



CARTEL CONTROL: INDIAN POSITION IN LIGHT OF THE DEVELOPED JURISDICTIONS

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1. Introduction:

Earlier, the state had a minimal role to play in market conditions as there was the prominence of concept of laissez faire. But with ever changing market conditions, there was a need of state regulation of market. The basic purpose of any antitrust law is to prevent practices having adverse effect on competition thereby protecting consumer interests. In line with this, any competition law regime should seek to prohibit anti competitive agreements, restrict abuse of dominance by a business enterprise, provide for regulation of combinations and for matters associated therewith. There is a difference between the market that actually exists and the one that we find in the books. Market economics forces the business players to go for better permutation and combination thereby resulting in greater benefits to the consumers. It needs to be understood that competition law has a social purpose as well. This social purpose could be found in the observation of the court in the US case of *United States v Aluminium Co. of America*,¹ wherein it was stated as follows:

It is impossible, because of its indirect social and moral effect, to prefer a system of small

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

In the Indian context, the constitutional foundations of antitrust law give the answer to the social purpose which a competition law regime must serve.²

2. Cartel control: General Perspective & Regulatory Control:

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

3.1 Cartels and Germany:

The land of cartels, Germany, provided many a breeding ground for the growth of flourishing cartels. The economic depression in 1873 in Germany led to a situation where the fascination for free competition faded. One has to understand the process in Germany in two forms: public regulation and private regulation. Industrialization worked the opposite way on Germany as it led to the formation of strong cartels. The commodities also played a crucial role in the

¹ 148 F2d 416 (2d Cir 1945).

² Articles 38 and 39, Constitution of India, 1950.



formation of cartels as they were suited to the formation and sustenance of the same. The purpose of legislation in Germany was not to eliminate cartels but to regulate the operation of cartels. Cartel formation and control has been affected by external factors as well. With the defeat in the second World War and the consequent redrawing of boundaries, the US came into picture and there was some sort of regulation sought to be put on cartels.

3.2 Cartels and Japan:

In Japan, there is the concept of Private Monopolization which means such business activities, by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby, causing contrary to the public interest, a substantial restraint of competition in any particular field of trade.³ The aforementioned statement is sufficient to reiterate that cartels are well taken care of in Japan. But can a definition be sufficient or efficient in controlling cartels, we shall see in the later part of the paper. If the aforementioned is not sufficient, the focus may turn on the phrase ‘unreasonable restraint of trade’. An unreasonable restraint of trade means such business activities, by which entrepreneurs by contract, agreement or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain or enhance prices; or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the

public interest, a substantial restraint of competition in any particular field of trade.⁴ An analysis of the second definition gives us a more exact picture. The meaning attributed to the phrase ‘unreasonable restraint of trade’ reveals that business activities which have the effect of distorting competition by contract, agreement or any other concerted practice. This is enough to include within its ambit cartels. The standard of proof of the existence of a cartel is almost the same as in other jurisdictions like that of the US and EU. There has to be a proof that there existed some kind of communication, even informal, amongst the cartel participants. Circumstantial evidence is accepted in Japan as a strong proof of cartel, but it is the other peripheral evidence that is also accepted.⁵ Cartels are permitted under certain circumstances as well in Japan.⁶

3.3 Cartels & the US jurisdiction:

The Sherman Act and Cartels:

The beginning of the cartel control mechanism in the US was with the passage of the Sherman Act, 1890. The first case in a long line of cases was that of *United States v Trans Missouri Freight Assn.*,⁷ in which it was observed that the prohibitory provisions of the Sherman Act apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation and are not confined to those in which the restraint is unreasonable. In the instant case, a well laid out plan was there for any violation of the agreement entered into by

³ Akira Kawamura, *Law and Business in Japan*, 2000 ed., (Commercial Law Centre Inc. Japan), at p.91.

⁴ *Ibid.*, 98.

⁵ See, *Nikon Sekiyu K.K. v FTC*, (Tokyo High Court, Nov.9, 1956).

⁶ Akira Kawamura, *Law and Business in Japan*, 2000 ed., (Commercial Law Centre Inc. Japan), at p.101.

⁷ 166 US 290 (1897).



the Trans Missouri Freight Association. In other words there was a cartel and it was flourishing as well. The case is important in light of the discussion being undertaken in the present paper because in this case, there was an apparent violation of the Sherman Act but the railroad companies very cleverly said that they had dissolved the association and now, therefore, no case can be made out against them. The court stated the following with regard to the Sherman Act, 1890: ‘the language of the Act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. A contract therefore, that is in restraint of trade or commerce is by the strict language of the Act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons or property.’ The next case that highlights the aspect of formation and operation of cartel, and its resultant effect thereon in the US is that of *Addyston Pipe and Steel Company et al v United States*,⁸ in which it was concluded that there was an existing cartel in the US cast iron pipe industry. The application of the Sherman Act was held valid in the present case. In the present case, it was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves by which they agreed that there should be no competition between them in any of the states or territories mentioned in the agreement in regard to the manufacture and sale of cast iron pipe. It was concluded

by the court in the present case that the combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. In another case of *United States v Socony Vacuum Oil Co., Inc.*,⁹ numerous oil companies and individuals were convicted under an indictment alleging that in violation of section 1 of the Sherman Act, they conspired to raise and maintain spot market prices of gasoline, and prices to jobbers and consumers in the Midwestern Area embracing many states, by buying up distress gasoline on the spot markets and eliminating it as a market factor. In support of the allegations of the indictment, there was evidence to prove that the defendants with intent to raise and maintain prices, devised and carried out an organized programme of regularly ascertaining the amounts of surplus spot market gasoline, of assigning its sellers to buyers who were in the combination, and of purchasing it at fair going market prices. In the present case also there was a finding of cartelization and subsequent fines and punishment was imposed accordingly as per the Sherman Act, 1890.

The aforementioned discussion of the US cases related to cartelization reveal that almost all cartels have been declared illegal per se by the US courts.

3.4 Cartels and EU:

Historically, the first European Treaty to aim at economic integration was the Treaty establishing the European Coal and Steel Community (ECSC) between France, Germany, Italy, Belgium, the Netherlands

⁸ 175 US 211, 20 S.Ct. 96.

⁹ 310 US 150 (1940).



and Luxembourg. The ECSC treaty was intended to render impossible any further armed conflict between the member states, while at the same time laying a firm foundation for European recovery after the second world war. The principal signatories to the ECSC Treaty signed another treaty at Rome on 25 March 1957, to establish what was then called the European Economic Community (EEC). It came into force on 1st January 1958, and it has been amended time and again since then, the major amendment to it being the Single European Act of 1986, which set a deadline for the establishment of a single European market. The main institutions which variously impinge upon the development of the Community and the enforcement of the EC Treaty are set out in Article 7, which provides that the task of the Community shall be carried out by (i) a European Parliament; (ii) a Council; (iii) a Commission; (iv) a court of justice and (v) a court of auditors. This section of the paper is concerned with Article 101 of the EC Treaty and how it affects the dynamics of competition regulation. Part 1 of the EC Treaty provides for articles 1 to 16 of the EC Treaty which provide for the basic framework of the Treaty. The aims of the EC Treaty are set out in Article 2 which provides as follows:¹⁰

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the community a harmonious, balanced and sustainable development of

economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states.”

Four terms primarily need to be understood in the context of the TFEU which are as follows:

- (i) Undertakings.
- (ii) Agreements.
- (iii) Decisions.
- (iv) Concerted practices.

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

It is important to define the term ‘undertaking’ as when we read the text of the Article, it says that *agreements between undertakings* are caught by the Article. Undertakings engaged in the supply of services are undertakings within the meaning of article 101(1) as well as undertakings engaged in the supply of goods. But it is essential that an undertaking should carry on some economic or commercial activity; bodies which are not engaged in any such activity are not undertakings within the meaning of the article. In *Poucet and Pistre* case,¹¹ the Court of Justice held that two autonomous schemes set up under the French law, one for sickness and maternity insurance and the

¹⁰ Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London), at p.14-15.

¹¹ Cases C-159 & 160/91 *Poucet & Pistre v AGF and Cancava* [1993] ECR I-637.



other for old age insurance, were not undertakings, they pursued only a social objective and were based on the principle of solidarity in that the benefits were not related to the level of compulsory contribution which was determined by reference to individual income. An individual is to be considered as an undertaking for the purposes of Article 101(1) if an insofar as he engages in economic or commercial activity in his own right, for example, as a sole trader, self employed professional, licensor of an industrial property right, performing artist or consultant.¹² State owned corporations are undertakings within the meaning of Article 101(1) insofar as they carry on economic or commercial activities, which include the supply of public services.¹³ The primary case dealing with the question of meaning of an ‘undertaking’ is the case of *Hofner and Elser v Macrotron GmbH*.¹⁴ The idea in Hofner case that any entity engaged in an economic activity, regardless of legal status, can qualify as an undertaking finds expression in numerous judgments of the community courts and decisions of the Commission. Further the ECJ in Hofner case stated that the legal status of an entity does not determine whether it qualifies as an undertaking. Public authorities such as the Federal Employment Office in Hofner case itself or the autonomous administration of state monopolies in the *Banchero* case, have been held to be engaged in activities of an economic nature with regard to employment

procurement and the offering of goods and services on the market for manufactured tobacco respectively.¹⁵ The following is a list of the cases where the Community courts and the Commission considered the term ‘undertaking’ and gave it an expansive interpretation:¹⁶

(i) The ECJ held in *Hofner and Elser v Macrotron GmbH*¹⁷ that: the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.

(ii) In *Toylov*¹⁸ the ECJ added: It has also been held that any activity consisting in offering goods or services on a given market is an economic activity.

(iii) In *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*,¹⁹ the ECJ said that the competition rules in the treaty: do not apply to activity, which by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity or which is connected with the exercise of the powers of a public authority.

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

The answer to the above question again depends on the level of interpretation given by the Community courts and the

¹² *EPI Code of Conduct*, OJ 1999 L106/14, [1999] 5 CMLR 540.

¹³ Case 155/73 *Sacchi* [1974] ECR 409; *British Telecommunications*, OJ 1982 L360/36.

¹⁴ Case C – 41/90 [1991] ECR I – 1979, [1993] 4 CMLR 306, para 21.

¹⁵ *Banchero*, Case C-387/93 [1995] ECR I – 4663, [1996] 1 CMLR 829, para. 50.

¹⁶ Richard Whish, *Competition Law*, 6th ed., 2009 (Oxford University Press) at p.83.

¹⁷ Case C – 41/90 [1991] ECR I – 1979.

¹⁸ [2001] 4 CMLR 30, para. 75.

¹⁹ [2002] 4 CMLR 913, para.57.



Commission from time to time. There can be various forms which an agreement might take and therefore there can be no hard and fast rule in determining whether an agreement attracts Article 101(1) or not.²⁰ It may be noted here that the concepts of ‘agreement’, ‘decision’ and ‘concerted practice’ overlap.²¹ The Commission may characterise the arrangements made by the parties to a complex cartel as constituting an arrangement and/or a concerted practice, and this approach has been upheld by the Community Courts.²² The court of justice has stated:²³

“The list in Article 101(1) of the Treaty is intended to apply to all collusion between undertakings, whatever form it takes. There is continuity between the cases listed. The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between the types of collusion.”

The word ‘agreements’ in article 101(1) is not confined to legally binding contracts. As the court of first instance explained, “it is sufficient if the undertakings in question have expressed their joint intention to

conduct themselves on the market in a specific way.”²⁴ However if the parties are still in the stage of negotiations and have not reached a consensus, there will not be an agreement for the purposes of Article 101(1).²⁵ The concept of ‘agreement’ is an important one when determining the prosecution of cartels operating over a long period of time. This is because it is very difficult to prosecute cartels in their entirety due to the time and the costs involved. Many cartels are and almost all cartels are complex and of a long duration. Firms may go in and go out of a cartel over a period of time and this may present a difficulty for the competition authority. Active membership of a cartel may change over a period of time and this may present a problem for the competition authority. In Europe, the concept of a ‘single overall agreement’ operates whereby even those firms are made responsible who may not be involved in the operation of the agreement on a day to day or continuing basis.²⁶ Another question that comes up for consideration is whether there is any difference between agreement and concerted practice. The two are conceptually different in Europe but the courts have in Europe over a period of time realised that there is little difference between the two. Linguistically, there might be a difference between the two but legally there is no difference. The courts in Europe have adopted a ‘joint classification’ approach whereby there is no difference between the two ideas viz. ‘agreement’ and ‘concerted practice’.

²⁰ Connected agreements may be treated as a single one. (*ENI/Montedison OJ* [1987] L 5/13). Source: Richard Whish, *Competition Law*, 6th ed., 2009, (Oxford University Press) at p.98.

²¹ Thus an ‘agreement’ can also be a ‘decision’. FEDETAB, OJ 1978 L224/29. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.51)

²² See, *Polypropylene*, OJ 1986 L230/1. (Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.51)

²³ Case C-49/92P *Commission v Anic Partecipazioni*.

²⁴ Case T-7/89 *Hercules v Commission* [1991] ECR II – 1171.

²⁵ Case E – 3/97 *Jaeger v Opel Norge* [1999] 4 CMLR 147.

²⁶ *Polypropylene*, OJ [1986] L 230/1.



The concept of agreement has undergone a change over a period of time. For example, advisers and consulting firms now have to be cautious in Europe when they become aware of anti competitive activities involving their clients. In a very recent case decided in the year 2008, by its judgment dated 8 July 2008,²⁷ the court of first instance ruled that firms providing consultancy and advisory services to cartel participants could be found liable for the entire cartel behaviour in the same way as if they were themselves active in the markets directly affected by cartel. While the court confirmed that the Commission may prosecute non market participants for their role as facilitators of cartel activity, its judgment nevertheless raises a number of issues about the limits of the Commission's prosecutorial powers.

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

The next question that beckons is what is a 'decision' for the purpose of article 101(1). How are these decisions taken and what is the modus operandi of taking such decisions. Such decisions may result in the formation of trade associations which may operate by way of a cartel. A trade association may take all the decisions related to the cartel and thus may require detection under article 101. Therefore a 'decision' refers to a practice whereby a trade association is formed and it takes decisions on behalf of the cartel.²⁸

²⁷ Case T-99/04, *AC - Treuhand AG v European Commission*.

²⁸ It has been held that the constitution of a trade association is itself a decision, *Re ASPA JO* [1970] L 148/9, [1970] CMLR D25.

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

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

"..... a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been included, knowingly substitutes practical cooperation between them for the risks of competition."²⁹

The court made an important point in the case of *ICI v Commission (Dyestuffs)*,³⁰ that whilst parallel behaviour by itself did not constitute a concerted practice, it may amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market. The court further noted that in order to decide the question whether market conditions diverge from the normal, it is necessary to examine the nature of the market for the products in question. The court in the aforementioned case found that the market for dyestuffs was fragmented and divided along national lines. The similarity of the rates and the timing of the price increases could not be explained away as the result of parallel yet independent behaviour prompted by market forces. In particular, the concerted prior announcement of price changes enabled the undertakings to eliminate in advance all uncertainty between them as to their future conduct on the various markets. The court said:

²⁹ Source: Bellamy & Child, *European Community Law of Competition*, 5th ed. 2001, (Sweet & Maxwell, London) at p.61.

³⁰ [1972] ECR 619.



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

Another typical situation is the parent subsidiary relationship in a commercial context. The community courts have over a period of time developed the principle of concerted practice by interpreting that a wholly owned subsidiary enjoys sufficient autonomy so that it should not be considered to form part of the same economic unit with its parent. Difficulties may however arise in cases of partly owned subsidiaries. In *Gosme/Martell – DMP*,³¹ the Commission considered an agreement between Martell and DMP, the latter being a joint subsidiary owned 50% by Martell and 50% by Piper Heidsieck. The Commission that Martell and DMP were independent undertakings. At the relevant time, Martell was not in a position to control the commercial activity of DMP because:

- (i) the parent companies each held 50% of the capital and voting rights of the DMP;
- (ii) half the supervisory Board members represented Martell shareholders and half Piper shareholders;
- (iii) DMP also distributed brands not belonging to its parent companies;

(iv) Martell and Piper products were invoiced to customers on the same document; and

(v) DMP had its own sales force and it alone concluded the conditions of sale with its customers.

Therefore why do we include ‘concerted practices’ within the scope of article 101. The idea behind a concerted practice is that there may be certain activities which are not directly connected with the undertaking, decision and agreement in question and therefore cannot be inquired upon directly.

For example, the parties to a cartel may do all that they can to destroy incriminating evidence of meetings, emails, faxes and correspondence, in which case it would be very difficult for the competition authority to infer practice or conduct that is adversely affecting competition. It is to prevent this that the concept of ‘concerted practice’ comes in and gains ground.

3. Cartels & India:

The Competition Act, 2002 of India and cartels:

When we talk of cartels in the Indian context, we can have a look at section 3 of the Competition Act, 2002, (the ‘Act’) which talks of anti competitive agreements. There are many components which make up section 3 of the Act and a plain and simple reading would give us a clear picture of as to what is meant by the term anti competitive agreements particularly with reference to cartels. Section 3 of the Competition Act, 2002, refers to anti competitive agreements. These agreements result in the course of trade and are hardly found in writing. There has to be a concerted action to determine the effects of an agreement as anti competitive.

³¹ OJ 1991 L185/23.



It need not be a formal arrangement and it need not also be in writing. Section 3(3) recognises the term cartel with reference to a sector. Accordingly, there could be sugar cartels, tobacco cartels, cement cartels and so on. Section 3 targets ‘certain’ anti competitive agreements. Section 19(1) sets out the procedure for the initiation of the process of inquiry into an anti competitive agreement. It is to the effect that the Commission may inquire into any alleged contravention of the provisions contained in section 3(1) on its own motion or on the receipt of a complaint.³² But how is a person supposed to know that an agreement is anti competitive. How can one understand that there has been an ‘alleged contravention’ of section 3(1) of the Act. There are so many parties involved in a business transaction like suppliers, sub suppliers, agents, distributors and retailers. Therefore each and every one of them cannot know the exact terms of an agreement which is falling within the purview of section 3(1). Thus what is the solution. The solution is in the fact of following a ‘rule of reason’ approach whereby every case is decided on its merits and a case by case approach is followed.³³ Another important point that arises here is that can multidisciplinary partnerships, which would allow delivery of composite services, be allowed. For example, there are various kinds of professionals like lawyers, chartered accountants, cost accountants and company secretaries, etc. Can these

professionals provide services under one roof. This is the demand of the time and requires consideration by each and every professional as well as academicians. The Competition Act defines the term ‘agreement’ to include any arrangement, understanding or action in concert. Such arrangement, understanding or action in concert could either be in writing or oral; and it could either be enforceable or not by legal proceedings.³⁴ The Competition Act, 2002, provides that no enterprise or association of enterprises or person or association of persons can enter into any agreement with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services that causes or is likely to cause an appreciable adverse effect on competition within India, and any such agreement entered into shall be void.³⁵ The basic question as to what is an anti competitive agreement is discussed with the help of the following points. Section 3(3) provides for certain statutory presumptions as to adverse effect of the agreement or combination on competition where the impugned agreement provides for the following:

- 1) Direct or indirect determination of sale or purchase price.
- 2) Limiting or controlling production, supply, markets, technical development, investment or provision of services.
- 3) Sharing of market or source of production or provision of services by territory allocation [geographical area allocation],

³² T.Ramappa, *Competition Law in India*, 2nd ed. 2009, (Oxford University Press), at p.20.

³³ The ‘rule of reason’ has been lucidly explained in *Board of Trade of City of Chicago v US*, 246 US 231 (1918).

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

³⁴ Section 2(b), Competition Act, 2002. (Source: Seth Dua & Associates, *Joint Ventures & Mergers & Acquisitions in India – Legal & Tax Aspects*, 1st ed. 2006, (Lexis Nexis Butterworths Wadhwa) at p.424)

³⁵ Section 3(1) and 2, Competition Act, 2002.



product or service allocation [particular type of goods may be given to particular type of dealers], allocation of customers of particular market or allocation of market or source in any similar way.

- 4) Direct or indirect bidding or collusive bidding.

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

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

In the US, it was held in the case of *United States v Griffith*,³⁶:

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

5. Cartels & Leniency in the Indian context:

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

³⁶ 334 US 100.



may impose lesser penalty than the penalty provided in the Act.³⁷

6. Conclusion:

Observations & Recommendations:

The authors of the present paper suggest as follows:

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

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

In order to receive immunity or leniency, an enterprise must

- a) End all illegal activity, except insofar as the Commission believes that the continuance of the activity is beneficial
- b) Not have been the ringleader of the cartel or coerced anyone into joining the cartel;
- c) Not have been found guilty of cartelization in the past
- d) Provide full and continuing disclosure to the Commission with respect to the cartel; and
- e) Plead guilty to any charges related to that activity

3. Rate of immunity

(1) The first informant shall receive full immunity subject to the conditions mentioned in this regulation if the information is provided before the

investigation has started or before the Commission has adequate evidence to convict the members of the cartel.

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

4. Continuous Cooperation

In order to receive immunity or leniency, an applicant must cooperate with the Commission. Cooperation includes:

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

4. Marker System

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

³⁷ S.M.Dugar, *Guide to Competition Law*, 5th ed. 2010, (Lexis Nexis Butterworths Wadhwa), at p.1072.



requiring the additional time. The information that has to be given at the time of the marker being given should include:

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

5. Confidentiality

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

6. Information

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

- (a) The name and address of the legal entity submitting the immunity application;
- (b) The other parties to the alleged cartel;
- (c) A detailed description of the alleged cartel, including:
- (d) The affected products;
- (e) The affected territory (-ies);
- (f) The duration; and nature of the alleged cartel conduct;
- (g) Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence); and
- (h) Information on any past or possible future leniency applications to any other

competition authorities in relation to the alleged cartel.

10. Oral Applications

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


