides, a meeting was held in the Ministry of Finance’s Secretariat for Economic Monitoring (SDE) in July 30th, 1996. Representatives of the three companies and one of the steel producers’ association (IBS – Brazilian Institute of Metallurgy) informed the government body that they would raise their prices. The Secretary replied that the practice would be eligible for cartel.

2.8.3. This case was decided under the parallelism plus theory. So, the plus factors found as sufficient to conclude that there was a collusion were: a) the fact that the first company to raise the price was the company with the lowest market share; b) there wasn’t an increase in costs that could explain the joint raise of prices; c) the companies used the same way at almost the

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<sup>9</sup> Paolo Buccirosi (2006), “Does Parallel Behaviour Provide Some Evidence of Collusion”, LEAR – Rome <<http://www.bepress.com/cgi/viewcontent.cgi?article=1027&context=rle>>

<sup>10</sup> See, among others, Kovacic, W., “The Identification and Proof of Horizontal Agreements under the Antitrust Laws” – Antitrust Bulletin 5. 1993: “Courts generally have held that a pattern of ‘conscious parallelism’ or oligopolistic interdependence, without more, does not permit an inference of conspiracy on the whole, courts require plaintiffs who emphasise parallel conduct to introduce additional facts, often termed ‘plus factors’, to justify an inference of collective actions”.

<sup>11</sup> Administrative Proceedings n° 08000.015337/94-48, *Respondentes Companhia Siderúrgica Nacional – CSN; Companhia Siderúrgica Paulista – Cosipa e Usinas Siderúrgicas de Minas Gerais – Usiminas*. Reporting Board Member Ruy Santa Cruz

same time to communicate the price raising; d) the joint meeting at SDE.<sup>12</sup> Defendants sued an injury against the condemnation. The Federal Court Decision of First Degree, however, found that the CADE's decision was correct. The Judge highlighted that the conduct for conscious parallelism without rational economic explanation could be used to condemn a cartel.<sup>13</sup>

2.9. Also in Brazil, the SDE is known to have developed a method to analyse complaints submitted, taking into consideration pricing behaviours and profit margins. Such a method – which is a first attempt to reach a filter and is still under discussion – is three pronged. Complaints are only prosecuted if cumulative conditions based on economic analysis are met. First, the profit margin tendency is verified. If the profit margin should decrease, the market is considered to be under a competitive behaviour, in which case the complaint is dismissed. Second, it is necessary to analyse whether the margin increase is linked to the reduction of price spread. If not, the case is dismissed. Third, if there is such a margin increase, then it remains to verify whether the margin and price dispersion behaviour follow the same pattern within a State geographical area. If they do, the case is dismissed. Therefore, only in cases where there is a margin increase linked to the reduction of price spread not following the State pattern, investigations will be continued.<sup>14</sup> This method, however, appears very statistical and might prove difficult to follow if a competition authority is not endowed with good staff strength in economics and statistics.

2.10. Three major factors are necessary to establish a cartel:

- cartel must be able to raise price above the non-cartel level without inducing substantial increased competition from non-member firms.
- expected punishment for forming a cartel must be low relative to the expected gains.

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<sup>12</sup> Concerning this aspect, the following understanding was adopted: if the companies asked for a joint meeting to communicate the price rises, they must have to know that each one will raise their prices. So, this fact was an evidence of the collusion.

<sup>13</sup> Roberto Pfeiffer, "Recent aspects of hard core cartel prosecution in Brazil", Report to section I of the third meeting of the Latin American Competition Forum: fighting hard core cartels in Latin America and The Caribbean.

<sup>14</sup> DAF/COMP/GF/WD (2006) 37, "Contribution from Brazil", Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement, Global Forum on Competition

- cost of establishing and enforcing a cartel agreement must be low relative to its expected gains.

2.10.1. In the first place, only if a cartel is expected to raise the price above the non-cartel level and keep it high do the firms join. The more inelastic the demand curve facing a cartel, the higher the price the cartel can set and the greater its profits. An inelastic demand curve in the long run means at least three essential things:

- there have to be very few close substitutes in the cartelised product market;
- the cartel members ought to control a large share of the relevant market; and
- there exist substantial barriers to entry therein.

2.10.2 Entry by non-member firms or close substitutes produced in other industries prevents a cartel from raising price. If the cartel controls only a small share of the relevant market, which includes all close substitutes, non-member firms will for sure undercut the cartel and prevent it from raising the price; that is, the demand facing the cartel will be relatively elastic. Even if all firms in a market form a cartel and raise the price, the higher price may induce enough new firms to enter that market and the cartel would be unable to keep the price high in the long run.

2.10.3. Secondly, cartels only form if members do not expect the government to catch and severely punish them. High chances of being caught and large expected penalties reduce the expected value of forming a cartel in the first place. Before they were made illegal in the US in 1890, explicit cartels were much more common. In fact, the basis of Sherman Act was to curb monopoly and cartel activities. Section 1 of the Sherman Act, prescribes agreements in restraint of trade, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nationals, is declared to be illegal”. The collective activity that is central to this provision can be between two or more competing sellers or competing buyers (horizontal) or a seller and its customer (vertical).<sup>15</sup> During periods when the Department of Justice (DOJ) has been relatively lax in enforcing the laws, price-fixing conspiracies have been more prevalent.

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<sup>15</sup> Foer, A (2006), “United States of America”, Competition Regimes in the World – A Civil Society Report, CUTS International, Jaipur



2.10.4. Last but not the least, even if a potential cartel could raise prices in the long run, and not be discovered, it would not form if the cost of initial organisation is too high as compared to the expected gains.

2.10.4.1. First, there should be only a small and manageable number of firms involved. Setting up a secret meeting without the government's knowledge is relatively easy if there are few firms involved.

2.10.4.2. Secondly, empirical evidence shows that cartels are more likely to be formed in concentrated industries. Similarly, cartels are also often found in smaller geographical areas, since the market being small is more likely to have few firms, who have a large share of the business. Of the global cartels studied recently, cartel members usually controlled over 90% of the market's sales. Moreover, when entry caused the cartel's share to drop below 65%, cartel activity typically ceased.<sup>16</sup>

2.10.4.3. Thirdly, the products involved should be homogeneous. Firms have more difficulty agreeing on relative prices when each firm's product has different qualities or properties. Each time a product is modified, a new relative price must be established. It is also easier for a cartel to spot cheating by members when all it has to examine is a single price. It is relatively difficult to detect price-cutting that is achieved by an increase in quality; a firm could increase its quality and hold its price constant if it wanted to increase sales without explicitly violating the pricing agreement. In virtually all the price fixing cases studied so far, the product was relatively homogeneous across firms. In a few exceptions, complicated products or services were allocated on a job-by-job basis that facilitated coordination, or a single issue was isolated for the agreement.

2.10.4.4. Finally, the organisation cost of a cartel is significantly lowered where a trade association exists. Trade associations, by lowering the cost of meetings and coordinating activities among firms in a market, facilitate the establishment and enforcement of a cartel. Having undertaken analysis of 63 cases (Refer to Annexure I) we found instances of 13 cases where associations of Lorry Owners, Tyre Industry, Mill Owners, Cement Manufacturers, Kirana Merchants, etc formed a cartel and were investigated by the MRTPC. Thus in near future it is important for CCI to keep a check on the activities and behaviour of various different trade/business associations that exist in India. It is

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<sup>16</sup> Supra note 1

important to note that though most industries have trade associations that meet regularly, though not all trade/business associations necessarily form cartels.

2.11. Even if a market consists of a small number of firms, producing a homogeneous good without close substitutes, having an inelastic demand curve, and facing no threat of entry, a cartel cannot succeed if members can and want to cheat on the agreement. Some of the factors that lead to the formation of a cartel also help it to detect cheating and enforce its agreement. It is shown that cartel agreements are easier to enforce if detection of cheating amongst members is easy. Four factors aid in the detection of cheating:

- there are few firms in the markets;
- prices do not fluctuate independently;
- prices are widely known; and
- all cartel members sell identical products at the same point in the distribution chain.

The above-mentioned factors could be used by competition authorities as strong signals to prioritise their enforcement activities vis-à-vis cartels.

2.11.1. With relatively few firms, the cartel may more easily monitor each other, and increases in one firm's share of the market (an indication of price cutting) are easier to detect.

2.11.2. If a market has frequent shifts in demand, input costs, or other factors, prices in that market have to often be adjusted. In that case, cheating on a cartel arrangement may be difficult to detect, because it cannot be distinguished easily from other factors that cause price fluctuations.

2.11.3. Similarly, cheating is easier to detect if prices are known. Some cartels have even arranged for firms to inspect each other's books. In some cases, with the government's help, for example, they often report the outcome of bidding on government contracts, so

that cheating is instantly observable by the cartel.<sup>17</sup> Public availability of information can greatly simplify the enforcement of cartel agreements. Publicly announcing price increases and decreases well in advance is one method of making price information available to all interested parties.

2.11.4. If some firms are vertically integrated (the same firm produces inputs, manufactures the product, and sells at the retail level), it may be difficult for the cartel to determine at what point in the distribution chain cheating occurs. In contrast, if all firms sell to the same type of customers (for example, at the retail level), cheating is easier to detect.

2.12. In the US, the Department of Justice (hereinafter referred to as “DOJ”) will investigate to check if there are sharp price increases (particularly after low prices) or stable prices in a slumping industry; parallel prices; concentrated sellers (10 or less) or an industry association; high barriers to entry<sup>18</sup>; joint sales agencies or inter-company sales (information sharing); homogenous products/commodities;<sup>19</sup> relatively sophisticated intermediate goods and services (chemicals, pharmaceuticals, plastics); relatively predictable and stable market (moderate growth) and market participants; social or cultural cohesiveness.<sup>20</sup>

2.13. We have got a fairly thorough discussion above regarding the various characteristics of markets which facilitate the formation of cartels. This can be seen from another angle: they point out to competition authorities where to look for possible cartel existence. Worthy attention and more investigative efforts should be put to information from a whistleblower or a friend-of-competition on industries/sectors/markets which are concentrated, with homogeneous products sold at fairly stable price levels which are widely known, without close substitutes, protected by a sufficiently high barrier to entry, and coordinated by a trade association. We are not mentioning countries where low level of penalties (effectively low deterrent effect) and lax enforcement of competition laws also

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<sup>17</sup> Of course in this case, the same mechanism might help competition authorities to look out for signs of possible collusions.

<sup>18</sup> It is important to note that in the *Vitamins* cartel executed therein, entry was slow and impeded by sunk costs and excess capacity.

<sup>19</sup> In the vitamins industry, for example, it is clear that for a given grade of bulk vitamin there is little or no differentiation across producers. Vitamins are widely viewed as “commodities,” that is, products so homogeneous that delivered price net of discounts is the only factor driving buyers’ decisions.

<sup>20</sup> Camatsos, S.G. & Foer, A. (2007), “Cartel Investigation in the USA”, American Antitrust Institute, Paper done for this project.

facilitate cartels; they are of course the fertile ground for cartels as well as any other restrictive trade practices. As can be seen later in the case of India, this is one of the main reasons for the mushrooming of cartels so far. The print media, for instance, has often reported the existence of cartel arrangements from time to time without any effective action.

2.14. Government policies<sup>21</sup>, especially those that makes prices readily available to all interested parties or those that divide markets into small segments, also facilitate cartel activity. Many of our government policies are framed and implemented to promote competition. Given below are examples of certain government policies that have helped in facilitating cartels:

2.14.1 Government Procurement Policies<sup>22</sup>: One example observed in India is the policy and practice of State Governments to give preference to local units in their procurement policy. Under such a policy, price or purchase preference is given to small-sector units, with the objective to protect and promote such small-sector units. In the context of the overall development policy of the state, such policies may be desirable. However, concerns arise, when the policy creates conditions for formation of a cartel of local manufacturers, which is solely dependent on Government's patronage. In such cases, the government ends up paying higher price for a product, which is often of poor quality, as seen in the following example:

2.14.1 As per an earlier policy of the state government of Rajasthan (during mid-1980s), a certain quota of barbed wire was to be procured from local manufacturers. This led to the formation of a 'cartel' under the name of Rajasthan Barbed-wire Manufacturers Association. The association increased the price of barbed wires and implicitly allocated the requirement of barbed wire among the members by way of an agreement. This led to poor quality of barbed wire being produced and the Government due to its policy had to buy barbed wires at a higher price. Local manufacturers depended solely on Government's patronage rendering them uncompetitive. Over time, the Government

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<sup>21</sup> Dayal, P and Agarwal, M (2006), "State Government Policies and Competition", Towards a functional competition policy for India, Ed. Pradeep S Mehta, CUTS International & Academic Foundation.

<sup>22</sup> Ibid.

changed its procurement policy, leading to closure of local units and the association broke up.

2.14.2. Excise Policy: Another sector in India, where cartelisation has been encouraged due to faulty government policy is the distribution and marketing of liquor. In certain states, liquor groups spread over large geographical areas are auctioned; competition is thereby restricted to a small number of players, who have the muscle power and the money to run the business. Thus over a period of time, it leads to cartelisation which in turn leads to loss of government revenue. Some state governments have sought to tackle this collusive practice by allotting liquor trade license through a lottery system. This has helped in keeping a check on collusive practices. The licence system, where shops are allotted by lottery has been found to be successful in states such as Madhya Pradesh, Uttar Pradesh, Maharashtra, West Bengal, Andhra Pradesh, Karnataka, and Kerala.<sup>23</sup>

2.14.3. Bid rigging in Construction/Works: Another area of government procurement where there are cases of collusion is construction contracts. All the projects are generally taken up by government agencies through the medium of contractors. Except in some cases, the works are awarded through a system of (open and widely publicised) competitive bidding, which may be international or domestic. Under the process of competitive bidding, notices are published for inviting tenders and depending on the complexity and quantum of the projects, bids are received. Then the bids are opened in front of the bidders, and the lowest bidder is determined through a transparent system and is awarded the work. However, there have been instances where contractors collude together and place the bid. As a result of this, competition is subverted and the bidding system fails to produce efficient results. Additionally, there is now a trend towards awarding contracts in bigger packages, which leads to the exclusion of small contractors from bidding for the contract, thus restricting competition and providing large contractors with incentives to collude.”<sup>24</sup>

2.14.4 The extent of the problem of procurement policies could be understood from the observations made by the Parliamentary Standing Committee on Railways in the year 2004, “The procurement of concrete sleepers has become a very sensitive matter, because a lot of unscrupulous existing manufacturers have formed a cartel to secure orders by unfair

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<sup>23</sup> Supra Note. 21

<sup>24</sup> *Ibid.*

means or tampering with procedure and simultaneously keeping the new competitors out of the race. The Committee is constrained to notice that there exists a regional imbalance in the setting up of concrete sleeper manufacturing units. They also express their unhappiness that new entrants are not encouraged, which ultimately strengthen the cartel of old/existing manufacturers. In procuring 160 lakhs broad gauge sleepers, the Railways awarded contracts to the existing 71 firms and ignored the 24 new firms entirely". The above instances show that Government Policies if implemented in a proper manner can reduce the incentives for forming a cartel.<sup>25</sup>

2.14.5 Interestingly, the South Central Railways in India, in their tender notices for procurement of material, clearly mention in the evaluation criteria, that whenever, all or most of the approved firms quote equal rates and cartel formation is suspected, the Railways reserve the right to place order on one or more firms with exclusion of the rest without giving any reason. In addition to that, firms who quote in a cartel are warned that their names are likely to be deleted from list of approved sources.

2.14.6 CCI's recent initiative has been to draw the attention of the Reserve Bank of India to distortions in banking due to the limited presence of the private sector, high entry barriers for foreign banks and cartelisation among banks in setting interest rates. CCI pointed out that during last 10 years, RBI has given license to only two private banks – Yes Bank and Kotak Mahindra Bank. Strict licensing norms for branches and automated teller machines and restrictions on locations have created high entry barriers. Further, it hinted at banks working as a cartel under the Indian Bank's Association banner in setting interest rates for savings accounts.

2.14.7 This particular study is not undertaking analysis of any particular policy of the government and whether the same facilitate cartels. However, it is highlighting examples of government policies facilitating cartels and that there is need for CCI to carry forward this work and do a more comprehensive analysis of various policies/practices at State Levels. For example, the policy of giving preference to local units has been dispensed by some states over the period of time. Thus it would be beneficial to analyse the impact, such as on quality of products, production level, competitiveness of local units, etc.

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<sup>25</sup> Supra Note. 21

2.15. We have a problem looming at hand, which is how to detect cartels and where are they are most likely to form and operate. This has been worsened with the advent of globalisation, economic transactions have moved on from the phase of ink-paper and gone digital, beyond the physical boundaries of a nation state, where various stakeholders in the market can produce, sell and buy goods from stakeholders of different countries. The common consumer is subject to higher degree of abuse, since firms have also become more powerful, better equipped and with super-sophisticated tools at hand to enforce their cartel agreements. Anti-cartel enforcement and the protection of consumer interest become extremely difficult when they are no longer the sole responsibility of a national law.

2.16. In India too, cartels have been alleged in various sectors, namely cement (Please see Box 2), steel, tyres, trucking (Please see Box 3), family planning device (Copper T) etc. India is also believed to be a victim of overseas cartels in soda ash, bulk vitamins (Please see Box 4), petrol etc. All these tend to raise the price or reduce the choice for consumers. Several of these products are key intermediates. Therefore, most often, it is the business houses that are affected by cartels as the cost of procuring inputs is enhanced or choice is restricted, denting their margins.<sup>26</sup> This implies that affected business houses or their associations could be useful source to detect instances of cartelization.

2.17. In one such case in early 2000, the Builders Association of India (BAI) had sought government's intervention to initiate action against cement companies under the MRTP Act for 'unfair trade practices' resorted to by the industry. Consequently, the MRTP Commission initiated a *suo moto* inquiry into the complaint of the BAI. Two points emerge from this case: One, information received from affected parties could be a good source to trigger investigation for alleged cartelization. Secondly, the fact that BAI approached the government and not the MRTP Commission indicates poor awareness about the powers given to the MRTP Commission or a lack of confidence in the MRTPC to take action in such matters. Hence it is imperative that CCI creates awareness among business houses and other stakeholders about cartels through its advocacy function and tap affected business houses for getting information about cartels in an industry.

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<sup>26</sup> Bhatia, G.R. "Combating Cartels in the markets: Issues & Challenges", Competition Commission of India (CCI)

2.18. “CCI commissioned a study, which was undertaken by the School of International Studies, Jawaharlal Nehru University to assess the state of competition in the cement industry. The study points out three specific aspects of the cement industry:

- The cement market appears to be split among companies. However, the study points out that there is more need of evidence required to show if the market sharing agreement was reached by a tacit agreement between companies.
- While margins for companies varied significantly, sale price was more or less the same. This clearly pointed to price fixation by the companies, either by covert or overt agreements.
- The study also points out the huge difference between retails prices and ex-factory price was unjustified, again indicating to price fixation by companies.”<sup>27</sup>

### **3. Investigating Cartels**

3.1. Due to the inherently secretive nature of cartels, the evidence that can be collected to prove a cartel agreement is largely circumstantial. It may include evidence of parallel pricing, for example, plus evidence of meetings or communications between competitors, but its difficult to detect direct evidence of an agreement to form a cartel. As mentioned earlier, in most of the cases, it is legally possible to sustain a cartel prosecution without evidence of direct agreement, but it is risky to try to do so. The case descriptions also include a few in which the circumstantial evidence was insufficient. The cartel prosecutor always strives for more direct evidence, but, as was noted above, such evidence is difficult to obtain, and doing so requires special techniques/tools, such as dawn raids, and leniency provisions, which shall be discussed in more detail subsequently.

3.2. Generally, many cartel investigations have been started once the competition authorities received a private notification or complaints about the existence of such alliances. Despite having top-most priority, cartel prosecution is still only one of the many tasks, unfortunately the most difficult one though, performed by the authorities. Limited

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<sup>27</sup> Iyer, P (March, 07) “Patently Cartelised: CCI – backed study”, New Delhi, Financial Express



resources with lack of information/data and the inherently secretive nature of cartels are the main reasons undermining the authorities' efforts to watch out for them, though it is in the authorities' mandate to monitor the market. This is very much the case in India and Brazil, and many other developing-country jurisdictions.

3.3. In the case of India, as will be seen in subsequent parts, most of cartel prosecution activities under the MRTP Act have been triggered either by anonymous complaints or on the basis of *suo moto* action taken by the MRTPC. The commission then used its power to pursue the investigation and sometimes even expand the ambit of the case. Anonymous complaint or private information, though often denounced by the defendants as unreliable, in the case of a country like India, deserve worthy attention.

3.4. Similarly, for example, in the case of Brazil, investigations can be triggered either by a private notification or by the authorities<sup>28</sup> themselves (although it seldom happens), due to their general obligation to monitor the markets. The investigations follow some pre-set procedures, but generally there is an interested party supplying evidence against the accused parties. The investigative powers are almost unlimited – except for what is related to the due process of law and they include deposition of witnesses, documents and others.

3.5. The US, having a more complex system of antitrust litigation and prosecution, has two avenues: civil action and criminal procedure. The Antitrust Division of the DOJ is the delegated authority to enforce the criminal provisions of the federal antitrust laws. The DOJ can also enforce the federal antitrust laws through civil means. The DOJ, which often brings almost all cartel cases in the federal courts, is better intentioned. The Federal Trade Commission (FTC) operates primarily through an administrative process.<sup>29</sup> However, even the DOJ investigation is typically generated by either a private complaint, a revelation in the media, or by an informant seeking protection under the leniency program.<sup>30</sup>

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<sup>28</sup> In Brazil, there is really only one agency (Administrative Council for Economic Defence – CADE), which is an independent and the ultimate decision-making agency. The investigation itself is, however, done by the Secretariat of Economic Law (SDE), of Ministry of Justice, which, at the end of any investigation, can either dismiss the case, with an automatic (*ex-officio*) appeal to CADE or send the case to CADE with a recommendation for punishment. There is also the Secretariat of Economic Assistance (SEAE), of Ministry of Finance, in charge or supplying economic expertise and which, at some occasions, has triggered cases.

<sup>29</sup> See *Alza Corp. v. Mylan Labs, Inc.*, 310 F. Supp. 2d 610 (D. Vt. 2004)

<sup>30</sup> *Supra* note 20

### ***3.6. Dawn raids***

3.6.1. For most countries there is one most effective tool available to the cartel prosecutor – the “dawn raid”,<sup>31</sup> or unannounced visit to the offices of suspected cartel operators for the purpose of seizing documentary or electronic evidence of a cartel agreement. Dawn raids are not too difficult to undertake, and can generally bring good results, especially in the case the alleged companies refuse to cooperate. More and more competition authorities across countries are employing the dawn raid tool to good effect. It is probably safe to say that an anti-cartel programme cannot be truly effective without the use of this evidence-gathering tool.

3.6.2. In today’s world, with advancement in technology, information relating to cartels can be stored electronically. It is required that the information to be retrieved, the competition authorities must have staff, or access to individuals, with the necessary skills to achieve this. This is why, in some jurisdictions, powers exist to listen to telephone conversations; to maintain surveillance, for example, of office premises to monitor who is attending meetings there; and even to require people to attend meetings of a cartel and to report back to the competition authority of what had taken place.<sup>32</sup> Finally, in order for a dawn raid to be effective, the fact that a competition authority is conducting an investigation must be held in strictest confidence even within the authority. That is, the public must not be privy to that fact and the suspected members of a cartel must have no prior knowledge that they are under investigation. This is a tricky point, since the procedures in most countries require that the competition authorities seek authorisation from courts in order to conduct dawn raids, once they think they have sufficient conclusive evidence of the violation. The longer and more complicated the process, the more players it involves, and there is a higher possibility that information might leak.

3.6.3. In the US, the tool closest to this is the use of search warrants in antitrust investigations. Unlike a subpoena - a command to a witness to produce documents issued by the grand jury, a search warrant typically does not provide the recipient with advance notice. It gives the law enforcement officers the benefit of surprise and consequently creates a much more volatile situation. In addition to search warrants issued by a court, several administrative agencies have the power to inspect the records of government

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<sup>31</sup> This term is most often used by the European Commission of its surprise early morning investigations

<sup>32</sup> On the powers to this effect in UK law, see Whish (2003), *Competition Law*, 5<sup>th</sup> edition, Oxford University Press, pp. 392-393.

contractors or participants in government programmes.<sup>33</sup> Besides, the DOJ can make use of informants, consensual monitoring/wiretap authority, and hidden microphones and video cameras.

3.6.4. The Civil Procedure Code of Brazil empowers all investigative powers as enjoyed by a judge on the relevant authorities. The Law gives the investigative authorities the power of search and copy whatever they feel is important, provided 24 hours notice is given to the relevant party. However, in certain circumstances, the law allows the authorities the power to search without giving the prior notice, if they have a judicial order to support their actions.<sup>34</sup>

3.6.5. In 2003, SDE undertook its first dawn raid, descending on the premises of contractor Sindipedras, which was quite successful. SDE has been investigating the members of a civil contractors' association on suspicion of bid rigging for three months. The raid was mounted on 16 July 2003 in connection with the alleged cartel and was authorised by a Federal Judge under the rules introduced in 2000, with the support of the Solicitor-General. According to local newspapers, the raid came as a total surprise. Five federal policemen accompanied the SDE and court officials and seized notebooks, tapes and computer equipment. A formal investigation into the bid rigging has been opened by SDE. According to the authorities, the cartel was in operation for more than two years, resulting in artificially high prices in the civil construction sector and affecting public works in São Paulo.

3.6.6. In India, the tool most close to dawn raids is visible in the MRTP Act under section 12 (5). If the Commission has grounds to believe that any books or papers, that are relevant to an inquiry and need to be produced in such inquiry, the section empowers the Commission to authorise any of its officer to undertake entry, search and seizure to recover such documents. However, the same powers have not been granted to the CCI, under the Competition Act. Instead, section 38 of the Competition Act, empowers the Commission to direct any person to produce before the Director General such books or accounts if in the opinion of the Commission such a trade has caused or is likely to cause an appreciable adverse effect on competition in the relevant market in India.

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<sup>33</sup> Supra note 20

<sup>34</sup> Grinberg, M (2006), "Getting the Deal Through – Cartel Regulation 2006", Global Competition Review

3.6.7. Absence of powers to search and seize could be a handicap in CCI undertaking investigation of cartel activities, especially when it is difficult to unearth documentary evidence. Be that as it may, the Competition Act has leniency provisions, which could be designed and implemented in a manner to make it an effective tool for detecting cartelisation.

### ***3.7. Leniency & Whistleblower Protection***

3.7.1. Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency. This is a definition, which has been used by the International Competition Network in its 2006 report on “Drafting and Implementing an Effective Leniency Program”.<sup>35</sup> In addition, agency decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. The term ‘leniency’, thus, could be used to refer to total immunity and ‘lenient treatment’, which means less than full immunity.<sup>36</sup>

3.7.2. The terms ‘immunity’, ‘leniency’ and ‘amnesty’ are used in various jurisdictions to describe partial or total exoneration from penalties but are not synonymous in all jurisdictions. A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process.<sup>37</sup>

3.7.3. Various jurisdictions have developed programmes that offer leniency, bearing several key objectives in mind. First and foremost is to be more proactive in prosecution – making conviction more likely by encouraging violators to confess and implicate their co-conspirators with first-hand, direct “insider” evidence that provides proof of conduct, which the parties want to conceal. Leniency programmes are also aimed at enhancing the likelihood of detection – promoting the discovery of conspiracies that would otherwise go undetected. The third goal of such programmes is desistance, i.e. destabilising existing cartels. The final rationale for adopting such programmes lies in its deterrence effect, which is to make cartels less profitable and hence prematurely stop the formation of cartel arrangements.

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<sup>35</sup> ICN (2006), “Drafting and Implementing an Effective Leniency Programme”, Anti-Cartel Enforcement Manual, Cartel Working Group – Subgroup 2: Enforcement Techniques, p.2

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

3.7.4. The programmes elicit confessions, direct evidence about other participants and provides leads that investigators can collate as evidence. The evidence can be obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide the same are promised lower fines, shorter sentences, less restrictive orders, or even complete leniency.<sup>38</sup>

3.7.5. Competition authorities across the globe are persuading whistleblowers in approaching them to give information about companies coming together and forming a cartel. However, there are certain conditions attached, for example the whistleblower must not be the ringleader of the cartel and he would be cooperating with competition authority for undertaking the investigation against such companies. Once the conditions are fulfilled to the satisfaction of the competition authorities, complete immunity is available from any penalty that might have been imposed, if the competition authorities discovered the relevant cartel before.<sup>39</sup>

3.7.6. In short, there are two main dimensions to any leniency programme, which should be carefully devised. First is the criteria for being awarded amnesty, including the stage of the investigative process at which leniency is possible, the maximum number of firms that can apply for leniency, and the eligibility criteria for leniency. Second is the extent of penalties that are waived when amnesty is awarded to any firm. There is no single formula for all these details and different jurisdictions, which have adopted a leniency programme so far, have been very detailed about the different leniency treatment that can be given to different parties.

3.7.7. In Brazil, in order to claim leniency, the application for delivery of information or any document that shows the evidence of a cartel, must be made by only one member of the expected cartel, there is no provision for the existence of second applicant. The information or document provided, must not been known by the authorities, if it is known, then one cannot claim for leniency. Same in the case for claiming immunity, which may be total, if at the time of giving the relevant information, the authorities were not aware of the same. If they are aware, then total immunity cannot be claimed, however, fines may be reduced depending on the effectiveness of co-operation and the good faith of

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<sup>38</sup> *Ibid.*

<sup>39</sup> Whish R. (2006), "Control of Cartels and Other Anti-competitive Agreements", Professor of Law, King's College London

the applicant. Thus there is no time as to when one should approach the authorities to claim leniency or immunity. What is important to note, is that the authorities should not have prior knowledge of the cartel.<sup>40</sup>

3.7.8. Under the US system, the DOJ's Antitrust Division offers leniency to both the corporate (known as 'amnesty programme' and the individual (known as 'leniency policy'). The corporate can be granted amnesty before the investigation begins, provided that the corporation is not the ring leader of the cartel and is the first to give vital information about the cartel activity. Amnesty to a corporate can also be granted, after an investigation has begun provided that it was the first to come forward and compensates the injured parties, where possible. In addition to that, the corporate directors, officers and employees are automatically granted amnesty, provided the corporation is granted.<sup>41</sup>

3.7.8.1 Leniency to individual is granted on the condition that when the individual who is not the ringleader of the cartel activity discloses vital information, the DOJ's Antitrust Division was not aware of the alleged activity and had no prior information about the same.

3.7.8.2 Leniency programmes in the US are quite successful. From 1993 to 2004, the DOJ automatically granted 100 per cent fine discounts and immunised all corporate officers for the first qualifying leniency applicants; second applicants received substantial discounts of 70 per cent to 80 per cent. In the late 1990s, the DOJ was receiving about 25 amnesty applications per year. Efforts undertaken by the DOJ to publicise that policy significantly contributed to the increased prosecution of corporations and responsible managers. The incentives for companies engaged in an illegal cartel to come forward and blow the whistle are now a major factor threatening existing conspiracies. The rewards for amnesty applicants to cooperate with the government and private parties increased in 2004. They now include damages in civil cases being trebled, and joint and several liabilities eliminated. These provisions are subject to a sunset provision, which will require their review by 2009.<sup>42</sup>

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<sup>40</sup> Grinberg, M. (2007), "Cartel: A View from Brazil", Paper done for this project

<sup>41</sup> Koob.C and Antoine, O (2006), "Getting the Deal Through – Cartel Regulation 2006", Global Competition Review

<sup>42</sup> Supra note 20

3.7.9. The Competition Act, 2002 of India has been empowered with a leniency provision. The leniency provision, as per existing provisions in the Act, provides specific relief to the first party who ‘spills the beans’ in cases of cartels and before the beginning of the investigation.

3.7.10. The party desirous to take shelter under the leniency provision has to proceed carefully as conditions precedents to avail of the concessions are:

- That full and true disclosure is made before initiation of investigation/enquiry
- The disclosure is vital in busting the cartel
- That the benefit of lesser penalty is limited to the party who made the disclosure first; and
- The benefit can be rescinded if there is non-compliance of conditions subject to which lesser penalty was imposed.

3.7.11. The Competition (Amendment) Bill, 2006, proposes that all the parties who wish to cooperate with an inquiry can do right until the time the Director General (DG) submits his report to the CCI. The amendment therefore proposes not to limit leniency to only the first party. Moreover, allowing leniency during investigations is considered to be an effective way to encourage other cartel members to come forward and cooperate with the investigations.<sup>43</sup>

3.7.12. It is worthy, in this regard, to mention the coordination game faced by cartel members in face of a leniency programme. Given a choice, each yet-to-be-detected cartel members would surely contemplate about whether or not to apply for leniency. In this case, there can be two solutions: the “No Report” solution – in which firms do not apply for leniency; and the “Report” solution – in which firms race to report to the competition authority. Besides, cartelised firms also face a ‘prisoner’s dilemma’ which might tilt the balance in favour of the “No Report” solution. Applying for leniency to the competition agency poses the risk of not getting the full leniency a firm wants to have, while being punished by other cartel members (for cheating) in case the cartel persists; whereas not applying poses the risk of the cartel getting prosecuted and being liable to heavy penalties.

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<sup>43</sup> Mehta, P and Mehta, U (2006), “The Competition (Amendment) Bill, 2006 – What needs to be done”, Bill Blowup, No. 2/2006, CUTS International

The dynamics of the waiting/racing game then is that each firm does not report in the hope that all other cartel members will do the same; and if a firm believes that it is imminent that another firm will report, it races to report. The policy challenge of an effective leniency programme then, is to induce firms to stop waiting and start racing.<sup>44</sup>

3.7.13. The Competition (Amendment) Bill, 2006 of India has been examined by the Parliamentary Standing Committee on Finance, which has observed that leniency provision should be structured in a way that each cartel member should be in a hurry to come forward with necessary evidence before others do so. The committee has accordingly recommended that complete amnesty should be granted to the first firm that gives enough evidence to commence an investigation and reduced penalties for those giving useful evidence subsequently, provided they continue to collaborate in the investigations against remaining cartelists.<sup>45</sup>

3.7.14. However, without strong penalties and a vigorous enforcement programme by the agency, there is no incentive for cartel participants to self report their breach of competition laws. The corollary being that no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and prosecution. There appears to be a general consensus between most agencies that there are essentially three prerequisites to successfully implement a leniency programme:<sup>46</sup>

3.7.14.1. *High risk of detection.* Agencies must adopt a strong enforcement programme to fight cartels. Agencies have to commit to vigorously investigating cartels and ensuring action establishing the infringement is taken. Those participating in cartels must perceive that there is a real risk of detection, in the absence of a leniency application, and that subsequent enforcement action will necessarily follow, in order to encourage them to come forward before they are caught. In addition it is also effective if a leniency policy can create a race between the company and its employee or, indeed, between members of the cartel to be “first in the door” i.e. to be the first in disclosing vital information regarding the cartel activity.

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<sup>44</sup> Harrington J., “Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion”, Presentation at the CPRC/COE Symposium on Towards an Effective Implementation of a New Competition Policy

<sup>45</sup> Ministry of Company Affairs (2006-07), “Competition (Amendment) Bill, 2006”, Forty Fourth Report, Standing Committee on Finance, Lok Sabha Secretariat

<sup>46</sup> Supra note 35, p.3



3.7.14.2. *Credible threat of sanctions:* The sanctions imposed on cartel participants must be significant. If sanctions are inadequate, cartel participants will not come forward since the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants should not be greater than the cost of getting caught and the likelihood of getting caught must be high. The main purpose of sanctions is the deterrence to form cartels. The decision to form or join a cartel is primarily a financial one. An effective deterrent, is therefore the one that takes away the financial gains that otherwise would accrue to the cartel members. Sanctions also provide an incentive to the cartel participants to cheat with the other cartel members and provide information to the investigators. Sanctions take an approach, which is called the “carrot and stick” approach. The cartel investigation requires that the “stick” be the possible sanction and it should be sufficiently severe to give effect to the “carrot” i.e. the opportunity to avoid the sanction by co-operating. Thus, for both deterrence and co-operation purposes the potential sanction must be severe if it has to be effective.

3.7.14.3. *Transparency and certainty:* There must also be transparency and certainty in the operation of a leniency programme. Agencies need to build up the trust of applicants and their legal representatives by applying a consistent application of the programme. An applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not.

3.7.15. Finally, a couple of other measures could be used to complement the adoption and implementation of an effective leniency programme:

3.7.15.1. The competition authority should manage the pre-investigation phase (during which they have some suspicion about the existence of a cartel but have not launched an investigation) to induce cartel members to come forward for leniency. This is to tackle the racing/waiting game mentioned above, since once investigation has been started; incentives to come forward for leniency would be weak.

3.7.15.2. Programmes should be developed to encourage buyers and uninvolved company employees to report should be developed. The result of an empirical survey of price-fixing conspiracies in the US during 1963-1972 showed that, out of forty nine cases examined, ten were detected by a complaint from a competitor, seven were detected by complaint from a customer, three by current or former employees, and one by anonymous

informant; a total of 42.8 percent.<sup>47</sup> This is, therefore, not only a rich source of information, but also it also helps to reduce the costs of implementing a leniency programme.

3.7.15.3. In addition to collecting and disseminating information about cartels, some screening could be done, for instance, for markets with characteristics which are prone to cartels, so that the authority has a clear strategy where to target its leniency programme at. The authority should also screen government purchase for collusion and require price data from past offenders and screen them for any further collusion. The relevant data regarding government purchase could be derived from various government procurement agencies or the CCI could request the Comptroller and Auditor General of India (CAG) for test checks of large procurement orders placed by government departments or undertakings.

## **4. Fines**

4.1. Competition experts agree that the most severe sanctions available under a competition law should be reserved for cartel operators. The primary purpose of sanctions in the cartel context acts as a deterrent. If sanctions, which are usually in the form of fines, are not significant, they become merely a cost of doing business for the cartel. In that case, the cartel operators can be confident of profiting significantly from their activity even if they are caught and sanctioned. A secondary purpose of sanctions against cartels is to provide an incentive for members of a cartel to detect and to cooperate with an investigation in order to avoid punishment.

4.2. Wide variations in sanctions imposed by countries have been observed in their anti-cartel enforcement activities. In a few cases, very large fines – as high as many billion dollars – were reported. In US and Brazil, the authorities are empowered by the relevant Act to impose criminal sanctions too. The Antitrust Criminal Penalty Enhancement and Reform Act, 2004 increased the maximum criminal fine for companies violating the Sherman Act from \$10 million to \$100 million, making antitrust fines one of the most severe under US criminal laws. There have been instances in both the countries, where top executives of a corporation have received a prison sentence for being a part of a cartel

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<sup>47</sup> Hay and Kelley (1974), “An Empirical Survey of Price-Fixing Conspiracies”, Journal of Laws and Economics, University of Chicago Press

activity. Convicted executives or individuals, because they are felons under the US Laws, may lose certain privileges of US citizenship, such as right to vote. In the US, in addition to large fines and possible imprisonment, cartel participants may be subjected to treble damages by private actions. Section 4 of the Clayton Act provides that any person, whether an individual, business entity, or government, who has been injured in its “business or property” by reason of an antitrust violation may sue to recover treble damages, costs of that suit, and attorney’s fees.<sup>48</sup> While it is more typical for private actions to be filed after the government wins (and in many cases simply after it files a complaint), there are also instances of cartel cases being prosecuted privately or by various States before the federal government gets involved, or even without the government ever getting involved. About one-third of all major private cartel suits are not follow-on suits.<sup>49</sup>

4.3. The Competition Act makes the participating enterprises liable to penalty. The law provides that the Commission shall impose upon each enterprise, which is a party to the cartel, a penalty equivalent to three times of the amount of profits made out of such agreements or ten per cent of the average turnover of the cartel for the last three preceding financial years, whichever is higher.<sup>50</sup> However, it remains unclear, according to the wording of the Competition Act, how the CCI would be calculating the three preceding financial years. Say, if a cartel is in operation from 1995-2000 and it gets detected in 2003 and prosecuted subsequently, then in this case what period would be considered to determine the penalty? In the case of Brazil, fine is imposed for the year immediately preceding the beginning of investigations. In the case of the European Union, under its 1998 Fining Guidelines, fine is imposed based on the financial year immediately before the adoption of the decision imposing the fine.<sup>51</sup>

## **5. Cartels under Indian Competition Law**

### ***5.1. MRTP Act 1969 - Overview***

5.1.1. The MRTP Act, has its genesis in the Directive Principle of State Policy, embodied in the Constitution of India. It was enacted to:

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<sup>48</sup> 15 U.S.C. § 15.

<sup>49</sup> Supra note 20

<sup>50</sup> Section 27(b) of the Competition Act 2002 on “Orders by Commission after inquiry into agreements or abuse of dominant position”

<sup>51</sup> Article 15 (2) of Regulation No 17; now article 23 (2) of Regulation No 1/2003.

- prevent concentration of economic power to the common detriment,
- provide for control of monopolies,
- prohibit monopolistic and restrictive trade practices, and,
- prohibit unfair trade practices.

5.1.2. The MRTP Act empowered the Central Government to set up an authority, called the MRTPC, which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on *suo moto* basis.<sup>52</sup>

5.1.3. Complaints regarding restrictive trade practices from affected parties is required to be referred to the DG (IR) for conducting preliminary investigation as per section 11 and 36C of the MRTP Act. The DG (IR), after completion of the preliminary investigation and as a result of its findings, submits at application to the MRTPC for an enquiry.

5.1.4. Restrictive trade practices, are generally those practices that have an effect on prevention, distortion and restriction of competition. For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice.

5.1.5. One example of a RTP is a cartel. As held in *Union of India & Others .v. Hindustan Development Corporation*,<sup>53</sup> “Cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity”. Under the MRTP Act, cartel is categorised as an RTP, which has been defined as “a trade practice which has or may have the effect of preventing, distorting or restricting competition”, Section 2(o) of the MRTP Act.

5.1.6. Various categories of agreements enumerated under section 33(1) of the MRTP Act, including agreement, which restrict persons from whom certain goods can be purchased,

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<sup>52</sup> Section 10 and 37 of the MRTP Act, 1969

<sup>53</sup> 1994 CTJ 270 (SC) (MRTP)

have been recognised as per se restrictive. Cartels, fall under clause (d) of the section, which states that “any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers, shall be deemed for the purpose of this Act, to be an agreement relating to restrictive trade practices and shall be subjected to registration as under Section 35 of the MRTP Act”. However, such agreements are not per se void or illegal. The MRTPC would still require to make an enquiry under Section 37 of the MRTP Act, as to whether the agreements are prejudicial to public interest or not. Until the time that the MRTPC declares the agreement as prejudicial to public interest, the parties may continue to conduct trade and business as usual.

5.1.7. Under the MRTP Act, the only power vested with the MRTPC with respect to restrictive trade practices such as cartels, is to issue a ‘cease and desist order’ or to permit the parties to a collusive agreement to modify the agreement so that it is no longer prejudicial to public interest. As already mentioned above, parties, until they are instructed by the MRTPC, can continue with the restrictive trade practice. At the most when a party is called and a restrictive trade practice is established, it may be directed to discontinue with the practice and only if it continues with the practice after the direction, would it be punishable for contravening an order made under Section 31 and 37 as provided in Section 50 of the MRTP Act. The MRTP Act grants MRTP Commission the power to search and seize vital information necessary for proving a cartel. However, the act did not grant leniency provision, which the Competition Act now empowers the CCI with.

5.1.8. Under the MRTP Act, even when the facts, as discovered during the inquiry, establish the existence of a restrictive trade practice, the onus is on the accused to show that the restriction is not against public interest or that the restriction is not unreasonable.

5.1.9. Looking at the cases of cartels, no matter how malicious the offences may be in the eye of public interest, no matter how serious the detriment caused may be, the MRTPC is without any weapon to grant justice to the aggrieved parties. The consequences are that the respondent, in case a complaint is lodged with respect to such breach of law or the MRTPC inquires *suo moto*, can still enjoy the fruits of their illegal acts, which may amount to innumerable amount of economic rent and yet no penalty can be levied because the MRTPC has not been empowered to impose penalties or spell an order of imprisonment to the offenders, what it could do is just pass a cease and desist order.

5.1.10. The following section deals with the analysis of some cartel cases under the MRTP Act and highlights the drawbacks.

***5.2. Select cases dealt under the MRTP Act, 1969 and the weaknesses that emerges***

5.2.1 Out of the 63 cases, that were analysed we found 36 cases dealing with allegations of price fixing, bid rigging or collusive tendering, 13 cases dealing with collective boycott, and 14 cases dealing with collective resale price maintenance. In several cases, cease-desist order was passed by the MRTPC.

5.2.2. A striking feature of these cases is that many are clustered within a few economic sectors or industries, as given in Box 1. Construction materials, such as cement, for example, seem to be fertile ground for cartelists. The reason for this high incidence is fairly obvious – cement, as well as most other construction materials, is a homogenous product. This homogeneity makes it easier for traders to agree on the terms of a cartel agreement, as well as to monitor the same. The same reason also seems to apply for other cartel-prone sectors, such as trucking, chemicals and newspapers, where price information is unfortunately quite readily available to all interested parties.

**Box 1.**

<b>Manufacturing</b>	<b>Services</b>
Chemical – 4 Cement - 4 Tyre - 3 Misc. (Manufacturing/Services) (Oil Mills, Power Cables, Foils, Ice Creams, Pictures, Batteries, Banks, Newspapers, etc)	Trucking – 5

5.2.3. In India as well as elsewhere, cartels are also found to be most common in markets for intermediate products – vitamins, cement, copper tubes, etc, that are processed and form input costs along several stages of the supply chain, with fairly sophisticated

customers. Thus a copper tube cartel may result in a distributor being overcharged, which is then passed on in higher prices from the distributor to a fabricator, the fabricator to the boilermaker, then onto the builder, and finally the householder. There is a fully rationalised reason behind this. The passing-on of costs makes it difficult for even a most vigilant competition watchdog to follow and work out the price increase, price spread, profit margin, etc in such markets/industries. Any possible claimant would be required to go through expensive accounting and competition analysis to determine the extent of the overcharge, and to examine and defend counter-claims that they partially or fully passed on the overcharge to their customers. The users of the end products, of course, would not have a clue about why the price is going so high. No doubt the lower possibility of getting detected and punished, the higher chance cartelists are rushing to make their rents. Besides, having 'fairly sophisticated customers' would, arguably, enable cartelists to 'sham' the transactions with differentiations even though prices remain the same.

5.2.4. In the comparison made under this project with facts obtained from Brazil regarding those sectors most prone to cartelisation, similar results were found. From 1999 to 2006, the Brazilian competition authorities had 47 convictions, mostly for price fixing. Of the 47 cases, 4 are in the industrial sector (sheet steel, naval construction, pharmaceuticals and stones for civil construction), 8 are in the commercial sector (gas stations and domestic gas distribution, respectively 6 and 2) and 35 refer to services. Among the latter, 26 are in the health sector (associations of hospitals, doctors and others), travel agents, accountants, air transport, urban transport, cable television, newspapers and driving education. Services are considered by the competition watchdogs here as the first and easiest choice, because professional associations tended to fix minimal prices, claiming to act on behalf of their members against the higher power of health insurance companies. Of course and as in any other jurisdictions, oligopolies in concentrated markets dealing with homogeneous products always claim a special dispensation by the authority as well. In addition, it is also mentioned that, cartelisation was partly due to the fact that these sectors had a past of very high inflation and a tradition of (obviously mistaken and misleading) price control.<sup>54</sup>

5.2.5. A word of caution is in order, though the same has been mentioned in brief in the preceding parts. It is axiomatic that mere simultaneous movement of prices, especially for homogeneous products like construction materials, is not by itself sufficient to prove an

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<sup>54</sup> Supra note 40

unlawful agreement. Such price activity could be equally consistent with active competition. In almost all countries there must be more evidence than just parallel pricing to support a cartel prosecution. This set of evidence is mentioned in the preceding part as “parallelism plus” factors. Indeed, in some countries investigations of possible price fixing in this respect have failed because such factors were lacking.

5.2.6. There have been instances where the DG(IR) and the MRTPC have tried to investigate cartels on suspicion of price rises or submission of collusive tenders, in various industries such as tyre industry, sugar mills, yarn producers, plywood manufacturers, cement manufacturers, etc. However, they were not successful to prove the existence of a cartel as because the evidence collected did not go beyond price parallelism and hence they were not able to provide direct or indirect evidence such as an agreement or meeting of minds to prove the existence of a cartel.

5.2.7. In the US, the legality of tacit (as opposed to overt) agreements to restrict output and charge a higher than competitive price was raised long back in an ancient case in 1939, *Interstate Circuit, Inc. vs. United States*. In the case, the court had to infer unlawful collusion since there was no direct (or what is called “smoking gun”) evidence of collusion. In such instances, the burden of proof that a conspiracy did not exist rests on the defendants. The court accepted the Interstate Circuit opinion that collusion may be inferred from circumstantial evidence but warned against going too far. In a famous phrase, the US court, in this case, argued that “conscious parallelism has not yet read conspiracy out of the Sherman Act entirely”. In short, parallel business behaviour by itself does not constitute a Sherman Act offence.

#### 5.2.8. Case 1: Essential factors to constitute a Cartel<sup>55</sup>

5.2.8.1. **Brief details:** In *DG (IR) vs. Modi Alkali and Chemicals Ltd*<sup>56</sup>, an anonymous complaint was received alleging that some of the leading undertakings in Northern India have formed a cartel for hiking the prices of their products. The prices of chlorine gas and hydrochloric acid had an increase of 277% and 200% within six and four months respectively in the year 1992. The same were contended to be a result of an agreement

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<sup>55</sup> Detailed information on market characteristics of the MRTP cases discussed in this section is not available, due to the inadequate recording system employed then, as well as the absence of an established mechanism to monitor old cases for future reference. This is a point, which should be noted during the design and establishment of the new competition regime in India.

<sup>56</sup> 2002, CTJ 459 (MRTP)



amongst the parties to create artificial scarcity, in order to raise prices of their products. Since the prices of raw materials namely sodium chloride and electricity had more or less remained the same, there was stated to be a fictitious crisis created to take advantage of the market and increase the prices of their products.

5.2.8.2. **Investigation:** The MRTPC directed the DG (IR) to carry out the preliminary investigation. The DG submitted its preliminary investigation report (PIR) that no case of cartel has been found and recommended that no action should be taken. However, the MRTPC after considering the PIR was of the view that the case needed enquiry and directed the issuance of a Notice of Enquiry. The respondents raised an objection, on the ground that the notice of enquiry lacked a concise statement of material fact on which the notice was based, not meriting to cognisance based upon an anonymous complaint. The DG (IR) contended that the present notice of enquiry had been issued under Section 10 (a) (iv) of the MRTP Act, which empowers the MRTPC to inquire into restrictive trade practice upon its own knowledge or on a complaint or information. Information can be derived from an invalid/irregular complaint or from any anonymous letter as held by the Calcutta High Court in the case of *ITC Limited vs. MRTP Commission & Ors. (1996) 46 Comp. Cas. 619*. Thus it was held that objection in regard to anonymous complaint is not valid.

5.2.8.3 The Commission then looked into the allegation of formation of a cartel. Cartel was not defined in the MRTP Act; however, the Commission referred to a preceding judicial pronouncements – “cartel is an association of producers who by an agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity”. Three essential factors were identified to establish the existence of a cartel, namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy and (iii) intent to gain monopoly or restrict/eliminate competition.

5.2.8.4. **Order:** Thus keeping in mind the definition of cartels and the necessary elements, the Commission was of the view that, except the use of expression ‘cartel’, there was no material evidence to suggest parity of prices or meeting of minds. The Commission was of the view, that the notice of enquiry and the subsequent investigation lacked relevant and necessary information in regard to the parties forming a cartel leading to distortion and

restriction of competition in the market. Having the essential factors not being proved, the Commission agreed with the respondents that *prima facie* there was no case of a cartel.

#### 5.2.8.5. **Emerging Issues:**

- Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels was only possible to be drawn from the Section 2(o) *i.e.* restrictive trade practice.
- Key factors required to establish the existence of a cartel namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition,
- Acceptance of anonymous complaint to initiate an Enquiry.

#### 5.2.9. **Case 2: Price Parallelism vs. Price Fixing**

5.2.9.1. **Brief details:** In *Alkali & Chemical Corporation of India Ltd. And Bayer India Ltd*, the companies were engaged in the manufacture and sale of rubber chemicals and amongst them possessed a dominant share of the total market for these products. There were charges of them making identical increases in prices on five to six occasions on or around the same date.

5.2.9.2. **Investigation and Order:** However, there was no direct evidence available behind the increase in prices. The MRTPC observed while making its judgment, that “in the absence of any direct evidence of cartel and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in the proof of any plus factor to bolster the circumstances of price parallelism, we find it unsafe to conclude that the respondents indulged in any cartel for raising the prices”.<sup>57</sup>

#### 5.2.9.3. **Emerging Issue:**

- Price parallelism as a defence against cartelised price fixation. Factors required separating price parallelism from cartelised price fixation.

#### 5.2.10. **Case 3: Absence of Penalties**

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<sup>57</sup> Kumar, S.S “Cartels and Price Fixation: Worst type of anti-competitive practices”.

5.2.10.1. **Brief details:** In *Sirmur Truck Operators case*<sup>58</sup> and *Truck Operators Union vs. Mr. N.C. Gupta & Mr. Sardar*<sup>59</sup> case, the nature of allegation was same, i.e. the respondents had acted in concert while fixing the freight rates for rendering transport services and that they did not allow non-member truck operators to load and unload goods, unless they joined the union.

5.2.10.2. **Investigation:** In both the cases, the MRTPC instituted an enquiry on the basis that the practices indulged by respondents fell under section 33(1)(d) and Section 2(o) of the MRTP Act<sup>60</sup>. For substantiating the allegations made against the respondents, in the *Sirmur Truck Operators case*, the DG (IR) submitted a lot of documents, such as the freight rates circulated by the respondent union, the letters exchanged between the respondents. Taking the freight rates as evidence, it was seen that there was no information on the freight list that, with the increase or reduction of the rates of diesel oil by the Government of India, there would be increase or decrease in freight rates fixed by the respondents. Thus there was no doubt that fixing the rates for the truck operators and asking the members to charge freight only on the rates fixed by the union was one of the instances of restrictive trade practice falling under clause (d) of Section 33(1), which states – *“Every agreement falling within one or more of the following categories shall be deemed, for the purpose of this Act, to be an agreement relating to restrictive trade practice and shall be subjected to registration, namely... (d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers.”*

5.2.10.3 In the *Truck Operator’s union case*, the respondents did not co-operate with the investigation and the DG (IR) conducted an on-spot investigation to assess the correctness of the allegations. During the on-spot investigation, they met a member of the union, who did orally acknowledge that unless the complainant truck owners become members of the union, they would be not be permitted to operate.

5.2.10.4. **Order:** The MRTPC in the both the cases concluded, on the basis of the evidence, that preventing and restricting competitors from doing business was undoubtedly a restrictive trade practice falling under Section 2(o) of the MRTP Act. Accordingly, the Commission issued an order of ‘cease and desist’ against the respondents and directed them to stop the trade practice.

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<sup>58</sup> (1995) 3 CTJ 332 (MRTPC)

<sup>59</sup> (1995) 3 CTJ 70 (MRTP)

<sup>60</sup> Section 2(o) of the MRTP Act covers restrictive trade practice

#### 5.2.10.5. **Emerging Issue:**

- The MRTPC not empowered to impose penalties.
- Increase in input cost as defence for price increase
- Non-cooperation on the part of the Defendants in the investigation

#### 5.2.11. **Case 4: Extra Territorial Jurisdiction**

5.2.11.1. **Brief details:** In *American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and others*, ANSAC, a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI, whose members included the major Indian soda ash producers, complained to the MRTPC to take action against ANSAC for cartelised exports to India.

5.2.11.2. **Investigation:** The MRTPC instituted an enquiry and passed an *ad interim* injunction on ANSAC, restraining it from cartelised exports to India. In June 1997, the Commission rejected ANSAC's petition for vacating the injunction. Quoting from the ANSAC membership agreement, it held that ANSAC was *prima facie* a cartel which was carrying out part of its trade practices in India, giving the Commission jurisdiction under Section 14 of the MRTP Act, even though the cartel itself was formed outside India. The Commission confirmed its earlier injunction, on the ground that ANSAC was *prima facie* a cartel. ANSAC then appealed to the Supreme Court of India, on the following grounds –

- Under the MRTP Act, the MRTPC had no power to stop import
- The MRTP Act did not confer extra-territorial jurisdiction to the MRTPC
- Action could be taken only if an anti-competitive agreement involving an Indian party could be proved and that too only after the goods had been imported into India. In this case, the shipment had not actually taken place.

5.2.11.3. **Order:** The Supreme Court did not go into the allegation of cartelisation, but instead held that the wording of the MRTP Act did not give the MRTPC any extra-territorial jurisdiction. The MRTPC therefore could not take action against foreign cartels

or the pricing of exports to India, nor could it restrict imports. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too only after the goods had been imported into India.<sup>61</sup> The Supreme Court overturned the order of the MRTPC.

#### 5.2.11.4. **Emerging Issue:**

- The MRTP Act did not empower the MRTPC with extra-territorial jurisdiction powers. It could handle only the cases that emerged in the Indian market but not that emerged outside India, despite their evident effects on the Indian market.
- Action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods have been imported into India.

#### 5.2.12. **Case 5: Presence of Gateways**

5.2.12.1. **Brief details:** In *DG (IR) vs. Sumitomo Corporation, Tokyo, Japan and others*<sup>62</sup>, the MRTPC was called upon to decide on the charges of restrictive trade practices of manipulating prices of products within the meaning of Section 2(o)(ii)<sup>63</sup> of the MRTP Act. On information being received by the commission regarding collusive tendering in the steel industry and quoting of identical prices, the commission appointed a consultant who reported that the Japanese companies along with their Indian agents have colluded and are quoting identical prices in respect of input material required by the steel plant.

5.2.12.2 **Investigation:** In the preliminary investigation, it was revealed that the prices quoted by the Japanese companies and their Indian agents were identical in respect of 8 items pursuant to a global tender floated by SAIL. However, there were some sort of negotiations between the relevant authorities and the Japanese companies, after which the latter revised their rates, which also were identical to the prices quoted by their apex body i.e. the Rollers Exporters Association. The same was the case in with regard to another global tender in the year 1984 invited by the Rourkella Steel Plant (RSP) to supply qualified

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<sup>61</sup> *Haridas Exports vs All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600. A discussion on the wider implications of this judgment, and Indian competition policy in relation to international trade, in greater detail can be found in Bhattacharjea (2003).

<sup>62</sup> 2004 CTJ 26 (MRTP)

<sup>63</sup> Section 2(o)(ii) – Restrictive Trade Practice – “which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified cost or restrictions”.

rolls. On the basis of a complaint initiated by the RSP, the DG was of the view that the respondents were indulging in restrictive trade practice within the meaning of section 2(o)(ii) of the Act. Accordingly a Notice of Enquiry was initiated.

5.2.12.3 In lieu of the investigation, the defendants submitted their defence on the following grounds:

- absence of any factual allegations regarding the manipulation of prices imposing unjustified cost on consumers, the issuance of notice of enquiry was misconceived.
- participation of 35 companies from 13 countries, identical prices as quoted by the Japanese companies would in no way lead to manipulation of prices imposing unjustified costs.
- restriction of competition was to be seen with reference to context of SAIL, which had 90% of the market share in product and supplies.
- ultimate decision for placement of orders on the suppliers rested with SAIL, as well as RSP, thus the uniformity in prices would have no significance.
- orders under the global tenders that were floated were for 18 rolls out of 228 pieces.
- The Indian agents, also a party to the investigation, pleaded that they had no role to play in either fixation of prices of the products or in negotiations with the purchaser.

5.2.12.4 The MRTPC focused on the depositions made by the defendants, where it was confirmed that their apex body (Rollers Exporters Association) conducted the negotiations. The variations in sales commission to their respective agents and conditions of delivery had also been argued to make no difference to the price the purchaser had to pay. Thus these facts clearly established a case of price fixing cartel by the defendants. However, the defendants contended that it had in no way been established that quotations of identical prices by them had been instrumental in preventing or impairing competition in any manner. In any case, the order for supply as placed by them was so small that it had virtually negligible effect on competition in the market and the same would bring the case in the ambit of provisions of Section 38 (1) (d) of the Act –

*(1) For the purposes of any proceedings before the Commission under section 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more*

*of the following circumstances, that is to say – “(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons, controls a preponderant part of the market for such goods”.*

5.2.12.5 With reference to the definition of cartel, as mentioned above in DG (IR) vs. Modi Alkali and Chemicals Ltd, quoting of identical prices pursuant to a global tender, negotiation of prices by the parties other than those who had submitted the tenders, having a close nexus in the trade dealings were a few factors strongly pointing to an action or activity undertaken by the respondents for manipulating the prices, adversely affecting competition in the market. In addition to that, it was argued that the arrangements between the respondents and its allied parties in quoting identical prices had narrowed down the option of the purchasers to buy the goods, despite there being other 35 companies.

5.2.12.6 Taking the allegation of SAIL having 90 per cent market power in the market, there was a need to make a distinction between restricting the players voluntarily and the restricted number of players available in the market due to an action allowed by the State Government. Thus the allegations raised by the respondents, were not sustainable.

5.2.12.7 Keeping in mind the facts of the case, it was held that the respondents had indulged in cartelisation. However, the respondents argued that they were liable to be exempted in lieu of the gateways, to which the Commission also agreed. The Commission agreed that in terms of both the quantity and value of the rolls, it would have insignificant impact on the cost of rolled products.

5.2.12.8. **Order:** In lieu of the gateway available to the defendants i.e. Section 38 (1)(d), the notice of enquiry was discharged. The allegation of cartelisation was only discharged on the ground of the availability of the gateway to the respondents.

5.2.12.9. **Emerging issues:**

- Presence of gateways acted as a deterrent in successfully charging the companies of a restrictive trade practice.

- Order for supply as placed by the respondents was so small that it had virtually negligible effect on competition in the market
- Justification of one's own activity of cartelisation on the basis that the accused is itself a dominant player in the market

5.2.13. To summarise, following **emerging issues** have been identified based on the above analysis of select cases. These issues would be analysed from the perspective of the Competition Act to assess whether the new law equips the CCI to address these issues.

#### 5.2.13.1 **Definition**

- Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels was only possible to be drawn from the Section 2(o) *i.e.* restrictive trade practice.

#### 5.2.13.2 **Factors to determine Cartel**

- Key factors required to establish the existence of a cartel namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition,

#### 5.2.13.3 **Defence (used by accused)**

- Price parallelism as a defence against cartelised price fixation. Factors required to separate price parallelism from cartelised price fixation.
- Increase in input cost as defence for price increase
- Presence of gateways
- Order for supply was so small that it had virtually negligible effect on competition in the market
- Justification of one's own activity of cartelisation on the basis that the accused is itself a dominant player in the market



- Acceptance of anonymous complaint to initiate an Enquiry

#### 5.2.13.4 Powers of the Commission

- The MRTPC was not empowered to impose penalties
- MRTP Act did not empower the MRTPC with extra-territorial jurisdiction powers. Action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods have been imported into India
- Non-cooperation on the part of the defendants in the investigation

### ***5.3. Competition Act 2002 – Overview***

5.3.1. In India, the MRTP Act was enacted in 1969. The focus of the MRTP Act was more on the control of monopolies and the prohibition of monopolistic and restrictive trade practices. In the current era of globalisation, the MRTP Act had become obsolete and there was a need to shift the focus from curbing monopolies to promoting competition.

5.3.2. The Central Government, therefore, constituted a high level committee known as the Raghavan Committee and after considering its report and suggestions from various stakeholders, enacted a new law called the Competition Act, 2002. The Central Government also constituted the Competition Commission of India.

5.3.3. According to Competition Act, 2002 a cartel is formed if below mentioned three prerequisites are fulfilled:<sup>64</sup>

- An agreement which includes arrangement or understanding;
- Agreement is amongst producers, sellers, distributors, traders or service providers, i.e. parties are engaged in identical or similar trade of goods or provision of service, and
- Agreement aims to limit, control or attempt to control the production, distribution, and sale or price of, or, trade in goods or provision of services.

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<sup>64</sup> Section 2(c) of the Competition Act, 2002

5.3.4. The Competition Act covers cartels under Section 3 i.e. anti competitive agreements. According to the section, it is presumed that such agreements causes appreciable adverse effect on competition. Thus the burden of proof in any cartel case is on the defendant to prove that the presumption is not causing appreciable adverse effect on competition. A specific goal of Competition Act is the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. The CCI is required to control agreements among competing enterprises on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes, which are likely to harm competition, need to be addressed.

5.3.5 The Competition Act lists certain factors that are to be taken into consideration for determining whether an agreement or a practice has an appreciable adverse effect on competition, namely, creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumers; improvements in production or distribution of goods or provisions of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

5.3.6 The CCI is empowered under Section 19 of the Act, to inquire into any alleged contravention of the provision either on *suo moto* basis or on receipt of complaint by any person, consumer or association or on a reference made to it by the Central or State Government. The Competition Act empowers the CCI with leniency provision but does away with the explicit search and seizure powers as granted to MRTPC. In addition, the Competition Act extends its jurisdiction to cover any agreement referred to in section 3, which have been entered into outside India; and any party to such agreement, who is outside India. The CCI shall “have power to inquire into such agreement [...] if such agreement [...] has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.” This is known as the “effects doctrine”. (Section 32)

5.3.7. The CCI has the power to grant interim relief (Section 33), award compensation, power to impose penalty (Section 27(b)) and to grant any other appropriate relief. The CCI also has the power to levy penalty for contravention of its orders, making of false statements or omission to furnish material information, etc.

5.3.8. The Competition Act is presently undergoing amendments pursuant to a writ petition in the Supreme Court of India. The government has proposed certain amendments, particularly relating to the leniency provision, as discussed earlier. The proposed amendment allows reduced penalty to be granted to any firm and not just the first firm that provides vital information regarding the existence of cartel activity. However, the said amendment does not clearly specify the extent of penalty reduction nor does it clarify as to what kind of information would be vital. It also stays away from putting as a condition the firms continued co-operation in prosecuting the other cartel members.

5.3.9. In US and EU, leniency programmes guarantee complete amnesty to the first firm that provides with information vital enough to start an investigation and reduced penalty is provided to those firms who provide useful evidence subsequently, provided they collaborate in investigating the other cartel members. Thus the leniency programme in EU and US requires leniency to both the firms that provides evidence and deterrent penalties to the rest. Thus each member of the cartel would be in a hurry to be the first to come forward with the necessary evidence before others can do so if they suspect exposure and action.

#### ***5.4. The Competition Act, 2002 vs. the MRTP Act, 1969***

5.4.1. Below we analyse the various **issues** that have emerged in the context of cartel cases analysed under the MRTP Act

##### **5.4.2 Definition of Cartel**

Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels was only possible to be drawn from the Section 2(o) i.e. restrictive trade practice

5.4.2.1. The Competition Act, 2002 explicitly define Cartels under section 2(c) of the Act – “*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 provision of services?*”.

##### **5.4.3 Factors required to establish Cartel**

Key factors required to establish the existence of a cartel namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition

5.4.3.1 Cartels are covered in Section 3 of the Act under anti-competitive agreements. The Competition Act frowns upon agreement, which causes or is likely to cause an appreciable adverse effect on competition within India. Four types of agreements between enterprises involved in the same or similar manufacturing or trading of goods or services are presumed to have an appreciable adverse effect on competition, namely: agreements determining prices; agreements limiting or controlling quantities; agreements to share or divide markets; and agreements to rig bids. These agreements define the contours of a cartel activity.

5.4.3.2 Furthermore, the Act lists out certain factors as covered in 5.3.5 above, which the CCI could consider in determining whether an agreement has an appreciable adverse effect on competition.

#### **5.4.4 Defence against Cartelisation**

Price parallelism as a defence against cartelised price fixation. Factors required to separate price parallelism from cartelised price fixation.

5.4.4.1 Based on experience from elsewhere, it is shown in the study that price parallelism is often used as an effective defence, posing a challenge for competition authorities. US and European courts have adopted a “*parallelism plus*” approach which requires showing the existence of “plus factors” beyond merely the firms’ parallel behavior, in order to prove that an antitrust violation has occurred. This has been adopted in some cases in Brazil as well. In all these jurisdictions, yet, there is an inclination to consider parallel behavior as a first clue pointing to the presence of collusion. Even though parallelism does not suffice to prove unlawful conduct, it may contribute to forming a suspicion of illegality.

Increase in input cost as defence for price increase

5.4.4.2 The Competition Act outlines various factors that determine the existence of a cartel. CCI needs to look into all the factors, before taking the input cost as a defence against cartelisation.

#### Presence of gateways

5.4.4.3 There is no Public Interest gateway present in the Competition Act, 2002.

#### Order for supply was so small that it had virtually negligible effect on competition in the market

5.4.4.4 Cartel activity is 'presumed' to have an appreciable adverse effect on competition, the onus would be on the accused to justify that the practice did not have any significant impact on competition in the market. They would then have to consider the factors listed in the Act and other circumstantial evidence to assess this defence.

#### Justification of one's own activity of cartelisation on the basis that the accused is itself a dominant player in the market

5.4.4.5 In a buyer-supplier relationship, if, for example, the buyer-firm happens to be a dominant firm, the supplier-firms may have an incentive to enter into a cartel-type agreement to counter the dominant position of the buyer. However, in such cases, the CCI needs to impress upon the supplier firms that instead of entering into an agreement, they could approach the CCI, should the buyer firm abuse its dominant position. Establishment of an anti-competitive agreement to counter another potential anti-competitive practice should be discouraged. Two wrongs do not make one right.

#### Acceptance of anonymous complaint to initiate an Enquiry

5.4.4.6 Section 19 empowers the Commission to start an investigation on the basis of a reference from the Central Government or the State Government or a statutory authority or on its own knowledge or information, thus the Competition Act also allows the Commission to accept an anonymous complaint to form a basis for further investigation.

### **5.4.5 Powers of the Commission**

#### The MRTPC was not empowered to impose penalties

5.4.5.1. Section 27 of the Competition Act empowers the CCI with powers to impose stringent orders and fines on detection of cartel activities. According to the section, CCI shall impose, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average turnover of the cartel for the last preceding three financial years, whichever is higher.

#### MRTP Act did not empower the MRTPC with extra-territorial jurisdiction powers. Action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods have been imported into India

5.4.5.2 The new law has extraterritorial reach and the provision is based on the 'effects doctrine'. Section 32 states that, notwithstanding any restrictive agreement, any party to such agreement, any enterprise abusing a dominant position, or any combination or party to combination is outside India, the CCI has the power to inquire into it, if it has an anti-competitive effect within the relevant market in India. This clearly restates the effects doctrine, which should undo the Supreme Court's disabling of the MRTP Commission in that respect. *The amendments proposed by the Government adds a phrase to Section 32, explicitly allowing the CCI to pass orders against acts of firms outside India that adversely affect competition in India. The original phrasing seemed to suggest that the CCI could only inquire into such acts.*

5.4.5.2.1 Sub-section 33(2) of the Act goes to the other extreme in undoing the effects of the Supreme Court's ruling. It allows the Competition Commission of India to grant a temporary injunction restraining any party from importing goods, if it can be established that such imports would contravene the Act's substantive provisions. *The Competition Amendment bill proposes to delete this clause that allows the CCI to issue temporary injunctions to restrain any party from importing goods. The original provision of countering an anti-competitive practice involving imports by shutting out the imports would have been inconsistent with WTO rules.*

#### Non-cooperation on the part of the Defendants in the investigation

5.4.5.3 The Competition Act empowers the CCI to penalise a person for making false statement or for not cooperating in the investigation. This could provide sufficient disincentives for not cooperating.

## 6. Conclusion

6.1. It is clear from the preceding discussion that the CCI has been much better empowered to tackle cartel cases than its predecessor the MRTPC. Such fact is well illustrated under the Competition Act, for example:

- availability of definition of cartel
- the incorporation of a leniency programme
- the powers to impose fines against cartel members
- the explicit provision to exercise jurisdiction in respect of actions taking place outside India (having an effect in India).

6.2. Recommendations are as follows:

6.2.1. First, private notification or complaints is an important source imperative to trigger cartel cases. The CCI, therefore, should try to maximise this channel, and encourage the submission of complaint by injured parties. Towards such end, one can publish reader-friendly booklets and pamphlets explaining what cartels are, the harm that they cause and how to report them. A telephone hotline or an email address to which complaints can be made will be immensely helpful as well. The CCI also should try to publicise the important role of complaints in cartel cases that are successfully prosecuted. The identity of complainants should be protected as confidential information to the fullest extent possible.

6.2.2. In addition to relying on complaints or private notification, the CCI should try to focus its initial investigative efforts on sectors where cartel conduct is most likely to complement on the basis of the tips they receive. This is going to be complementary to the effective implementation of a leniency programme that the CCI should adopt, as argued earlier at paragraph 3.7.15. The US DOJ, for instance, ‘as a general rule, [...] follows leads generated by disgruntled employees, unhappy customers, or witnesses from ongoing investigations. As such, it is very much a reactive agency with respect to the search for criminal antitrust violations.’<sup>65</sup> The cases analysed above, as well as the theoretical

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<sup>65</sup> McAnney J.W, “The Justice Department’s Crusade Against Price-Fixing: Initiative or Reaction?” Antitrust Bulletin (Fall 1991), p.521-542

discussion about the nature of cartels, shows that though cartels can happen in any sector, they are more likely to occur in some industries than in others. In most instances, the best sources of information about possible unlawful conduct in the marketplace are market participants themselves – if a seller’s cartel is suspected, then ask the buyers; if a buyer’s cartel is suspected, ask the sellers. The news media are another useful source since cartel operators, especially unsophisticated ones, may make public statements that betray cartel activity. In other instances, known in the US, a series of simple reporting of various tender packages reveal useful patterns. Good source of information regarding Cartels in India, are the tenders being floated by the Railways, information from various government procurement agencies and CAG. Finally, taking into the account the long history of government intervention and planning in India, a fruitful source for cartel investigations could be sectors whose prices were until recently controlled by the government, as suggested by the experiences of Brazil.

6.2.3. In several countries dawn raids are an effective investigative tool in the investigator’s toolkit. As noted above, the CCI is not equipped with this tool, which could handicap its efforts to detect cartels. Be that as it may, the Competition Act has leniency provisions, which could be designed and implemented in a manner to make it an effective tool for detecting cartelisation and minimise this limitation. CCI should be explicitly be empowered by the Competition Act to undertake search and seizure.

6.2.4. The CCI should work out the details of implementing the leniency programme. Such a programme may not produce immediate results, as it would require the CCI to establish its credibility in successfully investigating and prosecuting cartels. CCI would face a major challenge in the latter context, as there is no credible evidence in successfully punishing cartels in India. Incidentally, this also presents an opportunity for the CCI. Lax enforcement of competition law (*vis-à-vis* cartel activity) has led to a mushrooming of cartels in India, and is often reported in the media from time to time. The CCI could use this opportunity to establish its credibility by investigating such alleged cartels. Some international best practices in formulating and implementing effective leniency programmes distilled by the International Competition Network could be useful in this regard.<sup>66</sup>

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<sup>66</sup> Supra note 35



6.2.4.1 Thus a properly structured leniency programme should have the following elements:

- The first member of a cartel should receive complete immunity from prosecution and punishment. Leniency if provided to second applicant then there should be a wide gap between the first and subsequent applicants, in order to preserve the strong incentive to be the first.
- The programme should have maximum transparency so that would-be applicants can predict with certainty what the outcome of their application will be.
- The programme should apply both to situations in which the competition agency has no information about a cartel and those in which an investigation has already begun.
- CCI would need to maintain strict confidentiality regarding the fact of a leniency application and the identity of the applicant.<sup>67</sup>

6.2.5. A system of strong sanctions against cartels should also be detailed out, to provide a credible threat towards violators. The Competition Act provides for such tools to remedy the situation under the MRTP Act and they should be used.

6.2.6. Nowadays, there is an active international effort against cartels. The international competition community is working on means of achieving greater cooperation in fighting these secret, multinational agreements. International organisations, such as UNCTAD and the Organisation for Economic Cooperation and Development (OECD), have long been active in studying and reporting on hard-core cartels. Also, for the past seven years, representatives of the competition agencies of more than 25 countries have met annually to discuss anti-cartel enforcement techniques at the International Competition Network (ICN). The CCI should pro-actively participate in and make use of these cooperation initiatives. It may also try to establish bilateral cooperative arrangements with neighbouring countries and trading partners in competition law enforcement. While much of the information generated in the course of an investigation may be confidential and cannot be shared with a foreign agency, experience has shown that competition agencies can still

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<sup>67</sup> UNCTAD (2005)“A Synthesis of recent cartel investigations that are publicly available” Note by the UNCTAD secretariat

engage in meaningful “informal” cooperation, which can include exchanging information on the status of a case or investigation, or on legal theories and investigative leads in a case.

6.3. These above recommendations are with respect to specific cartel prosecution activities. Generally and most importantly, the CCI should try to develop a “competition culture” – an understanding by the public of the benefits of competition and broad-based support for a strong competition policy. This requires communication with all parts of society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials, and judges – about the benefits of competitive markets to them and to their country’s economy. Anti-cartel enforcement cannot be done in isolation, however; it is interdependent with competition law enforcement. Only through demonstrable success in enforcement will the public come to understand how it can benefit from competition.

6.4 The above recommendations also provide a platform to design the operational strategy for the CCI with relation to cartels, which is described below:

### **Operational Guidelines for CCI**

#### **6.4.1 Dealing with Business**

It is important for the CCI to educate business houses/associations on cartels. There have been instances where business houses or associations form a cartel without having an understanding of the fact that their action would come in the ambit of being a cartel. The practice becomes a norm without proper knowledge and prosecution of cartelisation. The CCI should prepare and publish reader-friendly booklets and pamphlets with case studies from around the world, explaining what cartels are, the harm that they cause and how to report them. This would help to curb cartel activities and business houses could be stopped from forming a cartel or running an existing cartel. This in turn would save a lot of the time and resources of the CCI.

Private notification or complaint is an important source of information to trigger cartel cases. Thus the CCI should develop a cordial relationship with the business houses and encourage them to give information about cartel activities in the industry.

As the study has shown, there have been instances where trade/business associations have been engaged in cartel activity. The CCI needs to keep a check on the activities of the various trade/business associations.

#### **6.4.2 Capacity Building of CCI officials**

It would be important to build in-house capacity on the understanding towards cartels. There is not much experience that could be gained from the past and hence the officials in CCI, who would be interacting with business houses, association etc, need to have a sound understanding of cartels. Thus they should undergo training programmes that would give them an exposure on cartels. In addition to that, CCI should also involve external advisers as experts for undertaking the training programmes. The external advisers should hand hold CCI for undertaking various activities including curbing of cartels in India.

#### **6.4.3 Studying Past Orders of the Supreme Court and the MRTPC**

Several of MRTP Commission's decisions were challenged in the Supreme Court and in several of these cases the apex court turned down MRTP Commission's decision. Such and other similar judicial orders have set a precedent. Defendants to defend their activity, when a particular case is taken up under the Competition Act could use these orders. However, it is important to realise that the context under which these cases were decided has changed drastically and the past judgements need to be interpreted under the provisions of the Competition Act. CCI should study such precedent-setting orders in depth and prepare its strategy/arguments accordingly to deal with them should such a situation arise in the future. The alleged practices might be similar, but the legal and economic environment has changed substantially.

#### **6.4.4 Action against existing cartels**

In recent time, various media houses reported the maiden attempt of Airlines for forming a cartel. The newly formed Federation of Indian Airlines comprising of eight domestic airline companies, had in principle agreed that the full service carriers like Jet, Kingfisher, Indian Airlines would not price tickets lower than Rs. 2.40 a mile and the low cost airlines

such as Air Deccan, Spice jet, etc would not price ticket lower than Rs. 2 a mile. The companies reached an agreement twice, but the cartelisation broke both times, with low cost airlines demanding a free run at the last minute. In addition to that, there have been several reporting of cartels in the cement, steel, pharmaceutical industries time and again. CCI can undertake in-depth study of such cartels and come out with their own analyses. The study would be undertaken for the purpose of in-house capacity building of the officials for better understanding of the workings of Cartels.

#### **6.4.5 Tie – ups with Media Houses and Consumer Organisations**

Often cartels are reported in the Media, which has lot of useful information on the activities that takes place in the market. CCI should build a relationship with Media and Consumer Organisations, who could act as informers and provide the CCI with vital information on existence of cartels.

#### **6.4.6 Government Policies**

As brought out in the report, there have been cases where government policy or its implementation created incentives for formation of cartel. Hence, while investigating a case, the CCI should keep this factor in mind. It is important to create an environment that discourages formation of cartels rather than continue to detect and prosecute cartels without doing much about the root causes.

## **Box 2 - MRTP Cases Against Cement Cos for Arbitrary Pricing**

**11 August 2006**

### **Lok Sabha**

The Monopolies and Restricted Trade Practices (MRTP) Commission has registered cases against some cement companies:

The DG (IR) filed an application under section 10(a)(iii) of the MRTP Act against Cement Manufacturers, Bombay and 44 others cement manufacturers. It was alleged that the Respondents had fixed the prices of cement arbitrarily and in an unjustified manner. It was further alleged that there was little variation in the prices of several cement manufacturers in the same region inspite of the fact that the cost of production was not identical.

The DG (IR) had filed an application under section 10 of the MRTP Act, 1969 against Associated Cement Companies Limited, Bombay. It was alleged that the Respondents increased the prices from time to time without any increase in the cost of production and this had led to an unreasonable increase in the profit of the Respondent.

A complaint filed by M/s Gayatri Agencies against Cement Manufacturers Association, Chennai under section 10(a)(i) alleging, interalia, that the Respondent did not give free hand to the applicant in the matter of prices, sale and distribution of cement by imposing various restrictions. The matter was referred to DG (IR) for investigation. The D.G. (IR) filed Preliminary Investigation Report

stating that the respondents are indulging in Restrictive Trade Practices under sections 33(1)(d) and Section 2 (o) of the MRTP Act.

Shri Servejit Mokha & Another have filed a complaint against Cement Manufacturers Association and 10 others under section 10(a) (i) and 36 B (a) alleging, inter alia, that the said cement manufacturers had formed a cartel and had increased the prices. Notice of Enquiry against 11 Respondents was issued.

DG (IR) filed an application under section 10 (a)(iii), read with section 37 of the MRTP Act, 1969 against Gujarat Ambuja Cements Limited and two others alleging that the respondents in collusion have created an artificial scarcity of cement resulting in increase in prices, which constitutes a Restrictive Trade Practice as defined under section 2(o) read with section 33(1)(d) of the MRTP Act, 1969.

The MRTP Commission has directed the DG (IR) to investigate into the sudden and steep increases in prices of cement reported in the print media during May-2006. It was reported that the prices of cement rose from Rs. 140 to Rs. 220-240 per bag with in a period of two months. It was also reported that the cement manufacturers have entered into a cartel. The Preliminary Investigation Report is awaited.

Shri Prem Chand Gupta, Minister of Company Affairs in Lok Sabha, gave this information.

Source: <http://www.indlawnews.com/1d1fdaa54779c92320fde0c478b09cf4>

### **Box 3 - Truck Operators' Cartels: A Snapshot**

- In case of Baddi, Himachal Pradesh, the Baddi Nalagarh Truck Operator Cooperative Transport Society, has monopolised the

movement of goods from the state. Controlled by the local MLA, the truck union charges 30 percent higher on the Baddi-Delhi route and 15-20 percent on the Baddi-Mumbai route. Trucks coming in with supplies go back empty, because they are not allowed to pick up freight, which only adds to the cost.

- In the case of Orissa, the Angul Truck-owners Association, a Government registered body operating at the National Aluminium Co. Ltd.'s factory charges as much as 200 percent more for transportation of ingots under the obliging eyes of the authorities. Such official cartels are known to exist in other parts of Orissa also like in Sukinda Mines, Paradeep Port and Balasore.

- In Punjab's Derabassi, truck unions have drafted their own tariffs, increasing costs of production for local units, thus rendering them uncompetitive. A cartel of around 500 truck operators has been troubling the area, since Derabassi's inception as an industrial town in 1987. In Sirhind, near Mandi Gobindgarh, such unions stalled industrial growth, resulting in industry to flourish in nearby Khanna and Amlah.

- A similar situation now exists in Bikaner, Rajasthan where the truck operators' union is creating problems in the smooth movement of minerals from the area. Due to obstruction in the supply, the ceramic tile industry, which uses these minerals as raw material are facing hardships, and even closure.

Source: Various newspapers published across India

#### **Box 4 - The Vitamins Cartel**

***Duration and Effect:*** The vitamins cartel to fix prices and allocate market shares for the sale of certain vitamins operated from 1990-1999. Annual global sales over the conspiracy period averaged US\$1.34bn. (Yu, 2003) The price increase generated by this cartel has been

estimated to be 35 percent. In the US alone this cartel may have produced US\$500mn in overcharges. (OECD, 2003)

***Impact on Developing Countries:*** The aforementioned high overcharge definitely impacted developing countries in view of the fact that developing countries imported around US\$6.6bn worth of vitamins in the course of the conspiracy. (Yu, 2003)

***Sanctions:*** US, Canada, EC, Australia, and South Korea have each investigated and prosecuted the cartel for its effect on their domestic markets. The US and European authorities have fined the cartel approximately US\$1bn and the EC 85mn, respectively. (OECD, 2000) The Korea Fair Trade Commission (KFTC) imposed corrective measures and a civil penalty to the amount of 3.9 billion Korean *Won*. Brazil, Japan and Mexico are reported to be investigating.

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Source: Chowdhury, J (2006), "Private International Cartels – An Overview", Briefing Paper, CUTS C-CIER



## Annexure I - Cartel Cases in India<sup>68</sup>

S. No.	Case	Reference	Description
<b>Cases before 1991 Amendment: Price Fixing and Collusive Tendering or Bid Rigging [Section 33(1)(d), (j(b))]</b>			
1.	Raymond Woollen Mills Ltd (J.K. Engineering Files Division)	RTPE 27 of 1974, Order dated 25/2/1975 before MRTPC	
2.	I A & I C (P) Ltd, Bombay and Sulphur Mills (P) Ltd, Bombay	RTPE 6 of 1981, order dated 23/2/1984	<p>Respondents were manufacturers of Sulphur dust 85% and allegedly engaged in parallel pricing and acting in concert for fixing, maintaining and increasing price of sulphur dust 85%</p> <p>Filed two statements in reply to a notice of enquiry (NOE) categorically stating that they will not indulge in RTP of fixing and raising prices in concert or indulging in cartel formation. After this, the MRTPC did not proceed with the enquiry whether the respondents were already engaged in a cartel or not; written statements were deemed to be as efficacious as a cease and desist order</p>

<sup>68</sup> These cases have been compiled from the unpublished M.Phil Thesis of Oindrial De (2005), submitted to the Department of Economics, University of Delhi, alongwith MRTPC Journals and various legal websites.

S. No.	Case	Reference	Description
			Mere assurance from respondents who may be indulging in RTP was satisfactory enough to stop the enquiry since the ultimate result of enquiry is not very different anyway
3.	Tirunerveli District Lorry Owners Association	RTPE 14 of 1983, order dated 20/3/1984	Similar situation (assurance given by respondents, hence no enquiry undertaken)
4.	Jay Engineering Works Ltd and others	RTPE 17 of 1980, order dated 6/4/1983	Similar situation (assurance given by respondents, hence no enquiry undertaken)
5.	Oriental Power Cables Ltd and Others	RTPE 12 of 1975	<p>Enquiry instituted against 10 respondents on the ground that they quoted identical or near about identical rates by arrangement and understanding among themselves. On receipt of NOE, respondents filed a writ petition at Bombay High Court complaining that they were being denied necessary particulars and they should be provided with better particulars by the MRTPC</p> <p>After 7 years! (In 1982), the High Court ordered the MRTPC to furnish better particulars. Subsequently, DG (I&amp;R) furnished better particulars.</p> <p>The respondents then filed an application under 37(2) stating that they have never indulged in any cartel</p>

S. No.	Case	Reference	Description
			<p>and would not indulge in such activity in future. They further stated that there is no relevance for investigating into an alleged cartel that formed almost a decade ago.</p> <p>DG alleged that respondents have a habit of entering into a cartel and same situation can happen in future, and that the matter should be thoroughly enquired. But the MRTPC did not find any relevant to continue with the enquiry and stated that if respondents indulge in such practices in future, DG can launch a fresh proceeding before the Commission</p>
6.	The general Code of Conduct for Members of the Automotive Tyre Industry of India	RTPE 1 of 1971, order dated 19/4/1976 (Ref: First Annual Report of MRTPC, 1971-72)	<p>Eight firms (Incheck Tyres Ltd, Dunlop India, Goodyear India, Firestone Tyre and Rubber Co. India Pvt Ltd, Premier Tyres Ltd, The India Tyre and Rubber Co. Pvt Ltd, Ceat Tyres of India Ltd, and Madras Rubber Factory Ltd.) engaged in a cartel with a formal or written agreement among them in the post 1967 period</p> <p>The agreement was known as “The general Code ... ..”</p> <p>The MRTPC instituted an enquiry in 1971 and commenced with it in</p>

S. No.	Case	Reference	Description
			<p>December 1972 on grounds of price fixing concert, discriminatory dealings, market sharing, fixing terms and conditions of sale other than price, mutually agreed distribution system, limiting, restricting and withholding supply, etc.</p> <p>MRTPC took up another enquiry against the 8 tyre companies based on a complaint lodged by the All India Motor Transport Congress. Allegations were price fixing concert, discriminatory dealings, restricting and withholding supplies and dumping accessories and other motor vehicle parts on dealers.</p> <p>Cease and desist order passed by the Commission in 1976 and in 1978 respectively. This led (?) to formal breaking up of the alleged cartel.</p>
7.	Firestone Tyre & Rubber Co. of India (P) Ltd (now changed to Bombay Tyres International Ltd) and Others	RTPE 13 of 1978, order dated 24/3/1983	MRTPC instituted an enquiry in 1978, but closed in early 1980s on the ground that the respondents agreed not to indulge in the concerted price fixing in future and agreed to inform the price increase to the Commission for consecutive 3-year period.
8.	Madras Rubber Factory Ltd, Goodyear India Ltd,	RTPE 6 of 1978, order dated 2/2/1983	Respondents filed an application under section 37(2) agreeing not to indulge in RTPs of concerted tying up

S. No.	Case	Reference	Description
	Dunlop India Ltd and Bombay Tyres International Ltd.		<p>sale of tyre flaps with either tubes or tyres or both and also agreed to inform the MRTPC about change in prices of tyre flaps in the replacement markets within three months of change for next five years.</p> <p>Two cease and desist orders were passed against these tyre manufacturers in late 1970s. Still the MRTPC did not punish them even though allegations of price fixing recurred again and again. MRTPC closed enquiry on the ground that respondents 'assured' it of not indulging in such practices in future.</p>
9.	Sandvik Asia	RTPE 44 of 1977, order dated 13/3/1979	Economic theory recognises that 'oligopoly pricing' is a special case of 'collusive pricing' and conscious parallelism is much-sophisticated business behaviour to guard the firms from anti-trust law.
10.	South India Mill owners' Association vs Gwalior Rayon	RTPE 83 of 1976, order dated 20/9/1979	parallelism is much-sophisticated business behaviour to guard the firms from anti-trust law.
11.	RRTA vs India Foils and Indian Aluminium Co.	RTPE 16 of 1981, order dated 6/5/1983	The Indian judgments did not recognise that price parallelism is a form of non-cooperative collusion.
12.	Grind well Norton Ltd and Carborandum Universal Ltd	RTPE 23 of 1981, order dated 27/7/1983	Several cases came up before the MRTPC regarding price parallelism by

S. No.	Case	Reference	Description
13.	DGIR vs All Gujarat Distillery Association and Others	I.A no. 109 of 1988 RTPE 315 of 1988, order dated 20/6/1988	manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort.
14.	RRTA vs Hyderabad Asbestos Cement Products and one other	RTPE 17 of 1979, order dated 20/12/1982	In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case
15.	DGIR vs Cement Manufacturers Association and Others	Order dated 28/1/1991	
16.	National Organic Chemical Industries and Others	Order dated 25/11/1978	
17.	The Alkali and Chemical Corporation of India Ltd, Calcutta and Bayer (I) Ltd, Bombay	RTPE 21 of 1981, order dated 3/7/1984	<p>Respondents were engaged in manufacture and sale of rubber chemicals and command a dominant share (around 75% to 82%, as per DGIR) in the market.</p> <p>Respondents failed to justify the arbitrariness of the price increase despite the fact that two opportunities were given to them to do so. Respondents did not deny price parallelism, but denied the allegation that it was due to concerted effort.</p> <p>DGIR could not furnish other circumstantial evidences sought by the Commission. Alleged that</p>

S. No.	Case	Reference	Description
			<p>respondents did not furnish cost data even when asked to do so</p> <p>In this case, the Commission relied on US judgment in deciding the case of price parallelism (346 U.S. 537, 1954, case of Theatre Enterprises) and sought for additional factors.</p> <p>The Commission held that there is no price collusion since DGIR did not provide with circumstantial evidences beyond price parallelism (crux: some additional factors or circumstances in the direction of concerted activity should be there to distinguish between price parallelism and tacit collusion).</p> <p>⇒ Neither the law nor the Commission and investigating agency had the expertise to deal with such cases.</p> <p>In this case, the Commission held that like price parallelism, price leadership too is a common feature of an oligopolistic market and cannot be considered as concerted effort</p>
18.	Hindustan Lever Ltd and TATA Oil Mills Co. Ltd	RTPE 4 of 1978, order dated 22/7/1982	<p>Allegation of price parallelism</p> <p>The Commission pointed out two requirements for a trade practice to be</p>

S. No.	Case	Reference	Description
			<p>a concerted one. First, the trade practice must either influence the market behaviour of undertakings concerned and remove in advance uncertainty as to the future competitive conduct of an undertaking or maintain or alter the commercial conduct in an uncompetitive manner. The MRTPC was satisfied with the facts presented by DGIR for proving the first requirement. But Commission emphasised on the second requirement: there should be a positive contact, however slender, between the parties either by meeting or decision or in any manner. The Commission stated “in an oligopolistic industry, a few units will be dominating the industry and each would be having an eye on the other to see what its behaviour will be. They will be interdependent without any overt acting together. The two respondents being the executive members of ISTMA and being dominant units in the industry is consistent with this possibility. No other contact for the above acted objections was alleged.</p> <p>DGIR applied for a review of the</p>



S. No.	Case	Reference	Description
			judgment, but this was rejected by the Commission
19.	Major English Newspapers and Indian and Eastern	RTPE 46 of 1975, order dated 18/12/1975	In 1975, four cases came up alleging concerted effort among major English newspapers and Indian and Eastern Newspaper Society and its regional committee to fix, increase and maintain price. It was alleged that even if there was substantial reduction in pages, the price was not reduced, rather increased in the said period. Interestingly, in this case, the respondents in all four cases submitted a 'cease and desist' order and MRTPC passed the order accordingly, without going for a full-fledged inquiry into price parallelism.
20.	Newspaper Society	RTPE 47 of 1975, order dated 6/2/1976	
21.		RTPE 48 of 1975, order dated 27/2/1976	
22.		RTPE 49 of 1975, order dated 19/3/1976	
23.	Coates India Ltd and five others	RTPE 7 of 1975, order dated 12/9/1975	Same as in newspapers case. Allegation of price parallelism, fixation and increase in prices in concert and concessions, discounts to dealers or customers
24.	Ghai Enterprises Pvt Ltd and Quality Ice Creams	RTPE 18 of 1983, order dated 25/4/1986	MRTPC finally linked price parallelism with tacit agreement  The two leading manufacturers of ice cream had a market share of about 80% and MRTPC observed that identity of prices of a large number of varieties of ice cream was not coincidental but a mutually planned scheme. It was also noted that the two

S. No.	Case	Reference	Description
			respondents have interconnection. Not only price increase but introduction of other incentives like discount schemes, new flavours were following one another. The Commission concluded that 'preponderance of probabilities' in the case leads to an inference of concerted effort and passed cease and desist order accordingly.
25.	Bengal Tools Ltd	RTPE 120 of 1984, order dated 25/4/1984	In this case, collusive tendering was proved as concerted effort  Quotes given by the respondents were totally identical for various sizes of sheer blades/knives and slitting cutters. The cost data provided by respondents revealed stark differences in cost among the manufacturers though they quoted the same price! Respondents argued the act was not prejudicial to public interest. Anyhow, MRTPC passed a 'cease and desist order'.
26.	Excel Industries Ltd and Others	RTPE 31 of 1985, order dated 23/3/1985	Same result as Bengal Tools Ltd case
27.	Shri Gopal Metal and Wood Works Ltd and Others, Perfect Circle Victor and Others	RTPE 31 of 1976	Same result as Bengal Tools Ltd case

S. No.	Case	Reference	Description
28.	Swastik Laminating Industries and Others	RTPE 81 of 1984, order dated 31/1/1986	<p>Identical rates were quoted by various small-scale units against the tender floated by National Fertilizers Ltd, and prices quoted by these units were lower than others. Small-scale units contended that this benefited not only government, but also the units which depended for their survival on such large tenders.</p> <p>The Commission decided that the practice is not prejudicial to public interest mainly due to three reasons, (i) small-scale nature of the units, (ii) denial of any collusion by National Fertiliser Ltd and (iii) Fixed factor price, which was quoted by respondents, was just 25-30% of the total cost of the goods supplied</p>
29.	Chloride India Ltd and Others	RTPE 46 of 1979, order dated 12/5/1981	<p>Case relating to price leadership</p> <p>Allegation revolved around quoting prices for storage batteries in concert because of the identity or near identity of prices quoted by the three respondents.</p> <p>The judgment stated “it was not possible to make allegation of concert against the first respondent, being the bulk supplier of batteries, having a large share of the market, other</p>

S. No.	Case	Reference	Description
			<p>respondents could not be blamed for treating him as a price leader and quoting prices either identical with or similar to the prices quoted by it</p> <p>(The Commission seemed to express a viewpoint similar to that observed in a US Supreme Court order: the fact that competitors may see proper, in exercise of their own judgment, to follow the prices of another manufacturer, does not establish suppression of competition nor show any sinister domination)</p>
30.	Baroda Rayon Corporation Ltd	Order dated 6/8/1976	Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or fix terms of sale.
31.	Alkali Manufacturers Association	RTPE 26 of 1984, order dated 29/3/1985	
32.	Indian Woollen Mills Federation and others	RTPE 32 of 1976, order dated 25/4/1977	
33.	Food grains and kirana Merchants Association, Indian Rayon Corporation, Gujarat	RTPE 18 of 1981, order dated 22/2/1983	
34.	Truck Operators and Transport Operators Association, Rampur and Other	RTPE 11 of 1987, order dated 14/8/1987	

S. No.	Case	Reference	Description
35.	RRTA vs Hind Lamps and others	RTPE 13 of 1974, order dated 19/4/1984	<p>(enquiry whether agreement prejudicial to public interest or not)</p> <p>Allegation was that the electric bulb manufacturers entered into a formal agreement which was restrictive in nature.</p> <p>Five foreign electric bulb companies and an Indian company floated a new electric bulb company within India named as Hind Lamps Ltd, through two agreements among them. The Commission dropped the enquiry on the ground that the agreement expired in 1972 and throughout the decade they did not hear any other complain against the respondents other than the application filed by RRTA.</p>
36.	The Nylon pact	Civil Miscellaneous writ petition 8060 of 1974, order dated 16/4/1976 by the Allahabad High Court	<p>(enquiry whether agreement prejudicial to public interest or not)</p> <p>The Nylon pact was among four nylon spinners and 18 weaver's association for the purpose of having an equitable distribution of nylon yarn at concessional prices under the supervision and approval of central government.</p> <p>The three-member bench differed in the matter that the agreement has the</p>

S. No.	Case	Reference	Description
			<p>approval of central government but by majority judgment, commission decided against the nylon spinners on 21/10/1974.</p> <p>The writ petition was filed by one of the nylon spinners.</p> <p>The High Court agreed that the agreement had the requisite approval of the central government and cannot constitute the subject matter of an enquiry under section 37 of MRTP Act. On the issue of whether the Commission can enquire into an agreement that has already expired (the agreement expired on 31/8/1975), the Court concluded that the RTP which is intended to be enquired into and prevented from being repeated must exist in <i>praesenti</i>. So the writ petition was allowed nullifying judgment given by the MRTPC</p>
<b>Cases Before 1991: Output Restriction, and Collective boycott [section 33(1)(g),(i)]</b>			
37.	RRTA vs Hindustan Pilkington Glass Workers Ltd and Window Glass Ltd		The manufacturers of wired, figured and profilite glass entered into an agreement with Surat Cotton spinning and weaving mills private ltd (proprietors of Navin glass products).

S. No.	Case	Reference	Description
			The latter company was prevented from making or selling certain glass products in consideration of payment of agreed compensation of Rs.12.5 lakhs by each respondent and was further required to sell its products to both. Pilkington and Window Glass also arrived at a common marketing arrangement through Associated Partners and Wired Glass, a company promoted by them for the purpose. The Commission passed a 'cease and desist order' against the respondents and declared the agreement as void.
38.	RRTA vs Jay Engineering Works	RTPE 17 of 1980, order dated 6/4/1983	In these two cases, parties submitted before the Commission under section 37(2), without admitting it
39.	RRTA vs Crompton Greaves Ltd	Order dated 29/10/1976	
40.	Andhra Pradesh Paper Mills Ltd	RTPE 1973, order dated 31/1/1976	Enquiry closed on the ground that after Paper (Control of Production) Order, 1974 had come into existence, the ordinary white printing and writing paper was no longer in short supply
41.	DGIR vs All India Organisation of Chemists and Druggists	RTPE 259 of 1988, order dated 18/11/1991	Respondents 1 to 4 (association of traders in pharmacy products) and respondent 5 (manufacturer of certain pharmaceutical products) entered into an agreement where certain obligations were imposed on respondent no. 5 by rest of them for

S. No.	Case	Reference	Description
			<p>appointing one stockist each geographical district where no stockists are in existence and if respondent 5 wishes to employ additional stockists in any area, it could only be done through mutual consent and discussion. Another allegation was that the agreement fixed the trade Commission to be paid to the stockists.</p> <p>The Commission held that it was an agreement between a seller and a purchaser and passed a cease and desist order on the ground of restrictions on persons to whom goods have been sold and territorial restriction. However, the Commission refused to consider this as collective agreement</p>
42.	Bombay Cotton Waste Merchants Association	RTPE 127 of 1984, order dated 20/3/1986	<p>Collective Boycott</p> <p>Enquiry closed on the ground that the respondents submitted undertakings under section 37(2) stating not to indulge into such practices</p>
43.	Ghee Merchants Association	RTPE 23 of 1976, order dated 14/2/1977	Cases of collective boycott involving trade associations
44.	Truck Operators Union	RTPE 32 of 1977, order dated 20/2/1978	



S. No.	Case	Reference	Description
45.	Motor Merchants Association	RTPE 1 of 1979, order dated 8/8/1979	
46.	General Merchants Association	RTPE 19 of 1976, order dated 18/3/1977	
47.	Association of Motion Picture Studios	RTPE 17 of 1985, order dated 8/4/1991	
48.	Retail and Dispensing Chemists Association, Bombay	RTPE 10 of 1984	
49.	Motor Lorry Owners and Operators Union (A.P.) and three other lorry owners' association	RTPE 97, 98 and 99 of 1989 and 402 of 1988, order dated 3/12/1990)	<p>Allegation that four lorry owners at four places acting in concert in fixing freight rates, not allowing transport contractors to hire other lorries at existing market rates, and not allowing them to even place their own lorries and forcing the contractors to hire lorries from its members at higher rates.</p> <p>The Commission held that physical obstruction is not a RTP, it should be dealt under criminal offence. The Commission refused to believe that the respondents are forcing transport contractors to hire lorries from them. In the absence of clear-cut evidence, the Commission discharged the NOE</p>

S. No.	Case	Reference	Description
<b>Cases before 1991: Collective Resale Price Maintenance [Section 33(1)(f), section 39, section 40]</b>			
50.	RRTA vs Svadesi Mills Co. Ltd	RTPE 19 of 1974, order dated 30/1/1976	Respondents collectively known as 'Tata textile mills'. A standard agreement was entered into between respondents and each of a number of stockist. Clause 2 of the agreement declared, "the stockists shall at all times, sell cloths at prices not higher or lower than those prescribed by the Tata textile mills'. According to respondents this clause was drastically changed and circulated among the stockists where they were made free to sell at any prices lower than a stipulated maximum price limit. Commission passed a consent order stating that the clause should be modified to replace, 'the prices recommended by Tata textile mills or any of them to the stockists shall be maximum prices and the stockists shall be free to charge prices lower than those prices'.
51.	Standard Mills Company Ltd and others	Case book on MRTP cases by Rajendra, page 502	Same judgment made in this case also, where textile mills of respondents were collectively known as Mafatlal group of mills.
52.	Phillips India Ltd and Others	RTPE 18 of 1975, order dated 18/6/	Collective resale price prohibited completely (cease and desist) in these

S. No.	Case	Reference	Description
53.	Phillips India Ltd	RTPE 26 of 1975, order dated 25/7/1976	cases
54.	RRTA vs Crompton Greaves Ltd	Order dated 29/10/1976	
55.	Amco Batteries Ltd and others	RTPE 25 of 1976, order dated 8/5/1978	
56.	RRTA vs Electric Lamp Manufacturers (India) Pvt Ltd and Others	RTPE 12 of 1974, order dated 17/9/1984	<p>Agreement among manufacturers or dealers of electric lamps and components. Main allegation was maintaining of resale price by the respondents.</p> <p>Respondents filed a writ petition before Bombay High Court objecting the institution of enquiry contending that the particulars furnished to them were insufficient. On the order of Bombay high court, RRTA furnished particulars demanded by them. The respondents filed an application under section 37(2) pleading that they have never indulged in any restrictive trade practices and assured the Commission that they will not do so in future. The Commission closed the inquiry without investigating into the matter.</p>
<b>Cases After 1991</b>			
57.	American Natural	Order dated in	Court held that MRTPC has no extra-

S. No.	Case	Reference	Description
	Soda Ash Corporation (ANSAC) vs Alkali Manufacturers Association (AMAI) and others	2002 (SC)	territorial jurisdiction (details to be taken from CUTS' own records)
58.	DGIR vs Reliance Industries and others	RTPE 123 of 1989, order dated 31/5/2002	Cases of price parallelism
59.	DGIR vs Modi Alkali and Chemicals Ltd and others	RTPE 118 of 1994, order dated 1/3/2002	
60.	U.O.I & Others vs Hindustan Development Corporation and Others	Special leave petition 11897-11898 of 1992, order dated 15/4/1993	<p>A case tried in the Supreme Court</p> <p>In this case three essential ingredients for cartel were identified: parity of prices; agreement by way of concerted action suggesting conspiracy; gain monopoly or restrict or eliminate competition</p> <p>Cartel not established</p>
61.	DGIR vs Four Wheeler Nishan Owners Union and Others	RTPE 94 of 1990, order dated 8/5/2001	Respondents were restricting non-members from lifting goods of local trade and industry and were compelling non-members to hire vehicles from them at the prescribed freight rate which was maximum. The Commission passed a cease and desist order despite the gateways pleaded by respondents
62.	DGIR vs Indian	RTPE 106 of 1995,	Respondents allegedly formed a cartel

S. No.	Case	Reference	Description
	Banks' Association and its constituent members	order dated 23/8/2001	<p>with a view to high bank service charges. DGIR in its preliminary report reveals that the accusation of arbitrary increase of service charges may not be established since there have been an increase in cost of operation, but there is no doubt that all the banks are fixing bank charges collectively which impairs competition within the meaning of section 2(o)(ii) and section 33(1)(d) and (g)</p> <p>The RBI in its letter dated 8/9/1999 stated that though the present practice of fixing benchmark rates by IBA for services rendered by banks was consistent with a regime of administered interest rate, in the current scenario of deregulation, the above practice is not consistent with the principles of competition among banks. So RBI directed IBA not to fix or advise any benchmark fees/service charges thereafter</p> <p>The Commission after observing RBI's direction did not find it relevant to investigate further into the matter.</p>
63.	Standing Committee Association of State Road Transport Undertakings vs		<p>Allegation of cartel by respondents and identical quotations for tenders</p> <p>But NOE issue under section 36A</p>

S. No.	Case	Reference	Description
	Karmobiles Ltd and others		<p>and 36B pertaining to UTP and not RTP as envisaged in section 2(o) and section 33(1)(d).</p> <p>Surprisingly, the two respondents do not produce same product!</p> <p>Commission dismissed the complaint</p>

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