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BUYER'S CARTELS: MARKET INSIGHTS & LEGAL RESPONSES

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ABSTRACT

The author will focus on the ability of buyers to form a cartel and how this practice is anti-competitive. The purpose of this paper is to show how the formation of this cartel would affect economic development and why these cartels should be banned. The author by way of study would shed light on how CCI has provided different and contrasted views on two distinct cases related to buyer's cartel. Further, the author has referenced various cases of the Supreme Court where "buyer's cartel" is interpreted. The author has also focused on the proposed change under the Draft Competition (Amendment) Bill², 2020 to amend the definition of a 'cartel' under the Act. Lastly, the paper will compare the laws related to buyers' cartels in India to the laws in foreign jurisdictions.

Keywords - Competition Law, Buyer's cartel, Antitrust Regulation, Anti-Competitive Agreements, Abuse of Dominant Position, Cartel Behaviour, Market Competition, Economic Regulation, Competition Policy, Competition Commission of India (CCI), Supreme Court Judgments, Legislative Framework, Case Law Analysis, Market Dynamics, Consumer Welfare, Monopoly Practices, Regulatory Compliance, Legal Interpretation, Market Structure, Fair Competition, Enforcement Mechanisms.

HISTORICAL BACKGROUND

In India, the law relating to 'fair trade' has been recognized since the times of *Arthashastra*, written by *Chanakya* in the 3rd Century BC.³ The Monopolies and Restrictive Trade Practices Act, of 1969 ("MRTP") existed before the Competition Act, of 2002 ("Act"). The MRTP Act authorized the MRTP Commission, in which the Commission can enquire about practices of corporations in the

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² Draft Competition (Amendment) Bill, 2020, MINISTRY OF CORPORATE AFFAIR <http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>.

³ Pradeep Mehta, Competition policy and governance, The Financial Express (Oct. 27, 2018), <https://www.financialexpress.com/archive/Competition-policy-and-governance/311040/>.

relevant market.⁴ However, the Raghavan Committee after the enforcement of Liberalisation, Privatisation, and Globalization (“LPG”) policies recommended repealing the MRTP Act⁵ to curb such conducts of the enterprises that were detrimental to competition in a market.⁶

The Act has made the CCI the authority and has provided it with the duty to promote fair competition in the market.⁷ There was a dire need to enact such legislation as in modern times enterprises often compete internationally and thus there is a rise in anti-competitive practices.⁸ The act has provided the responsibility of government to the commission to restrict anti-competitive practices i.e. anti-competitive agreements, abuse of dominant position.⁹

Section 3 of the Act stipulates that if any agreement¹⁰ between enterprises¹¹ or association of enterprises or person¹² or association of persons falls under the category of cartel¹³ has an appreciable adverse effect on the competition, then such agreement shall be void.¹⁴

The Section incorporated two types of agreements, namely, horizontal agreements and vertical agreements, and it envisages that if an agreement is established between two parties, then it is presumed that such agreement itself has an appreciable adverse effect on the competition.¹⁹ For any agreement to fall under Section 3 or to establish appreciable adverse effect on the competition²⁰, the Commission is required to look at the factors mentioned under Section 19 of the Act.

⁴ Monopolistic Restrictive and Trade Practices Act, § 10, Act No. 53 of 1963.

⁵ Indian Competition Law, Report of the High-Level Committee on Competition Policy and Law, (October 5, 2018: 3: 56 am), https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf; Kerala Bar Hotels Assn v. State of Kerala, 2015 SCC Online SC 1385; Udai Dagar v. Union of India, (2007) 10 SCC 306.

⁶ Comm'n of India v. SAIL, (2010) 10 SCC 744.

⁷ Competition Comm'n of India v. Steel Authority of India, (2010) 98 CLA 278.

⁸ *Verizon Comm'n, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004), 408

⁹ Tech. Products v. Bangalore Electricity Supply Co. Ltd., Case No. 58/2011; Nagar Nigam v. Al Faheem Meat Exports, (2006) 13 SCC 382.

¹⁰ Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(b).

¹¹ Id. at § 2(h).

¹² Id. at § 2(1).

¹³ Id. at § 2(c).

¹⁴ Manju Tharad v. Eastern India Motion Pictures Assn, [2012] 114 SCL 20 (CCI).

SCOPE AND LIMITATIONS OF ANTI-COMPETITIVE PRACTICES UNDER COMPETITION ACT

Under the Competition Act, it has been clearly defined that for anti-competitive agreements, and abuse of dominance, the legislation has clearly defined the ambit. Section 3 of the act mentions that any “enterprise” or “association of enterprises” or “persons” or “association of persons”, enters into an agreement that causes or is likely to cause appreciable adverse effect on the competition in the relevant market within India, then such agreement shall be void.¹⁵

‘Enterprise’ is defined as a person or departments of government that are engaged in an economic activity¹⁶ and ‘economic activity’ is itself defined in the provision and includes activities related to the production, supply and distribution, acquisition, and storage of goods.¹⁷ It does not include any activity of the Government relatable to the sovereign functions of the Government including any activity related to atomic energy, currency, defense, and space under section 2(h) of the act.¹⁸ Therefore any person or department of govt. carries out the activities mentioned above and engaged in any agreement or any cartel which causes or is likely to cause AAEC in the relevant market shall be void under Sub-Section 2 of Section 3 of the Act.¹⁹

Section 3(3) stipulated the instances which, if done by any person, enterprise, or association forming a cartel would be illegal per se. For any ‘enterprise’ to fall under the purview of section 3(3) it needs to be a person or department of govt. carrying out economic activity under section 2(h) but for a ‘person’ under section 2(1) any individual or anyone would fall under such category irrespective of the activity they are carrying out.

Sellers, producers, distributors would fall under this category either in section 2(h) or in section 2(1) and the same has been mentioned by the Supreme Court in various cases but nothing has been mentioned for the activity of ‘buying’ to be included in ‘economic activity’²⁰ and therefore the same would not be illegal under section 3(1), Also it was well established in the case of CCI v.

¹⁵ Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

¹⁶ CCI v. Coordination Comm. of Artists & Technicians of West Bengal, (2017) 5 SCC 17

¹⁷ Carew & Co. v. Union of India, (1975) 2 SCC 791: AIR 1975 SC 2260; Gir Prasad v. Govt. of Uttar Pradesh, [1996] 87 Comp. 623 (MRTPC)

¹⁸ Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

¹⁹ Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

²⁰ Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989).

Coordination Committee²¹ that the consumers or the buyers who do not carry out 'economic activity' would not be covered under the ambit of the anti-competitive practices under the act.

RECOGNITION OF BUYER'S CARTEL

The question is if the sellers, Distributors and producers can make a cartel that would harm competition then why not the consumers or buyers can make a cartel and decide not to bid over a certain limit or not to bid for the same quantity and price or come into an agreement where they decide the purchasing price? Also, it cannot be said that they can establish a monopoly that would harm the economy.²² These concepts of buyer cartel have been faced by the general public but still, there are no stringent laws against this. There may be cases where buyers collude to form a cartel and harm the competition in India²³ and decide to resell the product at higher prices or get control and establish a monopoly over sellers, distributors, and producers.

The felony is that any such anti-competitive agreement if entered by the sellers, producers, or distributors is void under section 3 but nothing is mentioned in the legislation if the buyers enter into such agreement.²⁴

It has been said numerous times that 'Every coin has two sides', similarly market economy also has two sides, one consists of the service provider or the ones who are indulged in the supply chain side and includes sellers, producers, distributors, and traders and on the other side are the ones who avail that service like buyers and consumers. The legislation successfully incorporated the first side under the act but forgot to mention the other side.²⁵

Buyers means any person who purchases the product and the use of the relevant. In the **US, Walmart's case** is the best example to understand this, it is one of the largest companies and has 8.5% of the retailers. The informant alleged that there exists a buyer's cartel amongst the retailers and they tried to eliminate competition from the market. It was alleged that an agreement was

²¹ Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal, (2017) 5 SCC 17.

²² Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).

²³ Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984).

²⁴ Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989).

²⁵ Thomas A. Piraino Jr., A Proposed Antitrust Approach to Buyers' Competitive Conduct, Hastings Law Journal (2005).

entered into by them where they agreed to purchase goods only from Walmart. Walmart benefited from one way under this but because of this other retailers were removed from the market.

There is a thin line gap between “Buying Group” and “Buyers' Cartel”.²⁶ Agreements between buyers may not always be harmful to the competition it may have some other benefits also like economic growth, such agreements that cause harm to the competition are called “buyer’s cartels” but on the other hand, cartels which do not have AAEC are called “buying group”. Buying Groups are valid before the eyes of the law.

Buyers’ cartels are an important factor to look into anticompetitive practices but the interpretation of the same is ambiguous as the judiciary has not been able to justify the importance of buyer’s cartels yet. The legislator intended to protect the interest of the consumer and for the welfare of the consumer but how buyers can also establish monopoly and harm the competition in the market was not recognized under the act. Section 2(c) of the Competition Act 2002, defines a cartel as an association of producers, sellers, distributors, or service providers and does not include buyers which means that the provision does not expressly mention the possibility of a buyer’s cartel. However, the CCI has recognized buyer’s cartel in its practice and has clarified that cartels can be of ‘buyers’ as well as ‘sellers’ under section 3(1) and section 3(3).²⁷

EU also practices the liability for the cartelisation of buyers²⁸ and the US court has also accepted the possibility of the buyer’s cartel and then subjected them to the per se approach especially when there are cases of monopsony power.²⁹

For the very first time in the case of *Pandrol Rahee Technologies Pvt. Ltd. v. Delhi Metro Rail Corporation*,³⁰ a landmark case related to the buyer’s cartel, hereinafter referred to as the ‘Pandrol case’, the question related to the buyer cartel was dealt with by the CCI. The informant alleged the existence

²⁶ Thomas A. Piraino, Jr., A Proposed Antitrust Approach to High Technology Competition, 44 WM. & M. L. REV. 65, 142-43 (2002).

²⁷ CCI order dated 04.07.2018 in Case No. 05 of 2018

²⁸ Case AT.40018 Car battery recycling [2017] C(2017) 900. As the EU’s fining regime is based only on the value of sales, which would not apply for a buyers’ cartel, the companies involved were fined on the value of the purchases, rather than the value of sales.

²⁹ In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) in respect of a buyer cartel of sugar refiners that possessed monopsony power and were subject to per se treatment.

³⁰ Case No. 3 of 2010 (Competition Commission of India, 07/10/11). One order given by the majority and one dissenting order. This study will only be confined to the majority order as the dissent did not address any of the issues relevant for this study.

of anti-competitive agreements and abuse of dominance of dominance by the opposite five parties in the procurement of the “rail fastening systems for ballastless track in metro rails” in India.

It was stated that the tendering process is an incumbent responsibility upon a public body and Delhi Metro Rail Corporation (DMRC) had not initiated any tendering process for the said procurement.

“Production chain ends where the last transaction takes place and the point after which the utility of the product is consumed by the person who buys it”, based on this the procurer was said to be the ‘buyer’ in the final decision as per the majority opinion. DMRC was said to be the public body that represents the consumers and as consumers, it is supposed to know what is best for them and is allowed to choose a product freely.

The decision was based on section 19(3) of the Act to determine the AAEC, which does not include the buyer being able to cause AAEC, under section 3(3) the requirement for forming a ‘cartel’ is to be indulged in “*identical or similar trade*”³¹ and under the definition of ‘trade’³² the word ‘acquisition’ is not included. Therefore, any type of acquisition (here purchase) by the buyer would not be said to be the acquisition under the definition of trade and thus any consumer or buyer could not be brought under the ambit of section 3(3). As a consequence, CCI does not have regulatory jurisdiction.

The second case related to the buyer’s cartel came to CCI in the form of *XYZ v. Indian Oil Corporation Ltd.*³³ (hereinafter referred to as “XYZ”). The Allegation by the informant was that the opposite party indulged in the collusive/ joint tendering. The opposite parties were three, public sector oil companies, and the tender was concerned with the procurement of services of ‘Tank Trucks for transportation of LPG cylinders.’ In this case, the CCI stated “*in the present case the informant has alleged to be the existence of buyer cartel and under section 3(1) and section 3(3) the ‘sellers’ and ‘buyers’ both are included.*”

The decision was based on the point that section 3(1) mentions ‘acquisition’ and also price fixing³⁴ has been taken as per se violation section 3(3). Hence it is mentioned in the act itself that, fixing a purchase price by a cartel is anti-competitive. Thus, CCI has the jurisdiction to try the case. It was

³¹ Of either goods or services.

³² Section 2(x), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

³³ Case No. 5 of 2018 (Competition Commission of India, 04/07/18).

³⁴ Section 3(3)(a), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

also stated that treating a buyer cartel at par with the seller's cartel may not be appropriate as the existence of a buyer's cartel may lead to major direct benefits to the consumer in terms of lowering the price through bargaining. Thus, each case has to be dealt with on a fact-to-fact basis, keeping in account the benefits to the consumer of a buyers' cartel.

If we see the criteria of 'identical and similar trade' under section 3(3) then the three oil companies were acquiring the service of the trucks for their consumption and thus become the end user of the service. They were not going to further transact the service and thus fall within the ambit of the buyer's cartel as interpreted in the Pandrol case. But on a strict reading of the act buyers are not the constituent of the cartel under section 3 (3).

Therefore, there existed two different opinions regarding the jurisdiction of the CCI for buyer's cartel. If we the decision on XYZ is correct then Pandrol escaped the liability for forming a buyer cartel and if the decision of Pandrol was correct then CCI had gone beyond its jurisdiction in the XYZ case.

In the eyes of the author, the possible argument from the side of XYZ could be that the buyer's cartel is within the definition of 'cartel' as the definition is fully inclusive and not exhaustive³⁵. Even after this the definition of 'trade' creates a hurdle and for that, it could be argued that '*control of goods*' constitutes a trade.³⁶ When a buyer buys a good, it comes under the control of that buyer and thus consumer/buyer could be envisaged under the definition of the 'trade'.

The "Competition Law Review Committee" was set up on 1st October 2018 to review the Competition Act and the Rules and Regulations framed thereunder. The Committee had been tasked with the responsibility to review and recommend a robust competition regime, by taking the inputs of key stakeholders and suggesting changes in both the substantive and procedural aspects of the law. The committee in its report expressed the inclusion of the term 'buyers' in the definition of cartel under section 2(c) as it would help to draw attention towards the cartelization of the buyer's side³⁷ and clarify that buyer's cartels are within the ambit of the Competition Act. Consequently, the word buyer was also agreed to be added to the proviso of Section 27(b) and

³⁵ Section 2(c), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

³⁶ Section 2(x), The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

³⁷ CCI order dated 07.10.2011 in Case No 03 of 2010. This case saw allegations of anti-competitive practices against the buyers of rail fastening systems, but the CCI did not make any finding of infringement, one of the reasons being the lack of any express reference to the purchasing activity of a consumer in the Competition Act.

Section 46 which talks about the imposition of penalty and the lesser penalty applications respectively.

However, no amendment was made in the definition of ‘trade’ under section 2(x), and thus the question that was raised in the case of Pandrol still holds value. The CLRC stated in its report that its recommendation is based on the decision of XYZ³⁸ and thus it seems that the decision of the Pandrol case has been discarded completely.

DIFFERENT JURISDICTIONS ON BUYERS' CARTEL

During the 1890s, Debates on both the houses of the US were going on regarding the excessive power on the seller or buyer’s side in the market. Due to this, the Sherman Act was enacted. The buyers’ cartel is illegal per se as per the Sherman Act and liable to be criminally prosecuted. The Sherman Act treats buyer’s cartels the same as it treats seller cartels. It is said in the US that all such activity of entering into agreements and making cartels is a “threat to the central nervous system of the economy.”³⁹

In the case of *United States v. Adobe Systems*, companies have effective management in the US came into an agreement not to ‘cold call’ the employees of another⁴⁰ and thus harmed the competition as this decreased the ability of employees to get better job opportunities and between employers not much competition was left. The judge approved a \$415 million settlement.

As per European law, any form of cartel that reduces revenue is illegal per se. As per them whenever infringement in competition law happens, it leads to an overcharge or other harm to the consumer or in the case of a buyer’s cartel, lower price, and other harms to the supplier. This Directive should be applied accordingly to those cases.⁴¹ Recital 43 of the Directive qualifies the lower price paid by the buying cartel as actual loss, that is the harm to the supplier corresponding to the difference between the competitive price and the price paid by the cartels.⁴²

³⁸ Report of the Competition Law Review Committee, Government of India, Ministry of Corporate Affair. http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

³⁹ *United States v. Socony-Vacuum Oil Co.*, 310 US 150 (1940), 226 n.59

⁴⁰ *United States v. Adobe Sys., Inc.*, No. 1 : 10-cv-01629 (D.C.C. Sept. 24, 2010), ECF No. 1, Complaint 2, at 2.

⁴¹ Directive 2014/104/EU of the European Parliament and the Council (26 November 2014), art. 2 (20).

⁴² <https://core.ac.uk/download/pdf/46117303.pdf>.

For example, in the EU it was found that three companies are acting as buyers and formed a cartel and agreed to reduce the purchase price of the scrap lead-acid automotive batteries. The companies paid 67 million Euros as a penalty.⁴³

CONCLUSION

In the above paper, the author has explained the current situation of Competition law in India, the role a cartel plays in the competition, and how it can cause adverse effects in the relevant market. ‘Cartel’ has been interpreted by the author and it is suggested that both ‘sellers’ and ‘buyers’ should be included in the definition under section 2(c) of the Act.

Various facts can change the buying patterns for a certain product in the market and one of those is also countervailing buying power. It can affect the price of a product directly and indirectly. Therefore, it is suggested that these restraints put by the consumers should be illegal per se under the Act. Also, the formation of a buyer cartel helps the small buyers to develop their business this type of cartel provides transactional efficiency. Keeping all these points in mind, it is suggested that proper guidelines should be laid down and needful amendments should be made in the Act to include buyer’s cartels so that members avoid entering into such cartels.

⁴³ Malina McLennan, DG Comp fines battery recycling buyers’ cartel, Global Competition, (October 24, 2018).