CCI ORDERS: A COMPARATIVE ANALYSIS WITH ITS WESTERN COUNTERPARTS

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Radhika Shingwekar
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Radhika Shingwekar
LIST OF ABBREVIATIONS

%  Percentage
&  And
AIR  All India Reporter
ANR  Another
Art.  Article
CCI  Competition Commission of India
Cir  Circuit
Co.  Company
Corp.  Corporation
E.g.  For Example
EC  European Community/European Commission
Ed.  Edition
FCT  Federal Commission of Trade
Govt.  Government
i.e.  Id est/that is
Ibid  Ibidem
Ltd.  Limited
MC  Marginal Cost
No.  Number
OFT  Office of Fair Trading (UK)
Op. Cit.  Opera Citato/In the work cited
Org.  Organization
Ors.  Others
p.  Page no.
para.  Paragraph
pps.  Page no(s)
Pub.  Publication
S.  Section
v.  Versus
vol.  Volume Number
PART -I

INTRODUCTION

“The main objective of the Competition Law is to promote economic efficiencies using competition as one of the means of assisting the creation of market responsive to consumer preferences.” – Supreme Court of India

1.1 What is Competition?

Competition can be defined as a process wherein cost efficient production is achieved in a structure having reasonable number of players (producers and consumers) with simple entry and exit procedures and where exists a close substitution between products of different players in a given industry.¹

Competition refers to a market situation in which sellers independently strive for buyer’s patronage in order to achieve the business objectives of profit, sales turnover and market share. In other words, it is the act of competing by an enterprise against other business enterprises for the purpose of achieving dominance in the market or attaining a reward or goal. It is the foundation on which a market system works. For market economy to function effectively, this competition has to be free and fair. Such a competition stimulates innovation and productivity and thus leads to the optimum allocation of resources in the economy; guarantees the protection of consumer interests; reduces costs and improves quality; accelerates growth and development and preserves economic and political democracy.²

In the absence of adequate safeguards, enterprises may undermine the market by resorting to unfair practices for their short term gains. As a result, market- distortionary practices and anti-competitive forces may restrict the working of healthy competition in an economy. Thus, there arises the need to have a proper regulatory environment which can ensure a healthy competition so that all business enterprises can grow and expand and stimulate economic development of the country. Legislation of an effective competition law should contain short term and long term policy options that can regulate the competition leverage to run the economy on a safe track with sustaining speed.³

Most competition laws seek to increase economic efficiency, enhance consumer welfare, ensure fair trading, and prevent abuse of market power. The three areas of enforcement that are provided for in most competition laws are—

1 RICHARD WHISH, COMPETITION LAW (5th Ed., Oxford University Press, 2005) p 5
2 Ibid. p. 6
3 Ibid.
i. Anti-competitive agreements
ii. Abuse of dominance, and
iii. Mergers which have potential for anti-competitive effect.⁴

The reasons for adoption of competition laws vary across countries; these are usually on account of concerns about high level of market concentration, formation of cartels, state monopolies, privatization and deregulation, meeting with the requirements of bilateral and plurilateral trade agreements and in addition, to take care of cross border competition dimensions and concerns.⁵

1.2 The Competition Act, 2002 and the Competition Commission of India

In India, the authority on Competition Law, the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and M&A), which causes or likely to cause an appreciable adverse effect on competition within India.⁶

The objectives of the Act are sought to be achieved through the Competition Commission of India (CCI) which has been established by the Central Government with effect from 14th October 2003.⁷

It is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India.

The Commission is also required to give opinion on competition issues on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues.⁸

To effectuate its findings, the CCI passes “orders” deciding on whether the activity(s) has an appreciable adverse effect on competition in India or not; after following the procedures given under Sections 19, 26 and 27 of the Competition Act, 2002. Such orders are appealable to COMPAT⁹, and further to the Supreme Court of India.

1.3 Types of Orders by Commission

⁵ Ibid.
⁷ Ibid.
⁸ Ibid.
⁹ Competition Appellate Tribunal
During the course of inquiry, the Commission can pass interim order restraining a party from continuing with anti-competitive agreement or abuse of dominant position.

The Commission can impose a penalty of not more than 10% of the average turnover of the last 3 preceding financial years of the enterprise. In case of a cartel, the Commission can impose on each member of the cartel, a penalty of up to 3 times its profit for each year of the continuance of such agreement or upto 10% of its turnover for each year of continuance of such agreement, whichever is higher.

After the inquiry, the Commission may direct a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement or abuse its dominant position (cease and desist order). The Commission may also direct modification of such agreement.

The Commission may direct division of enterprise in case it enjoys dominant position.\(^\text{10}\)

1.4 \textit{Scope and Objective of the researcher}

The scope of the study is limited to the analysis of legislations and case laws prevalent in India and the objective of the study is drawing a comparative analysis of the same with its western counterpart viz. Australia, European Union, United Kingdom and the United States of America.

1.5 \textit{Research methodology}

The researcher will employ a combination of doctrinal, analytical and comparative method of research in this report. Data will be procured from primary as well as secondary sources. Primary sources include provisions from various legal enactments. Secondary sources include books, articles from journals, law commission reports, news reports and internet articles.

\(^{10}\) Supra, n. 6
1.6 Research Questions

1. How is the Competition Law of India different from the Competition Laws prevalent in Australia, EU, UK and USA?
2. What are the lessons that the CCI can learn from the Competition Cases in the above jurisdictions for the purpose of investigating, penalising and preventing anti-competitive conduct?

1.7 Scheme of the Project

For the sake of convenience, this project report has been divided into four parts.

PART I deals with an introduction and backdrop to the project report. It provides an overview of the entire project.

PART II is titled as CCI Orders. It will cover the basics of anti-competitive conduct in India, and provide for certain orders that have put into effect CCI’s rulings.

PART III deals with Competition Law and Orders in other jurisdictions. It will cover the basics of Anti-Competitive Conduct in other jurisdictions, the respective Governing bodies responsible for the enforcement of competition law in these jurisdictions, and the case laws pertaining to these anti-competitive conducts.

PART IV depicts the comparative analysis of the competition laws in the abovementioned jurisdictions with the Indian competition law.

PART V is the final part of the project report and gives suggestions and conclusions which the research reached to.
In this section, the researcher has analyzed a few significant rulings of the CCI with respect to the competition issues in the Indian market.

2.1 Anti-Competitive Agreements

Section 3 of the Competition Act talks about Anti-Competitive Agreements. The Act has a wide and inclusive definition of the term ‘agreement’ viz.:

- An arrangement/understanding or action in concert
- Can be oral or in writing
- Need not be enforceable by law
- Even a ‘wink and nod’ can be construed as an agreement.\(^{11}\)

2.1.1 Anti-competitive agreements

Any agreement with respect to production, supply, distribution, storage, acquisition or control of goods/provision of services which is anticompetitive is prohibited and void. Such agreements must cause or be likely to cause appreciable adverse effect on competition (AAEC) in a relevant market in India. The relevant market may be a geographical or a products market. The Act distinguishes between horizontal and vertical agreements.\(^{12}\)

a. Horizontal agreements

Agreements between enterprises or persons engaged in trade of identical or similar goods or services are presumed to have AAEC if they:

- Directly or indirectly determine purchase or sale prices
- Limit or control output, technical development, services etc.
- Share or divide markets
- Indulge in rigging or collusive bidding\(^{13}\)


\(^{12}\) The Competition Act, 2002, Section 3

\(^{13}\) Ibid
Cartels are also prohibited under the Act and have an inclusive definition providing that any group of entities agreeing to limit, control or attempt to control production, distribution, sale or price would be construed as cartels.\textsuperscript{14}

b. **Vertical Agreements**

Agreements between enterprises or persons at different stages/levels of production chain in different markets are prohibited if such agreements cause or are likely to cause AAEC. Vertical agreements include:

- Tie-in arrangement (e.g. requiring a purchaser of goods to purchase some other goods as condition of such purchase)
- Exclusive supply arrangement (e.g. restricting a purchaser in course of his trade from dealing in any goods other than those of the seller)
- Exclusive distribution arrangement (e.g. limiting/restricting supply of goods or allocate any area or market for sale of goods)
- Refusal to deal (e.g. restricting by any method any person/classes of persons to whom goods are sold)
- Resale price maintenance (e.g. selling goods with condition on resale at stipulated prices)\textsuperscript{15}

**Horizontal v. Vertical agreements**

Horizontal agreements are presumed to have AAEC whereas in vertical agreements, the onus of proving AAEC lies on the CCI. Joint venture agreements are an exception to horizontal agreements, provided such agreements increases efficiency in production, supply, distribution, storage acquisition or control of goods or provisions of services. Export agreements and agreements to protect intellectual property are allowed to have protective clauses.\textsuperscript{16}

### 2.2 **CCI Orders with respect to Section 3**

A. **Builders’ Association of India v. Cement Manufacturers’ Association & Ors.**\textsuperscript{17}  
(The Cement Cartel Case)

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\textsuperscript{14} Ibid\textsuperscript{15} Ibid\textsuperscript{16}http://www.nishithdesai.com/Media_Article/2012/Competition%20Law%20In%20India%20Vs%20USA%20And%20EU.pdf\textsuperscript{17} Case No. 29/2010
The CCI, through its order dated 20 June 2012, imposed a penalty of approximately six thousand crores (approx. USD 1.1 billion) on cement manufacturers in India after holding them guilty of cartelisation in the cement industry. The penalty has been imposed at the rate of 0.5 times the net profit of such manufactures for the past two years. Additionally, the Cement Manufacturer’s Association (the CMA) has been fined 10% of its total receipts for the past two years for its role as the platform from which the cartel activity took place.

Brief facts

The decision of the CCI emanates from information filed by the Builders’ Association of India on 26 July 2010 against the CMA and ACC, Gujarat Ambuja Cements Limited (now Ambuja Cements Limited), UltraTech Cements, Grasim Cements (now merged with UltraTech Cements), JK Cements, India Cements, Madras Cements, Century Textiles & Industries Limited, Binani Cements, Lafarge India and Jaiprakash Associates Limited.

On 15 September 2010, the CCI formed a prima facie opinion on the contravention of the Competition Act, 2002 and directed investigations in the matter. On 31 May 2011, the Director General submitted his report detailing contravention of the Competition Act by the respondents.

The CCI called for comments and objections from the respondents and after considering their submissions came to the conclusion that the respondents had contravened sections 3(3) (a) and (b) of the Competition Act.

Before going to the principal findings of the CCI, it is important to note that the CCI restricted itself to the cement companies named in the information owing to the fact that such companies were the prominent participants in the market and were key players in the whole arrangement. Similarly, as to the period of contravention, the CCI limited the period from 20 May 2009 to 31 March 2011. However, it made clear that this limitation was only relevant to the present case and would be independent of other cases.

\[\text{Supra, n. 17}\]

\[\text{Supra, n. 17}\]

\[\text{Supra, n. 17}\]

\[\text{Supra, n. 17}\]
Preliminary Issues

1. **Jurisdiction**: The respondents had raised concern over the DG’s investigation and reliance on data prior to 20 May 2009. The CCI held that mere examination of data prior to 20 May 2009 cannot be construed to mean that the provisions of the Competition Act have been applied retrospectively. Moreover, relying on the Bombay High Court decision in *Kingfisher Airlines v CCI*, the CCI took the view that if the effects of acts taken place prior to 20 May 2009 were continuing, it had the jurisdiction to examine such conduct.

2. **Failure to provide opportunity to cross examination**: The respondents contented that the DG did not give them an opportunity to cross examine witnesses relied upon by him. The CCI rejected this submission and stated that by giving the respondents the chance to submit oral and written evidence before it, the proceedings were in accordance with the principles of natural justice.

3. **Incorrect reliance on motivated information and press reports**: The respondents stated that the information filed by the Builders’ Association was motivated. This, again, was rejected by the CCI. It held that under the scheme of the Competition Act, the final outcome was to be determined on the basis of an inquiry after going into the questions whether competition forces were being inhibited due to certain anti-competitive behaviour.

Substantive Issues

The substantive question before the CCI was whether the conduct of the cement companies violated sections 3. The CCI also examined whether there was an abuse of dominant position, but found that the market was characterised by several players and no single firm or group was in a position to operate independent of competitive forces or affect its competitors or consumers in its favour (*cf.* Explanation (a) to section 4 of the Competition Act)

In respect of violations of sections 3(1) (a) and (b), the CCI examined the following facts and submissions:

1. **Market Structure of the Cement Industry**: As previously stated, the CCI observed that no player can be said to be dominant in India as per the prevailing market structure. The industry is characterised by twelve cement companies having about 75% of the total

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21 The date on which the provisions of Section 3 of the Competition Act were brought into force.

22 Supra, n. 20
capacity in India with about 21 companies controlling about 90% market share in terms of capacity. Given the oligopolistic nature of the market, each company takes into account the likely reactions of other companies while making decisions particularly as regards prices. In such a scenario, collusion between companies is possible and can be adduced from circumstantial evidence.

2. *Circumstantial evidence is sufficient to prove violation:* The chief objection taken by the cement companies was that the DG failed to support his findings with any direct evidence. The CCI, relying on international practice, noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelisation.

3. *Section 3 does not require a delineation of relevant market:* The CCI has held that for an inquiry under section 3 of the Competition Act, there is no requirement under the Competition Act to determine a ‘relevant market’. The Commission states that there is a distinction between ‘market’ as used in section 3 and the ‘relevant market’ as defined in section 4 of the Competition Act.

4. *CMA is engaged in collecting competition sensitive data:* The respondents contended that CMA collects retail and wholesale prices data from different parts of the country and transmits them to the Ministry of Commerce, as per the latter’s request. The CCI held that the competitors were interacting using the platform of the CMA and this gave them an opportunity to determine and fix prices. The fact that it was being under the instruction of DIPP did not absolve them of liability. Further, the CCI noted that the CMA publishes statistics on production and dispatch of each company (factory wise) and circulates such information amongst its members. The sharing of price, production and dispatch data makes co-ordination easier amongst the cement companies.

5. *High Power Committee Meetings:* The CCI took note of the fact that cement prices increased immediately after the High Power Committee Meetings of the CMA which were attended by the cement companies in January and February 2011. It further noted that ACC and ACL, despite having ceased to be members of the CMA, attended these meetings. The CCI observed that whilst ACC and ACL admitted to having attended these meetings, both CMA and JAL refuted their presence. The inconsistencies in the statements of the different respondents established that they were keen on hiding material information.

6. *Amendments to the CMA constitutional documents:* Certain rules and regulations of CMA had serious competition concerns. These were highlighted in a CMA meeting on 30
November 2009. However, the amendments to those rules and regulations were only carried out once the DG sent notice to the respondents in the instant case.

7. **Price Parallelism**: The DG had conducted an economic analysis of price data which indicated that there was a very strong positive correlation in the prices of all companies. This, according to the DG, confirmed price parallelism. The respondents argued that the correlation benchmark of 0.5 taken by the DG was arbitrary. Moreover, the prices used by the DG were incomparable since the prices submitted by the companies differed from each other (some had submitted gross prices, while others had submitted depot prices, average retail prices etc.). The CCI did not accept these arguments and stated that given the nature of data exchanged between the parties, price parallelism could not be a reflection of non-collusive oligopolistic market conditions.

8. **Limiting and controlling production**: The Report submitted by the DG suggested that whilst capacity utilisation increased during the last four years, the production has not increased commensurately during this period. The various respondents contested these figures and led evidence to show that capacity utilisation was on the increase. It was also argued that the DG had incorrectly relied upon ‘name plate’ capacity whereas actual capacity was dependent on raw materials, plant stabilisation time, power supply etc. Therefore, if the aforesaid is taken into account, the capacity utilisation would be much higher. These submissions did not hold water with the CCI, which observed that on a year on year and plant wise basis, the capacity utilisation across the respondents had decreased.

9. **Limiting and controlling supply**: The CCI observed that the forces of demand and supply dictated that the dispatch figures should have been more than or equal to consumption of cement in the corresponding period of the previous year. However, in two months of November and December 2010, the dispatch was lower than the actual consumption for the corresponding months of 2009. It was not the case that the market could not absorb the supplies, but, instead, the lower dispatches coupled with the lower utilisation establishes that the cement companies indulged in controlling and limiting the supply of cement in the market.

10. **Production Parallelism**: The production figures across cement companies (in a particular geographical region) showed strong positive correlation. According to the CCI, in November – December 2010 the cement companies reduced production collectively, although during the same period in 2009, the production of the cement companies differed. This was a clear indication of co-ordinated behaviour.
11. *Dispatch Parallelism:* It was observed that the dispatches made by the cement companies have been almost identical for the period from January 2009 to December 2010. The cement companies argued that the parallelism in both production and dispatch is on account of the commoditised nature of cement, the cyclical nature of the cement industry and the ability of competitors to intelligently respond to the actions of their competitors. The CCI noted that the drop in production and dispatch in the November 2010 was unusual especially when November 2009 witnessed a mixed trend. Interestingly, the CCI held that the parties to a cartel may not always co-ordinate their action; periodically their conduct may reflect a competitive market. Where co-ordination proves gainful, parties will substitute competition for collusion.

12. *Increase in price:* The deliberate act of shortage in production and supplies by the cement companies and almost inelastic nature of demand of cement in the market resulted into higher prices for cement. The CCI was of the view that there was no apparent constraint in demand which could justify the lower capacity utilisation. Further, there was no constraint in demand during November and December 2010, and, in fact, the construction industry saw a positive growth in the third quarter of 2010-11.

13. *Price Leadership:* The CCI noted that the given the small number of major cement manufacturers, the price leaders gave price signals through advanced media reporting which made it easier for other manufactures to co-ordinate their strategies.

14. *High Profit Margins:* The profit margins of all the cement companies were examined by the Commission, which arrived at the conclusion that some companies posted a high Return on Capital Employed and higher EBITDA in 2010-11 as compared with 2009-10. Additionally, the CCI observed that the respondents earned huge margins over the cost of sales.

15. *Factors set out in Section 19(3) of the Competition Act:* It is worth noting that the CCI has stated that where contraventions of sections 3(3) (a) and (b) are proved, the adverse effect on competition is presumed. However, on account of the rebuttals raised by the respondents, it considered the factors mentioned in section 19(3) to determine whether an appreciable adverse effect on competition has been caused.

Although, the Commission did not go into the factors set out in section 19 (3) (a), (b) and (c), it held that the increase of price and reduced supply in the market was to the detriment of the consumers. Further, the efficiency defences in section 19 (c) and (f) were not available as the conduct of the respondents neither caused any improvement in production or distribution of
goods nor any promotion of technical, scientific and economic development. In view of the evidence and the analysis of the factors mentioned in sections 19(d) to (f), the contraventions of sections 3(3) (a) and (b) stood established.\(^\text{23}\)

**Directions of the CCI**

In cartel cases, the CCI has the power to fine parties up to three times of its profit for each year of the continuance of the cartel or 10% of its turnover for each year of the continuance of the cartel, whichever is higher. The turnover and profit for the cement companies were examined and accordingly the following penalties were levied on the cement companies. In addition, the CMA was fined 10% of its total receipts for the past two years.

<table>
<thead>
<tr>
<th>Company</th>
<th>Penalty (INR in Crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACC Ltd.</td>
<td>1147.59</td>
</tr>
<tr>
<td>Ambuja Cements Ltd.</td>
<td>1163.91</td>
</tr>
<tr>
<td>Binani Cements Ltd.</td>
<td>167.32</td>
</tr>
<tr>
<td>Century Textiles Ltd.</td>
<td>274.02</td>
</tr>
<tr>
<td>India Cements Ltd.</td>
<td>187.48</td>
</tr>
<tr>
<td>J K Cements Ltd.</td>
<td>128.54</td>
</tr>
<tr>
<td>Lafarge India Pvt. Ltd.</td>
<td>480.01</td>
</tr>
<tr>
<td>Madras Cements Ltd.</td>
<td>258.68</td>
</tr>
<tr>
<td>Ultratech Cement Ltd.</td>
<td>1175.49</td>
</tr>
<tr>
<td>Jaiprakash Associates Ltd.</td>
<td>1323.60</td>
</tr>
</tbody>
</table>

The respondents have been directed to pay the above penalties within 90 days of the receipt of the CCI order.

\(^{23}\) Ibid
The CCI also directed the companies to ‘cease and desist’ from indulging in agreement or understanding on prices, production and supply of cement in the market. Similarly, the CMA has been directed to disengage and disassociate itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members.

B.  *The Tyre Cartel Case*  

The Competition Commission of India (CCI) gave a clean chit to tyre manufacturers, stating that there is no evidence of cartelisation. In its order dated October 30, 2012 the CCI has said, “there is not sufficient evidence to hold a violation by the tyre companies Apollo, MRF, J.K. Tyre, Birla, CEAT and Automotive Tyre Manufacturers Association (ATMA)” of the provisions of the Competition Act. A host of law firms through their senior counsels represented the tyre companies.

The All India Tyre Dealers’ Federation (AITDF) had filed a complaint against the tyre manufacturers. AITDF alleged that the major tyre manufacturers, which control 95% of the market, were indulging in anti-competitive activities, resorting to mal-practices such as “price rigging and strangulation of production and supplies”, and “usurping the excise duty reduction” against the interests of tyre users.

The dispute can be traced back to 2007 when the AITDF filed information before the Ministry of Corporate Affairs which was eventually placed before the CCI. In June of 2010, the CCI had directed the Director General (DG) to conduct an investigation on the five major domestic tyre manufacturing companies including Apollo Tyres, MRF Ltd., CEAT Tyres, Birla Tyre and JK Tyre with regard to these allegations.

The DG concluded that the major domestic tyre companies acted in concert and ATMA provided the platform to the members for exchange and sharing of information relating to price, export, import etc. Thus, the DG concluded that ATMA and its five major domestic tyre-manufacturing companies have acted in concert in contravention of the provisions of the Act.

However, the CCI in its 126-page majority order said that “taking into consideration the act and conduct of the tyre companies/ATMA, it is safe to conclude that on a superficial basis


25  Ibid
the industry displays some characteristics of a cartel there has been no substantive evidence of the existence of a cartel”.

The CCI observed, “As a tradable the industry has always been open to competitive threats from imports”. However, one CCI member, R. Prasad dissented with the majority order. He held that the tyre companies operated as a cartel and have followed anticompetitive practices. Prasad further held that ATMA was also involved in the anti-competitive practices and is an extension of the cartel. In fact, Prasad has imposed a penalty of 0.5 times of net profit for 2009-10 on tyre companies and a penalty of 10% of its total receipts for the year 2009-10 on ATMA.26

The majority opinion, however was that the available evidence did not provide enough proof to prove that tyre companies/ ATMA acting together have limited and controlled the production and price of tyres in the market in India.

The Commission further stated, “There are some factors which may be conducive to cartelization but they may be diluted due to other factors. The fact that market concentration is very high with entry barriers and the product is homogenous which support cartel formation, but high bargaining powers of Original Equipment Manufacturers due to the volumes, options to replacement consumer to retread, increasing radialization, imports effectively being cheaper even in the brief period of anti dumping duty go against sustaining a cartel structure”.27

AITDF approached the Competition Appellate Tribunal with their pleas against the CCI judgement, which the Tribunal refused.28

There were a lot of similarities between the Cement Cartel Case and the Tyre Cartel Case. Cement cartel was also prosecuted on the basis of circumstantial evidence and similar circumstantial evidence was adduced by the DG in this case In spite of similarities in the conduct of the parties involved: homogeneous nature of product, excess capacity, price parallelism, exchange of commercially sensitive information and uncanny and unexplained action, which seems to be in concert, the same yard stick has not been applied by the Hon’ble CCI in both these cases.

2.2.1 Bid Rigging

26 Ibid
27 http://www.tyrepress.com/News/51/India/23875.html
The Explanation to section 3, sub-section (3) of the Act defines "bid rigging" as “any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.”

Bid rigging takes place when bidders collude and keep the bid amount at a predetermined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

Bid rigging may take many forms, but bid rigging conspiracies usually fall into one or more of the following categories:

1. **Bid Suppression**: One or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

2. **Complementary Bidding**: Complementary bidding (also known as 'cover' or 'courtesy' bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

3. **Bid Rotation**: In bid rotation schemes, all conspirators submit bids but take turns to be the lowest bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator.

4. **Subcontracting**: Subcontracting arrangements are often part of a bid rigging scheme. Competitors, who agree not to bid or to submit a losing bid, frequently receive subcontracts or supply contracts in exchange from the successful bidder. Almost all forms of bid rigging schemes have one thing in common: an agreement among some or all of the bidders, which

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29 The Competition Act 2002, Section 3
31 http://www.iica.in/images/IAS_Competition_Law_Appreciation.pdf
32 Ibid
33 Ibid
predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.\textsuperscript{34}

5. **Collusive bidding**: Collusive bidding can take form of an agreement among firms to divide the market, set prices, or limit production. It can involve "wage fixing, kickbacks, or misrepresenting the independence of the relationship between the colluding parties." In legal terms, all acts affected by collusion are considered void.\textsuperscript{35}

6. **Market allocation**: Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm etc. Besides, Public Sector Enterprises have been the victim of International Cartels which often reflects monopolistic behaviour of the suppliers in the market who often co-ordinates the production to maintain high level of prices.\textsuperscript{36}

A.  \textit{In Re: Aluminium Phosphide Tablets Manufacturers}\textsuperscript{37}

The present matter relates to the allegations of anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets (ALP) required for preservation of central pool food grains by Food Corporation of India. The Chairman and Managing Director (CMD) of Food Corporation of India (FCI) vide letter dated 04.02.2011 while drawing attention towards rise in cost of procurement due to anti-competitive agreement among the manufacturers of ALP in the tenders of FCI, had requested the Commission to make inquiries in the matter as per the provisions of the Act.

There are four known manufacturers of the ALP in India, namely, M/s United Phosphorous Limited (UPL), M/s Sandhya Organic Chemicals Private Limited (SOCL), M/s Excel Crop Care Limited (ECCL) and M/s Agrosynth Chemicals Limited (ACL) who are making supplies to FCI. On the basis of a statement showing the details of tenders floated by FCI for the procurement of ALP during the last 8 years, it was informed that the Opposite Parties had quoted identical rates in those tenders and on negotiations reduced the rates by the same margin.

\textsuperscript{34} Supra, n. 30
\textsuperscript{35} Ibid
\textsuperscript{36} Ibid
\textsuperscript{37} \textit{Suo moto} Case No. 02/2011
The letter of CMD, FCI also alleged that since the Opposite parties quoted identical rates under an anti-competitive agreement or understanding, the very purpose of floating tenders was defeated. It has also been apprehended in the letter that the manufacturers of ALP have formed a cartel. The price of ALP Tablets has nearly doubled during the period 2007 to 2009 and in all probabilities, the price is likely to rise further in future.

1) DG has submitted that in the year 2009, a Global Tender was floated for procurement of a fixed quantity of 600 MT with a view to break the suspected monopoly/cartel of the Indian manufacturers of ALP. However, no foreign firm participated in the tender and bids were submitted only by the three Indian firms, M/s United Phosphorous Limited (UPL), M/s Sandhya Organic Chemicals Private Limited (SOCL) and M/s Excel Crop Care Limited (ECCL) who had earlier been quoting in the tenders of FCI. Like in earlier tenders, in this tender also, these firms quoted identical rates and after negotiations agreed for the common negotiated rates.

2) The Opposite Parties have jointly boycotted some of the tenders issued by FCI (in 2005, 2008, 2011)

3) On the basis of the above facts and circumstances, DG has concluded that the OPs have acted in a concerted manner to eliminate the competition among themselves by indulging in collusive bidding in the tender for procurement of goods by FCI in 2009 and collectively boycotting the e-tenders floated by FCI in 2011.

**Commission Order**

The Commission has found the act and conduct of the Opposite Parties as violative of the provisions of section 3(3)(b) and section 3(3)(d) of the Act. The three OPs in the bids before the F.C.I. were submitting exactly the same price in their bids. The Commission also finds that the act of the Opposite Parties of acting together and quoting identical prices has deprived FCI of competitive bid rates in matter of procurement of ALP Tablets.

**B. In Re: LPG cylinder manufacturers**

The cognizance in the present case was taken by the Competition Commission of India suo motu under section 19(1) of the Competition Act, 2002 consequent upon the submission of investigation report of the Director General in Case No. 10 of 2010, M/s Pankaj Gas Cylinders

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38 Case No. 10 of 2010
Ltd. v. Indian Oil Corporation Ltd. In that case it was reported by the DG that in tender No. LPG-0/M/PT-03/09-10 floated by Indian Oil Corporation Ltd. for the supply of 105 lakh, 14.2 Kg capacity LPG cylinders with SC valves, the manufacturers of LPG cylinders had manipulated the bids and quoted identical rates in groups through an understanding and collusive action.

1) IOCL had invited bids vide Tender No. LPG-o/M/PT-03/09-10, for the supply of 105 Lakh, 14.2 KG capacity LPG Cylinders with SC valves in year 2010-2011, to various bottling plants

2) DG, on the analysis of bids submitted by the bidders for the year 2010-2011, had noted that there was a similarity of pattern in the bids submitted by all the 50 bidders who submitted price bids for various States. The bids of a large number of parties were exactly identical or near to identical in different States. DG, after analyzing the bids submitted by various bidders to IOCL for 2010-11 has come to the conclusion that there is a similarity of patterns in the price bids submitted by all the 50 bidders

3) The LPG cylinder manufacturers while submitting bids for the supply of 14.2 Kg LPG cylinders to the IOCL against the tender issued by it, met in Hotel Sahara Star in Mumbai on 1st and 2nd March, 2010, just before the date of submission of price bids discussed the tender and submitted identical bids in collusion with each other

Commission held- that there is a case of bid rigging. Additionally the Commission directs all the contravening parties to cease and desist from indulging in such anti-competitive conduct which result in bid-rigging. Penalties imposed are to the tune of Rs.165 crore

2.3 Abuse of Dominance

Section 4 of the Competition Act deals with the issue of Abuse of Dominant Position. A dominant position is a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to:

- Operate independently of competitive forces
- Impact its competitors, consumers, relevant market in its favour

Factors for determining dominant position include market share, size and resources of the enterprise/competitors, economic power of enterprise, vertical integration, dependence of consumers etc.

Abuse of dominance
Not dominance but its abuse is prohibited: Abuse occurs when an enterprise uses its dominant position in the relevant market in an exclusionary and/or exploitative manner.

**Relevant market**

The Act lays down factors that may be taken into account while defining the relevant market. The CCI may determine this with reference to the following:

- Relevant product market comprises all interchangeable or substitutable products/services. It is the smallest set of goods/services that are substitutable among themselves, given a small but significant non-transitory increase in price; or
- Relevant geographic market comprises area in which conditions for competition for supply or demand of goods/services are homogenous and can be distinguished from the conditions prevailing in the neighbouring areas; or
- With reference to both.

**Deemed abuse**

The Act gives an exhaustive list of practices deemed to be abuse of dominance:

a. **Exploitative: Unfair/discriminatory**
   - Pricing (includes predatory pricing)
   - Conditions on purchase/sale of goods and services
b. **Exclusionary**:
   - Limited production of goods or provision of services or technical development
   - Limited/Deny market access
   - Conclusion of contracts subject to unconnected supplementary obligations
   - Use of dominant position in one market to enter into or protect the other market

A. **Belaire Owner’s Association v. DLF Limited & Ors.**  
   (DLF Abuse of Dominance Case)

   The Commission in its order dated 16th August 2011 has found DLF Limited (“DLF”) guilty of abusing its dominant position in the market. A brief description and analysis of this case is as follows:

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39 CASE NO.19/2010
The information in the instant case was filed under Section 19(1)(a) of the Competition Act, 2002 by Belaire Owners’ Association (“Informant”) against the three respondents which are DLF, Haryana Urban Development Authority (HUDA) and Department of Town and Country Planning, Haryana (DTCP). It had been alleged by the Informant that DLF by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the housing complex ‘The Belaire’, which has serious adverse effects and ramifications on the rights of the allottees, DLF has abused its dominant position. One of the main contentions was that that in place of 19 floors with 368 apartments, which was the basis of the Informant booking its respective apartments, now 29 floors have been constructed by DLF, unilaterally. Consequently, not only the areas and facilities originally earmarked for the apartment allottees were substantially compressed, but the project has also been abnormally delayed without providing any reasons to the Informants whatsoever. Pursuant to the complaint made by the informant, the Commission had directed the Office of the Director General to carry out investigations on the allegations levelled against DLF and submit a report on its findings. Based on the aforementioned report, the Commission had arrived at its decision by analyzing 4 (four) crucial issues, which are as under:

i. **Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?**

DLF contended that Agreement would not fall under the jurisdiction of the Commission as the Agreement entered into between DLF and the allottees was before setting up of the Commission and before section 4 of the Act was enacted. The Commission however held that the Act applies to all the existing agreements and covers those also which though entered into prior to the coming into force of Section 4 but sought to be acted upon now thereby denying the contention of DLF. DLF further contended that as sale of an apartment can neither be termed as sale of “goods” nor sale of “service” Section 4(2) (a) (ii) of the Act is not relevant and applicable in the present case as the same can be invoked only when there is purchase or sale of either goods or service.41

The Commission however rejected this contention by relying on several Supreme Court judgements wherein it has time and again held that housing activities undertaken by development authorities are a “service” and are covered within the definition of “service” given in Section 2(o)

40 Ibid.  
ii. What is the relevant market, in the context of Section 4 read with Section 2(r), Section 19(5), Section 19(6) and Section 19(7) of the Competition Act, 2002?

The Commission observed that a relevant market is delineated on the basis of a distinct product or service market and a distinct geographic market. These terms have been defined in Section 2(r) of the Act read with Section 2(s) and Section 2(t).43

As per the Commission, the promotional brochures of the property by DLF provided for innumerable additional facilities, like, schools, shops and commercial spaces within the complex, club, dispensary, health centre, sports and recreational facilities, and such features, along with the cost-range mentioned earlier, may be broadly considered to define the characteristics of “high-end residential accommodation”. The Commission noted that in the present case, Gurgaon is seen to be the relevant geographic market as a decision to purchase a highend apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location. As per the Commission, Gurgaon is known to possess certain unique geographical characteristics such as its proximity to Delhi, proximity to airports and a distinct brand image as a destination for upwardly mobile families.44

Thus the Commission was of the view that the relevant market in the instant case is the market for services of developer / builder in respect of high-end residential accommodation in Gurgaon.

iii. Is DLF dominant in the above relevant market, in the context of Section 4 read with Section 19 (4) of the Competition Act, 2002?

As per the Commission, the Explanation (a) to Section 4 of the Act clearly defines “dominant position” as a position of strength; which should enable the enterprise to “operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour.” Another aspect of dominance taken into

42 Ibid
43 Ibid
44 Ibid
consideration by the Commission was the explanation (a) (ii) to Section 4 which relates to the ability of an enterprise to affect its competitors or consumers or the relevant market in its favour.45

The investigation report of the DG stated that DLF Ltd. has a clear early mover’s advantage since it has been in the business since 1946 and apart from residential sector it has a leadership position in commercial, retail and office space sectors. In the relevant market, DLF faces negligible threat from its rivals, including the new ones, particularly, since it has a strong presence in almost all related real estate sectors. The DG’s report had also analysed total sales figure of 82 companies, who are engaged in real estate residential business and who are not only operating in Gurgaon but also in other places in India. The report established that the superior market share of DLF at about 44%. For the year 2009-10 also, DG has shown the market share of DLF in relevant market to be about 50%. All these factors indicate that DLF Ltd. is fully capable of operating independently of competitive forces in the relevant market.46

On analysis the Commission concluded that DLF Ltd. has significant advantages over competitors in size and resources. In light of the aforesaid factors, the Commission concluded that DLF was in a position of dominance in the relevant market.

iv. In case DLF is found to be dominant, is there any abuse of its dominant position in the relevant market by the above party?

The Commission went through the Agreement for the purpose of determination of this issue, and considered the impact of conditions imposed wherein it specifically noted a number of terms reflected how heavily biased the buyers’ agreement.47 The Commission particularly noted the various clauses including:

- Unilateral changes in agreement and supersession of terms by DLF without any right to the allottees
- DLF’s right to change the layout plan without consent of allottees.
- Discretion of DLF to change inter se areas for different uses like residential, commercial etc. without even informing allottees.

46Ibid
47http://www.singhania.in/userfiles/Competition%20Law_%20DLF%20penalized%20for%20abuse%20of%20dominance.pdf
• Preferential location charges paid up-front, but when the allottee does not get the location, he only gets the refund/adjustment of amount at the time of last installment, that too without any interest.
• DLF enjoys unilateral right to increase / decrease super area at its sole discretion without consulting allottees who nevertheless are bound to pay additional amount or accept reduction in area.
• Proportion of land on which apartment is situated on which allottees would have ownership rights shall be decided by DLF at its sole discretion (evidently with no commitment to follow the established principles in this regard).
• DLF continues to enjoy full rights on the community buildings/sites/recreational and sporting activities including maintenance, with the allottees having no rights in this regard.
• Arbitrary forfeiture of amounts paid by the allottees in many situations.
• Allottees have no exit option except when DLF fails to deliver possession within agreed time, but even in that event he gets his money refunded without interest only after sale of said apartment by DLF to someone else.
• DLF’s exit clause gives them full discretion, including abandoning the project, without any penalty.
• Third party rights created without allottees consent, to the detriment of allottees’ interests.
• Punitive penalty for default by allottees, insignificant penalty for DLF’s default.48

It was further noted that allottees in situations like the instant case become captured consumers who are subject to abuse by DLF through imposition of unfair conditions contained in the Agreement. The Commission further stated that such abuse is not a one-time abuse by DLF, rather it continues throughout the span of the period of construction, and allottees are subjected, or there is a scope to subject them time and again, to newer conditions aggravating the existing abusive conduct of DLF.49

The moot point in this case and indeed the competition concern is that a dominant builder/developer is in a position to impose such blatantly unfair conditions in its agreement with its customers and bind them in such one-sided contractual obligation. In a competitive

48 Ibid
49 Ibid
scenario, where the enterprise indulges in such anti-consumer conduct, there is sufficient competition in the market to provide easy alternatives for the consumer. The competitive forces would ensure that the builder/developer would soon face loss of customers, which would force it to become more consumer-friendly. However, only when a dominant enterprise indulges in such conduct is there little hope for the consumers because not only that enterprise indulges in such behaviour with impunity but smaller competitors would want to enjoy as much advantage by following the leader. Since a weaker competitor is not in a position to take on the competitive might of the dominant enterprise, it would rather emulate the dominant enterprise and take similar advantage of the consumers. This Commission held that the nature of clauses and conduct as indicated in earlier paragraph are blatantly unfair, even exploitative.\(^{50}\)

Keeping, in view the totality of the facts and circumstances of the case, the Commission passed an order imposing a penalty at the rate of 7% of the average of the turnover for the last three preceding financial year (i.e. Rupees Six Hundred and Thirty Crores) on DLF.

B. \textit{Pitambara Books Pvt. Ltd v Primary Education Dept, Andhra Pradesh & Others}\(^{51}\)


\textbf{Opposite Parties:}

1. Primary Education Department, Office of the Director, Andhra Pradesh Open School, Andhra Pradesh: autonomous organization; provides non-formal education to dropout children and to the neo-literates.

2. Sh. S.V Prasad, Chief Secretary and Chairman, Andhra Pradesh Open School, Govt. of Andhra Pradesh, Hyderabad: government functionary in the State of AP.

3. Rao, Principal Secretary and Vice Chairman, Andhra Pradesh Open School, Govt. of Andhra Pradesh, Hyderabad: government functionary in the State of AP.

\textbf{Facts and allegations}

- Application under Section 19(1) of the Competition Act, 2002.

\(^{50}\) Ibid
\(^{51}\) Case No. 53/2011
Section 19(1) reads as “The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

   a. [receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association;”

- Opposite Party 1 floated a tender notice on behalf of Primary Education Department, Govt. of Andhra Pradesh; invited sealed tenders under two cover systems from the eligible ISO approved registered firms situated in the States of Andhra Pradesh, Karnataka, Tamil Nadu and Kerala. The appellants also moved an application under Section 33 of the Act for an interim order.

**Contentions of the appellant**

The qualifying criteria is biased and anti-competitive as it has allowed to participate printer firms situated only in the State of Andhra Pradesh, Karnataka, Tamil Nadu & Kerala in the said tender. In earlier tenders floated by Opp. Party 1 had considered the eligible bids of all printers who met the prescribed specification and qualification irrespective of their geographical location. Thus it is creating barrier to entry, foreclosing competition, driving out the informant and adopting unfair and discriminatory conditions; and restricting of scope of potential bidders-preventing free and fair competition in the relevant market of printing of books in the State of Andhra Pradesh. It also contended that the opposite party is creating barrier to entry, foreclosing competition, driving out the informant and adopting unfair and discriminatory conditions.

**Observations of the Court**

Opposite Parties intend to avail the services of printers for getting text books printed, supplied and distributed; but any other agency, person or an enterprise can also avail their services for printing any other material on paper. Since the printers are free to provide their services all over India and there is no restriction over the same, the relevant geographic market is the entire territory of India. Opposite Parties-not engaged in any activity identical or similar to that of the prospective parties to the bid. Therefore, no agreement of a horizontal nature covered under Section (3) of the Act in the matter and no prima facie violation.
Opposite Parties-consumers are availing the services of printers to meet out the requirements of text books for schools; not providing raw materials, labour or any other capital in the normal course of business- thus not commercial, thus the provisions of different clauses of Section (4) are not applicable in the matter. For determining-any prima facie case under Section 4-determine whether Opposite Parties are 'enterprises' within the purview of the Act, and whether they are abusing their position of dominance in a relevant market to the detriment of competition. To determine if they are enjoying position of dominance in a relevant market and are using their position of strength as a buyer to act independently of competitive forces prevailing in that relevant market or have the ability to affect their competitors or consumers or the relevant market in their favour. There is no evidence that even as a consumer they are dominant and abuse of their alleged position of dominance within the meaning of Section 4 of the Act does not get established. Opposite Parties-have chosen to invite bids from the eligible prospective bidders who are based only in the said four (4) States; there may be some valid and justifiable reasons behind imposing such a condition: capacity, EMD, turnover, experience in the relevant field.

2.4 Combinations

A Combination is an acquisition of one or more enterprises by one or more persons, merger or amalgamation of enterprises, if it meets the prescribed monetary thresholds and involves:

- Any acquisition of control, shares, voting rights or assets of any enterprise
- Any acquisition of control by a person over an enterprise, where such person already has direct/indirect control over another enterprise in a similar business
- Any merger or amalgamation of enterprises.\(^{32}\)

Combinations above the defined monetary thresholds require filing and prior approval of the CCI before they can be made effective. CCI has powers to investigate combinations and modify/reject them. Separate provisions exist in case of acquisitions pursuant to loan/investment agreements of public financial institutions, FII, banks or VC funds. The CCI must be notified within 30 days of the ‘trigger event’ of such combinations.

\(^{32}\) The Competition Act, 2002, Sections 5 and 6.
Board approval of the enterprises in case of a proposed merger/ amalgamation; or
Execution of any agreement or ‘other document’ in case of a proposed acquisition

Which Combinations require filing of notice effective 1 June 2011

Combinations which need to be notified to CCI for its evaluation and approval are:

- Mergers or amalgamations where the proposals have been approved by the board of directors on or after 1 June 2011
- Acquisitions where the binding documents are executed on or after 1 June 2011

What is a ‘Group’?

- To be considered a Group, two or more enterprises, directly or indirectly, must be in a position to either:
  - Exercise 26% or more of the voting rights in the other enterprise; or
  - appoint more than half the board of directors in the other enterprise; or
  - control the management or affairs of the other enterprise

Special exemptions

For the first five years from 1 June 2011, the following have been exempted from combination regulations under the Act:

- Group exercising less than 50% of voting rights in other enterprise
- Enterprises whose control, shares, voting rights or assets are being acquired has either assets of the value not more than INR 250 crores in India or turnover not more than INR 750 crores in India.

Who is obliged to file the form with CCI

- In case of merger or amalgamation, parties to the combination are jointly responsible
- In case of acquisition, the obligation is of the acquirer

55 Ibid
56 Ibid
57 Ibid
• In case of acquisitions without consent of the enterprise being acquired, the acquirer is to furnish only such information as is available and the CCI can direct the enterprise being acquired to furnish additional information.

Parties are ordinarily required to file notices in Form I but may opt to file in Form II or the CCI may, during the course of inquiry seek information in Form II.

Nature of orders passed by CCI

The CCI may pass the following orders:

• Approve the combination
• In case it finds that a combination shall have or is likely to have AAEC in the relevant market, CCI may order:
  ➢ that the combination should not be given effect to; or
  ➢ suitable modifications to amend the transaction structure and based on the response of the parties, pass further orders

Any transaction found to be likely to cause or to have caused AAEC in the relevant market in India can be declared as void and of no effect by the CCI.

A. Combination Registration No.: C-2013/03/112

The Competition Commission of India received a notice on 7th March 2013 under sub-section (2) of Section 6 of the Competition Act, 2002 given by Mr. Michael S. Dell the Silver Lake Group, L.L.C. (collectively referred to as the “Acquirers”). In terms of Regulation 14 of the Competition Commission of India the Acquirers were required to remove defects and provide information regarding the notice; and were required to furnish additional information/documents; which were complied with, by the Acquirers. The proposed combination comprises acquisition of indirect control of Dell Inc. by MSD, jointly with Silver Lake, which is ultimately proposed to lead to the de-listing of Dell. The notice was filed pursuant to the execution of an Agreement and Plan of Merger between Denali Holding Inc., Denali Intermediate Inc., Denali Acquiror Inc. and Dell. Further, while Denali Holding Inc. was incorporated by MSD and Silver Lake; Denali Intermediate Inc. was set up as a wholly owned

58 Ibid
60 Referred to as MSD hereinafter.
subsidiary of Denali Holding Inc. and Denali Acquiror Inc. as a wholly owned subsidiary of Denali Intermediate Inc. The proposed combination falls under Section 5 of the Act.\textsuperscript{61}

Silver Lake, a US-based private equity firm, is stated to be engaged in private investments in technology and technology-enabled industries. Dell, through its subsidiaries, designs, develops, manufactures, markets, sells and offers its customers a wide range of IT products, IT related/enabled solutions and IT related services. In India, Dell, acting through its subsidiaries, predominantly focuses on IT hardware and peripheral equipment, and IT services & solutions form only a small part of its revenue.\textsuperscript{62}

It was observed that the proposed combination, which concerns the market for IT hardware and peripheral equipment as well as the market for IT services/solutions, only involves a change in the ownership and control of Dell, with MSD and Silver Lake acquiring the indirect control of it. MSD, as an individual, has no business in India and notwithstanding that certain business activities of some portfolio companies controlled by Silver Lake in India, could have horizontal overlap as well as a vertical relationship with the business activities of Dell in India, it is observed that the revenue generated by these portfolio companies controlled by Silver Lake, from the said business activities in India, is insignificant. The market for IT hardware and peripheral equipments and IT services in India is also considered to be competitive with presence of a large number of players and insignificant entry barriers. In view of the foregoing, the proposed combination is not likely to give rise to any appreciable adverse effect on competition in India.

Considering the facts on record and the details provided in the notice and after the assessment of the proposed combination after considering the relevant factors mentioned in sub-section (4) of Section 20 of the Act, the Commission is of the opinion that the proposed combination is not likely to have an appreciable adverse effect on competition in India and therefore, the Commission thereby approved the proposed combination under sub-section (1) of Section 31 of the Act.\textsuperscript{63}

B. Combination Registration No.: C-2013/03/111\textsuperscript{64}

\textsuperscript{61} C-2013/03/112
\textsuperscript{62} Ibid
\textsuperscript{63} Ibid
\textsuperscript{64} http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-03-111.pdf
On 4th March, 2013, the Competition Commission of India received a notice jointly filed by Champalal Motilal Steel Company Private Limited (“CMSL”), Pheonix Impex Private Limited (“PIPL”), Poscho Steels Private Limited (“PSPL”) and Akshata Mercantile Private Limited (“AMPL”) under sub-section (2) of Section 6 of the Competition Act, 2002 relating to the proposed amalgamation of CMSL, PIPL and PSPL into AMPL, pursuant to a Scheme of Amalgamation under Sections 391 to 394 and other relevant provisions of the Companies Act, 1956, which was approved by the Board of Directors of the parties on 22nd February, 2013.65

In terms of Regulation 1466 of The Competition Commission of India on 6th March, 2013, the parties were required to remove certain defect(s) in the notice and furnish the required information latest by 13th March, 2013, which was finally furnished by the parties on 2nd April, 2013. The parties, in the said letter, were also required to clarify as to how the proposed amalgamation, for which the notice was filed by them under sub-section (2) of Section 6 of the Act, met the assets or the turnover thresholds as prescribed under Section 5(c) of the Act.67

On going through the details provided in the notice and the subsequent submissions made by the parties, it was observed that the value of the assets or the value of the turnover of the parties to the proposed amalgamation did not exceed the value of assets or the value of the turnover as prescribed under Section 5 of the Act. It was noted that the proposed amalgamation of CMSL, PIPL and PSPL into AMPL, pursuant to the said Scheme of Amalgamation, for which the parties filed the notice under subsection (2) of Section 6 of the Act, is not a ‘combination’ in terms of Section 5 of the Act. Therefore, the notice filed by the parties under the provisions of subsection (2) of Section 6 of the Act on 4th March, 2013, was not required to be filed, and does not require the Commission’s Order under Section 31 of the Act.68

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65 C-2013/03/111
66 (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
67 Supra, n. 65
68 Ibid
PART-III

COMPETITION LAW AND ORDERS IN OTHER JURISDICTIONS

3.1 Australian Competition Law Overview

Australia's core competition law provisions are contained in Part IV of the Competition and Consumer Act 2010 (CCA). In addition, separate prohibitions have been created in relation to anti-competitive conduct in the telecommunications industry and a regime for access to essential facilities has been created.

3.1.1 Policy

In 2005, the Competition Policy Reform Act 1995 (Act 88 of 1995) inserted an objects clause in section 2, which provides, “The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”

3.1.2 Cartel conduct

Cartel conduct is prohibited by a new Division 1 of Part IV of the Competition and Consumer Act 2010 (CCA). It is prohibited civilly and it constitutes a criminal offence. Cartel conduct is now defined in s 44ZZRD as including four forms of activity: price fixing (defined in the same way as the former 45A), market division, restricting outputs and bid rigging. This conduct is prohibited where made or given effect to in a 'contract, arrangement or understanding' and two or more of the parties involved are competitors. In relation to price

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69 http://www.australiancompetitionlaw.org/overview.html
71 44ZZRD Cartel provisions: (2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:
   a) fixing, controlling or maintaining; or
   b) providing for the fixing, controlling or maintaining of; the price for, or a discount, allowance, rebate or credit in relation to:
   c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
   d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
   e) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
   f) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.
fixing the provision must have the 'purpose or effect' of price fixing; in relation to the other forms of conduct the provision must have the requisite 'purpose'. Criminal penalties of up to $220,000 per offence or up to 10 years imprisonment will be available for individuals found to have committed a cartel offence. The civil penalties for making or giving effect to a cartel provision are the same as those currently available for other contraventions of Part IV. A limited defence is available for joint venture contracts.\textsuperscript{72}

3.1.3 \textit{Anti-competitive agreements}

Section 45 of the Competition and Consumer Act 2010 (CCA) prohibits contracts, arrangements or understandings containing a provision which has the purpose, effect or likely effect of substantially lessening competition. These arrangements will generally be horizontal in nature, but this is not a requirement of section 45. Legislation introduced in 2006\textsuperscript{73} permits certain collective bargaining arrangements. A joint venture exemption is also available where the joint venture itself does not have an anti-competitive purpose or effect.\textsuperscript{74}

3.1.4 \textit{Exclusionary Provisions}

In addition to prohibiting anti-competitive agreements generally, section 45 prohibits exclusionary provisions per se. Exclusionary provisions are defined broadly in section 4D.\textsuperscript{75}

3.1.5 \textit{Misuse of Market Power}

Section 46(1) prohibits a corporation with substantial market power taking advantage of that market power for a prohibited anti-competitive purpose. In 2007 section 46(1AA) was introduced to specifically target predatory pricing.\textsuperscript{76}

3.1.6 \textit{Exclusive Dealing}

Section 47 of the Competition and Consumer Act 2010 (CCA) prohibits various forms of exclusive dealing. Broadly, it captures two types of anti-competitive vertical transactions:

\begin{itemize}
  \item (1) the conditional supply (or acquisition) of goods or services.
  \item (2) refusing to supply for specified reasons .
\end{itemize}

\textsuperscript{72} Ibid
\textsuperscript{73} Trade Practices Legislation Amendment Act (No 1) 2006
\textsuperscript{74} Ibid
\textsuperscript{75} \url{http://www.comlaw.gov.au/Details/C2011C00003/Html/Volume_1#param12}
\textsuperscript{76} Ibid
Most forms of exclusive dealing (including full line forcing) are captured only if it can be demonstrated that they substantially lessen competition (section 47(10)). Authorisation may be provided on public benefit grounds.

3.1.7 Resale Price Maintenance

Section 48 of the CCA prohibits a corporation from engaging in the practice of resale price maintenance, both in relation to goods and services.

3.1.8 Mergers

In Australia mergers are prohibited if it can be demonstrated that they will have the effect or likely effect of substantially lessening competition in a market (section 50 CCA). It is possible to obtain clearance (formal or informal) or authorisation for proposed mergers, but there is no mandatory notification process. Authorisation however may be granted by the Australian Competition Tribunal even where the merger will substantially lessen competition if it can be demonstrated that the merger would lead to such a benefit to the public that it should be allowed to occur (section 95AZH). Section 50A deals with mergers occurring outside Australia.

3.1.9 Authorisation and Notification

Authorisation is available for all forms of conduct prohibited by Part IV of the CCA, save for misuse of market power. Authorisation is granted either where public benefit can be demonstrated to outweigh any anti-competitive detriment or where the public benefit is such that the conduct should be permitted. Notification is available for small business collective bargaining, exclusive dealing and certain forms of price signalling.

Administration

A. Australian Competition and Consumer Commission

The ACCC is the primary enforcer of Part IV of the CCA. If it believes there has been a contravention of the CCA it may commence proceedings for pecuniary penalties, injunctions, divestiture in the case of mergers and it may accept undertakings (section 87B) designed to alleviate competition concerns. It has powers to obtain evidence pursuant to section 155 and, subject to obtaining a search warrant, has search and seizure powers to assist in its investigations.
The ACCC also provides a semi-judicial role, having the power to grant 'authorisation' of conduct that would otherwise contravene Part IV on public benefit ground. It also has the power to revoke notifications made in respect of exclusive dealing or collective bargaining; again on public benefit grounds (appeal is available to the ACT).

More generally the ACCC has the function of disseminating information about the CCA, including the provision of guidelines, and has a research and reporting role.

B. Australian Competition Tribunal (ACT)

The Tribunal's main function is to hear appeals from decisions of the ACCC relating to authorisation and notification besides its review function. Since the passage of the 2006 Amendment Act the Tribunal now hears merger authorisations applications directly and they may hear appeals from formal merger clearance decisions of the ACCC.

C. Commonwealth Director of Public Prosecutions (CDPP)

The CDPP determines which matters it will prosecute as a 'cartel offence'. The ACCC will make recommendations to the CDPP about which matters it considers appropriate to pursue criminally and the CDPP will make a determination. The CDPP may also grant immunity from prosecution for whistleblowers meeting set criteria.

D. National Competition Council (NCC)

It has the primary role of advising about competition law matters and making recommendations in relation to access declarations.

E. Federal Court of Australia

The Federal Court of Australia has primary jurisdiction in relation to competition law matters (to the exclusion of other courts).

Remedies

Both civil remedies and criminal penalties are available for contraventions of Part IV of the CCA. Civil remedies include:

- pecuniary penalties\textsuperscript{77}

\textsuperscript{77} Competition and Consumer Act 2010 (CCA), Section 76
• damages\textsuperscript{78}
• injunctions\textsuperscript{79}
• divestiture (in relation to mergers)\textsuperscript{80}
• non-punitive orders (e.g. community service)\textsuperscript{81}
• punitive orders - adverse publicity orders\textsuperscript{82}
• disqualification from directorship\textsuperscript{83}
• other orders\textsuperscript{84}

Criminal fines and imprisonment for up to 10 years is available for contraventions of the cartel provisions in Division 1 of Part IV of the CCA.

**Bid rigging\textsuperscript{85}**

1. **Marine Hose Cartel.**\textsuperscript{86} This case involved price fixing, bid rigging and market sharing by four foreign companies that supplied rubber hosing to transfer oil and gas from production and storage facilities to offshore tankers. The four companies involved (Dunlop Oil & Marine, Bridgestone Corp., Trelleborg Industrie SAS and Parker ITR) each appointed members to a committee that allocated jobs and coordinated bidding and quoting for these jobs. The designated winner of the contract was referred to as the ‘champion’ and the cartel used such codes and other covert tactics to conceal their activities. The cartel was international and the key meetings were held overseas, but the successful court action was based on the cartel giving effect to their agreement in the Australian market, following global enforcement action taken by competition authorities in the USA, UK, Europe and Japan. In 2010 the Federal Court of Australia made orders restraining the parties from repeating such conduct and imposed penalties exceeding $8 million.

\textsuperscript{78} Ibid, Section 82
\textsuperscript{79} Ibid, Section 80
\textsuperscript{80} Ibid, Section 81
\textsuperscript{81} Ibid, Section 86C
\textsuperscript{82} Ibid, Section 86D
\textsuperscript{83} Ibid, Section 8gE
\textsuperscript{84} Ibid, Section 87
\textsuperscript{85} http://www.accc.gov.au/business/anti-competitive-behaviour/cartels/cartels-case-studies-legal-cases
2. **Brisbane fire protection cartel**: For about 10 years until 1997 most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings, at which they agreed to allow certain tenders to be won by particular competitors. Calling themselves the ‘Sprinkler Coffee Club’ and the ‘Alarms Coffee Club’, the groups would meet up over a cup of coffee at hotels, cafes, and various sporting and social clubs. At these meetings they would share tenders and decide who was to submit ‘cover prices’ to make the tender process look legitimate, while ensuring the agreed company won the tender.

It has been estimated that this conduct affected contracts worth more than $500 million. The Federal Court imposed more than $14 million in penalties on the companies and some of their executives.\(^88\)

**Market sharing**

**Power Transformers Cartel**\(^89\)

The major Australian suppliers and manufacturers of both power and distribution transformers were involved in price fixing, bid rigging and market allocation within domestic markets with a combined value of around $160 million per year. The customers affected by the cartel included some of the largest electricity transmission and distribution utilities across Australia, many of them publicly owned, resulting in Australian consumers paying higher electricity bills. A whistleblower alerted the ACCC to the cartel conduct.\(^90\)

The cartel included the principal manufacturers and suppliers of transformers in Australia and covered virtually 100% of the industry, including the ABB companies, Schneider Electric (Aust), Wilson Transformers, Alstom Australia and AW Tyree. The collusion involved executives at the highest level, and featured secret meetings in hotel rooms, airport lounges and private residences in various locations across Australia. These meetings rigged the outcomes of multimillion dollar contracts, with at least 27 tenders being rigged between 1993 and 1999. Some aspects of the cartel ran from 1989 to 1999. A 2004 study by the Australian National University...

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\(^87\) Australian Competition and Consumer Commission v Tyco Australia Pty Ltd (2001) ATPR 41-810


\(^89\) [http://www.ft.com/cms/s/0/200ce6d2-b354-11de-ae8d-00144fcb49a.html](http://www.ft.com/cms/s/0/200ce6d2-b354-11de-ae8d-00144fcb49a.html)

\(^90\) Ibid
concluded that the cartel extracted an extra $70 million to $80 million from its customers between 1994 and 1999.\footnote{Ibid}

The Federal Court imposed penalties of more than $35 million on the participating companies and some of their executives. The Court was particularly scathing about the fact that the arrangement was coordinated by senior executives, including managing directors. Total penalties imposed on individual executives exceeded one million dollars, with the highest being $200 000.\footnote{Ibid}

**Output restriction legal cases**

**Tasmanian Atlantic salmon growers**\footnote{https://www.duo.uio.no/bitstream/handle/10852/16231/tasmanian-atlantic-salmon.pdf?sequence=3}

In 2002 the Tasmanian Atlantic salmon industry was in financial difficulty and decided that supply was outstripping demand. The industry association, the Tasmanian Atlantic Salmon Growers Association (TSGA), decided that if all members culled stocks by around 10 per cent, this would meet demand and avoid further price falls.

It sought legal advice but did not correctly brief its lawyers. The advice that the cull would not breach competition laws was consequently flawed. After a meeting of growers approved the plan, agreements were circulated. One member, Tassal, subsequently culled its stocks.

The ACCC investigated and the cull was stopped. Due to the parlous state of the industry and the fact that legal advice had been sought and cooperation shown, the ACCC chose not to pursue penalties. It instead obtained court orders that the industry establish a trade practice compliance training program and stop any future culls.\footnote{Ibid}

**Price fixing**


In June 2006, competition authorities simultaneously raided airline offices in the United States and Europe, in order to investigate claims that many major airlines had colluded in the
setting of their fuel and security surcharges. German carrier Lufthansa informed the authorities of the illegal agreements and were granted immunity from prosecution.

Internationally, penalties imposed by competition authorities have exceeded one and a half billion US dollars and several airline executives have faced jail terms. In addition, several airlines have faced class actions and have had to compensate customers measuring hundreds of millions of dollars.

In Australia, the ACCC has pursued 15 local, European and Asian based airlines for price fixing in the Australian air cargo market. The Federal Court has imposed $58 million in penalties to date including a $20 million penalty against Qantas, $5 million against British Airways and $5.5 million against each of Japan Airlines and Korean Airlines. Each penalty was reduced depending on the level of co-operation provided to the ACCC with Qantas receiving the largest discount of 50%. Qantas has also paid several overseas penalties and a senior executive was jailed for 6 months in the United States of America. Legal proceedings against other airlines are continuing.\(^{96}\)

**Industry association legal cases**

*ACCC v. C.C. Constructions and others*\(^{97}\)

The tender for the Commonwealth Office at Haymarket, Sydney, in 1988 led to the exposure of long-term collusive practices by large construction firms.

Before the close of tender the industry association, the Australian Federation of Construction Contractors (AFCC), called a meeting of the four firms bidding for the contract. It was agreed that to enable recovery of overheads associated with preparing tenders the winning firm should pay the three losers $750 000 each, and the AFCC $1 million. The project was worth around $200 million. The transactions were to be concealed by invoices for consultancy services.

The arrangement was difficult to detect because it added fixed price components to the final tender prices, which were otherwise prepared in competition with each other. The competitive positions of each of these companies were not disturbed.

The arrangement was exposed by a New South Wales Royal Commission into the construction industry. The Federal Court issued penalties of $1.75 million on the companies and

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\(^{96}\) Ibid
\(^{97}\) (NSW) P/L (1999) 165 ALR 468
individuals involved. It came out in the case that ‘loser’s fees’ were a common arrangement in the industry.

The court found that there was an expectation (thus an agreement) that these fees were levied in addition to the contract price. As such, they were an imposition on the developer, in this case the Commonwealth government, and therefore on the taxpayer. 98

3.2 European Union Competition Law Overview 99

European Union competition law arose out of the desire to ensure that the efforts of government could not be distorted by corporations abusing their market power. Hence under the treaties are provisions to ensure that free competition prevails, rather than cartels and monopolies sharing out markets and fixing prices. Competition law in the European Union has some similarities with the law in the United States antitrust, though there are some key differences; not least, while US law is designed to protect competitors from the power of monopolies, EU law is designed to protect consumers from anti-competitive behaviour.

The EU’s control over competition policy gives it the power to rule on mergers, takeovers, cartels and the use of state aid. However, it has also been criticised for going beyond its accepted remit and for pursuing a free market policy that might undermine parts of the social market model that has operated in many European countries.

3.2.1 How does EU Competition Policy work 100?

Under the Treaty of Rome, the Commission is empowered to investigate price fixing, the abuse of market position by dominant companies and agreements that fix market share, limit production or technical development. Significantly, it is also allowed to intervene against governments who attempt to prop-up uncompetitive companies with state aid. Competition policy is run by a part of the EU Commission called the Directorate-General for Competition. Along with the European Court of Justice (ECJ), they investigate potential breaches of competition law and prosecute companies that fail to reach the required standard. This involves not only court cases but also active investigation, with the EU conducting dawn raids on businesses that it suspects of engaging in illegal practices. Its main sanction is to impose fines on

98 Ibid
100 http://www.civitas.org.uk/eufacts/FSECON/EC11.htm
those who do not comply.\textsuperscript{101} Its far reaching power has brought it into conflict with some governments, particularly the French, who believe that they have a right to protect so-called 'national champions' - companies that are seen to be strategically important.

- Between 2007 and 2011 the EU imposed €10.5 billion of fines for illegal cartels.
- Between 1990 and 2005 the EU prevented 18 mergers; however between 2005 and 2011 only 2 mergers were prevented.
- The EU has imposed a number of fines on Microsoft for abusing its dominance of the market, including: €497 million in March 2004; €280 million in July 2006; and €899 million in February 2008.
- The EU's largest fine to date was the fine of €1.06 billion for Intel in May 2009. The company was fined for uncompetitive practices.\textsuperscript{102}

Four main policy areas of the EU Competition Commission include:

1. **Cartels, or control of collusion and other anti-competitive practices that affect the EU:** Under EU law cartels are banned by Article 101 TFEU\textsuperscript{103}. Art. 101 TFEU makes clear who the targets of competition law are in two stages with the term agreement "undertaking". This is used to describe almost anyone “engaged in an economic activity” who must then have formed an agreement, developed a “concerted practice”, or, within an association, taken a decision. This includes both horizontal and vertical agreements, effectively outlawing the operation of cartels within the EU.\textsuperscript{104}

   Exemptions to Article 101 behaviour fall into three categories. **Firstly,** Article 101(3) creates an exemption for practices beneficial to consumers, e.g., by facilitating technological advances, but without restricting all competition in the area. **Secondly,** 'Agreements of minor importance' applicable to small companies, together holding no more than 10% of the relevant market. **Thirdly,** the Commission has also introduced a collection of block exemptions for different contract types.\textsuperscript{105}

2. **Market Dominance, or preventing the abuse of firms' dominant market positions:** EU law can apply for "dominant" market players with as little as 38% market share, compared to the US where a market share of 60%+ is usually required to trigger

\begin{flushleft}
\textsuperscript{101} Supra, n. 99
\textsuperscript{102} http://www.out-law.com/page-5811
\textsuperscript{103} Treaty on the Functioning of the European Union
\textsuperscript{104} Ibid
\textsuperscript{105} Ibid
\end{flushleft}
intervention. Article 102 is aimed at preventing undertakings which hold a dominant position in a market from abusing that position to the detriment of consumers:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3. Mergers, control of proposed mergers, acquisitions and joint ventures involving companies that have a certain, defined amount of turnover in the EU/EEA; This is governed by the Council Regulation 139/2004 EC (the Merger Regulation). Under the authority of Article 82 TEC, the European Commission became able not only to regulate the behaviour of large firms it claims abuse their dominant positions or market power, but also the possibility of firms gaining the position within the market structure that enables them to behave abusively in the first place.

Article 81 covers restrictive practices such as cartels and collusion and Article 82 Prohibits abuse of dominant market position.

- The Commission has allowed many mergers e.g. Volvo / Renault Trucks despite having 58% of the market because the prospects for competition were good.
- The EU blocked a merger between Lornrho (UK) and Gencor (S.A.) which would have created a virtual duopoly in Platinum which is important because there are few substitutes to Platinum
- The EU Competition commission fined Steel producers a total of 248 million Euros for forming a cartel, e.g. despite a recession which usually sees prices falling prices remained high.

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106 Ibid, Article 102
107 Ibid
108 The European Community
109 http://www.economicshelp.org/microessays/competition/eu-competition.html
4. **State aid, control of direct and indirect aid given by Member States of the European Union to companies:** Article 107 TFEU, similar to Article 101 TFEU, lays down a general rule that the state may not aid or subsidise private parties in distortion of free competition, but has the power to approve exceptions for specific projects addressing natural disasters or regional development.\(^{111}\)

As the EU is made up of independent member states, both competition policy and the creation of the European single market could be rendered ineffective were member states free to support national companies as they saw fit. Primary authority for applying EU competition law rests with European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorates General.\(^{112}\)

### 3.2.2 Leniency policy

The leniency policy consists in abstaining from prosecuting firms that, being party to a cartel, inform the Commission of its existence. The leniency policy was first applied in 2002. The Commission Notice on Immunity from fines and reduction of fines in cartel cases guarantees immunity and penalty reductions to firms who co-operate with the Commission in detecting cartels.\(^{113}\)

The mechanism is straightforward in the following way:

- The first firm to denounce existence of a cartel receives immunity from prosecution. If the firm is not the first to denounce its existence, it gets a 50% reduction in fines.
- If the firm co-operates with the Commission, acknowledging its culpability, it gets a 10% reduction in fines.
- If, once the investigation is opened, the firm gives additional information, it gets a 20-30% reduction in fines.\(^{114}\)

This policy has been of great success as it has increased cartel detection to such an extent that nowadays most cartel investigations are started according to the leniency policy. In cross

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\(^{111}\) Supra, n. 103, Article 103  
\(^{112}\) Supra, n. 110  
\(^{113}\) **II.A, section8:** The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to: carry out a targeted inspection in connection with the alleged cartel; or find an infringement of Article 81 EC in connection with the alleged cartel.  
border or international investigations, cartel members are often at pains to inform not only the EU Commission, but also National Competition Authorities and authorities across the globe.115

A. European Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels116

Background

Two distinct types of CRTs are relevant for the cartels sanctioned in this decision: colour display tubes (CDT) used in computer monitors and colour picture tubes (CPT) used for colour televisions. The Commission's investigation started with unannounced inspections in November 2007.

The European Commission has fined seven international groups of companies a total of € 1,470,515,000 for participating in either one or both of two distinct cartels in the sector of cathode ray tubes ("CRT"). For almost ten years, between 1996 and 2006, these companies fixed prices, shared markets, allocated customers between themselves and restricted their output. One cartel concerned colour picture tubes used for televisions and the other one colour display tubes used in computer monitors. The cartels operated worldwide. The infringements found by the Commission therefore cover the entire European Economic Area (EEA). Chunghwa, LG Electronics, Philips and Samsung SDI participated in both cartels, while Panasonic, Toshiba, MTPD (currently a Panasonic subsidiary) and Technicolor (formerly Thomson) participated only in the cartel for television tubes. Chunghwa received full immunity from fines under the Commission's 2006 Leniency Notice for the two cartels, as it was the first to reveal their existence to the Commission. Other companies received reductions of their fines for their cooperation in the investigation under the Commission's leniency programme.117

Top management level meetings, dubbed "green(s) meetings" by the cartelists themselves because they were often followed by a golf game, designed the orientations for the two cartels. Preparation and implementation were carried out through lower level meetings, often referred to as "glass meetings", on a quarterly, monthly, sometimes even weekly basis. Meetings were held in various locations in Asia (Taiwan, Korea, Japan, Malaysia, Indonesia, Thailand, Hong Kong, etc.) and Europe (Amsterdam, Budapest, Glasgow, Paris, Rome).

115 Ibid
117 Ibid
Multilateral meetings usually started with a review of demand, production, sales and capacity in the main sales areas, including Europe; then prices were discussed, including for individual customers, i.e. TV and computer manufacturers. They had therefore a direct impact on customers in the European Economic Area (EEA), ultimately harming final consumers. The cartelists were trying to address the decline of the CRT market in a collusive way, to the detriment of consumers.\textsuperscript{118}

Fines

The fines were set on the basis of the Commission's 2006 Guidelines on fines. In setting the level of fines, the Commission took into account the companies' sales of the products concerned in the EEA, the very serious nature of the infringement, its geographic scope, its implementation and its duration. One of the companies invoked its inability to pay the fine.\textsuperscript{119}

The fines imposed are as follows\textsuperscript{120}:

<table>
<thead>
<tr>
<th>Name of undertaking</th>
<th>Reduction under the Leniency Notice (%)</th>
<th>Fine for the TV tubes cartel1 (€)</th>
<th>Fine for the computer monitor tubes cartel1 (€)</th>
<th>Total fine (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chunghwa2</td>
<td>100%</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Samsung SDI</td>
<td>40%</td>
<td>81 424 000</td>
<td>69 418 000</td>
<td>150 842 000</td>
</tr>
<tr>
<td>Philips</td>
<td>30%</td>
<td>240 171 000</td>
<td>73 185 000</td>
<td>313 356 000</td>
</tr>
<tr>
<td>LG Electronics</td>
<td>0%</td>
<td>179 061 000</td>
<td>116 536 000</td>
<td>295 597 000</td>
</tr>
<tr>
<td>Philips and LG Electronics2</td>
<td>30% (reduction only for Philips)</td>
<td>322 892 000</td>
<td>69 048 000</td>
<td>391 940 000</td>
</tr>
<tr>
<td>Technicolor</td>
<td>10%</td>
<td>38 631 000</td>
<td></td>
<td>38 631 000</td>
</tr>
<tr>
<td>Panasonic</td>
<td>0%</td>
<td>157 478 000</td>
<td></td>
<td>157 478 000</td>
</tr>
<tr>
<td>Toshiba</td>
<td>0%</td>
<td>28 048 000</td>
<td></td>
<td>28 048 000</td>
</tr>
<tr>
<td>Panasonic, Toshiba and MTPD2</td>
<td>0%</td>
<td>86 738 000</td>
<td></td>
<td>86 738 000</td>
</tr>
<tr>
<td>Panasonic and MTPD2</td>
<td>0%</td>
<td>7 885 000</td>
<td></td>
<td>7 885 000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td>1 142 328 000</td>
<td>328 187 000</td>
<td><strong>1 470 515 000</strong></td>
</tr>
</tbody>
</table>

\textsuperscript{118} Ibid
\textsuperscript{119} \url{http://www.cui.eu/RSCAS/Research/Competition/2006/pdf/200610-COMPed-Bloom.pdf}
\textsuperscript{120} Ibid
Action for damages

Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the European Court of Justice (ECJ) and the Antitrust Regulation (Council Regulation 1/2003) both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine.\(^{121}\)

B. *European Commission sends second statement of objections to ENI and Versalis in synthetic rubber cartel after General Court judgment*\(^{122}\)

The European Commission informed ENI and its affiliate Versalis that it intends to reimpose a 50% fine uplift for recidivism, representing €90.75 million, in the context of the synthetic rubber cartel investigation. The Commission had originally imposed fines on these two companies in November 2006 for participating in a cartel in this sector.\(^{123}\)

In November 2006 the Commission had fined ENI and Versalis €272.25 million for participating in the synthetic rubber cartel. The Commission imposed the fine jointly and severally on ENI and Versalis. This fine included a 50% increase of the basic amount of the fine, amounting to €90.75 million, due to the aggravating circumstance of recidivism, as foreseen in the then applicable Commission 1998 guidelines on fines. The General Court fully confirmed the participation of ENI and Versalis in the infringement but annulled the fine uplift for recidivism on the ground that the Commission "had not adduced sufficient detailed and specific evidence" to justify its conclusion that the three infringements had been committed by the same undertaking.\(^{124}\)

Procedural background

A statement of objections is a formal step in Commission investigations into suspected violations of EU rules that prohibit cartels and restrictive business practices (Article 101 of the

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\(^{121}\) Ibid.
\(^{122}\) [http://www.euractiv.com/competition/eu-cartel-leniency-programme-analysis-505907](http://www.euractiv.com/competition/eu-cartel-leniency-programme-analysis-505907)
\(^{123}\) Ibid
\(^{124}\) Ibid
Treaty on the Functioning of the European Union and Article 53 of the European Economic Area Agreement). The Commission informs the parties concerned in writing of the objections raised against them and the companies can examine the documents on the Commission’s investigation file, reply in writing and request an oral hearing to present their comments on the case before representatives of the Commission and national competition authorities.

Where the annulment of a Commission Decision is due to insufficient reasoning, the Commission is entitled to re-instate a Decision reaching the same conclusion as the annulled one, on the basis of the same facts, but curing the irregularity in question. This is what the Commission aims to do in this case, depending on the outcome of the judgments of the European Court of Justice on the appeals against the General Court judgements.125

3.3 UK Competition Law and Policy Overview126

United Kingdom competition law is affected by both British and European elements. The Competition Act 1998 and the Enterprise Act 2002 are the most important statutes for cases with a purely national dimension. However if the effect of a business’ conduct would reach across borders, the European Union has competence to deal with the problems, and exclusively EU law would apply.127 Even so, the section 59 of the Competition Act 1998 provides that UK rules are to be applied in line with European jurisprudence. Like all competition law, that in the UK has three main tasks:

- prohibiting agreements or practices that restrict free trading and competition between business entities. This includes in particular the repression of cartels;
- banning abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing, tying, price gouging, refusal to deal and many others;
- supervising the mergers and acquisitions of large corporations, including some joint ventures.128

Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to "remedies" such as an obligation to divest part of the merged

126 http://www.economicshelp.org/microessays/competition/evaluation-uk-competition.html
128 Ibid
business or to offer licences or access to facilities to enable other businesses to continue competing.\textsuperscript{129}

The Office of Fair Trading (OFT) and the Competition Commission are the two primary regulatory bodies for competition law enforcement. Consumer welfare is usually thought of as the dominant objective of competition law, though it may connect with a number of difficult questions relating to industrial policy, regional development, protection of the environment and the running of public services. Competition law is closely connected with law on deregulation of access to markets, state aids and subsidies, the privatisation of state owned assets and the establishment of independent sector regulators.\textsuperscript{130}

\textit{The Competition Act 1998} provides an updated framework for identifying and dealing with restrictive business practices and abuse of a dominant market position. One of the main purposes of this act was to harmonise the UK with EU competition policy, with Chapter I and II of the act mirroring the content of Articles 81 and 82 of the Treaty of Amsterdam.\textsuperscript{131}

\textit{Chapter I} deals with restrictive practices engaged by companies operating within the UK that distort, restrict or prevent competition. These are primarily in the form of horizontal agreements. These agreements could be to limit output, collusively share information, fix prices, tender collectively and share markets out.\textsuperscript{132}

Office of Fair Trading (OFT) is responsible for prosecuting such firms who engage in these activities, and are able to levy fines up to 10\% of annual UK turnover for every year in which a violation has taken place up to a maximum of 3 years.

Exemptions from prohibition are available if the firm can demonstrate that these practices are in the interest of the consumer through increasing market efficiencies or advancing technical progress.\textsuperscript{133}

\textit{Chapter II} deals with the abuse of a dominant position by a firm which uses practices such as predatory pricing, excessive prices, refusal to supply, vertical restraints and price discrimination to maximise profit, gain competitive advantage or otherwise restrict competition.

In investigating alleged breaches of chapter II a two stage process is involved. Firstly it must be identified if the firm actually possesses a dominant market position. Generally if a firm is found to have a market share in excess of 40\% then it is considered a threat to competition.\textsuperscript{134}

\textsuperscript{129} Ibid
\textsuperscript{130} http://www.of.t.gov.uk/news-and-updates/press/2009/114-09#.UXasOLVTAz5
\textsuperscript{131} http://www.legislation.gov.uk/ukpga/1998/41/contents
\textsuperscript{132} Ibid
\textsuperscript{133} Ibid
\textsuperscript{134} Ibid
There are no exemptions to chapter II as by its very definition as "abuse" of a market position, one must be guilty of wrongdoing for the chapter to apply.

An example of the effects of the act is that in 2004, public schools were investigated for fee-fixing by the Office of Fair Trading, and in 2005 fifty of the leading schools were ordered to raise £3 million between them to be spent on charities nominated by the pupils of the schools involved in the years 2001-2003, and were banned from further sharing of information on their fees.\(^\text{135}\)

**The Enterprise Act 2002** is an Act of the Parliament of the United Kingdom which made major changes to UK competition law with respect to mergers and also changed the law governing insolvency bankruptcy.

The Act had five major competition policy objectives; Make all competition decisions through independent bodies, root out forms of anti-competitive behaviour, create a strong deterrent effect, to redress injured parties in distortions of competition and raise the profile of competition policy in the UK.\(^\text{136}\)

The act made the Office of Fair Trading formally independent from government, and gave it additional powers. The act also established the Commission Appeals Tribunal (CAT) for companies to appeal against decisions by the Competition Commission.

On the deterrence side of the act, a jail term of a maximum of five years for directors was introduced in order to increase deterrence for forming cartels. The competition commission also had its scope widened to cover investigations of whole industries, not just specific firm, for example the supermarket industry.\(^\text{137}\)

**The Office of Fair Trading (OFT)** is a not-for-profit and non-ministerial government department of the United Kingdom, established by the Fair Trading Act 1973, which enforces both consumer protection and competition law, acting as the UK's economic regulator. The OFT's goal is to make markets work well for consumers, ensuring vigorous competition between fair-dealing businesses and prohibiting unfair practices such as rogue trading, scams and cartels. Its role was modified and its powers changed with the Enterprise Act 2002. The Competition and Markets Authority (CMA) will be established on 1 April 2014 combining many of the functions of the OFT and the Competition Commission.\(^\text{138}\)

The majority of the OFT's work consists of analysing markets, enforcing consumer and competition law, merger control, licensing and supervisory work (of consumer credit, estate

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\(^{135}\) Ibid
\(^{137}\) Ibid
agency, anti-money-laundering supervision), advocacy, delivering information, education programmes and campaigns to business and consumers. The OFT investigates markets to see whether they are working well for consumers and customers.\footnote{http://www.oft.gov.uk/news-and-updates/press/2009/119-09#UXasOLVTAz5}

The OFT works under a structure that is arranged by markets rather than legislation with a Services, Infrastructure and Public Markets group and a Goods and Consumer group. This enables the OFT to look more easily at whole markets and to use all the tools available to improve them if they are not operating effectively. The OFT will use consumer and competition enforcement, market studies and references, education and communication in whatever combination is appropriate.\footnote{Ibid.}

Cases


   In April 2011 the OFT fined Reckitt Benckiser £10.2 million after it found that it had abused its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines. Reckitt Benckiser admitted infringing UK and European competition law by withdrawing and de-listing Gaviscon Original Liquid from the NHS prescription channel in 2005. The OFT’s allegation was that Reckitt Benckiser withdrew NHS packs of Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid. Pharmacies that receive prescriptions for Gaviscon Advance Liquid must dispense it, as it is patent protected and there are no generic equivalent medicines.


   The Office of Fair Trading (OFT) imposed fines in two separate cases relating to the UK construction industry. One cartel concerned bid-rigging by 103 construction companies, including the practice of cover pricing. The other cartel involved recruitment agencies in the construction sector. Both of the OFT’s decisions in these cases have now been appealed to the Competition Appeal Tribunal CAT.

   On 22 September 2009, the OFT announced that it had imposed fines of £129.5 million on 103 companies in the construction sector in England for operating a bid-rigging cartel. The main anti-competitive practice which the firms concerned were found to have carried out, was “cover pricing”. This practice is undertaken where a bidder submits a bid but does not wish to
win the tender; the bidder obtains an artificially high “cover price” from a competitor, which is then submitted as a genuine bid. In addition, the OFT found cases of compensation payments being made by successful bidders to unsuccessful bidders.

The OFT made some reductions under its leniency regime and others under a new fast track procedure, where companies which had not applied for leniency could still receive a reduction in fines (of up to 25%), in return for admitting their involvement and cooperating with the OFT’s investigation.\textsuperscript{143}

**OFT investigation into Recruitment agency cartel**

On 30 September 2009, the OFT announced that it had found eight companies\textsuperscript{144} guilty of involvement in a cartel in the construction recruitment agency sector and imposed fines totalling £39.27 million. The recruitment agencies in this case, which supplied professional, managerial, trade and labour skills to the UK construction industry, were found to have engaged in both price fixing and a collective boycott.\textsuperscript{145}

Two of the undertakings involved benefited from total immunity, and all except one benefited from some form of leniency reduction.\textsuperscript{146} According to the OFT, the total fines before leniency amounted to £173 million, an amount significantly greater than the eventual fines. The total level of fines before reductions for leniency were taken into account was £173 million.\textsuperscript{147}

### 3.4 United States of America-Competition Law and Policy Overview\textsuperscript{148}

United States antitrust law is a collection of federal and state government laws, which regulates the conduct and organization of business corporations, generally to promote fair competition for the benefit of consumers. The main statutes are the *Sherman Act 1890, the Clayton Act 1914 and the Federal Trade Commission Act 1914*.\textsuperscript{149} These Acts, *first*, restrict the formation of cartels and prohibit other collusive practices regarded as being in restraint of trade. *Second*, they restrict the mergers and acquisitions of organizations which could substantially lessen competition. *Third*, they prohibit the creation of a monopoly and the abuse of monopoly

\textsuperscript{143} Ibid
\textsuperscript{145} An agreement to withdraw from and/or refrain from entering into contracts with an intermediary company.
\textsuperscript{146} Beresford Blake Thomas and Hill McGlynn & Associates have been granted immunity from fines as they are part of the corporate group which first provided the OFT with evidence of this cartel activity. All parties applied for and were granted leniency, apart from A Warwick Associates which is in liquidation.
\textsuperscript{147} Ibid
\textsuperscript{148} http://www.atg.wa.gov/antitrustguide.aspx
\textsuperscript{149} http://www.ftc.gov/bc/antitrust/
power.\textsuperscript{150} The Federal Trade Commission, the US Department of Justice, State Governments and private parties who are sufficiently affected may all bring actions in the courts to enforce the antitrust laws.\textsuperscript{151}

Preventing collusion and cartels that act in restraint of trade is an essential task of antitrust law. It reflects the view that each business has a duty to act independently on the market, and so earn its profits solely by providing better priced and quality products than its competitors.\textsuperscript{152} The Sherman Act section1 prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”\textsuperscript{153} This targets two or more distinct enterprises acting together in a way that harms third parties. It does not capture the decisions of a single enterprise, or a single economic entity, even though the form of an entity may be two or more separate legal persons or companies.\textsuperscript{154}

In \textit{Copperweld Corp. v. Independence Tube Corp.}\textsuperscript{155} it was held an agreement between a parent company and a wholly owned subsidiary could not be subject to antitrust law, because the decision took place within a single economic entity. This reflects the view that if the enterprise (as an economic entity) has not acquired a monopoly position, or has significant market power, then no harm is done. The same rationale has been extended to joint ventures, where corporate shareholders make a decision through a new company they form.

In \textit{Texaco Inc. v. Dagher}\textsuperscript{156} the Supreme Court held unanimously that a price set by a joint venture between Texaco and Shell Oil did not count as making an unlawful agreement. Thus the law draws a "basic distinction between concerted and independent action.

\textbf{Restrictive practices}

Some practices are deemed by the courts to be so obviously detrimental that they are categorised as being automatically unlawful or illegal per se. The simplest and central case of this is price fixing. This involves an agreement by businesses to set the price or consideration of a good or service which they buy or sell from others at a specific level. If the agreement is durable, the general term for these businesses is a cartel. It is irrelevant whether or not the businesses

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\textsuperscript{150} http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978787
\textsuperscript{151} Supra, n. 148
\textsuperscript{152} ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/WernhardMoeschel.pdf
\textsuperscript{153} http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf
\textsuperscript{154} Ibid
\textsuperscript{155} 467 U.S. 752 (1984)
\textsuperscript{156} 547 U.S. 1 (2006)
\end{flushleft}
succeed in increasing their profits, or whether together they reach the level of having market power as might a monopoly. Such collusion is illegal per se.\textsuperscript{157}

\textbf{Rule of reason}

If an antitrust claim does not fall within a per se illegal category, the plaintiff must show the conduct causes harm in "restraint of trade" under the Sherman Act Section 1 according to "the facts peculiar to the business to which the restraint is applied". This essentially means that unless a plaintiff can point to a clear precedent, to which the situation is analogous, proof of an anti-competitive effect is more difficult. The reason for this is that the courts have endeavoured to draw a line between practices that restrain trade in a "good" compared to a "bad" way.

\textit{Arizona v. Maricopa County Medical Society}\textsuperscript{158} held that a maximum price agreement for doctors was per se unlawful under the Sherman Act section 1.

\textit{NCAA v. Board of Regents of the University of Oklahoma}\textsuperscript{159} held that the National College Athletics Association's restriction of television of games, to encourage live attendance, was restricting supply, and therefore unlawful.

\textbf{Bid rigging}

\textit{Addyston Pipe and Steel Co. v. United States}\textsuperscript{160} pipe manufacturers had agreed among themselves to designate one lowest bidder for government contracts. This was held to be an unlawful restraint of trade contrary to the Sherman Act. However, the Supreme Court held that implicit in the Sherman Act Section 1 there was a rule of reason, so that not every agreement which restrained the freedom of contract of the parties would count as an anti-competitive violation.

In \textit{Hartford Fire Insurance Co. v. California}\textsuperscript{161}, a group of reinsurance companies acting in London were successfully sued by California for conspiring to make US insurance companies abandon policies beneficial to consumers, but costly to reinsure. The Sherman Act was held to have extra-territorial application, to agreements outside US territory.

\textbf{Group boycotts of competitors, customers or distributors}

\textsuperscript{157} \textit{United States v. Trenton Potteries Co.}, 273 U.S. 392 (1927)
\textsuperscript{158} 457 U.S. 332 (1982)
\textsuperscript{159} 468 U.S. 85 (1984)
\textsuperscript{160} 175 U.S. 211 (1899)
\textsuperscript{161} 113 S.Ct. 2891 (1993)
Fashion Originators' Guild of America v. FTC, the FOGA, a combination of clothes designers, agreed not to sell their clothes to shops which stocked replicas of their designs, and employed their own inspectors. Held to violate the Sherman Act Section 1.

Associated Press v. United States, a prohibition on members selling "spontaneous news" violated the Sherman Act, as well as making membership difficult, and freedom of speech among newspapers was no defence, nor was the absence of a total monopoly.

**Oligopoly and Tacit collusion**

Bell Atlantic Corp. v. Twombly, while Bell Atlantic and other major telephone companies were alleged to have acted in concert to share markets, and not compete in each others' territory to the detriment of small businesses, it was held that in absence of evidence of an agreement, parallel conduct is not enough to ground a case under the Sherman Act Section 1.

Theatre Enterprises v. Paramount Distributing, no evidence of illegal agreement, however film distributors gave first film releases to downtown Baltimore theatres, and suburban theatres were forced to wait longer. Held, there needed to be evidence of conspiracy to injure.

**Mergers**

FTC v. Dean Foods Co, the FTC was entitled to get an injunction to prevent the completion of a merger, between milk selling competitors in the Chicago area, before its competitive effects are determined by a court.

United States v. Philadelphia National Bank, the second and third largest of 42 banks in the Philadelphia area would lead to a 30% market control, and so violated the Clayton Act Section 7. Banks were not exempt even though there was additional legislation under the Bank Merger Act of 1960.

Brown Shoe Co., Inc. v. United States, held that there is not one single test for whether a merger substantially lessens competition, but a variety of economic and other factors may be considered. Two shoe retailers and manufacturers merging were held to substantially lessen.

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162 312 U.S. 457 (1941)
163 326 U.S. 1 (1945)
164 550 U.S. 544 (2007)
165 346 U.S. 537 (1954)
166 384 U.S. 597 (1966)
167 374 U.S. 321 (1963)
168 Section 7 elaborates on specific and crucial concepts of the Clayton Act; "holding company" defined as a "common and favourite method of promoting monopoly", but more precisely as "a company whose primary purpose is to hold stocks of other companies" which the government saw as an abomination and a mere incorporated form of the 'old fashioned' trust.
169 370 U.S. 294 (1962)
competition, given the market in towns over 10,000 people for men's, women's and children's shoes.

**Monopoly and power**

Sherman Act 1890 Section 2 provides that,

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

When enterprises are not under public ownership, and where regulation does not foreclose the application of antitrust law, two requirements must be shown for the offense of monopolization. First, the alleged monopolist must possess sufficient power in an accurately defined market for its products or services. Second, the monopolist must have used its power in a prohibited way.

*United States v. Alcoa*[^148] held that a monopoly can be deemed to exist depending on the size of the market. It was generally irrelevant how the monopoly was achieved since the fact of being dominant on the market was negative for competition.

*United States v. E. I. du Pont de Nemours & Co.*[^351] illustrates the cellophane paradox of defining the relevant market. If a monopolist has set a price very high, there may now be many substitutable goods at similar prices, which could lead to a conclusion that the market share is small, and there is no monopoly. However, if a competitive price were charged, there would be a lower price, and so very few substitutes, whereupon the market share would be very high, and a monopoly established.

**Exclusive dealing**

In *Standard Oil Co. v. United States*[^337], it was held that oil supply contracts affected a gross business of $58,000,000, comprising 6.7% of the total in a seven-state area, and were contrary to Clayton Act section3.[^337]

In *Tampa Electric Co. v. Nashville Coal Co.*,[^127] Tampa Electric Co contracted to buy coal for 20 years to provide power in Florida, and Nashville Coal Co later attempted to end the contract

[^171]: Ibid
[^172]: 148 F.2d 416 (2d Cir. 1945)
[^173]: 351 U.S. 377 (1956)
[^174]: 337 U.S. 293 (1949)
on the basis that it was an exclusive supply agreement contrary to the Clayton Act section3\textsuperscript{177} or the Sherman Act sections 1 or 2\textsuperscript{178}. Held, that this did not affect competition sufficiently.

**Predatory pricing**

In theory, predatory pricing happens when large companies with huge cash reserves and large lines of credit can stifle competition by selling their products and services at a loss for a time, in order to force their smaller competitors out of business.\textsuperscript{179} High barriers to entry such as large upfront investment, notably named sunk costs, requirements in infrastructure and exclusive agreements with distributors, customers, and wholesalers ensure that it will be difficult for any new competitors to enter the market, and that if any do, the trust will have ample advance warning and time in which to either buy the competitor out, or engage in its own research and return to predatory pricing long enough to force the competitor out of business.\textsuperscript{180}

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*\textsuperscript{181}, it was held that to prove predatory pricing the plaintiff must show that changes in market conditions are adverse to its interests, and that prices are below an appropriate measure of its rival's costs, and (2) the competitor had a reasonable prospect or a "dangerous probability" of recouping its investment in the alleged scheme.

In *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company*,\textsuperscript{182} concerning the saw mill market it was held that a plaintiff must prove that, to make a claim of predatory buying, the alleged violator is likely to recoup the cost of the alleged predatory activity.

**Intellectual property**

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*\textsuperscript{183} concerning a self opening paper bag, it was held not an unlawful use of a monopoly position to refuse to licence a patent's use to others, since the essence of a patent was the freedom not to do so.

In *International Salt Co. v. United States*\textsuperscript{184}, it was held that it would be a per se infringement of the Sherman Act section2 for a seller, who has a legal monopoly through a patent, to tie buyers to purchase products over which the seller does not have a patent.

\textsuperscript{176} 365 U.S. 320 (1961)
\textsuperscript{177} § 3 Clayton Act, 15 U.S.C. § 14: Sale, etc., on agreement not to use goods of competitor
\textsuperscript{178} The Sherman Antitrust Act, 1890: Section 1. Trusts, etc., in restraint of trade illegal penalty
\textsuperscript{179} Section 2. Monopolizing trade a felony; penalty.
http://www.stolaf.edu/people/becker/antitrust/statutes/sherman.html
\textsuperscript{179} http://www.iie.com/publications/chapters_preview/56/10e1664.pdf
\textsuperscript{180} Ibid
\textsuperscript{181} 509 U.S. 209 (1993)
\textsuperscript{182} 549 U.S. 312 (2007)
\textsuperscript{183} 210 U.S. 405 (1908)
\textsuperscript{184} 332 U.S. 392 (1947)
PART – IV

COMPARATIVE ANALYSIS – CONCLUSIONS

After an in-depth analysis of the existing laws of enforcement of Competition Law and Policy, the researcher hereby attempts to draw up the following comparative analysis.

4.1 India and Australia

Australia's core competition law provisions are contained in Part IV of the Competition and Consumer Act 2010 (CCA), meaning Competition laws and Consumer Laws are covered under the same ambit, which is not the case in India. Moreover, CCI provides only for civil remedies, whereas the Australian law in this respect provides for a large number of civil remedies along with criminal remedies for the contravention of the Act.

4.2 India and European Union

- Regulation 1/2003 of European Commission provides for Article 9 whereby if the undertakings concerned, offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision, make those commitments binding on the undertakings. Such an exercise amounts to saving of time of the Commission. However the Competition Act 2002 does not provide for any such mechanism.

- Article 14 of the Regulation provides that the Commission should before taking any decision should consult Advisory Committee on Restrictive Practices and Dominant Position. The Committee consist of members who are competent in competition matters. However there is no such provision for consultation in the Competition Act but Section 17 of the Act provides that the Commission can appoint experts and professionals for the proper functioning of the commission.

- Further Article 20 and 21 of the Regulation provides the Commission with the power to inspect the undertakings and the associations of the undertakings and for this purpose the officer so authorised can enter the premises of the undertaking, examine the books and other related records, seal the business premises etc. Further the Commission can also inspect any other place apart from undertaking premises like homes of directors, managers and other member staff of the undertakings. But in Competition Act no such provision for inspection is provided. The Commission can only order the Director General to investigate and Director General while make investigation has power similar to Commission provided under Section 36(2).
Apart from the imposition of penalty under Article 23, 1/2003 Regulation of EC also talks of concept of periodic penalty which provides for compelling the undertaking to abide by the decision given by the commission under Article 7, 8, 9, 17, 18(3), 20(4) but no such compelling mechanism is provided under the Indian Competition Act.

4.3 **India and the UK**

Though India follows the same line of enforcement authorities in India still there are few difference between the enforcement mechanism of competition law between U.K and India.

- Indian Competition Act though talks about investigation but unlike U.K Competition Act it does not talks about the power of the enforcement authority to enter the business premises as talked about in Section 27 and 28 of the U.K Competition Act. Non inclusion of such provision in Indian Competition Act can affect the investigation process to very large extent.
- The concept of privileged communication as provided under Section 30 of the U.K Competition Act is also not included in the Indian Competition Act. This non inclusion can affect the right of the undertakings or legal or natural persons who are undergoing investigation.
- In India, we have sectoral regulators as well as Competition law enforcement authorities which raise a serious concern as to the fact of handling of affairs of cross-sectoral issues. For example undertaking may be regulated by one agency on a certain aspect and by CCI on the competition aspects. In such situations businesses are afraid that in such instances there may be conflicting directions from different regulators. There are also fear that they need to comply with double regulations will result in increased business costs. In India there is no framework for coordination between the sectoral regulations and the Competition Commission of India. On the other hand in U.K a number of sectoral regulators have power to apply the Competition Act concurrently with OFT. The *Competition Act 1998 (Concurrency) regulations 2000* have been made for the purpose of coordinating the exercise of the concurrent powers and the procedures to be followed.

4.4 **India and the USA**

As opposed to the Indian framework comprising single legislation and single agency, the US enforcement framework comprises multiple agencies and legislation. In the US, two federal agencies bear the major responsibility of enforcing, the Antitrust Division of the US Department
of Justice ("DoJ") and the Federal Trade Commission ("FTC"). The former is part of the executive branch of the government and the latter is an independent administrative agency, similar to the CCI. The Sherman Act is the oldest federal antitrust statute, enacted in 1890 and deals primarily with anti-competitive agreements and monopoly exercised by firms. The Clayton Act, 1914 deals with specific business practices including mergers, price discrimination and tying, exclusive supply etc. The DoJ and FTC independently enforce the Sherman Act and the Clayton Act. However, if the violation entails criminal prosecution, then the DoJ has the exclusive authority to prosecute.

4.5 Comparative Analysis with respect to Combinations

The procedure for pre-filing notification is similar throughout the world. The Competition Act throughout the world has been enacted to protect the consumers, society and the business community. The pre-filing notification is effective in cases where the transaction is going to affect competition beyond one member nation. It proposes whether the proposed transaction violates the Competition law. Each jurisdiction has a mandatory merger notification based on targeting parties to "large transactions" which must notify the agency, supply required information for the review of competition issues and wait for the lapsing of established time periods before they can legally complete the transaction.
PART- V
RECOMMENDATIONS

With the change in the International economic environment, the competition standards of a country also change. Since the Competition Commission of India is still in its shaping phase, it is comparatively easier to formulate policies in accordance with the growing needs of the market economy. The researcher has attempted to throw light on some recommendations that can prove to be conducive in the functioning of the CCI.

1. Harmonious Integration of Consumer Laws and Competition Laws

The notion of consumer under competition law is broader than under consumer law. This means that competition law might acknowledge certain situations as favourable for consumers while such situations do not benefit the final consumers; only the direct customers of the undertakings. Further, competition law is mostly concerned with the economic interests of consumers and while in a few cases it might take account of wider consumer interests it is definitely not concerned with other significant consumer interests like health and safety issues or information disclosure. Thus a harmonious integration of these laws will prove to the maximum benefit and protection of the consumers, which is the ultimate aim of both these laws.

2. Introduction of Plea Bargaining

Plea agreements or settlements can provide significant benefits to both sides. From the competition authority’s point of view, they can bring about more efficient outcomes, saving resources and time and allowing the competition authority to make better use of its resources. Increased enforcement activities can overall lead to greater deterrence.

From the defendant’s point of view, a plea agreement or settlement likewise saves time and money and can give him a greater sense of being involved in the disposition of the case and of being able to influence its final outcome.

They can also be beneficial for society, as they encourage an optimal allocation of scarce investigation and prosecution resources and thus increase the deterrent value of existing resources. If a cartel case leads to a settlement or plea agreement, each side will give up some entitlements it would have had if the case had gone to a full trial or through a full administrative procedure ending with a formal decision. Both sides also agree together on a sanction or proposed sanction. So the competition authority may well forgo the right to seek or impose higher penalties, in return for the savings in resources and the certainty of a guilty plea. The defendant, in turn, waives certain procedural options that a more formal process and trial would
provide as well as any possibility of acquittal in return for an outcome that may include reduced sanctions.

3. Though Commission itself consist of Experts but Setting up of an independent Advisory Committee would help in proper functioning of the Commission.

4. The power to inspect the undertaking which charged of committing anti competitive activities is not provided to the commission, if such power is not given to the commission then it might vitiate the investigation proceedings. Hence such powers should be provided to the commission.

5. Setting up of frameworks for coordination between Sectoral regulators and Competition Authorities will ensure a better implementation of Competition laws in the country.

The Competition (Amendment) Bill, 2012

On December 10, 2012, the Indian government introduced the Competition (Amendment) Bill in the parliament. This Bill aims to modify certain provisions of the Act, as well as insert some new provisions, to meet the evolving needs of industry. The Bill still has to be debated and passed by two houses of the parliament before it becomes law. Following are some amendments that the bill proposes:

a. **Vertical arrangements to include "provision of services":** The Bill aims to include reference to "provision of services" in the explanation provided for all the illustrations under vertical agreement. While this amendment does not substantively impact the interpretation of section 3(4) *per se* since the main clause includes reference to "provision of services," it does ensure that there is no dichotomy between the text of the main clause and explanation provided for its illustrations. For instance, the present definition of "tie-in arrangements" includes "*any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.*" The amendment proposes the definition to be modified as "*any agreement requiring a purchaser of goods or recipient of services, as a condition of such purchase or provision of such services, to purchase some other goods or availing of some other services.*"

b. **Introduction of “collective dominance”:** The Bill now proposes to replace section 4(1) with "No enterprise or group, jointly or singly shall abuse its dominant position." The intention behind this amendment is to include enterprises or groups, related or unrelated, whether within the same management or not, to fall within the ambit of section 4. This implies that independent and unrelated parties could be held "dominant" under section 4 explanation (a). The amendment proposed by the Bill is a positive step forward since it will regulate instances where, for instance, a particular industry
may collectively abuse its position but a single enterprise within that industry may not qualify as a dominant player under section 4.

c. **Definition of “Turnover”:** The Bill now proposes to modify section 2(y) to state that "Turnover" will include value of sale of goods or services excluding the taxes, if any, levied on sale of such goods or provisions of services.

d. **Definition of “Group”:** The Bill aims to bring the Act in sync with the Notification and revises the definition of "group" to include "two or more enterprises which, directly or indirectly, are in a position to exercise 50% or more of the voting rights in the other enterprise." 50-50 joint ventures continue to fall within its scope. This amendment does not change the present interpretation of "group," but merely brings the Act in conformity with the Notification.

e. **Orders of the CCI during the stage of inquiry:** In order to give the CCI statutory provisions under which it can close a case even if the DG finds a contravention of the Act, the Bill proposes to expand the scope of section 26(8). In addition to passing an order directing a further inquiry, the amendment will also allow the CCI to "make appropriate orders thereon after hearing the concerned parties." This means that if the amendment is effected, the CCI will legitimately be able to pass any order, irrespective of the finding of the DG during its investigation.

f. **Opportunity to be heard before imposition of penalty:** The Bill now proposes to amend the language of section 27(b) as well as 27(g) to include a proviso requiring the CCI to grant a hearing to the party(s) before it passes any order under any of the aforementioned sections. This development will be consistent with judicial practice and offer a fair chance to parties to defend any imposition of the penalty once the CCI holds them in contravention of the Act.

Thus Indian Competition Authorities can learn lessons from jurisdictions all around the globe, since the Competition Act is not yet fully maturated. This will ensure an effective implementation of Competition Laws in the country benefitting the end-product users.
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