DISSERTATION ON

“ATTRIBUTION OF PRICE PARALLELISM AS CARTELS UNDER THE COMPETITION ACT, 2002”

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I

A. INTRODUCTION

To Adam Smith business collusion was a ubiquitous temptation, a ‘conspiracy against the public’ that was injurious to the workings of a market economy. To business leaders at various times in history, collusion has been merely cooperation, meant to avoid destructive competition that is injurious to their firms and industries. To legal authorities who must implement competition law, collusion is an ongoing problem that lurks among the millions of business transactions occurring each year in a complex developed economy, but is not always easy to find or even define.

Concerted practice by enterprises in India is not an isolated conundrum. It can be observed in its various global counterparts. But it can be a sensitive issue when it escapes the clasp of competition authorities in the name of parallel conduct which is not a punishable offence, except if it attempts an appreciable adverse effect on the competition.

Taking a common example of the food price inflation in India or raising the airfares by various airlines as alleged in various newspapers, we come across a unique problem. That is if business enterprises follow each others’ prices in a particular business sector, is it merely business sense, or a conspiracy to organize a cartelisation.

This research project attempts to study this problem of the competition law. It takes a holistic view in ascertaining the concept of concerted practices as defined in European Union Treaty, The Sherman Act, U.S.A. and lastly the Competition Act, 2002 in India.

It also attempts to come out with a comprehensive idea of what is parallel conduct and how is it treated by competition laws of various jurisdictions. It studies the concept of ‘plus factors’ which when present with parallel behaviour, lead to an inference of cartelisation.

It aims to suggest a probable solution with the help of this research study, which can be used as a kaleidoscope whilst determining the issue of price parallelism versus cartels in an economy.
B. DEFINITION OF RELEVANT TERMS

1. ANTI-COMPETITIVE CONDUCT

Antitrust. An act that harms or seeks to harm the market or the process of competition among businesses, and that has no legitimate business purpose.¹

2. CARTEL

According to the Competition Act, 2002 Section 2(c) defines cartel as:

“cartel” 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.

3. ANTI-COMPETITIVE AGREEMENTS

S. 3 Anti competitive agreements

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

II.

PARALLEL BEHAVIOR VERSUS CONCERTED PRACTISE:
CONTEMPORARY POSITION OF LAW IN VARIOUS JURISDICTIONS

A. EUROPE

1. Meaning of agreement – Concurrence of wills

In EC law, the term agreement has been given a liberal construction. In *Bayer AG v. Commission* the CFI set out what has now become the classic definition of the concept holding that proof of an agreement must be founded upon ‘the existence of the subjective element that characterizes the very concept of agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market’. It is clear from the case-law that in order for there to be an agreement...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.

2. Proof of an agreement

It must, therefore, be founded upon the direct or indirect finding of a concurrence of wills between economic operators. So long as there is a concurrence of wills, constituting the

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faithful expression of the parties’ intention, its form is important. The concept catches agreements whether or not they are intended to be legally binding, whether or not sanctions are provided for a breach and whether they are in writing or oral. It covers ‘gentlemen’s agreements’, standard conditions of sale, trade association rules (which are treated as an agreement between the members to abide by the rules), and agreements entered into to settle disputes, such as trademark delimitation agreements. An agreement exists once the parties agree on ‘good neighbours rules’ or ‘establish practice and ethics’ or ‘certain rules of the game which it is in the interests of all of us to follow’.

Further, an agreement which has been terminated may be caught by Article 101 (1) in respect of the period after termination if the effects of the agreement continue to be felt. Agreements may be caught even if they are encouraged or approved by national law or entered into after consultation with the national authorities. It is no defence that an undertaking that an undertaking was bullied into concluding the agreement or that an undertaking never intended to implement or to adhere to the terms of the agreement. This point was made forcefully by the Commission in Industrial and Medical Gases. In this case, two of the undertakings alleged to be members of a cartel, Air Liquide and Westfalen, argued that they had not taken part in agreements or implemented them. Rather they had acted as a ‘tough competitor’ on the market or had pursued an ‘aggressive commercial policy’ towards competitors. The Commission rejected this argument.

3. CONCERTED PRACTICES

i. Concept under Article 101(1)

Article 101(1) EC prohibits agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition. Article 101(1) may be declared inapplicable where the criteria set out in Article 101(3) are satisfied. An agreement which is prohibited by Article 101(1) and which does not satisfy Article 101(3) is stated to be automatically void by virtue of Article 101(2). Full text of Article 101 is as follows:

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7 For further reading on Article 81(1) see Faull and Nikpay The EC Law of Competition (2nd ed, 2007), ch 2, paras 3.01-3.392; Bellamy and Child European Community Law of Competition (eds Roth and Rose, Oxford University Press, 6th ed, 2008) ch 3.
1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
   b) Limit or control production, markets, technical development, or investment;
   c) Share markets or sources of supply
   d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   e) Make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   • Any agreement or category of agreements between undertakings;
   • Any decision or category of decisions by associations of undertakings;
   • Any concerted practise or category of concerted practices;

Which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of resulting benefit and which does not:

   a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

ii. Policy of Article 101
The policy of Article 81 is to prohibit cooperation between independent undertakings which prevents, restricts or distorts competition. In particular it is concerned with eradication of cartels and ‘hard-core’ restrictions on competition.

**iii. Application of Article 101(1)**

The application of Article 101(1) is not limited to legally enforceable agreements: this would make the evasion of law simple. Article 101 applies also to more informal understandings like concerted practices. A broad interpretation has been given to the term ‘agreement’, ‘decision’ and ‘concerted practice’. A difficult issue is whether parallel behaviour by firms in an oligopolistic industry is attributable to an agreement or concerted practise between them, in which case, Article 101(1) would be applicable.

A protocol which has an element of concurrence of will between parties constitutes an agreement within the ambit of Article 101(1).\(^8\) The fact that formal agreement has not been reached on all matters does not preclude a finding of an agreement\(^9\), and there can be an agreement or concerted practice notwithstanding the fact that only one of the participants at a meeting reveal its intentions\(^10\).

**iv. Complex cartels and role of concerted practices: a mammoth task for the competition authorities**

Many cartels are complex and of long duration. Over a period of time some firms may be more active than others in the running of a cartel; some may ‘drop out’ for a while but subsequently re-enter; others may attend meetings or communicate in other ways in order to be kept informed, without necessarily intending to fall in line with the agreed plan; there may be few occasions on which all the members of a cartel actually meet or behave precisely in concert with one another. This presents a problem for a competition authority: where the shape and active membership of a cartel changes over a period of time, must the authority prove a series of discrete agreements or concerted practices, and identify each of the parties to each of those agreements and concerted practices? This would require a considerable amount of evidence and would impose a very high burden on the competition authority. It might also mean that it would not be possible to impose fines in relation to ‘old’ agreements.

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\(^8\) *HOV SVZ/MCN* [1994] OJ L 104/34, para 46.


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and concerted practices, in relation to which infringements had become time-barred\textsuperscript{11}: precisely this issue arose, for example, in BASF AG v Commission\textsuperscript{12}, an appeal in the Choline Chloride case. The Commission, upheld by the Community Courts, has addressed these problems in two ways: first, by developing the idea that it is not necessary to characterise infringements of Article 81(1) specifically as an agreement on the one hand or a concerted practise on the other; and secondly by establishing a concept of a ‘single overall agreement’ for which all members of a cartel bear responsibility, irrespective of their precise involvement from day to day\textsuperscript{13}.

The inclusion of concerted practices within Article 81 means that conduct which is not attributable to an agreement or a decision may nevertheless amount to an infringement. While it can readily be appreciated that loose, informal understandings to limit competition must be prevented as well as agreements, it is difficult both to define the type or degree of coordination within the mischief of the law and to apply that rule to facts of any given case. In particular there is a problem that parties to a cartel may do all they can to destroy incriminating evidence of meetings, e-mails, faxes and correspondence, in which case the temptation of the competition authority may be to infer the existence of an agreement or concerted practise from circumstantial evidence such as parallel conduct on the market. This can be dangerous, for it may be that firms act in parallel not because of an agreement or concerted practise, but because their individual appreciation of market condition tell them that a failure to match a rival’s strategy could be damaging or even disastrous. The application of the law in this area is complex and competition authorities must proceed with care in order to distinguish covert cartels from rational and innocent parallel commercial activities.

It is necessary to consider first the legal meaning of a concerted practise; secondly the question of whether a concerted practice must have been put into effect for Article 81(1) to have been infringed; and lastly the burden of proof in such cases.

\textsuperscript{11} Under Article 26 of Regulation 1/2003 (the ‘Modernisation Regulation’) OJ [2003] L 1/1, [2003] 4 CMLR 551, the Commission cannot impose fines in relation to an infringement that ended five years or more before it initiated proceedings: see Kerse and Khan EC Antitrust Procedure (Sweet & Maxwell, 5th ed, 2005), paras 7.82-7.85.

\textsuperscript{12} Cases T-101/05 and T-111/05 [2007] ECR II-000, PARAS, 132-133.

\textsuperscript{13} See generally Joshua ‘Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law’ [1995] Fordham Corporate Law Institute (ed Hawk), 85.
ICI v Commission (usually referred to as the Dyestuffs case) was the first important case on concerted practices\textsuperscript{14} to come before the ECJ. The Commission had fined several producers of dyestuffs which it considered had been guilty of price fixing through concerted practices. The Commission relied on various pieces of evidence, including the similarity of the rate and timing of price increases and of instructions sent out by parent companies to their subsidiaries and the fact that there had been informal contact between the firms concerned. The ECJ upheld the Commission’s decisions. It said that the object of bringing concerted practices within Article 81 was to prohibit:

A form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition\textsuperscript{15}.

In Suiker Unie v Commission\textsuperscript{16} (the Sugar Cartel case) the ECJ elaborated upon this test. The Commission had held that various sugar producers had taken part in concerted practices to protect the position of two Dutch producers on their domestic market. The producers denied this as they had not worked out a plan to this effect. The ECJ held that it was not necessary to prove that there was an actual plan. Article 81 strictly prohibited:

any direct or indirect contract between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market\textsuperscript{17}.

v. Legal test

These two cases provide the legal test for what constitutes a concerted practise for the purpose of Article 81:


\textsuperscript{15} [1972] ECR 619, [1972] CMLR 557, para 64.


There must be a mental consensus whereby practical cooperation is *Knowingly* substituted for competition; however the consensus need not be achieved verbally, and can come about by direct or indirect contact between the parties.

In *Zuchner v Bayerische Vereinsbank AG*\(^\text{18}\) the ECJ quoted both of these extracts when repeating the test of a concerted practice.

In *Wood Pulp*\(^\text{19}\) Advocate General Darmon noted at paragraphs 170 to 175 of his Opinion that the concept of a concerted practice implies the existence of reciprocal contract. However, this reciprocity can be quite easily established.

In the *Cement appeals*\(^\text{20}\) the CFI found that Lafarge was party to a concerted practise when it received information at a meeting about the future conduct of a competitor: it could not argue that it was merely a passive recipient of such information. In the same case the CFI stated that a concerted practises when it received information at a meeting about the future conduct of a competitor: it could not argue that it was merely the passive recipient of such information. In the same case the CFI stated that a concerted practise does not require a formal undertaking to have been given as to future behaviour.

In *Polypropylene, PVC and LdPE* the Commission stresses that a concerted practise did not require proof of a plan, and it is notable that in *LdPE BP*, Monsanto and Shell were held to be parties to a concerted practise even though they were on the ‘periphery’ of the cartel. In *Soda-ash/Solvay* the Commission pointed out that it would be unlikely, given the well-known legal risks under Article 81(1) that one would find a written record of an illegal resolution; it said that:

> There are many forms and degrees of collusion and it does not require the making of a formal agreement. An infringement of Article 81 may well exist where the parties have not even spelled out an agreement in terms but each infers commitment from the other on the basis of conduct.

**vi. Must a concerted practice have been put into effect?**

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The judgment of the ECJ in the *Polypropylene* case deals with the question of whether a concerted practise must have been put into effect in order for there to be an infringement of Article 81. If the answer to this question is yes it would follow, for example, that if competitors were ‘merely’ to meet or to exchange information, without actually producing any effects on the market by doing so, this would not amount to a concerted practise, the Commission would therefore have to prove there to be an agreement, the object or the effect of which is to restrict competition. The Commission has been keen not to allow there to be legalistic distinctions between the treatment of agreements and concerted practices in Article 81(1), and has received the support of the Community Courts in this endeavour. The ECJ held in *Huls*, one of the *Polypropylene* cases, that ‘a concerted practice... is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market’; however in the *Cement* cases the CFI said that there would be no infringement if the parties can prove to the contrary. In reaching its conclusion in *Huls* the ECJ stated that, as established by its own case law, Article 81(1) requires that each economic operator must determine its policy on the market independently. At paragraph 161 the ECJ acknowledged that the concept of a concerted practice implies that there will be common conduct on the market, but added that there must be a presumption that, by making contract with one another, such conduct will follow: the ECJ appears to be saying that, because of the presumption, the Commission does not have to go further and actually prove those effects. At paragraph 164 of the ECJ specifically stated that a concerted practice may have anti-competitive object, thus harnessing the words of Article 81(1) itself (agreements and concerted practices the *object or effect of which...*) in support of the proposition that the concerted practise in the absence of an actual effect on the market.

vii. The burden of proof

An important issue, having established the legal definition of what constitutes a concerted practise, is to consider who bears the burden of proof. It is clear that the burden is on the Commission to establish that there has been a concerted practise; the Community Courts have annulled decisions where they were unhappy about the evidence on which the Commission relied. In particular, the ECJ’s judgment in *Campagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* established that, whereas parallel behaviour can be circumstantial evidence of a concerted practice, it cannot be conclusive where there are other explanations of what has taken place. In that case the Commission had concluded that the
simultaneous cessation of deliveries to a Belgian customer, Schlitz, by CRAM and Rheinzink of Germany was attributable to a concerted practice to protect the German market. The ECJ held that there was a possible alternative explanation of the refusal to supply, which was that Schlitz had been failing to settle its accounts on the due date; as the Commission had not dealt with this possible explanation of the conduct in question its decision should be quashed.

viii. Parallel behaviour versus concerted practices under Article 81

Both the Commission and the Community Courts appreciate that price competition in an oligopoly may be muted and that oligopolists react to one another’s conduct so that parallel behaviour does not, in itself, amount to a concerted practice under Article 101(1). In Dyestuffs\(^{21}\) the ECJ said at paragraphs 65 and 66 that:

*By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not itself be identified with a concerted practice, it may however amount to strong evidence of such practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallise the status quo to the detriment of effective freedom of movement of the products in the Common Market and free choice by consumers of their suppliers (emphasis added).*

The ECJ added at paragraph 68 that the existence of a concerted practice could be appraised correctly only:

*If the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the products in question.*

In *Dyestuffs* the parties argued that they had acted in a similar manner only because of the oligopolistic market structure. The ECJ rejected this assertion since the market was not a pure oligopoly: rather it was one in which firms could realistically be expected to adopt their own pricing strategies, particularly in view of the compartmentalisation of the markets along

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national boundaries. The ECJ recognized that there might be situations in which a firm must take into account a rival’s likely responses, but said that this did not entitle them actually to coordinate their behaviour:

Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.\(^22\)

In Zuchner v Bayerische Vereinsbank AG\(^23\) the ECJ repeated that intelligent responses to a competitor’s behaviour would not bring firms within the scope of Article 81(1). In Zinc Producer Group the Commission said that it did not intend to condemn parallel action between 1977 and 1979 which might be explicable in terms of ‘barometric price leadership’\(^24\), saying that in such circumstances ‘parallel pricing behaviour in an oligopoly producing homogenous goods will not in itself be sufficient evidence of a concerted practise’\(^25\). In Peroxygen Products however the Commission rejected an argument that an agreement between oligopolists fell outside Article 81(1) since, even without the agreement, the structure of the market would have meant that they would have behaved in the same way. In the Commission’s view, the very fact that the firms had entered into an agreement at all indicated that the free play of competition might have led to different market behaviour.

In Wood Pulp\(^26\) the Commission held that producers of wood pulp were guilty of a concerted practice to fix prices in the EC. There had been parallel conduct on the market from 1975 until 1981, but there was no evidence of explicit agreements to fix prices. However the Commission concluded that there was a concerted practise, basing its findings on two factors. The first was there had been direct and indirect exchanges of information which had created an artificial transparency of price information on the market. The second was that, in the Commission’s view, an economic analysis of the market demonstrated that it was not a

narrow oligopoly in which parallel pricing might be expected. On appeal, the ECJ substantially annulled the Commission’s findings. The fact that pulp producers announced price price rises to users in advance on a quarterly basis did not in itself involve an infringement of Article 81(1): making information available to third parties did not eliminate the producers’ uncertainty as to what each other would do. Furthermore, there were alternative explanations for the system of and simultaneity of price announcements, and the parallelism of prices could be explained other than by the existence of a concerted practise. Information was freely available on the market as buyers informed each other of the prices available, some agents acted for a number of different producers and so were well-informed about prices and the trade press was dynamic. As to parallelism, the ECJ’s experts considered that the market was more oligopolistic than the Commission had supposed, and that economic problems had discouraged producers from engaging in price cutting which their competitors would inevitably follow; the experts also considered that there was evidence to suggest that there could not have been concertation: for example, market shares had varied from time to time, which would be unlikely if there was a concerted practice; and the alleged cartel members had not tried to establish production quotas, which they could be expected to have done if they wished to control the market.

This important judgment demonstrates that the burden is on the Commission to prove the existence of a concerted practise, and in particular to deal with any alternative explanations advanced by the parties of parallel behaviour on the market. The judgment does acknowledge, however, in an appropriate case, parallelism could be evidence of a concerted practice where there is no plausible alternative explanation.

B. UNITED STATES OF AMERICA

1. APPLICATION OF THE CONCEPT UNDER ANTITRUST

Whether the agreement is called “collusion”, a “contract”, a “combination”, “concerted action”, or a “conspiracy” a plaintiff or prosecutor must prove using either direct or

29 Ibid.
circumstantial evidence that there occurred a meeting of the minds\(^{30}\) between two or more separate parties\(^{31}\).

As the Supreme Court has put it, there must be proof “that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective\(^{32}\).”

2. OVERVIEW OF SECTION 1 SHERMAN ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[15 U.S.C.A. § 1]

Section 1 of the Sherman Act generally proscribes any contract, combination or conspiracy that unreasonably restraints the nation’s domestic or foreign commerce.\(^{33}\) As construed by the courts, Section 1 of the Sherman Act broadly prohibits concerted action that “unreasonably” restraints the nation’s domestic or foreign trade.\(^{34}\) This extremely expansive language has been held to encompass a wide range of practices deemed anticompetitive in past judicial decisions. For example, the statute has been utilized to strike down diverse practices as:


\(^{31}\) See *Copperweld Corp. v Independence Tube Corp.*, U.S. 752, 771 (1984). A section 1 conspiracy requires “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement”. Quoting *Tobacco Co. v United States*, 328 U.S. 781, 810 (1946).


\(^{33}\) 15 U.S.C.A. § 1. Corporate officers and directors who authorize or take part in the law violation are also subject to criminal sanctions under Clayton Act § 14, 15 U.S.C.A § 24. See also U.S. Dep’t of Justice and Federal Trade Comm’n, *Antitrust Guidelines for Collaborations Among Competitors*, Sec. 3.2 (April 2000) (“Agreements of a type that always or almost always tends to raise price or to reduce output are per se illegal. The agencies challenge such agreements, once identified, as per se illegal. Typically these are agreements not to compete on price or output. These type of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids or share or divide the market by allocating customers, suppliers, territories, or lines of commerce. The Courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, precompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.”); U.S. Department of Justice and Federal Trade Comm’n, *Antitrust Enforcement Guidelines for International Operations*, Sec. 2.1 (April 1995) (“Conduct that the Department prosecutes criminally is limited to traditional per se offences of the law, which typically involve price-fixing, customer allocation, big-rigging or other cartel activities”).

1) Horizontal price fixing, in which direct or potential competitors at the same level of the market structure agree upon the prices that they will charge customers or pay suppliers;
2) Vertical price fixing in which firms at different levels of market structure (e.g. a manufacturer and one of its distributors) fix prices at one or more market levels;
3) Horizontal allocation of territories, customers or output among actual or potential competitors;
4) Vertical territorial, customer, or other nonprice restraints involving firms at different levels of the market;
5) Competitively motivated group boycotts and concerted refusals to deal;
6) Tying agreements, in which the availability of one product or service is conditioned upon purchasing another product or service or upon refraining from purchasing the products or services of the seller’s competitors and
7) Exclusive dealing agreements, in which a supplier agrees to sell all or a significant portion of its output of a product or service to a particular buyer, or a buyer agrees to purchase substantially all of its requirements from a particular seller.

The preceding list is merely illustrative of the wide range of practices that have been brought under the theoretical umbrella of statute. Virtually, any concerted action among two or more entities may be susceptible to Section 1 challenge, provided that it is shown to have the requisite anticompetitive impact and to meet certain threshold procedural and substantive requirements.

One of the most important requirements is “concerted action.” The key challenge under the section is to demarcate between a concerted action and unilateral behaviour of separate actors. Furthermore, the challenged conduct should be competitively “unreasonable”. The expansive language of the section includes desirable as well as undesirable arrangements. Another essential requirement is that the plaintiff’s injury must be an antitrust injury.

3. NECESSITY OF “CONCERTED ACTION”

Section 1 of the Sherman Act is necessarily directed at concerted action only. According to the Supreme Court the requirement of concerted action was met by explicit understandings between defendants, either taking the form of a actual written agreements or of verbal
commitments.\textsuperscript{35} The existence of a contract, agreement or conspiracy must be gathered from circumstantial evidence. Virtually, any evidence may be utilized for this purpose, if it indicates that the parties entered into an “agreement” or “understanding” to take joint action.\textsuperscript{36} The evidence must show a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.\textsuperscript{37}

Circumstantial proof of conspiratorial action has been held to include such things as meetings attended by the defendants at which they had the opportunity to conspire followed shortly thereafter by parallel behaviour; in parallel behaviour that goes beyond what would be expected absent an agreement; in an aura of secrecy surrounding meetings attended by the defendants; in conduct that is seemingly against the players’ respective self-interest; and in the simultaneous imposition of substantially identical terms of sale. It is to be noted that an involuntary agreement is generally viewed as concerted rather than unilateral, conduct for antitrust purposes.

Merely coincidental behaviour that can be explained on legitimate business grounds does not, however, in itself establish a conspiracy if it is equally indicative of a series of unilateral actions.\textsuperscript{38} For example, parallel pricing behaviour by firms in a price sensitive market need not indicate an actual agreement to fix prices; the firms may instead be simply be responding unilaterally to the price changes of their competitors.\textsuperscript{39} In addition, it is not concerted action for a party to simply announce the terms under which it is willing to deal and to then act in accordance with this unilateral announcement, even though the practical effect may be to achieve considerable conformity of behaviour.\textsuperscript{40} Likewise action taken against a dealer by a supplier in response to complaints received from its other dealers does not in itself establish the necessary concert of action, where the supplier may simply be acting in its own economic self-interest.\textsuperscript{41}

4. PARALLEL PRICING AND OTHER PARALLEL BEHAVIOR

\textsuperscript{35} United States v Trenton Pottery Co., 273 U.S. 392 (1927).
\textsuperscript{36} Monsanto Co. v Spray-Rite Service Corp., 465 U.S. 752, 764, 104. S. Ct. 1464, 79 L. Ed. 2d 775 (1984) (“the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.”);
\textsuperscript{37} American Tobacco Co. v United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946).
\textsuperscript{38} Theatre Enterprises, Inc. v Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954).
\textsuperscript{39} Blomkest Fertilizer, Inc. v Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028, 1032 to 1033 (8th Cir. 2000).
\textsuperscript{40} Ibid 41.
Conscious Parallelism

A plaintiff or a prosecutor cannot prove a horizontal agreement simply by proving that multiple sellers in a given market knowingly raised their prices within a short time of each other, a practise referred to as “conscious parallelism”\(^{42}\).

The plaintiff or prosecutor must prove that the price increase was the result of an agreement between two or more of the companies. The seemingly coordinated nature of the increase could be used as circumstantial evidence of an agreement.\(^{43}\)

But without additional evidence, sometimes referred to as “plus factors”, proof of consciously parallel behaviour is not enough to establish a violation.\(^{44}\) The additional evidence or plus factors need not take the form of direct evidence of an explicitly illegal agreement.\(^{45}\)

It is frequently impossible for a prosecutor or plaintiff to come up with such evidence. Circumstantial evidence can be used to support an inference of an agreement.\(^{46}\)

In addition to parallel behaviour, Courts will look at, among other things: whether the defendants had a motive to enter an anti-competitive agreement; the existence of correspondence, meetings or other communications among the defendants (specially if such contacts were frequent or suspiciously timed in relation to price increases and/or the contacts concerned the subject matter of the alleged agreement); and whether it would have made economic sense for the defendants to act as they did if they were acting independently.\(^{47}\)

Proof of parallel conduct by a group of alleged conspirators may, in appropriate circumstances, provide probative evidence of the existence of a conspiracy between them.

\(^{42}\) See generally Theatre Enters. Inc. v Paramount Film Distribution Corp., 346 U.S. 537, 541 (1954).


\(^{44}\) As Supreme Court stated in Theatre Enterprises Inc.: “this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently that such behavior itself constitutes a Sherman Act offence…circumstantial, judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.” 346 U.S. at 541.

\(^{45}\) United States v General Motor Corp., 384 U.S. 127, 142-143 (1966) (“explicit agreement is not a not a necessary part of a Sherman Act conspiracy”).

\(^{46}\) Monsanto: Norfolk Monument Co. v Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969) (“business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.”

\(^{47}\) Matsushita Electronics Industries Co. v Zenith Radio Corp., 475 U.S. 574, 588 (1986). (More evidence of agreement required where the allegedly illegal conduct made no economic sense).
For example, in *American Tobacco Co. v United States*, the existence of a conspiracy was premised in large part upon parallel pricing and competitive bidding behaviour that would not have been expected absent a conspiracy. Similarly, in *Interstate Circuit, Inc. v United States*, conspiratorial action was found in the parallel acceptances by a group of suppliers of separate demands on them by a dominant customer to restrict the pricing of its competitors, where each supplier was aware of the fact that similar demands were being made on the others, and where common acceptance was essential for successful implementation of the pricing scheme.

Parallel conduct is not, however, necessarily determinative of the issue. Parallel pricing or other matching behaviour does not in itself establish the existence of a combination or conspiracy, nor should it, if it is equally consistent with the lawful behaviour of firms acting separately and independently of one another. For example, it is not price fixing for firms in a highly price sensitive market to unilaterally respond to the price changes of their competitors.

Additional evidence is instead necessary to further bolster the inference of collusion—hence the common statement that what is needed is proof of parallel conduct “plus.” A wide range of circumstantial evidence can be used to establish the needed plus factor, if indicating that the defendants, rather than acting in a merely parallel manner, have actually acted in concert.

For example, have they attended secret meetings or conducted suspicious discussions at which they had the opportunity to conspire; have they acted against their own economic best interests; have they engaged in parallel behaviour that is economically irrational unless an agreement exists; has at least one participant expressly invited common action by the others; have they simultaneously taken an identical action, where purely unilateral action would have entailed at least some time delays; or does the evidence demonstrate other indicia of an “actual meeting of minds”?  

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49 *Blomkest Fertilizer, Inc. v Potash Corp. of Saskatchewan, Inc.*, 203
Absent such additional evidence, parallel behaviour alone will not satisfy the Section 1 requirement of an actual “contract, combination or conspiracy.” In the words of the Supreme Court,\(^\text{51}\)

*This Court has never held that proof of parallel business behaviour conclusively establishes agreement or, phrased differently, that such behaviour itself constitutes a Sherman Act offence..."conscious parallelism” has not yet read conspiracy out of the Sherman Act entirely.*

Illustrative of this principle is the Seventh Circuit decision in *Reserve Supply Corp. v Owens-Corning Fibreglass.*\(^\text{52}\) The plaintiff was a distributor of fibreglass insulation materials manufactured by the defendants. It alleged in relevant part that they had conspired to fix the wholesale prices charged for the materials. In affirming summary judgment for the defendants, the appellate court ruled that the plaintiff failed to present sufficient evidence of an actual conspiracy between them to raise a triable issue of fact.

The plaintiff presented no direct evidence of a price fixing agreement. Instead it had relied on the following circumstantial evidence: prices had moved in tandem for a prolonged period of time; each defendant had signalled price changes by preannouncing them to the trade; prices had continued to increase in a period of falling demand; and the defendants had continued to earn allegedly supracompetitive profits. This evidence was ruled probative of a possible conspiracy but not, of itself, sufficient in light of uncontroversed evidence that the oligopolistic nature of the market meant that the parallel pricing could also be explained as independent “follow the leader” behaviour. The court suggested a three-step analysis:\(^\text{53}\)

*In making this enquiry into concerted versus merely parallel behaviour, the court should first examine the plaintiff’s evidence of a conspiracy among the defendants. Next it should examine whether the defendants have offered evidence tending to show that the conduct complained of is as compatible with the defendants’ legitimate business activities as with illegal conspiracy. If the court concludes that the foregoing analysis leaves the evidence of conspiracy ambiguous, it should then determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.*

\(^{51}\) *Theatre Enterprises, Inc. v Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

\(^{52}\) *Reserve Supply Corp. v Owens-Corning Fiberglass*, 971 F 2d 37 (7th Cir. 1992).

\(^{53}\) Ibid.
Other decisions have likewise concluded that parallel behaviour, while certainly suggestive of the existence of joint action, is not itself sufficient.\textsuperscript{54}

\section*{5. PLUS FACTORS}

Plus factors are economic actions and outcomes, above and beyond parallel conduct by oligopolistic firms, that are largely inconsistent with unilateral conduct but largely consistent with coordinated action. Possible plus factors are typically enumerated without any attempt to distinguish them in terms of a meaningful economic categorization or in terms of their probative strength for inferring collusion.

\subsection*{i. Current issues related to plus factors}

Generally it is observed that in an oligopolistic industry, the firms recognize their mutual interdependence, acknowledge that they are players in a repeated game, and act according to it. In antitrust decisions, mere conscious parallelism does not suffice for determination of firms engaged in concerted action because such pricing can emerge from firms acting non-collusively where they understand their role as players.\textsuperscript{55}

In such cases courts have required that economic circumstantial evidence go beyond the parallel movement in price to reach a finding that the firms have crossed that line thereby violating Section 1 of the Sherman Act. This additional economic circumstantial evidence is collectively known as “plus factors.”\textsuperscript{56}

Analysis of plus factors as circumstantial evidence of agreement remains as one of the most significant and unsettled areas of antitrust law.

Plus factors focuses on what modern economic understanding do to coordinate their behaviour.

Since the mid-1990s growing number of other jurisdictions have amended their laws to permit the prosecution of cartel offenses as criminal offences.\textsuperscript{57}

The litigation of agreement issues has sparked the debate of demarcation between lawful unilateral conduct and illegal collective behaviour. Despite the major contribution of

\begin{footnotes}
\item[\textsuperscript{54}] \textit{Theatre Enterprises, Inc. v Paramount Film Distributing Corp.}, 346 U.S. 537, 541 (1954).
\item[\textsuperscript{55}] \textit{Brooke Group Ltd. v Brown & Williamson Tobacco Corp.}, 509 U.S. 209, 227 (1993).
\item[\textsuperscript{56}] ABA Section of Antitrust Law, Antitrust Law Developments 11-16 (6\textsuperscript{th} ed. 2007).
\item[\textsuperscript{57}] Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 Antitrust L.J. 711 (2001) (describing the remedies obtained in private cases challenging the vitamins cartel).
\end{footnotes}
Attribution of Price Parallelism as Cartels under the Competition Act, 2002.

Economists, jurists on this issue, the definition and proof of concerted action remain litigated issues in horizontal restraints cases under Section 1 of the Sherman Act. In leading antitrust cases like the Theatre Enterprises, Interstate Circuits etc, some major points are established by the judiciary. Firstly that courts would allow agreements to be inferred by circumstantial proof suggesting that the challenged conduct more likely than not resulted from concerted action. Secondly courts would not find an agreement where the plaintiff showed only that the defendants recognized their interdependence and simply mimicked their rival’s pricing moves.

After the Monsanto case, one can attribute conscious parallelism as ‘conscious commitment to a common scheme’. Each firm in an oligopoly knows the effect of its acts depends on the reaction of its rivals. All producers have a notion that price increases will be accepted only if all firms raise prices. Realizing their interdependence, each firm decided, without consulting its rivals to match competitor price increases. Repeated efforts to match rivals’ price moves arguably indicate the firm’s conscious commitment to achieve higher prices. The sole interfirm communication consists of each firm’s observation of its rivals’ price changes. By calibrating its own moves to conform with the decisions of its rivals, each firm can be said to have “consciously committed” itself to participate in a “common scheme.”

Legal scholars have recognized that certain industry structures, firm histories, and market environments are conducive to and/or facilitate collusion. These include but are not limited to:

- The defendant’s participation in past collusion related offences.
- Evidence that the defendants had the opportunity to communicate or actually did so
- The use of facilitating devices such as delivered pricing or most favored nation clauses.
- Industry characteristics (product homogeneity, frequent transactions, readily observed price adjustments, high entry barriers, and high concentration) that are conducive to successful coordination.

Courts have relied on operational criteria known as “plus factors” to determine whether a pattern of parallel conduct results from an agreement. The chief plus factors have included:

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• Actions contrary to each defendant’s self interest unless pursued as part of a collective plan
• Phenomena that can be explained rationally only as the result of concerted action.
• Evidence that defendants created the opportunity for regular communication.
• Industry performance data, such as extraordinary profits, that suggest successful coordination.
• The absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals), or the presentation of contrived rationales for certain conduct.

Two basic problems have attended judicial efforts to identify and evaluate plus factors. Firstly, courts have failed to establish any analytical framework that explains why specific plus factors have stronger or weaker evidentiary value or to present a hierarchy of such factors. Antitrust agreement decisions rarely rank plus factors according to their probative merit or specify the minimum critical mass of plus factors that must be established to sustain an inference that conduct resulted from concerted acts rather than from conscious parallelism. Nor do courts ordinarily devote great effort to evaluating the economic significance of each factor. This *ad hoc* approach makes judgments about the resolution of future cases problematic and gives an impressionistic quality to judicial decision making in agreement related disputes.

The variation in judicial analysis of plus factors also suggests that the outcome in many agreement cases depends upon the court’s unarticulated intuition about the likely cause of observed parallel behaviour. Judges appear to vary in their acceptance of the proposition in *Theatre Enterprises* that conscious parallelism does not always bespeak concerted behaviour. Thus, judges who regard pricing uniformity as a sign of collaboration will give lip service to *Theatre Enterprises*.

**ii. cartel conduct**

If an effective cartel uses a market share allocation scheme, then we will observe fixed relative market shares among those firms. This statement is not logically equivalent to if we observe fixed relative market shares among a subset of firms then the firms exhibiting those relatively fixed shares are effectively colluding through the use a market share allocation

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60 Gavil et al., 310-11.
Attribution of Price Parallelism as Cartels under the Competition Act, 2002.

scheme. But since A implies B does not logically yield B implies A. What then is a plus factor?

One issue with the characterization of plus factors is that there is no taxonomy for them. There is no ranking, grouping or relative probative value. It depends upon nature of specific product, industry and marketplace in considering a given plus factor; however, at the current time, all plus factors tend to reside in the same five-gallon bucket, essentially without distinction.

These actions can be broadly construed as an explicit cartel:

A. Raise prices above what they would have been without the conspiracy.\(^{61}\)
B. Reduce total industry-wide quantity below what it would have been without the conspiracy.
C. Allocate the collusive gain among members.
D. Monitor compliance with the agreement and communicate regularly regarding all relevant features of the conspiracy that require coordinated action with respect to buyers.
E. Redistribute gains and losses among members so as to maintain compliance with the agreement.
F. Stand ready to threaten to credibly punish, and potentially enact punishment against, non-complaint conduct by members
G. Change within firm incentives so as to inhibit interfirm competition and foster higher prices.
H. Once interfirm rivalry has been suppressed successfully, seek additional profits through activities such as dominant-firm conduct.

One or more of the above has to be consistent with any plus factor provided below:\(^{62}\)

1. Fixed relative market shares
2. Marketwide price discrimination
3. Exchanges of price information
4. Regional price variations
5. Identical bids for non-standard products
6. Price, output, and capacity changes at the formation of the cartel

\(^{61}\) Stigler (1964).
7. Industry-wide resale price maintenance
8. Declining market shares of leaders
9. Amplitude and fluctuation of price changes
10. Demand elastic at the market price
11. Level and pattern of profits
12. Market price inversely correlated with number of firms or elasticity of demand
13. Basing point pricing
14. Exclusionary practices

A cartel is solving a multidimensional problem, and the actions it takes will not be one dimensional.

iii. Price elevation

Cartels have taken great comfort in the fact that, at the end of the day, courts are typically not going to rely on economic evidence about price to infer collusion.63

iv. Quantity Restrictions

The OPEC cartel operates by establishing petroleum output limits for its member countries. By suppressing output of oil, they increase the market clearing price for oil above what it would have been without constraints. The role of quantity reductions to increase prices is well understood by governmental agricultural price support programs that pay farmers not to grow certain crops or to leave fields fallow. Recently, a suit was filed claiming that the United Potato Growers of America Inc. and others “conspired to manipulate potato prices by controlling and reducing supply, taking coordinated steps including agreeing to limit potato planting acreages, to pay off farmers to destroy potatoes or not grow additional potatoes, and to diminish the overall number of potatoes available to direct purchasers.”64

The allocation of collusive gain can occur through a market share agreement, a customer allocation, a geographic allocation, or some combination of these. As noted above, these allocations are also part of implementing the supply restriction and not just in place to divide the collusive gain. If a firm sells beyond its market share allocation, then some other firms are below theirs, and the former will be required to buy product from the latter at cartel prices at the end of the year. The latter firm is thus made whole while the former is incurring a penalty for overselling.

64 “OPEC of Potatoes” Hit With Price-Fixing Action,” Law 360, June 18, 2010.
product at cartel prices that it could produce at much lower cost. Observationally, each of the allocations has an implication-stable market shares for a subset of firms, no customer churn, and certain regions being serviced only by specific firms, respectively. But each of these may arise as part of non-collusive conduct by oligopolists in a repeated game setting. However, strong buyer resistance when firms are acting without explicit collusion will produce more variability in market shares, the sellers that customers select, and the penetration of geographic regions by sellers than when there is explicit collusion. In the face of rising prices, we expect stronger buyer resistance and thus more variability in these three measures when firms are acting non-collusively. To see these measures actually become more stable and have less variability when prices are rising leads to the inference of explicit collusion.

v. Communication and Monitoring
Communication is the central part of the operation of a cartel. The “agreement” to engage in explicit collusion involves communication, but this is largely “legal” evidence, and we are concerned with communication that reflects the ongoing nature of the conspiracy. In general, if a seller (receiver) knows something about another seller (sender) an immediate question arises—was there no legitimate unilateral function for the sender in communicating such information to the receiver? Overall, information is a valuable commodity. For one seller to know information about a rival is to give that seller a competitive advantage. A competitor has no unilateral interest in disadvantaging itself relative to its rivals.

With regard to firm-specific production information, again there is no reasonable explanation for such a conveyance by a non-collusive seller to another non-collusive seller. For example, unilateral knowledge of a rival’s capacity utilization, inventory levels, or production costs will increase expected profits in any competitive bidding process. The conveyance of firm-specific production and sales information is important for monitoring compliance with many cartel agreements. For example, market share allocations require knowledge of exactly this kind of information, as well as the ability of cartel members to verify such information. Sometimes cartels will use trade associations, export associations, or outside consultants to convey such information among themselves.

vi. Redistribution of gain and losses
Cartels will often need to redistribute gains and losses to maintain their agreements. Plus factors are not observed in isolation. Just as there may be multiple symptoms in medicine, there may be multiple plus factors in cartel matters. Given the life-or-death stakes in medicine, multiple symptoms cannot be ignored or their information wasted. The same should be true in law. Thus, whether in medicine or in law, when multiple diagnostic factors are observed, the very proper way to treat these is as a constellation, rather than in isolation. It is to be noted that individual factors cannot lead to the same diagnosis as a constellation of factors\(^{65}\).

C. INDIA

1. OBJECTIVE OF COMPETITION POLICY

The objective of a competition policy is to promote efficiency and maximise welfare and, thus to create a conducive business environment in which the abuse of market power is prevented mainly through competition.

The competition law therefore, targets therefore anti-competitive agreements. The relevant section under the Competition Act, 2002 is therefore Section 3.

Section 3 of the Act deals with the economic regulation of the market power intended to constrain an enterprise from exercising it, to promote and sustain competition in markets.

It is designed to prevent, alongwith conspiracies and monopolies against consuming public, such unfair practices against smaller competitors, and also such other practices, that unfairly disadvantage competitors or injure consumers as tying arrangements, exclusive supply or distribution agreement, refusal to deal. It therefore, provides for prohibition of entering into an agreement in respect of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India.

Section 3(3) deals with horizontal agreements.

\(^{65}\) Continental Ore Co. v Union Carbide and Co.
2. OVERVIEW OF SECTION 2(b) and SECTION 3 OF THE COMPETITION ACT, 2002

S.2(b)
—agreement includes any arrangement or understanding or action in concert,—
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

S. 3 Anti competitive agreements
(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.
(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.
Section 3(1) prohibits an enterprise or person or their associations from entering into an agreement (in respect of production, supply, distribution, storage, acquisition or control of
goods or provision of services) which causes or likely to cause an appreciable adverse effect on competition within India. Any agreement entered into in contravention of this provision is void [section 3(2)].

The term “adverse effect on competition” refers not to a particular list of agreements but to a particular economic consequence which may be produced by quite different sort of agreements in varying circumstances.

Contracts creating restriction upon individual freedom of contract and impeding the due course of trade, competition are brought within the prohibition of the Act.

Section 3 is a general provision setting out the prohibition on the basis of economic consequence of an agreement. It prohibits all kinds of agreements which have the effect to restrict competition and prevent those which are likely to have such effect.

What is prohibited is the agreement or arrangement to control and dominate trade and commerce in a commodity, coupled with the power and intent to exclude competitors to a substantial extent. It is not the form or the particular means used, but the result to be achieved that the statute condemns.

Agreements here may be formal, or action in concert or arrangement or understanding. Thus: price or output. That adverse effect to an appreciable extent on the competition must be the consequence of the agreement. That consequence may even be unintended. It is not always necessary to find a specific intent in order to find the agreement having an appreciable adverse effect on the competition and thus contravening section 3(1). It is sufficient that the likely effect is the consequence of the person’s conduct or business arrangements. The essence of violation is the illegal agreement, the proper analysis focuses upon the potential harm that would ensure if the conspiracy is successful, and not upon the actual consequences.

The conduct of the party, therefore, should be such which may have appreciable effect on the competition within India. The conduct or a contract between two parties not resulting the said consequences, is not prohibited.66

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66 Pawan Hans Ltd. v Union of India [2003] 114 Comp. Cas. 676 (SC); Mahindra and Mahindra Ltd. V Union of India (1979) 2 SCC 529 (SC).
Contravention is *prima facie* established, in respect of agreements of the nature as set out in section 3(3) which are presumed to have an appreciable adverse effect on competition. No investigation is necessary.

An agreement is anti-competitive, if its cause occasions adverse effect. Cause is something that occasions or effects a result. The effect of the agreement and its economic impact rather than technical form is important.

- It is not the form of the agreement or the particular means used but the result that the statute condemns;
- It is not important whether means used to accomplish the unlawful objective are themselves lawful or unlawful;
- No formal agreement is necessary to constitute an unlawful conspiracy;
- The essential conspiracy in violation of the Act may be found in the course of dealing or other circumstantial as well as in the exchange of words.

The motive of a person to adopt a particular course of action is not important, as its sole and dominant purpose, i.e., the design of effecting something to be achieved or accomplished. The overt act must be looked at to find out the effect, whether such effect is calculated, or designed or could be predicted.

### 3. FACTORS FACILITATING ANTI-COMPETITIVE AGREEMENTS

The factors which facilitate anti-competitive agreements differ from market to market. Those which facilitate however, are:

1) Demand for the product is relatively inelastic;
2) Market shares are stable;
3) There are barriers to entry to the market;
4) The market is concentrated;
5) Demand is stable;
6) Goods are homogenous so that the product differentiation is not possible.

In case of a cartel, there are other additional factors, as its success depends on trust and non-cheating. Cheating on cartel is facilitated where products are homogenous, buyers are dispersed, and market is concentrated.
4. CONCERTED PRACTICES

Section 3(3) deals with agreements between persons, or concerted practices or decisions of associations of enterprises which have anti-competitive effect. It, therefore, covers multiple possibilities that go beyond “agreement”. Practices carried on, decisions taken, by an association of enterprises including cartel are various devices which cannot be taken to be agreement, but may have adverse impact on competition. The possibilities of evading the prohibitory provision, through such devices, are removed. The term “agreement” has been defined in section 2(b), which has already been discussed. Agreement may not be formal and written. It may be informal, oral or non-bidding.

5. DISTINCTION BETWEEN CONCERTED PRACTICE AND PARALLEL BEHAVIOR

The competition law prohibits any form of collusion which distorts competition, but does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.

It is necessary to ascertain whether parallel conduct can be explained otherwise than concertation, by taking into account the nature of the products, the size and the number of the undertakings and the volume of the market in question.

It is very difficult to distinguish concerted practice from parallel behaviour. Raghavan’s Report on Competition Law observes as follows in paragraph 4.3-3:

“Howeover distinction needs to be made between what could be called an illegal practice of price cartelisation and must, therefore, be curbed and punished and a perfectly legitimate economic and business behaviour in responding to a situation in which a given competitor is placed in what could be described as price leadership position. When a price leader alters the price of his goods or services due to factors such as increase in the cost of inputs, raw materials or other related costs, most other competitors will have no choice, but to follow him though the extent could vary. This cannot be said to be illegal because its behaviour is not based on any prior discussion or understanding, but on the sheer economic premise that any price increase taken by a small player ahead of the price leader would imply significant penalties in terms of loss of custom. These price followers, therefore, have no choice but to wait until price leader takes a price increase. To assume in each case, an informal
cooperation (or informal agreement), would be too harsh and would ignore a market place reality."

6. REBUTTABLE PRESUMPTION

A parallel fall in prices can be evidence of healthy competition, but an increase would raise presumption of concertation rebuttable on evidence to the contrary as matter of common prudence. Parallel price increases, particularly during periods of general inflation are as consistent with competition as with collusion and provide no strong evidence of anti-competitive behaviour. For concertation, therefore, it has to be established that some form of communication or shared knowledge of business decisions has taken place among enterprises leading to concerted action. The concept of concerted practices refers to reciprocal communications between the competitors with the aim of giving each other assurance as to their conduct on the market. Actual communication, therefore, is the requirement. In its absence, concerted practise cannot be proved to have been established; but parallelism of behaviour could be inferred arising as a result of independent business decision taking into account the present and foreseeable conduct of the competitors.

7. AGREEMENT AND CARTELISATION

Cartelisation is entering into an agreement or arrangement or understanding between enterprises and instituting measures to control competition. The Act defines “cartel” in section 2(c) as follows:-

“cartel” 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.

The definition is very wide and inclusive, covering both trade and competition. It is a formal association of manufacturers or suppliers to maintain prices at high level, and control production, prices, marketing arrangements etc., and thereby limiting competition and imposing restraints on trade. It, thus, imposes unreasonable restraint on free trade and distorts competition.
8. RECENT DEVELOPMENT IN LAW: Re DOMESTIC AIRLINES⁶⁷:

i. Factual matrix:

The first matter related to an investigation before the office of Director General, Investigation and Registration - DG(I&R), Monopolies & Restrictive Trade Practices Commission (MRTPC) taken up on the basis of news reports published in the 'Financial Express' and 'Economic Times' on 11.02.2009 that airline operators in India had simultaneously withdrawn promotional offer fares of Rs. 1/- and Rs. 99/-, and hiked their air fares by 25 percent across the board in February 2009. The other case, suo- motu case was related to allegations in media that acting together the airlines had raised their fares around diwali season of 2010, cognizance of which was taken up by the Commission and an order was passed directing Director General (DG) to conduct investigation into the matter.

ii. Issue involved:

The main issue raised before the Commission was that by acting in concert, Indian domestic airline operators have colluded to raise airline fares together.

iii. Defence taken by the individual airlines:

In response to the initial investigation carried out by the DG, it was replied by the various airlines that:

Air India - Air India submitted that as the Indian domestic air travel market had gone through a significant decline since the summer of 2008y due to global financial crisis, it was compelled to review the fare structure in January 2009 in a bid to stimulate demand and with a view to remain in competition. However, even reduction in the airfares did not result in increase in carriage and its daily passenger carriage declined by 253 per day between December 2008 and January 2009. Since the fares were increased by its competitors in the month of February 2009, it was also compelled to increase its fares to meet out competition. However, in many sectors, the revised fares charged were still lower than that of the competitors. Moreover, it also continued to offer lower fares against the tickets purchased well in advance for reaching out to the segments in the market which are known to be price sensitive.

⁶⁷ MANU/CO/003/2012
Kingfisher Airlines Ltd. – it submitted that it had not increased the fares during the period of reference but only restored the fares to December 2008 levels. The Airline also submitted that it had lowered the air fares during December 2008 with a view to boost the demand. However, lower fares did not yield the expected result; rather its traffic got reduced by 14% compared to the traffic during January 2008. It further brought out that the company was incurring a loss because of economic slowdown across the globe. Therefore, fares were raised in February 2009 to generate as much revenue as possible to cover the costs. It was also brought out that it follows a dynamic pricing model by which consumers are benefited by paying lower fares in case they book tickets in advance. Kingfisher Airlines also argued that due to factors like increased cost on account of aircraft lease, maintenance as well as increase in airport charges it was compelled to raise the fares which had nothing to do with the fares of other airline operators and furthermore it was not aware of any collective increase in air fares by all the domestic airlines.

Inter Globe Aviation Ltd (IndiGo)- Denied the charges of cartelization, replied that it has never acted in a collusive manner, although the fares offered by the competitors are definitely a determining factor in determining its fares. It also submitted that its fares are dependent upon dynamic pricing principle wherein fares are cheaper for bookings in advance and gradually increase as the booking date gets closer to the departure date. With regards to withdrawal of promotional offers it submitted that such fares are introduced in the lean seasons in order to boost the market demand and remain for a limited period since they are designed to be for a short term either for a fixed duration or for a limited inventory of seats or both and end when the duration is over or the inventories are exhausted.

The basic tenets of pricing actions of all airlines are 'Price-Parallelism' or 'Price Parity' and IndiGo also matches competitive fares where it feels that demand will not outstrip the supply. However, these actions only cannot be construed as collusion since price-parallelism in itself is not an evidence to establish cartelization and the increase in air fares by the airline operators was not in tandem and was not a result of concerted action. According to the airline, in absence of any evidence, only newspaper reports cannot form the basis for establishing cartelization and anti-competitive agreements.

Go-Air - denied that it had entered into agreement with any airlines to sell tickets at a higher price. It also submitted that it has adopted web based reservations and fare system which
work on dynamic pricing model based on various market forces such as product strength, seasonality, demand, load and comparative fare of competitors. No response was received from the other airline operators.

iv. Investigation Report of the DG

The investigation and findings of the DG concluded:

- all the airlines denied the allegations and re-iterated their position on the lines submitted before DG(I&R), MRTPC stating that there was no anti-competitive agreement among the airlines pursuant to which they withdrew promotional fares and raised fares in the month of February 2009.
- the domestic air travel market had been witnessing a significant decline since mid 2008 due to slowdown of the world economy. In order to stimulate demand, the airline operators had lowered the airfares in the month of January 2009. However, the same did not stimulate demand. Therefore, they restored their previous price levels.
- although there was increase in fares during February 2009, the increase during the period under investigation was not uniform across all the airlines, all the sectors and all class of tickets. Further, no evidence was also found during the course of investigation with regard to withdrawal of promotional fares by all the airlines simultaneously across all the sectors.
- in airline industry there is a high degree of transparency over prices and volumes and airlines fares are instantaneously available over computer reservation systems. The fares are kept by each airline at a competitive level and also tend to move together. Generally fares of all scheduled domestic airlines go up as the flight gets closer to the departure date. To this extent, it may be said that there is a certain degree of price parallelism. However, this appears to be more in view of competitive pricing that each airline adopts which in itself cannot be said to a conclusive evidence to establish cartelisation. However, price parity alone may not be sufficient to show that the airlines have acted in a collusive manner and acted as a cartel. The price increase was not affected in tandem by all airline operators and no evidence could be found during the course of investigation that the increase in the fares was a result of premeditated/concerted action of the airline operators.
• no evidence has been found to establish and conclude that the domestic airline operators had reached some understanding/ agreement to raise the air fares during the reference period. Hence, according to DG, no case of cartelization or anti-competitive agreement under section 3(3) of the Act is made out in this matter.

• no single airline enjoys a position of dominance in this relevant market.

• all airlines are following dynamic pricing principle where fares move according to factors like capacity, market demand, seasonality and time of flight.

v. Suo moto cognizance by the Competition Commission of India

• the business model of all the airline operators in India is not the same. The domestic airlines operating in India can be categorized into two broad categories - Full service carriers and Low cost airlines.

• characteristics of Low Cost Airlines and Full Service Carriers are different. While Full Service Carriers offer all frill services like lunch, snacks and dinner on flight; low cost airlines are offering no-frills and economise on cost. Low cost airlines employ various web-based distribution systems like Navitaire Open Skies reservation (RES) system and Radixxx which allow customers as well as the travel agents to make bookings directly through the websites of these airlines. This is unlike the Full Service Carriers, who are using Global Distribution System.

• Full Service Carriers send the entire fare sheets electronically to the Airline Tariff Publishing Company (ATPCo) in USA, which in turn distributes the same to the major Global Distribution Systems - like Sabre, AMDEUS or Galilio as also to other third parties. In case of LCCs, fares and allocations are entered directly into the system and do not require to be filed with ATPCo.

• there would be little incentive to reach a common understanding and agreement among all of them with a view to increasing fares and reducing supplies, more so when the airlines are competing with each other for getting additional share of passengers.

• under a system of dynamic pricing, airlines are required to constantly adjust rates in response to changing supply and demand conditions. In a way, dynamic pricing supported by real time access of information and integrated network is also demand induced wherein during periods of low demands, lower rates are offered and with increase in demand, fares in lower rate categories are closed and higher rates become
visible. It is also possible that the adjustment of fares may not go only upward, it can
go either way.

- due to the aforesaid market dynamics and a fair degree of transparency in fares among
  all the airlines in the sector, fares of all airlines generally move together and to this
  extent as has been found by DG there would be a case of price parallelism. However,
  the Commission holds that this on its own cannot be said to be indicative of any
cartelization, more so when there is no evidence to suggest that fares of all domestic
  airlines were kept at the same level across all the sectors and across all bucket class
  under some kind of agreement

- there is a pattern in air fares going upwards together in a sense that during the period
  of high demand, fares of all airlines tend to move together. However, in absence of
  evidence of any organised, express or tacit collusion among the airlines, the
  Commission feels that it cannot be concluded that the airlines have entered into any
  anti-competitive agreement in violation of section 3(3) of the Act.

- the airlines do adjust the seats under different buckets and thus during the period of
  high demand and enhanced load factor, the seats in the lower fare buckets get reduced
  and seats in the higher fare buckets category goes up. Therefore, during the peak
  demand period, the consumers are left with no choice but to purchase air tickets of
  higher bucket fare category. The behavior of the airlines tend to be same and there is a
  case of price parallelism in a sense that fares move upwards generally in case of all
  airlines during the peak demand time and to the close of the departure.

vi. Application of plus factors – a leap forward

- The issue in this case is of price parallelism. The Director General found that all the
  airlines were resorting to parallel pricing. In every business parallel pricing is
  necessary because when a person starts a business his price of goods based on the
  price of the similar goods in the market. Subsequently all the operators in the market
  realize that they must have a similar price in order not to lose business and this brings
  an equilibrium in the market. If one of the operators thinks of having a different price
  and reduces the price then his sales increases at the cost of the other operators of
  similar goods in the market. In the consequence the other operators in the market
  would also reduce the price to bring it at par with that of the first operator. Sometimes
  in order to teach a lesson to the operator who lowered the price, the other operators
reduce the prices to such an extent that the first operator starts incurring a loss and may ultimately go out of business. The economists on the basis of the game theory define price parallelism as a case of tacit collusion. But the different courts in the US and Europe have held that price parallelism itself is not violative of the Competition Act.

- The courts have held in the US and Europe that some plus factors with price parallelism are necessary to establish concerted price parallelism. Concerted price parallelism envisages a meeting of minds and without the meeting of minds there cannot be a violation of the Competition Act. But then the laws in the US and Europe are different from the Indian competition law.

- Concerted price parallelism envisages a meeting of minds and without the meeting of minds there cannot be a violation of the Competition Act. But then the laws in the US and Europe are different from the Indian competition law. According to the legal provisions existing in the Sherman Act or Articles 81 and 82 of the European Commission there has to be an action in concert which has to be established by the competition authorities before any violation of the Competition Act can be found in those regimes. But concept of parallelism by itself does not show any conspiracy and it also cannot be classified as an agreement by any stretch of imagination. What is necessary is that it has to be established that competitors had knowledge of identical prices and that they had decided to whether to fix identical prices. But it is quite possible that parallel decisions may be independent and not inter dependent.

- The leading case on this issue is of American Tobacco Company vs. US where the prices of the products were identical for nearly 12 years. All three producers of cigarettes of then increased their prices at the same time by similar amounts. There was also material to show that they offered similar discounts to different distributors at different points of time. Though the companies took the plea that the price was fixed independently of each other, the other material showed that there were same plus factors. Such behaviour is possible when there is oligopoly situation where the sellers are very few. In the modern world the different operators in the market do not sit down together in a smoke-filled room and come to an agreement that they will fix the price. In the modern times with the coming up of the computers decision of the fixing prices is immediate and information is also available through various modes and means and a meeting together is not at all necessary. Considering this fact
decision taken can reflect anti-competitive behaviour without an actual agreement taking place. Persistent price stability in the case of general excess capacity indicates confidence on the part of each seller that competitors will hold the price line. Therefore what transpires is a tacit agreement and as price-fixing is involved such an agreement is unlawful. In such cases meeting of minds cannot be established but what can be established is an agreement of parallel pricing.

- The Indian competition law is different. Under Section 3(3) of the Competition Act 2002 and an agreement or a decision taken by an association or a practice followed are treated as agreement though they are different items provided the conditions in clauses (a) to (d) of Section 3(3) are satisfied. In the European law or the American law such a situation does not exist. Under those jurisdictions the competition authorities have to establish that there was a conspiracy. Under the Indian Competition Act. A fiction has been created and according to this fiction if the conditions in clauses (a) to (d) are established then an enterprise has to discharge the onus that it had not resorted of price-fixing. The first fact is that practice has been put on par with agreement and the second aspect in this case is that the onus has been shifted on the enterprise to establish that it had not resorted to price-fixing. The onus is rebuttable and when it is discharged, the enterprise can get out of clutches of Section 3(3) of the Act.

- In this particular case the parallel behaviour over a long period of time by the different airlines amounts to a practice carried out by them. Practice has been defined under Section 2(m) of the Act in an inclusive manner and a defined as follows:-
  
  Practice” includes any practice relating to the carrying on of any trade by a person or an enterprise.

- Therefore price parallelism can be regarded as a practice in the case of airlines. It was for the airlines to establish by bringing material on record that they have not indulged in price-fixing. This onus has not been discharged by the airlines either before the DG or before the Commission. There is no material to hold that there has been conspiracy or there was an agreement but for the practice carried out it is necessary for the parties to establish that they have not indulged in price-fixing. Under the provisions of Section 3(3) of the Competition Act it is not necessary for the Commission to establish adverse effect on competition (AAEC). But if the
factors mentioned in Section 19(3) are looked into then by having price parallelism there is no accrual of benefits to consumers in and in fact the consumers; are put to a loss.

Even there is no improvement in production or distribution of goods or the provision of services. Therefore the provisions of Section 19 (3) are applicable.

- Price parallelism in this case is established. It has to be examined whether there are plus factors in this case to establish contravention of the Act. The business model is that each airline has a number of fare buckets. The number of seats in each bucket is known only to the airline and not to the consumer. When the demand increases at the time of festive season or when there is a strike and the supply of airline seats decreases, the airlines move the seats from the lower buckets to the buckets having higher prices. Thus the consumer has to buy tickets which are costlier. Further some of the LCCs are now flying to foreign countries but they have not opted for Global Distribution System (GDS). The reason for not having interface with GDS has not been given by the airlines. Further, all forecasting of seasonal fares is based on historical data but before the D.G. the airlines have stated that they do not maintain historical data of fares. Such an explanation is not acceptable. The airlines have not given any data on the cost of operations and their relationship with the prices of tickets. Further, it is seen that the Air Fuel surcharge levied by the airlines are found to be same for number of routes and same among the airlines for those routes. This clearly shows information sharing among the airlines and may be a reason for parallel pricing. Another important fact to be noted is that when Air India did not fall in line with the other airlines as far as pricing of tickets was concerned, all these airlines complained to the Ministry of Civil Aviation that Air India was resorting to predatory pricing. This also shown a concerted action on part of the airlines. In fact there is no reason as to why all these airlines are having the same price for the same city pair. In fact, there is no evidence to support an alternative explanation. Thus, the plus factors exist in this case which shows a concerted behaviour and leads to price parallelism.

- under the Indian Competition Law, it is not necessary for practice to have a meeting of minds. The onus was on the airlines to discharge the fact that they have not resorted to price parallelism and price fixing. There are also plus factors in this case which shows concerted behaviour leading to price parallelism.
under the provisions of Section 27 of the Act the following directions are issued to these airlines.

(a) They should cease and desist from price fixing through price parallelism and price fixing

(b) The number of seats in each price bucket should be indicated to DGCA and should also be indicated on their website.

(c) They may consider introduction of the bid process in the purchase of their air tickets.

(d) A proper rationale for fuel surcharge should be followed.

(e) A penalty of Rs. 5 crores each is levied in the case of Indigo, Jet Airways, Kingfisher, Spice Jet and Go Air. The penalty is much below 10% of the turnover of each of the airlines.

III

CONCLUSION AND SUGGESTIONS

“Competition Law is not an area of law in which there is much scope for absolute concepts or sharp edges”

The above statement holds true whilst demarcating the thin line between price parallelism and cartelisation.

The competition laws of various jurisdictions, may it be European Union, U.S.A or India have a primordial objective that is to check any business behaviour which is anti-competitive. The enterprises can freely operate their business with the market forces, but any agreement or practice which has a tendency to reduce or eliminate competition catches the eye of the competition authorities.

The competition laws define practices under anti-competitive agreements improperly so called. For constituting these practices one requires a ‘concurrence of wills’ or meeting of minds as mere parallel conduct is not anti-competitive in itself.

Various case laws in the EU and U.S.A have faced the issue of determining as to what constitutes a concerted practice and which behaviour is normal parallel behaviour.
But in the name of parallel behaviour, many enterprises can organize cartels easily, which are an offence punishable under the Competition laws. Therefore, the first step towards solving this dilemma was taken by U.S.A in coining the term ‘plus factors’.

These factors are like symptoms leading to a concerted practise like cartel.

Although these plus factors themselves are struggling with the issue of ranking and grouping, in order to be ascertained. But their presence definitely leads to a conclusion that the enterprises are not carrying out parallel pricing just to follow their business counterparts, but in order to collude.

The recent example which has steered the concept through is in the case of *Re Domestic Airlines*. In this case, the dissenting opinion of Mr. R Prasad is an attempt to lift the veil of price parallelism and unfurl the ulterior objectives of the airlines which are practicing the covert system of “bucketing seats” management of which are ultimately unknown to the common man, but are of special knowledge within them.

This case hinges upon differentiating the Competition Act in India from the EU and the U.S.A competition laws.

Firstly, the Preamble of the Act itself states that its objective is to present practices appreciable adverse effect on Competition, to promote and sustain competition in trade industry, to protect the interest of consumers, to ensure freedom of trade carried on by the participants in market in India. And these objectives are to be achieved by the Competition Commission of India.

Therefore the word ‘practice’ has already been used in the Preamble itself, which is not there in other jurisdictions like the EC and the U.S.A.

Secondly, Practice has been defined under Section 2(m) of the Act in an inclusive manner and a defined as follows:-

“Practice” includes any practice relating to the carrying on of any trade by a person or an enterprise.

Therefore **price parallelism can be regarded as a practice in the case of airlines.**
Under Section 3(3) of the Act, adverse effect on competition is not necessary to be established by the Commission.

Thirdly, in the modern world the different operators in the market do not sit down together in a smoke-filled room and come to an agreement that they will fix the price. In the modern times with the coming up of the computers decision of the fixing prices is immediate and information is also available through various modes and means and a meeting together is not at all necessary. Considering this fact decision taken can reflect anti-competitive behaviour without an actual agreement taking place. Persistent price stability in the case of general excess capacity indicates confidence on the part of each seller that competitors will hold the price line. Therefore what transpires is a tacit agreement and as price-fixing is involved such an agreement is unlawful. In such cases meeting of minds cannot be established but what can be established is an agreement of parallel pricing.

Fourthly, The Indian competition law is different. Whilst, different courts in the US and Europe have held that price parallelism itself is not violative of the Competition Act. I need not elaborate those decisions as they are many. The courts have held in the US and Europe that some plus factors with price parallelism are necessary to establish concerted price parallelism. Concerted price parallelism envisages a meeting of minds and without the meeting of minds there cannot be a violation of the Competition Act. But then the laws in the US and Europe are different from the Indian competition law. According to the legal provisions existing in the Sherman Act or Articles 81 and 82 of the European Commission there has to be an action in concert which has to be established by the competition authorities before any violation of the competition can be found in those regimes. But concept of parallelism by itself does not show any conspiracy and it also cannot be classified as an agreement by any stretch of imagination. What is necessary is that it has to be established that competitors had knowledge of identical prices and that they had decided to whether to fix identical prices. But it is quite possible that parallel decisions may be independent and not inter dependent. Under Section 3(3) of the Competition Act 2002 and an agreement or a or a decision taken by an association or a practice followed are treated as agreement though they are different items provided the conditions in clauses (a) to (d) of Section 3(3) are satisfied. In the European law or the American law such a situation does not exist. Under those jurisdictions the competition
authorities have to establish that there was a conspiracy. Under the Indian Competition Act a fiction has been created and according to this fiction if the conditions in clauses (a) to (d) are established then an enterprise has to discharge the onus that it had not resorted of price-fixing. **The first fact is that practice has been put on par with agreement and the second aspect in this case is that the onus has been shifted on the enterprise to establish that it had not resorted to price-fixing.** The onus is rebuttable and when it is discharged, the enterprise can get out of clutches of Section 3(3) of the Act.

The concept of communication and dissemination of information is quintessential to distinguish cartelisation from a parallel conduct.

For example in this case of *Domestic Airlines*, information sharing among the airlines and may be a reason for parallel pricing. Another important fact to be noted is that when Air India did not fall in line with the other airlines as far as pricing of tickets was concerned, all these airlines complained to the Ministry of Civil Aviation that Air India was resorting to predatory pricing. This also shown a concerted action on part of the airlines. In fact there is no reason as to why all these airlines are having the same price for the same city pair. In fact, there is no evidence to support an alternative explanation. Thus, the **plus factors exist in this case which shows a concerted behaviour and leads to price parallelism.**

Since information is freely available on the internet, the information floating must be gathered. For example, if there are common agencies which are operating on behalf of the enterprises, it is a clear indication of a common place where such information is being traded and is germane to collusion.

There are many factors which make the parallel conduct possible, which otherwise would not directly point out towards a cartel. These factors when looked at actually indicate towards a cartel when they are not rebutted by the enterprises, leading towards a strong indication of them being engaged in cartels.

In this case, these factors/economic evidence have been ardently laid down for guiding the use of plus factors. Thereby solving this dilemma. It is suggested that the concept of plus factors may be taken into strong consideration when ascertaining the practices of enterprises. These plus factors require a grading and grouping system.
The researcher clarifies here, that under the Competition Act, 2002, the definition of anti-competitive agreement is an inclusive definition. Its wordings are clear and there is no ambiguity. A plain reading of all these provisions speak out that cartels although separately defined in another section, are also a form of agreement or practise. This inference cannot simply say that price parallelism attributes to cartelisation, but on the contrary, price parallelism can be a strong indicator of a collusive conduct or practice like cartelisation. To ascertain this we have coined a term as ‘plus factors’ which are like evidences to be gathered with price parallelism/ parallel behaviour, thereby indicating anti-competitive agreements.

These anti-competitive agreements can be a cartel or any other form of anti-competitive agreements. But certainly, cartels is one of the most pernicious anti-competitive conduct that the Act targets to address and resolve. Therefore, without falling into a cobweb of self-created legal jargons, and with a simple understanding of the bare provisions we can ascertain the legal acumen of the legislators.

It is pertinent to note here that the Competition Act, 2002 is a nascent legislation. For any new legislation to be understood and interpreted one requires the help of the interpretation. One of the things which is under process.

Hence, price parallelism is like a defence which any business enterprise takes to avoid getting into the eyes of Competition Authorities, but with the help of economic evidences one can find out the link between their parallel conduct and an attempt to collude in the market.

Competition Authorities also have to be extra cautious while dealing with the investigation of such cases, as a proper investigation is a foundation to the growth of the Competition Environment in India as well as for the benefit of the innocent consumers.

It can be concluded that all cartels are anti-competitive agreements, but all anti-competitive agreements are not cartels.
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