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Penalty by Competition Commission of India in Cartel Cases: A Review of Pattern and Practices

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Abstract:

Cartel is considered as the most severe form of anti-competitive activity. Any agreement between the firms of an industry with the purpose of fixing prices, limiting production, determining supply, allocation market among themselves has direct impact on the interest of the consumers. Cartelisation is not a new phenomenon in the market. It has been in existence since ancient economies. Even in the Kautilya's Arthashastra, reference to agreement between the traders can be found. This global phenomenon has been dealt with strictly in major competition law regimes across the world. India, too, in its legal framework has incorporated the prohibition of anti-competitive agreements by providing strict penalties and competent authorities empowered to impose such penalties in case of cartel activity. Competition commission of India, established and empowered under the Competition Act, 2002 has played an important role in penalising the firms forming cartels. However, in the history of almost more than a decade, these penalties has failed to have a deterrent effect. After a careful study and analysis of the competition commission of India's orders, it is to be examined whether and if yes, then what pattern is adopted by the chief regulatory authority in determining the penalty on the infringing firms. With this purpose, the researcher has analysed the cartel cases decided by the Competition Commission of India in pre pandemic times and during pandemic phase. It can be found out that the orders by CCI do no follow any uniform or certain guidelines in determining the penalty of the firms and individuals, which makes it highly a discretionary matter with less deterrent effect. It is concluded that there is a need to establish authoritative guidelines to be followed by the CCI while imposing penalty in cartel cases.

Keywords: Competition law, cartels, Competition Commission of India, penalty, consumer interest

Introduction

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice." (Smith,1776)

In order to restrict competition in the market, a number of firms enter into an agreement, formal or informal, and such understanding is known as cartel. The purpose of these agreements may be price fixing in the market, limitation on output or supply, market division of markets between firms either locally or product-wise, or function in consensus so as to limit the entry of new players in the industry with the purpose of creating monopoly. The legislative framework in India, following the global standards provide the definition and penal provisions relating to horizontal agreements, cartels in particular. Section 3 of the Competition Act, 2002 relating to anti-competitive agreements was enforced and brought to operation on 20 may, 2009. Section 27 of the Act makes provision for the penal powers of the CCI to be imposed on any enterprise or individual contravening the section 3. More than a decade has passed since the enforcement of these provisions which mandates a review of the practices and patterns of the penal provisions imposed by the Competition Commission of India and its deterrent effect, especially in cartel cases.

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Penalties by CCI

According to section 27 of the Act, "Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely":—

"(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: [Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.]" [Section 27, Competition Act, 2002]

Further, under Section 48 of the Act "Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention."

Penalties on individuals

The first instance of penalty on individual by CCI can be traced as late as 2014 - i.e. three years after the imposition of the penalty by CCI. The penalties imposed on individuals is more or less similar to the penalties imposed on the infringing enterprises in the same case and the criteria is generally the individual income during the relevant period. [M*/s Arora Medical Hall Ferozpur v. Chemists & Druggists Association Ferozpur*, 2012]

Ever since the advent of Liberalisation, globalisation and privatisation, the anti competitive behaviour has been on an increase mandating the need of a strong legal regime in order to protect the interest of the consumers.by maintaining competition in the market.

The Competition Act provides such legal regime following the global standards. The Competition Commission of India, being the chief regulator has played and active role in past decade. However, in last few years it is found that even after finding the blatant violation of the Act, especially cartelisation, the CCI has either imposed symbolic penalties or no penalties due to the economic impact of the Corona Pandemic. Whereas, in few other orders, CCI has imposed heavy penalties on the firms as well as on the individuals to the maximum extent. Though the Commission is mandated to give reasoned decisions under the principles of natural justice, yet the same is not found in recent cases. This makes it pertinent to study and examine the pattern of penalty orders before pandemic and during pandemic era.

In Vedanta Bio Sciences, Vadodara vs. Chemists and Druggists Association of Baroda, 2009

The Commission passed the order mentioning that it is important to penalise such conduct in order to "discipline the erring party" for contravening the provisions of the Act. Accordingly, the Commission deemed it fit "to impose a penalty on the Opposite Party at the rate of 10% of its relevant income based on the income and expenditure account for three financial years filed by it for the relevant years during the earlier proceedings before the Commission."

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In Re: Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Ltd. (HPCL) Vs. Allampally Brothers Ltd. & Others, 2014

In this case, parties quoted order of the Commission in M/s Orissa Concrete and Allied Industries Ltd for considering the mitigating factors while imposing the penalty. It was observed by the Commission in this order that:

"As regards penalty under section 27 of the Act, the Commission notes that there are circumstances in this case which require the issue of penalty to be looked into somewhat differently. The facts as projected in the present reference reveal a complete lack of awareness by the opposite parties which are small and micro enterprises. The replies of many of these parties are effectively incriminating in nature. Further, none of these parties quoted for more than 50% quantity which was a requirement under the tender. Thus, right in the beginning the offers made by these parties were not in accordance with the requirement of the tender and hence they could not have got supplies as per the tender conditions. Moreover, the bid given by these parties was not the lowest and so they could not have been awarded the contract."

In this case, Commission rejected the plea of parties to consider the facts of the present case on par with M/s Orissa Concrete and Allied Industries Ltd and held that being a small and micro enterprises per se cannot be the decisive factor in determining the amount of penalty, however, it can be considered as one of the mitigating factors.

The present case related to bid rigging collusion between the firms for public procurement and therefore, according to the Commission, fit case for imposing penalty on the infringing firms. To quote the order,

"Any collusion in rigging tenders in public procurement costs exchequer on account of anti-competitive bids besides resulting in higher cost to end-consumers for whom a cylinder is a necessary input for their daily requirements. This itself is a compelling factor for the Commission to not only impose penalty but to view the contravention seriously."

Therefore, the Commission ordered the penalty, under section 27 of the Competition Act, 2002 (Act) on the 51 infringing firms at the rate of 1% of their average relevant turnover for the financial years 2013-14, 2014-15 and 2015-16. The Commission further found liable the individuals of the 51 infringing firms under section 48 of the Act and imposed the penalty "at the rate of 1 percent of their average income of the financial years 2013-14, 2014- 15 and 2015-16." (M/s Arora Medical Hall Ferozpur, 2012)

In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems) against NSK Limited, Japan and Others., 2014

In this case, it was alleged that Japanese firms: NSK and JTEKT along with their respective Indian subsidiaries, RNSS and JSAI were engaged in cartelisation and contravened the provisions of the Act. The said cartels functioned in Electric Power Steering systems from 2005 to 2011. The Commision held them liable for collusion in price determination, market allocation, bid coordination and manipulation of bidding in OEMs. Such acts were found to have AAEC in India. Along with the firms, liability of individuals were also held under S. 48 of the Act.

In the exercise of its powers under section 27 (b) and proviso thereof, Commission imposed a penalty computed on the basis of the turnover of the cartelising firms. In the instant case, the cartel was identified from 2005 to 2011. Since the penal provisions were enforced from 2009, the computation of penalty was based on the turnover from 2009 to 2011.

The Commission quoted judgement of the Hon'ble Supreme Court in Excel Crop Care Limited v. Competition Commission of India and Others, 2017,
"Turnover for the purposes of Section 27 (b) is 'relevant turnover' of a company which relates to the product in question in respect whereof the provisions of the Act are found to have been contravened. In the present case, the product in question is EPS Systems. Both NSK and JTEKT have submitted that direct sales of EPS Systems in India are made by them only through their Indian subsidiaries RNSS and JSAI respectively. Therefore, for the purposes of calculation of penalty, the Commission shall take into consideration relevant turnover and relevant profit details of RNSS and JSAI."
In the light of the leniency applications filed by the cartelising firms, NSK and JTEKT under section 46 of the Act for the grant of lesser penalty, hundred percent reduction was given to the first applicants and fifty percent reduction was given to the second applicants.

Nagrik Chetna Manch vs. SAAR IT Resources Private Limited & Others.2017

The instant matter related to the alleged bid rigging cartel for the tender Selection of agency for carrying out tree census having geo-enabled with the use of GIS & GPS Technology. The allegation was of the infringement of the Act for which the Commission held the Opposite party liable for entering into a bid rigging agreement and imposed the penalty according to the section 27(b) of the Act.
Regarding imposition of penalty, first Opposite Party submitted that "the quantum of penalty should be determined based on turnover arising out of the impugned tender and should not be based on total turnover" which was rejected by the Commission stating that "the Commission does not find any merit in the said submission as very narrow interpretation of relevant turnover has been made by the said OP." further the Commission refused to consider any of the mitigating factors submitted by the infringing firm stating that "conduct of OP-1 demonstrates that it has scant regard for the public procurement process and the manner in which it rigged the tender suggests that OP-1 had acted with *malafide* intention from the very beginning."

Therefore, "considering the *facts and circumstances of the case*," the Commission imposed the penalty "at the rate of 10 % of the average turnover for three financial years viz, 2015-16, 2016-17, and 2017-18/" (Nagrik Chetna Manch vs. SAAR IT Resources Private Limited & Others., 2017)

Chief Materials Manager, South Eastern Railway v/s Hindustan Composites Ltd. & ors.) 2016

In this case, the Commission examined the matter in the four reference cases which it received in different time. The cases related to bid rigging by the opposite parties in various tenders during 2009 to 2017 notified by the different Railway Zones/Divisions. In the investigation done by the Director General in these reference cases, a report was prepared and consolidated and handed over to the CCI. Meanwhile one more reference case was initiated with the Commission which was later on clubbed with the previous four cases. Therefore the matter involved a number of heterogenous parties and wide ranging individuals. It was noted by the Commission that,
"The concerned parties have not only cooperated but have even admitted their respective role/ conduct in the said tenders as brought out by the DG. It cannot be gainsaid that cooperation to such an extent by the parties concerned is one of the consideration which may be taken into account by the Commission in quantifying the penalties. Moreover, the Commission notes that some of the OPs are Micro Small and Medium Enterprises (MSMEs). In fact, the Commission has also looked at the relevant turnover arising out of Composite Brake Block (CBB) in the present matter and observes that most of the OPs are having small annual turnover in this segment."

Also, commission considered the situation of outbreak of Pandemic (Covid-19) and its impact on the MSMEs where such enterprises required measure to be taken by the government of India to support the need of such vulnerable MSMEs and help them to withstand the economic challenges posed by the Global Pandemic. These considerations taken holistically, the Commission refrained from imposing any monetary penalty.

Another consideration specifically pointed out by the Commission for dealing with the infringing firms rather leniently was that the firms "*have fully cooperated during investigation and inquiry before the DG and the Commission respectively by not denying the material confronted by the DG. Needless to add, such cooperative conduct optimizes the resources of the DG as also expedites the adjudicatory process besides lessening the regulatory burden. The ultimate object of the Act is to correct the market distortions and to discipline the behaviour of the market participants.*"

Therefore, the Commission decided that in the interest of justice and to mete out the objectives of the Act, wherein the cartel behaviour must cease and firms should desist from entering n any such anti-competitive activity, the parties are cautioned to ensure the strict adherence to the Act.

In Re: Cartelisation in Industrial and Automotive Bearings,2017

In this case, after considering all the facts and factors, the Commission held Tata Bearing, NEI, SKF, and Schaeffler, liable for anti competitive agreement and thus contravening the provisions of the Competition Act 2002. Apart from the firms, individuals related to the firms were also held liable under section 48 of the Competition Act. The Commission ordered the infringing firms to "cease and desist in future from indulging in practices which have been found in the present order to be in contravention of the provisions of Section 3 of the Act, as detailed in the earlier part of the present order."

Taking a benevolent approach regarding penalty, the Commission observed that "in light of the peculiar facts and circumstances of the present case as detailed in this order, ends of justice would be met if the parties cease such cartel behaviour and desist from indulging in it in future, as directed earlier."

In Re: Anti-competitive conduct in the paper manufacturing industry2016

In the reference case, the agreement between the opposite parties was established beyond doubt. However, regarding exercise of power of imposing penalty under section 27, it was opined a symbolic penalty instead of maximum penalty would suffice to meet the ends of justice.

The factors like outbreak of pandemic and its impact on the paper industry was weighed upon and considered valid as most of the activities and businesses were conducted in online mode. This heavily reduced the need of paper affecting the demand of paper in the market significantly. Imposing penalty would further render these firm economically unviable. Therefore, a symbolic penalty of Rs. 5 lakh was imposed on each infringing firm who were found to have been actively involved in the cartelisation. Grant of lesser penalty was made to the extent of 100 percent to the party for cooperating with the DG investigation.

The Commission also opined that "the objectives of the Act would be met if the parties including their respective individuals in the present matter are ordered to cease such cartel behaviour and are further directed to desist from indulging in similar behaviour in the future, as directed earlier. The OPs and their respective individuals are, however, cautioned to ensure that their future conduct is strictly in accord with the provisions of the Act, failing which, any such future behaviour would be viewed seriously as constituting recidivism, with attendant consequences."

Mr. Rizwanul Haq Khan, Dy. Chief Material Manager, Office of the Controller of Stores, Southern Railway Vs. Mersen (India) Pvt. Ltd. and Another,2016

In this case also, the violation of the Act was found by Commission and parties were held liable under Section 27(a) of the Act. The concerned officers were also held liable under Section 48 of the Act. The commission while passing its order considered the factors like structure of market, nature of the firms, relevant revenues of the firms & profits; acknowledgement of the conduct and lesser penalty application; the situation od MSME in India and economic effect of Covid-19 Pandemic, etc.

In this situation, "if any penalty were to be imposed on these firms, it may render these firms economically unviable and may even result in exit from the market, which would further reduce competition in a market already characterised by the presence of few players due to the policy of the Indian Railways to procure items from RDSO approved vendors. Thus, considering the matter holistically, the Commission decides not to impose any monetary penalty on the OPs and their respective officials. Further, the Commission is of the considered opinion that the objectives of the Act would be met if the parties in the present matter cease such cartel behaviour and desist from indulging in similar behaviour in the future, as directed earlier."

Eastern Railway, Kolkata vs. M/s Chandra Brothers and others,2018

In this case also, it was clearly established before the CCI that the opposite parties engaged themselves in anti-competive agreements and contravened section 3 of the Act. Many factors affecting Competition in market were analysed by the commission at length. Some of them being "market structure, role of Indian Railways as a monopsony buyer, nature of the firms, the staff employed by them and the quantum of their annual and relevant turnover, and considered the same in light of the overall the objective of the Act to prevent practices from having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India."

In this case also, the factors like opposite parties being MSMEs with limited staff and small turnover, the effect of outbreak of pandemic on such MSMEs, the insistence of the government of India on maintain liquidity and credits to maintain the viability of such MSMEs in the country were considered. The cooperation extended by the erring parties and lesser penalty applications were also considered by the Commission while imposing penalty. The resultant action was "the Commission decides not to impose any monetary penalty on the OPs and their respective officials in the peculiar circumstances of this case, as noted above. Further, the Commission is of the considered opinion that the objectives of the Act would be met if the parties in the present matter cease such cartel behaviour and desist from indulging in similar behaviour in the future, as directed earlier. The parties are, however, cautioned to ensure that their future conduct is strictly in accord with the provisions of the Act, failing which, any such future behaviour would be viewed seriously as constituting recidivism, with attendant consequences."

GAIL (India) Limited Vs. PMP Infratech Private Ltd. and Another,2019

In the instant case, the commission took the lenient view and considered the mitigating at length submitted by the infringing firms. And order of "behavioural correction" and "cease and desist" was considered as suffice to serve the interest of the market.

A symbolic penalty was consequently imposed on the erring parties.

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In Re: Alleged anti-competitive conduct in the Beer Market in India, 2017

In yet another famous case, Commission exercised its power of imposing penalty in case of established cartelisation under station 27 of the Act. The Commission, while computing the penalty took into consideration the facts regarding profit and revenue from the sale of beer in India and the financial statements submitted by the opposite parties, 2% of each year's during the existence and continuance of the cartel or a penalty at the rate of 0.5 times of the profit for each year of the continuance of the cartel or, whichever is higher.

Regarding the individual liability for indulging in cartelisation, a penalty of three percent of their income average, for three financial years preceding of the cartel was imposed.

"The Commission is of the view that the intention behind imposition of penalty is only to punish the individuals for their cartel so as to create a deterrent effect. As such, the Commission imposes penalty uniformly on the individuals by taking their income details for the preceding three financial years, rather than relating the same to their respective period of cartel."

Conclusion

In the light of the above mentioned cases, it can found out that there is no fixed pattern in imposition of penalties by the CCI under the Act. It has been over a decade since CCI is exercising its power of imposing penalties. The obvious consequence should be emergence and establishment of some uniform trends and guidelines while dealing with the cartel cases in India and imposing (or not imposing) fines under the Act. The orders of the CCI do not provide any fixed parameters in adopting the metrics for calculating the quantum of fine in contravention cases. On one hand, MSME is considered as a mitigating factor decisively whereas on the other, benefit is denied on the plea of being MSME. The purpose of imposing penalty i.e. deterrence can be achieved only when there is certainty and uniformity in how the Commission imposes fine of the infringing firms. Therefore the need of the hour is to provide appropriate guidelines in order to establish with certainty and uniformity the principles to opt for the suitable metric while imposing fines and to calculate the extent of fines. And these guidelines should be on par with the international standards.

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