

CCI joins forces with the Indian Tax Department: A new dawn for the Indian Fair-trade regulator?

Kluwer Competition Law Blog
October 10, 2020

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Please refer to this post as: *Hrishav Kumar and Anish Gupta, 'CCI joins forces with the Indian Tax Department: A new dawn for the Indian Fair-trade regulator?'*, *Kluwer Competition Law Blog, October 10, 2020*, <http://competitionlawblog.kluwercompetitionlaw.com/2020/10/10/cci-joins-forces-with-the-indian-tax-department-a-new-dawn-for-the-indian-fair-trade-regulator/>

The outbreak of the Covid-19 pandemic has worsened the already struggling Indian economy and the sky-high growth in the cartel cases in the country comes as no surprise. However, given the current economic fallout, the Competition Commission of India ('CCI') has lately shown leniency to the companies involved in the cartel cases. The Indian fair-trade regulator recently pulled up two major cartel cases (the *automotive bearing case* & the *railway locomotive case*) but merely passed a cease and desist order against the perpetrators without imposing any pecuniary penalties.

Consequently, not intending such clemency to be an impetus for further cartel activities, the Central Government on July 30, 2020, released a notification authorizing the income tax department to share the relevant information with the CCI. The notification has come as a breather for the CCI as the collection of authentic financial information from the parties especially from the individuals is a difficult task. However, it has been clarified that only 'relevant and precise information' shall be shared by the tax authorities to maintain appropriate confidentiality. This post argues that the move will simplify the task of cartel detection and the added financial reports would further help the competition watchdog keep a check on potential competition violations in the market whilst performing the economical surveys and other proactive screenings.

A much-needed development?

Detecting and fighting cartels have always remained the top priority for the antitrust watchdogs since cartels are secretive and difficult to detect. The competition authorities need extraordinary power, skills, and expertise to destabilize the cartel conspiracies. In India, the CCI usually relies on the leniency programs, the Dawn Raids, and the whistleblowers or individual complaints to bust the entities involved in a cartel. Despite such methodical contrivances for cartel detection, the CCI on many occasions has been unable to catch hold of the increased cartel practices. The prime reason for CCI's failure has been the reluctance to actively involve itself with the proactive methods of detection mechanism. The CCI therefore, realized that merely levying nominal penalties and imposing fines on the company's turnover or profits won't deter the anti-competitive behavior. Hence, on account of the rising numbers of cartels in specific sectors such as Healthcare, Pharma, Telecom, FMCG & other essential retails in such unprecedented times, the exchange of information between the tax authorities and the CCI was a much-needed move. Such a move would not only make CCI informed regarding the tie-up, collusion, price gouging, and other ex-ante regulations or agreements among the competitors but also help the CCI in determining the dominance of a particular company or enterprise in the relevant market.

Antiquated detection mechanism: Time for the restructuring?

Usually, the investigation for any cartel practice commences upon an investigation order passed by the CCI to the Director General (DG). The cartel investigations are generally required to be completed within 60 days from the day of receipt of the order. But because of the complex and secretive nature of cartels, the investigation in India majorly takes often exceeds 18-24 months or more. For instance, in the recent case of *Re: Cartelisation in Industrial and Automotive Bearings*, the Director-General took more than 24 months to provide the investigation report to the CCI.

The arduous task of busting cartels cannot be reconciled with the reactive methods of detection mechanism. Since, cartels seldom exist in explicit contractual form the companies and the individuals are asked to provide a detailed list of documents, the conduct of the parties, and other related information. The burden of proof majorly lies on the alleged parties, to present a clear and logically correlated reason for their conduct, with concrete reports and internal notes for easy inference in complex and intricated cartel cases.

Over the years, the CCI has eventually become more vigilant and beady-eyed towards the individual office bearers involved in contraventions. Individuals were first penalized in the *Bengal Chemist case* where the CCI not only held the Bengal Chemists and Druggists Association ('BDCA') guilty for anti-competitive conduct such as price-fixing, limiting supply, and setting the price of the drug but also held the office bearers of the BDCA guilty under section 48 of the Act. Moreover, to determine the penalty of the office bearers CCI considered the income certificates of the individuals for enshrining the principle of 'individual culpability'. Similarly, in the *Indian Jute Mill Association case*, the CCI found the office bearers vicariously liable and penalized them for cartelization in the pricing of the jute bags. This didn't only manifest the uncompromising attitude of the authorities in imposing fair and strict imposition of penalties but also set a requirement for sharing individual income and other financial statements whilst adjudicating further competition concerns.

It is interesting to see the new and evolving proactive methods of cartel detection in the growing Indian competition market. The Indian government has been coming up with new and innovative ideas to aid the CCI by lending both intensive & extensive coordination and cooperation with specialized agencies such as tax authorities, sector-specific regulators, and various ministries dealing with corporate bodies.

Sharing of financial statements - Would it help examine violations under Competition Act?

Many factors such as the market share of an enterprise, entry barriers, size of the competitors and, financial power of the enterprise, *inter alia*, are taken into consideration to determine the dominant position of an enterprise in any relevant market. The financial strength of an enterprise in particular has proved to be an important factor for the CCI to determine the issue of dominance on many occasions. For instance, in *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*, the NSE was held to be dominant in the relevant market basis its overall financial strength and level of vertical integration in the stock market, notwithstanding the lower market share of the NSE. Imperatively, the Director-General, *inter alia*, examined the financial statements of NSE during the investigation process. Likewise, in *Shri Ashutosh Bhardwaj v. Ms. DLF Limited*, the CCI gave due consideration to several factors such as DLF's vast amount of fixed assets and capitals, turnover, return on assets, profits after tax, etc. Further, in *Surinder Singh Barmi v. The Board of Control for Cricket in India*, financial statements of the BCCI were scrutinized by the CCI to determine the status of the BCCI. Moreover, the CCI also looks into the financial details of the entities while scrutinizing the significant mergers and acquisitions and assessing the amount of penalty to be imposed upon the enterprises for contravening the provisions of the Act.

Conclusion

The move from tax authorities to share relevant information with the CCI will prove to be a shot in the arm for the CCI as it often takes into consideration the financial information of the parties to examine potential violations under the Act. Income tax departments like the CBDT are government bodies having access to authentic financial information and as such entities and individuals can no longer get away with inconsistent disclosures. At the same time, the CCI can now have better access to the tax profiles of the entities during the investigation process. Further, such coordination and exchange of information between the government departments will help enhance the investigation process.

Having said that, there appears to be a need for clarification on vaguely worded "relevant and precise" caveat. The absence of clarification on the ambiguous terms in the notification does more harm than good as it might provide leeway to the tax authorities to reveal excessive and unnecessary details of the taxpayers in the garb of investigation. Be that as it may, with the release of the notification, the CBDT seems to have struck the right chords, however, it remains to be seen if such coordination between the income tax authorities and the CCI continues to post the Covid-19 exigencies.