



सत्यमेव जयते



भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA

ADVOCACY BOOKLET

CARTELS

**UNDER THE COMPETITION
ACT, 2002**



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DISCLAIMER

This quick guide, based on the work of an expert, is published as part of the advocacy programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission or of its officials. Readers are advised to carefully study the Competition Act, 2002 and seek legal advice, wherever necessary.

CARTELS UNDER THE COMPETITION ACT, 2002

DEFINITION OF CARTEL

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, (the 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.

Cartels are agreements between enterprises¹ (including association of enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice for goods or/and services.

¹Enterprise is defined in section 2 sub section (h) of the Act as under :

"Enterprise means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space".



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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.



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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."

EXTRA- TERRITORIAL REACH

Anti-competitive activities, including cartels, taking place outside India but having effect on competition in India would fall within the ambit of the Act and can be inquired into by the Commission. The Act thus has extra territorial reach (section 32).

CARTELS - PRESUMED INJURIOUS

Agreements between enterprises engaged in identical or similar trade of goods or provision of services (commonly known as horizontal agreements) including cartels, of four types specified in the Act are presumed to have appreciable adverse effect on competition and, therefore, are anti-competitive and void.



Section 3, sub section (3) of the Act states:

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

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

However, horizontal agreements of the above four types entered into by way of joint ventures are not presumed to have appreciable adverse effect on competition and are excluded from the above provisions of section 3, sub section (3) of the Act if they increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.



Proviso to section 3, sub section (3) of the Act states:

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

Appreciable adverse effect on competition of other types of agreements i.e. other than those covered by section 3, sub section (3) of the Act, including tie-in arrangement, exclusive supply arrangement, exclusive distribution agreement, refusal to deal and resale price maintenance, commonly known as 'vertical agreements' would not be presumed to have appreciable adverse effect on competition, and would be evaluated by the Commission based on facts using the 'rule of reason' approach.

COMMON CHARACTERISTICS OF CARTELS

Usually cartels function in secrecy. The members of a cartel, by and large, seek to camouflage their activities to avoid detection by the Commission.

Perpetuation of cartels is ensured through retaliation threats. If any member cheats, the cartel members retaliate through temporary price cuts to take business away or can isolate the cheating member. Another method, known as compensation scheme, is resorted to in order to discourage cheating. Under this scheme, if the member of a cartel was found to have sold more than its allocated share, it would have to compensate the other members.



CONDITIONS CONDUCTIVE TO FORMATION OF CARTELS

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

CARTEL INVESTIGATION

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'.

ANTI-CARTEL ENFORCEMENT

The Commission is empowered to inquire into any cartel, and to impose on each member of the cartel, a penalty of up to three times its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of continuance of such agreement, whichever is higher. In case an enterprise is a 'company' its directors/officials who are guilty are also liable to be proceeded against and punished.



In addition, the Commission has the power to pass inter alia any or all of the following orders (section 27):

- (i) direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- (ii) direct the enterprises concerned to modify the agreement.
- (iii) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- (iv) pass such other order or issue such directions as it may deem fit.

INTERIM ORDERS

During the pendency of an inquiry, the Commission may, by order, temporarily restrain any member of the alleged cartel from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to the parties, where it deems necessary.

LENIENCY SCHEME

The Act empowers the Commission to grant leniency by levying a lesser penalty on a member of the cartel who provides full, true and vital information regarding the cartel. The scheme is designed to induce members to help in detection and investigation of cartels. This scheme is grounded on the premise that successful prosecution of cartels requires evidence supplied by a member of the cartel. Similar leniency schemes have proved very helpful to competition authorities in successfully proceeding against cartels.



Section 46 of the Act states:

"The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or under the rules or the regulations:

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section :

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings:-

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) had given false evidence; or
- (c) the disclosure made is not vital,

and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed."

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