

Regulating Competition and Cartelisation in the Corporate Real Estate Sector: The Emerging Market Case

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Abstract

The main reason for an increase in cartelisation can be attributed to the liberalisation of the economy in India resulting in de-regulation and empowering the enterprises to be at the helm of their affairs. Cartelisation as per UNCTAD impedes healthy competition by fixing prices and restricting supply. The paper gains significance as India aspires to provide housing to all by 2022 but the COVID-19 pandemic coupled with the issue of cartelisation has worsened the situation. The boom in the Corporate Real Estate sector has been coupled with an increase in the anti-competitive practices prevailing in this sector and has negatively impacted the economy. The paper has analysed the provisions in the Indian legal regime as well the legal regimes of the USA and UK regarding cartelization. The Indian regime falls short on various counts when compared with the law of developed nations like the USA and UK, which must be tackled on a war footing. The sector has the potential of opening up numerous opportunities including providing jobs to the Indian youth. The paper aims at providing relevant suggestions in that regard, including the need for whistleblower protection and to have a Cement Regulatory Authority among other things that might prove helpful for the legislators aiming to attract 100 lakh crores in the infrastructure sector in the next five years.

Keywords: Cement Cartels; Builders' Monopoly; Anti-Competitive Practices; Real Estate; Affordable Housing; Competition Act

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INTRODUCTION

People of the same trade seldom come together, even for amusement and diversion, but the discourse ends in a plot against the public, or in some scheme to raise prices, as Adam Smith famously observed in *The Wealth of Nations* (Whish, 2007). The primary goal of competition law is to prevent private players from stifling the market economy and monopolizing the market so that there is free and fair competition that advances customer welfare, increases production efficiency, maintains the quality of goods produced, and keeps dominance at bay. Cartelisation is one of the many ways in which private actors obstruct the market economy (Ramappa, 2009). Firms have a tendency to limit competition by entering into collusive agreements to fix prices and outputs, and they frequently make exploitative and exclusionary moves as a means to achieve this vicious end. It may even happen that some major players in the market hold hands and enter into a joint venture or some other type of combination to prevent new players from emerging while they have complete control (Dhall, 2007). Such measures just foster unfair activities, becoming an impediment to the progress of a free and fair economy.

The authors in this paper have tried to analyze the issue and challenges posed by the presence of cartels in the real estate sector, especially in the cement industry and in the builders' lobby. For this purpose, the paper has been divided into several sections. The first section describes the methodology used by the authors while conducting the research. The next section lists down certain research questions which the authors have tried to address considering their importance to the research on the current topic. Further continuing the discussion the paper will address the effect of cartels on the markets in general, followed by a discussion based on case laws on the effect of cement

cartels and builders' cartels on the real estate sector in particular. Finally, the paper analyses the laws of the developed nation's vis-à-vis cartelization followed by judging the effectiveness of CCI as a regulator in India. The authors finally conclude by providing a comparative analysis of the laws and by suggesting certain reforms that India can incorporate to fulfil the aspiration of Housing for All by 2022.

The problems of the cartel agreements were succinctly expressed by Adam Smith in the book "*Wealth of Nations*" long back as "A monopoly granted either to an individual or a trading company has the same effect as a secret in trade or manufactures." Nevertheless, all cartels are not presumed to abolish competition but may become a hindrance in fair competition if not regulated (Weishaar, 2013). Before 1945 most of the world thought that cartels brought widespread benefits (Fear, 2006). Modern Antitrust laws began with the United States legislation of the Sherman Act of 1890 and the Clayton Act of 1914. It was followed by several enactments in various nations including the UK and Canada etc., which aimed at regulating these cartels. As per reports of UNCTAD (2013, 2014) and OECD (2000, 2017), cartels reduce the options available to the consumers in the market thus depriving them of their right to choose. Such a scenario creates a situation wherein the consumers are forced to pay the price determined by the market players through their cartels. The cartels collude to set prices or quantities, which has a direct impact on the consumers and negatively impacts the developing countries, including India, where the per capita income is comparatively low.

Before the Competition Act, no anti-competitive law in India had expressly and thoroughly defined cartel. However, it was implicitly covered under Section 33 1 (d) of the Monopoly and Restrictive Trade Practices Act, 1969 ("MRTP"), which dealt with Agreements relating to Restrictive

Trade Practises. It might be said that Cartels is one of the more malicious types of infringement of competition law as it unequivocally hampers competition and causes loss to the market economy and free competition, and owing to this seriousness of cartels, they are subject to the 'per se illegal rule' in United States, United Kingdom and even in India (Mittal, 2011). This essentially means that cartels violate the law just by the reason that they are in restraint of trade and it is immaterial whether they cause any harm (Mittal, 2011). Cartels are defined in Section 2(c) (Definitions) and Section 3(3) (Anti-Competitive Agreements) of the Competition Act, 2002 which provides that any kind of price fixation, bid-rigging, and allocation of territory will be presumed to harm Competition. Section 3(3) of the Indian Competition Act is in trial with UNCTAD's Model Law of Competition. The Competition Commission of India (CCI), while inquiring into the alleged contraventions of Section 3(1) or 4(1) which provides for anti-competitive agreements and abuse of dominant position respectively may, if it opines that there exists a prima facie case, order an investigation by the Director-General into the affairs of the company.

Cartels have been a subject of litigation since the time of the MRTP Act, 1969, and have been a noteworthy part of the Competition Act, 2002. The Supreme Court has characterized the word cartel in *Union of India v. Hindustan Development Corporation* (AIR 1994 SC 988) as an association of producers who by agreement among themselves attempt to control production, sale, and price of the product to obtain a monopoly in any particular industry or commodity. It may be any combination the object of which is to limit or control trade or production, distribution, sale or price of the goods or services." This principle has also been expressed in *Copperweld Corp v. Autonomy Tube Corp* (467 US (SC 1984)) which is a major US

antitrust case law that even clarified that an attempt by the parent company of conspiring with its wholly-owned subsidiary would also amount to a violation of anti-trust laws prohibiting cartelisation.

Cartelization has existed and has impacted the Corporate Real Estate Sector as well. The real estate sector along with the Infrastructure sector is the backbone of the economy of any developing country. A well-developed, productive, infrastructure is the key driver, ensuring the overall growth of any economy. Since the real estate sector is closely linked to the infrastructure sector, all the issues of this sector must be tackled well to ensure effective infrastructure growth in India. The Indian government, acknowledging the importance of infrastructure, came up with National Infrastructure Pipeline which was introduced in the financial year 2019-20. It is an investment plan aiming to enhance infrastructure in the identified sector across the country, thus improving the quality of life for all its citizens, within a period of five years from 2020-2025 and has been allotted 1.4 trillion dollars, to attract investments into the infrastructure sector and ensure that India becomes a \$5 trillion economy by 2025. Similarly, the Indian government aims at providing affordable housing to every person in India by 2022, under PM Awas Yojana. Both these initiatives are crucial for ensuring the overall growth of the country and can falter if the issues in the real estate sector are not tackled properly.

The paper becomes relevant in this aspect, as it seeks to find solutions to the issue of cartelization which has plagued the real estate sector. The success of the two crucial infrastructure-related initiatives will depend on India's capability and willingness to rule out a strict policy or rules against cartels and the paper tries to provide certain important and relevant recommendations in that regard.

RESEARCH METHODS

To examine the concept of cartelization in the Real Estate Sector and the effectiveness and weaknesses of the Indian Competition Law Regime in dealing with the same, a combination of explanatory and doctrinal research has been attempted. Specifically, the research was carried out by analyzing the existing statutory provisions and cases in the field of competition law related to cartelization, nationally as well as globally. Being literary-based research, it involved the study of both primary sources such as acts, notifications, reports, etc. as well as secondary sources such as books, journals, etc. related directly or indirectly to the topic of research.

RESULTS AND DISCUSSION

Effect of Cartels on the Market in General

Any competition law regime aims to secure the competition and to advance consumer welfare. As a premise, trading in the market is assumed to maintain fairness and integrity, which must not be destroyed by oligopoly or monopoly (Shimizu, 2020). Anti-competitive practices, particularly the cartels that fix prices and additionally constrain the yield harm the consumers (UNCTAD, 2013). There are different classes of cartels across the globe based on their operations which include Customer Cartels, Specialization Cartels, and Syndicates, etc.

Regardless of having innumerable negative impacts on the market, there are few benefits of cartels. In a brownfield economy, wherein an overly invested facility fails to reap the expected profits, the competitors can try to compensate their costs by reducing the prices and by increasing the sales. They end up setting prices below average costs thus creating the situation of destructive competition. This situation can be improved by cooperation in the society amongst the competitor, who can try to restore the efficiency

in the market, which the competition laws aim to establish. The EU countries have relied upon cartels more than once to solve a destructive competition situation (Lee, 2016). Further, joint sponsorships for projects, beneficial for all the participants, like consortium agreements, are other areas where cartels play positive roles. Unless this participation leads to monopolistic behaviours between the horizontal competitors, the consortium cartels can produce net consumer welfare benefits (Lee, 2016). Cartels can, arguably, prevent price fluctuations because they agreed on fixed prices. Many organizations like International Tin Agreement and International Coffee Organization had achieved price stability during the period of fluctuations and decline in growth (UNCTAD, 2016).

Despite such benefits, cartels, in general, have the capacity, if left unregulated or less monitored, to diminish social welfare, create allocative inefficiencies and can modify the output as well as manipulate the prices (Fairoze, 2016). Therefore, the subsequent part of this paper examines the ill effects of cartelisation and ways of minimizing other anti-competitive practices. Engaging in cartels for diminishing competition can lead to the creation of an artificial, unstable, and inefficient market structure, opposite to the objectives of the competition regime of any country. The real estate industry is in a slump because prices have been hiked to a point where demand has dried up (Pandey & Jessica, 2018). As per Adam Smith, business collusion is a conspiracy against the public, which is dangerous and injurious to the workings of any market economy (Grossman, 2004).

Among the negative effects of the cartels on the economy and consumer interests, the most relevant ones are an inefficiency in production and price discrimination. For efficiency to exist, the market must be free, characterized by low cost and high production. However, the

cartels replace market participants' free exercise of business decisions with the cartel agreements thereby leading to a restricted market, leading to inefficiency in the market (Weishaar, 2013). Such features have a tendency of creating discriminatory pricing based on the cartel agreements (OECD, 2000). Such prices are not flexible and do not reflect the true conditions prevalent in the market. Cartels raise the price and keep it as high as possible without considering the demand and supply dynamics as prevalent in the markets. Such high prices can reduce the elasticity of demand for any single member (Fear, 2006).

Thus, in the majority of the cases, great economic harm is caused by cartels to the economy by the circulation of under investments created by reducing the demand power for other products and reducing the incentives to invest in the market. This in turn destroys the natural flow and functioning of the market economy, especially in the developing countries (Levenstein & Suslow, 2003). As a consequence, Cartels reduce the options available to the consumers in the market thus depriving them of their right to choose. Such a scenario creates a situation wherein the consumers are forced to pay the price determined by the market players through their cartels. Moreover, there is a lack of transparency within the cartels as the members withhold the price information, and the customers are made to suffer and are thus the most serious violation of competition law (Kaur, 2017).

So it can be said that besides creating economic imbalances, a cartel harms the faith of the consumers in the markets. In the cartels, the enterprises focus more on their profits rather than on the interest of their consumers or the ultimate beneficiaries. This in turn reduces the faith and the social respect of the public towards the businesses leading to the general loss of faith and integrity of such sectors in the eyes of the consumers (Ivaldi et al., 2016).

Cartelisation in the Real State Sector

Real Estate is an important part of the economy and is accountable for an extensive part of its development investment, the advancement of the nation's infrastructure stand and is a major originator of trade and industrial activities. Considering the remarkable growth in the Real Estate sector in the past few years, the real estate field observed the entry of many local and big names and real estate investment companies from abroad. Only if these firms would agree to lower their output and not to pick up customers turned away by the competitors, would the prices go up. This would be a cartel and would cease to be a competitive market (Balmaceda, Fischer, & Ramirez, 2014). Consequentially, the issue of cartelization has percolated to the real estate sector as well. The instances of cement cartelisation and the possibility of cartelisation amongst builders in the real estate sector are discussed in Figure 1.

The problem of cement cartelisation is a concern in the legal investigation and settlement in India. Currently, a great boost is going on in the real estate sector in India. In this event, a huge cartel was formed in the cement industry, as cement is the most required component of the real estate business. During 2000-2001, the cement industry of India like Grasim, Lafarge, Birla, and others entered into a cartel resulting in price control in the Indian cement market. The cement lobby is extremely solid. It is a cartel by itself. The cement producers have been resorting to the frequent price hike. This has cast an antagonistic effect on the development of the real estate sector (Basanta Kumar, Chawla, & Mohanty, 2018). India is the second-largest manufacturer of cement in the world after China thus the presence of cement cartels in India does not come as a shock (D. Pant et al., 2019). Ever since liberalisation and decontrol, cement manufacturers have been accused of cartelisa-

No.	Sector	09-10	10-11	11-12	12-13	13-14	14-15	15-16	16-17	17-18	18-19	Total
1	Real Estate	0	17	28	21	25	43	34	22	10	9	209
2	Financial Sector	17	9	5	4	8	7	3	3	8	5	69
3	I & B (Film/ Entertainment/ TV/Print Media)	4	15	11	10	4	3	5	7	7	2	68
4	Health/ Pharmaceuticals	3	3	3	6	9	9	9	7	2	4	55
5	Automobiles	4	1	3	3	7	8	2	72	4	2	106
6	Information Technology	2	3	4	4	6	4	7	5	3	3	41
7	Petroleum/Gas	4	3	3	5	3	5	13	2	4	2	44
8	Railways	2	3	2	1	6	8	1	3	1	8	35
9	Civil Aviation	6	3	1	3	3	1	6	-	1	-	24
10	Power	3	1	4	-	3	5	1	2	6	-	25
11	Chemicals & Fertilizers	3	-	-	2	6	4	1	-	-	-	16
12	Iron & Steel	3	1	3	2	2	1	-	-	-	1	13
13	Coal	-	1	1	5	3	1	4	4	2	2	23
14	Miscellaneous	30	16	24	28	30	29	35	34	24	30	280
	Total	81	76	92	94	115	128	121	161	72	68	1008

Figure 1. Sector-wise distribution of Anti-Trust Matters
 Source: CCI Annual Report (2019)

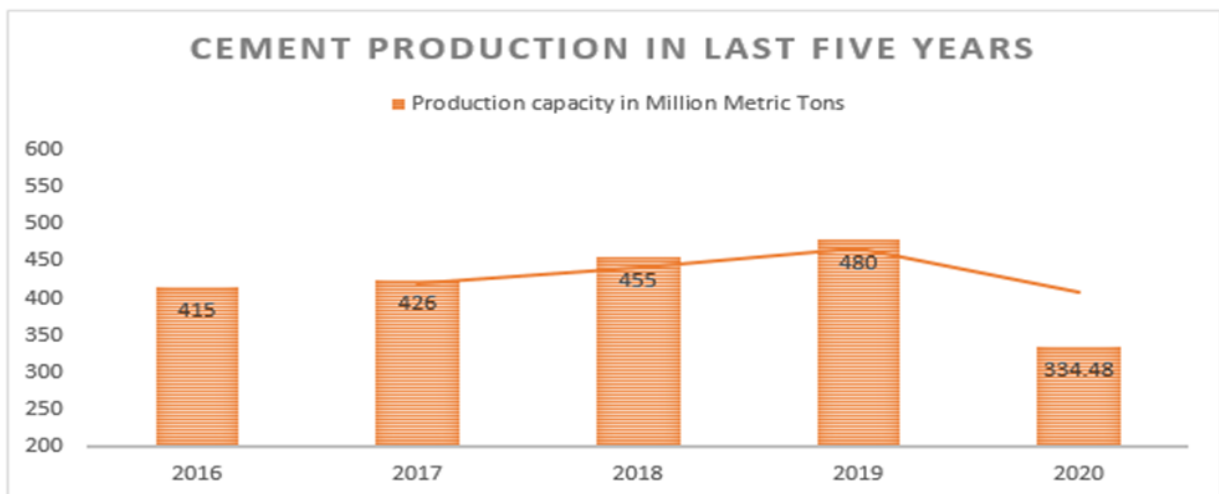


Figure 2. Cement Production in the Last Five Years in India
 Source: Processed by the Authors (2020)

tion and in 2007 the Monopolies and Restrictive Trade Practices Commission, New Delhi had decided that cement manufacturers have been acting in a manner attracting Section 33 (1), (d) of the MRTP Act and passed a cease and desist order against the manufacturers.

In 2012, the issue of cement cartelisation came to the forefront when the Builders Association of India filed a case against the Cement Manufacturers' Association (CMA) asserting infringement of Sections 3 and 4 of the Competition Act and setting up of anti-competitive cartel (Guha & Raychaudhuri, 2020). The court in Builders Association of India vs. Cement Manufacturer Association held that the presence of written material was not necessary to demonstrate a common understanding or agreement, and that merely the activities implying the existence of such an agreement are sufficient. The fact that the production and dispatch of the companies were fluctuating similarly was considered critical evidence. It was held that the act of limiting and controlling of production and supplies in the market caused upward movement in the cost of cement and that the deliberate act of shortage in production and supplies by the cement companies and the almost inelastic nature of the demand for cement in the market resulted in higher prices of cement. Hence, it was held that the cement companies acting together had restricted, controlled, and attempted to control the production and price of cement in the Indian market. The act was held not just detrimental to the cause of consumers yet additionally to the entire economy since cement constituted a significant input in the construction and infrastructure industry and is vital for the economic development of the nation and therefore, a suitable penalty was imposed and subsequently confirmed by the CCI in August 2016.

The problem did not stop here and on further complaints, the CCI ordered a

further probe by the Director-General who presented his report on May 30, 2011, in which he expressed the view that prices of cement had ascended in a frightfully similar way even though the cost of sale had just barely increased (Chaudhuri, Rathi, & Chand, 2020). The major cement producers alongside CMA partitioned the entire market into five zones, which empowered them to control the supply and fix the prices by forming a cartel and that, as indicated by the Director General's investigation report, CMA formed a high power committee and the prices of cement were discussed and fixed in their meetings (Chaudhuri, Rathi, & Chand, 2020).

The analysis that develops on this issue is complex. The Confederation of Real Estate Developers' Association of India (CREDAI) urged the administration to set up mechanisms to regulate cement prices that have been going up at a disturbing rate influencing the real estate developers' business. They have also urged the administration to set up Cement Regulatory Authority in line with TRAI and other such bodies. To control the cost of construction and bring down prices within the reach of the common man, the CREDAI moved to the CCI against cement manufacturers who have been unduly increasing the cost of cement.

It is well known that the real estate sector is experiencing huge pressure presently with a subsequent decrease in the cement demand. It is also estimated that housing and other real estate sectors account for nearly half of the cement demand in the country. Regardless of the low demand, the costs of cement have hopped by 20-40% in top cities pan India in recent few months (Dhar, Pathak, & Shukla, 2020). It is well-known that the cost of raw material for cement production came down significantly during the past few years. Still, the cement manufacturers are controlling the prices of ce-

ment. CCI has cautioned CMA in the past, yet sadly they appear to be proceeding with their price and market manipulation. The COVID-19 pandemic affected the cement industry, decreasing the production of the same. Despite this, the price of cement and other raw material has skyrocketed, impacting the dream of building a dream home for many.

The confederation complained that there is by all accounts no justification for supply restriction and the recent price increase of cement given the low demand. The confederation additionally brought to notice the CCI's order in the above-mentioned case of Builders Association of India v. Cement Manufacturer Association wherein cement manufacturers were directed to 'cease' from indulging in any activity relating to the agreement, understanding or arrangement on prices, production, and supply of cement in the market (Ivaldi et al., 2016). In that order, the CCI had imposed a penalty on various cement companies. However, various cement manufacturers challenged the order before the Competition Appellate Tribunal which granted a stay of the penalties. But the Appellate Tribunal did not discover anything incorrect in the relation to the

'cease' and 'desist' which is continuing to operate to date. Regardless of such an order, the prices of cement are still controlled, leaving the customers with no choice but to succumb to the cartel. This is totally against the public interest. The 'Housing for All' vision of the Government (PM Awas Yojana) will not be successful until the costs of construction are brought down to a level that is affordable to the common man.

In the Real Estate Sector there are numerous instances concerning the abuse of the dominant position in the form of unfair terms of the contracts as entered into between the builders and the buyers. As per the law laid down in the Brojo Nath Ganguly case (1986 SCC (3) 156), the parties to an agreement must always be on equal footing. Usually, the contract between the buyer and the builder suffers from an innate lack of equal footing. The contract suffers from information asymmetry. This was highlighted in the landmark case between Belaire Owners' Associations v. DLF Limited (2011 Comp L. R. 0239) as decided by the CCI.

The informant, in that case, contended that DLF had abused its dominant position and had inserted many unfair and

Cost of construction materials	
Prior to pandemic	Now
Cement (50kg bag)	
₹320	₹420
Steel TMT rod Per tonne	
₹38,000 per tonne	₹44,000 per tonne
Bricks (3,000 units)	
₹21,000	₹23,000
Blue metal per cubic feet	
₹32	₹35
M-Sand per cubic feet	
₹45	₹50
Labour cost	
₹700 per labourer per day (avg approx)	₹1,000 per labourer per day

Figure 3. Cost of Construction Material Pre and Post COVID-19 Pandemic
Source: Processed by the Authors (2020)

arbitrary terms in the contract. DLF contended that it was not a dominant player in the market as there exists stiff competition from other competitors coupled with a lack of impediments for the entry of new players in the market. CCI remarked that to assess the dominant position of any enterprise, the sole factor is not the market share but a host of other factors as well, which are enumerated under Section 19(4) of the Competition Act, 2002 which talks about Inquiry into agreements and dominant position of enterprises. It noted certain clauses which were considered unfair and declared that DLF had abused its dominant position in the market of Gurgaon (Gurugram) and subsequently imposed a heavy fine upon the builders. The order of CCI was challenged before the Appellate Tribunal, i.e. COMPAT, which affirmed the decision of CCI and noted that this order of CCI is expected to go a long way to ameliorate all the conditions of the consumers. The matter was subsequently challenged before the Supreme Court which refused to interfere with the findings of the appellate tribunal (Venkatesan, 2014). However, the recommendations and the attempt of the CCI to detect and curb the unfair trade practices as prevalent in the real estate sector is a laudable attempt and is expected to go a long way in ensuring consumer welfare.

The DLF Order presents an interesting example of how the lines between the competition and consumer laws are often blurred (A. Pant & Jain, 2018). The Consumer Protection Act addresses the consumer disputes against the traders directly whereas the Competition Act ensures consumer welfare by ensuring efficiency and choice in the markets. CCI identified the theory of harm and stated that the conduct of DLF can be imitated by other players in the real estate sector, the consequence of which would impede the welfare of the consumers.

In the above-mentioned decision in *Belaire Owners' Associations*, one of the

contentions by DLF was that the agreement in question was a general agreement used by almost all the builders as part of their industry practice. There exists a possibility of collusion in such a scenario and actions must be taken against such acts of collusion as these are clear cases of Cartelisation. The CCI is planning to open up a *suo-moto* investigation to check whether the same techniques are being used by other companies as well to harass the buyers?. But the problem arises in the fact that mere parallel behaviour on the part of enterprises is not punishable unless it is a result of a concerted practice, as per the Competition Law Regime in India. Thus, in considering the point of Cartelisation, the difficulty arises in establishing the meeting of minds behind the parallel practice amongst the builders and other real estate players. Therefore, for proving Cartelisation the establishment of joint mens-rea of non-competitive practice is imperative.

The annual report of CCI in 2015-2016 highlighted that after 8 years of enforcement of the provisions of Sections 3 and 4, the sector which has seen the highest number of complaints and orders has been the Real Estate Sector (CCI Annual Report, 2015-16). In the absence of any specific regulator, people were drawn to CCI, especially after the DLF matter, against the Real Estate Developers. However, such a situation is likely to change after the recent enactment of the Real Estate (Regulation and Development) Act of 2016.

Cartelisation during Covid-19 and ICC

It has been a common feature across Indian businesses to join hands owing to the technical and economical challenges caused by covid-19 like disruptions in supply chains and rationalisation of product ranges etc. Competition Commission of India (CCI) had initiated an investigation against Indian Cement giants, ACC and Ambuja Cements but took a lenient

view in light of the global pandemic and did not impose a penalty in either of the cartel cases looking at the economic distress situation due to the lockdown imposed by the Government of India from March 2020 to June 2020 owing to the COVID-19 pandemic. India is supposed to become the biggest exporter of Cement in future, the regulators understand the need of the sector in a pandemic situation. Just like measures taken by the US, UK and EU, The Market regulator in India have also ensured that the Competition Commission of India Act 2002 have safeguards for coordinated activities through efficiency-enhancing joint ventures and in these lines, the CCI had issued an advisory to businesses recognising the need of businesses in 2020, which certifies that enterprises may indulge in sharing data on stock levels, timings of operation, sharing of distribution network and infrastructure and production, R & D, transport and logistics. The advisory has also mentioned that businesses should not take advantage of prevailing situations. It has been noticed by the Ministry of Commerce, Government of India that there is a cartel of builders operating under the banner of Confederation of Real Estate Developers Associations of India (CREDAI) and Builders Association of India (BAI) which increase prices, which had a direct bearing on the construction sector. The consequence of this is that the cost of apartments and independent houses had skyrocketed, putting the consumers at a severe loss. To curb this government is yet to take steps for creating an independent regulatory authority for Cement Industry but due to the extended pandemic government is yet to proceed in this matter. However, a parliamentary committee has been constituted to study this issue. As far as the action by CCI on cartels during covid1- is concerned, the CCI passed two orders related to the cartel i.e, Cartelization in Industrial and Automotive Bearings and Railway Brake

Blocks Cartel, where no penalty was imposed by CCI on cartel participants ongoing pandemic.

Regulatory Instruments vis-à-vis Cartelization in the Developed Countries

Developed countries including the United States of America and the United Kingdom have had a long history with cartelization. In the United States, at the federal level, the Sherman Act of 1890 prohibits every combination, contract, or conspiracy which is in restraint of trade or commerce. The act authorizes the Department of Justice of the US to pursue criminal penalties for violations of the Sherman Act. The act applies to individuals as well as companies and does not require any written agreement between the parties (26 Stat. 2019, 15 U.S.C.). The act provides for a maximum fine of 100 million dollars; however, it further provides that such a fine may extend up to twice the amount of gain earned by the company or individual or twice the amount of loss suffered by the other party. Finally, like the Indian law, the US legislation also has a leniency program for the company or individual which first reports cartel conduct to the agencies (Salisu, Raheem, & Ndako, 2020).

Similarly in the UK, the Competition Act of 1998 and the Enterprise Act of 2002 prohibit all forms of restrictive agreements and practices between companies which may affect the trade within the UK or which distorts the competition within the UK. Like the US law, UK laws also prohibit any type of unwritten, informal collusions, as long as the intended effect of such agreement is to cause appreciable distortion in the competition existing within the country. The Competition and Markets Authority is the main enforcement agency of competition laws in the UK, having the power to impose fines up to 10% of an undertaking's worldwide turnover in the last financial year (Thomson Reuters, UK Cartels Guide). It

also runs a leniency program similar to the one running in countries like the USA, India, etc. Thus, globally and especially in fully developed markets, cartels pose a serious challenge, which can become even more challenging in developing countries, increasing the cost of essential services and blocking all essential investments in the infrastructure sector.

Effectiveness of CCI as Regulator in Combating Cartelisation

Cartel busting requires certain specialist skills as compared to the skills required for investigation and prosecution of other violations of the competition law (Majumdar, 2014). In the case of cartels, the attention lies on proving the existence of the arrangement itself rather than demonstrating its impact on the market in economic terms (Pingali et al., 2016). An increasing number of Competition Authorities, in this way, have set up special cartels branches and the inspiration to do so is to create centres of excellence about the expertise required in organizing search and raids, interviewing witnesses,

etc. There is a conspicuous requirement for serious and extensive coordination and participation with other specialized agencies such as tax authorities, police, and ministries dealing with corporate bodies (Babu Chennupati & Mouly Potluri, 2011).

Under the Act, the Director-General, while discharging his obligations, has been vested with powers similar to that of a 'Civil Court', for example, summoning and enforcing the attendance of any individual and examining him on oath, requiring discovery and production of reports and other responsibilities. The Director-General is additionally vested with powers as are vested in the 'Inspector' under Section 217 of the Companies Act, 2013 which lists down powers and duties of inspectors. These powers include the production of documents and evidence in the custody of body corporate, a search of places, and seizure of documents, etc. A large number of Competition Authorities operate Leniency programs (additionally called amnesty programs) as a key to determining and detecting cartel operations

Year	No. of cases	Penalty Imposed	Realised	Refunded	Being Refunded	Net Penalty Realised as on March 31, 2019 (Rs. Crore)		
						Realised without resorting to Section 39(2)	Referred to Income Tax Authorities for Realisation	Realised by Income Tax Authorities
2011-12	21	860.38	1.78	0.72	-	1.06	-	-
2012-13	17	7,156.18	28.49	13.61	-	14.88	-	-
2013-14	18	688.36	55.42	51.80	-	3.62	-	-
2014-15	21	2,592.39	22.96	0.39	-	22.57	-	-
2015-16	15	1,501.64	8.4	0.01	-	8.39	-	-
2016-17	17	288.28	5.92	-	-	5.92	-	-
2017-18	26	436.65	2.54	-	0.02	2.52	-	-
2018-19	42	357.85	1.41	-	-	1.41	-	-
Total	177	13881.73	126.92	66.53	0.02	60.37	-	-

Figure 4. Penalties Imposed vs. Collected by CCI
Source: CCI Annual Report (2019)

(Sanduja, 2007). Under the criminal law, there is a provision related to pardon about the offences committed, if the person concedes the offence and helps the authorities in bringing other perpetrators behind bars. Similar to the criminal jurisprudence, when an individual from a Cartel breaks the rank and makes full and genuine disclosures which bring about the bursting of the 'Cartel', the Commission has been given the discretion and authority to impose a lesser punishment. This plan is intended to encourage persons involved in a Cartel to defect from the cartel arrangement.

The penalty is vital for the effective enforcement of laws and rules. A penalty is deemed to be effective only if it is successful in producing the desired result. The order to "Cease" was based on the reformatory theory which in the given time is not successful in persuading a party to discontinue or not to recur the anti-competitive trade practices. Therefore, there is a need to empower the Commission to impose penalties on those who are found acting contrary to the Act. The current law enables the Commission, in the event of the cartel, to impose upon every person included in the cartel, a penalty equivalent to thrice the amount of profits made out of the cartel agreement by such person or 10% of the turnover of the cartel for the preceding three financial years, whichever is higher. Also, the issue of collection of the penalty has raised concerns over the effectiveness of CCI. Of the total fines imposed, it has been able to collect a mere 0.4% raising questions over its executive powers.

As can be seen, the penalty is linked with the number of profits or the turnover of the cartel and the Commission has no discretion in respect of the quantum of the penalty (CCI Annual Report, 2019). Thus, by focusing on the requirement of strong penalties and sanctions in respect of the irredeemable harm caused by the cartel agreement, the Commission will be

able to deal effectively with the issues of national as well as cross-border cartels. The Competition Law Review, set up by Central Government in 2018, has also stressed this aspect and has given out certain guidelines on how the CCI can arrive at the penalty amount, including the requirement of being transparent while arriving at an amount.

CONCLUSION

The Indian Infrastructure Sector has been promised an investment of over Rs 100 Lakh Crore over the next five years in the Union Budget 2020. Moreover, India is going ahead with the aspirational program of Housing for All by 2022. These schemes are hindered by the presence of these cartels which create an artificial crunch even affecting the capital formation of our country, thus hampering our GDP and growth prospects.

The competition regime in India provides for a comprehensive law to deal with the issues of anti-competitive conduct, but certain aspects need reconsideration. The guidelines and the principles for determining the relevant costs of production and the factors considered therein must be made known to the industries so that the defence of ignorance of fact and the absence of any specific regulation is not available with the enterprises. Another area that needs consideration is the move from the rule of reason as included under Section 38 of the MRTP Act from the per se rule under the current Competition regime which fails to consider the fact that certain groups can be formed, for the public interest, without prejudicing the interests of the stakeholders and which are not like monopolistic trade behaviours. Many countries provide certain exemptions in certain limited cases of cartelisation, for example, the crisis cartels which help the industries in decline, and the export cartels which try to regulate trade in a manner that is beneficial to the entire nation.

Not only this, there is a need to form a Consumer Education Fund under the Competition Act as well as RERA, in line with the Investor Education and Protection Fund as given under Section 125 of the Companies Act, wherein the commission may use the amount received through penalties for educating the consumers and spreading awareness about investment and other strategies. Further, whistle-blowing should be encouraged in the enterprises which will help the competition authorities in determining cartels. Moreover, the Cartels in Cement Industry has been noticed during covid-19 as well and has escalated the pricing of housing at large, CCI has taken a lenient view looking to pandemic situations and effect of harsh decisions on other industrial sectors. Nevertheless, the demand of CREDAI and other business organizations regarding the formation of a Cement Regulatory Authority must be considered, which can check the issue of inflated pricing of cement among other things.

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