DISCLAIMER

This quick guide 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. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, and seek legal advice, wherever necessary.

CARTELS

INTRODUCTION

The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007, (the Act) follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates entering into combinations (consisting of mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

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.

An agreement may be horizontal i.e. between enterprises, persons, associations, etc. engaged in identical or similar trade of goods or provision of services, or it may be vertical i.e. amongst enterprises or persons at different stages or levels of the production chain in different markets.

Cartelisation is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Competition Act, 2002.

WHAT IS A 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.

Cartel is defined in section 2, sub section (c) of the Act:

"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;'

Cartels are agreements between enterprises (including a person, a government department and association of persons / enterprises) not to compete on price, product (including goods and services) or customers. The Act gives a detailed definition of an enterprise in section 2 (h). The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or/and services.

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. 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. This is because such cartels do not adversely affect markets in India and are hence outside the purview of the Act.

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.

However, horizontal agreements of the above four types mentioned in the Introduction, 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.

Appreciable adverse effect on competition of agreements 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

are commonly known as 'vertical agreements " and 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 CONDUCIVE 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

INQUIRY INTO CARTELS

In exercise of powers vested under section 19 of the Act, the Commission may inquire into any alleged contravention under section 3 (3) of the Act that proscribes cartels.

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'.

Note: For the details of the procedures related to inquiry and investigations please refer to Regulation No. 2 of 2009 dated May 21, 2009(also available on the CCI website www.cci.gov.in)

POWERS OF THE COMMISSION

The Commission is empowered to inquire into any cartel, and to impose on each member of the cartel, a penalty of up to 3 times its profit for each year of the continuance of such agreement or 10% 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.

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

- direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;
- direct the enterprises concerned to modify the agreement.
- 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
- pass such other order or issue such directions as it may deem fit.

LENIENCY SCHEME

Section 46 of 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.

The Commission has notified the Competition Commission of India (Lesser Penalty) Regulations, 2009 laying the process, procedure and methodology for granting leniency to the cartel members who breaks the ranks of the cartel and becomes helpful to the Commission and instrumental in busting that alleged cartel.

Note: For the details of the conditions for lesser penalty please refer to Regulation No. 4 of 2009 dated August 13, 2009 (also available on the CCI website www.cci.gov.in)

INTERIM ORDER

Under section 33 of the Act, , during the pendency of an inquiry the Commission may temporarily restrain any party from continuing with the alleged contravention, until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems it necessary.

Note: For the details of the procedures related to interim orders please refer to Regulation No. 2 of 2009 dated May 21, 2009(also available on the CCI website www.cci.gov.in)

APPEALS

The Competition Appellate Tribunal (CAT) is established under section 53A of the Act, to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act.

An appeal has to be filed within 60 days of receipt of the order / direction/ decision of the Commission.

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REGULATIONS NOTIFIED BY COMPETITION COMMISSION OF INDIA

- The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009; (No. 1 of 2009)
- The Competition Commission of India (General) Regulations, 2009 ; (No. 2 of 2009)
- The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009; (No. 3 of 2009)
- The Competition Commission of India (Lesser Penalty) Regulations, 2009; (No. 4 of 2009)
- The Competition Commission of India (Determination of Cost of Production) Regulations, 2009; (No. 5 of 2009)
- The Competition Commission of India (General) Amendment Regulations, 2009; (No. 6 of 2009)

Above regulations are available on the website of the Commission : www.cci.gov.in