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CONTENTS

1. LEGAL AND ECONOMIC REVIEWS OF CARTELS IN AIRLINE INDUSTRY- A CRITICAL ANALYSIS

BY PRITANSHU SHRIVASTAVA & ANURAG GUPTA…………………………………...1

2. THE CALL FOR CRIMINAL SANCTIONS FOR ENFORCEMENT OF COMPETITION LAW AND ITS PRACTICAL CONCERNS

BY DR. ANEESH V. PILLAI ……………………………..……….……………26

3. INVESTIGATING PETROLEUM INDUSTRY OF INDIA WITH RESPECT TO ALLEGED COMPETITION LAW VIOLATIONS

BY UJJAWAL SATSANGI & SOURAV CHANDAN………………………………..37

4. INDIAN SHIPPING EXEMPTION: A COMPARATIVE ANALYSIS

BY ARAHANT JAIN & SHUBHA JINDEL……………………………………………47

5. INDIAN COMPETITION (AMENDMENT) ACT, 2007 HAS NOT MADE DIFFERENCE BETWEEN *PER SE* RULE AND RULE OF REASON

BY SOUVIK CHATTERJEE…………………………………………………….60

LEGAL AND ECONOMIC REVIEW OF CARTELS IN AIRLINE INDUSTRY – A CRITICAL ANALYSIS

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ABSTRACT

The Competition Act 2002 prohibits vertical and horizontal agreements that have an appreciable adverse effect on the competition. The Indian Aviation Sector being an oligopoly market has tendency of collusion amongst its players thereby proving detrimental to the consumers and social welfare at large.

In an oligopoly the products may be homogeneous or differentiated. Oligopolies are able to set prices (they have market-making power) but they also compete with other firms in the industry based on product differentiation.

In the present paper the Authors have discussed the law and economics of cartels in an oligopolistic market and the effects thereof. Also, the nature, scope and effect of cartels in airline industry in India and at the end of the article suggested few measures to fight the menace of cartelisation in the Industry.

I. PROLOGUE

"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."

Adam Smith, The Wealth of Nations, 1776

Airplane, one of the greatest inventions of all times, has given way to the growth of the "Air Industry" or the "Civil Aviation Sector" all over the globe. It is now well recognized that the there is a link between civil aviation and economic activity and it has a catalytic impact on general development.

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Every $100 spent on air transport produces benefits worth $325 billion to the economy. It generates 100 additional jobs in air transport and 610 related jobs.[3]

The aviation sector in India is rapidly gaining importance. It is estimated that foreign exchange transactions of $22.5 billion are directly facilitated by civil aviation and another $96 billion indirectly through civil aviation services. 95% of tourist arrivals are by air. Airports facilitate growth of high-value and perishable trade; 40% of exports and imports in India by value are carried by air. The sector might one day also serve to routinely provide connectivity to remote areas otherwise inaccessible by other modes of transport.[4]

Airline industry all over the world has been considered as an oligopolistic market i.e. market dominated by a few firms which are large enough to influence the market size, due to their capital intensive nature and policy restrictions[5]. In oligopolistic market there is a natural tendency to collude between enterprises. Since, it is a form of industry (market) structure characterised by a few firms where products may be homogenous or differentiated. The behaviour of any one firm in an oligopoly depends to a great extent on the behaviour of others. So, with collusion, oligopolistic firms can avoid behaviour that is detrimental to their general interest e.g. price war. Therefore, there is a high tendency of oligopolists forming a cartel. Same can be seen in the aviation industry throughout the world. A cartel is a formal organization of similar, independent companies who make joint decisions to fix prices, limit production or to share markets or customers between them. Instead of competing with each other, cartel members rely on each others agreed course of action which reduces their incentives to provide new or better products and services at competitive prices.

According to economists a number of conditions need to be present, for a cartel to work:[6]

I. The demand for the product for which Cartel is formed in the market must be such that changes in price have a relatively small effect on the quantity of the goods demanded i.e. inelastic. Availability of substitutes in the market makes the increase in the cartel's price self defeating as buyers shift to the available cheaper substitutes.

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[3] *See* http://spsairbuz.net/story.asp?Article=340. (Last visited September 11, 2013).

[4] Ministry of Civil Aviation, Government of India, *A Road Map for Civil Aviation Sector*, Report of the Civil Aviation Committee, October, 2004 *available at* http://civilaviation.gov.in/cs/groups/public/documents/newsandupdates/moca_000741.pdf (Last visited September 11, 2013).

[5] *See* http://www.ukessays.com/essays/economics/market-structure-of-the-airline-industry-economics-essay.php (Last visited September 8, 2013)

[6] KARL E. CASE AND RAY C, FAIR, PRINCIPLES OF ECONOMICS, 342 (Prentice Hall Business Publishing).

II. The members of the Cartel must work within the rules of the group. There are always big incentives for the members to break out, cheat by increasing the output and making huge profits.

The main purpose of forming cartels is to coordinate the policies of member firms to increase the profit.[7] But such cartels are held to be anticompetitive by competition laws of almost all the countries including Competition Act, 2002 of India (henceforth referred as 'the Act'). This article will focus on the recent trends in airline industry and will show the tendency to enter into cartels all over the world including India. For example, in October 16, 2005 honchos of 11 airlines met in Mumbai to form the Federation of Indian Airlines (FIA) that will provide a common platform to debate industry issues and lobby the government and hammer out solutions. However, at the very first meeting they were discussing about pricing issues, which was timely brought to the notice of the CCI, and hence the very first step towards cartelization was aborted. Earlier, there had been chances of coordination in prices which might become even higher if the Proposed Alliance between AI and Jet had materialized.[8]

II. ECONOMICS OF INDIAN AIRLINE INDUSTRY: THE OLIGOPOLY MARKET

In the present article, it has been previously mentioned that Indian Aviation sector has an oligopoly market structure, therefore, the authors claim that like all oligopolistic or concentrated industries, the Indian Aviation sector is likely to be inefficient, based on the following economics postulates:

1. The price (P) charged by these firm is above the Marginal Cost (MC)[9] i.e (P > MC), which means there is underproduction from the entire society's point of view. The society could get more for less, but it does not.
2. Strategic behaviour outcome is not in the society's best interest.
3. There is always a real danger of waste and inefficiency.

Due to limitation of any authoritative resource which shows that oligopoly is truly similar to monopoly, the authors for the purpose of showing similarity between the oligopoly and monopoly rely on similarities between the two, so as to take forward the proposition that oligopoly market structure is as inefficient as monopoly *vis-a-vis* perfect competition.

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[7] Gallop and Roberts, *Firm Interdependence in Oligopolistic Market*, 10, JOURNAL OF ECONOMETRICS, 1979, 313-331.

[8] Preeti Mechan, *A Project Report on Cartels In Aviation Industry*, Internship Project Report, Competition Commission of India, New Delhi *available at* http://cci.gov.in/images/media/ResearchReports/PreetiInt200711.pdf (Last visited September 13, 2013).

[9] Marginal cost (MC) is the increase in total cost that results when an input is increased by one unit; *available at* http://thismatter.com/economics/firm-production-and-costs.htm (Last visited September 11, 2013).

Features of oligopoly market structure and monopoly are as follows:

Monopoly	Oligopoly
➢ Unique goods of one seller	➢ Similar & unique products of few sellers
➢ High barriers to entry • Government regulations • Location of business operations • Resource (capital, expert human resource, etc.) • Technology	➢ High barriers to entry
➢ Imperfect Information	➢ Slightly Imperfect Information
➢ Little advertising	➢ Uses advertising
➢ Max Profits → Marginal Revenue[10] (MR) = Marginal Cost (MC)	➢ Always Max Profit when MR = MC
➢ Price Setter	➢ Forms of collusion which reduce competition and lead to higher costs for consumers
➢ Long-run profits can be positive	➢ Retain long run abnormal profits. High barriers of entry prevent sideline firms from entering market to capture excess profits
➢ Inefficient outcome	➢ Inefficient outcome

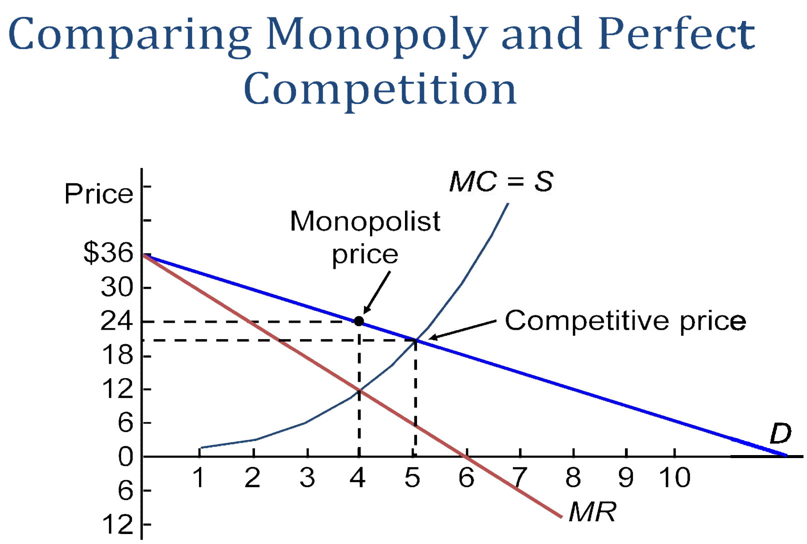
From the above, we can infer that oligopoly is not much different from the monopoly market structure or in other words oligopoly is a diluted form of monopoly.

One way to understand collusive oligopoly versus perfect competition is with the aid of graph of monopoly because when the sellers in an oligopoly market come together to form cartel they determine price and behave as a monopolist, thus, it would be useful to compare with equilibrium

[10] Marginal revenue (MR) is the additional revenue that will be generated by increasing product sales by 1 unit, *available at* http://thismatter.com/economics/firm-production-and-costs.htm (Last visited September 11, 2013).

output and price in a perfectly competitive industry with the output and price that would be chosen if the industry were organised as monopoly or a collusive oligopoly.

Figure 3[11]



The above given figure explains that under a perfectly competitive market, price and output is determined at the level where price is equal to marginal cost. In this case, price is $21 and output is 5 units. These price and output decisions are determined by the intersection of the competitive supply curve, S and the market demand curve. (MC in a newly organized monopoly is exactly same as the Supply curve, S that represents the behaviour of all the independent firms when the industry was organized competitively).

The monopolist can choose any price/quantity combination along the demand curve. The output level that maximizes profits to the monopolist is 4 units - the point at which marginal revenue intersects marginal cost. Output will be priced at $24. To increase output beyond 4 units or to charge price below $24 (which represents the amount consumers are willing to pay) would reduce profits.

Instead of considering a monopoly in the above discussed model, if we consider that the individual firm owners simply decide to work together in an effort to limit competition and increase joint profits, i.e. they decide to collude, then also the outcome would be exactly the same as the outcome of a monopoly in the industry. Thus, firms certainly have an incentive to collude in spite of being illegal.[12]

3.1 Game Theory, Oligopoly & Cartels

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[11] *Supra* Note 4 at pg 316.

[12] *Ibid*

A cartel is a special case of oligopoly when competing firms in an industry collude to create explicit, formal agreements to fix prices and production quantities. In theory, a cartel can be formed in any industry but it is only practical in an oligopoly where there is a small number of firms. Cartels are more stable if the industry deals in commodities rather than differentiated products because it is easier to fix price and production quantities. In such situations, if there is any change in the market share of one member of the cartel, the member will immediately know that this is potentially because of rise or cut in prices made by another member.

In Game Theory terms[13], a cartel arrangement *may* have prisoner's dilemma. All the members of the cartel will be better off if they stick to the agreed prices and production quantities. But for each individual member, it is advantageous to cheat by increasing production or reducing price and thereby selling more products.[14]

When firms in an oligopoly decide about quantity and pricing, they must consider what the other firms will do, since quantity and price are inversely related. If all the firms produce too much, then the price may drop below their average total costs (ATC)[15], causing them losses. If they can restrict quantity to that which corresponds to where marginal cost equals marginal revenue for the oligopoly as a whole, then they can maximize their profits. However, they do have one advantage over the prisoner's dilemma scenario — they usually know what the other firms did in the past, so they can decide on quantity and pricing based on the assumption that they will act in the same way in the future. But if the firm is wrong in its anticipation, then they can make corrections in its production schedule.

Therefore, firms in an oligopoly try to eliminate guesswork by forming a cartel, where they agree on a particular output, so that they can sell their output at a profit maximizing price.Where firms have a history of working together, they can choose a dominant strategy based on the choices that the other firms have made, which is called a Nash equilibrium.

But cartels often fail because one or more firms will be tempted to cheat, since this will allow them to earn outsized profits, especially if they are a smaller firm that contributes only a small share of the

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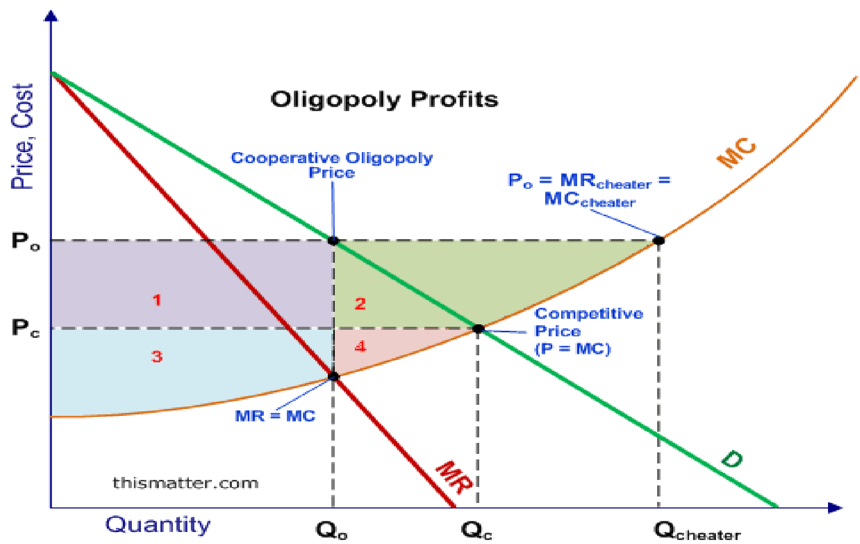
[13] Game theory is a particularly useful tool for understanding why firms and individuals make the decisions they do, and how the decisions made by one individual affects others, *available at* http://economics.about.com/cs/studentresources/f/gametheory.htm (Last visited September 12, 2013).

[14] *See* Economics of Cartel, *available at www.tutor2u.net/blog/files/Collusion_Oligopoly.pdf* (Last visited September 10,2013)

[15] Average total cost is the sum of all the production costs divided by the number of units produced, *available at* http://thismatter.com/economics/firm-production-and-costs.htm (last visited September 12, 2013).

total output of the oligopoly. For that would allow the firm to sell a greater quantity at the profit maximizing price without lowering demand, and therefore, the price.[16]

Figure 5: Game Theory of Olipolistic Pricing[17]



When firms in a cartel cooperate by restricting quantity for higher prices, then each firm gets P_o for its product by restricting its quantity to the agreed amount Q_o (it is assumed that Q_o is equal to each firm's MR = MC output), and each firm earns the revenue above its marginal cost represented by the areas 1 + 3 in the diagram on the left. Hence, ***the oligopoly earns what a monopoly would earn***. When none of the cartel members cooperate, then the quantity increases to Q_c and the market price declines to the competitive price P_c, and each firm in the oligopoly earns 3 + 4 above their marginal cost. (Again, the size of the 2 areas will be commensurate with the size of the firms and their corresponding market share.)

If a firm cheats, then it earns: 1 + 2 + 3 + 4 by producing more until MC = P_o, which is equal to the quantity, $Q_{cheater}$. This assumes that the firm produces only a small portion of the output of the oligopoly; otherwise, the firm's increased output would cause the market price to decline, and the market demand curve for the oligopoly as a whole would shift to the left.

3.2 Social Cost Of Oligopoly

The economists generally agree that resources should be developed and utilised in such a way so as to maximise total satisfaction or welfare of the people. According to Welfare Economics, *"the maximum total satisfaction is the yard stick for analysing the efficiency of an economy"*. Italian Economist

[16] *See* Game Theory of Oligopoly, *available at* http://thismatter.com/economics/oligopoly-game-theory.htm (Last visited September 14, 2013).
[17] *Ibid*

Vilifred Pareto enunciated a straight forward criterion "any change in economic operations which harms no one and which makes some people better off must be considered to be an improvement and hence welfare".

In oligopoly, there is misallocation of resources and hence reduction in social welfare. Because a dominant firm determines the price and output policy for the entire industry and other market players in tacit collusion follow the league to yield maximum profit. Hence, this price leadership is similar to a monopolist setting price of the commodity or services.

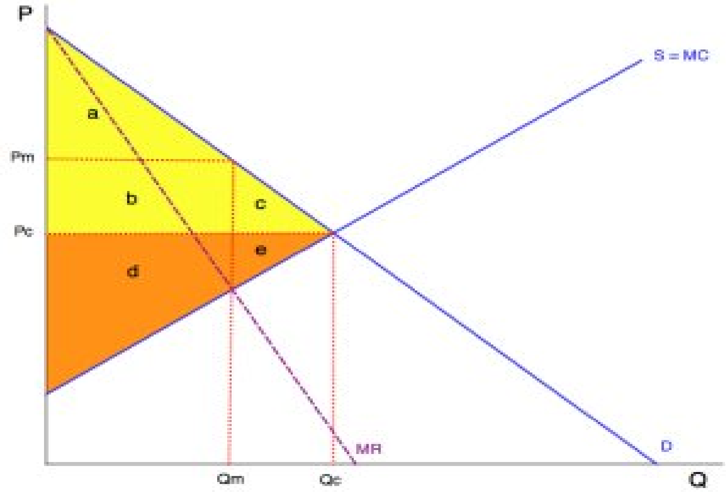
As discussed above, when the sellers in oligopolistic market structure enter in collusion with one another they are just like a monopoly and lead to an inefficient mix of output as consumers face scarce output and high prices. Thus, we can safely assume that social cost of oligopoly market players in collusion is quite similar to that of monopoly.

The below given diagram shows how we might make a rough estimate of the size of the loss to social welfare that arises from a monopoly or collusive oligopoly: in the case of perfect competition, firms simply produce at competitive price (P_c) where the supply and demand curves interact. All firms are identical so will face identical supply curves – if this firm's supply curve (marginal cost curve) was higher and it was unable to profitably produce at P_c then it would have gone out of business, and if its supply curve was lower and it was able to make profits then other firms would enter the market until all firms were making zero profits. When the firm produces at P_c it will supply quantity (Q_c).

When it has a monopoly, it instead produces at the point where MR = MC, i.e. where the marginal revenue curve cuts the supply curve. This is quantity Q_m which will sell for price P_m.

Now first consider the consumer and producer surplus in the case of perfect competition.

Figure 4: Welfare Loss From Monopoly *vis-a-vis*-Perfect Competition[18]



The yellow area shows consumer surplus and orange area shows producer surplus. The graph is split into five areas - area a, b, c, d and e. Ignore the purple MR line cutting through areas a, b and d, the areas are just bound by the blue supply and demand curves and the red dotted lines linking price and quantity combinations.

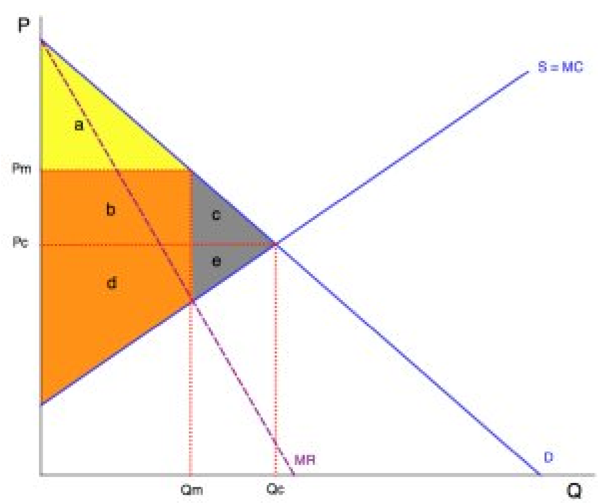
In the *competitive case:*

Consumer surplus = a + b + c

Producer surplus = d + e

Now let us consider the consumer and producer surplus in the case of monopoly.

Figure 4A[19]



[18] *See* http://mnmeconomics.wordpress.com/2011/08/15/the-welfare-loss-of-monopoly/ (Last visited on September 14, 2013).

Again yellow is consumer surplus, orange is producer surplus, and third colour is grey to show 'deadweight loss'[20] – the area that was surplus to consumers or producers in the competitive case but has now been lost.

In the *monopoly case:*
Consumer surplus = a
Producer surplus = b + d
Deadweight loss = c + e

The effect of going from perfect competition to monopoly is bad for consumers. Consumer surplus has been reduced by (b + c). Area b has gone from consumers to producers, so this is not an overall welfare loss, just a distributional change from consumers to producers.

However the monopoly is good for producers. Producer surplus has increased by (b – e) and as b is a larger area than e, this is a net gain. Areas c and e are deadweight loss. Consumers have lost c and producers have lost e, this is because there is now less output being produced due to the quantity decreasing from Q_c to Q_m.

So overall society loses out thus, there is a net welfare loss when the aggregate welfare of consumers and producers is taken into account, although producers are likely to be happy as they have gained at the expense of consumers. From an economic point of view, here there is an efficiency loss caused by going from perfect competition to monopoly.

III. NATURE OF INDIAN AVIATION SECTOR AND FACTORS CONDUCIVE TO FORMATION OF CARTELS

As discussed in previous sections, that Indian Aviation sector operates in an oligopoly market, the following qualities contributes to make it a collusive one:

- High Entry and Exit Barriers[21]

  Aviation Industry has high entry barriers. The following entry barriers are faced by a new entrant:

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[19] *Supra* note 13.
[20] Economic Times, *Definition of 'Deadweight Loss', available at* http://economictimes.indiatimes.com/definition/deadweight-loss (Last visited on September 15, 2013).
[21] Murtuza, *Role of Economic Evidences in Prosecution of Cartels', available at* http://cci.gov.in/images/media/Reports/MURTUZAIntn240211.pdf (Last visited September 15, 2013).

1. High capital cost of purchase of aircrafts, this to some extent is tide over by leasing of aircrafts, but leasing too doesn't come very cheap.

2. Regulations governing new entry:

    a. *Route Dispersal Guidelines:*[22] They are constraining the profitability of the carriers. The airlines are expected to serve a fixed percentage of their capacity to routes where passenger traffic is low which is making their operations unviable and in turn making the industry less attractive as far as new entry is concerned.

    b. *Minimum Equity and Fleet Requirements*[23] for domestic operations is again increasing the entry cost.

    c. *Minimum 5 years of domestic experience and Minimum fleet size* of 20 aircrafts is restricting entry in International skies.

    d. *Slot Allotment*[24] *& Constraint:* Capacity constraint acts as a major entry deterrent and increases the cost of entry as unavailability of desirable slots will have its impact on the profitability. Allocation of slots have been grand fathered and entails incumbency benefits. In allocation of slots, it is more important to have good quality of slots that are strategically placed than to have a quantum of slots which are oddly timed and result in lower passenger loads and higher costs.

- *Homogenity of Products*[25]

    The Airlines typically deliver the same product i.e. transferring scheduled passenger traffic from their origin to the destination. There are 2 sets of Models namely Full Service Carriers and Low Cost Carriers. The full service carriers (FSC) take passengers from origin to destination but in a more luxurious manner. They offer free on board food and entertainment where as Low Cost Carriers (LCC) doesn't go out of the way as far as delivering these amenities are concerned.

- *Similar Production Cost*[26]

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[22] Government of India Order No. AV 11012/2/94-A.
[23] Aeronautical Information Circulars No. 08 of 2009.
[24] Airport Authority of India and Director General of Civil Aviation (DGCA) allot slots in accordance with the IATA worldwide slot guidelines. IATA Worldwide Slot Guidelines, *available at* IATA August 2011 http://80.168.119.219/UserFiles/File/w-slot-g.pdf (Last visited on September 15, 2013).
[25] *Supra* Note 17.
[26] *Ibid*

The airlines' production costs are more or less similar in the sense that most of their revenue receipts go in paying the fuel bill. The Aviation Turbine Fuel (ATF) is the most costly in India when compared to other nations.[27] The liberal taxes imposed on the imports of ATF have made air travel expensive. Of late, airlines have started charging a Congestion Cess of Rs 150 from passengers despite the Government.'s opposition. Airlines find it justified as they feel that a lot of precious fuel is wasted when the aircrafts circle in the air before they finally get a green signal to land at the congested city airports. However, justification of this cess is highly debatable as consumers bear the maximum brunt. Firstly, it is their trip that is getting delayed and further to add salts to the wounds, they are made to pay for the delay also. The industry players always complained of structural dominance of public sector companies: Indian Oil Corporation; Bharat Petroleum Corporation; Hindustan Petroleum Corporation Ltd.[28] as the only Aviation Turbine Fuel (ATF) suppliers at the airports. The government recently has approved demand of airlines to infuse competition in the ATF business by bringing public sector monopoly to an end. In initial stages, government plans to allow private players for marketing ATF at smaller airports. AAI has now approved Reliance Industries to set up ATF business in 25 non-metro airports.

However, a major part of fuel uplift is from major metro airports. Presently, the public sector companies are expected to charge a margin of 20-25% on ATF sold by them. The entry of RIL is expected to bring down fuel prices (margins are expected to reduce by 5-10% with entry of private players) considerably, if only it is permitted to operate in metro airports. Other costs include parking charges; landing fees; hangar charges; maintenance; repair; personnel; entertainment etc.

- *Excess Capacity*[29]

  The sector doesn't have much excess capacity. Carriers need to ascertain their demand a couple of years in advance as the delivery of aircrafts is made with a lag of 3-5 years. However, capacity comes at a cost. There can be excess capacity if airlines charge exorbitant fares. At the same time, there can be full passenger load factors on the carriers if fares are rationally priced. So in a nutshell, capacity comes at a price.

- *High Dependence of Consumers on the Product*[30]

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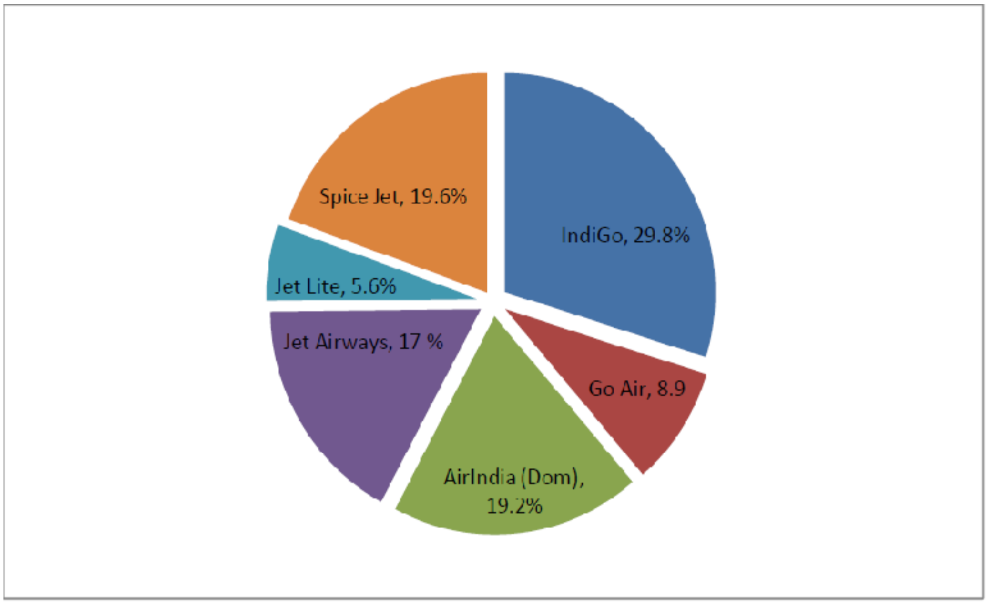
[27] *See* http://travel.financialexpress.com/200801/aviationworld09.shtml (Last visited on September 8, 2013)
[28] *See* http://www.ilntoday.com/2013/03/structural-dominance-of-public-sector-undertakings-psusnational-oil-companies-nocs/ (Last visited on September 12, 2013)
[29] *Supra* note 17.

Consumers are addicted to this mode of transportation as there is no existence of other mode in India that can make a passenger reach his destination within a couple of hours.

- *Seller Concentration*[31]

Cartels and cooperative behaviour are more likely in industries where there are a few firms. This is because the costs of forming a cartel and coordinating and monitoring its members' actions are lower, with less number of firms. Also, according to principles of economics in an oligopoly market, the firms with similar market shares and/or cost structures are less likely to divert and leave the cartel and hence a reduced risk that some firms will defect. The figure below shows that the market shares of different airlines are approximately the same.

Figure 5: Market Share of Players in Indian Aviation Sector[32]



- **Higher Concentration**[33]

In order to calculate the potential monopoly power from a merger, a commonly accepted measurement is the Herfindal-Hirschman Index (HHI). The HHI of a market is calculated

by summing the squares of the percentage market shares held by the respective firms.[34] In fact, this index is a measure of industry concentration. According to U.S Merger

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[30] *Ibid*.

[31] *Supra* note 8.

[32] *See,* http://www.dgca.nic.in/reports/mar-ind.htm (Last visited on September 13, 2013).

[33] *Supra* note 26.

Guidelines, if post merger, HHI takes a value between 1,000 and 1800 and merger adds more than 100 points, the merger is likely to be challenged; whereas if post merger HHI takes a value higher than 1800 and merger adds more than 100 points, the merger should be challenged.[35]

To illustrate above, the following data[36] is borrowed from the source mentioned in the footnote as to how HHI is used:

Firms	**Market Share 2006**	**Square of Market Share**	**Market Share 2007**	**Square of Market Share**	**After Merger**
Kingfisher Airlines	10	100	13	169	748
Deccan	19	361	15	225	
Spice Jet	7	49	10	100	100
Jet Lite	9	81	8	64	961
Jet Airways	27	729	23	529	
Indigo	4	16	9	81	81
Go Air	4	16	4	16	16
Indian	19	361	17	289	289
Paramount	1	1	1	1	1
HHI		1714		1474	2232

With respect to the HHI ratios, we can conclude that the concentration post merger is fairly high in the industry. Hence, chances of cartelization and its materialization are quite high as with such less number of players, tacit collusion is easily traceable and deviation is less unlikely. Cartels are universally recognized as harmful type of anticompetitive conduct. It is condemned in all competition laws of the world. No legitimate economic and social benefit is derived out of it. So, the CCI must keep an eye on such tendencies.

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[34] *See,* http://www.unclaw.com/chin/teaching/antitrust/herfindahl.htm (Last visited September 13, 2013).
[35] *See,* http://www.justice.gov/atr/public/guidelines/horiz_book/15.html (Last visited on September 13, 2013).
[36] Administrative Staff College of India (ASCRI), *Competition Issues in the Domestic Segment of the Air Transport Sector in India,* 12, (2006).

IV. NATURE AND IMPACT OF CARTELS

Cartels are universally recognized as the most harmful type of anticompetitive behaviour. As they offer no legitimate economic or social benefits that would justify the losses that they generate to the society and consumers.[37] Thus, they are condemned in all competition laws and in some countries are classified as a crime.[38] Sophisticated cartel operators know that their conduct is unlawful and so they conduct their business in secret, sometimes taking great pains to keep their agreements disclosed from the public and from law enforcement officials.[39]

Cartels have inherent characteristics that adversely affect the economy. The artificial price rise seen in the cartel cases, endorses this fact. The ultimate victims of cartelization are the consumers and the business houses. Cartels not just have monopoly over price of a product but also restrict other private market players to enter in the market. Cartel formation will be difficult and unsustainable if effective competition persists in the market.[40]

As discussed earlier, cartels are kind of horizontal anti-competitive practice. The operation of cartels has a tendency to be very complex and may be varied according to the number of participants and the nature of the market. There can also be situations wherein there is no overt collusion between cartel members but they act in a manner which seems to be a collusive behaviour in line with the existing market forces.[41]

Such agreements are not prohibited *per se* instead rule of reason needs to be applied, but they are prohibited when the cartels' sole motive is profit maximisation through- fixing of prices, sharing/dividing of market, etc. and in turn causing a negative impact on prices, output, innovation or quality of products and services.[42]

5.1 Price Transparency & Tacit Collusion

There is a high degree of transparency over prices and volumes in the Aviation sector. All the airlines have their present and future fares available over Computer Reservation Systems (CRS), which can be

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[37] Baxter, *Private Cartel Goes Public,* 22, STAN. L. REV. 675.
[38] OECD Report, *Nature and Impact of hard core Cartels and Sanctions Against Cartels Under Competition Laws of Nations*, 5 (2006).
[39] *Supra* note 31.
[40] *Supra* note 13.
[41] ABIR ROY, COMPETITION LAW IN INDIA,. 68 (Eastern Law House,1st edn, 2008).
[42] *Supra* note 24.

accessed by the customers as well as by the rival airlines.[43] Such transparency can be an instrument for collusion as it facilitates the detection of cheating on a cartel agreement. It is a common practice for an airline to announce, through the CRS's that its price on a certain route will increase by some amount beginning on a certain date in the future.[44]

The colluding parties take advantage of this transparency and enter to a tacit collusion. A collusion occurs when price and quantity - fixing agreements among producers are explicit. Tacit collusion occurs when such agreements are implicit.

If the other carriers match the behaviour, the price increase is implemented. If they don't, the airline suggesting the increase will either withdraw it or push back the implementation dates. Other airlines might counteroffer with a smaller increase, effective a day after the first increase. Then the first airline may proceed with a smaller increase or counteroffer again. All of this occurs without the airlines changing prices on actual sales.[45]

This transparency has its own advantages and disadvantages. Though it is important to have transparency in pricing for the consumers to make choice keeping in mind the cost, schedule. At the same time chances of cartelisation cannot be ignored either.

Thus, as mentioned earlier competition makes an enterprise more efficient and offers wider choice to consumers at lower price. Fair competition is beneficial for the consumers, producers / sellers and finally for the whole society since it induces economic growth.

V. CARTELS UNDER COMPETITION ACT, 2002

Anti-competitive Agreements are those agreements which cause or are likely to cause Appreciable Adverse Effect on Competition (AAEC). The Act provides for two kinds of anti-competitive Agreements viz. **horizontal agreements and vertical agreements**. Vertical restraints are agreements or concerted practices entered into between two or more companies each of which operate, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[46]

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[43] See http://www.oecd.org/competition/abuse/2535975.pdf (Last visited September 15, 2013).

[44] Nancy Shah, *Competition Issues in the Civil Aviation Sector*, Internship Project Report, Competition Commission of India, New Delhi *available at* http://cci.gov.in/images/media/ResearchReports/F1_NancyShah_20080411102237.pdf (Last visited September 15, 2013).

[45] *See,* http://www.econ.jhu.edu/People/Harrington/Rome.ppt (Last visited September 24, 2013).

[46] *See*, the European Commission's Guidelines on Vertical Restraints (2000/C 291/01)

However, horizontal agreement is an agreement for co-operation between two or more competing businesses operating at the same level in the market. Horizontal Agreement is presumed to have AAEC and vertical agreements having AAEC which is to be determined by rule of reason.[47] Cartels are included in the category of horizontal agreements presumed to have AAEC. Establishing AAEC is the key factor before any agreement is termed to be anti-competitive and declared void. In case of horizontal agreements that are presumed to have AAEC, the burden of proof shifts on the enterprise or person against whom the charge is framed.[48]

As per Section 3 of the Act, *any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –*

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

Cartelization is one of the horizontal agreements that shall be presumed to have an appreciable effect on competition under Sec. 3 of the Act. Cartel busting requires certain specialized skills which differ from the skills required for investigation and prosecution of other infringements of competition law. An increasing number of Competition Authorities apply leniency programmes to detect the cartel infringement.

Section 46 of the Act empowers Competition Commission of India (henceforth CCI) to impose lesser penalty if disclosure is made by the member of the cartel before submission of investigation report by Director General with CCI.

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available at http://europa.eu/legislation_summaries/other/l26061_en.htm (Last visited September 24, 2013)

[47] Somya Suman, *Competition Law and Cartelization*, Internship Project Report, Competition Commission of India, New Delhi *available at* http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=543 (Last visited September 24, 2013).

[48] *Supra* note 39.

Section 19 of the Act, provides that CCI may inquire into any alleged cartel on receipt of any information from any person, consumer or their association or trade associate. To avoid furnishing of false information, the Act prescribes for payment of very high fee, for the information furnished to be entertained by CCI, hence, making the probability of receiving wrong information is almost nil.[49]

Cartelisation is very difficult to detect and investigate for its inherently secretive nature.[50] The fight against cartels is legally and practically an uphill task. Firstly, cartelists are by definition secretive about their illicit behaviour, and therefore agencies have to undertake great efforts to detect cartels. Secondly, agencies need additional powers and skills to collect sufficient evidence to mount a viable case against non-cooperative defendants. Thirdly, only in the cartel area, do agencies operate sophisticated leniency programmes to destabilize such conspiracies. Fourthly, the investigation of international cartels tests the limits of agency's jurisdictional reach. Last but not the least, the growing trend to criminalize cartel behaviour obliges many agencies to work to a particularly high standard of procedure and proof.[51]

Special skills are required for cartel busting which are different from the skills required for investigation and prosecution of other infringements of competition law. The focus is on proving the existence of an arrangement itself rather than establishing its impact on the market in economic terms.[52]

Section 41(2) of the Act, confers upon the Director General, in the discharge of his duties, the powers as are vested in a Civil Court under the Civil Procedure Code, 1908. By virtue of this section, the Director General is empowered to summon, demand production of documents, receive evidence on affidavit and issue commissions for the examination of witnesses or documents. The Director General or any person investigating under his authority has the powers as are vested in the Inspector in terms of sections 240 and 240A of the Indian Companies Act, 1956. Thus, the Director General or any person investing under his authority also has the power to demand production of documents and evidence which are in the custody of a body corporate and power to search and seizure with the approval of the First Class Magistrate having jurisdiction where he has reasonable grounds to believe that books, papers or documents may be destroyed. [53]

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[49] Competition Act, 2002.
[50] Brander, *Dynamic Oligopoly Behaviour in Airline Industry,* 11, INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANISATION, 407-436 (1993).
[51] *Supra* note 13.
[52] *Ibid*.
[53] *Ibid*

The following are some illustrative cases to explain the aforementioned:

- *Kingfisher-Jet Airways Agreement on Code Sharing*

The Competition Commission of India has begun investigation in the alleged case of airline cartelization in the form of code sharing agreement between the two airlines. Jet Airways and Kingfisher together control a market share of close to 60 percent.[54] Apart from this combination there are only small market share holding airlines excluding Air India. So this combination may prove to be detrimental to the interest of the consumers and to the very spirit of the competition law. Also, the DG report has found that the code sharing agreement has breached sections 3 and 4 of the Competition Act, 2002. These sections deal with anti-competitive pacts regarding production, storage, distribution and supply and abuse of dominant position. The CCI has reached a final determination in the case and found that there was no anti-competitive practice or a cartel to increase air fares in this case.

But it can be said that such alliances may prove detrimental to competition in the relevant market as the main objective of an alliance is to strengthen or expand the aligning member's market presence and to redefine or consolidate their position in aggressively competitive global environment.

Airline alliances benefit the consumer by offering seamless travel and services between a more extensive range of city pairs, reduction in traveling time, joint lounges and co-ordination of Frequent flier programs. But on other hand, alliance can significantly reduce competition on overlapping non-stop routes and overlapping connecting routes where the allied airlines were once main competitors.

The two airlines could form a monopoly, virtually killing all kinds of competition in the aviation sector.[55] This code sharing agreement would result in formation of a cartel and may also result in an abuse of dominance.[56] But as said before that rule of reason needs to be applied rather than just a theoretical doctrine or principles of cartelisation that prohibit industry practice such as code sharing *per se*.

- *Air India's Involvement in Fuel Surcharge Raising Cartel*[57]

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[54] *See,* http://www.dnaindia.com/report.asp?NewsID=1111855 (Last visited September 25, 2013).

[55] *See,* http://businesstoday.intoday.in/story/probe-into-airfare-hikes/1/11681.html (Last visited September 25, 2013).

[56] Tae Hoon Oum, *The Effects of Airline Code Sharing Agreements on Firm Conduct and International Air Fares*, JOURNAL OF TRANSPORT ECONOMICS AND POLICY, 102 (1996).

[57] *See*, http://www.thehindubusinessline.in/2010/06/23/stories/2010062350180900.htm (Last visited September 25, 2013).

It was found that the airlines had conspired to raise fuel surcharge rates for air cargo to-and-from Korea between 1999 and 2007 in a concerted manner. The case included summoning 54 airline executives from all over the world for investigation and conducting a joint investigation with foreign competition authorities for the first time. The regulator found that the conspiracies took place on outbound shipments from Korea and inbound shipments to Korea from Hong Kong, Europe and Japan.

The case showed that the airlines overcharged by $5.71 billion in the local market by imposing or increasing fuel surcharges during the eight-year period. The uncovering of airline cartels on fuel surcharge actually began in 2006, when European and US authorities investigated few airlines including British Airways. The investigation came at a time when the airlines were facing high fuel costs and competition from low-cost carriers.

The situation deteriorated further in 2007, as more airlines were inspected and charged for various anti-competitive practices. European Commission charged several airlines for fixing freight service prices. British Airways had to pay billions of dollars as fine as the UK and the US competition authorities denounced it for price fixing during the period 2006-07.

Korean Federal Trade Commission (KFTC) found that 21 airlines had conspired to raise the fuel surcharge rates for air cargo to and from Korea including Air India. Flag carrier Korean Air was fined the largest amount of KRW 48 billion, though the actual fine paid will be around KRW 22 billion as it was granted leniency for providing crucial information during the investigation.

India's national carrier although escaped from being prosecuted by Korean Fair Trade Commission in the present case and a class action against 21 airlines followed the issuing of a combined $ 98.9 million as fine.

From this case, we can see that Korean Air even after being a flag carrier and founded by South Korean Government in 1962 was penalised, and Air India despite escaping the penalty from KFTC was not brought to book or penalised by the Indian Antitrust Authorities even when there was a conclusive proof of Air India's involvement. Just because it is acting as government instrumentality (i.e. if Air India Ltd.'s corporate veil is pierced we can see the government officials are involved in the business decisions) so, it should be exempted from investigation of such conduct by CCI shows lackadaisical attitude of the Indian Antitrust Authorities.

As Air India by virtue of Aeronautical Information Circulars No. 08 of 2009 and the Air Corporation Act of 1953 gets preferential treatment in few matters, this creates disincentives for the national carrier to become a more efficient and financially leaner service provider. In order to level out the competitive field between private service providers and national carrier, preferential treatment legislation needs to be revised.

Because poor business decisions of Air India are not punished by the market in the same way as poor decisions of other private air carriers. Bad business decisions of all private air carriers are punished by holders of the firm's debt whereas Air India is only accountable to the Indian government. This social safety net reduces Air India's incentive to compete in the same way as other private Indian carriers. Maintaining the viability of the national carrier is very important, however preferential treatment reduces the national carrier's incentive to compete and make sound business decisions.

Furthermore, in order to incentivize Air India to become a leaner and more competitive service provider, the national carrier may be partially privatized. Also, to show India's commitment and law abiding attitude towards Declarations/Memorandum of Understanding (MoU) signed by India with BRICS and other countries for international cooperation in anti-trust issues.

- *Cartels For Charging High Ticket Pricing*

CCI received a fresh complaint in September 2013 from the Air Passengers Association of India (APAI), which has alleged that airlines were acting as cartels to push the ticket prices. Chennai-based APAI had approached CCI after a recent hike of as much as 25 per cent in air fares by most carriers.[58]

CCI Chairman Mr. Chawla said that CCI would need more information from APAI to proceed further, as the price movements were found to be a function of supply and demand during its earlier probes. CCI Chief also said that this matter has been looked into again and again, because the upward and downward movements in ticket prices have indeed been found to be in tandem. At the same time, the prices had also been found to be moving in tandem with the forces of demand and supply, which is how a market should function and therefore no evidence could be seen of any cartelization.

In the first week of September, all domestic carriers hiked their respective fares by about 25 per cent after a steep rise in fuel prices. The hike was first announced by low-cost carrier Spice Jet and followed by other players like Jet, Air India, Indigo and Go Air followed suit.

Although this matter has merely begun and not even close to its final determination, it is difficult to comment conclusively on the likelihood of cartel formed among the airlines to hike the ticket prices

[58] *See,* http://beta.livemint.com/Companies/xJ1ocj3GvXDmPl5aBU5DSK/CCI-to-probe-high-airfares-for-5th-time.html (Last visited September 25, 2013).

because it would need rational economic evidences to make sure that cartel exists and thereby satisfy rule of reason.

VI. COMBATING CARTELS IN OTHER JURISDICTIONS

Unlike India, that doesn't have many cases where airline cartels are prosecuted or discovered. In other jurisdictions there are many decided cases from which CCI can draw lessons and learn from their experiences. To illustrate cases from other jurisdictions, the authors have selected following countries:

- Europe Union (EU): On November 9th, 2010, the European Commission fined 11 air cargo carriers nearly €800m for operating a global cartel that had affected air cargo services within the European Economic Area between December 1999 and February 2006. The airline carriers had initially introduced a co-ordinated flat rate surcharge per kilo for all shipments, and then extended their co-operation by introducing a security surcharge.[59] Thereafter, due to the carrier's refusal to pay a commission on surcharges to their freight forwarder clients, the carriers ensured that the surcharges did not become subject to competition through the availability of discounts to customers. Ultimately, this cartel fell within the purview of cartelization in terms of regulatory fines and exposure to civil damages claims.[60]

- United States (USA): Department of Justice (DoJ) had raided the offices of several carriers on 11 February 2006, seizing thousands of documents, following a tip-off from whistleblower Lufthansa. Lufthansa thereafter, pleaded guilty to participation in the cartel and has provided cooperation in the subsequent DoJ investigations against other participants in the conspiracy. In return, the DoJ reduced the amount of the fine it sought against Lufthansa. To date, the DoJ has levied fines of around US$1.8bn on a number of carriers and a number of airline executives have also faced fines and prison sentences in the US for their participation in the cartel.[61]

  The 16 companies which had pleaded or agreed to plead guilty to the DoJ's investigation into this cartel, including Air France-KLM, British Airways, Cathay Pacific, El Al, Japan Airlines, Korean Airlines, LAN Cargo, Martinair, Northwest Airlines Qantas and SAS Cargo. According to the DoJ, the "*co-conspirators entered into and engaged in a combination and conspiracy to*

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[59] Scott Campbell and Tristan Feunteun, *The Air Cargo Cartel - Counting the cost of Conspiracy*, COMPETITION LAW INSIGHT, 18 September 2012, *available at* http://www.stewartslaw.com/article-on-the-air-cargo-cartel-by-scott-campbell-and-tristan-feunteun-of-stewarts-law.aspx (Last visited September 26, 2013).

[60] *Supra* note 51. *See*, http://www.bbc.co.uk/news/business-11719507 (Last visited September 27, 2013).

[61] *See*, United States of America v. British Airways PLC, Criminal No.: 07-183-JDB, 15 U.S.C. § 1, *available at* http://www.justice.gov/atr/cases/f224900/224943.htm (Last visited September 27, 2013).

suppress and eliminate competition by fixing the cargo rates charged to customers for international air shipments, including to and from the United States".

Thus, in a cartel case, under the US law, each individual cartelist is liable for all the damages caused by the cartel and which is estimated to be equivalent to the damages caused to the affected country, which in this case was the US. During trial, when found guilty, the carriers were also sought to be fined three times the actual amount of damages caused by the conspiracy as a deterrent to violations of US competition laws.[62]

At the time of settlement, American Airlines decided to provide information and evidence in the form of witnesses, documents, electronic data and meetings with counsel, all of which was used in the prosecution of non-US based claims totalling to a total figure up to $485.8m being settled by 11 carriers.[63]

- Australia: Australian Competition & Consumer Commission (ACCC) had recently asked its airline industry to cough up the largest penalties for cartel conduct in its history. In 2006, the ACCC had started investigating collusion on fuel surcharges for air cargo services for the period between 2000 and 2006.

  After the proceedings were launched between 2008 and 2010, 13 of 15 international airlines have paid a total of $98.5m to the end of last year. Qantas paid $20m, and most recently Emirates, Singapore Airlines, Cathay Pacific and Thai Airways International have, respectively, paid penalties of $10m, $11.75m, $11.25m and $7.5m.[64] However, Garuda airlines of Indonesia, which has not been included in the class action, has been a holdout, along with Air New Zealand, with both contesting the ACCC's findings in the Federal Court.[65] The ACCC has, till date, fined nine airlines AU$58m.

- South Africa: Competition Commission announced in March 2012 a settlement with South African Airways and Singapore Airlines. The settlement, which involves a combined fine of $5.8m, encompasses the air cargo surcharges as well as other price-fixing, such as escalating

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[62] *Ibid.*
[63] *Ibid.*
[64] *Supra* note 51. *See*, http://www.theaustralian.com.au/business/opinion/stakes-rise-high-in-air-cargo-cartel-case/storye6frg9wx-1226726471455 (Last visited September 27, 2013).
[65] *Ibid.*

prices on particular routes during the 2010 FIFA World Cup. This probe followed a leniency application by SAA in December 2009.[66]

VII. Conclusion And Suggestions

After analysing working of Indian Airline Industry and different case studies, it can be safely concluded that there are potential areas of cartels in airline industry like code sharing which is not cartel *per se* but can be a mode of anti competitive practice. Secondly, Air Turbine Fuel (ATF), dividing of routes, air ticket price manipulation, etc are some areas on which competition law has to keep a check on cartel formation.

After having a bird's eye view of different airline cartel cases in different jurisdictions it can be seen that whether an airline is national airline or a private airline that countries have not only dealt with them harshly but also imbued them with criminal liability in worst cases. Another point of observation is that the jurisdictions have not only taken the damage to their economy alone but also the damage that occurred in other countries where the cartel operated.

A large number of Competition Authorities operate *'Leniency Policy*' as a key tool to detect cartel infringements. The law empowers the CCI to extend the benefit of lesser penalty to party in cartel for disclosing the facts and information of cartel operation. The preliminary evidence of mergers and acquisitions along with code-sharing agreement compelled to conclude that there is possibility of cartels to exist in Indian airline industry.

Civil Aviation Minister Ajit Singh had also proposed an economic cell in his Ministry to monitor the pricing mechanism and said*" The airfare monitoring cell is ready and will soon be commissioned under the aegis of the ministry. The economic cell would analyse data on tickets sold by airlines under different price buckets and make the information public to bring in transparency in airfare pricing. In case there are discrepancies, it would be referred to the CCI,"*[67]

Under Competition Act, 2002, Commission is empowered to determine whether the combination would have or is likely to have an Appreciable Adverse Effect on the competition (AAEC) and therefore, CCI will have to play a proactive role in the maintenance and observations of fair competition rules and prevent any anti competitive agreements from taking place. With the passage of time a number of players would certainly attempt to improve their market share and profitability. If

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[66] *See*, http://mg.co.za/article/2012-03-26-saa-agreest-to-r188million-price-collusion-settlement (Last visited September 21, 2013).

[67] *See,* http://www.business-standard.com/article/companies/fare-hike-passengers-association-takes-airlines-to-cci-113090800267_1.html (Last visited September 23, 2013)

cartels are not destroyed at incipiency it will take us back to the era of monopoly or dictatorship enjoyed by the State air carriers and consequently there will be dearth of low cost airlines in India. There's urgent need to formulate sector specific competition rules and policy according to the needs of industry in India.

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THE CALL FOR CRIMINAL SANCTIONS FOR ENFORCEMENT OF COMPETITION LAW AND ITS PRACTICAL CONCERNS

DR. ANEESH V. PILLAI*

ABSTRACT:

The effectiveness of competition law and its enforcement based on fines as well as behavioral and structural remedies has always been a debatable issue. It is argued that such competition law enforcement based on fines and other remedies has less deterrent effect compared to a system based on criminal sanctions. Therefore some of the jurists and authors have proposed that criminal sanctions should be included in the competition law enforcement. This paper seeks to examine the need and effectiveness of criminal sanctions in enforcement of competition law. It discusses the various justifications for the use of criminal sanctions for competition law enforcement such as Utilitarian Justification of Deterrence; Retributivist Non-Consequentialist Justification; Stigma Effect; To ensure the Obligation of Members or Agents of the Company; To Legitimize the Extra Territorial Application of Competition Law; and To Ensure Cooperation among Countries. At the same time this paper also identifies various practical issues involved in the criminal enforcement of competition law such as the problem of defining competition law offences; attribution of mens rea to corporate bodies; attribution of vicarious liability to the body corporate in criminal law; etc. Further the paper attempts to provide some pragmatic solutions for dealing with the various concerns raised by the criminal enforcement of competition law.

I. INTRODUCTION

In the contemporary era, competition law has emerged as one of the most significant branches of law[1]. Its importance can be attributed to the increasing trade, simultaneous changes in the market and the need to regulate such markets. The basic objectives of competition law are; to eliminate anti-competitive practices in the market, to promote competition and to protect the welfare of consumers. Competition law regimes all over the world can be classified into three broad categories depending upon the approach followed by the countries. Firstly, many countries consider competition law as civil wrongs, for example the European Union Competition Law[2]. Secondly, some countries consider

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[1] In USA this branch of law is known as 'Antirust Laws'. However in most of the jurisdictions of the world this branch of law is known as 'Competition Law'.

[2] Wouter P. J. Wils, *Is Criminalization of EU Competition Law the Answer?* (2005). 28 World Competitions, Issue 2, 117-159.

competition law as criminal in nature, for example the US Antitrust Laws[3]. Thirdly, some countries have adopted a mixed approach and consider some of the anticompetitive practices as criminal offence and some anti competitive practices as civil wrongs. For example in the UK most of the anti competitive practices are civil wrongs but cartels are considered as an offence by the UK Enterprise Act, 2002; in Austria, anti competitive practices are civil wrongs but bid rigging is considered a criminal offence. Though countries follow a civil or criminal or mixed approach, there has always been a dispute regarding the civil approach in competition law[4].

The effectiveness of competition law and its enforcement, based on monetary penalty and behavioral and structural remedies, has always been a debatable issue. It is argued that such an enforcement based on fines and other remedies has a less deterring effect as compared to a system based on criminal sanctions. Therefore some of the jurists and authors have proposed that criminal sanctions should be included in the competition law enforcement[5]. At the same time it is to be noted that some countries who had initially adopted criminal sanctions for enforcement of competition law have subsequently decriminalized the same and adopted a civil approach. For example in the Netherlands, the Competition Act, which came into effect in 1997, replaced an earlier system of criminal enforcement by a purely administrative system with only fines for undertakings. Similarly in Austria, the 2002 Competition Law reform replaced a system of criminal enforcement by a system of administrative fines for companies. Also in Luxembourg, the Competition Act, 2004 abolished an earlier competition regime based on criminal enforcement and replaced it by a new regime based on only fines[6]. In view of the increasing importance of competition law in the contemporary times, it is necessary to examine the effectiveness of criminal sanctions for the enforcement of competition law. Thus, this paper seeks to examine the need and effectiveness of criminal sanctions in enforcement of competition law.

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[3] Federal Trade Commission (USA), *An FTC Guide to the Antitrust Laws* available at http://ftc.gov/bc/antitrust/factsheets/antitrustlawsguide.pdf (last visited September 30, 2013).

[4] Allan Fels, *International Perspective Competition Policy Asia Pacific Region Regional Economic Development policy to Planning to Investment Opportunities in Vietnam Hanoi,* available at http://www.accc.gov.au/system/ files/International%20Perspective%20Competition%20Policy.doc. (last visited September 30, 2013).

[5] *Supra* Note 1. Also See ANGUS MACCULLOCH, BARRY RODGER, COMPETITION LAW AND POLICY IN THE EC AND UK, 394 (Routledge – Cavendish, 4th Edn.-2009); KATALIN J. CSERES, MAARTEN PIETER SCHINKEL, FLORIS O.W. VOGELAAR, CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES, (Edward Elgar Publishing Limited, U.K. 2006) ; Julie Clarke, *The Increasing Criminalization Of Economic Law – A Competition Law Perspective*, (2012) 19 Journal of Financial Crime, Issue 1, 76 – 98; Gurgen Hakopian, *Criminalisation of EU Competition Law Enforcement – A Possibility After Lisbon?*, (2010) Comp. L. R, Vol. 7 (1) 157-173.

[6] K. J. CSERES et.al, CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, 73-74 (Edward Elgar Publishing Ltd., 2006).

II. COMPETITION LAW AND ITS ENFORCEMENT

Competition law may be considered as a set of rules and judicial decisions developed by governments and judicial institutions in order to promote competition in the market as well as prevent those practices which adversely affect the competition in the market and are also against the welfare of the consumer in the market. During the past two decades the number of countries that have adopted competition law framework has grown exponentially[7]. In fact many of the developing countries have adopted and developed competition law in response to the increasing liberalization and for reforming their markets in order to streamline it with the changing practices in the market. India had also adopted the policy of economic liberalization in the last quarter of 1980 and introduced a number of economic reforms. As a result the Indian markets started growing and not only the domestic players expanded but foreign market players also entered into Indian market. In order to cope up with these changes in the market the Indian Government adopted the Competition Act, 2002[8].

The Competition Act contains various provisions to deal with practices which affect the competition in the market such as anti-competitive agreements, abuse of dominant position by dominant firms and regulation of business combinations. Like any other competition law regime, the Competition Act also contains the penalty provisions for infringement of its provisions. The penalties provided under the Competition Act are of two types *i.e.* Monetary Penalty and Criminal Liability[9]. Monetary penalty is imposed under the Competition Act for entering into anti competitive agreements; for abuse of dominance and for entering into combinations having an adverse effect on competition in Indian market. The criminal liability under the Competition Act arises only when there is a non-compliance of an order passed under the Act[10]. It is to be noted that there is no criminal liability under this Act for any of the anti competitive practices.

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[7] Michal S. Gal, *The Ecology Of Antitrust Preconditions For Competition Law Enforcement In Developing Countries In Competition, Competitiveness And Development*, UNCTAD, Geneva, 20-38 (2004).

[8] The Competition Act, 2002 was enacted by the Parliament of India in the year 2002 as part of liberalization and on recommendation of high powered Raghvan Committee Report, 2000. It replaced the Monopoly and Restrictive Trade Practices Act, 1969. The Act received the assent of the President in 2003. The Competition Act, 2002 was amended by the Competition (Amendment) Act, 2007 and again by the Competition (Amendment) Act, 2009.

[9] See, Mehak Gupta, *Penalties for Infringement of Competition Law,* Internship Project Report, Competition Commission of India, New Delhi, July 2012, http://cci.gov.in/images/media/ResearchReports/Penalties%20for%20infringement%20of%20Competition%20Laws.pdf (last visited Sept. 30, 2013)

[10] *See*, § 42 & §48

III. NEED FOR CRIMINAL SANCTIONS FOR COMPETITION LAW ENFORCEMENT

The use of criminal law for the prevention of malpractices in the market and protection of the interests of consumers is not a new idea. Even in ancient India, the malpractices in market were considered as an offence and one can find an elaborate discussion in the Vedas[11]. During such period four broad types of relevant criminal offences were prominent: adulteration of food stuffs, charging of excess prices, fabrication of weights and measures and sale of forbidden articles. For all these offences, statutory measures and punishments were discussed in prominent texts like Manusmriti, Naradasmriti and Kautilya's Arthasastra[12]. The history of other countries also shows that criminal sanction was used for preventing malpractices in the market. For example, in Austria, the seller of adulterated goods had to swallow all of the adulterated products publicly and in France in the 16th century there was a law under which people were allowed to throw eggs at those who had sold eggs of lower quality[13]. Thus criminal law has been used for the detecting, preventing and punishing the malpractices in the market place.

In modern times the markets have expanded and the detection and prevention of malpractices or anti competitive practices is not easy. However, most of the countries have developed a competition law system to deal with such malpractices based on monetary penalties. In this context it is to be noted that the competition law based on monetary penalty suffers from a serious weakness. This is because generally a potential violator of competition law would calculate tentatively the amount of financial profit he would make from his anti competitive practice and also calculate approximately the amount of monetary penalty he may incur if caught by law. Though the exact fine amount is difficult to calculate, the potential violator may calculate the approximate amount by looking into the practice of competition authorities. Thus if the net financial profit is more compared to the monetary penalty he would not hesitate to adopt the anti competitive practices. The companies or the traders are able to pay the fine or compensation, because it is only a negligible amount compared to the amount they have obtained from engaging anti competitive practices. Though there are various instances of the Competition Commission of India ('CCI') imposing crores of rupees as fine on violators[14], it is to be noted that such amounts are negligible for companies. For instance, the CCI in its 2012 order, had

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[11] Dr. A. Rajendra Prasad, *Historical Evolution of Consumer Protection and Law in India: A Bird's Eye View*, 11 JOURNAL OF TEXAS CONSUMER LAW 132- 136 (2008).

[12] V. BALAKRISHNA ERADI, CONSUMER PROTECTION JURISPRUDENCE, (LexisNexis, Nagpur, 2005) pg.

[13] MAN CHAND KHANDELA, CONSUMER PROTECTION IN INDIA, 10 (Shyam Prakashan, Kanpur 2001).

[14] For example, Competition Commission of India has imposed a penalty of Rs. 1,773.05 crore on Coal India Ltd for abusing its dominant position as a fuel supplier, available at http://www.thehindu.com/business/cci-slaps-rs1773-cr-penalty-on-cil/article5444989.ece, (last visited on 17.02.2014).

imposed a fine on Aditya Birla Group's Ultratech Cements (Rs 1,175 crore), Ambuja Cements (Rs 1,164 crore) and ACC (Rs 1,148 crore). The fine was fixed at 50% of their profit during 2009-10 and 2010-11[15]. This example shows that even if cores of rupees are imposed as fine it will not adversely affect the violator since they are making very high profits and have large assets. . Thus in most cases the violator is happy to pay this negligible amount and may consider it as a license amount to continue or proceed with their anti competitive practices. Therefore to remedy this weakness it is suggested that the Competition Act should criminalize anti competitive practices and provide criminal sanction such as imprisonment. There are various arguments put forward by jurists in order to support the inclusion of criminal sanctions in Competition Act

1. The Utilitarian Justification of Deterrence

The Utilitarian Justification of Deterrence is based on the assumption that criminal sanctions have more deterrent effect than a civil sanction. This is the most common justification for introducing criminal sanctions for anticompetitive behavior. It is argued that for first time offenders, this will ensure effective deterrence in contrast to civil penalties. There has been a general consensus that pecuniary penalties do not meet the standard of effective deterrence since these penalties fall short when compared to the gains achieved from the violation[16].

According to the utilitarian principle propounded by Bentham, the law should be such that it promotes the greatest happiness of greatest number. As per Bentham all human action is subject to two sovereign masters: the pursuit of pleasure and the avoidance of pain[17] and hence the legislature may opt to use instruments of pain and pleasure for achieving its social goals. Thus application of this theory to competition law would mean that the punishment for anti competitive practices, although it causes pain, can be justified because it incapacitates the offender. It specifically deters offenders from future crimes, promotes general deterrence, and may reform the offender. The US Antitrust laws are based on this justification[18]. The US experience has shown that imprisonment is a very effective

[15] See, http://timesofindia.indiatimes.com/business/india-business/Tribunal-upholds-CCIs-630cr-fine-on-cement-companies/articleshow/20116121.cms, (last visited February 17, 2014).
[16] Kush Makkar, *Combating Cartels in India: Justifying Criminalization,* Internship Project Report, Competition Commission of India, New Delhi, July 2012, , available at http://www.cci.gov.in/images/media/ResearchReports/cartels.pdf, visited on 17.02.2014.
[17] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (John Bowring ed., 1843).
[18] Susan Beth Farmer, *Real Crime: Criminal Competition Law,* available at http://www.luc.edu/media/lucedu/law/ centers/antitrust/pdfs/publications/newsviews/farmer.pdf, (last visited September 30, 2013)

deterrent for potential antitrust offenders. It was pointed out by Arthur Liman that, "For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail; and thus the threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations."[19]

2. The Retributivist Non-Consequentialist Justification[20]

This argument is based on the retributive theory of punishment, which means that a crime is not aimed merely at the sufferer but is in affront to the community itself which should avenge the wrong and see that retribution overtakes the wrongdoer. It means that the criminal should meet his reward by an equivalent suffering[21]. Thus according to this argument the offenders deserve punishment because they are morally culpable. The persons or enterprises engaging in anti competitive practices have done a wrong against an individual as well as against the society and hence they have to be rewarded with punishments for such wrongs[22]. It is also argued that the anti competitive practices are against the society as a whole like a crime, thus criminal sanctions should be made available for such practices.

3. Stigma Effect

It is considered that the imposition of criminal sanctions carries a stigma. This is because criminal acts and its punishments receive wide publicity. The hostile response of the society and the consequential impact on the family and friends would help to deter the likeminded persons from committing and repeating such crimes. Prison sanctions send a more deterring message as it ensures negative publicity in business community. The criminal sanctions thus have a stigma effect when compared to civil penalties[23].

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[19] BRENDAN J. SWEENEY, THE INTERNATIONALIZATION OF COMPETITION RULES, 109 (Routledge, USA, 2010).

[20] See for more, LEO ZAIBERT, PUNISHMENT AND RETRIBUTION, 140 (Ashgate Publishing Co. 2006); and Mitchell N. Berman, *Two Kinds of Retributivism*, in R. A. DUFF & STUART GREEN (Ed.), PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, (Oxford Scholarship Online, 2011).

[21] V. D MAHAJAN, *JURISPRUDENCE AND LEGAL THEORY*, 146 (Eastern Book Co., Lucknow, 5th edn. 2005).

[22] *Supra* note 15.

[23] *Supra* note 1.

4. Fines on Corporations will not ensure the Obligation of Members or its Agents

Another argument which supports the criminalization of anti competitive practices is based on the ground that mere imposition of fine on company or corporation will not ensure obligation of members or its agents. This is because the company or corporations have a distinct personality from the members and in many cases it is only the company or corporation which is the legal or artificial person that incurs the liability and the members go free. Also by the time the anti competitive practice is detected, the member or agent or manager of the company/corporation may have left it or joined some other company or corporation. Thus the monetary penalties to a company/corporation would not ensure a responsible behavior by the individual member or manager in a company. Therefore, if there is a criminal liability imposed on such individual members or manager for anti competitive practices they would behave in a more responsible manner and thereby the rate of anti competitive practices can be reduced.

5. To Legitimize the Extra Territorial Application of Competition Law

In the contemporary times due to the developments in international trade, the anti competitive practices have no territorial limits. Business practices of multinational companies can affect the market conditions of more than one country. As a result the modern competition law has to provide for extra territorial application if there is an adverse effect in the market. The Competition Act provides for an extra territorial application under Section 32[24]. However, it is to be noted that the Competition Act is only a civil law. The application of civil competition law by one country in the territory of another country is not permissible under international law. This is because under international law every state is equal and sovereign, so no state can enforce its civil law in the territory of another country.

At international level civil jurisdiction of a state is based on territoriality i.e. every state has jurisdiction only on those individuals who are within its territory and cause of action arises within their territorial limit[25]. Thus no state can exercise jurisdiction on a cause of action arising in another country. However under the criminal jurisdiction extra territorial jurisdiction is permissible on various

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[24] §32 provides that: The Commission shall, notwithstanding that - (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.

[25] *Report of the Task Force on Extraterritorial Jurisdiction,* available at www.ibanet.org/Document/Default.aspx? Document Uid=ECF39839*,* (last visited September 30, 2013).

principles such as active nationality, passive nationality, and protective principle. Among these principles, the principle of passive nationality and protective principle can be used as a justification for the extra territorial application of competition law if such competition law is criminal in nature. The principle of passive nationality confers jurisdiction on the basis of nationality of the victim. Thus if an Indian national suffered harm or loss due to the anti competitive practices India can exercise its criminal jurisdiction to such country where the act is committed. So the extra territorial application of criminal competition law can be justified on the ground of protective principle.

Protective principle allows states to exercise jurisdiction if the crime has an effect on the safety and welfare of such country. Thus the countries can exercise jurisdiction on any anti competitive practices committed anywhere in the world if it affects the safety and welfare of such country. It is generally considered that an effective competitive market is a sine qua non for a welfare state. Thus any practice which has an adverse effect on such market can be considered as an act against the welfare of the state. A country's safety is based on its economic stability and anti competitive practices can cause damage to the economy of the country. Thus it can be seen that by using the protective principle extra territorial application of criminal competition law can be justified. Therefore it is argued that to legitimize the extra territorial application of competition law it is necessary to criminalize the anti competitive practices.

6. To Ensure Cooperation among Countries

Further it is argued that if there are criminal sanctions, it would ensure cooperation among the states to prosecute such offenders. This is because at international law there is no system extradition for a civil act. But in case of a criminal case such transfer can be facilitated by way of Extradition Treaties between the countries. In 2010 UK extradited Mr. Ian Norris to USA for price fixing [26].

Thus the criminalization of competition law offers the above advantages. However at the same time it raises various practical concerns.

IV. PRACTICAL CONCERNS IN THE CRIMINALIZATION OF COMPETITION LAW

The most important concern is with respect to the definition of offence under the competition law. The question which arises is whether each and every anti competitive practice can be considered as an offence? Or only some practices can be considered as offence? And what criteria should be followed while considering anti competitive practice as an offence.

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[26] See, "*Former Morgan Crucible Chief Ian Norris Sentenced To 18 Months in Us Jail*", THE TELEGRAPH, Dec 10, 2010.

The second major concern is that in order to constitute a crime both 'actus reus' and 'mens rea' are essential. *Actus reus* is the physical act involved in a crime and *mens rea* is the guilty mind for committing such an act. In competition law the element of *actus reus* can be proved by establishing an anti competitive agreement or an abusing practice on the part of the accused. However proof of *mens rea* or guilty intention is a herculean task. This is because the accused in an anti competitive practice is primarily a corporate personality[27]. Hence, the question which arises here is whether the intention of the manager or employee or an agent of company/ body corporate can be attributed to such a legal person?

A further concern which arises is that an anti competitive practice can be performed by a manager/employee/or an agent of a body corporate. In such a case the question is who can be held criminally liable or in other words who can be considered as an accused? This is because generally the anti competitive practices are carried out in the name of a company/body corporate. The decision for such practices is taken at management level; but they are carried out by the employees. Therefore the question is whether manager or employee should be considered as an accused in such case or whether the company can also be considered as an accused.

The fourth major concern is that in most of the countries that follows a civil competition law including India, the proceedings are initiated by the enforcement agency i.e. Competition Commission and it imposes the monetary penalty. Thus the Competition Commission can be both the aggrieved party and the decision maker at the same time. However, if the competition law is criminal in nature such enforcement is not acceptable. This is because India follows an adversarial system for prosecution in criminal matters, thus both prosecutor and judge should not be the same person. Moreover, such a trial will violate the fundamental right to fair trial of an accused.

The final concern is with respect to the proof of anti competitive practices. This is because the standard of proof required in a criminal case is very high compared to the proof required in a civil case. In a civil case the penalty can be imposed on a violator on the basis of balance of probability; however in criminal case in order to impose sanction the case has to be proved beyond any reasonable doubt. Hence in order to impose a criminal sanction in a competition law case, the guilt of the accused should be proved beyond any reasonable doubt. However it is a herculean task to prove the guilt of the

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[27] Lori Cornwall Mark Katz, *Criminal Fundamentals: Horizontal Agreements between Competitors,* available at http://www.dwpv.com/images/CriminalFundamentalsHorizontalAgreementsBetweenCompetitors.pdf. , (last visited September 30, 2013).

accused in a competition law case[28]. This is because compared to a traditional crime the competition law crimes are carried out by business experts in the four walls of their business house and therefore does not leave any evidence against them. Moreover in competition law cases investigation is done by either commission itself or an agency like director general[29] appointed by the commission. It is to be noted that the members of the commission or such other agency engaged in investigation generally are not trained in investigation of crimes. Thus it can be argued that the collection of evidence and proving the guilt of an accused in a criminal competition case is very difficult.

V. THE WAY FORWARD

Competition law is the main tool in the hands of government to create competition in the market and to eliminate practices which have an anti competitive effect. However the achievement of such objectives is not an easy task. Therefore in order to ensure the effectiveness of competition law and to achieve its objectives, criminalization of competition law is suggested. The criminal law tries to establish that a criminal act will not end as a profitable enterprise but it would be an ill bargain to the offender. The temptation to conserve or promote one's selfish interest is at the bottom of every crime. The criminal law by imposing an adequate penalty on the offender as a consequence of his crime, seeks to create an artificial counter motive to avoid the path of crime. To this end it inflicts physical evils on the offender, which vary in proportion to the gravity of the offence or magnitude of its temptation. Such evils are imprisonment, fine and confiscation of property etc[30]. In order to ensure an effective criminal law framework for competition law enforcement, it is necessary to address the practical concerns discussed above. The following suggestions can be considered for dealing with those concerns and for establishing an effective criminal law framework for competition law enforcement.

1. The anti competitive practices which are considered as *per se illegal* by various competition law jurisdictions can be considered as offences under competition law[31].

2. Mens Rea should be attributed to the company/ body corporate. Recently, the Supreme Court of India in *Iridium India Telecom v. Motorola Inc*[32] has confirmed that companies can be prosecuted for

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[28] Dr. Péter Mezei, *"Wanted: Antitrust Criminals": Criminalization of Cartel Law with A Special View to Hungary* available at *www.bpugyvedikamara.hu/download.php?id 120560* (last visited September 30, 2013)
[29] *See* §16 Competition Act, 2002.
[30] *Supra* note 12 at 71; Aneesh V. Pillai, *Criminal Law: A Tool for Consumer Protection in India*, 1 (6) INDIAN JOURNAL OF APPLIED RESEARCH, 131 (2012)
[31] The practices like, Price Fixing; Cartels; Sharing of Market; Bid Rigging or Collusive Bidding; and Controlling of Production, Supply, Markets, Technical Development, Investment or provisions of Services. (*See* §. 3(3) of Competition Act, 2002)
[32] Iridium India Telecom v. Motorola Inc (2011) 1 SCC 74.

offences involving *mens rea*. The Court in *Iridium* case has approved that the intention of the directing mind and will of a company is attributed to the company.

3. Vicarious Liability should be imposed to the company and other personas who are involved in such activities. Though vicarious liability is not a general rule in criminal law, a statute can impose vicarious liability. Thus all the persons who are involved at the decisional level and the level of execution should be considered as criminally liable.

4. A separate court should be established for conducting the trial of criminal competition cases and trained prosecutors should be appointed for competition law cases.

5. A proper market investigation body should be established with adequate number of trained investigators for the investigation of competition law cases.

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INVESTIGATING PETROLEUM INDUSTRY OF INDIA WITH RESPECT TO ALLEGED COMPETITION LAW VIOLATIONS

BY UJJAWAL SATSANGI & SOURAV CHANDAN PADHI[1]

Abstract

Petroleum is a commodity of high volatility in lieu of economic values. Today, no nation can survive without energy and petroleum is the most important source of energy. Petroleum prices have always been a topic of discussion in everyday life of a common man. It affects not only the ordinary discussions of coffee shop but also the discussions of the centre politics at the parliament. But, Indian petroleum sector is alleged to have anti-competitive behaviours. It is argued that the state owned PSUs are not allowing the private players to survive in a free and open market. Now the moot question is that what kind of effect is such policy making on the competition and on the consumers. Competition is a boon to consumers, and regulation is helpful to the nation as a whole. The former helps the consumers directly by providing them quality products with multiple options, whereas the lattert helps in ensuring the reach of every citizen to every kind of resource. Both are different in nature. But the question is what is better for petroleum sector; Regulation or competition? This article will find the answer to it. It will also inspect the possibility of survival of private players in a state dominated market without hampering the consumer rights.

> *"And while the law of competition may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department"*[2]

I. Introduction

In 2009, India was the world's fourth largest consumer of crude oil and petroleum products after the United States, China and Japan, with product consumption growing by a remarkable 5.2% per annum in 2009, despite the effects of the global recession.[3] India is forecasted to become the world's third largest oil consumer by 2014, although per capita consumption rates are expected to remain well below OECD averages.[4] Given the growing significance of India as a crude consumer, it is important to

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[2] Andrew Carnegie, *Wealth* 148 N. AM. REV. 653, 655 (1889).

[3] INTERNATIONAL ENERGY AGENCY (2010), *Oil Market Report* 16 (February 11, 2010) *available at* http://omrpublic.iea.org/omrarchive/11feb10full.pdf.

[4] International Energy Agency, Tables: Reviewing Medium Term Horizon – December 2009, *available at* http://www.oilmarketreport.org/indexsubscribers.asp (last accessed on September 4, 2013).

understand and analyse the pricing, regulatory and investment dynamics at play in its downstream petroleum sector. These factors will to a large extent shape domestic supply and consumption patterns currently and into the future, which in turn will also largely determine the nature of India's involvement in global energy markets, especially refined product and crude markets. A country's economic growth is closely correlated to the energy demand. Consequently, the demand for oil and gas, which is one of the main sources of meeting energy requirements, is expected to increase further. The value of the Indian oil and gas sector is forecasted to grow from US$ 117,562.9 million in 2012 (estimated) to US$ 139,814.7 million by 2015[5]. In any economy the energy sector plays an important role, the growth of the economy largely depends on the energy sector. To a very great extent, this can be determined to be the cause of India's poor share in the world's oil and gas production and petroleum product consumption. Some of the biggest problems associated with the sector include excessive dependence on import of energy products and very little participation of private players in the sector.

In 1997 Government tried to deregulate the petroleum sector to certain extent. Moreover, the government has facilitated the entry of private players in the industry, in both upstream and downstream activities. Thus, deregulation of energy sector was supposedly a step forward to improve the Indian Petroleum Industry[6]. This has brought in more competition and increase in quality of service in the petroleum industry. Ultimately the consumers are the beneficiary of the policy, it has also led to improvement in technology used in petroleum industry also starting form refinery to selling products through retailers. But still, the petroleum sector is isolated from competition. Allegation of cartelisation, predatory pricing and unfair trade practices have become common. This article is a quest for searching the veracity present in the allegations and if they are true what can be done to remove such defects. The article will also analyse the role of petroleum regulation and its effect on competition and will try to find solutions of any defects, if present.

1. Petroleum and Natural Gas Regulation: A Boon or Bane

Regulation is often spoken of as an identifiable and discrete mode of governmental activity, yet the term "regulation" has been defined in a number of ways.[7] One of the commentators has pointed to at

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[5] Indian Brand Equity Foundation, Indian Oil & Gas Sector: Recent Development, Growth and Prospect 3 (January 2013) available at http://www.ibef.org/download/Oil-Gas-Sector-040213.pdf.

[6] UNI, Deregulate Oil Industry Immediately: Survey, (January 4, 1997) available at http://www.rediff.com/money/jul/04oil.htm

[7] Robert Baldwin, Martin Cave & Martin Lodge, Understanding Regulation: Theory, Strategy and Practice Pg. 3 (2d ed. 2012).

least five meanings of the term; another has pointed to important distinctions between usage in Europe and in the United States.[8] Definitions include at the most general level, the act of controlling, directing, or governing according to a rule, principle or system.[9] This includes any conscious ordering of activity, and so has always been of fundamental importance.[10] In India, regulatory framework both in infrastructure and the financial sector has developed in an ad-hoc mechanism as per the need basis.[11] There has been no central planning in development of the regulatory framework which is evident in the following discussion.[12]

Following a structural adjustment program in 1991, India embarked on the path of market liberalization.[13] To fulfil the lacuna created after the 1991 liberation, several sector-specific regulators have emerged on the Indian regulatory horizon.[14] The regulatory framework in the infrastructure sectors has developed autonomously within each infrastructure sector with very little co-ordination or cross-fertilisation of ideas across sectors.[15] In the light of regulatory reform another regulatory authority joined the league on March 31st, 2006 i.e. Petroleum and Natural Gas Regulatory Board (PNGRB).

Competition and regulation are two distinct objects. The integration of both of them, if not done properly, may result disastrous. There are several dimensions involved in the integration process of Competition Law and Regulation Law. First, the state of affairs, the interference of government, regulatory body and other edicts may affect the state of competition negatively. Secondly, the question is regarding the industries working in competitive market and regulated market. If the industries will be regulated then the key question will be, who is regulating and how it is getting regulated. The regulation though may bring positive effect in the equal sharing and utilisation of any resource, but it may affect the market competition adversely. Third and most important question is how completion law will apply in the regulated industries, the scope and extent of application and how to resolve the ambiguities that will arise in the course of time. Also, another important question will be resolving the overlapping jurisdiction on subjects.

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[8] Tony Prosser, Law and the Regulators (1t ed. 1997), pg. 7.
[9] *Id.*
[10] *Id.*
[11] Vijay Kumar Singh, *Competition policy and financial regulations - case of a unified competition regulator* 34(7) EUR. COMP. L. REV., PP. 376-380 (2013).
[12] *Id.*
[13] Amit Bhaduri & Deepak Nayyar, The Intelligent Person's Guide To Liberalization , pg. 76 (1996).
[14] Rahul Singh, *The Teeter-Totter of Regulation and Competition: Balancing The Indian Competition Commission with Sectoral Regulators* 8 WASH. U. GLOBAL STUD. L. REV. 71, 73 (2009).
[15] The Secretariat for the Committee on Infrastructure, *Paper on Approach to Regulation of Infrastructure, Planning Commission, available at* http://infrastructure.gov.in/event_Regulation_Law_and_Policy_final.pdf.

2. Sectoral Regulation and its Impact

In a regulated market vast number of laws and regulations are enacted which flood the market. These regulations are applied in every sphere including local, regional, state or provincial, national and international. But, the result of such regulations is doubtful. The result may be positive or negative also. No analysis of competition policy in the modern economy is complete without considering the effects of regulations on competition.[16] Indeed, many economists argue that the effects on competition of anti-competitive regulations are greater than the effects of anti-competitive practices in the private sector, and there where there is a lack of competition in any industry, most often the fundamental cause being a government law that affects competition, for example, by restricting entry.[17] The roles of regulatory and competition authority can be complementary, but many of times the interference between the two results into tension. The work culture of both the practices is distinct and dissimilar. While sector-specific regulation seeks to identify a problem *ex ante* and creates administrative machinery to address behavioural issues before the problem arises, competition policy generally addresses the problem *ex post*, in the backdrop of market conditions.[18] Hence, these two mechanisms can work effectively and efficiently only through harmonise implementation method.

Eventually, our Competition Act also provides for harmonisation of work between the regulatory authorities and the CCI to an extent. Section 21 suggests that in any proceeding before a statutory authority, if such a need arises, the statutory authority[19] may refer an issue to the Commission.[20] The Commission is then bound to deliver its opinion to the statutory authority within a stipulated period of two months.[21] Incidentally, however, this opinion is not binding upon the statutory authority. A reciprocal provision was also enacted in 2007, where the Competition commission can take opinions from the regulatory authorities.[22] The essence behind these two sections is to promote harmony and to

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[16] Allan Fels, *Competition and Regulation* COMPETITION LAW TODAY 195 (2007).
[17] *Id.*
[18] *Supra* note 12.
[19] Competition Act, 2002 §2 (w)
[20] Competition Act, 2002 §21(1)
[21] Competition Act, 2002 §21(2)
[22] Competition Act, 2002 §21A
(1)Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:
Provided that the Commission, may, *suo motu*, make such a reference to the statutory authority.
(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory

bring a set of cooperation between different sectoral regulators and CCI. But the fact that the opinion of the regulator or the CCI remains unbinding and the objective of every regulator and CCI is different from each other creates hindrance. For example, the objective of SEBI is to promote interest of the investors,[23] whereas the objective of CCI is to promote the interest of consumer.[24] The decisions of every organisation are nothing but a reflection of the aims and objectives of it. Hence, in this case, the decision of SEBI will not change merely on the advice of CCI, even if a blatant violation of competition law would be taking place.

The most common industries where competition law interacts with sector or industry specific laws are in the network industries involving access to network facilities sometimes considered as essential facilities or interconnection, monopoly pricing, anticompetitive agreements and merger control.[25] Due to this overlapping nature of both the mechanisms the objective sought to achieve gets difficult to achieve. The idealist model of harmonising effect is impractical to achieve unless and unless a pan-enforcement or coordination body is created. As it is said, *more the mouth, more the saying*, similarly more the number of authorities, more number of opinions will come. Plato has registered in his philosophy of simplifying the system. As per him, keep the system simpler, rest will be followed as conclusion.[26] Countries like Australia, UK etc. went to the similar lines and tried to convert their system in a simpler form.

3. Sectoral Regulation and Foreign Jurisdiction Model

The principles of Community competition law do not merely promote competition between the companies.[27] They also serve to liberalize and integrate markets, to challenge the existence and extension of monopolies, as well as their behaviour, and to question restrictions on freedom to provide services and freedom of establishment.[28] Actually, regulation is a vital weapon for dealing market failures and market power control. Regulation has the power to alter the market situation. On the other

authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

[23] Preamble ,SEBI Act, 1992

[24] Preamble Competition Act, 2002

[25] Warrick Smith & David Gray, *Regulatory institution for Utilities and Competition, International experience* 27 World Bank Paper (1988).

[26] Plato, Republic 34 (G.M.A. Grube *rev.* 2d ed. 1992).

[27] John Temple Lang, *European Competition Policy and Regulation: Differences, Overlaps and Constraints* in Antitrust and Regulation in the EU and US – Legal and Economic Prospective (François Lévêque & Howard Shelanski eds. 2009).

[28] *Vlaamse Televisie Maatschappij NV v Commission of the European Communities*, [1999] ECR-II 2329; *See* also *Corbeau*, Case C320/91 [1993] ECR I-2533; *See* also *Entreprenorforeningens Affalds/Miljosektion (FFAD) v Kobenhavns Kommune*, [2000] ECR I-3743; *See* also *Regie des Telegraphes et des Telephones v SA GB-INNO-BM*, [1991] ECR I-5941, 5980-81.

hand, competition law maintains existing competition, it neither create competition nor it can remove the defects or failures of an existing market. Since, such irregularities can be removed only and only by regulatory means. In developing countries where the utilisation of resources and development of market is the primary issue, regulation can play a pivotal role whereas countries where market has already developed and nurtured competition can come into picture for taking the best out of it. This changing requirement was detected by different countries across the world.

Institution building is not an easy task. It is comprehensive and exhaustive. Practically it is very difficult to replace or abolish established institutions.[29] The problem between the regulators and competitive authorities is the same. Though a wide range of models are available, but since, not much work has been done in this area, the models of other nations can't be relied upon. Every country has its own way. They all are trying to curb out this problem to the extend they could. Australia has a Competition Authority supporting model, whereas UK provides more powers to the sectoral bodies.[30] Historically there is no evidence that categorically establishes the consultant of regulatory body.[31] Despite of the fact, in UK itself, where the competitive powers implemented by the sectoral regulations, by September 2005 no infringement decisions were made.[32] Hence, it is very difficult to rely upon any one of them. The ideal model has to be *sui generis*. As Friedrich Hayek, a Nobel Prize-winning economist, has suggested, the most significant advantage of the free market is its ability to make use of decentralized, individual knowledge of day-to-day affairs in life.[33] An old military teaching is that the best intelligence can be obtain from the people living or present at the location. Since, it is the private companies and individuals in between of all the mash. Therefore, the best option to solve this problem can be sought by the private individuals rather than legislatives. No matter how powerful an economic regulator is, it cannot possibly replicate the mélange of information accessible to individuals.[34]

A private enforcement of regulation and competitive reform will bring deterrence among the public, and more enterprises will incline to follow it. Private enforcement would bring people closer to

[29] Int'l Competition Network, Antitrust Enforcement In Regulated Sectors Working Group, Subgroup 2: Interrelations Between Antitrust And Regulatory Authorities, Report To The Fourth Icn Annual Conference, pg. 9 (June 2004).
[30] Dep't Of Trade & Indus. & H.M. Treasury, *Concurrent Competition Powers In Sectoral Regulation,* pg. 20 (2006).
[31] *Supra* note 27 at 4-6.
[32] *Supra* note 28 at 28.
[33] Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).
[34] William C. Taylor & Polly Labarre, Mavericks At Work: Why The Most Original Minds In Business Win 67 (2007).

competition law, creating stakeholders in Indian economic growth and competitiveness.[35] Indeed, private enforcement remains the bulwark of U.S. antitrust law, with private actions constituting around ninety percent of antitrust cases.[36] But such an arrangement will not bring any major reform in the sector. Such arrangement will only provide a *locus standi* to the private individuals. It does not necessarily constitute any special allurement to initiate action.[37] But coupled with the possibility of damages, it confers upon a potential plaintiff an incentive to sue.[38]

Such an arrangement possesses very low possibility of damage to the guilty party. Since there is a very low possibility of detection, compensatory damages only mean that if an enterprise is caught violating competition legislation, the enterprise would have to restore the victim to its position prior to the infringement.[39] Exemplary damages are necessary for a proper enforcement.
On the basis of the above analysis, we can conclude that there could be three type of enforcement – (1) Sectoral Regulators act as a supplement to Competition Authorities; (2) Competition Authority acts as a pan-authority *and* (3) Both work in harmony.

4. RIL v. OMCs[40] – Prospective of Private Players

The background facts on which the complainant has raised the complaint is the 1997 notification of government that waived the administered price mechanism method for determine prices of petroleum products. The dispute had its origin in RIL losing a tender for supply of aviation fuel to Air India which was won by a cartel of Oil Marketing Companies (OMC). Afterwards, a complaint was registered with the CCI against three companies to probe allegations of cartelization and abuse of dominant position. While the proceeding were taking place, IOC went on to question the CCI's authority as sector regulator stating that the adjudicatory power vested instead with the Petroleum and Natural Gas Regulatory Body. The amendment of 2002 provided private companies to apply for authorization to market transportation fuels. Subsequently, the matter was brought before the Delhi High Court by the OMCs and the High court ordered in favour of the OMCs. The issues raised petroleum board are – a. to direct the OMCs to cease and desist from indulging in 'predatory pricing of transportation fuels and follow the published policy of the government; b. To direct for respondents to cease and desist from cartelization in respect of marketing of petroleum products and particularly the

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[35] European Commission, *Annex to the Green Paper: Damages Actions for Breach of EC Antitrust Rules* (Commission Staff Working Paper, 2005) *available at* http://eur-lex.europa.eu/ RECH_naturel.do (Last visited September 4, 2013).
[36] Clifford A. Jones, *Private Enforcement Of Antitrust Law In The EU, UK and USA*, pg. 16 (1999).
[37] Rahul Singh, *Supra* note 12 at 97.
[38] Steven Shavell, Foundations Of Economic Analysis Of Law 39 (2004).
[39] European Commission, *Supra* note 33 at 34.
[40] Oil Marketing Companies

transportation fuels and direct the respondents to sell indigenously produced crude oil at prices determined by market forces; c. Prohibit the respondents from indulging in any type of restrictive trade practice/ unfair trade practice and from any monopolistic practice or cartelization in the sale of petroleum products; and d. Levy penalty on the respondents for the loss suffered by the complainants.
The complaint clearly mentioned about the violation of the provisions of the competition Act 2002. The above mentioned practices were anti-competitive in nature as it deterred the entry of private players, restricted the scope of innovation and up-gradation in technology, better quality of service could not be ensured for customers, it increased the risk of adulteration and reduction of quality of products. These in short defeated the very purpose and motive behind economic reform that was brought in the sector. As government offered subsidies and rebate to the Public sector OMCs over the pricing of diesel, kerosene and LPG, so that these products are available at a affordable price to consumers. But these subsidies are used alternatively by PSU OMCs for cross subsiding other products like ATF. This practice of cross subsidising is unfair trade practice and restricted under the Act. These PSU OMCs have a greater base in retail outlets, it makes it difficult for private players to compete them and reaching a large consumer base. The OMCs are also provided with administrative support for establishment of retail outlets by the Government so this makes it an unfair practice followed by these companies.

The board held that allegation of restrictive trade practices, unfair trade practices, cartelization, collusion and monopolistic behaviours on the part of respondents have no basis. Anti- competitive outcomes that have emerged as a result of the pricing policies of PSU OMCs are not their own making, but have been an unintended consequence of pricing policies thrust upon them by the government. Therefore, charges of cartelization and collusion have no basis. It held that the pricing policies of the government have resulted in loss of market shares for the private retailers. Even if a monopolistic situation has emerged as an unintended consequence, in order to establish monopolistic behaviour through collusion, cartelization, predatory pricing etc. the complaints will have to establish that the respondents raised fuel prices beyond what a competitive market would have allowed. Clearly this is not the case. In fact prices continue to remain below the guidance level set by UOI. Therefore to establish that the respondents engaged in anti-competitive behaviour, the pecuniary advantage accruing from such action will have to be established. So the board did not find merit in the issue raised by complainant that PSU OMCs indulged in monopolistic or anti-competitive behaviour. As the board had been established to protect the consumer interests, as the complainants had sought for an interpretation this section enforce price fixation. It was of the view that prices will veer towards optimal levels of the most efficient producer. Market should be allowed their optimal levels. The complainants were asked to pay penalty.

According to the authors this order is not in adherence to the competition law that is prevalent in India. As the APM method of pricing was waived out in 2002 so as to encourage more number of private players to participate and level playing was created by the government for all entities. But the present action by public sector oil marketing companies is an abuse of their dominant position as they have tried to lower the price of aviation turbine fuel (ATF) for creating a monopoly over the market. By this action of OMCs the private players are unable to compete with them this is violation of section 4 of the Act. They are indulged in predatory pricing of the products which result in violation of the above mentioned provisions. The three Public sector OMCs are the only entity involved in retail petroleum business throughout the country. The government has been subsidizing certain product sold by them, this has resulted the firms in cross subsidizing the ATF and selling it a lower price than the market value.

Issue of cartelization contended by the complainant was struck down by the board. But according to the author the background fact and circumstances are clearly visible that there was cartel operating among the three public sector OMCs. As the price quoted while bidding for tenders for supplier ATF to AirIndia, all the three OMCs had quoted similar prices. This action makes it clear that there is cartel operating among the OMCs. As under section 3 of the competition act that prohibit any horizontal agreements among the producers engaged in engaged in identical or similar trade of goods or provision of services. This action of the OMCs is in clear violation of the section 3 of the Act. It also prohibits for any agreement that determines the price of the goods.

According to the authors the CCI should have been allowed to have a free rein in matters regarding anti-competitive behaviour instead of the petroleum board being given the jurisdiction over the matter. This has led an order i.e. in clear violation of the provision of the Competition Act. As the matter involved substantial question relating to Anti-trust laws. Therefore by referring the matter to CCI would have been justified as it has better understanding in competition Act and relating to questions involved in the matter. Authors are of the view that the sectoral regulators are expert in the sector specific issues but where are when an anti-trust issues are being raised by the complainants then CCI should be referred as they have wider, deeper and its understanding of anti-trust concepts far more clear than a sectoral regulator. As competition act is specific legislation and pertains to specific situation and conditions and specific law always prevails over general legislations. However, Indian courts should allow CCI to be the primary regulator whose jurisdiction should not be excluded. The Competition Commission has been provided with a legal framework to determine competition issues.

In this regard, it has been vested with powers to undertake inquiries, summon and enforce the attendance of any person and examine him under oath, require the discovery and production of documents, receive evidence on affidavit, issue commissions for the examination of witnesses or documents, requisition any public record or document , call upon such experts from the field of economics, commerce, accountancy, international trade or from any other discipline.

II. SUGGESTION AND CONCLUSION

The article tried to analyse the on-going tussle between the sectoral regulators and CCI. Different objectives are the key problem for different treatment of the same issue. It is quite clear that foreign models are of no help. Also, the moot point is that India is still a growing market and it needs its resources to be regulated wisely so as to provide maximum benefits to maximum people. It is true that petroleum prices play a vital role in the life of each and every human being. Petroleum prices are of such volatile nature that a hike in it may result into dissolution of the government even. Hence, allowing petroleum prices to be determined on the basis of market forces will affect the consumers adversely. It will go against the very objective of the act.

But, it is also true that the reimbursement policy of the government is arbitrary in nature. Providing reimbursement only to PSUs and not to private companies is actually prohibiting the private players to think twice before entering into the field. This reimbursement is actually anti-competitive. Ironically, the preamble of the PNGRB Act states that '*to promote competitive markets'*. But, the on-going tussle of jurisdiction over the petrol pricing case between RIL and OMCs is delaying the answer. If a sectoral reform will be brought into picture, where all the sectoral regulators, including CCI, will be asked to work under a common head i.e. Market and Economic Development Authority then the harmony that is required will be achieved. The different objectives of the bodies should be comprehended into one. The problem of multiple institute and necessity of development of new will be permanently terminated and a single full-fledged cross-sector regulator will take place of it. Competition should be kept in the heart of it and the provisions should be made in the interest of both consumers and investors. In the similar fashion, the authority shall be gifted with its own tribunal. The tribunal will hear all the cases irrespective of their sector and it should be adjudicated by a three member panel consist of a market and economics expert, a sector area expert and a competition area expert. The three judges with their different area expertise will do justice for the consumers, investors and other interested parties. Competition shall be developed, but not on the basis of the hue and cry of the general public, and that is why a regulatory application shall act as a complimentary measure to competition law.

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INDIAN SHIPPING EXEMPTION: A COMPARATIVE ANALYSIS

ARAHANT JAIN[1] AND SHUBHAJINDEL[2]

ABSTRACT

The issue arose when the Ministry of Corporate Affairs issued a notification in September 2012 to exempt Vessel Sharing Agreements and Voluntary Discussions Agreement. Looking upon the notification, one can clearly observe that the Ministry has bona fide intention but the application of the notification is ill-conceived. Ministry of Corporate Affairs issued a notification in September 2012 to exempt Vessel Sharing Agreements and Voluntary Discussions Agreement. The notification clearly is of a bonafide nature, but the haste of drafting has made it a waste.

The agreements not only promote domestic shipping but also international shipping but such haphazard instructions create nothing apart from trouble. These agreements promote domestic shipping along with international shipping, but irregular instructions create nothing apart from trouble. Upon comparison with countries like Singapore, USA, Canada, Australia, New Zealand, Japan and European Union- which have a better developed shipping industry than ours, we can easily see the lacunae in the laws governing our shipping industry. Cue should be taken from other nations and proper guidelines should be established for the domestic shipping companies.

In this paper, we aim to look into the advantages and disadvantages of the exemptions granted by the Competition Commission of India. We shall also see how the regulations are imposed on the shipping industry in India. We will also compare the laws pertaining to Vessel Sharing Agreements and Voluntary Discussions Agreement of other nations to ours.

In the end, the question remains, "Are the Shipping Exemptions too much of a good thing?"

I. INTRODUCTION

The guiding principles behind competition law are to promote smoother markets by inhibiting private players from obstructing market. Its increases consumer welfare, encourages dynamic efficiency and adds to the progress of the economy. The Competition Commission of India keeps a close eye on the anti-competitive agreements, may it be horizontal or vertical agreements. International shipping liners try to undermine small domestic players all across the globe, and hence the government steps in to save them from the usurping powers. But sometimes these agreements which seem anti-competitive on the face of it, benefit both the consumers as well as the service providers. The current scenario of the

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international shipping industry is dominated by a Danish giant "Maersk". In India, a public sector enterprise "Shipping Corporation of India" creates waves in the domestic seas.

The exemption concerning Vessel Sharing Agreement and Voluntary Discussion Agreement has been welcomed with open arms by the shipping industry worldwide. Vessel Sharing Agreement sanctions liners to share space on each other's vessels, share terminals, and improve productivity by reducing cost and environmental burdens. Voluntary Discussion Agreement allows carriers to share market information, adopt common service standards and suggest a unified voice in discussions with government bodies and shipping companies. The exemption frees the liner companies for a year. The journey beyond this time period remains unclear.

II. THE NOTIFICATION

The Ministry of Corporate Affairs ("MCA"), Government of India issued a notification dated September 19, 2012 ("Shipping Notification"), to exempt Vessel Sharing Agreements ("VSA") and Voluntary Discussions Agreement ("VDA") (collectively "Agreements") from being anti-competitive, for a period of one year.[3] By virtue of this notification, shipping liners will be free to enter into VSA and VDA within the sector, including the foreign companies operating in India.

VSA is a term used to refer to an agreement which is, entered into between the liners for sharing space on each other's vessels, consolidate duplicative services and share terminals to improve productivity and lower costs.

Example: Liner A has a deck space of 25 containers and it is sailing with only 10 containers at one instance, liner B's ship is undergoing repair, but it has 15 containers to be shipped on the route liner A is plying, hence A and B enter into a VSA to share vessel space and set forth conditions for future sharing of the vessel, by this action both the liners share space and utilize space to the possible limit resulting in sharing of sailing costs. Whereas VDA refers to the agreement entered into between parties, to share market information, adopt common service standards and offer a single point of contact in discussions with government bodies and shipper organizations, to a limited extent, depending on the parties.

The Shipping Notification seems to provide a blanket exemption, while the Competition Commission of India ("CCI") in the past has shown its reluctance from allowing blanket exemptions, this increases the ambiguity related to this notification issued by the MCA. Although the MCA has put these agreements under the scanner by having Director General of Shipping ("DGShipping") monitor such

[3] *See* http://www.mca.gov.in/Ministry/pdf/draft_notification_19_sept_2012.pdf (Last visited on July 30, 2013)

agreements in order to discuss and evaluate possible extension of this exemption. However, in the absence of any guidance/clarity, the implementation and use of this notification may potentially raise issues, and it would be highly ambiguous for the DG Shipping to monitor agreements in absence of any mechanism.

This article aims to analyze the Shipping Exemption in the light of models followed by leading foreign jurisdictions. By comparative analysis of the Indian shipping industry's regulatory regime with the industries across the globe we aim to reach a consensus as to the applicability and likely problems which may arise from the Shipping Exemption.

III. THE CCI AND ITS IMPACT

The Competition Act, 2002 ("Act") was passed by the Parliament in the year 2002, to which the President of India accorded assent and was also published in the Official Gazette of India in January, 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. Effective from May 20, 2009, the substantive provisions dealing with anti-competitive agreements (Section 3) and abuse of dominance (Section 4) under the Competition Act were notified and are currently in force. Further, effective June 1, 2011 the provisions dealing with regulation of mergers and acquisitions were notified. CCI is the regulatory body with respect to application of the Act, in the recent past it has come forward as a stringent regulator, with an aim to provide the ultimate benefit to the customers by fostering healthy competition throughout all business sectors. CCI in the recent past has taken an active stand against anti-competitive agreements and imposed heavy penalty on defaulting entities; this has had a significant impact on the business community and the economy as a whole.

In the real estate sector, DLF on account of imposing one sided unfair terms on flat buyers was found to have abused its dominant position. The CCI imposed a penalty of INR 630 Crore i.e. 7% of the average turnover. Further in compliance with the CCI order DLF amended its agreement with respect to flat buyers. Subsequently other real estate players indulging in same manner of business amended their respective agreements in order to comply with the CCI order.[4]

In certain sectors, after the CCI found a set of conduct to be anti-competitive, there has been a change in the manner in which business is carried out and/or regulated by respective sectoral regulator. The sectoral regulator for telecom, Telecom Regulatory Authority of India ("TRAI") came up with a

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[4]Belaire Owner's Association Vs. DLF Limited Case no. 19/2010 *available at* www.cci.gov.in/May2011/OrderofComission/DLFMainOrder110811.pdf, (Last visited on July 30, 2013)

Consultation Paper on Monopoly / Market Dominance in Cable TV Services[5] which addressed the concerns relating to cross ownership and cable TV/local cable operator regulations in this sector. The TRAI Consultation Paper was issued after an order of CCI in the case of *Kansan News Pvt. Ltd. vs. Fastway Transmission Pvt. Ltd*[6]. It is understood that in today's economic scenario, the CCI and its role is very crucial in order to maintain business conduct and competition across sectors. CCI aims to prove consumers with a safe competitive market environment.

In a recent step, MCA has provided banking sector with an exemption to facilitate Merger and Acquisition ("M&A") activities in this sector ("Banking Exemption"), it is noteworthy that this exemption is very strict and abides with an array of prerequisites and compliances. A banking corporation in need of RBI supervision has to undergo scrutiny and has to be screen by the RBI in order to avail the banking M&A exemption.

Prior to this exemption the MCA in the past has only exempted banking sector from the scope of the Act, though the Banking Exemption is subject to regulations and prerequisites and is only applicable with respect to merger and acquisition transactions undertaken between banks. The exemption in the shipping industry is the second exemption from the MCA though it is not as regulated and specific as the prior exemption.

In a recent interview[7], Mr. Ashok Chawla, Chairperson CCI was quoted saying that the CCI has no plans to provide exemptions to any sector, and the exemptions provided will not be blanket exemptions at all. This makes it clear that the shipping industry is considered to be one of high importance and such exemption was considered necessary by the govt. to foster growth and cut costs in the sector. It may be noted that CCI usually does not provide any blanket exemptions, , whereas in the present case this exemption for the shipping sector is devoid of any check, balance and scrutiny mechanism. For a balanced understanding of the effectiveness of the exemption, the current state of the Shipping industry in India should also be studied.

IV. INDUSTRY STRUCTURE

The Indian shipping industry and its significance is not alien to anyone. Ranked 15th in the world, the Indian Shipping industry with around 600 million gross tons per year, is one of the most crucial and

[5] TRAI Consultation Paper Consultation paper no. 5/2013, released on June 3, 2013

[6] Case no. 36/2011; *available at* www.cci.gov.in/May2011/OrderofComission/362011.pdf, (Last visited on July 30, 2013)

[7] *See* www.livemint.com/politics/hxdCNNCkZxca3QeWc7ADnM/There-Shouldnt-be-a-blanket-exemption-CCIs-Ashok-Chawla.html,(Last visited on 30 July,2013)

important industry with regards to international trade. The shipping industry is responsible for the movement of approximately 95% of India's international trade, and is thus acts like a back bone for our international trade.[8]

India has around 1071 ships with 772 coastal and 349 overseas ships; The Indian coastal shipping is highly fragmented, this fleet of around 1900 ships caters to the high volume demands of the importer and exporters. However, the growth and large volumes or concentrated among the top 9 liners who account for 70% of the total tonnage being addressed by the Indian Shipping industry, industry at present India has about 40 companies functioning under this industry, many amongst these companies have a fleet of not more than two ships.[9]

The shipping industry involves high investments and costs and the cost-revenue equilibrium is hard to achieve without high volumes in sails. Apart from the sailing costs, the poor state of port infrastructure lands up in ships docking for unreasonable time. It is understood that the revenue in the industry flows from the sail done by the respective liners and the docking period results in only cost addition with no revenue generating from such operations. In light of the above stated facts, we can rightly say that the poor state of infrastructure and high level or risk and investments makes sustaining in the market difficult for seasonal operators and also for the streamlined liners.

After an analysis of this industry we can outline the following advantages for the growth of this sector: (a) access to major shipping routes, (b) more than 7500 km of coastline, (c) fleet expansion by major domestic liners, (d) overseas acquisitions by Indian liners, (e) more than USD 4 billion is expected to be invested in Indian ports, (f) container terminals being built at Mumbai and Chennai.
The demerits and threats to the industry are as follows: (a) Underinvestment has affected the development of ports, (b) high levels of bureaucracy preventing the government funding, (c) major developments taking place in Sri Lankan port sector may reduce demand for trans-shipment, (d) Indian ports have suffered from congestion during 2012, potentially slowing countries growth trajectory.

V. REGULATORY REGIME IN SHIPPING

The shipping liners in India are subjected to the provisions of the Merchant Shipping Act, 1958 ("MS Act") which deals with the Indian ships and their registration amongst other guidelines for sailing in the Indian waters, but this statute does not create any regulations or conditions addressing the business aspect.

[8] DIBS-OMII survey, Indian Marine Industry – Shipping, April 2012
[9] *Ibid*

The power to regulate and supervise shipping in India rests with the DG Shipping at the top level and is further delegated to various Captain of Ports ("CoP") and Mercantile Marine Departments ("MMD") at various coastal states. The state wise delegation helps DG Shipping in addressing the problems and issues of coastal states and liners across the country.

DG Shipping along with various CoPs and the MMD draft and discuss rules and guidelines which are then implemented for the shipping industry. It is interesting to note that, CoP and MMD are responsible for granting permissions of various kinds, as prescribed in the MS Act, further the overall monitoring is done by the DG Shipping and in certain cases, approval from the DG Shipping is mandatory.

Except the issues which this notification aims to relax, the other major issue with the shipping industry is the rule of cabotage ("Cabotage Rule") which is provided in the MS Act, along with DG Shipping's objective to secure 100 % of coastal trade for national flag bearing vessels[10], which means that foreign vessels are not allowed to sail on a domestic route in Indian waters. Cabotage Rule has two sides, which are set out below:

i. It provides national flag vessels with opportunities of business in the domestic circuit and also cuts down competition for these national entities from the foreign players which deal with high volume.

ii. The total cabotage levies high costs on the foreign shippers, as they have to unload their total capacity on one Indian port and from there, the goods are transported to other destinations via sea/road/rail etc. This activity involves high costs and is a lot more time consuming.

In the year 1992, Cabotage Rule was relaxed for a period of 5 years, i.e. till the year 1997, but again the rule has been imposed and it is found to have a lot of disadvantages amongst fewer advantages. With the Shipping Notification in place, the industry accepts some relaxation to the foreign players, as they will now be equipped with the power to agree with domestic players on sharing vessels and voluntarily discuss confidential terms.

The Shipping Notification seeks to exempt VDA and VSA. These agreements include price fixing and market sharing clauses, which make these agreements anti-competitive. By the effect of this notification, the liners will be able to enter into these agreements without the scrutiny of the CCI. The agreements are considered to be catalysts for growth in the shipping segment as they aim at easing the s market burden of the shipping companies as well as relaxing investment in the same. It is discussed

[10] *See* www.dgshipping.com/dgship/final/manual/mchapter12.htm

that the sector asks for high risk investments which may be eased by way of pooling in of resources. The notification aims to smoothen the above.

Any such exemption on the shipping liners would not only have an effect on domestic companies but also have an effect on international liners. Accordingly, it becomes important to look at how such agreements are dealt with by authorities in other jurisdictions.

VI. EXEMPTIONS IN OTHER JURISDICTION

1. Singapore

Under Section 36 of Singapore's Competition Act, 2004 ("SC Act") the Minister for Trade & Industry has the power to make an order at the recommendation of Competition Commission of Singapore ("CCS") to exempt a particular category of agreements from the prohibition on anti-competitive agreements, decisions and practices under Section 34 of the SC Act. These exempted agreements must contain the following characteristics: Firstly, the agreement/decision/ practice should lead to improvement in production/distribution. Secondly, it should lead to the promotion of technical/economic progress. Thirdly, such practices, decisions or agreements should not impose on the concerned undertakings any restrictions which are not indispensable to the attainment of their objectives and lastly they should not allow undertakings, the possibility of eliminating competition in respect of a substantial part of the services in question.

Another condition imposed by CCS is that when the aggregate market share of the parties to a liner shipping agreement exceeds 50 percent, the parties are required to file their agreement and any variation or amendment of it with the CCS. This is done to ensure healthy competition and eliminate chances of any anti-competitive behavior.[11]

2. USA

In the United States of America ("USA"), the US Ocean Shipping Reform Act, 1998 ("OSRA") is enacted to grant immunity to liner shipping conferences in the USA, however it places rigid pre-conditions for availing the benefits in the exemption for the same which reduced the chances of formulation of an anti-competitive agreement. The main objectives of the OSRA is to increase the flexibility of carriers/shippers to tailor their contractual relationships in a manner that best meets their need, whilst at the same time ensuring that the result would not be anti-competitive. It is necessary for

[11] *See* Order of the Competition Commission Singapore available at http://www.ccs.gov.sg/content/ccs/en/Legislation/Block-Exemption-Order.html, (Last visited on July 30. 2013)

the liners, wishing to avail the exemptions to satisfy the following conditions: Firstly, shippers and carriers have to negotiate liner service agreements and keep the terms of the contracts safe from other carriers and shippers; Secondly, conference tariffs have to be published; and lastly, independent rate action for carriers should be allowed so that they can cover multiple trade lanes which makes it easier for larger shippers to engage in one stop shipping.

3. Canada

In Canada the Shipping Conferences Exception Act, 1987 ("Canadian Shipping Act") deals with granting of competition law exemptions to shipping liners. Section 4 of the Canadian Shipping Act declares that the Competition Act, 1985 ("Canadian Competition Act") will not apply to any agreements entered into by a liner conference to the extent that:

Firstly, the conference agreement requires a member of a conference to use a tariff. Secondly, the conference agreement requires a conference member to carry out a loyalty contract if it provides for the following: (a) Termination by either party at any time within 90 days from the date when a notice to conveying intention to terminate is communicated to other member in writing; (b) Application to goods shipped by the shipper of tariffs that incorporate a dual rate system in which no contract rate for any goods is less than 85% of the non-contract rate for those goods; (c) No provision exists to the effect that a payment has to be made by any member of a conference of a rebate charged for the transportation of any goods shipped by the shipper; (d) Contains no terms / conditions in a standard form approved by the members of a conference requiring a shipper of goods to offer to those members for transportation by them of all goods shipped by that shipper; (e) Regulates the timing of sailing of vessel, members and the kind of service that members of a conference may provide; (f) Regulates the admission and expulsion of members; (g) for sharing of transportation of goods as well as the earnings and losses arising out of each transportation.

4. Australia & New Zealand

A. Australia

In Australia the pre-dominant legislation with regard to competition law is the Competition and Consumer Act, 2010 ("Australian Competition Act"). Part X of the Australian Competition Act ("PartX") deals with liner shipping services, it provides for an exemption to liner shipping services and stevedoring services which enter into agreements revolving around fixation of prices, pooling or apportioning of earnings/losses/traffic and regulation of capacity etc. For obtaining this exemption, shipping liners have to abide to the conditions set out as follows: Firstly, all liner shipping companies are required to register under an Australian agent and update information at regular intervals.

Secondly, any shipping company which proposes to make any agreement with another shipping company must apply to register these agreements to obtain approvals for exemption, these agreements can include verbal agreements, discussion groups as well as joint shipping operations. Thirdly, registered agreements must meet a range of pre-conditions. Fourthly, Shipping companies are required to notify designated shipping bodies of their proposed agreements. Fifthly, any shipping company with a major market share must be registered with the Registrar of Liner Shipping whether operating under an agreement or not. Lastly, shipping bodies intending to discuss shipping agreements and negotiate with shipping lines are also required to register.

However, in spite of an exemption provided, investigations can be started at the initiative of the Minister for Infrastructure and Transport, Government of Australia or by the Australian Competition and Consumer Commission into a range of issues including unfair pricing practices.

B. New Zealand

In New Zealand, Commerce Act, 1986 ("NZ Commerce Act") by virtue of its section 44(2) provides exemption for liner shipping from competition law. Section 44(2) of the NZ Commerce Act provides that the provisions relating to restrictive trade practices will not apply in an instance where the following have been observed: Firstly, where a contract, arrangement or understanding has arisen which contains a provision for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand or from a place outside New Zealand to a place in New Zealand and Secondly, where any act has been undertaken to give effect to the activities enumerated in the above-mentioned point. However any contract, undertaking or arrangement that arises which contains a provision with regard to the loading or unloading of a ship will not be considered for the exemption.

However if an investigation is initiated and the Minister of Transport finds evidence of carriers engaged in unfair practice which would affect the interests of any New Zealand shipper in a substantial way then information must be furnished by the impugned carriers to the Secretary of Transport detailing all information relating to agreements containing the following elements:

(a) Fixing/regulation of freight rates; (b) Withholding special rates or other special privileges/advantages or the imposition of any detriment or disadvantage to any New Zealand shipper; (c) Allocation of ports to any particular vessel or carrier or the restriction or other regulation of the number or character of goods to be carried; (d) Restriction/Regulation of the volume of goods being carried by any particular vessel.

For the purposes of NZ Commerce Act, an association of carriers (i.e. liner conference) would be engaged in unfair practice if they engage in the following activities: (a) Abuse of Dominant Position; (b) Substantial failure to give reasonable notice to any New Zealand shipper who is likely to be affected by impending changes in terms and conditions on which such shipper entered into an agreement with the association of carriers; (c) Unreasonable refusal./failure to enter into negotiation or consultation requested by any New Zealand shipper relating to the terms and conditions upon which goods were transported; (d) Engaging in Bid-Rigging.

5. Japan

In Japan, Antimonopoly Act, 1945 ("AM Act") provides for exemptions with regard to liner conferences. These exemptions have been justified on the three grounds, Firstly, seasonal fluctuations in the volume of cargo; secondly, large scale process industry and lastly, market is prone to extreme fluctuation in prices due to shifts in supply and demand.

Article 28, AM Act provides for exemptions with respect to agreements dealing with the following subject-matter (provided that certain conditions are satisfied): (a) Freight Rates; (b) Charges; (c) Other Transport conditions; (d) Trade Routes; (e) Ship Deployment; (f) Cargo loading.

However, it is mandatory for shipping services that wish to avail of this exemption to file the requisite information regarding such agreements with the Minister of Transport, Government of Japan who would then scrutinize the agreement and sanction or modify or refuse the same. Whilst deciding the application the Japanese Minister for Transport must also consult with the Fair Trade Commission in order to comply with all competition law provisions.

6. European Union

The European Union's competition regime is governed by Treaty on Functioning of European Union ("TFEU"). The European Commission ("EC") has adopted a new block exemption regulation revising the old exemption for liner shipping consortia, the recently implemented exemption, allows shipping liners to enter into cooperation for the purpose of providing a joint service in transporting cargo. The new regulation extends the exemption for such cooperation until April 2015, within a new legislative and economic environment. Changes notably include a reduction of the market share threshold from 35% to 30% above which companies do not qualify for automatic exemption under the regulation and an extension of the scope of the exemption to all cargo shipping liners.

Any agreement or arrangement crossing the automatic route threshold goes through strict scrutiny by the EC in order to examine its adaptability and consequences. It is noteworthy that the commission has stressed on having a mechanism to provide healthy competition, whereby no party can take any undue advantage.

VII. APPROACH

It is important for us to examine the Indian policy of exemption in contract to the policies adopted by the leading international jurisdictions; this contrast study will help us understand the practice in other jurisdictions, while helping us construct our strategy for such exemptions.

The approach taken by Singapore, USA, Japan, Canada, Australia & New Zealand in this regard does not create a specific distinction between the VSA(s) and VDA(s), but there are specific outlines as to the content and conditions of the agreement which are exempted and content and conditions which are not exempted, making it clear, as to what is exempted and what is not. This approach has given advantages to these jurisdictions in terms of effective control and monitoring over these agreements. It is understood through the press release of the Singaporean commission that the commission finds it easy to monitor and keep track of such agreements where there are conditions instituted in order to avail certain exemptions, this way the task of the commission is reduced and effectiveness is increased. Various jurisdictions namely Japan amongst others, prefers that such agreements should be submitted to the government departments for scrutiny and comments before being executed, this ex-ante method has helped the country safeguard its national flag bearing ships in the foreign markets.

VIII. COMPARISON

The foreign jurisdictions discussed in this study have separate provisions and statutes to control the activities of shipping liners. These enactments give the governments a better understanding and control over the conduct of the business. It is understood that the specific provisions and statutes increase the efficiency of commissions. In contrast, we can clearly see that this particular sector has been given credit in all major jurisdictions and certain exemptions have been put in place by the respective commissions, in order to provide business opportunities to the shipping liners. The primary reason behind imposing such exemptions has been the high cost in the sector and also the aim of the commissions to prove customers with the benefit of lowered costs and stability in the industry.

A distinction can be made between the policies adopted across various important jurisdictions and the one page notification which has come out from the MCA. It can be now construed that the Shipping Notification has brought about a blanket exemption and it is not sufficient enough to control the conduct of the sector. We can construe from the above mentioned policies in other countries that, all these nations have strictly formulated schemes of mechanism and content to be taken care of by the shipping liners while entering into VSA and VDA, this is done in order to maintain order in the industry and keeping track of the activities. So far these jurisdictions have been successful in maintaining healthy competition in their respective jurisdictions.

Whereas the Indian exemption does not put across any condition or perquisite compliance in order to avail such exemptions, this blind folded exemption is not in the spirit of the CCI. It is also seen that the monitoring which the notification talks about, does not have a specified mechanism to be in force, in the absence of such mechanism, it is almost impossible for the DG shipping to evaluate and monitor such agreements.

From the above it can be seen that there is a need to further look into the shipping exemption in order to eliminate instances of misuse and ensure proper implementation.

IX. Conclusion

Through their Shipping Notification, MCA's attempt to promote economic activities falls short of perfection. It needs to establish guidelines to ensure the maintenance of law and order.

After looking at the laws in different jurisdictions and understanding the shipping industry, it is interesting to note that all of the foreign jurisdictions, follow a strict scrutiny mechanism before allowing shipping companies to enjoy privileges. The primary points taken care of by foreign jurisdictions in contrast to the Shipping Notification brought out by the MCA are as follows -

- Firstly, these exemptions are granted for a specific period of time, only after consultation with various stake holders, this exercise helps in increasing the effectiveness of the exemptions.
- Secondly, there is a need to draw a line of distinction between the VSA and VDA and their application, it is important to understand the distinction and nature of both types of agreement, though other jurisdictions have not specifically marked a distinction between the two except for Singapore and European Union, but the rules and prerequisites put forth by these countries draw a clear distinction as to till what extent these agreements are exempted and what subject matter is accepted.
- Thirdly, exemptions should not be blanket in nature, this fosters the possibility of rightful governance and reduces risk of misuse.
- Fourthly, jurisdictions like Japan have their respective ministries examine the agreements proposed to be entered into by the shipping companies even after they meet the prerequisites, this steps further helps in eliminating all the chances of misuse of this privilege; lastly, there is power reserved by the respective governments of these countries to start investigations even after the exemption is granted, this step further immunes the industry from any misuse or anti-competitive behavior.

In summary, it is right to state that for successful implementation of any exemption the two essentials are non-blanket nature and presence of remedy, i.e. exemptions should have prerequisites to be followed and further there should be power with the authorities to examine and take decision on any misuse of such exemption.

Consultation should be the basis of any approval granted for exemption. A certain prerequisite conditions should be put in force and a method of application to the respective authority for approving/modifying/rejecting such application should be put in place. Further upon receipt of such application, ministry shall consult the CCI on the implications of such agreement before deciding upon the application. Additionally, to ensure there is no unnecessary delay in processing and arriving on a decision for the application, a deeming provision should be built in. For example, if an application is not decided for a period of 45 days from the date of submission of application, it would be deemed to have been approved.

The Shipping notification needs a mechanism for the DG Shipping to evaluate the use of such exemptions, in order to evaluate the scope of extension of Shipping Notification, in absence of a mechanism is it very difficult for the DG Shipping to reach consensus as to the future course of Shipping Notification.

In light of the above it is concluded that, it is imperative to revise the Shipping Notification, which will enable to authorities to prevent any misuse or anti-competitive behavior.

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INDIAN COMPETITION (AMENDMENT) ACT, 2007 HAS NOT MADE DIFFERENCE BETWEEN PER SE RULE AND RULE OF REASON.

DR. SOUVIK CHATTERJI[1].

ABSTRACT:

Competition Agencies all across the world examine anti – competitive agreements by either per se rule or rule of reason. The competition laws of most countries had made the distinction because there was consensus about the hardcore activities like cartelization had pernicious effect and should be made illegal by the laws. In those cases the competition agencies are supposed to balance the pro-competitive benefits and anti-competitive effects in determining the allegation against alleged parties. The Indian law had not made any sharp distinction between the two and the liability is based on appreciable adverse effect on competition within India. The paper examines the stand of India in respect of per se rule and rule of reason.

I. INTRODUCTION:

Competition laws all across the world are over-burdened with determination of liability of alleged parties in respect of anti-competitive activities, abuse of domination and combinations. So the activities are broadly divided into two categories, per se rule and rule of reason. The reasons are obvious. The ones which have more pernicious effect are examined by per se rule. The competition agencies can directly and immediately prevent them. The other ones are examined by rule of reason, where the pro-competitive effects are balanced with the anti-competitive effects. The process is longer. Only when the anticompetitive effects outweigh the pro-competitive effects, the competition agencies give preventive orders.

II. PER SE RULE.

Under per se rule, the acts or practices specified by the Act as deemed or presumed to have an appreciable adverse effect on competition are by themselves prohibited. It is unnecessary, under the per se rule, if they limit or restrict competition. This is on the basis of established experience of their nature to produce anti-competitive effects. The US Supreme Court explained in the case *Northern Pacific Railway Co. v. United States*,[2] the basis of per se rule. It was said that there are certain agreements or practices which because of their pernicious effect on competition and lack of any

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[2] 356, US 1.

redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or business excuse for their use. The principle of per se unreasonableness avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable an inquiry so often wholly fruitless when undertaken.

In *State Oil Co. v Khan*,[3] the US Supreme Court held that vertical price fixing is no longer considered a per se violation of the Sherman Act, but horizontal price fixing is still considered a breach of the Sherman Act.[4] Also in 2008, the defendants of *United States v LG Display Co*.[5], *United States v. Chunghwa Picture Tubes*[6], and *United States v. Sharp Corporation*[7] heard in the Northern District of California, agreed to pay a total sum of $ 585 million to settle their prosecutions for conspiring to fix prices of liquid crystal display panels, which was the second largest amount awarded under the Sherman Act in history.

Elaborate enquiry is not made in respect of such activities. Only the involvements of the alleged parties in such activities are enough. In USA, price fixation, group boycotts, tying arrangements are considered per se bad.

The efficacy of having per se rule in place can be explained with an example. In a jurisdiction where tying arrangement is considered per se illegal, there only the question of the tied product being tied with another product and the compulsion of the consumers in buying both the products proves the allegation and accordingly the competition agency can take appropriate action. In another jurisdiction, where it is treated with rule of reason, the following things are supposed to be proved. First, the tying

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[3]State Oil Co. v. Khan, 522 U.S. 3 (1997).

[4] Horizontal agreements include agreements between independent undertakings operating and supplying to the same market to fix prices or apportion markets (by class or geographical region, for example), or restrict output with a view to controlling prices in a market. Perhaps the most striking example of an international cartel mechanism is the Organization of Petroleum Exporting Countries, commonly known as OPEC, but that is another story. Vertical agreements include agreements between independent undertakings at different stages of the production and distribution chain: between manufacturer, wholesaler, retailer and consumer, or agents or third parties standing in their shoes as such.

[5] Case No. CR 08-0803 SI, available at http://www.justice.gov/atr/cases/f239300/239375.pdf

[6] Case 3:08-cr-00804-SI Document 18 Filed 01/16/2009, available at http://www.justice.gov/atr/cases/f278500/278564.pdf

[7] CR 08 0802, available at http://www.justice.gov/atr/cases/f239300/239374.pdf

arrangement must involve two different products. Manufactured products and their component parts, such as an automobile and its engine, are not considered different products and may be tied together without violating the law.

Second, the purchase of one product must be conditioned on the purchase of another product. A buyer need not actually purchase a tied product in order to bring a claim. If a vendor refuses to sell a tying product unless a tied product is purchased, or agrees to sell a tying product separately only at an unreasonably high price, a court will declare the tying arrangement illegal. If a buyer can purchase a tying product separately on nondiscriminatory terms, however, there is no tie.

Third, a seller must have sufficient market power in a tying product to restrain competition in a tied product. Market power is measured by the number of buyers the seller has enticed to enter a particular tying arrangement. Sellers expand their market power by enticing additional buyers to purchase a tied product. However, sellers are prohibited from dominating a given market by locking up an unreasonably large share of prospective buyers in tying arrangements.

Fourth, a tying arrangement must be shown to appreciably restrain commerce. Evidence of anticompetitive effects includes unreasonably high prices for tied products and unreasonably low prices for competing products in a tied market.

So the example shows for establishing liability in cases relating to anticompetitive activity, while treating the activity with rule of reason, the procedure is longer, more elaborate, more expensive and more technical. If the competition agencies can identify certain activities as more harmful than the other ones, those activities can be broad under the per se rule scanner.

III. RULE OF REASON.

Under Rule of Reason the effect of competition is found on the facts of the case, the market, and the existing competition, the actual or probable restraint on competition. *Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement*,[8] was the case where Supreme Court of India interpreted rule of reason. It was held that to determine the question 3 matters are to be considered, (a) What facts are peculiar to the business to which the restraint is imposed, (b) what was the condition before and after the restraint is imposed, (c) what is the nature of the restraint and what is its actual and probable effect. In case of rule of reason test, the pro-competitive effects are balanced

[8] Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement, (1977) 47 Comp Cas 520 SC.

with the anti-competitive effects, and after that if the pernicious effect is considered higher the activity if prevented by the competitive agency of the respective jurisdiction.

In certain jurisdictions where criminal sanctions are there, the competition agencies try most of the cases with rule of reason approach because the criminal liability in cases like cartelization the evidence to be adduced is measured by proof beyond reasonable doubt. Where doubt is raised before the courts, the doubt goes in favour of the accused and the competition agencies don't want to take risk in losing cases before the respective courts for lack of collateral evidence.

IV. INDIAN POSITION.

India had devised the appreciable adverse effect on competition test to determine the liability of the alleged party. There are no separate categories of trade practices which are examined by per se rule. The factors that are weighed by the Competition Commission of India includes (a) creation of barriers to new entrants in the market, (b) driving existing competitors out of the market, (c) foreclosure of competition by hindering entry into the market, (d) accrual of benefits to consumers, (e) improvements in production or distribution of goods or provision of services, (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.[9] The anti-competitive activities like tying arrangements, refusal to deal, exclusive supply agreements, exclusive distribution agreements, resale price maintenance are defined in section 3 of the Competition Act. The factors to be weighed in case of liability are defined under section 19 of the Act. [10] The new Act had included effects doctrine, so Competition Commission of India can even investigate cases which occur outside India but the effect is felt within India.[11] The relevant provisions of the Indian Competition Act is mentioned below to show the treatment of anti-competitive agreements under the Indian law.

Section 3 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 defines anti-competitive agreement. Under Clause (1) no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an AAEC within India. [12]

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[9] Section 19 (3) of the Indian Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.
[10] Certain definitions like relevant product market, and relevant geographical market are defined in section 2 of the Indian Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. But the factors that the Competition Commission of India are going to examine are mentioned in section 19 of the Act.
[11] Section 32 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.
[12] Section 3 (1) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

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

(a) Directly or indirectly determines purchase or sale prices

(b) Limits or controls production, supply, markets, technical development, investment or provision of services;

(c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) Directly or indirectly results in bid rigging or collusive bidding, Shall be presumed to have an appreciable adverse effect on competition:

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

Explanation -For the purposes of this sub-section, bid rigging means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

(a) Tie-in arrangement;

(b) Exclusive supply agreement;

(c) Exclusive distribution agreement;

(d) Refusal to deal;

(e) Resale price maintenance,

(f) Practice includes any practice relating to the carrying on of any trade by a person or an enterprise.

(g) price in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing.

The term anti-competitive agreements as such has not been defined by the Act, however, Section 3 prescribes certain practices which will be anti-competitive and the Act has also provided a wide definition of agreement under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India.[13]

Section 3(2) simply declares agreement under section 3(1) void. Section 3(3) deals with certain specific anti-competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deal with restraints imposed through agreements among enterprises in different stages of production or supply etc. for example agreement amongst manufacturer and supplier. Section 3(5) provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.

Few references can be made in respect of cases tried by the Monopolies and Restrictive Trade Practices Commission, MRTPC, the Competition Agency which tried anti-competitive agreement under the name of restrictive trade practices before the Competition Commission of India came into existence.[14] In the case of *Hindustan Times Ltd*[15] the respondents were the publishers of leading newspapers namely Hindustan Times, Statesman, Times of India, National Herald, Indian Express and Patriot, and were members of an association of newspaper publishers (Indian and Eastern Newspaper Society). All the six undertakings increased the prices of their newspapers 3 or 4 times between 1971-1974, on or about the same time. The size of the newspaper were simultaneously reduced. It was alleged that these increases were done in concert either by informal consultation inter se by the six undertaking or through their association and these increases adversely affect competition among the publishers and the sellers of the newspaper and tended to bring about manipulation of prices of newspapers and so as to impose on the consumer's unjustified costs. All the respondents except the publishers of patriot submitted to the orders of the MRTP commission. The Commission accordingly

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[13] AAEC means appreciable adverse effect on competition in India. That is the standard maintained in the Indian Competition Act to consider a respective anti-competitive agreement bad and steps are taken to stop the anti-competitive agreement by the Competition Commission of India.

[14] The Monopolies and Restrictive Trade Practices Act of 1969, gave birth to the MRTP Commission. The MRTPC addressed the restrictive trade practices and unfair trade practices and if proved stopped the alleged parties from continuing with those activities.

[15] In Re. Hindustan Times Ltd, 1979 Comp Cas 495 (MRTPC)

passed 'cease and digest' order against them. However, there were no evidence of collusion between 'Patriot' and other respondent and thus the concert was accordingly proved against Patriot.

In the case of *RRTA v Bombay Customs House Agents Association*[16], the custom house agent had formed a trade association by its Code of Conduct fixed the minimum rates to be charged by its members for various services rendered to their clients. The MRTP commission held it to be restrictive trade practice of fixing prices in concert. But all these cases were tried by rule of reason. The pro-competitive effect and anti-competitive effects were balanced to find out the pernicious effect of the alleged activity.

Recent cases handled by the Competition Commission of India under the Competition Act, 2002, as amended by the Competition (Amendment) Act, also show that India want to weigh the pro-competitive and anti-competitive effects of the alleged activity to ascertain the liability of the alleged party. In *Belaire Owner's Association vs. DLF Limited & Ors*,[17] the Competition Commission of India successfully dealt with a case of abuse of dominant position. The information in the instant case was filed under Section 19(1) (a) of the Competition Act, 2002 by Belaire Owners' Association against the three respondents which are DLF, Haryana Urban Development Authority ("HUDA") and Department of Town and Country Planning, Haryana ("DTCP"). It has been alleged by the Informant that DLF by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the housing complex 'The Belaire', which has serious adverse effects and ramifications on the rights of the allottees, DLF has abused its dominant position. One of the main contentions was that that in place of 19 floors with 368 apartments, which was the basis of the Informant booking its respective apartments, now 29 floors have been constructed by DLF, unilaterally. Consequently, not only the areas and facilities originally earmarked for the apartment allottees were substantially compressed, but the project has also been abnormally delayed without providing any reasons to the Informants whatsoever. Pursuant to the complaint made by the informant, the Commission had directed the Office of the Director General to carry out investigations on the allegations leveled against DLF and submit a report on its findings.

The Commission observed that a relevant market is delineated on the basis of a distinct product or service market and a distinct geographic market. These terms have been defined in Section 2(r) of the Act read with Section 2(s) and Section 2(t). As per the Commission, the promotional brochures of the

[16]RTPE 14 of 1979, decision on 13-10-1960 (MRTPC)

[17] Belaire Owners' Association v. DLF, HUDA & Ors; Case No. 19 of 2010

property by DLF provided for innumerable additional facilities, like, schools, shops and commercial spaces within the complex, club, dispensary, health centre, sports and recreational facilities, and such features, along with the cost-range mentioned earlier, may be broadly considered to define the characteristics of "high-end residential accommodation".

The Commission noted that in the present case, Gurgaon is seen to be the relevant geographic market as a decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location. As per the Commission, Gurgaon is known to possess certain unique geographical characteristics such as its proximity to Delhi, proximity to airports and a distinct brand image as a destination for upwardly mobile families. Thus the Commission was of the view that the relevant market in the instant case is the market for services of developer / builder in respect of high-end residential accommodation in Gurgaon.

The CCI successfully decided another case on abuse of dominant position in *UPSE v. National Stock Exchange Limited*[18]. In the present case, CCI has dealt in detail with the concepts of "dominant position", relevant market, predatory pricing and abuse of dominant position in one market to enter another market in the context of the stock market services. CCI relying on the host of factors provided under the Act has attempted to determine whether NSE's activities amounted to indulgence in abusing of its dominant position and violation of the provisions of the Act. MCX, operating as an exchange platform for trading in currency derivatives alleged NSE of indulging in wrongful and abusive exercise of market power eliminating competition from the currency derivative segment and discouraging potential entrants from entering the relevant market through leveraging, waiver of transaction fees, annual subscription charges, data feed fees and adopting exclusionary devices to kill competition.

The major issue for analysis before the CCI was whether NSE merely occupying a position of strength in the other markets, could be considered a dominant players. It may be pertinent to note that the market share of MCX in comparison was higher in the said market player in the currency derivative market wherein it occupied only 33.17% of the market share with the entry of several other market

In discussing the issue related to "relevant market", in the case at hand, the CCI assessed all the segments of the stock exchange market including equity, futures and options, WDM segment dealing with government securities alongside the currency derivative market. It effectively delineated different sectors of the stock market and interestingly did not club the other sectors of the stock market

[18] UPSE Securities Ltd. V. National Stock Exchange of India Limited; Case No. 67 of 2012.

in arriving at its determination. The CCI was of the opinion that the other segments of the stock market were not 'adequate substitutable or interchangeable products' for the currency derivative ("CD") segment. Since the CD segment was 'distinctly different' from other segments requiring separate approvals, it was considered an independent and distinct relevant market. The boundaries of relevant market freeze when the products involved cease being practically interchangeable or substitutable; thereby the CD segment in India was found to clearly be an independent and distinct market. In all these cases factors under section 19 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, were examined. Per se rule was not used at all.

Competition laws in all over the world usually places anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements. Horizontal agreements are generally viewed more seriously than the vertical agreements. Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms.

The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser seller relationship. the Act have not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3 (4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti-competitive agreements.

V. CONCLUSION.

In conclusion it can be said that Indian Competition Act could have identified certain categories of anti-competitive activities like bid-rigging or price-fixing, which could be considered to be per-se bad. In that case the time of CCI would have been saved in the process of enquiry. Also expense of investigation and complicated procedure could be reduced. Only the impugned practice would have been required to be established, not the anti-competitive effect.

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