PROJECT REPORT ON PRICE PARALLELISM AND TACIT COLLUSION WITH RESPECT TO PRACTICES UNDER INDIAN COMPETITION LAW

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Isha Malhotra
New Delhi
January 24, 2012
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1. INTRODUCTION

“People who combine together to keep up prices do not shout it from the house tops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or a wink will do.”

The abovementioned statement retains its significance even in the present era. There is a hair line difference between Price parallelism and illegal collusion. Anti-Trust authorities of various nations are still struggling to overcome this quandary. Price parallelism is not an anti-competitive practice per se but when even the slightest hint of collusion comes into picture, it becomes anti-competitive. To distinguish between the two has been a problem for a long time in various jurisdictions and every case has a different story to tell. To deal with the problem, another concept of tacit collusion is brought up. Tacit collusion is an economic term and is synonymously used to express implicit collusion. Adhering to this there have been introduction and amendments in laws to fasten the liability on perpetrators of such conspiracies by making the rules more inclusive by applying a mature perception towards interpreting the law. Competition law which is also known as anti-trust law has always been a tough law to implement for any country because of the plethora of challenges. The major challenge before the concerned authorities is unavailability of evidences to prove that a practice (that causes adverse effect to the economy) is not just an outcome of parallel behaviour. The paper analyzes instances of tacit collusion in various jurisdictions. As agreed by Courts of almost every Jurisdiction that it is almost impossible to find out direct evidence which shows collusion between parties. So the courts require something more in the form of material proof to establish agreement or collusion. This extra factor was termed as “Plus Factor” in USA. The objective of this paper was to find out whether a mechanism can be developed to differentiate between the two, i.e. to say a parallel behavior or tacit collusion and concerted action.

1.1 PRACTICE DEFINED UNDER ANTI-TRUST LAW

According to Section 2(m) of the Indian Competition Act, “Practice includes any practice relating to the carrying on of any trade by a person or an enterprise.” This definition provides a very

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wide area of practice to Competition Commission of India. As per Section 18 of the Competition Act, it is the duty of the commission to eliminate practices having adverse effect on the competition, protect the interest of consumers, and ensure freedom of trade carried on by other participants, in markets in India.

Now the question comes whether “parallel behavior” which falls under the term practice causes an adverse effect on the competition?

In USA, Jonathan Baker stated that, “By operationalizing the idea of an agreement, antitrust law clarified that the idea of an agreement describes a process that firms engage in, not merely an outcome that they reach. Not every parallel pricing outcome constitutes an agreement because not every such outcome was reached through the process to which the law objects: a negotiation that concludes when the firms convey mutual assurances that the understanding they reached will be carried out.”

Massimo Motta in 2004 suggested, “Today pure market ‘parallel behavior’ without any attempt from the firms involved to communicate with each other or establish practices which help sustain collusion would probably not be judged by the Court of First Instance and the European Court of Justice as a concerted practice within the meaning of Article 81.”

The term tacit collusion and price parallelism has been discussed at length below:

1.2 Tacit Collusion
Seemingly independent, but parallel actions among competing firms (mostly oligopolistic firms) in an industry that achieve higher prices and profits, much as if guided by an explicit collusion agreement. Also termed implicit collusion, the distinguishing feature of tacit collusion is the lack of any explicit agreement. They key is that each firm seems to be acting independently, perhaps each responding to the same market conditions, but the end result is the same as an explicit agreement.

“Tacit collusion describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra

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3 Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory, 38 ANTITRUST BULL. 143 (1993).
competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”

“Concerted practices” is defined by the European Court of Justice as “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”

1.3 Price Parallelism

It is necessary to discuss the term “price parallelism for the purpose of the project. Conscious parallelism or price parallelism is a term used in competition law to describe price-fixing between competitors that occurs without an actual spoken agreement between the parties. Instead, one competitor will take the lead in raising prices. The others will then follow suit, raising their prices by the same amount, with the unspoken mutual understanding that all will reap greater profits from the higher prices so long as none attempts to undercut the others.

This practice, like most anticompetitive practices, can be harmful to consumers who, if the market power of the firm is used, can be forced to pay monopoly prices for goods that should be selling for only a little more than the cost of production. Nevertheless, it is very hard to prosecute because it occurs without producing any evidence of collusion between the competitors.

The difficulty for competition law, competition authorities is to distinguish between situations in which strategic coordination implies some sort of illicit collusion and when it merely corresponds to spontaneous coordination resulting from the rational response of each member of the oligopoly to the perceived interdependencies.

It is well known that firms in an oligopolistic industry recognize their mutual interdependence, understand that they are players in a repeated game, and act accordingly. In antitrust decisions about allegations of collusive pricing, conscious parallelism is viewed as insufficient for a

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8 Supra 2.
determination that firms are engaged in concerted action because such pricing can emerge from firms acting non-collusively where they understand their role as players in the repeated oligopoly game.\(^\text{10}\) In antitrust cases, courts have required that economic circumstantial evidence go beyond parallel movement in price to reach a finding that the conduct of firms has crossed the line into the realm of potentially violating fair competitive practices. This additional economic circumstantial evidence is referred to collectively as “plus factors.”\(^\text{11}\)

### 1.4 Significance of Plus Factors

In markets characterized by interdependence, each firm realizes that the effect of its actions depends upon the response of its rivals. It is well known that firms in an oligopolistic industry recognize their mutual interdependence, understand that they are players in a repeated game, and act accordingly.\(^\text{12}\) The recognition of interdependence can lead firms to coordinate their conduct simply by observing and reacting to their competitors’ moves. In some instances, such oligopolistic coordination yields parallel behavior that approaches the results that one might associate with a traditional agreement to set prices, output levels, or other conditions of trade.

In antitrust decisions about allegations of collusive pricing, conscious parallelism is viewed as insufficient for a determination that firms are engaged in concerted action because such pricing can emerge from firms acting non-collusively where they understand their role as players in the repeated oligopoly game.\(^\text{13}\)

The line that distinguishes tacit agreements from mere tacit coordination stemming from oligopolistic interdependence is blurred. Courts have relied on effective criteria known as “plus factors” to determine whether a pattern of parallel conduct results from an agreement. The chief plus factors have included:\(^\text{14}\)

- Actions contrary to each defendant's self-interest unless pursued as part of a collective plan.
- Phenomena that can be explained rationally only as the result of concerted action.
- Evidence that defendants created the opportunity for regular communication.

\(^\text{10}\)Ibid.
\(^\text{11}\)Ibid.
\(^\text{12}\)Ibid.
\(^\text{13}\)Ibid.
\(^\text{14}\)Ibid.
• Industry performance data, such as extraordinary profits, that suggest successful coordination.
• The absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals), or the presentation of contrived rationales for certain conduct.

The basic problem that arises is courts have failed to establish an analytical framework that explains why specific plus factors have stronger or weaker evidentiary value or to present a hierarchy of such factors. One plus factor that Court determines for one case might not apply for any other case depending upon the facts of the case. This ad hoc approach makes judgments about the resolution of future cases problematic and gives an impressionistic quality to judicial decision making in agreement-related disputes. But, one is without a solution because it is not possible to determine which plus factor has adverse implication on economy and which might not. Courts cannot give hierarchy to that effect of the plus factors involved.

The most important element of proof which is also the most difficult to uncover is showing how the defendants communicate their intentions and confirm their commitment to a proposed course of action. Perhaps the most probative proof of the mechanism for achieving consensus would consist of evidence demonstrating that a pattern of extensive communication among the defendants preceded a complex, parallel adjustment in behaviour that could not readily be explained as the product of the defendants’ independent efforts to identify and adhere to focal points for organizing their conduct. The interpretation of plus factors in the decision to prosecute and in the resolution of litigated cases can have enormous implications. The competition laws of most countries treat agreements among rivals to set the terms on which they will trade as serious offenses. A finding that the challenged conduct resulted from concerted, rather than unilateral, behavior can expose a firm to large civil fines and, in an increasing number of countries, criminal sanctions.

15 Ibid.
17 Supra 9.
18 Ibid.
1.5 CARTELS

Under Indian Competition Act 2002, the term “cartel” is defined as including “an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”\(^\text{19}\). A cartel is regarded as the most spiteful violation of competition law and is subject to the severest penalties. Cartels are nothing but agreements formed in secrecy between firms in direct competition with each other in the relevant market, and by the virtue of that cartels create an unfavourable effect on the market. Thus cartels refer to the illegal behaviour of competitors in which they work together to regulate their market behaviour so as to restrict competition. It was necessary to define the term cartel as its is the most spiteful collusion.

Fair Trade Practices and fair chance to new players to establish their footings in the market is very important for the holistic growth of the economy. It has been accepted globally that price manipulations by strong players in the market are one of the most egregious of all competition law violations: they are the most widely prevalent entities in markets for consumer goods or inputs and services essential to other sectors of the economy. The basic problem to establish a Cartel is to bring out the evidentiary proof. Price Parallelism or Conscious Parallelism is not per se anti-competitive because there is no collusion and no one can be held liable but where one can establish a proof of meeting of minds, the Cartel can be established. The Project focuses upon the distinguishing factors which differentiates a mere parallel behavior from a concerted Action. The struggle visible in various judicial decisions justifies the fact that a material procedure or a material test to demolish the practice cannot be brought about as each case is different from other. In India it is a relatively new concept. MRTP Act dealt with it under the blanket of Restrictive Trade Practices but a proper analytical framework is still not available on the issue. As mentioned, the project attempts to analyze various judicial decisions regarding the aspect and put forth suggestions to curb the same.

\(^{19}\) Section 2(c), The Competition Act, 2002.
2. APPLICATION OF LAW IN VARIOUS JURISDICTIONS

Both in the US and in the EC, according to case law the observation of parallel behavior is not sufficient to this end as it does not establish the existence of a contract, combination, or conspiracy as required by the Sherman Act\textsuperscript{20}, or an agreement or concerted practice as required by Article 81\textsuperscript{21} of the EC Treaty. US and European courts have adopted a “parallelism plus” approach which requires showing the existence of “plus factors” beyond merely the firms’ parallel behavior, in order to prove that an antitrust violation has occurred. Yet, in both jurisdictions there is an inclination to consider parallel behavior as a first clue pointing to the presence of collusion. Study of Case laws from some other Jurisdiction also suggests the inclusion of plus factors to prove an illicit collusion. Following the US and EC approach towards establishment of a conspiracy various other Jurisdictions have also relied upon existence of the so-called plus factor. But each country has a different approach to establish that plus factor. This chapter of the project contributes towards the particular aspect of “plus factors” \textit{vis-a-vis} their treatment in various Jurisdictions

2.1 EUROPEAN UNION

Lawmakers in the European Union have struggled with establishing a coherent theoretical framework for addressing coordinated behaviour in the case of joint abuse of dominance, also called “collective dominance”.\textsuperscript{22} Antitrust law in the European Union was established in Articles 81 and 82 of the European Community (EC) Treaty signed in Rome in 1957.

Article 81 of the EC Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. More in particular the direct or indirect fixing of purchase or selling prices or any other trading conditions, the limitation and control of production, markets, technical development, or investment and the allocation of markets or sources of supply are prohibited.

\textsuperscript{20} See Annexure
\textsuperscript{21} See Annexure
\textsuperscript{22} Supra 2.
2.1.1 Definition of Agreement/Concerted Action

Agreement under EU Competition Law has a wide meaning and covers agreements whether legally enforceable or not, written or oral. There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls may suffice. The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement although these facts may be taken into account in deciding the level of any financial penalty.

Article 81 of the EC Treaty and the Chapter I prohibition contained in the Competition Act 1998 (the Act) both prohibit, in certain circumstances, agreements which prevent, restrict or distort competition. The provisions prohibiting agreements preventing, restricting or distorting competition are contained in Article 81(1) of the EC Treaty. Agreements which fall within Article 81 and/or the Chapter I prohibition but which satisfy certain specified conditions are not prohibited, no prior decision to that effect being required. Certain categories of agreement are excluded from the scope of Article 81 and/or the Chapter I prohibition.

Article 81(1) provide an identical list of agreements to which the provisions apply, namely those which:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions
(b) Limit or control production, markets, technical development or investment
(c) Share markets or sources of supply
(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
(e) Make the conclusion of contracts subject to 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.

23 See Annexure.
24 See Annexure.
This is a inconclusive, illustrative list and does not set a limit on the investigation and enforcement activities of the OFT under Article 81 or the Chapter I prohibition. Article 81 and the Chapter I prohibition apply to concerted practices as well as to agreements. The boundary between the two concepts is imprecise. The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement or decision. The following are examples of factors which the OFT may consider in establishing if a concerted practice exists:

• Whether the parties knowingly entered into practical co-operation
• Whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings
• Whether parallel behaviour is a result of contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market
• The structure of the relevant market and the nature of the product involved
• The number of undertakings in the market and where there are only a few undertakings, whether they have similar cost structures and outputs.

In line with the above the Court spelled out in the *Cement case*:

“When the Commission establishes that the undertaking in question has participated in an anticompetitive measure, it is for that undertaking to provide, using not only the documents that were not disclosed but also all the means at its disposal, a different explanation for its conduct. It follows that the complaints alleging reversal of the burden of proof and breach of the presumption of innocence are unfounded.”

In the *Suiker Unie* case the Advocate General pointed out that .the evidence of concerted practice may, in most cases, only consist of evidence or presumptions which the investigations of the Commission have brought into being. It is the mixture of these presumptions - provided they are strong, precise and relevant which more often than not alone enables the existence of a concerted action corroborated by the actual conduct of the undertakings concerned to be proved.

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27 C-204/00 P, C-205/00 P.
28 *Ahlström Osakeyhtiö and others v Commission*, joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.
In *Imperial Chemical Industries v. Commission (Dyestuff)*,\(^{29}\) (Uniform increase in the prices of dyestuff) it was observed by the Court that,

“By its very nature, a concerted practice does not have all the elements of a contract but may inter alia arise out of co-ordination which becomes apparent from the behavior of the participants... Although parallel behavior may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to normal conditions of the market, having regard to the nature of the products, the size and number of undertakings, and the volume of said market”

### 2.1.2 Parallel Behavior is Not Per Se Unlawful—Wood Pulp Judgment

Perhaps the prototypical case of ‘tacit’ collusion is given by a situation where firms behave in a parallel way over time, that is tend to imitate each other in their price decisions.

The Wood Pulp judgment in 1984\(^{30}\), the EC adopted a decision (Wood pulp) that found that forty wood pulp producers and three of their trade associations had infringed article 81 of the Treaty by concerting on prices. The Commission found an infringement of article 81 due (among other things) to parallel behaviour, which consisted of:

(i) a system of quarterly price announcements;
(ii) the simultaneity or quasi-simultaneity of the announcements;
(iii) the fact that announced prices were identical.

In the absence of documents which directly prove the existence of collusion, it was a challenge to the Court was to find out whether the above mentioned behaviour was a mere competitive behaviour or had contained some latent factor that amounts to collusion.

“In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct.”\(^{31}\) To establish whether parallel conduct was in this case proof of collusion, the ECJ commissioned two expert’s reports, whose conclusions changed the entire approach of Courts towards parallel behaviour. And it was agreed that that


parallelism could well have been the result of the normal oligopolistic interdependence among competitors.\(^{32}\)

(i) The EC believed that the system of quarterly price announcements and the fact that all firms quoted prices in the same currency were practices expressly adopted by the wood pulp producers so as to increase the transparency of the market, thus rendering collusion easier. The experts found that it was the purchasers who, after World War II, demanded the introduction of that system of announcements, in order to better estimate their costs.\(^{35}\)

(ii) The explanation to close succession of price announcements was found out to be the normal market features like existence of common agents that work for several producers. It ensured the quick spread of announced prices.

(iii) The third element in the EC’s construction was the announcement of similar prices by the wood pulp producers involved were the very similar although they had different production costs, different rates of capacity utilisation, different costs of transportation to a given market; and other cost differences. However, the experts and the ECJ noted that same pattern of prices could also be consistent with an alternative explanation, that is competitive behaviour in an oligopolistic industry.\(^{34}\) First, the fact that (average) prices were high in some years and low in others might be explained by specific demand and supply shocks. Second, the experts argued that the fact that prices over the economic cycle were the same (or similar) across producers was compatible with the firms behaving independently: a competitor decides to set the same price as its rivals simply because it fears the reactions that would take place if it did not so.

In the light of the experts’ reports, the ECJ arrives at the conclusion that “concertation is not the only plausible explanation for the parallel conduct.”\(^{35}\)

This judgment is in contrast with the ICI Judgment. In the former Judgment weight was given to the simultaneous price announcement whereas, in the wood pulp judgment, a variant explanation to the same was pointed out. At this point, one can ask the broader question of whether one can


\(^{34}\)Ibid.

\(^{35}\)Ibid.
ever find an infringement of anti-trust laws by simply looking at parallel conduct. The answer is that this is possible, but the standard of proof is (rightly) high, as one should prove that communication and/or coordination of some kind among the firms must be the only plausible explanation for parallelism

2.2. United States of America

Antitrust litigants in United States devote much effort to determining whether a conduct stems from an agreement and therefore implicates Section 1’s (Sherman Act, 1890, See annexure) ban against collective trade restraints. The definition of agreement has been a constant antitrust problem because illegality under the Sherman Act is often predicated upon the existence of an agreement to retrain trade. In the Sherman Act, under Section 1 proscribes every “contract, combination or conspiracy” in restraint of trade, is strictly confined to joint action. The definition of agreement has been a constant point of discussion in series of cases. The courts have had to struggle with quandary of drawing a line among various forms of conduct having virtually identical results, or treating different forms of conduct as being the same despite the differences.

There are generally two kinds of agreement that a court can distinguish while considering the plaintiff’s evidence viz. express and tacit. Cases that categorize tacit collusion use the term to describe two phenomena. Firstly, alleged agreements that the plaintiff seeks to prove by introducing circumstantial evidence. Many cases that use the terminology in this way find liability with the crucial issue being to define what quantum of circumstantial proof will permit an inference of concerted action. Secondly, there is a series of cases that refer to parallel interdependent conduct of the type addressed.

2.2.1 Role of Judicial Decisions in Development of Law

Modern judicial efforts in the United States to define concerted action originate in four Supreme Court decisions beginning with Interstate Circuit, Inc. v. United States\textsuperscript{36} in 1939 and ending with Theatre Enterprises v. Paramount Film Distributing Corp.\textsuperscript{37} in 1954.\textsuperscript{38}

The facts of Interstate Circuit are discussed below:

\textsuperscript{36} 306 U.S. 208 (1939).
\textsuperscript{37} 346 U.S. 537 (1954).
\textsuperscript{38} Supra 9.
Exhibitors sent a letter to distributors’ branch managers requesting, as a condition of continued showing of distributors’ films in their first run theaters. The letter contained following conditions:

- Distributors will not allow the films to be shown in subsequent run theaters for less than 25 cents adult evening admission price; and
- Distributors will not permit the films to be shown as part of a double feature.

Letter was written on Interstate letterhead, and named all eight distributor branch managers as addressees. It was obvious that these practices if implemented, would have been significant changes from previous arrangements. Branch managers forwarded the communication to their head offices. Each of the distributor defendants subsequently incorporated the requested terms into their contracts. In this case District court drew an inference of agreement from:

- The nature of the proposals;
- The manner in which they were made;
- The substantial unanimity of action following the proposals;

The Court that Court defined the concerted action requirement in these terms. “acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”

The conviction of movie exhibitors for fixing the prices to be charged for first-run films was sustained.

In American Tobacco Co. v. United States,\(^39\) the Court stated that “no formal agreement is necessary to constitute an unlawful conspiracy.” The Court explained that a finding of conspiracy is justified “where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.” In 1948 in United States v. Paramount Pictures, Inc.,\(^40\) the Court reiterated Interstate Circuit’s agreement formula. In considering Section 1 and Section 2 conspiracy claims, the Court said “it is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement.” In can be inferred that in the above cases, Courts did not require a so-called “plus

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\(^{39}\) 328 U.S. 781 (1946).
\(^{40}\) 334 U.S. 131 (1948).
factor” to prove an illegal collusion. They relied on mere parallel conduct and the circumstances and their consequent effect to determine an illegal collusion.

It was in the case of Theatre Enterprises, which brought about the turmoil in the US judicial scenario. Plaintiff brought an action for damages and an injunction, alleging a conspiracy between the defendants to restrict first-run film releases to downtown Baltimore, thus excluding plaintiff (a suburban theatre) to unreasonable “clearances.” Plaintiff approached defendants separately about obtaining first run releases, and was uniformly rebuffed. Substantially the same reasons were provided by each defendant for rejecting the offer.

Defendants contented that the reasons for rejecting the plaintiff’s offered guarantee was simultaneous releases of the same film were generally restricted to non-competing theaters, and plaintiff was in competition with downtown theaters. Exclusive release to plaintiff was economically unviable, because plaintiff’s theater had a much smaller market. Also, defendants attacked that guarantee as not having been made in good faith.

The Court said “circumstantial evidence of consciously parallel behaviour may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not read conspiracy out of the Sherman Act entirely.”

Once the Theatre judgment had given a jolt to the American Antitrust jurisprudence in declaring in most unambiguous terms that conscious parallelism would not be enough to prove the case the focus was shifted on what that something more should be. The court required plaintiffs who relied on parallel conduct to introduce additional facts, often termed “plus factors” to justify an inference of agreement.

The decisions following the Theatre Enterprise ruling have considered various plus factors to eliminate and distinguish the cases which alleged involved in parallel or concerted action. In First National Bank of Arizona v. Cities Service Co., the court introduced ‘motive to conspire’ and contrary to ‘self interest factors’. Cases have been asked whether defendants had a rational motive to engage in a conspiracy. Further, other decisions considered whether the disputed conduct would have contradicted the defendants’ self interest if pursued unilaterally. In applying the aforesaid

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factors many cases have dismissed claims that rested chiefly on the fact of parallelism without a showing that defendants could expect to gain from concerted action.

Plus factors provides that if an inference of conspiracy has to be drawn from the concerted action the proof should include that defendants priced uniformly where price uniformity was improbable without an agreement; committed past antitrust violations involving collective action; directly communicated with competitors and then made simultaneous, identical changes in their behavior; or agreed to adopt common practices, such as product standardization whose implementation helped achieve pricing uniformity.43

It was in Monsanto Co. v. Spray-Rite Service Corp,44 the Court observed that the correct standard is that there must be evidence that tends to exclude the possibility of independent action by the parties. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful objective.

It is far unclear from the analysis of the cases treated by US DoJ that up to what extent evidentiary standard should be robust where direct evidence is lacking. In latest U.S. antitrust cases, competition authorities tend to utilize econometric technique to provide circumstantial evidence as to collusive pricing, although in most cases econometric evidence is treated as necessary but not sufficient to prove the existence of collusive prices. This is a sensible policy stance on antitrust enforcement. Even in recent leading cases, it was less clear that what type of evidence was indispensable for assessing unreasonable restraint of trade. Also unclear was the evidentiary standard and whether it meant the same in different cases. These recent cases illustrate current disagreement in terms of evidentially requirements in the U.S. court decisions. The ruling in most recent case, Bell Atlantic Corp. v. Twombly45, makes presence of “plus factor” a necessary element to determine collusion.

Plaintiff-purchaser of telecommunication services asserted a cause of action under Section 1 of the Sherman Act, asserting that Bell Atlantic and others conspired with one another to keep competitive local exchange carriers from competing successfully in their respective territories. The complaint also alleged that an agreement among the defendants not to compete with each

43 Supra 2.
other. However, the complaint did not identify any document that constituted or memorialized any such agreements. Rather, it argued that an improper agreement could be inferred by the motives and parallel conduct of the defendants.

The Court held, that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Parallel conduct alone does not constitute a violation of Section 1 of the Sherman Act. Therefore, it dismissed the complaint for failure to state a claim upon which relief can be granted.

Hence, the only aspect that can be safely presumed is that the Court retains the presence of plus factor in order to establish collusion.

### 2.3. ARGENTINA

Argentina’s Competition Defense Act (CDA) does not mention explicitly tacit agreements or conscious parallelism as forms through which collusion might take place. However, Article 1 of the law prohibits any act or conduct *manifested in any form* that has the object or the effect of restricting competition or constituting an abuse of a dominant position in such a way that the “general economic interest” is injured or potentially injured.

After reading the decisions of the Courts, which includes a no. of examples of convictions both explicit and implicit collusion, the basic conclusion can be drawn that price parallelism is not enough evidence to prove the infringement of the competition law. Certain case laws are discussed below to understand the practice followed in Argentina in case of parallel pricing.

In *Asociación de Agencias de Viajes y Turismo de Buenos Aires v. American Airlines and others* (2001) 46 a trade association of Buenos Aires’ travel agents (AVIABUE) filed a complaint against three airlines (Continental Airlines, British Airways and United Airlines) for abuse of dominant position through a simultaneous reduction (from 9% to 6%) of the commissions paid to travel agents.

The National Commission for the Defence of Competition (herein after referred as CNDC), established that an infringement of Article 1 of the CDA is configured when the following circumstances are proved:

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• The dominant position of the investigated firms.
• A reasonable possibility that the investigated firms may acquire the necessary purchase power (regarding the travel agencies’ services) that makes feasible a sustainable abuse of dominant position and collusion.
• A reasonable possibility that the conduct may harm the “general economic interest”.

To solve the accusation of a supposed collusion to reduce the commissions paid to travel agencies, due to a simultaneous and identical variation reduction, the CNDC made a detailed presentation of the concepts of “tacit collusion” and “conscious parallelism” according to economic theory. It was concluded:

• First, the fact that Aerolíneas Argentinas didn’t follow the conduct of other two airlines and that proved that these airlines found profitable the reduction of the commissions independently of the decision of Aerolíneas Argentinas47.
• Secondly, the fact that United Airlines decreased the commissions after American Airlines could be a signal of a competitive conduct since United didn’t want to stay behind regarding the competitive advantage that American could achieve through lower costs48.
• Thirdly, the existence of other type of retributions to the travel agencies that are not publicly known would make more difficult any sort of agreement; without a system of information exchange it wouldn’t be possible to monitor the compliance with the agreement.
• Fourth, the explanation given by the airlines was plausible in the sense that the reduction of the commissions would lower their costs

Since there were several elements that discarded collusion, the CNDC advised the closure of the investigation against the airlines. This opinion was endorsed by the Secretary of Competition Defense.

The most recent case of tacit collusion, CNDC v. Loma Negra and others (2005)49, is also the most important precedent because of the complex analysis of the authority and the evidence that
determined its final outcome. It is the only case where presence of tacit collusion was decided but final decision by the superior court is pending. In this case, CNDC concluded that four cement producers and a trade association had infringed the competition law by:

i) Agreeing quotas of production in the national market, with a corollary agreement on prices and other commercial conditions in certain regions, and

ii) Exchanging information regarding sensible competition through a statistical information system managed by the trade association of cement producers managed by the trade association.

A big load of evidence was presented and analyzed during the six years of proceedings, but the main proof was the statistical information exchange system. The system was considered direct evidence of the agreement of exchange of information (sensible for competition) and the main part of the evidence concerning the anticompetitive conduct of allocation of quotas of production and market participation50.

The relevant market of the case, according to the CNDC’s findings, was the production and commercialization of Portland cement at a national level51.

Regarding the conducts of the firms, the CNDC considered that the exchange of information (sensible for competition) infringes the competition law in two different ways: i) as part of the agreement on quotas and market participation, since it allowed the firms to control their agreement and to detect deviation from it and ii) as an agreement on exchange of information sensible for competition, it infringed the law by itself since it distorts competition and facilitates coordination or tacit collusion, therefore reducing the incentives of the firms to compete52.

The CNDC explicitly acknowledged the fact that in most cases it is impossible to prove the existence of cartels through direct proof, but that indirect evidence may constitute enough evidence to prove a cartel53.

51 CNDC, Dictamen 513 de 2005, pp. 32-42.
53 CNDC, Dictamen 513 de 2005, p. 41.
2.4. BRAZIL

The three agencies constitute the Brazilian Competition Policy System (BCPS). The proceedings before the competition authorities have an administrative nature and their decisions may be subject of judicial review before federal courts of first instance if requested by the private parties. The first instance decision may be appealed before a regional Court of Appeals by private parties or the agencies. Finally, the Court of Appeals’ decision may reach the Superior Court of Justice if the parties apply for an appeal.

A distinctive feature of Brazilian antitrust rules is that the proof of market power is necessary to determine the infringement of competition law regardless of the type of conduct. To date, the majority of the cases have been decided through direct evidence of collusion. Although there are few cases where Council for Economic Defence (CADE) assessed tacit collusion cases, the first big precedent was *SDE v. CSN, Usiminas and Cosipa* (1999)\(^4\) where the only three producers of flat rolled steel products were fined for price fixing.

Basically, the investigation was initiated due to two facts detected by the SDE (*Santiago Del Estero*) and the SEAE (*Secretaria de Acompanhamento Econômico*). Firstly, the communications sent by the firms informing a price increase that would take place the same day. Secondly, a meeting of the accused parties that took place where the investigated firms manifested their intention of readjusting (increasing) prices which was supposed to be effective from the next day. Furthermore, according to the evidence compiled during the investigation, the firms sent communications to different customers’ associations regarding the readjustment of prices that would be effective from the same date.

During the proceedings before the SDE, the investigated firms alleged that the similarity of prices was due to similar cost structures. Furthermore, the firms provided an economic expertise regarding “prices in concentrated markets.” The document exposes the economic theories according to which, in concentrated markets of homogenous products the prices tend to be similar due to potential competition, interdependence of firms in oligopolies, and price leadership where the most efficient firm in the market sets the price and the rest of the firms have to follow it to compete.

The CADE makes an account of the SDE’s “technical note” that justified the proof of a cartel through indirect evidence. Regarding the existence of dominance the SDE argued that the three firms were the only producers of flat rolled steel, the low contestability of the market was due to high barriers of entry and the scarcity of imports. Finally, the SDE discarded the hypothesis of “price leadership” since the firms alternated the “leadership” by announcing and applying the price adjustments and in an occasion one of the smallest firms was the first to raise prices.

The CADE decided by unanimity there was enough evidence to fine the three firms for infringing the law. The collusive practice was proved by the parallel behavior that had no rational explanation from the economic point of view and the meeting of the competing firms before the application of the price increase.
3. TREATMENT OF PARALLEL BEHAVIOR IN INDIA

Competition Act came into force in 2002. It is relatively a new law if we take into consideration US and EU. Competition Act has been prepared on the footsteps of Sherman Act and EU guidelines. The advocates and judges also look up to various judicial decisions to interpret the law. Restrictive Trade Policies were prohibited under MRTP Act and Agreements which restricted trade in any manner were well within the ambit so were cartels. It is notable that neither Sherman Act nor EU guidelines define the term “cartel” but Indian Competition Act has made an attempt to give a definition which has been inspired from various judicial conclusions of the above-mentioned Jurisdictions.

3.1 MRTP ACT 1969 - OVERVIEW

We now look at the Indian experience in investigating and punishing collusions which restricted trade. This facilitates comparisons with other countries and provides a road map for future progress. The MRTP Act empowered the Central Government to set up an authority, called the Monopolies Restrictive Trade Practices Commission (MRTPC), which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on suo moto basis. The DGIR used to report directly to the Ministry of Corporate Affairs and not the MRTPC Commission.

Restrictive trade practices are generally those practices that have an effect on prevention, distortion and restriction of competition. For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice. It has been succeeded by Competition Act and all the investigatory powers and other procedures are now carried out by Competition Commission of India.


3.2 **COMPETITION ACT, 2002**

A specific goal of the Competition Act is the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. The CCI is required to control agreements among competing enterprises on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes which are likely to harm competition need to be addressed.

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

Section 3, subsection 3 of the Competition Act states:

"Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:"

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In India, as elsewhere, illegal collusions are also found to be most common in markets for intermediate products – vitamins, cement, copper tubes, etc, that are processed and constitute input costs along several stages of the supply chain, with fairly sophisticated customers.\(^ {55}\) The definition of “agreement” as given under Indian Contract Act is as defined under S. 2(e) \(\text{“every promise and every set of promises, forming the consideration for each other.”}\)\(^ {56}\) But the intention and sense of agreement under Competition law is different from the contract law. Under the Competition law of India, it is defined under S. 2 (b) as-

“agreement“ includes any arrangement or understanding or a action in concert-

(i) Whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

3.2.1 Powers of the Competition Commission

The Commission has the power to direct the Director General to conduct an investigation and furnish a report once it is satisfied that a prima facie case of illicit agreement exits. For the purpose of conducting investigation, the Director General is vested with the powers of civil court and the powers of “search and seizure”. Section 19\(^ {57}\) empowers the Commission to start an investigation on the basis of a reference from the Central Government or the State Government or a statutory authority or on its own knowledge or information. Thus the Competition Act also allows the Commission to accept anonymous information to form a basis for further investigation.

Section 27\(^ {58}\) of the Competition Act empowers the CCI with powers to impose stringent fines on detection of cartel activities. According to this section, CCI shall impose, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average turnover of the cartel for the preceding three financial years, whichever is higher.

Section 32\(^ {59}\) states that the CCI has the power to inquire into any restrictive agreement which has an anti-competitive effect on Indian markets irrespective of where the involved parties are

\(^{55}\) Supra note 5.

\(^{56}\) See Annexure

\(^{57}\) See Annexure

\(^{58}\) See Annexure

\(^{59}\) See Annexure
located. This clearly corresponds to the effects doctrine, which should undo the Supreme Court’s disabling of the MRTP Commission in that respect.

3.3 Select Case Laws

Indian authorities are facing the same hardships as there counterparts faced while differentiating between Conscious Parallelism and an agreement. Some select case laws are discussed below where the issue came into picture.

The erstwhile competition authority MRTP has discussed and decided the meaning of the expressions ‘arrangement’ and ‘understanding’ more or less on the same line of UK. In re Delhi Automobiles Private Ltd\(^6\) it was observed that the joint advertisements by dealers offering uniform sale price of certain brand of cars was an arrangement or understanding though there was no formal agreement. In re Coates of India Ltd.\(^6\) the commission held that the grant of discount by the printing ink manufacturers to their distributors and dealer on reaching a target of purchase amounted to acting concert and was an arrangement covered by the term ‘Agreement’ as defined in the Act. However the Commission in re Hindustan Times Ltd.\(^6\) observed contrary it was observed that the raise in the price of their publications by the newspaper publishers did not amount to an arrangement for concerted action, as the raise price resulted from certain economic factors.

In Alkali & Chemical Corporation of India Ltd. And Bayer India Ltd,\(^6\) the companies were engaged in the manufacture and sale of rubber chemicals and amongst themselves possessed a dominant share of the total market for these products. There were charges against them making identical increases in prices on five to six occasions on or around the same date. However, there was no direct evidence available behind the increase in prices.

The MRTPC observed while making its judgment, that “in the absence of any direct evidence of cartel behaviour and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in the proof of any plus factor to bolster the circumstances

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59 See Annexure
50 (1976) 46 Comp. Cas. 610.
62 (1979) 49 Comp Case 495.
of price parallelism, we find it unsafe to conclude that the respondents indulged in any cartel for raising the prices”.

Ghai Enterprises Pvt Ltd and Quality Ice Creams, MRTPC finally linked price parallelism with tacit agreement. The two leading manufacturers of ice cream had a market share of about 80% and MRTPC observed that identity of prices of a large number of varieties of ice cream was not coincidental but a mutually planned scheme. It was also noted that the two respondents have interconnection. Not only price increase but introduction of other incentives like discount schemes, new flavors were following one another. The Commission concluded that ‘preponderance of probabilities’ in the case leads to an inference of concerted effort and passed cease and desist order accordingly.

The Competition Commission of India in the latest case of Sh. Neeraj Malhotra v. Deustche Post Bank Home Finance Limited (Deustche Bank) held that while appreciating the definition of an agreement for the consideration of a cartel (being the most vitiating form of collusion) formation-

“For an agreement to exist there has to be an act in the nature of an arrangement, understanding or action in concert including existence of an identifiable practice or decision taken by an association of enterprises or persons. …..The word “agreement” for the purposes of the Act has wide connotations as defined under Section 2 (b). However, it is imperative that existence of such an “agreement” is unequivocally established. The European Court of Justice has clearly laid down this principle with respect to infringements of Article 81 (1) of the EC Treaty in various cases”

The latest case and perhaps the only one decided by CCI as regards to parallel behavior is Re: Domestic Airlines. In this case, on account of strike by the pilots of Air India, it was observed that different airlines had started charging exorbitant fares for tickets. It was also alleged that one could not buy tickets online and had to buy them at higher price near to the date of departure.

The airlines in their defense submitted that over a period of time, Air India had played the role of price leader in the market and had maintained low costs. On account of strike by pilots of Air India, the consumers who had to re-book their tickets had to suffer high prices. It was also submitted that the tickets available on web-sites could not be availed due to heavy booking and blockage. It was submitted that the airline (Spice Jet) in fact suffered losses. As per the DG report, it was submitted that airline market is an oligopolistic market and hence there is no bar

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66 Reference Case no. 01/2011.
on shifting inventory from one price band to another. DG suggested that the above mentioned factors were an outcome of parallel behavior.

But DG also pointed out that airlines did exercise control over the supply of inventory i.e. availability of number of seats and for which they charged higher prices which was in contravention of Section 3(3)\textsuperscript{67} of the Act. It was submitted that thought there was no explicit agreement among the players but the action in tandem to increase fares by taking cue from others was nothing but a practice to limit and control the supply and hence violative of Section 3(3) of the Act.

The Commission observed that there was nothing in DG report that proved existence of an agreement resulting in cartelization amongst airlines. The commission denied presence of any “association” so that the provisions of Section 3(3) could be made applicable. And the fact that certain airlines suffered losses itself reflects presence of competitive dynamic.

In the dissenting opinion Member, R. Prasad observed that on presence of hint of parallel behavior further inquiry should have been made by the commission as per Section 26(8)\textsuperscript{68} of the Act. It was also observed that the onus of proof of proving against a price fixing agreement was not discharged by the airlines either before DG or before the Commission. Though there is no availability of material to hold the airlines guilty of having an agreement but for the practice carried out it is necessary to establish beyond reasonable doubt that they have not indulged in price-fixing.

This is perhaps the only case which was decided by the commission, as far as tacit collusion is concerned. The commission has relied upon the letter of law and absence of any association and agreement rendered the allegation unsustainable. It can be observed that there are mixed responses towards parallel behavior in the market. In former cases (MRTP), the commission relied upon certain EC and US judgments and the requirement of presence of evidence that showed concertation was a pre-requisite. In this case also, the dissenting opinion strives for want of presence of plus factor since the parallel behavior was submitted in the DG Report.

\textsuperscript{67} See Annexure.
\textsuperscript{68} See Annexure.
It can be summed up that, the interpretation of law regarding the matter is still in its inception and unless certain Judgments are made and their effect on the market is observed, it is difficult to state the approach of Indian Courts towards parallel behavior.
4. LESSONS TO BE LEARNT AND CONCLUSION

Despite the centrality of this issue, the analysis of plus factors as circumstantial evidence of agreement remains one of the most difficult and unsettled areas of antitrust law. The literature and jurisprudence underscore the significance of plus factors. Many commentators have catalogued plus factors and discussed the critical mass of circumstances that ought to justify an inference that observed behaviour is the product of concerted action. Numerous judicial decisions have wrestled with the evaluation of plus factors in cases dealing with questions of agreement in the jurisdictions discussed above.

In context with the case laws discussed the EU jurisprudence requires documentary evidence for the finding of a law infringement. Absent documentary evidence, proof of a concerted practice can be found from market outcomes (such as parallel behaviour) only to the extent that the coordination of competitors’ decisions is the only plausible explanation for those outcomes. In the European Re Wood Pulp case before the ECR, they chose to use the more restrictive implementation test.

- The implementation test requires an actual effect, not just an intended effect.
- Under the implementation test, conduct must be direct, substantial, and foreseeable for jurisdiction to be engaged.

Whereas in US the effects test, though pretty much same but is slightly easier to prove. That is because The US courts not only rely on the documentary evidence but also analyze the circumstances and the consequent effects of the alleged collusion. The four judgments discussed above analyze the development of law over a period of time. Earlier, the Courts would characterize as concerted action inter firm coordination realized by means other than a direct exchange of assurances. Also, courts allowed agreements to be inferred by circumstantial proof suggesting that the challenged conduct more likely than not resulted from concerted action. Third, courts did not find an agreement where the plaintiff showed only pricing moves. The present situation is a necessary requirement of “plus factor” to prove a concerted action. Now certain plus factors that can be categorized looking at the above case laws would be: motive to conspire; contrary to ‘self interest factors’ and likewise.
In my opinion, this is a better test as it gives equal scope for prosecution of a parallel conduct as against to the implication test conducted in EU, where burden of proof is on complainant and the degree of proof sought is also very high that gives escape routes to accused engaged in concertation. But EU laws provide wide explanation to the relevant provisions and in various guidelines have listed down the agreements that attract Article 81 and those which fall outside the ambit of the Section. Probably, that is the reason why EU has a comparatively lesser scope as most of the provisions are explained in black and white and needs to fall within the statutory requirement whereas, in US the scope of interpretation is wider.

The judgments of Argentina and Brazil are in fact quite explanatory. The degree of scrutiny of evidence is very high and also the standard of proof applied is very high. Among the arguments alleged by the investigated firms, the following were the most common: i) parallelism is explained by their similar cost structure and the variation of prices is explained by input’s price fluctuations; ii) there are elements of competitiveness in firms’ conduct; iii) the firms don’t have a dominant position in the market; and iv) there are no barriers of entry and there imports are strong.

From the analyzed cases of tacit collusion in Argentina’s antitrust system, the following conclusions may be drawn:

- An infringement of the competition law due to parallelism is discarded whenever there is proof of competitive dynamism of the market.
- In the case of CNDC v. Loma Negra and others a mechanism that facilitated data sharing and exchange of vital information was itself viewed as an infringement of competition law.
- Even when tacit collusion is proved, there is an inherent difficulty of distinguishing firms that participated in the concerted practices from the ones that just had to follow due to an exogenous condition of the market.

In case of Brazil there are various distinctive features that are relevant for tacit collusion cases. As per the legal provisions, there is a requirement of proving market power for determining an infringement of Law. Hence, the concept of collusion is explicitly linked with the exercise of collective dominance. Also, Resolution 20 of 1999 explicitly list the factors that make markets prone to cartelization: “high level of market concentration, existence of barriers to the entry of
new competitors, homogeneous products and costs, and stable cost and demand conditions.” Clearly this list is used as a guide by the competition agencies to assess the cases.

The arguments in Brazil are more economic in approach as against to being legal. It can be concluded that the market is analyzed and a good amount of consideration is given to study the market behavior.

The above discussed case laws, in the Indian context, reflect the want of sufficient evidence to prove an agreement. In *Quality Ice Cream Case*, in presence of sufficient evidence, MRTP proved the existence of collusion. As regards as practice is concerned, it can be of two kinds, Unilateral (Cases of Dominant Position) and Co-ordinated (Multi-lateral). As per the provisions of the Act, an agreement (Co-ordinated Practice) that has adverse effect on the Competition is anti-competitive. Under Section 3(3) the listed actions are presumed to have appreciable adverse effect on the Competition and any enterprise or person carrying on such a practice, unless otherwise proved of not causing adverse effect on the Competition (AAEC) must be convicted. In the Air lines case, though there was absence of Agreement but a practice of controlling the supply was carried on and it caused adverse effect to the consumers as well. Hence, in my opinion, proving the presence of Agreement was not necessary and scope of further investigation remained.

Competition law is a new domain in India. It is in an evolving stage and is much behind its U.S. and E.U. and other counterparts as regards interpretation of the legislation is concerned. But it does not change the fact that new industrial trends in India make the need of this legislation indispensable. Competition Law, in India has ample scope of interpretation. Also the CCI is much better empowered to deal with cases of collusion than its predecessor MRTPC. Moving on the footsteps of U.S. and E.C. laws, it remains to be seen how the Competition Commission of India treads the thin line between legitimate analogous behavior and illegitimate collusion for the determination of anti-competitive conduct. It still remains an open question whether CCI will learn from the struggles that the Courts of other Jurisdictions have faced or not.

**4.1 Suggestions**

- Economists around the globe are trying to bring about a mechanism by which studying the price fluctuations in the market of the particular product, presence of the collusion are proved. If the collusion can be proved by studying the market, the need to prove an explicit
agreement (which is very difficult to prove) would subside. The effectiveness and accuracy of this system is still under doubt but many countries are trying to adapt this approach to detect collusion. Indian authorities should also engage economics in this direction as an aid to the CCI.

- By studying the case laws from US and EU, a hypothesis can be made about the industries where Cartel formation is most likely and CCI can keep its check over those particular spheres of the market.

- In certain jurisdictions like Brazil, extensive measures have been taken by the government authorities like phone tapping of the directors etc. to curb the practice. Indian mechanism to detect Cartels is quite week and there are not many experts in the field because of its novelty. In such a situation, Indian authorities should not hesitate in adopting such practices to ensure effectiveness.

- Press reports and private notifications are a good source of information regarding uncompetitive behaviour being carried out in the market. Reports by private individuals or any information from any should be encouraged by CCI and secrecy of the source must be maintained.

- Plus factors have significant value in detecting collusive action. Indian authorities can avail the advantage of learning from their counterparts in US and EU and other Jurisdictions. An analysis can be made of certain plus factors which are commonly recognizable and whose presence is a clear indication towards presence of a collusion.

- International Organisations like United Nations Conference on Trade and Development and Organisation for Economic Co-operation and Development have been actively reporting on hard core cartels. Efforts to curb this practice are going on internationally. Anti Trust authorities from various countries are joining hands together to fight against hard core cartels. Indian anti-trust authorities should also actively participate as by this globally coordinated action is enhancing the ability to detect cartels.
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ANNEXURE

Annexure 1

Competition Act, 2002

S.2(b)

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

S. 3 Anti competitive agreements

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

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

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

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

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

Explanation.—For the purposes of this sub-section, "bid rigging" means 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.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d) refusal to deal;
(e) resale price maintenance,
shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—
(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.
(5) Nothing contained in this section shall restrict—
(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
(a) the Copyright Act, 1957 (14 of 1957);
(b) the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

S. 19. Inquiry into certain agreements and dominant position of enterprise

(1) 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 a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
(b) a reference made to it by the Central Government or a State Government or a statutory authority.
(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).
(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:

(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;
(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry.
(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

(a) regulatory trade barriers;
(b) local specification requirements;
(c) national procurement policies;
(d) adequate distribution facilities;
(e) transport costs;
(f) language;
(g) consumer preferences;
(h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

(a) physical characteristics or end-use of goods;
(b) price of goods or service;
(c) consumer preferences;
(d) exclusion of in-house production;
(e) existence of specialised producers;
(f) classification of industrial products.

26. Procedure for inquiry under section 19

(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.
(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section (3) to the parties concerned:
Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in subsection (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(6) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall enquire into such contravention in accordance with the provisions of this Act.]
S. 27. Orders by Commission after inquiry into agreements or abuse of dominant position

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;

(c) award compensation to parties in accordance with the provisions contained in section 34;

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(f) recommend to the Central Government for the division of an enterprise enjoying dominant position;

(g) pass such other order as it may deem fit.

S. 32. Acts taking place outside India but having an effect on competition in India

The Commission shall, notwithstanding that,—

(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.
Annexure 2

Sherman Act, 1890

S. 1. Every contract, combination in the form of trust or other-wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.

S. 2. 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 misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
Annexure 3

European Commission Treaty, 1957

Article 81 (Now Article 101 of Treaty of Functioning of the European Union)

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to 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.

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

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

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82 (Now Article 102 of Treaty of Functioning of European Union)

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) 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.