INTERDICTION OF CARTELS WITHIN INDIA

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WHAT IS A CARTEL?

The basic need of a conceptual analysis of cartel is to distinguish between cartels and other types of cooperative agreements.

Black's Law Dictionary[1] defines cartel as:

'[a] combination of producers or sellers that join together to control a product's production or price; [a]n association of firms with common interests, seeking to prevent extreme or unfair competition, allocate markets, or share knowledge.'

The *Organisation of Economic Co-operation and Development (OECD)* defines cartel as:

'A cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits or combination of these.'

Oxford's Advanced Learner's Dictionary[2] defines cartel as:

'A group of separate companies that agree to increase profits by fixing prices and not competing with each other.'

It is visible from the above stated definitions that a cartel is basically an agreement of cooperation amongst firms with similar interest to protect their mutual interests rather than competing with each other. Such agreements can be also termed as horizontal agreements as they are between firms of same levels.

[1] Bryan A. Garner (ed.), *Black's Law Dictionary,* 8th ed.(Thomas West,2004)
[2] https://www.oxfordlearnersdictionaries.com/definition/english/cartel?q=cartel, Retrieved 2018-09-01

MAJOR CASES OF CARTELS AND THEIR OUTCOMES

As it is already evident from the definitions that cartels are opposite of competing business bodies hence it is important to study as to what leads the business rivals to form cartels. This can be very well understood by analysing the cases of United States, Germany and Japan which are considered as highest cartelised countries throughout world. Further a comparative analysis between India and the former countries will help in finding out where the fault line actually occurs.

A. United States

Earlier the freedom to trade and free competition became a part of United States legal framework. The American society had a belief of free competition but being largely occupied by small entrepreneurs and farmers, there was an aversion towards authoritarianism and trade monopolies[3]. This social, economic and political laissez-faire ensured that individuals can compete without restraint. As a result of the same amenities like railway saw major improvements which resulted in the vast pool of opportunities for opening wider markets leading to creation of single large domestic market.

In lieu of the same centralization in terms of management seemed to be a much more efficient way to strive to achieve economies of scale. Consequently importance was given to the bigness of corporations that were capable of mass production. Due to which the first amenity to undergo consolidation was the railways. It was assumed that bigger corporations would be able to handle the railways better than smaller ones and hence such a vague assumption resulted into monopolies that rigged the prices in order to ensure a profitable investment. Such an activity was very harmful for the farmers as they were the worst affected as they had to pay excessive freight charges for the transportation of their produce.[4]

In order to be in the race the competitors had to price cutting but it was eventually leading to heavy losses. Hence the American corporations came with the idea of pooling agreements in order to ensure the minimum price was fixed so that losses can be curtailed. Later the American

[3] Richard Hofstadter, 'What happened to the Antitrust Movement?' in *The Political Economy of the Sherman Act: The First One Hundered Years*, ed. E. Thomas Sullivan, (OUP, 1991), 21-30
[4] Charles R. Geisst, *Monopolies in America : Empire Builders & Their Enemies from Jay Gould to Bill Gates* (OUP, 2000), 15.

Government passed the Interstate Commerce Act as the trusts and pooling agreements were seen as a threat to the democracy. Later Sherman Act was passed in 1890 which is till date considered as the 'Magna Carta' of all the anti-trust movements.[5]

B. Germany

Germany was known as the land of cartels, with a large number of industrial cartels in existence.[6] Since early times Germany had a feeling of disappointment towards free competition and hence this gave rise to the country's fascination for cartels. Such fascination led to excessive growth due to rapid industrialization but with time it was felt by the producers that such kind of unrestrained competition was not leading to a profitable business. It led to overpopulation, low prices and low demand[7] as people weren't able to buy goods as such hiked prices.

The rapid industrialization led to mass scale disruption of societal organizations. The large scale industries completely dominated and stifled the growth of small scale industries as they not only had being controlling the factories but also the whole process of production, from sale to finished goods. Thus such level of occupation by the large scale industries left no space for the smaller entrepreneurs. Such consequences led the Germans to believe that there was a need of regulation of the Competition market.

Further it was seen that the German passed an Ordinance titled *Ordinance against the Misuse of Economic Power*[8] which established courts for the Cartel related activities called as Special Cartel Courts. Consequently, the emphasis was on complete ban of cartels without exception so that the legal basis on which the cartels were built can be eradicated. On January 1, 1958 the new German Competition Law was enacted but it did not completely prohibit cartels but instead prohibited any activity which distorted the competition in any way. At that time this law was subject to certain exceptions but with time it got tuned with the provisions of EU Competition law.

[5] David J. Gerber, *Global Competition: Law, Markets and Globalization* (OUP, 2010), 123.
[6] Robert Liefmann, *Cartels, Concerns and Trusts* (Batoche books, 2001), 60.
[7] David J. Gerber, *Law and Competition in Twentieth Century Europe: Protection Prometheus* (OUP, 2003), 32-37
[8] Robert Liefmann, *Cartels, Concerns and Trusts* (Batoche books, 2001), 213.

C. Japan

Historically Japan followed a 'closed country' policy (*Sakoku*)[9] according to which Japanese had to live in international isolation. Any kind of contact with Countries other than Holland, China and Korea was prohibited as they felt a threat from foreign religious practices especially from Christianity. Moreover the country did not feel is worthy enough to exchange precious metals with expendable foreign goods. This policy was followed by Japan for almost 200 years after which it was forced to allow the trade services from countries like Great Britain and other Western Countries due to the various Wars during that time. Soon Japan not only had to allow such trade practices but also had to discontinue is international isolation policy.

Japan's ideology regarding cartels was more optimistic than putting restriction upon trade but they were forced to imbibe antitrust laws within their legislation. With time the Japanese government realised the importance of cooperative agreements and hence they introduced regulatory measures to restrict competition. However with time Japanese consumers felt that the law relating to the cartel regulation were not consumer based but producer driven and hence there was a re- orientation in the Japanese Policy and emphasis was laid on competition based de-regulation.

D. India

a) **Soda ash cartel:** Alkali Manufacturers Association of India v. American Natural Soda Ash Corporation is one of the landmark cases relating to Soda Ash Cartel. Earlier in India there were 6 soda ash producers and they were producing as well as selling independently. But in order to prevent the competition among themselves they started working together and hence they started producing and selling together even in foreign countries at very cheap rates. Due to this reason the local producers of different nations started to face difficulties to survive in the competition. The same problem occurred in India. The Government of India charged a very high rate of anti-dumping duty upon this cartel so as to deter their activities.

b) **Cement cartel:** Since past many years it is visible that cement industry has achieved great demand in the Indian Society. During these progressing years, a great cartel was formed in the cement industry, being one of the most essential components of the real estate business.

[9] Marius B. Jansen, *The Making of Modern japan* (Harvard University Press, 2002), 91-93

Around 2000-2001 it was seen that many industries like Birla, Grasim, etc. had entered into cartels which eventually resulted into the price control in Indian market. On the occasion of the same a complaint was filed by the Competition Committee which stated that mainly in the city of Jabalpur, price of cement had hiked significantly. The complaint also gave information as to how the cement giants were involved in a concerted practice to control the price rates and its fixation. The MRTP ordered the companies involved (nine of them) and CMA to refrain from such activities relating to price fixing.

If we give a closer observation to the condition we see that in March, 2006 the production exceeded the demand and there was a declination in the quarterly cost of production. This further resulted in a sudden increase in the price by 11 % in a month without any proper reason and hence this can clearly be seen as a cartel activity.

c) **Aviation Turbine Fuel cartel:** A complaint was filed by the RIL to the competition commission of India against the Public Sector Undertakings which dealt with the fuel of aviation turbines. In the said complaint RIL had alleged that the Public Sector Undertakings like BPCL, HPCL, IOC had all formed a cartel at the time of the bid for the ATF. RIL being another Public Sector Undertaking wanted to supply ATF to Jet Airways but had hindrance due to the existing cartel. Though this cartel failed to achieve its objectives still it wasn't due to the laws prevailing then but due to their own internal issues.

d) **Cartel in Road Transport:** Road transport is considered as lifeline of the economic growth of any country which is even the scenario in India. Earlier there were less number of roads and hence were under the control of the government but with the growth in society the number and quality of roads were getting out of control from the hands of the government and hence they thought of inviting in people for investing and maintenance purposes. But soon these investors realized that transport is a very profitable field in India and started competing among themselves hence they started bidding the prices for such investments which were completely against the Competition Act, 2002.There were also instances where entry barriers could be observed which further resulted in territorial contracts being allotted to the members of the cartels which were again against the Competition Act, 2002. This didn't just stop to this extend but from investing into basic maintenance it went to bidding for prices related to raw materials like steel, coal, charcoal

etc. in the said case it was seen that CCI proved to be a failure as a governing authority because it could not prevent such activities due to lack of deterrent regulations..

e) **Trucking cartel:** Transportation has trucks as its basic unit in a country like India. Transportation of goods plays a very essential role in its price fixation as eventually the cost of transportation has to be met by the consumer. In this sector a huge cartel was involved which was operated by truck drivers who fixed the fare of truck operations and restrained any other truck operator to compete with them which led to an increase in the price of the transportation and eventually the goods itself. But due to no provisions regarding penalties or criminal punishment no restriction could be imposed.

f) **Vitamin cartel:** Vitamin cartels didn't just affect Indian but were also prevalent in international domains like Japan, France and Germany. Companies from various countries like these entered into contracts regarding the fixation of prices of the vitamins traded throughout the globe and made their own territorial distribution for the same. This even led to a barrier for the newly entering companies. This cartel was continued for a period of near about 10 years after which France and US coordinated and put a restrain to it by paying huge fines. India itself faced huge losses due to this cartel, but due to no provisions regarding penalties or criminal punishment no restriction could be imposed.

WHERE IS THE FAULT LINE?

An analysis of the effectiveness of the doctrine of restraint from the perspective of an anti – cartel regulation is necessary. A clause relating to restraint of trade is incorporated by the parties to the agreement. The basic purpose of such a clause is to cease competition among parties. The same logic same logic applies in any other transaction wherein the clause ceasing competition adds value to the product.

The basic problem arises when the restrictive clause turns out to be so controlling that it deprives the covenanter of any benefit, this is so because there has to be a proper balance between freedom of contract and freedom to trade. Though the parties are free to come in the contracts yet they cannot seize others' freedom to trade. Indian law considers a restrictive clause as restraint to trade if it operates beyond the period of the said contract. Hence by the

use of such laws the contract act seems to confine the restraint clauses to the tenure of the contracts and not beyond. But in cases of contract the court just evaluates upon the issues like quality of consent and bargaining power and not the market structure.

A cartel agreement is basically to cease competition among competitors by coming on a common ground relating to price, sales, production, etc. i.e. it basically deals with restraint of trade. Doctrine of restraint of trade is only useful if party to such a cartel contract wants to challenge the contract based upon restraint of trade. Under section 27 of the Contracts Act the party to the contract has to prove that the restrain stretched beyond the period of contract. But under Competition Act such parties can face serious challenges as under section 23 of Contracts Act an agreement whose consideration or object is illegal is *void ab-initio.*[10] Moreover, any party to such agreement will be held to be *in pari delicto.*[11] Thus the argument of *in pari delicto* can defeat the claim of a party challenging the validity of a cartel agreement. If the claimant had others choices than entering a cartel agreement to cease competition, but nonetheless willingly participated in such an agreement for his own profit then such a person cannot be allowed to take advantage of his own illegal acts and hence courts applied the principle of *in pari delicto*. On the other side if it is found that the claimant was coerced to enter in the anti-competitive agreements then such a party would be entitled to claim damages.[12]

If such an issue comes before the courts on India they too will be convinced on the test of the bargaining power agreement. However such an agreement may not always come to a rescue considering the typology of cartels as the applicability of *in pari delicto* is more efficient than the argument of bargaining power.

CHALLENGES FACED IN THE IMPLEMENTATION OF THE PREVAILING CARTEL REGULATIONS

1. No proper definition for cartel crime

[10] Indian Contract Act , section 23
[11] Kuju Collieries Ltd. V. Jharkhand Mines Ltd and others AIR 1974 SC 1892, Para 8
[12] Courage v. Crehan Case C- 453/99, [2001] ECR I-6297

There is no proper definition given for the cartel as a crime within the ambit of Section 2 and Section 3. An ambiguous or a vague definition proves to be ineffective. If the definition is framed too strictly it might materially hinder any chances of successful criminal prosecution. On the other hand, if the "cartel offence" is defined too generally it might lead to over-deterrence. This has two negative potential effects:

(a) Possible mischaracterisation of certain practices as hard core cartels.[13]

(b) Reluctance on the part of criminal prosecution authorities to enforce the offence, viewing the prosecution on the basis of such a vague definition unfair.[14]

2. No proper enforcement capacity

Along with an absence of a proper definition for the cartel crime there isn't any particular jurisdiction defined for the sake of cartel activities. Along with this there isn't any kind enforceability guidelines laid down even with regard to the prevailing law. It's not any specialised agency which had to take the case related to cartel activity and hence even if two different agencies handle two cases of same intensity of crime they might render different punishments. The judgement given by such agencies is also dependent on their inherent powers and jurisdiction which differs from agency to agency.

3. Societal based approach

To further understand the difficulties in the implementation of cartel laws one has to understand the basic difference between a top down approach and a bottom up approach. In the case of a bottom up approach the laws against cartel activity is backed by the society as they have come to an consensus that such activities are harmful for the society and hence should be deterred. Whereas in case of a top down approach the government justifies its stand on why the laws against cartel activities should be there (in the interest of the larger public good).

[13] M.K. Block and J.G. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L. J. 1131, 1136-1139 (1980).
[14] J. Kindl, *Some problems of introduction of cartel of offence into the new Criminal Cod]*, 17 PRAVNI ROZHLEDY 622 (2010)

Usually the laws governed by top down approach are the ones which prevail due to the government support. But eventually it should be realised that the cartel activity is against the welfare of the society as a whole and hence only when the people within the society come to a consensus relating to its deterrence, only then can such laws work to their full capacity,

Enforceability of cartel laws cannot exist in vacuum. Just by terming the criminalisation of cartels as a better option for deterrence, one cannot get them implemented, as they would eventually be useless without the support from the society.

SOLUTIONS TO THE PROBLEM OF CARTELS REGULATION

1. Sanctions

OECD thorough its various reports have been trying to prove the point that in order to deter cartel behaviour effective sanctions are a must. Further these sanctions should not be just directed towards the firm or the company involved in the cartel activity but also should have an individualistic approach and should also hold the individual involved, as accountable. The interesting development to watch would be how the laws of the various countries would shift from mere penalties to criminal penalties for firm as well as individual. Usually it is seen in the principal agent cases that the agent is at a greater liberty of doing unethical acts rather than the principal itself as they know that holding them accountable would be difficult and eventually it would be the firm who has to pay the fine or penalty. Firms on the other hand don't get affected by such kind of fines or penalties as they eventually pass such extra costs to the consumers by increasing the price of the goods. Moreover if the firm is imposed with a large amount of fine then it might go into liquidation process which would result into loss of competition in market.

Criminal sanctions as well as individual accountability would act as a proper mix for deterring such cartel activities as the individual would lose his liberty of doing anything in the name of the firm and even the mere fines would be replaced by criminal sanctions. Such criminals sanctions have been a very important aspect in cases of US cartel activities where

in many high profile cases many senior as well as junior executives has to face years of imprisonment.

In furtherance to the same there should be specially designed courts for the purpose of cartel activities. Such courts should have their jurisdictions defined within the ambit of Competitions Act and should specialise in dealing with such cases. Inference regarding the same can be taken from the special courts made specifically for the purpose of Section 138 of the Negotiable Instrument Act i.e. cheque bouncing cases. Such special treatment to these acts leads to their deterrence effect in the society.

2. Tools

Usually the firms which participate in cartel activity are fully aware of their unlawful activities. They know under what jurisdiction they would have the minimum problems in fighting their cases and at what places the law is the most lenient. They tend to choose the authorities where they would be scrutinised the least.

Moreover it is seen that agencies find it very difficult to gather evidence against the cartel activities as either they are too secluded or strongly encapsulated. A serious problem faced by the various authorities is that even though they might get a whistle-blower and further this whistle-blower provides them with information regarding the meeting, contracts etc. of the cartel still they aren't able to get a strong evidence to qualify the standard of investigation set by law.

For the same purpose the agencies should get proper staff along with access to confidential information. Along with such powers they should also get the authorities for raids at public as well as private places. They should be able to track down bank accounts, conversations, telephonic conversations and maintain surveillance.

3. Whistle – Blower policy

A whistle-blower (also written as whistle-blower or whistle blower) is a person who exposes any kind of information or activity that is deemed illegal, unethical, or not correct

within an organization that is either private or public.[15] The information of alleged wrongdoing can be classified in many ways: violation of company policy/rules, law, regulation, or threat to public interest/national security, as well as fraud, and corruption.[16]

The people involved in a cartel activity very well know of their illegal acts and hence they adopt such procedures which involve minimum disclosure. For the same reason gathering evidence against such firms becomes very difficult. Whistle blowers disclose essential information about their own firm or the people they work with if they feel that such people or firm are involved in unethical activities.

Such disclosure can be very helpful as the main people involved their contracts, meeting can be easily discovered by the agencies, who are after the cartels. But usually people don't go for such risking activities. Cartels are usually headed by powerful entities and disclosing against them would mean a direct revolt against them. For the same purpose the government provides for whistle blowing policies under which the government gives protection to people who are involved in such disclosures.

In August 2010, the Public Interest Disclosure and Protection of Persons Making the Disclosures Bill, 2010 was introduced into the Lok Sabha, lower house of the Parliament of India[17]. The Bill was approved by the cabinet in June, 2011. The Public Interest Disclosure and Protection of Persons Making the Disclosures Bill, 2010 was renamed as The Whistle-blowers' Protection Bill, 2011 by the Standing Committee on Personnel, Public Grievances, Law and Justice.[18] The Whistle Blowers Protection Act, 2011 has received assent from the President on 9th May, 2014 and was then published in the official Gazette of the Government of India on 9th May, 2014 by the Ministry of Law and Justice, Government of India.

[15] Vandekerckhove, Wim (2006). *Whistleblowing and Organizational Social Responsibility: A Global Assessment*. Ashgate.
[16] Near, Janet P (Feb 1, 1985). "Organizational dissidence: The case of whistle-blowing". *Journal of Business Ethics*.
[17] The Public Interest Disclosure and Protection of Persons Making the Disclosures Bill, 2010
[18]The Public Interest Disclosure and Protection of Persons Making the Disclosures Bill, 2010 "Legislative Brief" . Retrieved 2018-09-01

4. Leniency programs

Cartels usually work in a code of silence which is very hard to penetrate. But if someone from the inside helps in penetrating through the cartel system then it becomes a lot easier to the agencies who are trying to control cartels.

The term leniency basically means reduction of the fines or any other kind of punishment which might have been there under non cooperative conditions. In some of the legislations where criminalization already exists leniency programs also mean waiver of the criminal punishments. In order to maximize its interest it is important for the Competition Act not just to lay down the best reward for the first one to confess but also to give a proper clarity to the terms of the deal.

Usually an individual or a group won't turn against their smoothly going cartel, for the sake of an unclear and unsure reward that they might get on disclosure. The Competition Act should lay down proper implementation process of the leniency program as to how and what would be the terms of the agreement. Under much legislation like EU, it is seen that there is a proper time frame given which is in proportion with the punishment that would be waived. Earlier only the first person or group which used to disclose was entitled for the reward but with time now even if a disclosure is made during the time of the investigation and such a disclosure helps in the investigation, then the person is entitled for a waiver in punishment.

Along with a waiver the Competition Act should also focus on such person's safety as they may have threats because of their disclosing acts. The Competition Act has to learn from various legislations like that of UK, Canada, US, EU, etc. as to how to implement the leniency programs in an effective manner. It should focus on the programs implementation, how the rewards would be given depending upon when and what level of disclosure is done so as to serve as an incentive for the individuals to disclose. It should not just focus on rewards but also the credibility of the information given as to whether the information is authentic, is it reliable or would it is useful to initiate or continue an investigation.

CONCLUSION

Whereas taking the basic assumption that cartel is illegal and hence should be criminalized in order to have deterrence effect seems convincing but its implementation is not that easy. Such an aspect cannot just be left to technical grounds in order to practically apply it one needs an well laid definition within the ambit of the Competition Act along with proper implementation guidelines and jurisdiction. The Competition Act should be able to deal with the issues of the societal approach towards cartels and also be able to give clarity on the terms of a leniency program or a whistle blower policy.

Therefore the introduction of the criminalization process should be very carefully considering all other aspects like deterrence effects along with reaction of people towards it. Though it's an essential principle to be adopted now still there can be a necessary delay in its implementation in order to ensure a successful sanction.