BASIC TENETS OF CARTELISATION AND COMPETITION LAW IN INDIA

A cartel is a group of formally independent producers whose goal is to increase their collective profits by means of price fixing, limiting supply, or other restrictive practices. Cartels typically control selling prices, but some are organized to control the prices of purchased inputs. Antitrust laws forbid cartels; however, they continue to exist nationally and internationally, openly and secretly, formally and informally. Note that a single entity that holds a monopoly by this definition cannot be a cartel, though it may be guilty of abusing said monopoly in other ways. Cartels usually occur in oligopolies, where there are a small number of sellers and usually involve homogeneous products. Bid rigging is a special type of cartel.

Section 3 of the Competition Act provides for and prohibits certain anticompetitive agreements. It deals with two types of anticompetitive agreements: agreements between or among competitors (horizontal agreements, including cartels); and agreements between enterprises or persons at different stages or levels of the production chain (vertical agreements). Cartels are a subset of horizontal anticompetitive agreements and to establish the existence of a cartel, the CCI must find that competitors had entered into an agreement to fix prices, limit supply, share markets or rig bids.

A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets. Cartel is defined in section 2, sub section (c) of the Act states: '(c)"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;' An important dimension in the definition of a cartel is that it requires an agreement between competing enterprises, not to compete, or to restrict competition. An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country. An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country. An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements. Section 3, sub section (5), clause (ii) of the Act states: “Nothing contained in this section shall restrict - (ii) the right of any person to export goods from India to the extent to which

the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export."

If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are:

- high concentration - few competitors
- high entry and exit barriers
- homogeneity of the products (similar products)
- similar production costs · excess capacity
- high dependence of the consumers on the product
- history of collusion

The Commission, on being satisfied that there exists a prima facie case of 'cartel', shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is vested with powers of civil court besides powers to conduct 'search and seizure'.

Recently in *Builders Association of India* vs. *Cement Manufacturers Association & Ors.* ("BAI case") and In *Re: Alleged Cartelization by Cement Manufacturers* ("Cement case"), CCI observed that Section 2(b) which defines "agreement" (any arrangement or understanding or action in concert, whether or not the same is in formal or in writing or intended to be enforceable by legal proceedings), is wide and will include tacit agreement. In cartelization, parties are cautious to avoid explicit and direct evidence such as minutes, paper trails, call records, inevitably mandating an inference to be based on circumstantial evidence taken as a whole and economic indices. CCI relied on Dyestuff's case,[11] where European Court of Justice observed that, whether there was a concerted action can only be correctly determined if the evidence considered as a whole and not in isolation, bearing in mind the peculiar feature of the market in question. It further noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelization.

CMA, through its meetings, and reports provided a platform for sharing of price, production, supply related information for sharing between the cement manufacturing companies. CCI relied on the T-mobile case[12] where European Court of Justice had held that, in an oligopolistic market[13] (like cement

industry) the exchange of such information that increases the predictability of market operations between competitors leads to restricted scope for competition.

Where there is strong price correlation between involved parties, a positive inference is drawn towards price parallelism indicating concerted action. Cement industry being seasonal, homogenic market is subject to volatile prices, higher variable costs and is susceptible to parallel price pattern. However, CCI noted that even though price parallelism is not conclusive evidence, the same in conjunct with other "plus factors", such as easy access to competition information, product and dispatch parallelism, and capacity under utilization will suffice to prove cartel.

Cement manufacturing companies had deliberately reduced their production and produced much less than the installed capacity to create an artificial scarcity and raise the prices of cements in order to earn abnormal profits.

Based on this, CCI upheld that the Respondents were in breach of Sections 3(3)(a) and 3(3)(b) read with Section 3(1) of the Act. This, in effect, means the Respondents have to deposit the specific penalty imposed on each of them. CCI computed it on the basis of net profits over a defined period for each cement manufacturer. Additionally, CCI also imposed a penalty of 10% of total receipts over a two year period. The penalty is payable within 60 days of receipt of the order.