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COMBATING CARTELS IN INDIA

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ABSTRACT

While the Competition Law is still evolving in India, we often come across Cartelization across all market sectors - oil, gas, potash, cement and so on. Cartelization refers to the process of forming Cartels which is a group of independent companies engaged in similar business that join to fix prices, limit production, or share consumers. The Competition Act, 2002, a part of which came into effect in 2009 prohibits "Cartels". However, this prohibition is not sufficed to put deal with the problems that such cartels pose for the economy and ultimately, the consumers. The paper studies the reasons why the present competition law in India is not adequately competent in dealing with prohibition of cartels and penalizing the corporations involved in such unfair trade practices. It further discusses plausible amendments that can be made to the current legislation to ensure effective application of the same by way of comparing the competition laws across different nations.

Keywords: Cartelization, Competition Act, 2002, Prohibition, Unfair trade practices, Amendments

INTRODUCTION

BASIC CHARACTERISTICS OF CARTELS

A. Brazen nature

In multinational cartels, one of the qualities that we witness again and over again is the brazenness with which the plots are perpetrated. The scorn and complete disrespect for antitrust enforcement that the members of the cartel have for their fellow citizens is what is meant by this statement. As a starting point, it is appropriate to mention that we are often urged by defense counsel to "regard a particular member of a cartel more favorably because the individual lives in a nation where cartel behavior is handled differently from that which is practiced in the United States". The major flaw in this reasoning is that, the conspirators

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are well aware that "they are breaching the law in the United States and other countries", and their sole goal is avoiding discovery, which we believe to be the case in all cases. Neither the foreign cartels that we have busted nor the multinational business people who, for cultural, linguistic, or other innocent reasons, find themselves unwittingly entangled in a violation of United States antitrust laws have been engaged in our busts. Rather, the cartels that we have legally convicted have always engaged in serious cartel activities, such as "price fixing, bid rigging, and market- and customer-allocation agreements", amongst other practices. Code names, secret locations, and "covers" (i.e., "fake" legal justifications) have all been used by these individuals in order to hide their illegal agreements from antitrust authorities in the United States and abroad. They have also gone to great lengths to conceal their actions, such as contacting one another using home phone numbers and giving each other false "covers" (i.e., "fake" legal justifications).[2]

B. Involvement of senior executives

Furthermore, cartels are often comprised of top executives at companies — individuals who have undergone considerable "antitrust compliance" training and who frequently have important roles in the company's antitrust compliance processes. Among these companies was F. Hoffmann-La Roche, which continued to be involved in the "vitamin conspiracy" even after "pleading guilty and paying a fine for its participation in the citric acid conspiracy".[3] The vitamin cartel, on the other hand, was led by the top management of some of the world's largest corporations. Consider the following scenario: several top executives at this multinational corporation were aware of the company's membership in international cartels in two industries. Those executives could and should have ended the business's cartel operations in the second (and bigger) industry when the firm's unlawful actions in one industry were exposed, resulting in "the firm being forced to plead guilty and pay millions of dollars in penalties".[4] To the contrary, it was reported that, "those executives orchestrated false statements to law enforcement authorities, took steps to conceal the firm's illegal activities further, and continued to lead the world's other producers in a global cartel — actions that will ultimately cost the company billions of dollars in fines and other sanctions". This incredible and expensive failure to heed a warning brings us back to the trait noted earlier: cartel members' disdain for "antitrust enforcement" and the brazenness with which they carry out their crimes against the antitrust laws.

C. Fear of being discovered by law enforcement officials in the United States

While cartel members are fully aware that their actions are in violation of antitrust laws in many countries, they have a particular dread of being prosecuted by the "United States Antitrust Division". As a result, multinational cartels attempt to keep their connections with the United States to a minimum by holding their meetings in countries other than the United States. As a matter of fact, this has been especially true since the lysine inquiry became public in 1995. Cooperating defendants in numerous recent instances have demonstrated that "the cartels altered their procedures and started avoiding interaction with the United States at all costs as soon as the Division began cracking down on and prosecuting transnational cartels in the United States". The cartel members, on the other hand, continue to direct their agreements at firms and customers in the United States; the

2. Stephan, A. (2010). Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures. Journal of Law and Society, 37(2), 345–367. http://www.jstor.org/stable/40835494.
3. *Id.*
4. Ezrachi, A., & Kindl, J. (2011). Criminalization of Cartel Activity – A Desirable Goal for India's Competition Regime? National Law School of India Review, 23(1), 9–26. http://www.jstor.org/stable/44283736.

only difference is that they now have virtually all of their meetings outside of the country. As seen in the next episode, international cartel members are reluctant to perform cartel operations inside the United States because of concern that they may be apprehended. The discussion takes place between an executive from ADM, who was also a cooperating witness, and an executive from the Japanese company "Ajinomoto", who are both male.[5] They are now debating where the next cartel meeting will take place. Although the Ajinimoto executive is plainly apprehensive about holding a cartel meeting in Hawaii, he eventually decides to consider it since Hawaii is a handy place for everyone and because the golf holes situated nearby are enticing enough to warrant consideration. Ajinimoto's executive's hesitation was well-founded, since the conference was videotaped by the FBI and later served as vital evidence in the conviction of the lysine conspiracy's perpetrators.

D. Making Use of Trade Associations as a Defense

Using trade groups to provide "cover" for their cartel operations is another hallmark of multinational cartels. For fear of "generating suspicion about the meetings they attended, the lysine conspirators established an amino acid working group or subcommittee of the European Feed Additives Association", which was a genuine trade organization. There was just one goal for the newly formed subcommittee: to fabricate a fictitious, yet superficially genuine, rationale for why they were meeting.

After all, the "lysine cartel members" did eventually meet in Hawaii, and the FBI was there to videotape the encounter, as previously stated. As you will see in the next video, the executives discussed how they planned to utilize the trade organization as the "ideal cover" for their price-fixing meetings in the future. Details such as producing fictitious agendas and fraudulent minutes of meetings to be sent to the parent organization situated in Brussels were also brought up during their discussion. Aside from that, they spoke about their mutual anxiety that the EU authorities would not become aware of their operations.[6]

CATEGORIES OF CARTELS

A. "Quota-fixing Cartels"

The goal of these cartels is to limit the availability of goods and services. To accomplish this goal, they want to restrict output by establishing production limits for each individual member. No member is allowed to generate more than the quota that has been assigned to him.[7]

B. "Price-Firing cartels"

These cartels limit pricing by reducing the amount of production available. Product pricing is set at a minimum level from the outset. No member is permitted to offer items at a lower price than the minimum price.

C. "Term-fixing cartels"

Tariffs and other terms of trade are set by cartels. Members are required to abide by the conditions of commerce established by the cartel. Among other things, terms of trade may pertain to delivery times, locations, and modes, payment terms, credit periods, insurance, and packaging. They may also pertain to interest charges on balance payments, among other things.

5. Afrika, Sasha-Lee, and Sascha-Dominik Bachmann. "Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil, and India—A Comparative Overview." *The International Lawyer* 45, no. 4 (2011): 975–1003. http://www.jstor.org/stable/23827260.
6. Hüschelrath, K., & Veith, T. (2014). Cartel Detection in Procurement Markets. *Managerial and Decision Economics*, 35(6), 404–422. https://www.jstor.org/stable/26607790.
7. *Id.*

D. "Ccustomers-assigning cartels".

They are created to ensure that each member receives a set level of sales. They are similar to market pools in that they pool money from different investors. The whole market is split among the members, and each member is allotted a specified number of clients or a specific sort of customers. The member unit shall only offer its items to those clients who have been assigned to it by the organization.

E. "Zonal cartels"

They are similar in nature to territorial pools in that they are founded in order to guarantee a particular level of sales to each individual member of the group. The complete market is split into geographical segments, and members are granted permission to do business in certain regions. For example, the whole Indian market may be split into four zones: the northern, southern, eastern, and western zones, with each zone being assigned to a certain member.[8]

F. "Super cartels"

They are created on a global scale via international cooperation. Accords between cartels in one nation and cartels in other countries are referred to as multilateral agreements.[9]

G. "Syndicates"

In a syndicate, the member units come to an agreement to create a joint selling agency, which is then sold to the public. Member units sell their goods to the syndicate at a price known as the accounting price to earn a profit. The accounting price would include all the costs of manufacturing as well as profit margins, if any were present.

The market structure of separate marketplaces is studied by the syndicate, which then sells at the greatest feasible price in each market. Thus, the prices charged by the syndicate would change depending on the market in which it operates. The prices charged by the syndicate are higher than the accounting price, resulting in profits being made. Profits are distributed among the group's participants. Profit ratios are often calculated depending on the amount of production provided to the syndicate by each individual member.

CARTELS UNDER COMPETITION ACT, 2002

Regulatory authority for "anti-competitive behavior" in India is provided by the "Indian Competition Act 2002" (hereinafter "Competition Act"), which is administered by the "Competition Commission of India" (hereinafter "CCI"), which is an independent statutory body charged with ensuring that the law is efficiently implemented. The Director-Office General (hereinafter "DG"), who is in charge of investigations, assists the CCI in carrying out its responsibilities. To ensure that the goals of the Competition Act are realized, the DG is responsible for ensuring that practices that have an "appreciable adverse impact on competition" (AAEC), market promotion, and the protection of free trade and consumer interests are all implemented.

"Section 2, subsection (c)" of the "Competition Act" defines a cartel as "an association of producers, sellers, distributors, traders, or service providers who, by agreement among themselves, limit or control [the production, distribution, sale, or price of goods or services], or who attempt to control [the production, distribution, sale, or price of goods or services], or who provide services."[10]

8. Hyytinen, A., Steen, F., & Toivanen, O. (2018). Cartels Uncovered. *American Economic Journal: Microeconomics,* 10(4), 190–222. https://www.jstor.org/stable/26528510.
9. Bhaskarabhatla, A., Chatterjee, C., & Karreman, B. (2016). Hit Where It Hurts: Cartel Policing Using Targeted Sales and Supply Embargoes. *The Journal of Law & Economics*, 59(4), 805–846. https://www.jstor.org/stable/26457021.
10. *Id.*

Aspects of "anti-competitive agreements" such as those "between or among competitors (horizontal agreements, such as those of cartels) and agreements between actors at different levels of the production chain are categorically forbidden under Section 3 of the Competition Act (vertical agreements)". Agreements that do not conform with the provisions of "Section 3", such as those that permit bid rigging, price fixing, and other forms of collusion, are assumed void.

"Specifically, in order to establish the existence and functioning of a cartel, the CCI must demonstrate that the competitors engaged into a written agreement with the explicit goal of fixing prices, controlling supply, sharing markets or influencing bids, and that the arrangement was legally binding."

"It is considered that if a cartel is proven to exist, it will have a significant unfavorable effect on competition (AAEC) unless the agreement is related to an efficiency-enhancing joint venture, which is not the case in this instance. However, despite the fact that this presumption is rebuttable, suspected cartel members have had little success in their efforts to challenge it. Also granted power is the CCI's ability to search for and seize documents, as well as to collect evidence via raids, in order to establish the existence of a cartel agreement."

According to "Section 19 of the Competition Act", the CCI has the authority to start investigations into "anti-competitive agreements" or "unilateral measures" on its own initiative, in response to any relevant information received, or on the basis of a referral from any statutory entity. A wide variety of factors, including the elimination of competition, the presence of entry barriers, and the benefits to consumers must be considered by the CCI when determining whether or not an agreement violates Section 3.[11]

A comprehensive list of elements must be considered in order to determine the relevant product and geographic markets prior to analyzing and evaluating competition in those markets is included in Section 19, as is a detailed description of the procedures to be followed in order to determine the relevant product and geographic markets. Along with the jurisdiction to issue cease and desist orders, the Competition Commission of India (CCI) is also allowed to levy penalties in accordance with the Competition Act.

"For each year that a prohibited agreement has been in effect, the Competition and Consumer Commission (CCI) may impose a penalty of up to three times the offender's profit; or a penalty of up to ten percent of the offender's turnover for each year that the prohibited agreement has been in effect; or a combination of the two penalties (whichever is higher)."[12]

When the "Supreme Court of India" issued a clarification in May 2016, it said that the "relevant turnover" of the company in question, rather than the "total turnover," should be taken into consideration when assessing the penalty to be imposed on the transgressor. When it came to the imposition of penalties, the Supreme Court of India found that "the penalty cannot be disproportionate, and it should not result in shocking results." It also found that the relevant turnover should be "more in line with the ethos of the Competition Act as well as legal issues that surround matters pertaining to the imposition of penalties." This term refers to the amount of money that an entity obtains from the sale of goods and services that have been damaged as the consequence of the breach.

In accordance with "Section 48(1) of the Competition Act", blame may be assigned solely to those individuals who were in control of the company's behaviour at the time the violation occurred. Note that "Section 48(1)" permits

11. *Supra note 1, at 115*.

12. Bhaskarabhatla, A., Chatterjee, C., & Karreman, B. (2016). Hit Where It Hurts: Cartel Policing Using Targeted Sales and Supply Embargoes. *The Journal of Law & Economics*, 59(4), 805–846. https://www.jstor.org/stable/26457021.

rebuttal of this presumption if the relevant people can demonstrate that the infringement occurred without their knowledge; rebuttal is also possible if the concerned individuals took reasonable efforts to prevent the infringement from happening. The consent or neglect of these individuals is established de facto by their participation in the proceedings, and under Section 48 (2) of the Code, rebuttal is no longer an option for these individuals. The Competition Act does not just apply to the people in command of a corporation; rather, it extends to any individual who was involved in the company's violation of the law as a whole, according to Section 48 (2) of the Act. For example, in the cases of "Sports Broadcasters (Case Number 02 of 2013)" and "Dry Cell Batteries (Case Number 06 of 2016)", former employees of the opposing parties were found to have engaged in unfair competition and were penalized under "Section 43 of the Competition Act". People associated with a corporation who engage in cartel behavior may be liable to a maximum penalty of ten percent of their annual income for each year that the company's cartel conduct is allowed to continue. In compliance with "Section 27 of the Competition Act", this is being done.[13]

A precedent established in the Cement Cartel case earlier this year indicates that decisions of India's Competition Commission may be appealed before the "National Company Law Appellate Tribunal (NCLAT)" and, eventually, before the Indian Supreme Court.

When it comes to initiating action against cartels, the Indian Competition Commission has shown exceptional dexterity and flexibility. According to data, before 2018, cartelization was the sole topic of investigation by the Commission in 63 percent of the cases investigated by the Commission. As of the 31st of July 2017, about "one hundred thirty-six (136) of the six hundred sixty-nine (669) orders issued by the CCI had featured major discussions about cartelization or other antitrust issues". Between 2018 and 2019, the Commission rendered decisions on a total of 68 enforcement procedures. Among the instances were those involving misuse of dominant position as well as anti-competitive agreements. A total of five cartel procedures have resulted in penalties being issued by the Commission since the first day of April this year. In the context of cartelization, the following are some instances of significant decisions taken by the enforcement agencies:[14]

Even though competitors were actively sharing information, the Commission found no evidence of a violation of "Section 3 of the Competition Act" in the Flashlights case. Considering that the agreement to fix prices had not been implemented, the premise of an appreciable adverse effect on competition (AAEC) did not hold up in this instance.

When it came to the case of "Rajasthan Cylinders (Civil Appeal 3546/2014)", the Supreme Court ruled unequivocally that, even though bidders and a trade organization had proposed comparable pricing, there had been no collusive bidding on the side of the parties. According to the findings of the study, parallel pricing was caused by the market's structure rather than by a conspiracy. A dawn raid on rivals' premises is permitted under "Section 41 (3) of the Competition Act", which gives the Director-General the power to conduct such searches. Early in the morning hours of a working day, officials from the Director General's office enter the offices of businesses that are suspected of breaking the Competition Act; these raids are often conducted in the early hours of the morning of a working day and continue throughout the day. In the event that reasonable force is required to obtain access into the premise to be searched, the director-general has the authority to seal the premise, inspect books and other documents pertaining to the firm, confiscate

13. *Id.*

14. Dong, A., Massa, M., & Žaldokas, A. (2019). The effects of global leniency programs on margins and mergers. *The Rand Journal of Economics*, 50(4), 883–915. http://www.jstor.org/stable/45219896.

papers, interview anybody under oath, and utilise deposition notes as evidence. Several restrictions on the director general's powers have been put in place to avoid misuse of authority. Among them are bans on the director general executing a raid without a search warrant and the presence of two independent witnesses, on accessing papers protected by the attorney-client privilege, and on investigating any place that is not specifically mentioned in the search warrant.[15]

In recent years, the Director General's Office has conducted a greater number of dawn raid investigations, with the goal of putting a stop to alleged anti-competitive behavior. It has been six (6) years since the establishment of the CCI that there have been instances of dawn raids in India, with three (3) of those raids taking place in the previous twelve (12) months. JCB India Ltd. on 15 January 2019, in which it was determined that papers taken by the Director general during a search may be used as evidence during an investigation, can be traced back to the Supreme Court's decision in "Competition Commission of India vs. JCB India Ltd." on 15 January 2019, in which it was determined that papers taken by the Director general during a search may be used as evidence during an investigation As part of his investigation, the Director-General has conducted raids at a number of companies, including Glencore over alleged collusion in the pricing of pulses, Eveready Industries, and the French firm Mersen, over alleged collusion in the pricing of equipment sold to Indian Railways, as well as "Climax Synthetics Private Ltd.".

IAGREEMENT: PROOF OF EXISTENCE

In the case of cartels, a standard of proof has been established that has not been laid down in any legislative act and is instead determined by judicial decisions. In addition, since cartelization is considered a civil offence, the informant or authority is not necessary to prove the existence of a cartel and anti-competitive behavior "beyond a reasonable doubt" in order to demonstrate the infringement. To determine whether or not there has been cartelization, the Commission has determined that the "balance of likelihood" and "liaison of intent" criteria must be used, and that this may be demonstrated by indirect or circumstantial evidence (such as documents).[16] The reason for this is because, given the nature of cartels, obtaining documented evidence under such circumstances may be a very tough endeavor to complete successfully. Agreements between cartels are unrecorded and well-hidden under the surface of the law, and as a consequence, the term of "agreement" under the Act is wide enough to embrace any informal arrangement that fits within the scope of the Act's application. Although it is important to demonstrate the existence of an agreement, it is not necessary to establish an explicit agreement between the parties, as the same may be inferred from the purposes or actions of the parties, according to the Commission. As a result, if circumstantial evidence of the existence of an agreement assuming coordinated activity is available, it may be utilized to establish the existence of an agreement. When facts concerning the conduct of parties are established that cannot be explained "but for" some type of anti-competitive agreement or concerted action under the current regulatory framework, the Commission has been granted the authority to investigate those cases of anti-competitive agreements on the basis of indirect and circumstantial evidence. Furthermore, according to the Commission, the Commission has penalized cartels only on the basis of circumstantial evidence, so adding to the jurisprudence of competition law and lowering the standard of proof for a cartel from its earlier attitude. Officials are now using the "parallelism plus" method in order to

15. *Supra note 11, at 809.*

16. Bergenstock, Donna J. (2006). *A Cartel's Response to Cheating: An Empirical Investigation of the De Beers Diamond Empire.* 173–189. https://jstor.org/stable/community.31637023.

establish whether or not cartels are functioning in the market. There must be some degree of similarity in the behavior of the participants in the market, as well as some positive indicators that point to collusive action on the part of a cartel, in order for this to occur.

Following the European Court of Justice ("ECJ"), the European Commission ("Commission") agreed that just parallel behavior was insufficient to demonstrate coordinated conduct on its own.[17] The actions performed resulted in competitive situations that were unresponsive to normal market conditions, taking into mind the nature of the product, the size of the firm, and volume of the market, and this was deemed important evidence of coordinated behavior by the courts. Various case laws may be reviewed in order to get a knowledge of how circumstantial evidence is evaluated in order to establish the existence of an agreement and coordinated activity, and this method can be explained in further detail by reading various case laws.

"MDD Medical Systems India (P) Ltd. v Competition Commission" was a case before the Competition Appellate Tribunal, which was adjudicating an appeal against a decision issued by the Competition Commission.[18]

In this specific case, the appellants were accused of participating in unlawful acts such as bid rigging and cartelization. The appellants denied the allegations. The vast majority of the problems before the Appellate Tribunal addressed the legitimacy of the Commission's decision in the matter of the present appellants, who were found guilty of breaching Sections 3(1) and 3(3) of the Act and were brought before the tribunal. The informant had filed a complaint with the Union of India, alleging that the tender system had been rigged in order to benefit a certain company. After a thorough investigation, the Tribunal determined that the appellants were not guilty and that there was no price parallelism between the two items in question. Furthermore, the court said that independent evidence must be shown in order to prove that the appellants had continued to engage in cartelization proceedings after being dismissed. According to the Commission, this presumption was made because the same parties had previously been found to have formed a cartel; however, the Tribunal found that this approach was incorrect, and as a result it was not possible to determine whether cartelization operations had continued in the case at hand. Specifically, it found that there was insufficient evidence to convict the appellants, and that the Director General's report was based on insignificant circumstances and transactions between the accused companies, and that, as a result, it was impossible to infer the existence of a cartel from those circumstances and transactions. In the case of "Excel Crop Care Ltd. v. CCI", the CCI found that there were only four (and the only) APT manufacturers in the market, and that the prices given by them for bids issued by the "Food Corporation of India (FCI)" were exactly the same as in the previous case.[19] Furthermore, the manufacturers jointly boycotted tenders at different points during the year, and they were unable to explain why this was taking place. Given the overall context of the scenario, it was determined that "price parallelism in the market was impregnable and had existed for years despite the fact that the manufacturers' costs of production, geographic locations, and profit margins were all vastly different". The prices mentioned by manufacturers for a given tender are the same, regardless of the fact that manufacturers provide a variety of different prices for a number of different tenders. Furthermore, after failing to

17. *Supra note 5, at 406.*
18. Perkovich, G. (2010). Global Implications of the U.S.-India Deal. *Daedalus*, 139(1), 20–31. http://www.jstor.org/stable/40544041.
19. Sethi, R., & Dhir, S. (2013). Anti-Competitive Agreements Under the Competition Act, 2002. *National Law School of India Review*, 24(2), 32–49. http://www.jstor.org/stable/44283760.

present a legitimate rationale for their choice, the manufacturers decided to boycott a tender as a group in order to save face. In addition to the lack of interest in and complete absence from the tender, as well as the manufacturers' common entry in the visitor's register for bidding, as well as the manufacturers' previous history of quoting identical prices, there was sufficient evidence to conclude that the boycott was a concerted action resulting from an understanding between the parties and, as a result, a violation of "Section 3(3)(d) of the Act" was committed.

In addition to establishing price parallelism, the Commission examined "plus factors" such as decreased capacity utilization, price changes following meetings of Cement Manufacturers' Associations, which provided an opportunity for discussions and information exchange, and dispatch parallelism, among other things, as part of its investigation into the Cement Cartel.[20]

Despite the fact that the manufacturers continued to produce enormous profits, they were not able to present a compelling explanation for the industry's trend. Their responses to queries concerning the discussions that took place at the trade association meetings were likewise inconsistent. The circumstantial evidence was found sufficient in order to meet the legal burden of proof needed by the law. Comparing this case to the Tyre Cartel case, it has been argued that this case shows relatively low evidentiary criteria for demonstrating a cartel and also demonstrates discrepancies in the appraisal of evidence during the course of the inquiry.[21] Similar to the Cement Cartel case, it was asserted in the Tyre Cartel case that plant capacity exceeded the amount of product being produced; nonetheless, the manufacturers refused to lower their prices, and there was an active trade organisation in existence at the time of the case. In addition to price parallelism, the Commission took into account "other criteria" in order to conduct a more thorough analysis of the information. The decision, on the other hand, was considerably different from the one reached in the cement cartel case. As the Commission pointed out, price parallelism in the tyre industry was regulated by economic need and separate strategic choices rather than by a concerted effort, which was a consequence of the generally transparent market structure of the industry. It was revealed after a comprehensive analysis into the cost of manufacturing that demand and supply were unpredictable due to the presence of an auxiliary retreading tyre market, as well as the fact that the industry's buying power had been significantly reduced as a result. It was decided by the court that the evidence was inconclusive and that the defendants were exonerated since there was no further "concrete pattern" between the parties. While there may be some parallels between the circumstances of the two cases, it is important to remember that the evaluation of evidence in such cases is a highly technical and difficult endeavour that requires expert knowledge. Due to the inherent variability of each product and industry, as well as the various factors that influence demand and supply, and the extent to which trade associations are involved, while consistency in appraising evidence should be maintained, due consideration should be given to the particular circumstances of each case.[22]

BURDEN OF PROOF

The case of "ABB Ltd. and ABB AB v European Commission" confirmed the need for "burden of proof" by upholding that, "the Commission cannot simply infer that a restrictive agreement applies to another category of power cable projects because the majority of projects in that category are global

20. *Id.*

21. Chawla, A. (2014). Global Business and Competition Law in India. *Indian Foreign Affairs Journal*, 9(2), 173–181. http://www.jstor.org/stable/45341926.

22. *Supra note 18, at 47.*

in nature, as opposed to the projects for which clear documentary evidence has been provided".[23] A clear identification of the products covered by the cartel agreement was not essential, according to General Court judgements.

The court confirms the level of proof necessary under "Article 101(1) TFEU" and the burden of proof placed on the Commission to show that the level of proof required has been fulfilled. The Court further questions the continued relevance of evidentiary shortcuts in the context of implementing "Article 101(1) TFEU" and EU competition law in general.

The Court of Justice confirms the Commission's standard and burden of proof under "Article 101(1) of TFEU".

In its conclusion, the Court determined that the requirement for establishing the existence of a restricted agreement had not been met in this case. This highlighted the interdependence of standard and burden of proof in the application of "Article 101 of the EU Treaty". To quote Advocate General Kokott's concise description of the T-Mobile judgement:

"The standard of evidence specifies the requirements that must be reached to prove facts. It's vital to distinguish this from the burden of proof. The burden of proof defines who is responsible for providing the facts and supporting evidence. Sometimes known as the evidentiary burden); and who carries the risk of the facts or accusations not being resolved or not being proveded.[24]

To reach the proof level, the Commission must include characteristics that enable direct assessment and understanding of the items covered by the restrictive agreement or practise. According to Regulation 1/2003, the Commission must provide sufficient evidence to satisfy the Commission that a restrictive practise exists. As a consequence, the Commission must show that the required level of proof has been met.

The Court's ruling in this case reaffirmed that the Commission had to show that a particular product category was covered by the restrictive agreement or practise, rather than making conclusions. So the decision isn't surprising. In numerous cases, EU Courts have held that the Commission cannot accept certain conclusions without adequate proof, therefore shifting the duty of rebuttal to the companies concerned. This judgement confirms that the Commission's responsibility to submit evidence extends to assessing the material degree of an "Article 101 TFEU breach". If the Commission fails to prove that feature, it is solely responsible for the unresolved issue, which arises when evaluating the material breadth of the cartel agreement.

The Commission cannot use evidence shortcuts to assess the material breadth of a restrictive practice under Article 101(1) of the EU Treaty. Not surprisingly, the Court affirmed the basic tenets of EU competition law pertaining to evidence and burden of proof. Notable is the Court's apparent or implicit hesitation to urge the Commission to adopt more evidentiary shortcuts.[25]

Enforcers or private claimants might use a prohibition rule without having to prove that the behavior in question was indeed anticompetitive. Using [shortcuts] allows enforcement officers and judges to act as though a certain kind of behavior is in place." Assumptions on which the shortcut evidentiary requirements are founded will be challenged by the undertakings, since they will have more evidence to show the contrary. Other EU countries still employ evidence-shortcuts under Article 101 of the Treaty on European Union. Even though neither Article 101 nor Regulation 1/2003

23. Saurabh, S. (2017). The Economics Of Antitrust Competition: An International Perspective. *World Affairs: The Journal of International Issues*, 21(2), 86–111. https://www.jstor.org/stable/48531465.

24. *Id.*

25. Michaels, R. (2016). Supplanting foreign antitrust. Law and Contemporary Problems, 79(4), 223–247. http://www.jstor.org/stable/45019876.

mentions such shortcuts, the Court of Justice has allowed the Commission to use them in at least three situations related to Article 101(1) TFEU: (1) to presume that contacts between firms resulted in subsequent coordination and, as a result, potentially anticompetitive behavior; and (2) to presume that contacts between firms resulted in subsequent coordination and, as a result, potentially anticompetitive behavior. Also, it is plausible to presume that a parent company had a considerable effect on a subsidiary's possible anticompetitive acts. In both cases, the Commission might make a legal conclusion (concerted practice and/or parental responsibility) based on the presence of particular factors (contacts between firms, a connection of (full) control or ownership).

According to the Court of Justice, an equivalent evidentiary shortcut that would allow a cartel agreement to expand its material scope was not recognized as an issue of EU law in the matter at hand. Due to the assumption of innocence, it is up to the Commission to determine the scope of the alleged cartel agreement. As a result, the decision shows the Court is wary of extending the Commission's use of evidentiary shortcuts to further instances. Rather than asking commitments to present negative proof proving they did not engage in a particular behavior, the Court seems to be adopting a similar approach. To limit the Commission's use of evidentiary shortcuts, the Court seems to be giving more weight to the presumption of innocence in its enforcement proceedings.[26]

But, more broadly, the Court questions the use of evidentiary shortcuts in the EU antitrust enforcement system. If the presumption of innocence is recognized as a basic right, it is likely to undermine present evidentiary shortcuts in EU competition law. The ABB ruling seems to indicate that the legality of present shortcuts may be challenged in the future. However, this issue should not be emphasized. The judgement under discussion was not made by the Grand Chamber and only dealt with a new evidentiary presumption recognized by the European Court of Justice. The inability to recognize this evidentiary shortcut does not spell the end of other similar shortcuts recognized by the courts. The Court is reluctant to accept any such evidential shortcuts that would make the work of the European Commission simpler, as indicated by the Court's refusal to decide in favor of the European Commission. In this sense, the European Commission, or at least Competition Commissioner Vestager, seems to be pressing for a faster reversal of the burden of proof in digital markets. It's not clear whether a judge would allow future attempts to change the Commission's enforcement practice if it restricts evidentiary shortcuts.

PROBLEMS & SUGGESTIVE REFORMS

First, the Commission's technique to evaluating the presence of a cartel is flawed since it accepts "price parallelism" as a credible defense if adequate proof is not discovered. The DG (IR) and MRTPC have sought to probe cartels for price increases or collusive bids in sectors including tires, sugar mills, yarn producers, plywood makers, cement manufacturers, etc. However, they failed to establish a cartel since the evidence gathered did not go beyond price parallelism. So they couldn't give direct or indirect proof of a cartel, such an agreement or meeting of minds.[27]

Second, the investigating method must be reformed. A system must be designed to ensure that no suspicious activity goes overlooked or ignored. The size of India's commercial market and the stakes associated with huge multinational corporations and government companies. Because cartelization is a basic concern of competition law, criminal punishments for misdemeanors and malpractices are required. A clause imposing a criminal punishment for creating cartels might be included to provide deterrent.

26. *Id.*

27. *Supra note 1, at 115.*

The third issue is the leniency policy rules, which may help investigators in such circumstances. These restrictions were implemented in 2009, but their full potential has yet to be realized. The accused should be notified of their right to seek leniency, which would facilitate the gathering of evidence.[28]

Fourthly, issues are apparent in the Commission's extraterritorial authority. The recent ruling by the Korean Fair-Trade Commission which fined foreign corporations for cartelization is a clear example of the Commission using extra-territorial powers. While the CCI is still investigating an alleged code sharing agreement between Kingfisher and Jet Airways, our national carrier, Air India, narrowly averted prosecution by the Korean Fair-Trade Commission for suspected cargo freight cartelization. In May 2010, the KFTC fined 19 airlines a total of almost $98 million in its largest antitrust case ever. A foreign character of agreement or arrangement shall not prevent the Commission from freely executing the legislation set out.[29]

Finally, CCI should take the lead and encourage knowledge sharing for good change. Since certain information sharing platforms may be beneficial to competition, CCI may need to lead in advocating for changes to guarantee that only those exchanges that have a significant negative impact on competition are outlawed. Since competition legislation is relatively new, there may be further modifications to maintain perfect competition.

CONCLUSION

The ultimate message is that Indian enterprises functioning in global marketplaces must be on the lookout for scenarios in which they may be harmed by global cartels. Not only should the CCI investigate anti-competitive activities occurring in foreign nations that harm Indian firms and customers, but Indian companies should also be informed of the losses they experience because of such anticompetitive behavior and the remedy they must recoup such damages. In a recent trend in the EU, prominent firms such as "Michelin and Deutsche Bahn" (a German railway operator) have been pursuing claims to collect damages from cartelists in different EU member states, and have been successful in certain instances. This might apply to Indian corporations as well.

28. International Crisis Group. (2013). Criminal Cartels. In Peña Nieto's Challenge: Criminal Cartels and Rule of Law in Mexico (p. Page 5-Page 15). International Crisis Group. http://www.jstor.org/stable/resrep31979.5.
29. *Id.*