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Cartelization: A Critical Study with Special Reference to the Covid-19 Pandemic

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ABSTRACT

The detection of cartels in free-market economies is the top priority for any antitrust agencies across the world. To combat this threat, the authorities have instituted a number of Leniency and Whistleblowing procedures. Cartels represent a significant economic danger to the free market; collusive agreements result in a decrease in the productivity or the welfare of the market. This article intends to concentrate on the regulation of anti-competitive activities of trade organisations, namely their cartelization. While examining the requirements of an agreement which is an essential element to prove cartelization, the oligopolistic market structure and the standard of proof along with concerted practices amounting to agreement by the parties are discussed. In addition, the legality of creating a "crisis cartel" in the event of a pandemic is explored in the context of Indian antitrust legislation and the advisories issued by the Competition Commission of India. The recent pandemic has established a major issue for the competition authorities around the world, to allow the companies to form a cartel on one hand and to safeguard the rights of consumers, enterprises and free market on the other. This paper examines the many elements about the cartelization in which the businesses are operating that the competition authorities can scrutinise during a cartel inquiry, including those elements that are related to the businesses' operations during the pandemic. It will also deal in detail with the constituents of the practice of cartelization and the standard of proof required to prove the same. Also, the paper tries to connect the same with the ongoing situation of the COVID-19 pandemic and its impact on the same.

Keywords: *Cartelization, Standard of Proof, Anti-competitive agreement, Pandemic and Advisory.*

I. INTRODUCTION

Cartels are considered as a major economic danger to the free market economy and it is said that act of cartel is a 'cancer on the free market economy and 'the supreme evil of antitrust'.[3]

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[3] Mario Monti, *Former Commissioner for Competition in the EU, once described cartels in these words*, EUROPEAN COMMISSION (Sept. 11, 2000) https:// ec.europa.eu/commission/presscorner/detail/en/SP

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Cartelization is not only detrimental to the end consumers but also to large-scale economies across the world as it results in the waste of resources, inefficiencies and damages the welfare of consumers.[4] It protects the cartels against full market forces exposure, which leads to a decrease in competition amongst competitors, resulting in loss of possible competitiveness in the future.[5] Therefore, the primary objective of any Anti-trust is to root out cartels, deter such anti-competitive activities and penalize the participants.

To achieve a monopoly in a certain industry, a cartel strives to control the production, sale or pricing of a product, which in general does not serve the public interest.[6] The severity of the effects of cartels is illustrated by section 27 of the Indian Competition Act, 2002[7] which imposes a higher penalty on cartel participants entering into an anti-competitive agreement as compared to other parties to another anti-competitive agreement.[8] This research paper will deal in detail with the constituents of the practice of cartelization and the standard of proof required to prove the same. Also, the paper tries to connect the same with the ongoing situation of the COVID-19 pandemic and its impact on the same.

II. AGREEMENT – AN ESSENTIAL TO PROVE CARTELIZATION

It is a settled position of law that there is no need to prove an exclusive agreement between parties for proving an act of cartelization and it can be very well inferred from the actions or intention of the parties.[9] The definition as understood under Indian Competition Act, 2002 section 2(b) is not an exhaustive one but being inclusive, in contradistinction to what is understood under civil law.[10] In fact, even a unilateral decision by one party and evidence of tacit acquiescence by the other is sufficient to establish an agreement.[11] It says *"agreement"* covers an arrangement or understanding which may be informal as well as formal.[12] Agreements between cartels are not well documented and clandestine under the radar and therefore, the *"agreement"* as defined under the Act is wide enough to bring into its scope any informal arrangement.[13] This implies that for proving the existence of agreement suggesting

EECH_00_295 (last accessed on May 14, 2021).

[4] M.M. Sharma, Economics of Exemptions from Competition Law, 24(2) Manu. Law Jour. (2013), http://docs.manupatra.in/newsline/articles/Upload/0F7253B5-6B78-4151-97D1-1006FA1DC20D.pdf

[5] M FURSE, COMPETITION LAW OF THE EC AND UK 135 (1st ed., Oxford University Press, 2004).

[6] VINOD DHALL, COMPETITION LAW TODAY: CONCEPTS, ISSUES AND THE LAW IN PRACTICE 49 (1st ed., Oxford University Press, 2007).

[7] The Competition Act, No. 12 of 2003, INDIA CODE (1993).

[8] American Natural Soda Ash Corporation v. Alkali Manufacturers Association of India & Ors. (1998) 3 CompLJ 152 MRTPC.

[9] All India Tyre Dealers' Federation v. Tyre Manufacturers, 2012 SCC OnLine CCI 65.

[10] Jyoti Swaroop Arora v. Tulip Infratech Ltd. & Ors., 2015 CompLR 109 (CCI).

[11] Case T- 23/90, Automobiles Peugeot SA v. Commission, 1991 E.C.R. II-2533 (EU).

[12] Technip S.A v. S.M.S Holding Private Ltd. (2005) 5 SCC 465.

[13] RICHARD WHISH & DAVID BAILEY, OXFORD'S COMPETITION LAW 561 (7th ed., Oxford University

concerted action, the circumstantial evidence can be appreciated to establish the existence.[14]

Further, section 3(1) of the Indian Competition Act, 2002 is the covering section that prohibits the existence of a cartel. The entire chapter II is named *"Prohibition of agreements"* and Section 3(1) is inherent and implicit, and further it envisaged two situations i.e., section 3(3) and section 3(4) which make it a broader provision. It cannot be argued that, as allowed for in section 3(3), *practices carried on"* or *"decision was taken by"* maybe without an agreement. Thus, the agreement is, therefore, a required component in all the sub-sections provided under section 3. It is the heart of the *"Prohibition of agreements"* chapter. There can be no restriction of agreements until there is an agreement. Therefore, an infringement of section 3(3) cannot be envisaged without an agreement.[15]

Similar is the opinion of the courts in India. In the *Commission in Director General of Investigation and Registration* v. *Gujarat Ambuja Cements Ltd. and Ors.*[16] while noting *DG (IR)* v. *Modi Alkali and Chemicals Limited*,[17] held that *"cartel is an association of producers who by an agreement among themselves attempt to control production, sale, and prices of the product to obtain a monopoly in any particular industry or commodity".* This case was further relied upon in *I.T.C. Limited* v. *M.R.T.P.C.*[18] Therefore, firstly the existence of an agreement is a must,[19] the word is designed in such a way as to produce a vast and sweeping coverage to include both overt and tacit forms and it is not required that it has to be an agreement as is understood in common legal parlance.[20] Much like India, the EU, and South Africa, the scheme of competition act suggests that the Commission functions as an inquisitorial body[21] and thus it has the power to expound upon and expand the meaning of the term to bring it in tandem with the objective of the act. In that light, it must be noticed that the Commission is not bound by the necessity of the existence of a written formal agreement[22] to conclude that there was an agreement. Thus, in situations of conspiracy when joint and collaborative actions involve the inception, execution and completion of the plan, there is no necessity for an express agreement.[23].

As already stated since cartelization is considered a civil offence, the standard of proof

Press 2012).
[14] Compagnie Royale v. Commission, [1985] 1 CMLR 688 (ECJ).
[15] M/s Metalrod Ltd., Ghaziabad v. M/s Religare Finvest Ltd., 2011 SCC OnLine CCI 28: [2011] CCI 27.
[16] DG of Investigation & Registration v. Gujarat Ambuja Cements Ltd. & Ors., (1994) 80 Comp Cas 15.
[17] DG (IR) v. Modi Alkali and Chemicals Ltd, 2002, CTJ 459 (MRTP).
[18] I.T.C. Limited v. M.R.T.P.C., (1996) 46 Comp Cas 619.
[19] CCI v. Artists & Technicians of W.B. Film & Television, (2017) 5 SCC 17.
[20] Shamsher Kataria v. Honda Siel Cars India Ltd., 2014 SCC OnLine CCI 95.
[21] Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 2004.
[22] Competition Commission of India v. Bharti Airtel Ltd. & Ors. (2019) 2 SCC 521.
[23] United States v. General Motors, 384 US 127.

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essentially is not beyond a reasonable doubt but evidence has to be appreciated on the benchmark of the preponderance of probabilities[24] or the 'liaison of intention' test must be employed to determine cartelization[25] and this can be established through indirect or circumstantial evidence.[26]

III. CONCERTED PRACTICES AMOUNTING TO AGREEMENT BY THE PARTIES

The ideas of agreement and concerted practise are smooth and frequently overlap. Observing the same Lord Denning in *R.R.T.A.* v. *W. H. Smith & Sons Ltd.*[27] *"People who combine to keep up prices do not shout it from the housetops. They keep it quiet. They make their arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do."* It is, therefore, necessary that companies have indicated their common intention to conduct in the market in a certain way.[28] The sharing of information between companies directly or indirectly is one of the key aspects that indicate concerted action[29].

It was held in *Volkswagen AG* v. *Commission*[30], that meeting of minds or concurrence of wills is needed in establishing concerted action. An agreement can be stated if the parties adhere to a shared strategy that restricts or is likely to limit their business behaviour by identifying lines of the mutual activity or by abstaining from actions on the market. Whereas there is a distinction between the concept of 'concerted practises' and ' agreements between undertakings' the purpose is to introduce into the ban a form of coordination between undertakings, through which practical cooperation between them is knowingly substituted without the reaching of a stage of the so-called agreement.[31]

Additionally, it has been held that the exchange of information might be a coordinated behaviour, if it eliminates strategic market uncertainty, thus promoting collusion, in other words, if the exchange of data is strategic[32]. As a result, the sharing of strategic data between competitors is concentrated, since it limits the independence of competitor's behaviour on the market and diminishes their incentives to compete.[33] If a firm receives the strategic data from a rival (whether in a meeting, by letter or by electronic means) then the information is

[24] Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Ors Decision, [2010] CCI 31.
[25] In Re: Suo-Motu Case Against LPG Cylinder Manufacturers, [2012] CCI 11.
[26] ABIR ROY, COMPETITION LAW IN INDIA 145 (2nd ed., Eastern Law House 2014).
[27] Registrar of Restrictive Trading Agreements v. W.H Smith & Son Ltd., (1969) 3 All ER 1065.
[28] T-305/94, Limburgse Vinyl Maatschappij N.V. & Ors. v. Commission (PVC II) [1999] ECR II-931.
[29] *Information Exchanges Between Competitors under Competition Law*, OECD (2010), available at https://www.oecd.org/competition/cartels/48379006.pdf (last accessed on June 4, 2021).
[30] Case C-74/04P, Volkswagen AG v. Commission of the European Communities, [2007] ICR 217
[31] Imperial Chemical Industries Ltd. v. Commission of European Communities, 1972 ECR 619 (ECJ).
[32] Rajasthan Cylinders & Containers Ltd. v. Union of India & Ors., (2020) 16 SCC 615.
[33] GR Bhatia, Ex-Parte Prima Facie order by the CCI - A Critique, Comp. L.R. (2013).

considered to have been received and modified accordingly, without responding clearly to this data, stating that it does not want to receive such information.[34]

The perception of concerted practice necessitates not the only concertation of items but also market conduct as the result of the causal relationship with concertations and having a fundamental relationship with it, subject to evidence to the contrary, it may be assumed that undertakings that participate and remain active in the market will take account of the information exchanged with competitors to determine their conduct in the market, particularly where the concertation takes place at regular intervals and over a long duration.[35]

IV. OLIGOPOLISTIC MARKET AND THE STANDARD OF PROOF

To prove the cartelization, the authorities around the world had taken the 'parallelism plus' approach.[36] Relying on the European Court of Justice, the Competition Commission of India has accepted that mere parallel behaviour is insufficient by itself to prove concerted practice.[37] This is to say that cases that have fastened liability on defendants have involved, in addition to uniform conduct, some circumstance pointing in the direction of concerted activity.[38] The presence of parallel behaviour among market players, in addition to other additional characteristics that indicate collusive conduct by a cartel, is required for a cartel to be formed. To prove the agreement and presumption that there exists a cartel, the Commission looks at the evidence gathered from the investigation and also at other plus factors such as market share, cost of sales, etc.[39] The Commission, while giving an order, mainly relies on the report by the Director-General. It is important to keep in mind that appraisal of evidence in such cases is a highly technical and complex exercise and is dependent on the nature of product, industry, etc which is given due importance.[40]

To establish cartelization, it must be shown that there exist circumstances that do not justify the behaviour in normal market circumstances.[41] In *Ahlstrom Osakeyhtio* v. *Commission*[42], the

[34] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal co-operation agreements, EUROPEAN UNION (Jan. 14, 2011), available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114(04):EN:HTML (last accessed on June 17, 2021).
[35] C-8/08, T-Mobile Netherlands BV & Ors. v. Raad Nederlandse Mededingingsautoriteit, [2009] ECR 0000.
[36] Ariel Ezrachi & Jiøi Kindl, Criminalization of Cartel Activity – A Desirable Goal for India's Competition Regime? 23.1 NLSIU Rev. 9 (2011).
[37] *ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES (4th ed., Oxford & Portland 2014).*
[38] Milton Handler, Twenty-five years of Anti-trust, 55 Cornell L. Rev. 161 (1970).
[39] William E. Kovacic, et al., Plus Factors and Agreement in Antitrust Law, 110 Mich. L. Rev. 393 (2011).
[40] Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, 2011 E.C.R. I- 527 (EU).
[41] *Supra* note 30.
[42] Ahlström Osakeyhtiö & Ors. v. Commission of the European Communities [1993] ECR I-1309, 978 – 979.

decisive question was laid down as *"Is the concert action the only plausible explanation for the conduct?".*

It was shown that price parallelism and pricing trends may be explained by market oligopolistic tendencies and the unique circumstances that prevail in a given era. Therefore, simple price parallelism does not show collusion as it may be the result of interdépendance in an oligopoly market as there is a significant degree of mutuality among companies in such a market[43] because in such a market there is a high degree of mutuality among firms.[44] In addition, it is not unusual in an oligopolistic market to find intentional parallelism amongst players in the market.[45]. Despite this, intentional parallelism as a normal reaction of firms in a concentrated market that recognise their shared economic interests and interdependency on price and output decisions is "not in and of itself illegal."[46]

A price-fixing scheme is prohibited only if it is carried out to obtain a competitive advantage and is accomplished by communication or agreement between companies or people.[47] When a business copies the price movements of a de facto market leader (also known as price leadership), this is not considered unlawful.[48] The success of each firm is reliant on the results of comparative market analysis, as well as the current market and competitive environment in which it operates. Any departure by one company may be followed by the rest of the firms in the same area of business. In no way, shape, or form, such a pricing pattern constituted or could constitute cartelization unless and until there was compelling proof of an agreement or decision to establish a cartel and/or to fix a certain price.[49]

The European Court in Imperial Chemical Industries[50] a case has discussed the *"Theory of Oligopolistic Interdependence"* as: *"In an oligopoly, a price reduction would swiftly attract the customers of the other two or three rivals, the effect upon whom would be so devastating that they would have to react by matching the cut. Similarly, an oligopolist could not increase its price unilaterally, because it would be deserted by its customers if it did so. Thus, the theory runs that in an oligopolistic market rivals are interdependent: they are acutely aware of each other's presence and are bound to match one another's marketing strategy. The result is that*

[43] W.T Stanbury & Reschenthaler, Oligopoly and Conscious Parallelism: Theory, Policy and the Canadian Cases, 15 O.H. Law Jour. 617 (1977), available at http://digitalcommons.osgoode.yorku.ca/ohlj/vol15/iss3/3.
[44] Amarnath, The Oligopoly Problem: Structural and Behavioural Solutions Under Indian Competition Law, 55(3) Jour. of ILI, 283-306 (2013), available at http://www.jstor.org/stable/43953671.
[45] Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499.
[46] Brooke Group Ltd. v. Brown & Williamson Tobacco Corpn., 1993 SCC OnLine US SC 94; *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 236 (2nd ed., 2003).
[47] ABIR ROY, COMPETITION LAW IN INDIA 145 (2nd ed., Eastern Law House 2014).
[48] P Buccirossi, Does Parallel Behaviour Provide Some Evidence of Collusion, 2(1) Rev. of Law & Eco. (2006).
[49] In Re: Alleged Cartelization in the Airlines Industry, MANU/CO/0011/2021.
[50] *Supra note 30.*

price competition between them will be minimal or non-existent; oligopoly produces non-competitive stability…"[51]

The proof of communication between the parties has also been noted to be highly essential in establishing a conspiracy among rivals, among the circumstantial evidence required to establish this. The sharing of knowledge alone, however, will not enough at this stage, as we will see later. The purpose of exchanging information should be to make it easier for the conspirators to carry out their shared plot of criminal activity.[52] In an oligopolistic market, it is well recognised that rivals' similar behaviour might also be the consequence of clever market adaptation. At this stage *Excel Crop Care Ltd.* v. *CCI*[53] is important to take into consideration wherein there was a history of quoting identical price and not even a rupee difference was there. It was held that coincidence cannot take place in such a way that the price quoted by the three appellants are the same, such actions amount to an act of cartelization.

This has also been the approach in *International Cylinder (P) Ltd.* v. *CCI*,[54] wherein account was taken of the fact that the actions of the OPs could not have been possible unless there were internal agreements between the concerns. Furthermore, the *Imperial Chemical Industries Ltd.* v. *Commission*[55,] approved in *Rajasthan Cylinders*[56] holds that *"although parallel behaviour may not itself be identified with a concerted practice, it may, however, amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market. Such is the case especially where the parallel behaviour is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from the competition and to crystallise the status quo to the detriment of effective freedom of movement of the products in the internal market and free choice by consumers of their suppliers."*

In *Technip SA* v. *SMS Holding (P) Ltd.*[57] the Court stated and discussed this aspect in the following manner, *"The standard of proof required to establish such concert is one of probability and may be established if having regard to their relation, etc., their conduct, and their common interest, that it may be inferred that they must be acting together".* Evidence of

[51] Gunjan Ahuja & Sahil Ahuja, Covid-19 and Its Affect on Competition Law Regime, ILI L. Rev. SI 93 (2020).
[52] Film & T.V. Producers Guild of India v. Multiplex Association of India & Ors., [2013] CCI 85.
[53] Excel Crop Care Ltd. v. Competition Commission of India, (2017) 8 SCC 47.
[54] M/s. International Cylinder (P) Ltd. & Ors. v. CCI & Ors., 2014 SCC OnLine COMPAT 11.
[55] *Supra* note 30.
[56] *Supra* note 31.
[57] *Supra* note 11.

actual concerted acting is normally difficult to obtain and is not insisted upon.[58] The Commission in its order in the case of *Tyre Manufacturers*[59] has held that *"the existence of an explicit agreement is not required and the same can be inferred from the intention or conduct of parties".* In *Guinness PLC* and *Distillers Company*[60] it was held that *"Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and common sense to determine whether those involved in any dealings have some form of understanding and are acting in cooperation with each other."*

Further, in the *Express Industry* case,[61] it was held that any firm has the right to alter or adjust its pricing at any time, taking into account the behaviour of its rivals that is reasonably predictable. That, on the other hand, is not indicative of the fact that it collaborates with the rivals in any way. An action plan for a price change that is coordinated with other actions ensures its success by eliminating all uncertainty about the conduct of each other's actions concerning the essential elements of that action such as the amount, the subject of the action, the date, and other such elements. The fact that the parties engaged passively even though there is no proof of direct meetings was also noted since they had the necessary means to acquire and exchange information through their shared agents. In addition, this demonstrates that the parties had a means of indirectly communicating their intentions to the market. Also, in *Commission* v. *Bayer AG*,[62] it was held that For the agreement to be valid, it is required that the parties to the agreement have explicitly stated their common purpose to conduct themselves in the market. In terms of the form in which the parties' shared purpose is represented, it is sufficient for a stipulation to constitute the statement of the parties' desire to conduct on the market in accordance with its provisions, regardless of how it is written.

The OECD document[63] has been highlighted in *Rajasthan Cylinders & Containers Ltd.* v. *Union of India*,[64] stating that there are always several forms of circumstantial evidence to consider. One is proof that cartel operators had a meeting or communicated in some other way, but it does not explain the substance of their communications in the same way that other evidence does[65] like (a) The existence of telephone conversation between competitors (but not

[58] CIT v. East Coast Commercial Co. Ltd., AIR 1967 SC 768.
[59] *Supra* note 8.
[60] *see*, Lam Chi-ming v. The Queen, [1991] 3 All E.R. 172, P.C.
[61] Express Industry Council of India v. Jet Airways (India) Ltd. & Others, MANU/CO/0013/2018.
[62] Commission v. Bayer AG, [2004] 4 CMLR 653.
[63] *see*, Indian Laminate Manufacturers Association v. Sachin Chemicals & Ors., 2020 SCC OnLine CCI 40.
[64] *Supra* note 31.
[65] *Policy Brief: Prosecuting Cartels without Direct Evidence of Agreement*, OCED (June 2007), available at https://www.oecd.org/competition/cartels/38704302.pdf (last accessed on May 17, 2021).

their contents), or of travel to a shared destination, or participation in a meeting are all such examples. (b) The evidence that the parties communicated about the subject, such as confidential internal documents demonstrating knowledge or understanding of a competitor's pricing strategy are shared or minutes and notes of a meeting demonstrating that prices, demand, or capacity utilisation were discussed of a competitor's intention to raise prices in the future and any other evidence of communication.

Circumstantial evidence can be divided into several categories, the most common of which is economic evidence. Economic evidence identifies primarily firm behaviour that suggests an agreement was reached as well as the conduct of the industry, elements of market structure that suggest that secret price-fixing was viable, and certain practises that would be used to stabilise a cartel agreement. Conduct evidence includes parallel pricing and industry performance[66], abnormally high profits, stable market shares, and a history of competition law violations.

Information and data relating to the market structure can be utilised primarily to increase the likelihood of a cartel agreement being discovered, even if market structure elements do not establish the existence of a cartel agreement in and of itself.[67] High concentration on one side of the market, low concentration on the other side of the market, high barriers to entry, a high degree of vertical integration, and standardized or homogenous goods are all examples of relevant economic data about market structure. Although structural evidence's evidentiary usefulness might be restricted, the absence of such evidence cannot be used to demonstrate that a cartel did not exist.[68]

Facilitating practices are one type of economic behaviour evidence that has been identified. It is crucial to remember that action labelled as "Facilitating practises" is not always illegal in all circumstances. However, in cases when a competition commission has discovered additional circumstantial evidence leading to the presence of a cartel agreement, the existence of enabling activities might be a valuable addition to the evidence gathered.[69] Information sharing, price signalling, freight equalization, price protection and most favoured country policies, as well as overly stringent product requirements, are all examples of facilitating practices. They can provide information about the types of arrangements that the parties made to facilitate the

[66] *Circumstantial Evidence in the Context of Competition Law*, Competition Primers for ASEAN Judges Developed AANZFTA (September 2018), available at https://www.asean-competition.org/file/Judicial%20Primers/Circumstantial%20evidence.pdf (last accessed on June 13 2021).
[67] Business Electronics Corporation v. Sharp Electronics Corporation, 485 US 717 (1988).
[68] Frederic Jenny, *Judging Competition Law Cases: The Role of Economic Evidence* (November 2016), available at http://www.fne.gob.cl/wp-content/uploads/2016/11/Final-Economic-evidence-in-competition-cases.pdf (last accessed on June 10, 2021).
[69] Samir Agarwal v. Competition Commission of India & Ors., (2021) 3 SCC 136.

formation of a cartel agreement, monitoring, detection of defection, and/or punishment, thereby supporting the "collusion theory" that the competition law enforcement agency has put together about the parties' cooperation.

To sum up, it can be said that the court considers that It is true that precise and consistent evidence must be provided to prove the presence of an infringement, .nevertheless, it is not required that every piece of evidence presented by the Commission meet those requirements concerning every component of the infringement. It is adequate if the body of evidence on which the Commission has relied, taken as a whole, satisfies that criteria.[70] Normally, agreements and activities that are illegal take on a clandestine character, and the paperwork that supports them is fragmented and limited in nature.[71] Consequently, it is necessary to infer the existence of an anti-competitive practise or agreement in the majority of cases from several coincidences and indicia that, when considered together, may, in the nonexistence of some other reasonable explanation, represent substantiation of a violation of the competition laws.[72]

V. APPRECIABLE ADVERSE EFFECT ON COMPETITION (AAEC)

The Indian Competition Act mentions about two kinds of agreements i.e., Vertical and Horizontal Agreement.[73] As per it, only the latter is said to have a presumption of AAEC and per se prohibited and penalized. Agreements involving cooperation between two or more competitive firms that operate on the same level of the market are known as horizontal arrangements.[74] There is a rebuttable presumption of an AAEC when a horizontal agreement is reached, such as a cartel about price-fixing, restricting or regulating the production or supply of products or the provision of services, market sharing, or bid-rigging.

In the case of agreements referred to in section 3(3), there is a presumption that such agreements will have an AAEC. This results in the presumption being rebuttable as a result of the fortiorari ruling because these agreements are not considered as conclusive proof of the fact that it would result in an AAEC.[75] As a result, if the Commission determines that a case is covered by one or more of the clauses listed in sub-section (3) of section 3, it will not be required to conduct any further investigation, and the onus will shift to the enterprises, individuals, and other entities to rebut the presumption by providing sufficient evidence. The

[70] Aalborg Portland A/S v. Commission of the European Communities, [2004] ECR I-123 at 53-57.
[71] Arthur G. Frass & Douglas F. Greer, Market Structure and Price Collusion: An Empirical Analysis, 26.1 Jour. of Industrial Economics 21-44 (Sep., 1977).
[72] T-61/02, OP Dresdner Bank and Others v Commission [2006] ECR II-3567.
[73] The Competition Act, *supra* note 5, § 3(3).
[74] VERSHA VAHINI: INDIAN COMPETITION LAW (1st ed., LexisNexis 2016).
[75] Cyril Shroff & Nisha Kaur Uberoi, Cartel Enforcement in India: Standard and Burden of Proof, CPI Antitrust Chronicle 1 (2013).

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Commission shall evaluate the elements listed in Section 19 of the Act and determine whether all or any of these elements have been proven if such evidence is presented that dispels the presumption of innocence.[76] If the data provided to the Competition Commission points to any of them or all of the factors listed in section 19(3), the agreement would be considered as one that has the potential to cause or is likely to cause an AAEC, requiring the Commission to take further remedial action in accordance with the Act.

Additionally, with respect to the above law, in *Rajasthan Cylinder and Containers Ltd.* v. *Union of India*,[77] the Apex Court discussed When the Commission is required to examine the criteria outlined in Section 19(3) of the Act concerning agreements arising under Section 3(3) of the Act, this is known as the consideration stage. It was observed by the court that: Section 19(3) of the Act lists the criteria that the CCI must consider when assessing whether an agreement has an AAEC in accordance with Section 3 of the Act. This investigation, on the other hand, would be required in those instances that are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Section 19(3) of the Act requires that it should be demonstrated that the parties' allegedly involved in unlawful conduct resulted in (i) *any accrual of benefits to consumers*; (ii) *improvements in the manufacture, distribution, and provision of services*; or (iii) *promotion of technical, scientific, and economic development through the manufacture, distribution, and provision of services*, as specified in the Act. Additionally, a bare reading of Section 3(1), for example, not only indicates that these restrictions regulate agreements that will have an AAEC, but they also prohibit agreements that are likely to have an AAEC.[78]

VI. ADVISORY AND CASES DECIDED BY THE COMMISSION IN LIGHT OF COVID-19 PANDEMIC

To mitigate the impact of an unprecedented shock to economic activity due to the pandemic and adapting to major changes in supply and demand patterns as a result of the exceptional circumstances of the COVID- 19 pandemic the Competition Commissions around the world including India issued advisories[79]. In the Indian advisory, it was specified that due to the current extraordinary situation there might be a need, 'need' being the keyword, for the businesses to undertake joint measures including actions such as sharing of data on stock levels, timings of operation, or sharing of distribution network and infrastructure and research and development, etc.[80] The advisory also highlights that while conducting an assessment of

[76] In Re: Nagrik Chetna Manch v. SAAR IT Resources Private Limited & Ors., MANU/CO/0033/2019.
[77] *Supra* note 31.
[78] Mr Ramakant Kini v. Dr. LH Hiranandani Hospital Powai, Mumbai, 2014 Comp LR 263 (CCI).
[79] *Advisory to Businesses in Time of COVID-19*' dated 19.04.2020.
[80] Gunjan Ahuja & Sahil Ahuja, Covid-19 and Its Affect on Competition Law Regime, ILILR. SI 93 (2020).

competition, section 19(3) of the Indian Competition Act allows to duly considered, among other things, in terms of accumulation of benefits to consumers, development in the production or distribution of goods or services, and promote technical, scientific and economic growth through the production or distribution of goods and services. Even though it was stipulated that the action should be essential and reasonable, as well as enhance production efficiency, among other things. Businesses were also cautioned not to take advantage of the epidemic to circumvent any of the restrictions of the Act, which was an additional restriction.

The Hon'ble Commission has already taken into consideration the post-pandemic situation after the issuance of the communication from the Commission and has decided on two pending cases of cartelization. The first one among them was the alleged cartelization of manufacturers of auto parts that had indulged in bid-rigging in their dealings with the railways between 2017-2019[81] and the second one was concerning a cartel in the automotive bearings market between December 2019 and June 2020, where the companies had coordinated with each other on sharing information about practices that would help preserve their revenue and workforce during the pandemic.[82] In both the above cases the Commission even after finding affirmative evidence of cartelization has restrained itself to impose any monetary penalty on considering the prevailing economic condition arising due to the outburst of the worldwide pandemic and merely ordered the parties to halt engaging in a cartel behaviour and refrain from engaging in it in the future too.[83] The Court in one of these cases i.e. of *South Eastern Railway & Ors.* v. *Hindustan Composites Limited & Ors.* has held that according to the Indian Competition Act, the ultimate goal is to remove market distortions while also disciplining the behaviour of market players. As a result, the goals of the Act would be fulfilled if the parties in the current matter were ordered to discontinue such cartel behaviour and refrain from engaging in it in the future, and no monetary penalty would be necessary to achieve the goals.

Even though the Commission is increasingly adopting a holistic approach by taking into consideration the extenuating circumstances, the account of parties' conduct and their support in the investigation is an essential factor while imposing/evaluating penalties. Under the Rule of Law grant of exceptions or exemptions does not always deteriorate the implementation of competition. Rather at times, it is required for the stronger application of competition laws.[84] General reasons for exemptions include the need to balance poor economic or decision-making

[81] CMM, South Eastern Railway & Ors. v. Hindustan Composites Limited & Ors., MANU/CO/0024/2020.
[82] In Re: Cartelisation in Industrial & Automotive Bearings, [2020] 161 SCL 383 (CCI).
[83] Udai S Mehta & Sakhi Shah, *Competition Enforcement for Business Collaborations during COVID-19: A Global Perspective*, CUTS INTERNATIONAL (July, 2020), available at https://cuts-ccier.org/pdf/competition-enforcement-for-business-collaborations-during-covid-19.pdf (last accessed on May 21, 2021).
[84] Whatsapp LLC & Ors. v. CCI & Ors., MANU/DE/0786/2021.

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power, the reduction of information and transaction costs to facilitate "collective action," the reduction of volatility in the market, and the satisfaction of demands from a special sector or interest groups, among other things.[85] Existing provisions of the Act prevent firms from being sanctioned for some coordinated activity, provided that the agreements result in enhanced efficiency.[86] The entire waiver of business from the implementation of sections 3 and 4 of the Act, as suggested by the current situation, may not appear to be feasible, and this may result in parties taking advantage of the current condition in their best interest by engaging in anti-competitive conduct with widespread and long-lasting consequences in the market.[87]

Regarding determining whether there has been an AAEC, the existing Indian antitrust framework is flexible and allows the commission to analyze on an individual basis taking into account any hardships or peculiarities of the current circumstances, among other considerations.[88] The assessment of AAEC necessitates a comparison of the procompetitive impacts of the product versus the anticompetitive impacts of the product. The Commission may, for example, take into account whether an agreement facilitates or results in "*the accrual benefits of consumers*" when evaluating the agreement's impact on the market. As with the determination of whether abuse of dominant position has occurred, the Commission must take into consideration any objective justifications that the enterprise may have had (such as protecting the quality of the supply chain or meeting competition) when imposing restrictions on the enterprise's ability to operate.[89] Thus, because of the above, a blanket exemption to the applicability of the Act may neither be feasible nor ever granted[90] and the same is also applicable to the present advisory.

VII. CONCLUSION

Cartels have inherent uniqueness that harms the economy, such as the increase in prices caused by price stimulation. Consumers, various business houses, as well as businesses that were previously involved in the sector, are the ultimate victims of cartelization. Cartels do not only

[85] Google LLC v. Oracle America, Inc., MANU/USSC/0003/2021.
[86] Pradeep S. Mehta & Udai S. Mehta, *'COVID-19: Should Competition Law Enforcement for Some Sectors be Temporarily Suspended in India?*', THE WIRE (Apr. 16, 2020), available at https://thewire.in/business/covid-19-competition-law-enforcement-india (last accessed on June 7, 2021).
[87] Ian Freckelton, COVID-19: Fear, Quackery, False Representations and the Law, IJLP 72 (2020).
[88] Vaish Associates & Advocates, *India: Competition & COVID-19-CCI Issues Advisory For Businesses During COVID-19*, MONDAQ (May 2020) available at https://www.mondaq.com/india/antitrust-eu-competition-/934746/competition-covid-19-cci-issues-advisory-for-businesses-during-covid-19 (last accessed on May 11, 2021).
[89] TN Power Producer Assn. v. Chettinad International Coal Terminal Pvt. Ltd. & Ors., MANU/CO/0022/2021.
[90] Manas Kumar Chaudhuri et al., *Covid - 19 Not a Blanket Safe Harbour Defence: Competition Act of India*, KHAITAN & CO (Apr. 8, 2020), available at https://www.lexology.com/library/detail.aspx?g=193d7b26-d3ea-41e7-a4f3-3c7c089f3306 (last accessed on May 11, 2021).

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establish a monopoly over the pricing of a specific commodity, but they also prevent a multitude of other private market participants from entering the market and competing with them. If there is efficient competition in the market, the establishment of cartels would be difficult and ultimately unsustainable. A prior opinion of the Commission said that the oligopolistic structure of the market is favourable to coordinated and concerted action. A natural inclination exists in an oligopolistic market for companies to collaborate since it is a type of industry defined by a small number of businesses offering items that are either similar or dissimilar.

The behaviour of anyone business in an oligopoly is highly dependent on the behaviour of the other firms in the market. As a result, oligopolistic companies can avoid engaging in behaviour that is damaging to their overall interests, such as price wars, through cooperation. Therefore, there is a high tendency for oligopolists to form a cartel. Hence, cooperation if looked leniently upon in one area may easily spread to other areas. Imposition of penalty or a fine aims to ensure that the prohibited conduct does not recur. The Commission often explicitly justifies a high fine being imposed to exclude, by its deterrent effect, any repetition of the behaviour in question. Thus, such abusive conduct of cartelization must not be fostered, and instead, a deterrent approach must be embraced**.**

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