

CARTEL REGULATION: A CRITICAL STUDY WITH SPECIAL REFERENCE TO INDIA

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ABSTRACT

Competition law is an integral part of policy making in today's times. In line with this, India enacted its Competition law in the form of Competition Act, 2002. There are certain core areas of competition law of India contained in sections 3 to 6 of the Competition Act, 2002. When it comes to competition law enforcement, India is keeping its date with the developed jurisdictions. Before the advent of competition law, there were in operation what one may call as trusts or cartels across the globe. These were sought to be controlled by competition law. In light of the above, the present paper seeks to analyze the importance of cartel control in India in light of the cartel control provisions in the jurisdictions of the US, EU, Germany and Japan. The authors of the present paper confine their study to the aforementioned jurisdictions as the Indian law on competition is based on the relevant country's law as stated above. The present paper shall analyse the problem of cartels, detection and prosecution of cartels and suggest ways to improve cartel control measures in light of the Leniency programme.

INTRODUCTION

Earlier, the state had a minimal role to play in the market conditions as there was the prominence of the concept of laissez faire. But with the ever changing market conditions, there was a need of state regulation of market. This can be seen in the market conditions that

persisted in the US which resulted in the passage of the Sherman Act, 1890.¹⁸⁹ Competition law is applicable not only to traditional activities but also to those once regarded as natural monopolies or preserve of the state, such as telecommunications, energy, transport, broadcasting and postal services.

The basic purpose of any antitrust law is to prevent practices having adverse effect on competition thereby protecting consumer interests. In line with this, any competition law regime should seek to prohibit anti competitive agreements, restrict abuse of dominance by a business enterprise, provide for regulation of combinations and for matters associated therewith.¹⁹⁰ There is a difference between the market that actually exists and the one that we find in the books. In a bookish market, sellers and buyers operate under perfect market conditions where each buyer has knowledge about the market and the products that are sold in the market. In actual market, buyers do not have perfect knowledge about the products or the substitutes that are being sold which leads to possibilities of distortion of competition.¹⁹¹ It is this ignorance which leads the business enterprises to behave in any manner they can. One effect of such behavior is the formation of cartels which has its own pernicious outcomes. The competitive process needs to be protected at all costs and this is ensured by way of competition regulation. Market economics forces the business players to go for better permutation and combination thereby resulting in greater benefits to the consumers. It needs to be understood that competition law has a social purpose as well. This social purpose could

¹⁸⁹ The Sherman Antitrust Act, 1890, was signed by president Benjamin Harrison, in 1890, and was named after its author, Senator John Sherman. (Source:<http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1990/1/cj9n3-13.pdf>, last visited on 22/05/16).

¹⁹⁰ India has its own set of provisions dealing with the aforementioned aspects in the form of section 3 which provides for anti competitive agreements, section 4 which provides for abuse of dominance, section 5 which provides for combinations and section 6 which provides for regulation of combinations.

¹⁹¹ For an economic analysis of antitrust laws, please see, Richard A. Posner, *Antitrust Law*, 2nd ed., (2001), (The University of Chicago Press, Chicago and London).

be found in the observation of the court in the US case of *United States v Aluminium Co. of America*,¹⁹² wherein it was stated as follows:

It is impossible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

In the Indian context, the constitutional foundations of antitrust law give the answer to the social purpose which a competition law regime must serve.¹⁹³

CARTEL CONTROL: GENERAL PERSPECTIVE & REGULATORY CONTROL

A historical review of the cartel problem would reveal that they were primarily opposed to competing business entities. In an effort to study cartel control mechanism, apart from the jurisdictions under study of that of US & EU, we would also look at the position pertaining to cartels in Germany and Japan.

Cartels and Germany:

The land of cartels, Germany, provided many a breeding ground for the growth of flourishing cartels. The economic depression in 1873 in Germany led to a situation where the fascination for free competition faded. One has to understand the process in Germany in two forms: public regulation and private regulation. Public regulation was done by the intervention of the

¹⁹² 148 F2d 416 (2d Cir 1945).

¹⁹³ Articles 38 and 39, Constitution of India, 1950.

government whereas private regulation took the form of cartels.¹⁹⁴ Industrialization worked the opposite way on Germany as it led to the formation of strong cartels. The commodities also played a crucial role in the formation of cartels as they were suited to the formation and sustenance of the same. These commodities were in the form of coal, iron and chemicals.¹⁹⁵ In 1897, the highest court of the German empire, Reichsgericht, in the case of *B. v Saon Woodpulp Manufacturers Association*,¹⁹⁶ took the issue of cartel formation upfront, but still did not condemn cartels per se. Thus it could be seen that the purpose of the legislation in Germany was not to eliminate cartels but to regulate the operation of cartels. There was another legislation that was passed in Germany in 1923 titled *Ordinance Against the Misuse of Economic Power*,¹⁹⁷ with the object of preventing the formation of cartels.

The only objective was to regulate the cartels in a manner that they can be better used for economic development. Thus in the 1923 legislation, it was stated as follows:

[T]he Reich Minister of Economic Affairs... (2) may order that any party to the cartel contract or resolution shall be free at any time without notice to denounce the contract or withdraw from the agreement; or (3) may order that a copy of all agreements and instructions which have been adopted for the purpose of giving effect to the contract or resolution shall be forwarded to him, and that such agreements or instructions shall not take effect until this has been done. It will be held that the public interest is endangered specially to an extent that is economically unjustifiable where production or marketing is restricted, or where prices are raised or prevented from falling, or in case of prices based on an index

¹⁹⁴ Lovely Dasgupta, *Cartel Regulation: India in an International Perspective*, First Published, 2014, (Cambridge University Press, India).

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*,20-21. .

¹⁹⁷ *Ibid.*, 22.

number, where a “risk premium” has been added to the price, or where there is inequitable interference with freedom of exchange through buyer’s or seller’s boycotts or through the fixing of differential prices or conditions of trading.

Cartel formation and control has been affected by external factors as well. The Great Depression of 1929 diluted the effect of the 1923 legislation which sought to introduce some measure of cartel control.¹⁹⁸ The external conditions which changed the scene relating to cartels in Germany was the coming into picture of Hitler, who made cartelization mandatory and there came the unexpected move of the century, with state control of cartels.¹⁹⁹ With the defeat in the second World War and the consequent redrawing of boundaries, the US came into picture and there was some sort of regulation sought to be put on cartels. With the further structuring of boundaries of Germany, a new law was enacted on January 1, 1958 which did not completely prohibit cartels but prohibited all agreements which did or intended to distort competition.²⁰⁰

Cartels and Japan:

In Japan, there is the concept of Private Monopolization which means such business activities, by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby, causing contrary to the public interest, a substantial restraint of competition in any particular field of trade.²⁰¹ The aforementioned statement is sufficient to reiterate that cartels are well taken care of in Japan. But can a definition be sufficient or

¹⁹⁸ *Ibid.*,23.

¹⁹⁹ *Ibid.*,24.

²⁰⁰ *Ibid.*,24.

²⁰¹ Akira Kawamura, *Law and Business in Japan*, 2000 ed., (Commercial Law Centre Inc. Japan), at p.91.

efficient in controlling cartels, we shall see in the later part of the paper. If the aforementioned is not sufficient, the focus may turn on the phrase ‘unreasonable restraint of trade’. An unreasonable restraint of trade means such business activities, by which entrepreneurs by contract, agreement or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain or enhance prices; or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.²⁰² An analysis of the second definition gives us a more exact picture. The meaning attributed to the phrase ‘unreasonable restraint of trade’ reveals that business activities which have the effect of distorting competition by contract, agreement or any other concerted practice. This is enough to include within its ambit cartels. The standard of proof of the existence of a cartel is almost the same as in other jurisdictions like that of the US and EU. There has to be a proof that there existed some kind of communication, even informal, amongst the cartel participants. Circumstantial evidence is accepted in Japan as a strong proof of cartel, but it is the other peripheral evidence that is also accepted.²⁰³ Cartels are permitted under certain circumstances as well in Japan.²⁰⁴

Cartels & the US jurisdiction:

The Sherman Act and Cartels:

The beginning of the cartel control mechanism in the US was with the passage of the Sherman Act, 1890. The Act was named after senator John Sherman, who had the vision and mission to control cartels or trusts operating in the US. There was little institutional support

²⁰² *Ibid.*,98.

²⁰³ See, *Nikon Sekiyu K.K. v FTC*, (Tokyo High Court, Nov.9, 1956).

²⁰⁴ Akira Kawamura, *Law and Business in Japan*, 2000 ed., (Commercial Law Centre Inc. Japan), at p.101.

for the Sherman Act and therefore the Act was made operational through the suits that were instituted in the courts from time to time.²⁰⁵ The first case in a long line of cases was that of *United States v Trans Missouri Freight Assn.*,²⁰⁶ in which it was observed that the prohibitory provisions of the Sherman Act apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation and are not confined to those in which the restraint is unreasonable. In the instant case, a well laid out plan was there for any violation of the agreement entered into by the Trans Missouri Freight Association. In other words there was a cartel and it was flourishing as well. On the 6th of January 1892, the United States as complainant, filed in the circuit court, of the US for the district of Kansas, filed its bill of complaint against the Trans Missouri Freight Association. It was stated in the complaint that the defendants ie: the 17 railroad companies had entered into an agreement to increase and augment the existing rates and prices and to counteract the effect of free competition on the facilities and prices of transportation and to maintain arbitrary rates to be charged. The case is important in light of the discussion being undertaken in the present paper because in this case, there was an apparent violation of the Sherman Act but the railroad companies very cleverly said that they had dissolved the association and now, therefore, no case can be made out against them. Justice Peckham, delivering the opinion of the court, stated, the following with regard to the Sherman Act, 1890: ‘the language of the Act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

²⁰⁵ The US Supreme Court in the case of *United States v E.C. Knight Co. et al*, 156 US 1 (1895), clarified the reach of the Sherman Act, 1890. It was stated as follows: ‘The Act comprises seven sections, of which section 1 of the Act reads as follows: *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or any other person, \$1,000,000 or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*’

²⁰⁶ 166 US 290 (1897).

among the several states or with foreign nations. A contract therefore, that is in restraint of trade or commerce is by the strict language of the Act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons or property.’

The next case that highlights the aspect of formation and operation of cartel, and its resultant effect thereon in the US is that of *Addyston Pipe and Steel Company et al v United States*,²⁰⁷ in which it was concluded that there was an existing cartel in the US cast iron pipe industry. The application of the Sherman Act was held valid in the present case. In the present case, it was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves by which they agreed that there should be no competition between them in any of the states or territories mentioned in the agreement in regard to the manufacture and sale of cast iron pipe and that in obedience to such agreement and combination and to carry out the same, the defendants had since that time operated their shops and had been selling and shipping the pipe manufactured by them into other states and territories under contracts for the manufacture and sale of such pipe with citizens of such other states and territories. It was concluded by the court in the present case that the combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed and but for the restriction, the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to do so and thereby affect trade and commerce in a negative manner. In another case of *United States v Socony Vacuum*

²⁰⁷ 175 US 211, 20 S.Ct. 96.

Oil Co., Inc.,²⁰⁸ numerous oil companies and individuals were convicted under an indictment alleging that in violation of section 1 of the Sherman Act, they conspired to raise and maintain spot market prices of gasoline, and prices to jobbers and consumers in the Midwestern Area embracing many states, by buying up distress gasoline on the spot markets and eliminating it as a market factor. In support of the allegations of the indictment, there was evidence to prove that the defendants with intent to raise and maintain prices, devised and carried out an organized programme of regularly ascertaining the amounts of surplus spot market gasoline, of assigning its sellers to buyers who were in the combination, and of purchasing it at fair going market prices. In the present case also there was a finding of cartelization and subsequent fines and punishment was imposed accordingly as per the Sherman Act, 1890.

In line with the above, the next case that demands attention is that of *American Tobacco Co. v United States*,²⁰⁹ in which the petitioners were convicted on the following four grounds: conspiracy in restraint of trade, monopolization, attempt to monopolize and conspiracy to monopolize. The court in the present case considered the aforementioned concepts in detail. Reynolds company in 1913 broke into the cigarette field with its Camel cigarettes. There were two other companies in the fray which were Liggett and P. Lorillard Company. The later evidence produced before the court showed that these three companies have operated together in recent years in violation of the Sherman Act. Each petitioner in the present case was convicted of the same offence under like counts, and the question before the court was to state the rule of law to be applied in defining monopolization under the Sherman Act. The court in the present case observed that these three cigarette companies were enjoying the

²⁰⁸ 310 US 150 (1940).

²⁰⁹ 328 US 781 (1946).

position of the 'Big Three' in the market and were in a position to monopolize the market. The court noted rightly that size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The court noted three years in particular, viz. 1937, 1938 and 1939. There was a large amount of money spent on advertising by the big three companies in the market. This tremendous advertising however is a widely publicized warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. It was observed by the court as follows: *'New competition dare not enter such a field unless it well be supported by comparative national advertising. Large inventories of cigarettes, and large sums required for payment of federal taxes in advance of actual sales further emphasize the effectiveness of a well financed monopoly in this field against potential competitors if there merely exists an intent to exclude such competitors. Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion.'* It was further observed by the court in the present case that the verdicts show that the jury found that the petitioners conspired to fix prices and to exclude undesired competition against them in the purchase of the domestic type of fluecured tobacco and of burley tobacco. The government introduced evidence showing that, although there was no written or express agreement discovered among American, Liggett and Reynolds, their practices included a clear course of dealing. This evidently convinced the jury and evidently convinced the court as well in the present case of a violation of the Sherman Act by the corporations concerned.

The next case is that of *Broadcast Music Inc. v CBS Inc.*,²¹⁰ in which the respondents Columbia Broadcasting System Inc. (CBS), brought this action against petitioners American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI)

²¹⁰ 441 US 1 (1979).

and their members and affiliates alleging inter alia, that the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is illegal price fixing under the antitrust laws. After a trial limited to the issue of liability, the District Court dismissed the complaint holding inter alia, that the blanket license was not price fixing and a per se violation of the Sherman Act. The Court of Appeals reversed and remanded for consideration of the appropriate remedy, holding that the blanket license issued to television networks was a form of price fixing illegal per se under the Sherman Act and established copyright misuse. It was held by the court in the present case that the issuance by ASCAP and BMI of blanket license does not constitute price fixing per se unlawful under the antitrust laws. The court observed in the present case that over the years and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations.

The aforementioned discussion of the US case related to cartelization reveal that all the cartels have been declared illegal per se by the US courts. In order to strengthen the cause and fight against cartels, the US government has created the Federal Trade commission (FTC) which deals with cases pertaining to antitrust violation.

Cartels and EU:

Historically, the first European Treaty to aim at economic integration was the Treaty establishing the European Coal and Steel Community (ECSC) between France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The ECSC treaty was intended to render impossible any further armed conflict between the member states, while at the same time laying a firm foundation for European recovery after the second world war. The principal signatories to the ECSC Treaty signed another treaty at Rome on 25 March 1957, to establish

what was then called the European Economic Community (EEC). It came into force on 1st January 1958, and it has been amended time and again since then, the major amendment to it being the Single European Act of 1986, which set a deadline for the establishment of a single European market. The main institutions which variously impinge upon the development of the Community and the enforcement of the EC Treaty are set out in Article 7, which provides that the task of the Community shall be carried out by (i) a European Parliament; (ii) a Council; (iii) a Commission; (iv) a court of justice and (v) a court of auditors. This section of the paper is concerned with Article 101 of the EC Treaty and how it affects the dynamics of competition regulation. Part 1 of the EC Treaty provides for articles 1 to 16 of the EC Treaty which provide for the basic framework of the Treaty. The aims of the EC Treaty are set out in Article 2 which provides as follows:²¹¹

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states.”

In dealing with any given problem, therefore, regard must be had to other provisions as well. Regulations made by the council or the commission have general application, and they are

²¹¹ Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London), at p.14-15.

binding in their entirety and directly applicable in all member states. By contrast, directives are binding upon member states as to the result to be achieved, but leave to the national authorities the choice of form and methods of achieving that objective. Council Regulation 17 was the first regulation implementing the competition rules of the Treaty and came into force in the then member states on 13 March 1962.²¹² Therefore we have been through the generalities of the TFEU as to how and why it was established. Four terms primarily need to be understood in the context of the TFEU which are as follows:

(i) Undertakings.

(ii) Agreements.

(iii) Decisions.

(iv) Concerted practices.

First question: what is an undertaking for the purposes of Article 101(1)?

It is important to note that the text of the treaty does not define the term ‘undertaking’. But it is important to define the term ‘undertaking’ as when we read the text of the Article, it says that *agreements between undertakings* are caught by the Article. It may be important to note here that the term ‘undertaking’ has been interpreted by the Community courts and the Commission in Europe. ‘Undertaking’ is a wide term which applies to almost any entity engaged in an economic activity, regardless of the legal status or the way in which it is

²¹² Regulations made by the Commission and currently in force, in further implementation of Council regulation 17, are Regulation 3385/94 (procedure for notifying agreements and making applications for negative clearance) and Regulation 2842/98 (hearings before the Commission prior to any Commission decision). Council Regulation 4064/89 (the Merger Regulation) was adopted pursuant to Article 83 and 308 of the Treaty to establish a regime for the scrutiny of mergers of undertakings active in the Community. (Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London), at p.31-32)

financed.²¹³ The Court of First Instance has stated that the article is addressed to economic entities made up of a collection of physical and human resources being capable of taking part in the commission of an infringement of the kind referred to in that article.²¹⁴ Undertakings engaged in the supply of services are undertakings within the meaning of article 101(1) as well as undertakings engaged in the supply of goods. But it is essential that an undertaking should carry on some economic or commercial activity; bodies which are not engaged in any such activity are not undertakings within the meaning of the article. In *Poucet and Pistre* case,²¹⁵ the Court of Justice held that two autonomous schemes set up under the French law, one for sickness and maternity insurance and the other for old age insurance, were not undertakings, they pursued only a social objective and were based on the principle of solidarity in that the benefits were not related to the level of compulsory contribution which was determined by reference to individual income. An individual is to be considered as an undertaking for the purposes of Article 101(1) insofar as he engages in economic or commercial activity in his own right, for example, as a sole trader, self employed professional, licensor of an industrial property right, performing artist or consultant.²¹⁶ State owned corporations are undertakings within the meaning of Article 101(1) insofar as they carry on economic or commercial activities, which include the supply of public services.²¹⁷ The primary case dealing with the question of meaning of an ‘undertaking’ is the case of

²¹³ *Hydrotherm v Compact*, [1984] ECR 2999.

²¹⁴ Case T-6/89 *Enichem v Commission* [1991] ECR II 1623, on appeal Case C-49/92P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, [2001] 4 CMLR 602; *Shell v Commission* [1992] ECR II – 757. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.45)

²¹⁵ Cases C-159 & 160/91 *Poucet & Pistre v AGF and Cancava* [1993] ECR I-637. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, Sweet & Maxwell, London at p.47)

²¹⁶ See case, *EPI Code of Conduct*, OJ 1999 L106/14, [1999] 5 CMLR 540.

²¹⁷ Case 155/73 *Sacchi* [1974] ECR 409; *British Telecommunications*, OJ 1982 L360/36; Cases C-147 & 148/97 *Deutsche Post* [2000] 4 CMLR 838.

Hofner and Elser v Macrotron GmbH.²¹⁸ The idea in Hofner case that any entity engaged in an economic activity, regardless of legal status, can qualify as an undertaking finds expression in numerous judgments of the community courts and decisions of the Commission.²¹⁹ Further the ECJ in Hofner case stated that the legal status of an entity does not determine whether it qualifies as an undertaking. Public authorities such as the Federal Employment Office in Hofner case itself or the autonomous administration of state monopolies in the *Banchero* case, have been held to be engaged in activities of an economic nature with regard to employment procurement and the offering of goods and services on the market for manufactured tobacco respectively.²²⁰ Another important case in which the meaning of the term ‘undertaking’ was considered in Europe by the Commission is the Commission decision of 11 June 1998 relating to a proceeding under article 86 of the EC Treaty. The name of the case is *Alpha flight services/Aeroports de Paris* in which the Commission considered the meaning of the term ‘undertaking’.

The court in the present case elaborated on the concept of an undertaking in very broad terms as follows:

²¹⁸ Case C – 41/90 [1991] ECR I – 1979, [1993] 4 CMLR 306, para 21.

²¹⁹ Companies and partnerships can of course qualify as an undertaking, as can agricultural cooperatives, P and I clubs and a firm established by four independent companies whose function was to supervise a quota fixing agreement. Similarly a trade association that carries out an economic activity can qualify as an undertaking; it follows that agreements between trade associations may themselves be caught by Article 81 (1). The fact that an organisation lacks profit motive or does not have an economic purpose does not qualify as an undertaking, provided always that it is carrying on some commercial or economic activity.

²²⁰ *Banchero*, Case C-387/93 [1995] ECR I – 4663, [1996] 1 CMLR 829, para. 50. State owned corporations may be undertakings, as may bodies entrusted by the state with particular tasks and quasi governmental bodies which carry on economic functions. For example, in the case of *Alpha Flight Services/Aeroports de Paris OJ* [1998] L 230/10, [1998] 5 CMLR 611, paras 49-55, upheld on appeal Case T-128/98 [2000] ECR II – 3929, [2001] 4 CMLR 1376, paras. 120-126, airports de Paris responsible for the planning, administration and development of civil air transport installations in Paris, the Portuguese Airports Authority, ANA and the Finnish Civil Aviation Administration were all found by the Commission to constitute undertakings.

1. The Court of Justice has consistently held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (Case C-41/90, *Hofner and Elser v. Macroton*);
2. Articles 85 and 86 of the Treaty apply to the behaviour of a public entity when it is established that, through that entity, the State carries on economic activities of an industrial or commercial nature by offering goods and services on the market. It is of no importance that the State carries out the activities directly through a body forming part of the State administration or through a body to which it has granted special or exclusive rights. It is therefore necessary to examine the nature of the activities carried out by the public undertaking or entity granted special or exclusive rights by the State.

The following is a list of the cases where the Community courts and the Commission considered the term ‘undertaking’ and gave it an expansive interpretation:²²¹

(i) The ECJ held in *Hofner and Elser v Macrotron GmbH*²²² that: the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.

(ii) In *Pavlov*²²³ the ECJ added: It has also been held that any activity consisting in offering goods or services on a given market is an economic activity.

²²¹ Richard Whish, *Competition Law*, 6th ed., 2009 (Oxford University Press) at p.83.

²²² Case C – 41/90 [1991] ECR I – 1979.

²²³ [2001] 4 CMLR 30, para. 75.

(iii) In *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*,²²⁴ the ECJ said that the competition rules in the treaty: do not apply to activity, which by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity or which is connected with the exercise of the powers of a public authority.

Therefore, after going through the above, one would be able to understand that the term ‘undertaking’ has to be understood in the context of function which is being performed or the economic activity which is being undertaken. There is a need to perceive a functional approach in determining the meaning of the term ‘undertaking’.²²⁵ In saying that there is a need to perceive a functional approach in determining the meaning of the term ‘undertaking’, it may be noted that the function that is being performed is an economic one and therefore it is the idea of *economic activity* that needs to be explored. What is meant by the term ‘economic activity’ or what could be considered as an economic activity. An economic activity could be said to include, offering of goods or services on a given market, no need for an economic purpose or profit motive, regardless of the legal status of the entity and the way in which it is financed. Thus the term ‘economic activity’ has been given an expansive interpretation by the Community courts and the Commission in Europe over a period of time.²²⁶

²²⁴ [2002] 4 CMLR 913, para.57.

²²⁵ It would be relevant to note here the observation of the CFI in the present circumstances in *SELEX Sistemi Integrati SpA v Commission*, [2007] 4 CMLR 372, wherein it was observed:

“the various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic.”

Source: Richard Whish, *Competition Law*, 6th ed., Oxford University Press, 2009 at p.83.

²²⁶ The fact that an organization lacks profit motive or does not have an economic purpose, does not in itself mean that an activity is non economic. On this basis the Commission held in *Distribution of Package Tours during the 1990 World Cup*, [1994] 5 CMLR 253, para. 43, that FIFA, the body responsible for the 1990

Second question: What is an ‘agreement’ for the purposes of Article 101(1)?

The answer to the above question again depends on the level of interpretation given by the Community courts and the Commission from time to time. Some of the examples of agreements are as follows:²²⁷

(i) Trademark delimitation agreement.²²⁸

(ii) Settlement of a patent action.²²⁹

(iii) Gentleman’s agreements.²³⁰

(iv) Simple understandings.²³¹

The aforementioned list is not an exhaustive one and there can be many instances of agreements between undertakings which attract Article 101(1) of the EC Treaty. There can be various forms which an agreement might take and therefore there can be no hard and fast rule in determining whether an agreement attracts Article 101(1) or not.²³² It may be noted here

football world cup in Italy, as well as the Italian football association and the local organizing committee were undertakings subject to article 81.

Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.84-85.

²²⁷ Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.97 & 98.

²²⁸ *Re Penney’s Trademark OJ* [1978] L 60/19. (Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.97)

²²⁹ Case 65/86 *Bayer v Sullhofer* [1988] ECR 5249. (Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press), at p.97)

²³⁰ Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661. (Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.97)

²³¹ *Re Stitching Sigarettindustrie Agreements OJ* [1982] L232/1. (Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.97)

²³² Connected agreements may be treated as a single one. (*ENI/Montedison OJ* [1987] L 5/13); An agreement may be oral. (Case 28/77 *Tepea v Commission* [1978] ECR 1391); The Commission will treat the contractual terms and conditions in a standard form contract as an agreement within Article 81(1). (*Putz v Kawasaki Motors*

that the concepts of ‘agreement’, ‘decision’ and ‘concerted practice’ overlap.²³³ The Commission may characterise the arrangements made by the parties to a complex cartel as constituting an arrangement and/or a concerted practice, and this approach has been upheld by the Community Courts.²³⁴ The court of justice has stated:²³⁵

“The list in Article 81(1) of the Treaty is intended to apply to all collusion between undertakings, whatever form it takes. There is continuity between the cases listed. The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between the types of collusion.”

The word ‘agreements’ in article 101(1) is not confined to legally binding contracts. As the court of first instance explained, “it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way.”²³⁶ However if the parties are still in the stage of negotiations and have not reached a consensus, there will not be an agreement for the purposes of Article 101(1).²³⁷ An agreement allegedly imposed by a supplier on his customers is still an agreement within the meaning of Article

(UK) Ltd. OJ [1979] 1 16/9, [1979] 1 CMLR 448; Sandoz OJ [1987] L 222/28, [1989] 4 CMLR 628, upheld on appeal Case 277/87 Sandoz Prodotti Farmaceutici SpA v Commission [1990] ECR I – 45); An agreement which has expired by effluxion of time but the effects of which continue to be felt can be caught by Article 81(1). (Case T-7/89 SA Hercules NV v Commission [1991] ECR II – 1171, [1992] 4 CMLR 84, para. 257, Case 51/75 EMI Records Ltd. v CBS UK Ltd. [1976] ECR 811, pp.848-849, [1976] 2 CMLR 235, p 267).

Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.98.

²³³ Thus an ‘agreement’ can also be a ‘decision’. FEDETAB, OJ 1978 L224/29. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.51)

²³⁴ See, Polypropylene, OJ 1986 L230/1. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.51)

²³⁵ Case C-49/92P *Commission v Anic Partecipazioni*.

²³⁶ Case T-7/89 *Hercules v Commission* [1991] ECR II – 1171. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.52)

²³⁷ Case E – 3/97 *Jaeger v Opel Norge* [1999] 4 CMLR 147.

101(1). In Europe the position all along has been that national legislative measures may restrict competition but they cannot as such constitute an agreement in violation of Article 101(1).²³⁸

The concept of ‘agreement’ is an important one when determining the prosecution of cartels operating over a long period of time. This is because it is very difficult to prosecute cartels in their entirety due to the time and the costs involved. Many cartels are and almost all cartels are complex and of a long duration. Firms may go in and go out of a cartel over a period of time and this may present a difficulty for the competition authority. Active membership of a cartel may change over a period of time and this may present a problem for the competition authority. In Europe, the concept of a ‘single overall agreement’ operates whereby even those firms are made responsible who may not be involved in the operation of the agreement on a day to day or continuing basis.²³⁹ Another question that comes up for consideration is whether there is any difference between agreement and concerted practice.²⁴⁰ The two are

²³⁸ Case 5/79 *Buys* [1979] ECR 3203, [1980] 2 CMLR 493; *Bulk Oil v Sun International* [1986] ECR 559.

²³⁹ In the celebrated case of *Polypropylene*, OJ [1986] L 230/1, the Commission investigated a complex cartel agreement in the petrochemicals sector involving 15 firms over many years. It held that the detailed arrangements whereby the cartel operated were all part of a single overall agreement; this agreement was oral, not legally binding and there were no sanctions for its enforcement. Having established that there was a single agreement, the Commission concluded that all 15 firms were guilty of infringing article 81, even though some had not attended every meeting of the cartel and had not been involved in every aspect of its decision making; participation in the overall agreement was sufficient to establish guilt. (Source: Richard Whish, *Competition Law*, 6th ed., Oxford University Press, 2009 at p.101).

²⁴⁰ What is a concerted practice? *ICI v Commission*, Cases 48/69 etc [1972] ECR 619, [1972] CMLR 557, was the first important case on concerted practices to come before the ECJ. The Commission had fined several producers of dyestuffs which it considered had been guilty of price fixing through concerted practices. Its decision relied on various pieces of evidence, including the similarity of the rate and timing of price increases and of instructions sent out by parent companies to their subsidiaries and the fact that there had been informal contact between the firms concerned. The ECJ upheld the Commission’s decision. It said that the object of bringing concerted practices within article 81 was to prohibit: ‘a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.’ In *Suiker Unie v Commission*, Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295, p.425, the ECJ elaborated upon this test. The Commission had held that various sugar producers had taken part in concerted practices to protect the position of two Dutch producers on their domestic market. The producers denied this as they had not worked out a plan

conceptually different in Europe but the courts have in Europe over a period of time realised that there is little difference between the two. Linguistically, there might be a difference between the two but legally there is no difference. The courts in Europe have adopted a ‘joint classification’ approach whereby there is no difference between the two ideas viz. ‘agreement’ and ‘concerted practice’. The Commission adopted a joint classification approach in the case of *British Sugar*²⁴¹ stating at paragraph 70 of its decision:

“The court of first instance in various judgments made it clear that it was not necessary, particularly in the case of a complex infringement of considerable duration, for the Commission to characterize it as exclusively an agreement or concerted practice, or to split it up into separate infringements. Indeed, it might not even be feasible or realistic to make any such distinctions, as the infringement as a whole might present characteristics of both types of prohibited conduct, while considered in isolation some of its manifestations could more accurately be described as one rather than the other. In particular, it would be artificial to subdivide continuous conduct, having one and the same overall objective, into several discrete infringements. The court of first instance in its judgments therefore endorsed the Commission’s dual characterization of the single infringement as an agreement and a concerted practice, and stated that this had to be understood, not as requiring, simultaneously and cumulatively, proof that each of the factual elements contained in the continuous conduct presented the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole which comprised a number of

to this effect. The ECJ held that it was not necessary to prove that there was an actual plan. Article 81 strictly precluded: ‘any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.’

²⁴¹ OJ [1999] L 76/1, [1999] 4 CMLR 1316.

factual elements some of which in isolation would be characterized as agreements whereas others would be considered as concerted practices.”

The concept of agreement has undergone a change over a period of time. For example, advisers and consulting firms now have to be cautious in Europe when they become aware of anti competitive activities involving their clients. In a very recent case decided in the year 2008, by its judgment dated 8 July 2008,²⁴² the court of first instance ruled that firms providing consultancy and advisory services to cartel participants could be found liable for the entire cartel behaviour in the same way as if they were themselves active in the markets directly affected by cartel. While the court confirmed that the Commission may prosecute non market participants for their role as facilitators of cartel activity, its judgment nevertheless raises a number of issues about the limits of the Commission’s prosecutorial powers.

Third question: What is a ‘decision’ for the purposes of Article 101(1)?

The next question that beckons is what is a ‘decision’ for the purpose of article 101(1). How are these decisions taken and what is the modus operandi of taking such decisions. Such decisions may result in the formation of trade associations which may operate by way of a cartel. A trade association may take all the decisions related to the cartel and thus may require detection under article 101. Therefore a ‘decision’ refers to a practice whereby a trade association is formed and it takes decisions on behalf of the cartel.²⁴³

²⁴² Case T-99/04, *AC - Treuhand AG v European Commission*.

²⁴³ It has been held that the constitution of a trade association is itself a decision, *Re ASPA JO* [1970] L 148/9, [1970] CMLR D25; *National Sulphuric Acid Association OJ* [1980] 3 CMLR 429, as well as regulations governing the operation of an association, *Publishers Association – Net Book Agreements OJ* [1989] L 22/12, upheld on appeal Case T-66/89 *Publishers Association v Commission (No.2)* [1992] ECR II – 1995, partially annulled on appeal to the ECJ in Case C-360/92 *P Publishers Association v Commission* [1995] ECR I-23, [1995] 5 CMLR 33; *Sippa OJ* [1991] L60/19; *Coapi OJ* [1995] L122/37; *Nederlandse Federative Vereniging*

Fourth question: What is meant by a concerted practice for the purposes of Article 101(1)?

The concept of ‘concerted practice’ in Article 101(1) has been defined by the court of justice as covering:

“..... a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been included, knowingly substitutes practical cooperation between them for the risks of competition.”²⁴⁴

The court made an important point in the case of *ICI v Commission (Dyestuffs)*,²⁴⁵ that whilst parallel behaviour by itself did not constitute a concerted practice, it may amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market. The court further noted that in order to decide the question whether market conditions diverge from the normal, it is necessary to examine the nature of the market for the products in question. The court in the aforementioned case found that the market for dyestuffs was fragmented and divided along national lines. The similarity of the rates and the timing of the price increases could not be explained away as the result of parallel yet independent behaviour prompted by market forces. In particular, the concerted prior announcement of price changes enabled the undertakings to eliminate in advance all uncertainty between them as to their future conduct on the various markets. The court said:

*voor de Grootlandel op Elektrotechnisch Gebied and Technische Unie (FEG & TU) OJ [2000] L 39/1, [2000] 4 CMLR 1208; Visa International OJ [2001] L 293/24; Visa International – Multilateral Interchange Fee OJ [2002] L 318/17. (Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.103).*

²⁴⁴ Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.61.

²⁴⁵ [1972] ECR 619.

“Although every producer is free to change his prices, taking into account in doing so the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action, such as the amount, subject matter, date and place of the increases.”

Another typical situation is the parent subsidiary relationship in a commercial context. The community courts have over a period of time developed the principle of concerted practice by interpreting that a wholly owned subsidiary enjoys sufficient autonomy so that it should not be considered to form part of the same economic unit with its parent. Difficulties may however arise in cases of partly owned subsidiaries. In *Gosme/Martell – DMP*,²⁴⁶ the Commission considered an agreement between Martell and DMP, the latter being a joint subsidiary owned 50% by Martell and 50% by Piper Heidsieck. The Commission that Martell and DMP were independent undertakings. At the relevant time, Martell was not in a position to control the commercial activity of DMP because:

- (i) the parent companies each held 50% of the capital and voting rights of the DMP;
- (ii) half the supervisory Board members represented Martell shareholders and half Piper shareholders;
- (iii) DMP also distributed brands not belonging to its parent companies;
- (iv) Martell and Piper products were invoiced to customers on the same document; and
- (v) DMP had its own sales force and it alone concluded the conditions of sale with its customers.

²⁴⁶ OJ 1991 L185/23.

Therefore why do we include ‘concerted practices’ within the scope of article 81. The idea behind a concerted practice is that there may be certain activities which are not directly connected with the undertaking, decision and agreement in question and therefore cannot be inquired upon directly. For example, the parties to a cartel may do all that they can to destroy incriminating evidence of meetings, emails, faxes and correspondence, in which case it would be very difficult for the competition authority to infer practice or conduct that is adversely affecting competition. It is to prevent this that the concept of ‘concerted practice’ comes in and gains ground.

In *Pierre Fabre Dermo – Cosmetique SAS v President de l Autorite de la concurrence*²⁴⁷ the reference for a preliminary ruling concerns the interpretation of article 81(1) and (3) EC and of Commission Regulation (EC) No. 2790/1999 on the application of Article 81(3) of the treaty to categories of vertical agreements and concerted practices. Pierre Fabre Dermo Cosmetique (PFDC) was one of the companies in the Pierre Fabre group. It manufactured and marketed cosmetics and personal care products and had several subsidiaries. The products at issue were cosmetics and personal care products which were not classified as medicines and were therefore not covered by the pharmacists monopoly laid down by the code de la santé publique (Public Health Code). The contracts awarded by PFDC for the distribution of cosmetics and personal care products in respect of certain brands stipulated that such sales must be made in a physical space and that a qualified pharmacist must be present. The referring court in the present case stated that it was agreed between the parties that the requirements exclude de facto all forms of selling via the internet.²⁴⁸ In the course of their

²⁴⁷ [2011] ECR 0000.

²⁴⁸ By decision of 27 June 2006, the Board opened up an ex officio investigation of practices in the distribution sector for cosmetics and personal care products. By decision No. 07-D-07 of 8 March 2007, the Board approved and made binding the commitments proposed by the undertakings under investigation, with the exception of the PFDC group to amend their selective distribution contracts in order to enable members of their networks to sell

hearing by the Rapporteur on 11 March 2008, the representatives of inter alia PFDC explained the reasons that had led the PFDC group to ban the sale of their products via the internet. The Board, in view of the fact that there might be an appreciable effect on intra – community trade examined the practices in light of the provisions of Article L.420-1 of the Commercial Code and Article 81 EC. In the decision, the Board found that in prohibiting its authorized distributors from selling products via the internet, PFDC limits the commercial freedom of its distributors by excluding a means of marketing its cosmetics and personal care products. It was also observed that PFDC restricts the choice of consumers wishing to purchase online.²⁴⁹ PFDC claimed inter alia that it had the right to ban internet sales as the organizer of a network retains the right to ban sales by an authorized distributor out of an unauthorized place of establishment. There was another question which is very important to discuss here. The question was that of an individual exemption pursuant to Article 81(3) EC (now article 101(3) TFEU) and article L.420-1 of the Commercial Code. With regard to the aforementioned question, the Board took the view that PFDC had not demonstrated economic progress or that the restriction on competition was indispensable in circumstances making it eligible for an individual exemption. On 24 December 2008, PFDC brought an action before the referring court for an annulment and in alternative the amendment of the Decision. By document dated 11 June 2009, the referring court gave the decision that any general and absolute ban on selling of contract goods to end users, imposed by a supplier on its authorized distributors within the framework of a selective distribution network constitutes a hardcore restriction on competition by object for the purposes of Article 81(1) EC whatever

their products via the internet. The Rapporteur General decided that the practices of the PFDC group would be subject to a separate examination.

²⁴⁹ The Board found that the ban necessarily had the object of restricting competition which is in addition to the limitation of competition inherent in the manufacturer's very choice of a selective distribution system, which limits the number of distributors authorized to distribute the product and prevents distributors from selling the goods to non authorized distributors.

the market share held by that supplier. The referring court also decided that the block exemption was not applicable to PFDC in the present case. Therefore in light of the above discussion, the following final question was referred to the court for consideration: *Does a general and absolute ban on selling contract goods to end users via the internet, imposed on authorized distributors in the context of a selective distribution network, in fact constitute a hardcore restriction of competition by object for the purposes of Article 81(1) EC which is not covered by the block exemption provided for by Regulation No. 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC?*

The authority in the final verdict ruled that the ban on internet sales is violative of the relevant provisions of the EC Treaty and also the block exemption is also not applicable to PFDC in the present case. The authority reasoned as follows: the authority considers that the ban, having regard to its anti competitive object is a hardcore restriction pursuant to Article 4(c) of Regulation number 2790/1999 and is prohibited in accordance with Article 81(1) EC. The ban limits active and passive sales in accordance with Article 4(c) of Regulation 2790/1999. The authority noted that the internet is a new channel of distribution and an important tool for increasing competition which must be reconciled with more traditional channels such as selective distribution thereby justifying the imposition of certain conditions. The authority noted in the present case that the products in question are not medicinal products and that there is no regulatory requirement either at national or Union level which would mandate their sale in a physical space and in the presence of a qualified pharmacist thereby justifying the general and absolute ban on internet sales in question. PFDC's public health and safety claims would appear therefore to be objectively unfounded. The court stated that PFDC's claims regarding the correct use of its products and the need for advise by a

pharmacist do not constitute an objective justification for the general and absolute ban on internet sales.

Cartels & India:

The MRTP Act, 1969: The problems & a precursor to the Competition Act, 2002:

The earlier response of the government of India to the cartel problem was not sufficient. It provided for restrictive trade practices which were required to be registered with the Monopolies Commission in India. The purpose behind such registration was that whenever a complaint was made against the business enterprise which carried out the restrictive trade practice, it was easy to track down the enterprise since all the details were with the Commission.²⁵⁰ A restrictive practice was defined as follows in the MRTP Act, 1969 as:

A trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about the manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

The primary test for cases coming before the MRTP Commission was that whether the alleged anti competitive agreement or abuse of dominant position is injurious to public interest. A pertinent case to note here is that of *Voltas Limited v Union of India and Others*,²⁵¹

²⁵⁰ The earlier legislation providing for regulation of private investment through the licensing procedure was the Industries (Development and Regulation) Act, 1951. This meant that private investment was discouraged and the government kept almost all the sectors of the economy with itself. The private sector was leashed through the establishment of a system of licenses.

²⁵¹ Civil Appeal No. 2252 of 1994, Judgment of Supreme court dated 7-2-1995, as appears in S.M.Dugar, *Guide to Competition Law*, 5th ed. 2010, (Lexis Nexis Butterworths Wadhwa), at p.942.

in which the Commission had recorded its finding under section 38 of the MRTP Act, 1969, as follows:

“We have gone through voluminous records and pleadings pertaining to these inquiries, evidence produced by the parties, oral arguments, written submissions and cases referred to by the parties and are of the view that no case of gateways under section 38(1), as pleaded has been made out by the Voltas in these proceedings.

Likewise the manufacturer, Simtools Ltd. in RTP Enquiry No.483 of 1987 has also failed to make out any case for gateways. Therefore, we hold that the respondents have indulged into the restrictive trade practices, as alleged in the notice of inquiry, and those practices are prejudicial to the public interest in each of the 15 inquiries.”²⁵²

The Competition Act, 2002 of India and cartels:

A cartel is defined as follows in the Competition Act, 2002:

S.2.(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;

When we talk of cartels in the Indian context, we can have a look at section 3 of the Competition Act, 2002, (the ‘Act’) which talks of anti competitive agreements. There are many components which make up section 3 of the Act and a plain and simple reading would give us a clear picture of as to what is meant by the term anti competitive agreements particularly with reference to cartels.

²⁵² The Supreme Court held in the instant case that “According to us, the Commission was required to go deeper into the matter and to record findings in respect of different agreements whether the objectionable clauses of the registered agreements were prejudicial to the public interest.

Section 3 of the Competition Act, 2002, refers to anti competitive agreements. These agreements result in the course of trade and are hardly found in writing. There has to be a concerted action to determine the effects of an agreement as anti competitive. It need not be a formal arrangement and it need not also be in writing. Section 3(3) recognises the term cartel with reference to a sector. Accordingly, there could be sugar cartels, tobacco cartels, cement cartels and so on. Section 3 targets ‘certain’ anti competitive agreements. Section 19(1) sets out the procedure for the initiation of the process of inquiry into an anti competitive agreement. It is to the effect that the Commission may inquire into any alleged contravention of the provisions contained in section 3(1) on its own motion or on the receipt of a complaint.²⁵³ But how is a person supposed to know that an agreement is anti competitive. How can one understand that there has been an ‘alleged contravention’ of section 3(1) of the Act. There are so many parties involved in a business transaction like suppliers, sub suppliers, agents, distributors and retailers. Therefore each and every one of them cannot know the exact terms of an agreement which is falling within the purview of section 3(1). Thus what is the solution. The solution is in the fact of following a ‘rule of reason’ approach whereby every case is decided on its merits and a case by case approach is followed.²⁵⁴

Another important point that arises here is that can multidisciplinary partnerships, which

²⁵³ T.Ramappa, *Competition Law in India*, 2nd ed. 2009, (Oxford University Press), at p.20.

²⁵⁴ The ‘rule of reason’ has been lucidly explained in Board of Trade of City of Chicago v US, 246 US 231 (1918), wherein it stated:

“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint is imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.”

Source: T.Ramappa, *Competition Law in India*, 2nd ed. 2009, (Oxford University Press), at p.21-22.

would allow delivery of composite services, be allowed. For example, there are various kinds of professionals like lawyers, chartered accountants, cost accountants and company secretaries, etc. Can these professionals provide services under one roof. This is the demand of the time and requires consideration by each and every professional as well as academician. The Competition Act defines the term ‘agreement’ to include any arrangement, understanding or action in concert. Such arrangement, understanding or action in concert could either be in writing or oral; and it could either be enforceable or not by legal proceedings.²⁵⁵ The Competition Act, 2002, provides that no enterprise or association of enterprises or person or association of persons can enter into any agreement with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services that causes or is likely to cause an appreciable adverse effect on competition within India, and any such agreement entered into shall be void.²⁵⁶ The basic question as to what is an anti competitive agreement is discussed with the help of the following points. Section 3(3) provides for certain statutory presumptions as to adverse effect of the agreement or combination on competition where the impugned agreement provides for the following:

- 1) Direct or indirect determination of sale or purchase price.
- 2) Limiting or controlling production, supply, markets, technical development, investment or provision of services.
- 3) Sharing of market or source of production or provision of services by territory allocation [geographical area allocation], product or service allocation [particular type of goods may be given to particular type of dealers], allocation of customers of particular market or allocation of market or source in any similar way.

²⁵⁵ Section 2(b), Competition Act, 2002. (Source: Seth Dua & Associates, *Joint Ventures & Mergers & Acquisitions in India – Legal & Tax Aspects*, 1st ed. 2006, (Lexis Nexis Butterworths Wadhwa) at p.424)

²⁵⁶ Section 3(1) and 2, Competition Act, 2002.

4) Direct or indirect bidding or collusive bidding.

Further any agreement of the following nature is likely to have an adverse effect on competition within India:²⁵⁷

- 1) Tie in arrangement which means and includes any agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods.
- 2) Exclusive supply agreement, which means and includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
- 3) Exclusive distribution agreement, which means and includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any market area for the disposal or sale of the goods.
- 4) Refusal to deal, which means and includes any agreement which restricts or likely to restrict by any method the persons or class of persons to whom goods are sold or from whom goods are purchased.
- 5) Re-sale price maintenance, which means and includes any agreement to sell goods on condition that the re sale of goods shall be at the prices stipulated by the seller, unless it is clearly stated that prices lower than those prices may be charged.

The primary rule behind the operation of section 3 of the Act is that the agreement in question should cause an appreciable adverse effect on competition within India. The section could be split into the following core areas:

1. Agreement.

²⁵⁷ Section 3(4), Competition Act, 2002.

2. Effect of the agreement on competition.
3. That effect being adverse on competition.
4. That adverse effect being appreciable.

The first requirement is that there should be an agreement. For if there is no agreement there can be nothing that can be termed as anti competitive. The second requirement is the effect of the agreement on competition because what we are concerned here is with effect on competition. The third requirement is that the effect on competition should be adverse because if there is nothing disturbing about the agreement in question, there is no need to restrict it. The fourth and last requirement is that the adverse effect of the agreement should be substantial on competition.

It needs to be noted that the phrase '*appreciable adverse effect on competition*' has to be interpreted in light of the judicial decisions given by the courts world over. In the US, it was held in the case of *United States v Griffith*,²⁵⁸:

- I. Even if there was absence of specific intent to restrain or monopolise trade, it may be violative of Sherman Act;
- II. It is sufficient that a restraint of trade results as a consequence of the defendant's conduct or business arrangements. It is not necessary to find a specific intent to restrain trade to say that sections 1 and 2 of Sherman Act have been violated.
- III. Specific intent in the sense in which the common law used the term, is necessary only where the act falls short of the results prohibited by the Sherman Act.
- IV. The use of the Monopoly Power, however legally acquired, foreclose competition, to gain competitive advantage, or to destroy a competition, is unlawful.

²⁵⁸ 334 US 100, as cited in S.M.Dugar, *Guide to Competition Law*, 5th ed. 2010, (Lexis Nexis Butterworths Wadhwa) at p.688.

CARTELS & LENIENCY IN THE INDIAN CONTEXT

Powers have been given to the Competition Commission of India to impose lesser penalty on the persons who come forward with important information with respect to the alleged violation of section 3 of the Competition Act, 2002. This provision draws its strength from the 'leniency programme' prevalent in Europe. This mechanism of lesser penalty provisions is particularly useful in the detection of cartels and helps in their detection and prosecution. Cartels operate by way of price fixing which means that cartels of producers come together and decide upon a fixed charge to be taken from some or all the consumers. The simplest form is an agreement on the price or prices to be charged on some or all customers. Cartel behaviour is very complex and strikes at the very purpose of consumer welfare in an adverse manner. The nature of a cartel is secretive and therefore it may become very difficult to detect and prosecute it. It is important to note that the lesser penalty provisions in India has its corresponding regulations across different jurisdictions. But before embarking on a detailed study of the leniency mechanism, it may be relevant to note here the law as it exists in India. The following will help us in understanding the position better. Amnesty provision has been made for making a full and true disclosure in respect of alleged violation of section 3 relating to cartel as defined in section 2(c) of the Competition Act, 2002 in which case the Commission may impose lesser penalty than the penalty provided in the Act.²⁵⁹ The conditions to be fulfilled in this behalf are:

(a) The Commission is satisfied that full and true disclosure in respect of alleged violation of section 3 has been made by the producer, seller, distributor, trader or service provider included in any cartel;

²⁵⁹ S.M.Dugar, *Guide to Competition Law*, 5th ed. 2010, (Lexis Nexis Butterworths Wadhwa), at p.1072.

- (b) The disclosures made are vital;
- (c) The disclosures have been made before the receipt of investigation report directed under section 26;
- (d) The producer, seller, distributor, etc. has made the full, true and vital disclosures;
- (e) The person making the disclosure has continued to cooperate with the Commission till completion of proceedings before the Commission.
- (f) The producer, seller, distributor, etc. has complied with the condition on which lower penalty was imposed by the Commission and has not made any false disclosure.

Now coming to the position prevalent in other jurisdictions with regard to lesser penalty provisions or better known as the ‘leniency programme’. US and European courts have adopted a ‘parallelism plus’ approach which requires showing the existence of ‘plus factors’ beyond merely the firm’s parallel behaviour, in order to prove that an antitrust violation has occurred. This has been adopted in some cases in Brazil as well.²⁶⁰ In India too cartels have been alleged in various sectors like cement, steel, tyres, trucking, family planning device, etc.

²⁶⁰ Source: www.cci.gov.in/images/media/completed/cartel_report1_20080812115152.pdf at p.13. Further on page 14, it is enumerated as follows:

In a leading case in Brazil, the Administrative Council for Economic Defence (CADE) adopted the ‘parallelism plus doctrine to prove the occurrence of a collusion amongst the three biggest Brazilian Steel companies in order to raise plain steel prices to the same level at the same time. CSN readjusted its prices in August 1st 1996 (3.65% for hot plated steel sheets and 4.34% for cold plated steel sheets), while Cosipa readjusted its prices in August 5th 1996 (3.59% for hot plated steel sheets and 4.31% for cold plated steel sheets), and Usiminas readjusted its prices in August 8th 1996 (4.09% for hot plated steel sheets and 4.48% for cold plated steel sheets). The new prices were preceded by communiqués sent to buyers in July 17th 1996 (CSN) and July 22nd 1996 (Cosipa and Usiminas). Besides a meeting was held in the Ministry of Finance’s Secretariat for Economic Monitoring (SDE) in July 30th 1996. Representatives of the three companies and one of the steel producer’s association informed the government body that they would raise their prices. The Secretary replied that the practice would be eligible for cartel. This case was decided under the parallelism plus theory. So the plus factors found as sufficient to conclude that there was a collusion were: (a) the fact that the first company to raise the price was the company with the lowest market share; (b) there wasn’t an increase in costs that could explain the joint raise of prices; (c) the companies used the same way at almost the same time to communicate the price raising; (d) the joint meeting at SDE.

India is also believed to be a victim of overseas cartels in soda ash, bulk vitamins, petrol, etc. But once we are able to deal with the important question as to how to detect and prosecute a cartel all our other worries would be taken care of by itself.

CONCLUSION

Observations & Recommendations:

Therefore it could be seen that the provision relating to cartels in the Indian Competition Act, 2002, are sufficient in dealing with the problem of cartels in the present era. The earlier position contained in the MRTP Act was insufficient in dealing with the problem of cartels. Thus came the Competition Act, 2002 which dealt with the problem of cartels in a very specific way. It is clear that cartels pose an open threat to competition worldwide. The introduction of a leniency programme has been able to detect cartels to a certain extent. However a more pro consumer approach would be beneficial to detect cartels in the long run.

The authors of the present paper suggest as follows:

There should be an additional set of leniency provisions apart from the Lesser penalty regulations of 2009 for India. These could be a new set of provisions or they can be made a part of the existing set of regulations. The following provisions may be given attention to:

1. An enterprise shall be entitled to immunity or leniency only if they fulfil the conditions laid down in these regulations
2. Conditions for receiving leniency:

In order to receive immunity or leniency, an enterprise must

- a) End all illegal activity, except insofar as the Commission believes that the continuance of the activity is beneficial
- b) Not have been the ringleader of the cartel or coerced anyone into joining the cartel;

- c) Not have been found guilty of cartelization in the past
- d) Provide full and continuing disclosure to the Commission with respect to the cartel; and
- e) Plead guilty to any charges related to that activity

3. Rate of immunity

(1) The first informant shall receive full immunity subject to the conditions mentioned in this regulation if the information is provided before the investigation has started or before the Commission has adequate evidence to convict the members of the cartel.

(2) The later informants shall receive leniency ranging from 10% to 100% depending on the value added by the information they provide to the Commission. The chronological order of providing this information shall be a relevant factor in determining the amount of leniency shown, with earlier disclosures being shown greater leniency.

4. Continuous Cooperation

In order to receive immunity or leniency, an applicant must cooperate with the commission.

Cooperation includes:

- (a) Providing the Commission promptly with all relevant information and evidence that comes into the applicant's possession or under its control;
- (b) Remaining at the disposal of the Commission to reply promptly to any requests that, in the Commission's view, may contribute to the establishment of relevant facts;
- (c) Making current and, to the extent possible, former employees and directors available for interviews with the Commission;
- (d) Not destroying, falsifying or concealing relevant information or evidence; and
- (e) Not disclosing the fact or any of the content of the leniency application before the CA has notified its objections.

1. Marker System

As long as certain information is provided at the time of the original application being made, additional time should be given to an applicant to complete their application if the applicant can show a good faith basis for requiring the additional time. The information that has to be given at the time of the marker being given should include:

- (a) The basis for the concern which led to the leniency approach;
- (b) The parties to the alleged cartel;
- (c) The affected product(s);
- (d) The affected territories;
- (e) The duration of the alleged cartel;
- (f) The nature of the alleged cartel conduct; and
- (g) Information on any past or possible future leniency applications to any other competition authorities in relation to the alleged cartel.

2. Confidentiality

The information provided by the applicant as well as the identity of applicant should be kept confidential till possible. The information can be released once the notice has been served upon the other members of the cartel as the testimony of the applicant might be necessary for the case to proceed.

3. Information

The following information should be provided by the applicant when applying for leniency

- (a) The name and address of the legal entity submitting the immunity application;
- (b) The other parties to the alleged cartel;
- (c) A detailed description of the alleged cartel, including:
 - (d) The affected products;
 - (e) The affected territory (-ies);
 - (f) The duration; and nature of the alleged cartel conduct;

(g) Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence); and

(h) Information on any past or possible future leniency applications to any other competition authorities in relation to the alleged cartel.

10. Oral Applications

Upon the applicant's request, the Commission may allow oral applications. In such cases the statements may be provided orally and recorded in any form deemed appropriate by the Commission. The applicant will still need to provide the Commission with copies of all pre-existing documentary evidence of the cartel. The oral application will be recorded and transcribed by the Commission.
