

Cartels in the time of COVID-19: Competition Commission of India Adopting a Soft Approach

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In the last few months, Competition Commission of India (CCI) took what most might view as an extremely lenient stance in two cartel cases; what is known as the most serious violations of competition law. Hard-core cartels are perceived as the "supreme evil of antitrust"^[1]. It is then perplexing to understand why such cartels operating since well before the current pandemic should be given complete exemptions from a monetary penalty. The markets in question were the railways' procurement market and the domestic industrial and automotive bearings markets. Citing 'peculiar circumstances' in the first case, and an 'economic slowdown faced by the Micro Small and Medium Enterprises (MSMEs) due to the ongoing pandemic' in the next one, the CCI refrained from imposing a monetary penalty in both cases. The parties were simply warned and directed to cease and desist their anti-competitive activities.

In the railways' procurement investigation, a complaint was filed against the railway vendors by multiple zonal departments of Indian Railways alleging a cartel^[2]. The said cartel was alleged to be in operation from 2009 to 2017 to rig the bidding process for the procurement of Composite Brake Blocks (CBB). In *Re: Cartelisation in Industrial and Automotive Bearings*^[3], the parties were key players in the domestic industrial and automotive bearings market. The investigation was taken up by CCI *suo motu* on receipt of a leniency application under Section 46 of the Competition Act, 2002 (the Act) read with Regulation 5 of the CCI (Lesser Penalty) Regulations, 2009 (LPR) filed by one of the participants in the cartel. This cartel was in operation from 2009 to 2014 to facilitate price coordination in the supply of components to original equipment manufacturers (OEMs).

Investigation and evidence

In the reference cases pertaining to cartelization by railway vendors, the Director-General (DG) found extensive evidence e.g., Whatsapp groups, text messages, and e-mail correspondence between senior executives of the parties. The parties coordinated prices to be quoted in the tenders for procurement of CBBs by railways departments through a Whatsapp group. The prices shared in that group were found to be identical to the submitted bids. Subsequently, the existence of a cartel was also admitted by executives of the parties when confronted with various emails as proof.

In the bearings cartel, several meetings were held by the executives of the parties to discuss price-sensitive information. For instance, the discussions related to an agreement on identical percentage increase in the prices, and the ways to push OEMs to increase prices by sending price-increase letters simultaneously. The DG also placed reliance on telephonic and travel record of the executives.

Despite finding explicit evidence of cartelization, the CCI did not impose any penalty on the parties in both the investigations. The parties were simply warned and let off with a cease and desist order to refrain from indulging in anti-competitive activities. While the first order did not elaborate on the rationale for not imposing a penalty on the parties; in the subsequent one, CCI stated that the parties and their executives provided continuous cooperation during the investigation and were MSMEs facing economic hardships due to the ongoing pandemic so no penalty will be imposed on them.

'Covid-pass' given to the parties?

Without a doubt, businesses all over the world have been bearing losses and economic hardships during the ongoing pandemic. Most competition authorities including CCI had issued guidance notes/communications and/or interim authorizations for businesses operating in coordination to supply essential goods and services. Hard-core cartel activities, however, do not find protection even in these. As per the European Commission's statement^[4] (ECN Statement), temporary measures by businesses to ensure the supply of scarce products will not attract the provisions of competition law. However, businesses are warned to not take advantage of the present circumstances by cartelizing or abusing their dominant positions. Through a follow-up communication^[5], cartelization has been explicitly excluded from the list of anti-competitive activities given temporary exemptions in the wake of COVID-19 crisis and active reporting of cartels has been sought. The CCI's advisory^[6] to businesses in the wake of the pandemic also has no application to the cases in question, as it only aims to consider coordination between competitors arising due to COVID-19.

Under normal circumstances, punishing cartels is an active priority for all competition authorities. Both the sectors in question are also, in fact, prone to cartelization. Suppliers of Railway equipment have previously been caught by the CCI for bid rigging^[7]. The list of instances of cartelization in the global automobile OEM suppliers' market is even longer^[8].

A more reasoned approach to address price-fixing during COVID-19 was taken up by the High Court of New Zealand in their decision in *Commerce Commission v. International Racehorse Transport NZ*^[9]. No monetary penalty was imposed on the defendant in that case also but that decision was based on a detailed analysis of the financial stability of the defendant who was severely hit by the economic repercussions of COVID-19; an independent assessment of the financial condition of the defendant was undertaken. The assessment resulted in a conclusion that the defendant would not be able to pay the penalty on account of the current circumstances and the decision was based on this conclusion. In the context of present cases, the industries in question are fraught with anti-competitive activities and are prone to recidivism. An independent analysis of the publicly available financial reports of the parties to the cartels reveals that more than half of them had reported profits in the last three preceding financial years. Therefore, one may say that the orders of the CCI reflect a lack of proper assessment as no case-by-case financial analysis of the parties was done to assess their ability to pay the penalty.

In conclusion, while it is important to provide financial stimulus to MSMEs and other struggling businesses to keep them afloat, the approach should be reasoned and balanced through an appropriate assessment of the businesses involved, the parties' financial position and most importantly, the behaviour in question. The Central Board of Direct Taxes has also issued a notification^[10] authorising income tax authorities to share financial information with CCI; therefore, allowing CCI to properly assess the financial information of the parties in relation to the imposition of penalties. A lesser penalty even may be imposed on the basis of a case-by-case assessment of the parties involved through a reasoned order.

[1] *Verizon Communications v. Law Offices of Curtis v. Trinko* 540 US 398 (2004).

[2] Reference Cases No. 03 and 05 of 2016, 01, 04 and 08 of 2018, available at <<https://www.cci.gov.in/sites/default/files/03-of-2016.pdf>>.

[3] *Suo Motu* Case No. 05 of 2017, available at <<https://www.cci.gov.in/sites/default/files/05-of-2017.pdf>>.

[4] *Joint Statement by European Competition Network (ECN) on Application of Competition Law during Corona Crisis* available at <https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf>.

[5] *Communication on Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak* (2020/C 116 I/02), available at <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0408\(04\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0408(04))>.

[6] See, "Advisory to Businesses in Time of COVID-19", issued by CCI on April 19, 2020, available at <https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf>.

[7] In *Re: Reference Case No. 05 of 2011 filed by Shri B P Khare, Principal Chief Engineer, South Eastern Railways*, CCI held the parties in violation of the Act for running a cartel but did not impose a penalty as the parties were MSMEs and lacked proper knowledge of competition laws in India, available at <https://www.cci.gov.in/sites/default/files/REF-052011_0.pdf>.

[8] In *Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)*, *Suo Motu* Case No. 07 (01) of 2014, CCI had found the existence of a cartel by the OEMs suppliers. However, as the information was filed under Section 46 of the Act read with the Competition Commission of India (Lesser Penalty) Regulations 2009, the parties did not face any monetary penalty, available at <<https://www.cci.gov.in/sites/default/files/Suo-Moto-07-01-2014.pdf>>. See, CASE AT.40481 - Occupant Safety Systems (II) supplied to the Volkswagen Group and the BMW Group; Press release for two separate decisions on cartels operated by OEMs suppliers, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_962>. Also, Press Release Number 13-1074 by Department of Justice, USA - Multiple suppliers to OEMs in the automobile were found to be running a bid-rigging cartel by the Antitrust Division, available at <<https://www.justice.gov/opa/pr/nine-automobile-parts-manufacturers-and-two-executives-agree-plead-guilty-fixing-prices>>.

[9] [2020] NZHC 1716, available at <<https://comcom.govt.nz/case-register/case-register-entries/international-racehorse-transport-new-zealand-partnership>>.

[10] Notification No. 57/2020 dated July 30, 2020, issued by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, available at <https://www.incometaxindia.gov.in/communications/notification/notification_57_2020.pdf>.