ROLE OF CIRCUMSTANTIAL EVIDENCE IN THE PROSECUTION OF CARTELS

Competition Commission of India

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DISCLAIMER

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1. INTRODUCTION

Competition policy has never before had the prominence that it enjoys today. The ideological battle between the supporters of state control and proponents of the free market has, for the time being at least, been decided in favour of the market. In short period of time, the number of competition law regimes has grown enormously. In 1990s, there were about 30 countries with a competition law also referred to as antitrust or antimonopoly or fair trade laws then. At present, there are over 100 countries in various stages of enactment of a competition law.

One of the most contentious and high profile aspects of Indian competition law and policy in recent years has been the regulation of what are now usually described as ‘cartel violations’, typically involving large and powerful corporate producers and traders operating across India. Such infringements are usually based on deliberate, highly organized and covert collaborative efforts to achieve goals such as price fixing, market sharing and production quotas and designed to maximize profit or at least preserve profit margins in declining markets.

There is little disagreement now, in terms of competition theory and policy at both international and national levels, regarding the damaging effect of trade practices such cartels on public and consumer interests. Cartels have been subject to increasing condemnation in the legal process of regulating and protecting competition.

The competition laws across the world differ in various aspects; however, there is one feature that unites them, i.e. condemning cartel agreements. Competition policies are anchored in the belief that free competition will bring about consumer welfare which can only take place when the enterprises in the economy are acting independently of each other. Therefore, one of the paramount goals of any competition regulator becomes ensuring that the enterprises in a market have no illegitimate communication with each other. This is often done through making any communication related to their business suspect.

The problem with cartels is that they are very difficult to detect. In fact, it is near impossible to gather enough information about them through usual investigatory channels.¹ The biggest challenge competition law faces is by the unavailability of evidences in prosecution of cartels. It is of utmost importance that this challenge is explored and the role of varied types

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of evidences including economic evidences be realised for the development of competition law as a whole.

What constitutes sufficient proof of concentration (agreement or understanding), did defendants actually form a carte? Did they agree? This is a question of proof therefore the problem is in fact case specific.

Trends in India suggest that the authorities are often inclined towards prosecution based on direct evidence and that for required detection and prosecution of cartels, India’s current competition law regime is unsuccessful in relying on indirect/economic evidence. The provisions of the Competition Act 2002 are ineffective when it comes to appreciation of indirect/economic evidences for prosecution of cartels especially when compared to other jurisdictions.

The author would try and make an attempt to recognize limitation Indian competition setup faces with regard to utilization of economic evidences in cartel prosecutions and would try and provide for significant suggestions. This would aim for not only better and efficient prosecution of cartels but also growth and development of the Competition law in India as a whole.
2. DEFINING CARTELS

The term ‘Cartel’ was virtually unknown to the Indian Language a generation ago. Like most borrowed words, when first taken over meant different things to different persons. Time was required to crystallize its meaning. A Business cartel may be defined as, an organization of independent enterprise from the same or similar area of economic activity, formed for the purpose of promoting common economic interests by controlling competition between them.

The word ‘cartel’ has a complex etymology. The linguistic origins of the term are explained concisely in The Dictionary of Political Economy, in its 19th Edition;

“Cartel means, in international law, the terms of agreement between belligerents for the exchange or ransom of prisoners. The ‘cartel’ of chivalry meant first of all the terms of combat, and then simply the challenge; and the second is still its ordinary meaning on the Continent. By analogy, the word ‘Kartell’ is now often used by German economist to denote trust, i.e. an agreement between rival merchants to limit production or otherwise temper the extremity of competition; so in 1889 it was used of the suspension of hostilities between conservatives and liberal parties in view of the common defence empires.

The term “cartel” refers to the worst kind of such communication, as it deals with the creation of agreements to fix prices of goods and services at an artificially high level. Objective of cartel is to raise prices above the competition levels, resulting in injury to the consumers and to economy. Cartel formation effects consumers as it results in higher prices, poor quality and less or restricted choice. Cartels are universally established as being the most pernicious form of agreement for competition regulators. The OECD refers to them as “the most egregious violations of competition law,” and has repeatedly found that one of the most important goals of Competition Policy must be to root out cartels.

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2 George W. Stocking and Myron W Watkins, Cartels in Action : Case Study in International Business Diplomacy ( Twentieth Century Fund, 1946)
3 Dictionary of Political Economy ( London 1919), vol 1, 229
Writing in the 1920’s, Robert Liefmann commented: For it is one of the chief purposes of cartels generally and thus of international cartels also, to stabilise and equalise conditions in their particular industry. In their most usual form, the regional, they are above all designed to prevent or equalise the disturbance of industry caused by commercial or political measures and their frequent oscillation: even at times to ward them off altogether.5

Over a period of time the concept of cartels has evolved and has attained great precision, fuller content and a more regulatory meaning.

A notable and a fully worked out example of this term is provided by the OECD Council Recommendation of March 1998, specifically entitled Effective Action Against Hard Core Cartels. The Recommendation couples an explicit recognition of the objectionable character of cartels as: ‘Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.6

The Office of the UK Director General of Fair Trading, in its guidance note on the Competition Act states that: “Generally speaking, a cartel is an agreement between undertakings to fix prices or other trading condition or to share our markets. A distinctive form of cartel is known as collusive tendering or bid rigging. The aim of cartel is to increase prices by restricting and removing competition between the participants. Cartels are operated secretly and can be hard to detect.”7

In India, The Competition Act, 2002 defines cartel as – “Cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, trade in goods or provisions of services.8

The Judiciary has also from time to time interpreted various conducts and classified them and brought them under the ambit of Section 2 (c) of The Competition Act. The Supreme Court

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6 OECD Paris, 27-28 April 1998 (C(98) 35/Final)
8 Section 2( c) of the Competition Act, 2002
in Union of India v. Hindustan Development Corporation\textsuperscript{9} laid down, “Cartel, therefore, is an attempt to control production, sale and price of the products to obtain a monopoly in a particular commodity or industry”. In \textit{Alkali Manufacturers Association of India v. Sinochem International Chemicals Co. Ltd.}\textsuperscript{10} emphasised, “This being an economic field, a greater latitude has to be given to the word cartel to include all sorts of communications, which are anti-competitive.

\textbf{2.1 Types of Cartels:}

For the purpose of our study cartels may essentially be classified into – international cartels and domestic cartels.

International cartels- An international cartel consists of a group of producers of a certain commodity located in various countries, who agree to restrict competition among themselves, in matters of markets, prices, terms of sales etc.

India has not remained untouched by international cartels however, the prosecution of international cartels in India has been far from satisfactory. A study done by Simon Evenett and Julian L. Clarke estimate that the overcharges in India during the conspiracy period of vitamin cartel were US$2571mn.\textsuperscript{11} It was brought to the notice of MRTP Commission of existence of cartels in vitamins and was passed onto the competition authority, at that time being MRTPC. The MRTPC came to the conclusion that no case was made out. The grounds for arriving at such a conclusion were, however not known.

On the other hand, a domestic cartel involves an agreement among competing firms in a particular sector in the same country. Both domestic and international can be further classified as- import cartels, export cartels, rebate cartels etc.

An Export cartel is an agreement or arrangement between firms to charge a specified export price and/or to divide export markets. Import cartels involve agreement on common strategies for importing such as limiting the aggregate amount of specified imported goods, determining the source of supply for such imports and fixing the price and terms of purchase, whereas a rebate cartel would involve members fixing rebate strategies and terms.

\textsuperscript{9} 1993 3 SCC 499
\textsuperscript{10} 1999 98 Comp Cas. 333 (MRTPC)
\textsuperscript{11} Chowdhury, J, (No. 5/2006) \textit{Private International Cartels- An overview, Briefing Paper, CUPS C-CIER}
2.2 Cartel Conduct:

The most common forms of illegal cartel conduct as recognized across the globe are:

1. Price fixing occurs when competitors agree on a pricing structure rather than compete against each other. Essentially an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law.

2. Bid rigging is the way that conspiring competitors effectively raise prices where purchasers which are often state, or local governments acquire goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process. As with price fixing, it is not necessary that all bidders participate in the conspiracy.

3. Output restrictions occur when the participants in an industry agree to prevent, restrict or limit supply. The purpose is to create scarcity in order to increase prices (or counter falling prices) while also protecting inefficient suppliers. Any business may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output. Generally, the action needs the support of key market participants to achieve the cartel’s desired result.\(^{12}\)

4. Market sharing occurs when competitors agree to divide a market so participants thus circumventing from competition laws. By allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves. For example, one competitor will be allowed to sell to, or bid on contracts let by, certain customers or types of customers. In return, he or she will not sell to, or bid on contracts let by, customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

3. DETECTION OF CARTELS

“There is a widespread perception that the ‘fact’ of a market with certain specific contours is not like other facts capable of definitive proof. For example though it may be just as difficult to prove the existence of a conspiracy as it is to prove a market, at least lawyers embark upon the former task confident that there is “real” answer- there either was a conspiracy or there wasn’t. Market definition is different.”

In competition/antitrust law we witness that unlike other disciplines like criminal law we can never have an intuition that a said behavior is wrong. So linking it with real time problems seems the one of the major hints towards judging a behavior to be of anti-competent nature.

A major problem could be deduced from the famous short story by Leo Tolstoy titled “Master and Man”

“The youthful landowner was asking ten thousand rubles for the grove simply because Vasli And reevich was offering seven thousand. Seven thousand was however only a third of its real value was. Vasli might perhaps have got it down to his own price, for the woods were in his district and he had a long standing agreement with other village dealers that no one should run up in price in another district, but he had now learnt that some timber-dealers from town meant to bid for the Goryachkin grove and he resolved to go at once and get the matter settled.”

This might seem to be a contractual issue earlier but the confidence of vasili, raises eyebrows of all antitrust lawyers. The reason for his confidence is that he through an agreement is left as the only buyer in the market. This is just an amazing example of how competition wrongs are available everywhere but what it requires is a sharp investigating eye and high standard of proof through substantial evidences.

It is the purpose of competition law across the world to promote competition and resultant efficiency. Competition laws are designed to secure two primary goals: deterrence of anticompetitive behaviour and compensation for injuries suffered by victims of competition law violations. One of the major challenges that competition policy face is detecting and

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assessing various forms of non-competitive behaviours that are classified explicitly or tactically in the source of anti-trust law.

Cartel Law is different from most other competition law. It is different because other areas typically involve difficult analytical questions as to whether certain conduct or transactions are anti-competitive, whereas cartels are by definition anti-competitive. A cartel can be a result of either explicit agreement or implicit collusion. Explicit agreements are concluded when cartel members actually meet to decide how to control the market thus generating formal agreements among themselves. Since such collusions are illegal in jurisdiction which has efficient competition regimes, formal agreements mostly acquire the form of highly secretive agreements resulting from covert meetings.

3.1 Approaches to Cartel Detection:
In modern times Cartel agreements are frequently verbal, thus making detection difficult. Taking into account the practical dimension, the possibility of objectively detecting and assessing collusions is highly demanded and abundant research has already been done to find and test adequate methods for realizing the task.

‘Detection’ means detecting a cartel to the standard evidence required to commence a viable investigation. There is a growing body of law dismissing case before trial for insufficient evidence of the agreement to go to trial. Thus the dire need being to adopt best practices in order for successful detection and prosecution. As a result, economic theory can best help to distinguish between competitive and collusive equilibrium and provide some general considerations indicating patterns conducive or cartelization.

Past economic studies indicates that median price increase attributed to cartels in around 25%. Private international cartels i.e. those with participants from two or more nations had an average price increase of 28%, whereas domestic cartels averaged 18% less than 10% of all cartels in the sample failed to raise market prices.  

\[\text{\textsuperscript{15}}\text{ As pointed out in Connor and Helmers (2006), in the time period 1990 – 2005 alone, the existence of 283 so-called ‘hard core cartels’ of domestic and/or global reach was proved. Financial penalties of the total nominal value of 25.4 billion USD were imposed on them. Therefore, the ability to prove objectively the existence of a collusive agreement in an industry is not only of a scientific character but also practical and constitutes an important (or key) element in anti-trust proceedings affecting the involved parties.}\]

\[\text{\textsuperscript{16}}\text{ Study by Connor and Lande, 2005}\]
Broadly speaking, methods of discovering cartels can be partitioned into those that are structural and those which are behavioural.

3.1.1 Structural Approach-
A structural approach entails identifying markets with traits thought to be conducive to collusion. The structural approach essentially relies on economic indicators like price, cost analysis, capacity utilization, number of firms, concentration and firm size, demand viability, cost-sales ratio etc. It has been shown that cartel formation is more likely with fewer firms, more homogeneous products, and more stable demand. The Grout and Sonderegger Study (2005, p. 15) is representative of this approach:

“... the fundamental background reduces to three core issues - product, volatility, and company criteria. The first core question is whether the industry has a homogeneous product or not. Cartels are far more likely if the product is fairly homogeneous between companies in the market. ... Second, does the industry display volatile turnover over a sustained period of time? Cartels are more likely if output and market conditions are normally stable. ... Finally, are the leading players in the market large and relatively constant? If there are significant changes in the market shares or regular exits and entrants then cartels are less likely.”

Parameters to test sustainability of cartels in a particular market:

1. **Number of firms**: Collusion likelihood either increases or decreases with variation in industry. Number of firms in a particular sector is inversely related to the probability of cartel in that industry, thus smaller industry size being conducive to collusion. There are a variety of reasons to expect that cartel success is negatively related to the number of firms in the industry. Among others, being that large number of firms create coordination problems or increases the probability that an existing firm is willing to cheat.

2. **Entry Barriers**: Entry barriers are anything which prevent the entry of new firms. Entry barriers include increased capital investment on technology, increased R&D ETC. Barriers can be of two kinds - Structural barriers which exist due to conditions such as economies of scale and network effects Structural barriers have more to do with basic industry conditions such as cost and demand than with tactical actions

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17 For some industry traits associated collusion, see Symeonedia (2003), Motta (2004) and Grout and Sonderegger.
taken by incumbent firms. In contrast, strategic barriers, in contrast, are intentionally created or enhanced by incumbent firms in the market, possibly for the purpose of deterring entry. These barriers may arise from behaviour such as exclusive dealing arrangements etc. Cartel members create entry barriers so as to hinder the entrance of new private firms. For example, in the recent Indian Cement Industry case, data analysis establishes that measures were adopted to prevent the entry of new firms.

3. **Concentration of firms:** Cartels and cooperative behavior are more likely in industries where there are a few firms. This is because the costs of forming a cartel and coordinating and monitoring its members’ actions, are lower the fewer the number of firms. Also, if the firms have similar market shares and/or cost structures it is less likely their interests and incentives will diverge, and hence a reduced risk that some firms will defect.

4. **Demand Variability:** Grout and Sonderegger’s study 2005 indicate that a stable demand encourages the formation of a cartel and its persistence over time. In industries where demand is stable or declining it is easier to detect those firms cheating on the collusive agreement since changes in market shares cannot be masked by temporary or cyclical demand fluctuations. Conversely, a cartel is unlikely to form where demand is increasing significantly because of the difficulties of disentangling those sales due to greater demand from those induced by a firm undercutting the cartel price.

5. **Capacity Utilization:** Recent game theoretic contributions, such as Osborne and Pitchik (1983, 1986, 1987), Allen, Deneckere, Faith, and Kovenock (2000), and Roller and Sickles (2000) emphasize the strategic effect of capacity. An indication of cartel is also supported by evidence of low capacity utilization or availability of excess capacity with a firm even in periods of high demand. The OPEC that is the Oil Cartel is a classic example. Its eleven member countries aimed to keep the international price within range of US$22-28 a barrel. To do that the countries control the amount of crude oil they export and avoid flooding or squeezing the international market place.

6. **Cost-Sales Ratio:** Increase in the price of a commodity or service provider without any correlated increase in expenses or cost of production is an indicator of cartelization.
7. **History of Collusion:** Cartels are more likely in industries which have a history of cartelization since the factors that make cartel formation likely are present, and the firms tend to be more ‘experienced’ in operating cartels.

8. **Inelastic Price:** Demand for a product can be said to be very inelastic if consumers will pay almost any price for the product, and very elastic if consumers will only pay a certain price, or a narrow range of prices, for the product. Inelastic demand means a producer can raise prices without hurting demand for its product very much, and elastic demand means that consumers are sensitive to the price at which a product is sold and will not buy it if the price rises by what they consider to be too much. In markets like oil and gas, cement, steel, power and other essential products linked to the automobile or construction sectors, where the demand is inelastic, there is greater scope for huge profits by price rise and collusive behavior.

Table 1.1 as indicated below summarizes factors affecting the sustainability of cartels.

**Table 1.1- Factors and their corresponding impact on cartel sustainability**

<table>
<thead>
<tr>
<th>Factors</th>
<th>Impact on sustainability</th>
</tr>
</thead>
<tbody>
<tr>
<td>History of Collusion</td>
<td>Positive</td>
</tr>
<tr>
<td>Lower Utilization of Capacity</td>
<td>Positive</td>
</tr>
<tr>
<td>Small number of firms</td>
<td>Positive</td>
</tr>
<tr>
<td>High concentration Index</td>
<td>Positive</td>
</tr>
<tr>
<td>High entry and exit barriers</td>
<td>Positive</td>
</tr>
<tr>
<td>Low price elasticity of demand</td>
<td>Positive</td>
</tr>
<tr>
<td>Discontent with existing performance</td>
<td>Positive</td>
</tr>
<tr>
<td>Trade Associations</td>
<td>Positive</td>
</tr>
<tr>
<td>Mutual Trust</td>
<td>Positive</td>
</tr>
<tr>
<td>Homogenous goods</td>
<td>Positive</td>
</tr>
<tr>
<td>Market Transparency</td>
<td>Positive</td>
</tr>
<tr>
<td>------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>History of Collusion</td>
<td>Positive</td>
</tr>
<tr>
<td>Inelastic Price</td>
<td>Positive</td>
</tr>
<tr>
<td>Threat of Legal Sanction</td>
<td>Negative</td>
</tr>
<tr>
<td>Large Powerful Buyers</td>
<td>Negative</td>
</tr>
<tr>
<td>Demand Fluctuation</td>
<td>Negative</td>
</tr>
</tbody>
</table>

Thus an ideal approach could be to investigate industries that score high on these relevant traits with the hope of finding evidence of a cartel. It is clear that the commission is not entitled to “fishing expeditions” that is to launch instructive investigation measures in an unfocused attempt in the hope of finding some evidence of cartel activity. There is however no reason why more indirect evidence of cartel activity should not be capable of creating a sufficient degree of suspicion to justify an inspection by the Commission. Also indirect and circumstantial evidence based on sector inquiry or market screen, i.e., active assessment of the markets by the Competition authority should be relied upon to further prosecution.

3.1.2 Behavioral Approach:
Alternatively, a behavioural approach focuses on the market impact of that coordination, suspicions may emanate from the pattern of firms prices or quantities or some other aspect of market behaviour. Buyers could become suspicious because of price parallelism. The theoretical literature on collusion has, until recent, underestimated or ignored the role that communication plays in sustainability of cartels. Insufficient emphasis has been placed on the role of communication, and the exchange information adds to the plight of investigatory authorities.

Leniency, Whistle Blowers and Indirect evidence form three major behavioural methods for cartel detection which have been adopted globally to facilitate cartel prosecution. Structural methods based on indirect evidence generated by economic methodology are far from satisfactory and are still under developed. Also indirect and circumstantial evidence based on a sector inquiry or a market screen i.e. the active assessment of market by a competition authority could be potential source for suspicion of a specific cartel.
3.1.3 Leniency or Amnesty Programmes:

Leniency Programs have proved to be a great asset in fighting cartels globally. The proliferation of leniency or amnesty programs has appreciably contributed to this development by providing enforcement authorities a highly effective tool for bursting cartel activity and by giving cartel members a strong incentive to inform about their co-conspirators. According to International Competition Network, “Leniency” is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency.

The original version of our Amnesty Program actually dates back to 1978. Under that program, violators who came forward and reported their illegal activity before an investigation was underway were eligible to receive a complete pass from criminal prosecution. In 1993, the Antitrust Division dramatically expanded its Amnesty Program to increase the opportunities and raise the incentives for companies to report criminal activity and cooperate with the Division. The Amnesty Program was revised in three major respects:

- First, the policy was changed to ensure that amnesty is automatic if there is no pre-existing investigation. That is, if a corporation comes forward prior to an investigation and meets the program’s requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion.
- Second, the Division created an alternative amnesty, whereby amnesty is available even if cooperation begins after an investigation is underway.
- Third, if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic amnesty.

In 1999, the Antitrust Division formally announced that the Corporate Leniency Policy had been extended to include a new “Amnesty Plus” provision. This development occurred because over half of the Antitrust Division’s international cartel investigations were initiated when cooperating witnesses in an ongoing investigation into cartel activities is from an unrelated industry. Over the last five years, the United States Amnesty Program has been responsible for detecting and cracking more international cartels than all of our search

warrants, secret audio or videotapes, and FBI interrogations combined. In 2004 Antitrust Criminal Penalty Enhancement and Reform Act, 2004 was introduced for the reduction in civil liability for amnesty applicant.

Influenced by the US Amnesty Program the EU adopted its first leniency notice in the year 1993 which was then revised in 1996, incorporating a more US oriented approach. The European Union (EU) has taken a different approach with its Leniency Policy. Its policy provides a sliding scale whereby a company that reports wrongdoing before an investigation has begun, and meets all of the other requirements of the program, is eligible for a reduction in fines ranging from 75 percent to 100 percent.

3.2 Methods of Cartel Detection: Top Down vs. Bottom Up Approach

In literature, two main principle approaches for cartel detection have been identified- Top down and bottom up approaches. Top down approaches screen several sectors in order to identify industries prone to collusion. An example of top down approach can be found in the study carried out by Grout and Sonderegger (2005) for the OFT. Unlike the top down approaches that are applied to a wide range of sectors or markets, the bottom up approach focuses on a particular sector market. The bottom up approaches thereby do not rely on consistent cross-sector data, they can adopt a more flexible set of criteria and therefore are less vulnerable to strategic approaches and less affected by the selection bias as theoretical considerations can more easily be taken into account.

4. KINDS OF EVIDENCE

“Overseas estimates point to a 10 – 20% chance that a cartel will be discovered. The highest detection rate estimated is 33% and the lowest is less than 10%”

Competition authorities all around the world are interested in evidence of all kinds. The OECD policy brief categorizes evidences used in investigation as:

- Direct or documentary evidence – Parties statements in submission or at transcribed hearings, strategy, board papers, customary surveys and studies of market.

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19 Scott D. Hammond, Detecting & Deterring cartel activity through an effective Leniency program, US Department of Justice
22 Organization for Economic Cooperation and Development (OECD), prosecuting cartels without direct evidences of an agreement, Policy Brief, June 2007
4.1 Direct Evidence:
In common parlance direct evidence connotes something that can be proven factually, without any inference or assumption. Direct evidence of an agreement is that which identifies a meeting or communication between the subjects and describes the substance of their agreement. The most common forms of direct evidence are:

a) Documents, printed or electronic form that identify an agreement and the parties thereto; and
b) Oral or written statements by co-operative cartel participants describing the operation of the cartel.

Though there has been an inclination towards direct evidence, seldom direct evidences are unavailable, owing to the practice of entering into verbal agreements which are preferred over formal agreements by the cartel members. The situation described, necessitated Competition Authorities to appreciate other evidences available for the detection and prosecution of cartels.

4.2 Circumstantial Evidence:
Circumstantial evidence is that evidence which leads to, but does not prove specific conclusion. Circumstantial Evidence has gained a significant place among all Competition Authorities in all jurisdictions. There are two general types of circumstantial evidence: communication evidence and economic evidence.

- Communication Evidence: Communication evidence is evidence that cartel operators met or otherwise communicated, but does not describe the substance of their communication. It has been popularly termed as communication evidence. It includes, records of telephone conversations among suspected cartel participants, however excluding the actual substance of such communication. Further, travel to a common destination or of participation in a meeting. Other evidences indicating
communication about the subject matter of forming cartels such as minutes of meetings showing that price, demand or capacity utilisation were discussed, internal documents evidencing knowledge or understanding of a competitor’s pricing strategy, such as awareness of future price.

- **Economic Evidence:** First, economics can help to identify markets tending to be cartelized. Second, cartels can be proved by depending only on economic evidence. In other words, economics can help to prove the existence of a cartel by analysing the players’ behavior in a market.

The author has discussed the various kinds of economic approaches and methods used in competition law under part 3 of the paper. Economic analysis plays a central role in competition enforcement. Economics as a discipline provides a framework to think about the way in which each particular market operates and how competitive interactions take place. It is therefore necessary to ensure that economic analysis meets certain minimum technical standards at the outset, facilitate the effective gathering and exchange of facts and evidence, in particular any underlying quantitative data, and use in an effective way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.23

Economic evidence has made heavy inroads in competition law enforcement and litigation in relation to policy, the analytical framework, and the treatment of evidence. The emerging role of economic consultancies in litigation has been the notable result of the more economics-oriented approach in competition law. The emergence of a market for economic experts in Europe may profoundly affect the way economic expertise is integrated in legal proceedings. International convergence has been enabled by and enabled further by consensus on the use of economics in competition analysis. An economic methodology has never been used by the Commission to justify inspections. Pro-active economic methods are part of an ideal enforcement policy and can be considered a complement to existing, more passive tools of cartel detection: First, triggering successful

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23 Best Practices for the submission of Economic Evidence and data collection.
inspections based on an economic methodology is the only tool available to detect cartels outside the reach of the competition authority if full deterrence cannot be achieved for institutional or regulatory reasons. Second, in some instances leniency is little more than terminal care for cartels, limiting the consumer benefits of cartel detection in those instances. Third, cartel detection based on economic methods also adds to cartel deterrence. Finally, cartel detection based on economic methods and leniency programs exhibit strong complementarities with respect to cartel deterrence.

However, the problem inherent in using economic analysis for triggering inspections has, to be considered. In particular four principles of any economic methodology ought to be met, in order to be a valuable tool in cartel detection:

- It must have the potential to detect and thereby deter cartels;
- It should not be easy to circumvent;
- It has to take into account the capabilities and resources of a competition authority;
- Has to consider the limited public information available.\(^{24}\)

Despite the numerous challenges, economic approaches are a necessary element in modern cartel detection. Bottom up approaches, in particular, can be structured in a way to meet the legal standards for triggering inspections ex officio while keeping the methodology sufficiently light with respect to resource requirements. The development of such a methodology is a promising first step towards an ideal cartel enforcement policy that if implemented will hopefully be capable of scoring wonders in prosecuting cartels and anti cartel enforcement measures.

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**CASE STUDY - BABY MILK CARTEL IN ITALY:**

The case is a recent example of employing direct as well as circumstantial evidence for the prosecution of cartels. In October 2005, the Italian Competition Authority fined seven sellers of baby milk product, a total of €9,743,000.

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The prosecution proceeded on the observation of the Italian government that, during the financial years 2000-2004 these firms had engaged in parallel pricing of their product. The authority developed evidence of contact between the firms both by relying on both direct and indirect evidence that supported the findings.

Following kinds of evidences were used in reaching a conclusion of existence of a cartel among the seven sellers:

- Direct evidence: the producers apparently agreed on a maximum price reduction;
- Communication evidence: the producers had met at the trade association and discussed prices, although with the exception of the maximum price reduction there was no direct evidence that they had reached an agreement;
- Conduct evidence: parallel pricing; steep price reductions and increased competition following the investigations which suggested that earlier high prices were not the result of competitive behaviour;
- Conduct of the entire industry: the prices were significantly higher than in other European countries;
- Market structure evidence: this was a highly concentrated industry with only three independent suppliers, and they sold a relatively homogenous product; and
- Facilitating practices: recommended resale prices for pharmacies with significant price transparency; sales occurred predominantly through pharmacies, eliminating outlets such as grocery stores that likely would have used discount prices.

**Author’s Observation:**

The need of hour as far as India is concerned in the current era is to adopt better means to evaluate these economic evidences. This could be done by appointing experts in the field of economics to give their input. These experts would also act as expert witnesses in the court so that they help judges interpret the evidence in its true sense. Another suggestion is to enact specific laws or rules for admissibility and evaluation of economic evidences like the United States of America.
5. ROLE OF CIRCUMSTANTIAL EVIDENCE – COMPARITIVE ANALYSIS

In most jurisdictions including India cartels are prosecuted administratively. The principle administrative sanctions applied to this anti-competitive conduct are fines assessed mostly against organizations. National treatment of cartels, such as whether they are prosecuted as crimes or as administrative violations can affect the burden of proof that applies to the cases, and hence the use of circumstantial evidence.

Another question of vital importance is pertaining to the nature and scope of admissibility of cartel evidences, keeping in mind the settled principles of due process and the degree of proof as mandated by the Evidence Act. The fundamental principal governing these issues are well established: No one can be prosecuted or condemned without concrete evidence of the infringement of which the defendant is accused.
Competition Commissions and Authorities of different jurisdictions have been thus equipped with requisite investigatory powers to meet the legal and procedural requirement which are required to be fulfilled regarding cartels evidences. It is pertinent to mention that no hierarchy of evidences have been prescribed under various statutes. However, from observation of the past trends it can be said, that it is extremely difficult to provide penalizing decision by solely or largely on circumstantial evidence. The existence of a cartel maybe proved through direct evidence or circumstantial evidence or a combination of both.

5.1 European Union

5.1.1 Background

The appearance of the first competition laws in a number of EU member states and the coming into force of what was then Arts. 85 and 86 of the EEC Treaty, now Article 101 and 102 of the Treaty on the Functioning of the European Union. Article 101 of the EC Treaty prohibits agreements between undertakings that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of the competition within the Common Market. Article 101 lists the following as prohibited as incompatible with common market:

a. price-fixing agreements;

b. those that limit or control production, market, technical development, or investment or share markets or source of supply;

c. agreements that impose dissimilar conditions to equivalent transactions, placing trading parties at a disadvantage;

d. agreements that place the other party to the contract under supplementary obligations commercially unrelated to the contract
The listed prohibitions are illustrative and not exhaustive. The basic principle is that agreements falling under 101(1) are automatically void, unless they are specifically exempted under subsection (3).

In the year 1996 Leniency notice was issued for the first time, influenced by the approach adopted by the US Anti-trust division, which decided to adopt federal sentencing guidelines for prosecution of cartels. The commission later on adopted a new leniency notice that was much more heavily influenced in the year 2002.

The European Union XXXII Report on Competition Policy 2002 said:

Cartel diminish social welfare, create allocative inefficiency and transfer wealth from consumers to participants in cartel by modifying output and/or price in comparison with market driven levels. Cartels are harmful also over the long run. Engaging in cartels to avoid competition can result in the creation of artificial uneconomic and unstable industry structure, lower price productivity gains or fewer technological improvements and sustained higher prices. Furthermore, the weakening of competition leads to a loss of competitiveness and threatens sustainable employment opportunities.25

Section 101 does not define cartels however a precise definition of a hard core cartel is given in the Commission’s leniency notice No. 3:

This notice concerns secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports. Such practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry.26

5.1.2 Assessment of Cartels:

The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of

25 Paragraph 26
26Commission notice on immunity from fines and reduction of fines in cartel cases. OJ C 45, 19.2.2002, p. 3.)
affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on competition. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3). If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void.

5.1.3 Detection:

1. Information Exchange: Assessment of Information Exchange has been given a vital role in detecting cartels. Information exchange can take various forms. The Commission recognizes both data shared directly or indirectly. Direct includes information exchanged between competitors whereas, indirect includes dissemination of information through a common agency such as trade associations or third parties such as market research organizations or through companies suppliers or retailers. The Commission recognizes that information exchange may lead to restriction of competition especially where communication of information among competitors may constitute an agreement, a concerted practice, or a decision of association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchange will normally be considered and fined as cartels.

Information exchange can only be addressed under Art.101 if it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings. In line with the plethora of case-law of the Court of Justice of the European Union, the concept of concerted practice refers to a form of coordination between the undertakings by which, without it having reached the stage where an agreement properly so called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.

Article 101 EC the core elements underlying any horizontal cartel activity are agreements between undertakings, decisions by associations of undertakings or
concerted practices. Most commonly cartels discovered by the Commission have been based on either publicly known or secret agreements or tacit agreements that express themselves through a concerted practice. The categorisation of the concrete circumstances of the case under the terms agreement or concerted practice will have an impact on the question of standard of proof.

In EC competition law an agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing, no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, to have agreed in advance upon a comprehensive common plan and the concept of agreement would also apply to the inchoate understandings and partial and conditional agreements which are short of definitive agreement.

2. Market Characteristics: The Notice from EU Institutions, Bodies, Offices & Agencies, Official EU Journal highlights Market Characteristics as a vital tool of detection. Companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations. However, information exchange can also enable companies to achieve a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. In this context, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics.

The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome. An information
exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. The pre-existing degree of transparency, inter alia, depends on the number of market participants and the nature of transactions, which can range from public transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors.

3. Evidence: The sanctions imposed by the commission are essentially administrative in nature, i.e. to say that there is no criminal sanction for the prosecution of cartels. However the administrative character of the proceeding does not significantly lower the standard of proof which lies upon the Commission in comparison to criminal proceedings. The Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place.

Prosecution trends suggest that the commission relies on both direct and indirect evidence. The Court has not given a precise definition of either. Direct evidence is that which allows the commission to establish that precisely designated companies or persons in charge of companies concluded an agreement that has as its effect to restrict competition. Direct evidences include direct evidence, gentlemen’s agreements, minutes of meetings or notes of meetings or contacts, budget notes and meeting notes. Corporate statements from undertaking directly involved in the infringement have become more and more important in the Commissions fact finding.

It is a recognized practice in EC to provide corporate statements in the framework of commissions Leniency Notice. These Corporate statements often include recollections of employees involved in infringement which is obtained as oral evidence. Moreover the elaborate procedure of investigation incorporated by this jurisdiction allows evidence in the form of statements to be obtained at different stages. The commission
as per the is entitled to conduct interviews during inspection or at any time pursuant to Article 19 of Regulation No 1/2003. The Commission

CASE STUDY- GRAPHITE ELECTRODES CASE:
The Commission’s investigation started in June 1997 when it carried out “surprise” investigations. The investigation showed that SGL Carbon AG (Germany), UCAR International Inc. (USA), Tokai Carbon Ltd. (Japan), Showa Denko K.K. (Japan), VAW Aluminium AG (Germany), SEC Corporation (Japan), Nippon Carbon Co. Ltd. (Japan) and The Carbide Graphite Group Inc. (USA) had fixed prices and allocated markets and market share quotas and set up a machinery for monitoring and enforcing their agreements. The arrangements covered the whole of the EEA and lasted for most of the companies at least from May 1992 to March 1998. The Commission found that the cartel represented a very serious infringement of the EC competition rules that justified imposing heavy fines on the companies involved. The gravity of the infringement in SGL Carbon’s case was particularly aggravated by its role as one of the ringleaders and instigators of the cartel, its attempts to obstruct the Commission proceedings and its continuation of this infringement even after the investigations.

Further the CFI ruled in the Graphite electrodes case that such statements may be used as evidence and that commission can prove infringement solely on the basis of statements, as long as there is sufficient mutual corroboration of the respective statements.

CASE STUDY- SEAMLESS STEEL TUBE CARTEL
The cartel restricted competition in the common market by requiring that the domestic markets of the different producers (i.e. the German, French, Italian, UK and Japanese markets) should be respected: the supply of seamless tubes to Member States of the Community where a national producer was established was limited by the other producers party to the agreement refraining from delivering tubes to those markets. Other parts of the cartel agreement, which related to certain third markets, were not covered by the decision, since the Commission could not provide evidence of a restrictive effect within the EU. As regards duration, the
Commission decided that the infringement lasted from 1990 to 1995.

To prove the Cartel the Commission relied heavily on written statement made by an executive of one of the undertakings during the dawn raid in response to oral requests for explanations. In the decision, it sought to find corroboration for its statement in various contemporaneous documents that each confirmed different parts of the declaration. It was held that the statement was intrinsically of great probative value so that the degree of corroboration needed was less.

Circumstantial Evidence on the other hand is that which corroborate the proof of existence of a cartel by the way of deductions, economic analysis or logical inference from other facts that are established. In most cases the Commission will discover only a limited amount of direct evidence. The Commission recognizes that in cases where direct evidences are not available, to meet the burden of proof requirement it is essential that anticompetitive practice be inferred from a number of coincidences and indicia which taken together in absence of another plausible explanation, constitute evidence of an infringement of the competition rules.27

27 Aalborg Portland A/S and others v Commission, Para 57,227
CASE STUDY- SUIKERUNIE & OTHERS V. COMMISSIONER 1975 ECR 1663

In SuikerUnie case the court pronounced on concerted practices. The Commission found several sugar producers to have concerted on sealing off each other’s market by adopting a policy of ‘no movement’ of goods from country to country except by agreement between producers and producers on their domestic market. An appeal was filed against the Commission’s decision by different sugar producers.

On the facts of the case the court concluded that documentary evidence demonstrated that the competitors had contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors. The ECJ further found that the practices under its consideration did not in any way result from independent decisions by the producers concerned but were concerted between them because they knowingly substituted for the risks of competition practical cooperation between them, which culminated in a situation which did not correspond to normal market condition.

The advocate general pointed out that “evidence of concerted practice, in most cases, only consists of evidence or presumption which the investigations of the commission have brought to light. It is the combination of these presumptions – provided they are strong, precise, and relevant- which more often than alone enables the existence of a concerted action corroborated by the actual conduct of the undertakings concerned to be proved.

As the European Commission is free in choosing the evidence for the demonstration of infringing behaviour, no exhaustive list of indirect evidence is there. The concept of standard of proof offers great flexibility in integrating economic evidence. Contrary to the all or nothing determination of admissibility of evidence, the standard of proof accommodates the inclusion, in the judicial consideration of facts and of law, of economic evidence, that corresponds to the requisite standard of proof.28

28 Sigrid Stroux, The EC and US Oligopoly Control, Page 75
Evidence through Leniency Programme:

In addition to the direct and circumstantial evidence, the EC superseded its 1996 notice relating to leniency in the matter of member cartel, the commission issued a new notice, "The notice on immunity from fines and reduction of fines in cartel cases"\(^{29}\) came into force on 14 February 2002.

Laying down following criterion for availing Immunity from fines:

a. The undertaking should be the first to submit evidence which in the Commissions view may enable it to adopt a decision to carry out an investigation in connection with an alleged cartel affecting the Community;

b. the undertaking should be first to submit evidence which in the Commissions view, may enable it to find infringement of Article 101 in connection with an alleged cartel affecting the Community;

c. It must also terminate its involvement in the suspected infringement no later than the time at which it submits its the evidence.

According to the Commission, these provisions limit the risk that a leniency applicant provides incorrect or incomplete information, which constitutes grounds for rejecting a request for leniency.\(^{30}\)

\(^{29}\) 2002/c/45/03

5.2 UNITED STATES

5.2.1 Background

It is well known that the US Antitrust Division has long ranked anti-collusion enforcement as its top priority. The US Department of Justice (DOJ) recognizes price fixing, bid rigging and market allocations as cartel behavior. Enacted in 1890, the Sherman Act is one of the most important and enduring pieces of economic legislation wherein Section 1 of the Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity.

5.2.2 Assessment

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." The assessment of cartel activities are carried out under Section 1 of the Sherman Act which applies the per se rule.

Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice. Herein violation are felony punishable by a fine of up to $10 million for corporations, and a fine of up to $350,000 or 3 years imprisonment or both for individuals, if the offense was committed before June 22, 2004. However in cases

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31 Case T-113/07 , 5 C.M.L.R. 20  
32 Section 1 of the Sherman Act  
33 Per Se Rule: Per Se agreements are conclusively presumed to be illegal without any inquiry into the precise harm or business excuse for their use. Per Se agreements include price fixing, bid rigging, customer or territory allocation, or output restriction

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where the offense was committed on or after June 22, 2004, the maximum Sherman Act fine is $100 million for corporations and $1 million for individuals and the maximum Sherman Act jail sentence is 10 years. Under some circumstances, the maximum potential fine may be increased above the Sherman Act maximums to twice the gain or loss involved. In addition, collusion among competitors may constitute violations of the mail or wire fraud statute, the false statements statute, or other federal felony statutes, all of which the Antitrust Division prosecutes. In addition to receiving a criminal sentence, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.  

5.2.3 Detection

“Concerted action forms the basis of detection and ought to be adduced from the conduct of the parties. In US cartel conduct is treated illegal per se. As stated in the antitrust offences section of the United States Sentencing Commission Guidelines, the United States Sentencing Commission Guidelines, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual anticompetitive effect.

Under the per se rule, the acts as deemed or presumed to have an adverse appreciable effect on competition are themselves prohibited. That is to say that there is no need to prove anticompetitive nature of per se violations. The basis of the per se rule have been laid down in Northern Pac R. Co. v. United States, stated: “However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry.” A per se rule prohibiting hard core cartels is efficient and predictable, and greatly simplifies the investigation and prosecution of the most harmful

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34 Anti-Trust Premier issued by Department of Justice
antitrust offences. It properly focuses the inquiry on the existence of an unlawful agreement, and runs no risk of deterring beneficial business conduct.

**CONCERTED ACTION- CASE STUDY**

*Interstate Circuit, Inc. v. United States, 1939*[^36] While the District Court’s finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated or invited, the distributors gave their adherence to the scheme and participated in it.

*Theatre Enterprises v. Paramount Film Distributing Corp.*[^37] “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.”

*American Tobacco Co. v. United States*[^38] “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.”

*United States v. Paramount Pictures, Inc.*[^39] “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.”

[^38]: 328 U.S. 781 (1946).
[^39]: 334 U.S. 131 (1948).
5.2.4 EVIDENCE:

Under the US Jurisdiction proving cartels does not require us to show that the conspirators entered into a formal written or express agreement. Price fixing, bid rigging, and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries. The “conscious commitment to a common scheme” can be shown with direct or circumstantial evidence.40

Economic Evidence: The US jurisdiction recognizes the appreciation of economic evidence and recognizes two kinds of economic evidence - One that the structure of the market is such that it makes existence of cartels feasible and second, that the market behaved in a non-competitive manner. Neither form of economic evidence is strictly necessary, since price-fixing agreements are illegal even if the parties were completely unrealistic in supposing they could influence the market price.41 The same can be inferred from the Supreme Court landmark judgment where in it was laid down that, any combination which tampers with the price structure is engaged in an unlawful activity. Even though the price-fixing groups were in no position to control the market, to the extent that they raised, lowered or stabilized price they would be directly interfering with free play of market forces.42

The Anti-trust premier recognizes structures conducive to collusion. It lays down, Some of the industry conditions favourable to collusion are: i. Few sellers in the market; ii. Higher degree of standardization of product, making it easy for the competing firms to agree on a common price structure; iii. Repetitive purchase enabling the vendor to know of the other bidders.

The existence of collusive pricing even though no overt acts of collusion are detected, are indicated by- fixed relative market shares, market wide price discrimination, exchanges of price information, regional price variations identical bids, industry wide resale price maintenance.

40 ES Dev., Inc. v. RWM Enters., 939 F.2d 547, 554 (8th Cir. 1991) (antitrust plaintiff may prove existence of combination or conspiracy “by providing either direct or circumstantial evidence sufficient to warrant a finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement.”)
41 In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 654-55
**Price Parallelism:** Price Parallelism alternatively known as signalling game in which rules of response are fixed automatically. When firms in an oligopolistic market coordinate their actions despite the lack of an explicit cartel agreement, the resulting coordination is sometimes referred to as tacit collusion or conscious parallelism, which is not actionable in most competition law.

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.

As is pointed out by Motta (2004, p.189), econometrics is more likely to give complementary evidence, rather than conclusive proof, of collusion . . . inferring illegal collusive behavior . . . from market data would not be desirable, and the legal approach which requests some hard evidence as proof of collusion is sensible practice.” This is a sensible policy stance on antitrust enforcement.

**CASE STUDY**

*Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* 346 U.S. 537, 540-41 (1954) the Court said: “To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”

*Bell Atlantic Corp. v. Twombly:*

The Court reiterated the principle that proof of conscious parallelism alone is inadequate to establish conspiracy and endorsed the application of the Matsushita plausibility standard to evaluate motions to dismiss. The court laid down, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” For purposes of pleading an antitrust claim, the plaintiff must present “enough facts to state a claim to relief that is plausible on its face.”
PLUS FACTOR

It has been a settled practice by the US DOJ in cases where the conspiracy claim is based upon evidence of parallel conduct, the courts are of the opinion that more evidence in the form of certain plus factors such as evidence that the defendants attended secret meetings or conducted suspicious discussions at which they had an opportunity to conspire; acted against their own economic best interests; or invited common action by the others are essential. Without such plus factors, the fact that the defendants acted in a parallel fashion is just as likely the result of independent action as an agreement or conspiracy and does not, without more, support even an inference of conspiracy.

In *Twombly v. Bell Atlantic Corporation*, 425 F.3d 99 (2d Cir. 2005), the district court dismissed a complaint for failure to allege at least one“plus factor” tending to exclude independent self-interested conduct as an explanation for the parallel behavior of the four defendants.

In the authors opinion which has been formulated through the analysis of the plethora of cases of the US DOJ, it is observed that antitrust conspiracy cases highlight the interdependence among the six key elements of a competition law system: the substantive scope of the legal command, the volume and quality of evidence required to prove a violation, the means for detecting violations, the prosecution of violations, the adjudication process that determines innocence or guilt, and the sanctions imposed for infringements.

PRESENT INVESTIGATION- THE LIBOR CARTEL

The Competition Authorities in the EU, US, Canada, Switzerland and Japan are investigating the rigging of Libour (London interbank offered rate), Euribo (Euro) and Tibor (Tokyo).

Period for investigation being mid 2005 to mid 2007 when the purpose of rigging of the market was profit alone. For the purpose of investigation the UK Financial Services Authority and the US Future Trade Commission repeatedly refer to Barclay’s communications with other banks. Collusion between traders would not be enough to establish a conspiracy among different banks, but direct evidence that Barclays submitters colluded with submitters at other banks
would make an open and shut case.

Barclays was found to have moved Libour on its own occasion. Its co-operation with other financial regulators moderated fines imposed on it in the US.

5.3 INDIA

5.3.1 Background

In India the Monopolies and restrictive Trade Practices Act 1969 was the statute that dealt with Cartel formation detection and prosecution. But later it was felt that the Monopolies restrictive Trade Practices Act 1969 has become obsolete in certain respects in the light of international economic developments relating particularly to competition laws and there is a need to shift focus from curbing monopolies to promoting competition. A new competition law, the Competition Act 2002 was consequently enacted pursuant to the recommendations of a high level Committee on Competition policy 2000. The committee had observed that competition regimes in the world today regulate: (1) anti competitive agreements, (2) abuse of dominance, and (3) combinations among enterprises. By adopting this tripartite scheme, the Competition Act 2002 has made a historic shift bringing Indian law in line with the conceptual regulatory framework prevailing in the UK, the EU and the US.44

5.3.2 Assessment

The Section 2 (c) of Indian Competition Act, 2002 has an inclusive definition of Cartels. The Indian Competition Act prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. Any such agreement is void. Agreement has an inclusive definition and includes any arrangement or understanding or action in concert. It also includes formal or informal, written or oral agreements. Cartels are prosecuted as anti-competitive agreements under Section 3 of the Act. A comprehensive procedure for prosecution has been established.

43 Competition Act 2002, Statements of Objects and Reasons
Detection

The Commission is empowered to inquire into activities of cartel. In case the Commission is convinced that prima facie case exists against a cartel, it shall direct the Director General to inquire and furnish report. Director General for the purpose of inquiries is vested with the powers of civil court besides powers to conduct ‘search and seizure’

The duty of the DG is to assist the commission on investigation into any contravention of the provisions of the Act, or any rules or regulations made there under. The DG while reaching to his conclusion for holding an operator liable for forming a cartel has an inclination towards primary evidences- that is mostly agreements. But apart from these, DG also has the authority to adopt econometric models which it is unable to utilize to the fullest because of lack of understanding of underlying assumptions.

On receipt of a complaint or a reference, the Commission has to first satisfy itself of the existence of a prima facie case. A complaint can be filed under Section 19 of the Act; whereas a reference from a statutory authority may also be directed to be investigated by the director-general. The Commission has also adopted the policy of Suo- Moto cognizance.

The prima facie existence of an agreement is essential. Any agreement, formal or informal, written or verbal would provide adequate proof for beginning investigation. In *ITC Ltd v MRTP Commission* (1996) 46 Comp Cas 619- Three essential factors have been identified to establish the existence of a cartel, namely agreement by way of concerted action suggesting conspiracy; the fixing of prices; and the intent to gain a monopoly or restrict/eliminate competition.

In the recent order in Builders Association of India v. Cement Manufacturers’ Association and Ors., Section 2(b) of the Act has been interpreted. Section 2(b) defines agreement as under,

“Agreement” includes any arrangement or understanding or action in concert,-

i. Whether or not such agreement, 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 proceeding.

The order clearly supports the view that the definition of term agreement is inclusive definition. It inter-alia includes any arrangement, understanding or action in concert irrespective of whether formal /written or otherwise or intended to be legally enforceable.
There is no need for an explicit agreement and the existence of an agreement within the Act. Further, the same can be inferred from the conduct of the parties. In case of any anti-competitive agreement, proof of agreement may not be available and may be established by circumstantial evidence alone.

5.3.4 Evidence: The nascent jurisdiction established by the Competition Commission is still in its evolution phase. The Past trends suggest that there has been an inclination towards reliance on direct evidence thus restricting the number of prosecutions. Both MRTPC and the Competition Commission inclination is well established. In Sarabhai Chemicals P. Ltd. And another, in re45 Owing to the lack of direct evidence in cartel cases, from, which are unlikely to be discovered in cartel cases, the authority has started incorporating econometric analysis for robustness and will want appropriate evidences. But it suffers through a lot of limitations which include competence to consider complex economic data, information asymmetry, huge amounts of data, extending the process, backlog of cases, etc.

Circumstantial Evidence:

Economic Evidence
In the plethora of cases dealt in early years of the MRTPC, it was laid down that Economic theory recognizes that ‘oligopoly pricing’ is a special case of ‘collusive pricing’ and conscious parallelism is much sophisticated business behavior to guard the firms from antitrust law. The judgments did not recognize that price parallelism is a form of non-cooperative collusion. Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasized on direct evidence of concert and other circumstantial evidence to strengthen the case.46

In subsequent years, 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

45 1979 49 Company cases 145 MRTP Commission
46 See DGIR v. Cement Manufacturers Association & Others, RRTA v. Hyderabad asbestos cement products & one other, DGIR v. All Gujrat Distillery Association, RRTA v. India folis and aluminium
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.47

The MRTPC successor, the Competition Commission came into force in May 2009. Among other objectives, the Competition Commissions strives extensively for prosecution of cartels. More than often the Commission faces difficulty in successful prosecution, owing to the lack of direct evidence. In the past, the investigation into onion cartel case fell flat for want of enough evidence when the majority order accepted the investigation report of the DG and closed the case on lack of evidence.

CEMENT CARTEL CASE:
For the purpose of our study, it would be apt to deal with the Cement Cartel48 wherein, the commissions by its order has fined the 11 cement companies to the tune of 6307 crores. The investigation was initiated on information received by the Commission from Builders Association of India.

Facts:
For the purpose of our study, the facts are being stated briefly, for the sake of brevity:

- The matter relates to information filed under Section 19 of the Act, informant being Cement manufacturing Association (CMA), a society registered under the Societies Registration Act, 1860 is an association of builders and other entities involved in the business of construction. Cement manufacturers Association (CMA), is an association of public and private sector cement units. The strength of CMA stood at 46, including the two most big cement manufacturers on 31st March 2009.

- As per the informant, the cement manufacturers under the shadow of CMA indulged directly and indirectly into monopolistic and restrictive trade practices, in an effort to control the price of cement as against the available capacity of production.

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48 Builders Association of India v. Cement Manufacturers’ Association and Ors.
Further alleging ‘collusive price-fixing’, diving of territory into 5 zones so as to enable them to control the supply and determine or fix exorbitantly high price of cement by forming cartel in contravention of the Section 3 of the Act.

The other parties being OP4 to OP12 had also been alleged to have also indulged into various anticompetitive activities. In addition to limiting production in order to create artificial scarcity, through its concerted actions also resorted the practice of restricting supply, produce less cement to increase prices of cement.

Thus, effectively the case has been made out under Section 3 and Section 4 of the Act.

Such cartel formation has an adverse impact on the construction and real estate sector. The growth in the construction sector decreased from 10.10% in 2007-08 to 7.25% in 2008-09 and was further projected at 6.5% for the year 2009-10. Whereas, the growth in the real estate sector came down from 8.25% in 2007-08 to 7.77 and was projected at 8.10% in 2009-01 as per data published by National Accounts of Statistics.

Pursuant to the persistent complaints by the builders and the preponderance/ suspected cartel led to appointment of a standing committee by the Ministry of Commerce to look into the suspected acts of the alleged cartel members.

The Commission after forming an opinion that a Prima facie case exists in the matter, vide order under 26(1) of the Act passed an order for the DG’s investigation.

**ISSUES FRAMED**

The commission framed 8 main issues as under: The following 8 issues were taken up for consideration:

1. Whether the parties have violated the provisions of Section 4 of the Competition Act, 2002 as has been alleged;

2. Whether the acts and conduct of the Opposite parties are subject matter of examination under section 3 of the Act?

3. Whether there exists an agreement or arrangement among the cement companies named as the Opposite under which they have details of price, production and capacity among other using the platform of CMA.

4. Whether they have indulged in directly or indirectly determining the prices of cement?
5. Whether they have indulged in limiting and controlling the production and supply of cement in the market?

6. Whether there is a case of production and dispatch parallelism among the opposite parties?

7. Whether the aforesaid acts of the Opposite Parties have caused increase in price of cement?

8. If so, whether the Opposite Parties have contravened the provisions of the Section 3(3) of the Competition Act, 2002?

For addressing the above issues, a bare perusal of the DG’s investigation report suggests appraisal of economic evidence. The economic data as ascertained by the DG can be placed under the following heads of Economic structural indicators. Thus re-affirming the stance reiterated under Chapter 2 of the Report, which suggests that industries that score high on the economic indicators laid therein are conducive to collusive behavior. The analysis of DG can be classified as follows:

**INDICATORS**

1. **HISTORY OF COLLUSION**
   - ACC AND ACL being subsidiary companies of the holding company Holcium. Various inquires have been conducted into the functioning of Holcium by various courts and commission and has been penalized and held guilty all over the world.
   - Lafarge India, a subsidiary of the French building materials major - Lafarge, has already been fined in 1994, 2002 and 2008 for committing irregularities in different jurisdictions which means that it is an habitual offender of competition laws.

2. **CAPACITY UTILIZATION**
   - The slowdown in construction industry was revived in FY- 09-01. The cement manufacturers during April-June 2009 increased their respective installed capacity from 219.17 Million tonnes on 31st March 2009 increased to 246 Million tonnes by 31st March 2010. The increase in the cement sector was 11.68%. Inspite the growth in the cement sector utilization of installed capacity still exhibited a downtrend.

   - Further, relying on the capacity utilization revealed by the DG investigation, a bare perusal of the same clearly establishes that capacity utilization beginning year 2005-06 to 2010-11 exhibits a trend of underutilization of capacity, which is conducive to cartel behavior.
Moreover, the cement produced is consumed, thus making the argument of the cartel members that, capacity utilization is lower on account of low demand is not tenable,

3. PRICE RISE

- The standing committee on Commerce indicated that the price charged by the cement companies is unreasonably high and there is a lot of scope for correction. The DG’s investigation clearly establishes that the price charged by the companies is not at all competitive, and the cement manufacturers have been operating at a profit margin of more than 25%.

- Cost analysis of Cost Audit Report of the companies, the cost of sales including the cost of production varies from unit to unit with a group and the different companies. The average profit per bag is maintained at Rs. 38/- to 45/- which indicates that price is above competition price levels

- The data analysis of the last quarter of the FY-2010-11 witnessed a price rise of 20-50% which is unreasonable and higher than competitive price, in comparison to the third quarter. Moreover the rise being unwarranted since no change in correlated raw material.

4. MARKET SHARE: (AOD)

- OP-2 to OP-9, by the virtue of fact, holds more than 57.23% of market share in India. Further OP2 and OP3 (ACC AND ACL) being dominant players in the market, owing to their large market share to the tune of 21% in India, was in a position to fix price and also curtail competition. Further, it is observed that manufacturing units are geographically dispersed and the price of cement increased in all five zone (North, East, West, South and Central).

5. DEMAND

The demand and supply situation vary from region to region. The nature of product being almost homogenous in nature facilitates oligopolistic pricing. The DG has further noted that the demand of cement is inelastic

COST-SALES RATIO

- According to the DG analysis, it is established that there is a wide divergence between the cement price index and index price of various inputs like coal, crude petroleum, and electricity. The trends suggest that the price of cement is rising faster than the input price.

- It was noted that price of cement has been on the rise since 2004-05 from about 150/- per bag to about 300/- in March 2011, whereas the increase in the cost of inputs has only been about 30% . As such, the price of cement is changed frequently.
It has further been found that change in price is mainly effected by external factors and not by internal factors like cost, product, etc. No systematic mechanism or documentation was found to be maintained by any of the parties that price is decided on market feedback. Thus the plea of price changes owing to market feedback was completely vexatious.

For proving “Concerted Action” the following indicators have been relied upon:

The concerted action herein has been mainly inferred from the output restriction – production and dispatch parallelism. The investigation report of the DG highlights that the big players mainly holding the largest shares normally tend to be the triggers. Since the demand is inelastic, any one firm can increase the total output, however the counter response by other firms is also likely to be increase. The collusive price leadership is conducive for concerted action.

**PARALLELISM**

The analysis of data suggests that prices of cement companies move in a particular direction in a given period of time in different zones. The range of price movement has been found to be same for all the companies and in all the zones. Past trends suggest that when the prices of a particular cement company go up, it’s followed by other companies simultaneously; the following conduct can be termed as “signaling”.

Even after keeping in mind the market share of each company it is noticed that the market It is pertinent to mention that the price changes are taken independently, however the prices of all the companies move in the same manner, towards similar direction.

Rationale: Since the cost of production, transportation charges vary from company to company; it should effectively vary the cost of production and thus also vary the sales price, even after keeping the average profit constant. However that is not the case, the movement of price of all the companies is in the same range and in the same direction, which is suggestive of ‘prior consultation’ among the companies. The price correlation is positive, and thus indicative of collusive behavior.

The DG has also relied on the plant wise monthly production and after analysis has come to the conclusion of positive correlation of output production and moreover the examination of dispatch data for the period of two years, beginning from January 2009 to December 2010 show that the changes in dispatches of cement of top companies were identical. The correlation relating to increase and decrease in dispatch are taken to be as indicative of “consensus or meeting of minds” thus suggestive of coordinated behavior.
COMMUNICATION EVIDENCE

The scrutiny of the communications between reveals consensus and meeting of minds, following are the facts suggestive of collusion:

- Firstly, Cement Manufactures Association can be seen as a platform for dissemination of information. The CMA which has nominated 34 different centers to collect and disseminate the retail price has the effect of sharing prices of all companies which in turn helps in collective decision making about future prices. In addition, 10 centers also gather wholesale prices on monthly basis.

- The CMA has several publications like - Executive Summary Cement Industry, Cement Statistics- Interregional movement of Cement. These publications essentially highlight the production and dispatch details of different companies, which are shared among the members.

- The records of the meetings held between the members are suggestive of the fact of – “consensus and meeting of minds” with regard to the existing price and also can be viewed as a platform for deciding future prices. It is also pertinent to mention that though ACC and ACL had withdrawn from CMA, the records confirm the presence of both in the meeting held on 24.02.2011 and 04.03.2011

- Further it was found that the high power committee of the CMA is a platform for the discussion of prices. The existence of Trade Associations scores high on economic indicators, since most members under the guise of association enter into agreements and understandings.

Industries have trade associations score high on the conduciveness to collusion, since trade associations provide a platform for meeting and communications of the members.
AUTHOR’S OBSERVATION:

The order incorporates the Best practice suggest by OCED, whereby it has been quoted that: “Circumstantial evidence is of no less value than direct evidence, for that it is a general rule that the law makes no distinction between direct and circumstantial evidence... In order to prove conspiracy, it is not necessary for the government to present proof of verbal or written agreement.”

On the contrary “Parallelism plus” approach for identifying cartels which requires showing some evidence beyond that of the firms’ parallel behaviour in order to prove that an antitrust violation has occurred though is considered as a Best practice, however keeping in mind two factors-

One, It is pertinent to keep in mind that ‘plus factor jurisprudence’ which has been developed mainly by the US DOJ, wherein cartel conduct is penalized in contrast to the administrative nature of proceedings in India; Second, the needs of evolution of the competition law in India and the need for development of jurisprudence in this area should encourage the appraisal of economic evidence alone.

It can be gathered from the DG’s findings in the Cement case, that high reliance has been placed on structural evidence and communication evidence despite the unavailability of direct evidence to establish the same. The order should be seen as a bold step forward in the direction of developing competition laws a step closer to that of the developed economies.

What essentially needs to be understood is- that the failure to satisfy the ‘Plus factor’ should not be used as a loophole to change the decision of the Commission in appeal, since corroboration of the facts and other economic evidences taken into consideration, suggest cartel formation. Furthermore, it is also important to note that the prosecution of cartels under the Competition Act, is merely administrative and not criminalized, thus lowering the standard of proof from- ‘plus factor jurisprudence’ to ‘corroboration’ and ‘correlation’ would be an appropriate stance.
6. SUGGESTIONS:

- They say, “the harder the investigations get, the smarter the suspects get.” Investigation is indispensable for successful detection and prosecution of cartels. From a close study of the various jurisdictions it is evident that competition agencies have been resorting to and seeking greater investigation powers for unearthing evidence, such as ‘dawn raids’ and the power to order production of documents or summons witnesses. In lysine cartel, agents of Department of Justice along with FBI agents simultaneously raided the offices of cartel members across the country. To help them nail the cartel they taped telephone conversations and video-taped meetings held in secret locations. The Director General of European Commission has also acquired the power of dawn-raids. In Indian context, what seems justice is exercising the powers of search and seizure, which have already been granted to the DG and also equipping the DG with additional powers of inspection and dawn-raids.

- Over 50 countries have immunity programs movement towards criminalization of cartel conduct (e.g. U.S.UK, Canada, Brazil, Japan, South Korea, Ireland, Australia, Israel). Section 46 which is a special provision empowering the Commission to impose a lower penalty on a member cartel alleged to have violated Section 3 of the Act and who makes a full and true disclosure in respect of alleged violation. The study of the various jurisdictions clearly indicates that Leniency plays a vital role in prosecution, owing to the secretive nature of cartel agreements. Statistics show that most successful prosecution have been carried out in both US and EU on the basis of the application filed, especially US. However, in is pertinent to note that in US cartel agreements have been penalized. In contrast, in India, Section 46 has not come into play even after three years of the establishment of the Competition Commission of India. The failure to prosecute on Leniency can be attributed to the administrative character of the prosecution process.

- With regard to Economic evidence, what needs to be understood is that Competition Law essentially being Economics oriented, the need of hour as is to adopt better means to evaluate these circumstantial evidences. This could be done by appointing experts in the field of economics to give their input. These experts would also act as expert witnesses in the court so that they help judges interpret the evidence in its true sense. Another suggestion could be to frame specific rules for admissibility and
evaluation of economic evidences like the United States of America. The UK Competition Commission, but also most recently the European Commission have adopted best practices (2010) governing the submission of economic evidence in their proceedings.

- Furthermore, the CCI needs strengthening through ‘functional’ guidelines for its activities concerning economic approaches. Besides, there is a need for the CCI to participate in international efforts against cartels such as at United Nations Conference on Trade and Development (UNCTAD), Organisation for Economic Co-operation & Development (OECD), etc., in order to improve their understanding of the taxonomy of cartels and the upcoming economic theories and analysis adopted by modern antitrust countries. Most importantly, CCI should undertake advocacy activities to create a competition culture and awareness about disadvantages of cartels and the harm they cause to the economy, which could help to promote detection and prosecution of cartels in India.

- The Commission should encourage SUO MOTO Cognizance of cases that score high on the Economic Indicator Tests. Random Selection of Industry analysis should be taken up by the Economics Department.
7. REFRENCES

7.1 LITERATURE REVIEW

BOOKS


This volume is a commentary on the competition law and competition process in India. It offers a comprehensive survey and analysis of key concepts and issues in competition law. It contains the essence and experience of law in practice for major developed and developing economy through contribution by leading experts in the field.


This volume critically analyses the issues enunciated under the Competition Act 2002. It provides for basic principles of competition law, and then makes a detailed study of the provisions of the statute relating to anti-competitive agreements, abuse of dominance, acquisitions, and mergers. It also includes an analysis of the powers of the Commission under the Act, as well as of comparable legislation in the United States and Europe.


This book offers a clear, concise and comprehensive account of the competition rules of the EC and the UK. It also provides a wider international interest as EC competition rules have become an important source. This book includes cases and materials and detailed commentary and case studies.

ARTICLES


This Article provides for the role of economic evidences in prosecution of cartels with detailed study of the judicial trend in EU and US. It further throws light upon the shortcomings India faces while utilizing economic evidences while providing for suggestions.

The article is based on a very simple proposition ‘that economic evidence is very significant in most competition cases’, it further looks at its history and context; and discusses its significance in relation to policy, the analytical framework, and the treatment of evidence.


This article provides for a detailed analysis of prosecuting through indirect evidence in numerous cases ranging from highly evolved countries like U.S.A to those like Zimbabwe. In furtherance they also provide for procedures and the lacunae in various countries.


This article provides for in depth and detail as to what cartels are what do they construe and how are they classified. Further it also provides for evidence that lead to proving cartels and their characters and other procedural issues concerning the same.


This article gives insight to the categories of evidences. Further it provides of what all are considered to be circumstantial evidences and what role do these circumstantial evidences play in prosecuting cartels


This article states Hard core cartels are the most egregious violations of competition law. It lays emphasis on effective action against hard core cartels being particularly important from an international perspective. Through this council recommendation, it recommends to member countries to ensure that their competition laws effectively halt and deter hard core cartels by providing for effective sanctions and adequate enforcement procedures and institutions to detect and remedy hard core cartels.