IDENTIFYING THIN LINE DIFFERENCE BETWEEN CARTEL AND INFORMATION EXCHANGE AGREEMENT

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Abstract

Competitors exchange certain information among themselves in order to make certain business-related decisions and these information exchanges among competitors may induce certain pro-competitive benefits as well, however in Competition law it is settled proposition that information exchange among the competitors may facilitate in formation of cartel the among the competitors which would attract exemplary penalty. Thus, corporates competing among themselves and competition regulators are required to identify thin line difference between cartel and information exchange agreement to avoid the mammoth penalty of violation of the competition law. The purpose of this research paper is to determine: Whether information exchange agreement among competitors is per se void? If not, under what circumstances information exchange agreement can be made permissible.

INTRODUCTION

Exchange of information among competitors is essential to make accurate business related decisions. This information exchange among the competitors at the same level of the market induces certain pro-competitive results such as: increase of transparency in the market, standardization, avoids overproduction, shortages, increase in capability to predict demand fluctuation.[1] This often leads to collaboration among the player to achieve legitimate competitive goals such as: jointly funding innovative project, jointly penetrate in new geographical market and many others. With exchange of information undertakings may also improve their investment decisions. Hovenkamp states that: "firms counter the uncertainty by being less aggressive. If the producer has no idea about potential demand for its product, it will hedge its bets, in this case it means building a less significant plant or making fewer purchases of inputs. By contrast, good market information reduces uncertainty and gives sellers more confidence about their investment and, accordingly, more incentive to invest" and "pricing, output and inventory data may be valuable to lead firms to make intelligent decisions about how much to invest, how much to plan on manufacturing the following year."[2]

However, on few occasions' information sharing agreement among the competitors through trade association or through any other arrangement pave the way for the competitors to perform many anti-competitive activities including Cartels. Competitors in the camouflage of information exchanges agreement dispense certain business sensitive information such as planned price increases, capacity, or other future conduct provides the platform to the competitors to injure the consumer interest by creating cartel.

JUDICIAL RESPONSE IN U.S ON INFORMATION EXCHANGE

Cartel is the most pernicious form of anti-competitive conduct which results in higher prices, restriction of output, carving up the market. On the contrary, cooperation agreements lead to increasing efficiency through cost reduction, output enhancement, and innovation. In both the arrangements, there is a presence of agreement between the competitors at same level of the

[1] Information Exchanges between Competitors under Competition Law 2010 OECD Id. P. 107
[2] Hovenkamp, 1999, p. 43

market.[3] Parties to agreement in both the cases communicate frequently in the process of information exchange and Adam Smith has warned us the consequences of communication between the competitors.[4]There is a thin line difference between prohibited and permissible information sharing agreements. In the absence of detrimental criteria to identify the cartel an effective legal determination process is disabled. Unavailability of definitive criteria makes such adjudication even harder.

Information exchanges can be considered as circumstantial evidence of a price fixing or market allocation agreement among competitors. In *Petroleum Prods.*[5], court explained the circumstances in which information exchanges help to establish an antitrust violation these are:

(1) The exchange of information connotes the presence of an express agreement among the parties to fix or stabilize prices, or

(2) The exchange is made with the express agreement that is itself a violation of Section 1 under a rule of reason analysis." The court further held that evidence of price information exchanges may be considered as one of the evidences of a conspiracy of the Sherman Act, but not per se proof of such a conspiracy.

Apart from treating it as the evidence of a felonious agreement, information exchanges which likely to affect prices may, under certain circumstances, be prohibited. For example, in *United States v. Container Corp. of America*[6] the Supreme Court of U.S. held that the competitors were sharing the present price among themselves but there was no agreement to follow that exchanges price. It was held by the court that, nonetheless, that exchange of information concerning the "most recent price charged" among sellers of shipping containers, on an irregular basis, unlawfully stabilized the prices.

Consequently, the Court held that the exchange of information on price, involving a highly intense industry and with inelastic demand "had an anticompetitive effect in the industry,

[3] *Supra* Note 1
[4] In the Wealth of Nation of 1776, Adam Smith observed: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."
[5] 906 F 2d 432, (9th Cir. 1990)
[6] 393 U.S. 333 (1969)

chilling the vigour of price competition."[7] It therefore court found that the exchange is concerted practice and thus adequate to establish a conspiracy in infringement of the Sherman Act.

Now with the development of jurisprudence even in U.S jurisdiction information exchange is not considered as ipso facto anti-competitive; to determine whether the information exchange may lead to anti-competitive effects quality and quantity of the information has to be considered. It stated that *"genuine competitors do not make daily, weekly and monthly reports of the minute details of their business to their rivals." In terms of likely effect, the Court observed that prices of the product on which these companies were competing had increased "to an unprecedented extent," and therefore found the evidence to indicate cartel-like behaviour. In light of these findings, the Court found the information exchange to constitute a combination and conspiracy in restraint of interstate commerce that was unlawful under section 1 of the Sherman Act."*[8]

The Supreme Court of US in *Maple Flooring case*[9], propounded four factors to determine the legality of the information exchanges these are

First, the data shared ought to be collective and of past transactions, i.e. it must involve only past transactions; second, the information exchanged by the competitors was publicly available; third, the exchange did not lead to standardization of prices; and, finally, the court found the exchanged data to have "a useful and legitimate purpose in enabling members to quote promptly a delivered price on their product."

With the time, in adjudicating information exchange agreements, the Court appeared to change its prominence from the objective of the exchange to probable effect on competitive conditions, and rather than looking only for evident price fixing agreements, it also started to calculate the information exchanges that suggest tacit collusion agreement. In *U.S. v. Container Corp.*[10], despite of the fact that there was no agreement on price, the Court held that an express exchange of information on price among the competitors posed risk upon the competition.

[7] *Ibid*
[8] American Column and Lumber Co. v. United States, 257 US 377 (1921)
[9] Maple Flooring Mfrs.' Ass'n v. United States 268 U.S. 563, 582-83 (1925)
[10] *Supra* Note 5

The Court clarified its earlier decisions and propounded further guidelines for analyzing information exchanges in *U.S. v. U.S. Gypsum Co.*[11] In its decision, the Court observed that exchange of data upon price and other information among competitors may not lead to anticompetitive effects. The Court distinguished the "gray zone of socially acceptable and economically justifiable business conduct," from per se illegal conduct, observing that the exchange of information on price, without looking into the intention with which it was shared, may not constitute illegal conduct. The Court further observed that the information exchange practices may, on few instances, cultivate economic efficiency and confer pro-competitive effects. Relevant considerations in determining whether a practice confers pro-competitive or anticompetitive effects include the structure of the industry and the kind of the information exchanged. The Court observed that the exchange of present information of price has the greatest probability of producing anticompetitive effects.

GUIDELINES ON HORIZONTAL COOPERATION

To overcome the ambiguity prevailing between provision of information exchange and cartel Federal Trade Commission (FTC) of USA formulated the guidelines in order to determine the legality of information exchange agreement.[12] According to FTC guidelines, following factors need to be taken into consideration while determining whether information exchanged is within the permissible ambit of antitrust law or not. These are: intent of parties sharing information, if the intention of the parties to the agreement is to stabilize or increase price then it may follow the antitrust action. Secondly, industrial structure, if parties to the agreement are performing their business activity in concentrated market then exchange of information even among few undertakings may adversely impact the competition. If the undertakings shares information which is already in public domain, risk of its misuse appears low. Frequency of exchanges is also one of the important factors to determine the legitimacy of the information.[13] If information is more frequent then more problematic it may be and it may solidify the existence of restrictive practice, as it has been observed in *American Column & Lumber Co. v. United*

[11] 438 U.S. 422 (1978).
[12] Available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf
[13] *Ibid*

States[14], hardwood floors cartel case if information exchanged is on daily, weekly or monthly basis with their rivals, chances of the information to be used to perform anti-competitive activity is comparatively high.[15] Past and historical information have much lesser collusive potential than current or even future information. If the undertakings share past data then it is generally deemed as less problematic then sharing the recent one.

GUIDELINES IN EU UPON INFORMATION EXCHANGE

Guidelines of European Union to the horizontal agreements recognizes the benefits of horizontal agreements and information exchange in the following words "Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster."[16] After purporting the benefits it provides that how information exchange results in the disclosure of information of the strategy thereby results in increasing the possibility of coordination among the competitors. One of the important factors to establish the existence of cartel is through market share of the undertakings involved if the parties have a minimal market share then the horizontal co-operation agreement is not likely to increase the restrictive effects on competition within the meaning of Article 101(1) and, normally, no further analysis is required.[17] It also empowered the commission to consider probable development such entry or exit barrier or expansion of the relevant market. It further provides that the burden of prove is upon the undertaking invoking the benefits of information exchange agreement. If upon the evidences and arguments contended by the alleged undertaking, commission is satisfied that there isn't any restrictive activity taking place then it may exonerate the undertaking.

[14] American Column and Lumber Co. v. United States, 257 US 377 (1921)
[15] *Supra* Note 5
[16] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN
[17] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Para 44

If information is of nature that it may reduce strategic uncertainty in the market and in this sought of information independent decision-making process decreases and incentive to compete is absent, then it may attract Article 101.

These guidelines further provide that the even if agreement is *prime facie* appears to be restricting competition; it can be justified on the following grounds:

a) If agreement is for the purpose of recuperating production or distribution of goods or services, or promoting technical or economic development.
b) Restriction is consequential for achieving afore mentioned goals.
c) If the undertakings have attained these goals then consumer must receive fair share out of these benefits.
d) The agreement between the undertakings must not result in reducing competition on major part of the product involved in the case.[18]

In *John Deere Ltd v Commission of the European Communities*[19], tractor makers in the United Kingdom established an arrangement whereby competitors shared data on sales of tractors in the United Kingdom. The Advocate General found that this arrangement had the effect of decreasing uncertainty in the market and therefore violated Article 101 (then Article 85). The ECJ concurred and held that the effect of the agreement reduced competition because it decreased uncertainty and resulted prevention of producers from entering the market because they may have issues pertaining to the participation in the arrangement of registration of the sales data. The ECJ did not go into detail as to how the agreement would assist the market; it was majorly focused upon the fact that it had the effect of decreasing uncertainty in the market. Specially, when the market structure is narrow oligopolistic in nature. The tractor manufacturers were unable to show that the restrictions upon competition resulting from the information exchange arrangement are inevitable, majorly with the objectives of contributing to economic strength and equal division of benefits. The ECJ further held that the limiting competition resulted from the exchange of information are not inevitable, since 'own market data and aggregate data of the industry are adequate to operate in the relevant market (agricultural tractor market).

[18] Article 101(3) of TFEU
[19] 1998 E.C.R. I-3138

In, *Asnef-Equifax v. Ausbanc*[20], banks of Spain exchanged data of the information of borrowers in order to determine loans by the banks. The Advocate General opined that the information shared about customers may not distort competition and it is necessary because it had positive effects by facilitating banks to determine the effects of giving loan to the particular customers. It is noteworthy that the banks did not share information about their businesses and that the information shared by the banks was present to all the banks in the Spanish market. The Advocate General opined that the information sharing was sine qua non for the banks and had positive effects. The court agreed to the finding that the sharing of history customer information did not distort competition. The effects of the information sharing were valuable to the banks as it facilitated to prevent bad loans.[21] In this case ECJ analyzed the beneficial outcome of the information exchange among the competitors. Since the information of loan defaulters would provide immense benefits to the banking industry rather than restricting the competition. Therefore, ECJ permitted the information exchange agreement among the banks.

PER SE v. RULE OF REASON

Earlier, in many jurisdiction roles of economic analysis in assessing the legality of the information exchange agreement was limited when the agreement is distorting competition by its object. The competition agency does not require showing that the agreement in competition has anti-competitive effects if on the face of it agreement appears to have anti-competitive effects. If the competitors are exchanging information pertaining to production or price it may amount to per se violation of section 1 of the Sherman Act.[22] Thus, strict compliance of *per se* rule often restricts the beneficial competition.

It is also to identify the information which is considered as anti-competitive by its objects, however many experts have identified that the agreements to exchange future price or volume ought to be considered as anti-competitive by its object.

[20] 2006 E.C.R. I-11145
[21] *Ibid*
[22] Barry S. Eisenberg, Information Exchange Among Competitors: The Issue of Relative Value Scales for Physicians' Services, Vol. 23, The Journal Of Law And Economics, 1980

However, if parties to the agreement are able to satisfy the competition agency that an agreement generates sufficient efficiency gains, then undertaking may enter into safe harbour. To determine whether certain exchange is per se anti-competitive or shielded by safe harbour competition authorities must look into overall typical effect of the information exchange agreement. Main element which differentiates the Cartel and information exchange is the purpose and effects of the particular exchange. And the effects of the agreement can only be determined through economic analysis of the information exchange among the competitors. Therefore, *per se* approach, which is generally presumed to be violating the fundamentals of competition law, may be not appropriate for assessing the adjudication of information exchange. It is more appropriate to apply the rule of reason principle to evaluate the pro-competitive effects of the information exchange. Even in *US v. US Gypsum Co*[23]. Court decided to move way from per se approach and held that exchange of information pertaining to price may not lead to anti-competitive effects unless intent of the competitors is not taken into consideration. Therefore, exchange of any information may not attract per se liability under the competition laws unless intent the competitors is to distort the competition. The court also focused upon the fact that exchange of present price information has the strong potential to generate anti-competitive effects even then it cannot be held as per se anti-competitive.

Information exchange policy in EU clearly states that per se approach will not be applied in any case. Case by case is the fundamental approach to determine the anti-competitive effects of the information exchanged.

POSITION IN INDIA

There is only one case in India whereby eleven cement companies were penalized for fixing the price of the cement.[24] It was alleged by the Director General (Investigative Branch of Competition Commission of India) that all the companies within themselves under the umbrella of association exchanged the prices, production target of the companies. This information was shared on weekly basis. The said collection was justified by the cement companies on the

[23] *Supra* Note 7
[24] Builders Association of India v. Cement Manufacturers' Association and ors. COMPETITION COMMISSION OF INDIA Case No. 29 of 2010

ground that they were collecting it under the instruction of Department of Industrial Policy and Promotion, which is the branch of Ministry of Commerce working under Government of India. It was further justified by the association on the ground that information collected was already in public domain and it was published by the newspapers focusing on market. And it was historic prices not current prices. Thus, it cannot distort the competition in the cement market.[25]

However, rejecting all these contention, it was held by the commission that sharing of information such as production and dispatch of each company facilitates the coordination among the companies easier.[26] And since officials of these companies were holding meetings on various occasions, thereby these companies were found guilty of fixing prices of cement.[27]

It is to be noted that competition commission of India did not went into detailed analysis as to sharing to this information resulted in actual price fixation or not. Since these companies were sharing the business information among themselves doesn't necessarily results in cartel. However, in this case, apart from information exchanges other factors such as existence of price parallelism, low levels of capacity utilization and reduced rate of growth in production, existence of production and dispatch parallelism, super-normal profits earned by the companies involved in the cartel.

There is no case in Indian jurisdiction whereby existence of cartel is alleged solely on the basis of information exchange between the competitors. And in the absence of specific guidelines on horizontal on horizontal cooperation, may create intricateness to determine such adjudication.

CONCLUSION

Cartels are considered as the most pernicious violation of competition law whereby through the fixation of prices or dividing geographical market arrangement competitors deprive their customers in reaping the ultimate benefits of competition among the firms. On the contrary, through information exchange competitors may achieve efficiency, avoids overproduction, predict fluctuating demand which is in the best interest of consumers as well as of the

[25] *Ibid*
[26] *Ibid*
[27] *Ibid*

competitors. Through exchange of information competitors may either create unlawful arrangement of cartel or they may enter into legally permissible information exchange agreement to achieve efficiency. Since in both the arrangements, horizontally located competitors are exchanging information among themselves, distinguishing cartels from information exchange agreement is strenuous task for the competition law enforcement agencies. While earlier courts were of the opinion that exchange of competition sensitive information such as price or production is per se anti-competitive but with the evolution in the competition jurisprudence, court realized that even the information of price or output may not lead to distorting the competition. Even these information exchanges may increase the efficiency of the undertaking. Therefore, courts in both the jurisdiction i.e. EU and US court are now following the rule of reason approach for assessing the implication of the anti-competitive agreement. Even after abiding the rule of reason approach court follows dichotomous approach with restriction imposed by agreement and efficiency achieved through information exchange. If court come onto the conclusion that achieving efficiency is in the interest of competition then it may allow the undertakings to continue with the agreement in the ultimate interest of the consumer.