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EXAMINATION OF PRICE-FIXING IN INDIA

DR. SOUVIK CHATTERJI*

There exist many forms of cartels in different parts of the world which are detrimental to the interest of the society. If the cartels lead to loss in the economy of the jurisdiction, they are considered to be harmful and are prohibited. Price-fixing is one form of such cartels or anti-competitive agreements which are bad for the economy. Price-fixing was handled both by the Monopolies and Restrictive Trade Practices Commission ("MRTPC") and presently the Competition Commission of India ("CCI"). The Article examines the evil of price-fixing and the efficacy of the law which addresses the practice in India.

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I. ANTI-COMPETITIVE AGREEMENTS IN INDIA

In United States of America, Sherman Act and Clayton Act were the early acts which dealt with anti-trust issues in modern language we call Competition Law perspectives. In India Monopolies and Restrictive Trade Practices Act, 1869, was the first competition law statute. Although the Act had provisions relating to restrictive trade practices and unfair trade practices, it lacked teeth. Beside

* Dr. Souvik Chatterji, Assistant Professor of Law, National Law University, Jodhpur, INDIA. Email: souvikchatterji2000[at]gmail[dot]com.

dominance was per se bad according to the Act.[1] In 2002, India enacted the Competition Act. But due to two writ petitions filed in High Court and Supreme Court, it took 5 years for passing the Act, and the Competition Commission of India started functioning from 2008. The present Act (Competition Act, 2002, as amended by the Competition Amendment Act 2007) is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite *pari materia* to the Indian legislation. In United Kingdom, the Office of Fair Trading (OFT) is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in United States deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries are progressive, applied rigorously and more effectively. The deterrence objective in these anti-trust legislations is clear from the provisions relating to criminal sanctions for individual violations, high upper limit for imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies.[2]

The term anti-competitive agreements as such has not been defined by the Act, however, Section 3 prescribes certain practices which will be anti-competitive. The Act also provides a wide definition of "agreement" under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India.[3]

Section 3(2) simply declares agreement under section 3(1) void. Section 3(3) deals with certain specific anti-competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deals with restraints imposed through agreements among enterprises in different stages of production or supply etc. For example, an agreement amongst manufacturer and supplier. Section 3(5)

[1] The Monopolies and Restrictive Trade Practices Act, 1969 was enacted at a time when India was under the Command and control regime. Monopolies used to be considered bad for the economy. The new Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, is modern in concept. It restricts anti-competitive activities, abuse of dominance and anti-competitive mergers.
[2] *Competition Commission of India* v. *Steel Authority of India & Anr* (2010) 10 SCC 744.
[3] Generally, after examining the manner in which appreciable adverse effect on competition is used by CCI, it is inferred that the yardstick is similar to that of rule of reason. The pro-competitive benefits are compared with the anti-competitive effects.

provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.[4]

Competition laws all over the world usually place anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements.[5] Horizontal agreements are generally viewed more seriously than the vertical agreements. Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms.[6]

The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser seller relationship.[7] The Act has not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3(4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti-competitive agreements.[8]

II. PRICE FIXING ACROSS VARIOUS JURISDICTIONS

Price fixing is a conspiracy between business competitors to set their prices to buy or sell goods or services at a certain price point. This benefits all businesses or individuals that are on the same side of the market and involved in the conspiracy, as prices are either set high, stabilized, discounted or fixed.[9] Such agreement between competitors that sets the price of a good or service or interferes with how that price is reached is illegal under the Commerce Act.[10]

In a simple example of price fixing, two rival gas stations could meet and decide to offer their gas at the same price, creating an artificially high price for

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[4] Pratima Singh Parihar, *Anti-competitive Agreements-Underlying concepts & principles under the Competition Act, 2002* (January, 2012), *available at*: http://cci.gov.in/images/media/ResearchReports/Pratima31jan2012.pdf [Hereinafter *Parihar*].
[5] *Id*.
[6] Pradeep S. Mehta, A FUNCTIONAL COMPETITION POLICY FOR INDIA 56 (2006).
[7] *Id*.
[8] Parihar, *supra* note 1.
[9] *What is Price Fixing?*, http://business-law.freeadvice.com/business-law/trade_regulation/price_fixing.htm [hereinafter *Price Fixing*].
[10] Commerce Commission, New Zealand, *Price Fixing and Cartels*, *available at*: http://www.comcom.govt.nz/business-competition/fact-sheets-3/price-fixing-and-cartels/ [Hereinafter *Commerce Commission*].

gasoline which consumers would be forced to pay through lack of choice. Usually, this practice is illegal, and in some nations, it comes with severe legal consequences.[11]

Price-fixing agreements are also sometimes referred to as cartels. A cartel is formed when businesses agree to act together for an anti-competitive purpose instead of competing against each other. Price fixing harms competition. Cartel members make more profit than they would if they competed fairly. This means that goods and services become more expensive, consumers end up with fewer choices, and quality or service levels are likely to deteriorate.[12]

Price fixing means the collusion of a number of firms or companies to fix the price or other attributes of goods and services. This practice can also involve individual players in the market which is being manipulated. People regard this practice as unfair because it allows companies to dictate the prices for goods and services, rather than allowing prices to fluctuate as the free market influences them. Governments may also become involved in price fixing.[13] If two companies happen to sell competing products at the same price, it is only considered price fixing if collusion can be proved. In other words, if two supermarkets both sell packs of a dozen eggs at the same cost, this would not be illegal. If, however, someone could prove that the owners of the supermarkets held a secret meeting in which they decided to sell their eggs at the same price, it would be considered price fixing.[14]

Often, price fixing results in price gouging. In a free market where businesses adjust prices to meet supply and demand needs, prices can fluctuate a great deal, but they are generally considered fair. When people collude, they usually elevate prices significantly, creating a price discrimination situation in which prices rise well above a level which would be considered acceptable. Many people believe that this practice hurts the economy as a whole, which is one of the reasons it is frowned upon.[15]

In a related concept, bid rigging, contractors collude together when offering sealed bids. The sealed bidding process is designed to generate a pool of competitive bids for a contract like supplying food to the troops or building a government building. When the contractors hold a secret meeting to determine which bid should be accepted and then submit bids in a way which promotes a particular contractor's bid, this is bid rigging. Bid rigging can be accomplished by pulling out of the bidding pool at the last minute, offering a bid which is way over-priced, or attaching unfavorable terms to a bid. These practices create the illusion of a diverse pool of bids to choose from, but they inevitably lead to a single contractor's bid as the obvious choice, thereby eliminating the competitive aspect of the process.[16]

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[11] *What is Price Fixing*, *available at*: http://www.wisegeek.com/what-is-price-fixing.htm [hereinafter *What is Price Fixing*].
[12] Commerce Commission, *supra* note 10.
[13] What is price fixing, *supra* note 11.
[14] *Id.*
[15] *Id.*
[16] *Id.*

The agreement to inhibit price competition by raising, depressing, fixing, or stabilizing prices is the most serious example of a per se violation under the Sherman Act. Under the Act, it is immaterial whether the fixed prices are set at a maximum price, a minimum price, the actual cost, or the fair market price. It is also immaterial under the law whether the fixed price is reasonable.[17]

Price fixing violates competition law because it controls the market price or the supply and demand of a good or service. This prohibits other businesses from being able to compete against the businesses in the price fixing agreement, which prevents the public from being able to expect the benefits of free competition. This violation can be implied or express, with minimal evidence needed to prosecute.[18] Even if there is evidence that competitors have appeared to agree on a price, this can lead to a collusion charge. Price fixing can be prosecuted federally as a criminal violation under the Sherman Antitrust Act or a civil violation under the Federal Trade Commission. Price fixing can also be prosecuted under state antitrust law.

It is important to remember that *illegal* price fixing only occurs when there is an agreement between businesses to fix prices. A business, acting on its own, may use legitimate efforts to obtain the best price they can, including the ability to raise prices to the detriment of the general public. Further, businesses that conform to the same prices without an express or implied agreement are not in violation of price fixing laws. However, there is a fine line between conforming to prices at one's own accord, and having an implied agreement to do so.[19]

Competition Act, 2002 has included the term association of price i.e. price fixing but it hasn't elaborated on vertical and the horizontal price fixing. If a manufacturer, by using his dominant position, fixes the price with retailer then it is vertical price fixing but if manufacturer fixes price with other manufacturer then it is horizontal price fixing. Vertical price fixing is also knows as price maintenance e.g. Agreement between a film distributor and exhibitor is illegal. A patentee cannot control its resale price through price maintenance agreements. Generally prices are fixed when they are agreed upon.[20]

III. PRICE-FIXING IN INDIA

Price-fixing agreement is a common form of anti-competitive agreement which directly or indirectly determines purchase or sale price. This is also referred to as a "price cartel". It is to substitute prices determined by fiat by combination or conspiracy without taking into account the interest of consumers. The aim and

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[17] *Sherman Anti-Trust Act - Price Fixing*, *available at*: http://law.jrank.org/pages/10243/Sherman-Anti-Trust-Act-Price-Fixing.html.

[18] Price Fixing, *supra* note 9.

[19] *Id.*

[20] Shrishti Dutt, *Competition Law in India, US, & UK: A Comparative Analysis*, (November, 2012), *available at*: http://www.scribd.com/doc/209211150/Competition-Law-in-India-US-UK-A-Comparative-Analysis.

objective of a price-fixing agreement is the elimination of the competition. Such agreements are made by way of informal understandings as to price for preventing competition and keeping the prices up. In this regard, Adam Smith wrote over two centuries ago.

> "*People of the same trade seldom meet together, even for merriment and diversion, but the conversion ends in a conspiracy against the public or 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.*"[21]

Thus, the power to fix prices, whether reasonably exercised or not, involves power to control the market and to raise the prices arbitrarily above the competitive level. A combination to fix prices is presumed to have an appreciable adverse effect on competition and, therefore, is void *per se*. The practice or agreement of price-fixing in concert falls under clause (a) of section 3(3) of the Competition Act. It covers not only the agreement between the sellers but also the agreement between the buyers.

In *FICCI-Multiplex Association of India v United Producers/Distributors Forum*[22], there was a collective decision of the opposite parties producers and distributors of films) not to release films to the multiplexes with a view to pressurise the multiplexes into accepting the terms of revenue sharing ratio. The purpose of forming United Producers and Distributors Forum ("UPDF") was extracting better revenue sharing ratios from multiplexes. UPDF issued notices instructing all producers and distributors, including those who were the members of UPDF, not to release any new films for the purpose of exhibition at the multiplexes. In this case, Competition Commission of India held that the agreement entered into by the opposite parties is covered within the mischief of clauses (a) and (b) of the Section 3(3) of the Act.[23]

In *Surinder Bhakoo v HDFC Bank Ltd*[24], it was alleged that the bankwas imposing pre-payment penalty on auto loan borrowers on early return of loans. But, there was no allegation that the HDFC Bank had any agreement with other Banks or Indian Bank Association in this regard. The Competition Commission, therefore, held that section 3 of the Competition Act has no application in this case. The Commission further found that it could not be established that the bank was in a dominant position in auto loan segment, and resultantly, there was no violation of section 4 of the Act.

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[21] *See* Adam Smith, THE WEALTH OF NATIONS, BOOK II 152 (1776).
[22] *FICCI-Multiplex Association of India* v. *United Producers/Distributors Forum*, Case No. 1/2009, CCI order dated 25-05-2011.
[23] *Id.* at ¶23.53.
[24] *Surinder Bhakoo* v. *HDFC Bank Ltd*, Case No. 15/2009, CCI order dated 22-03-2011.

IV. PRICE-FIXING UNDER MRTP ACT

In India, prior to the Competition Act, 2002, the practice or agreement of price fixing in concert was covered under clause (d) of section 33 of the MRTP Act. The clause provided that any agreement to purchase of sales goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon the seller or purchasers, shall be subject to registration under section 35 of the Act. The MRTP commission was empowered to initiate an inquiry into the practice or agreement even if the agreement was not registered. The clause was so widely worded that it covered all agreements or understandings which might have an adverse effect of competition. It covered not only the agreement between the seller but also the buyers.

Many cases of the price fixing in concert, or fixing of other terms or conditions of sale or purchase came up before the MRTP Commission for its decision. Some of the leading cases are as follows:

The first inquiry instituted by the MRTP Commission was in case *Incneck Tyres Ltd*[25]. In this case the respondents were leading players who manufactured and sold automotive tyres of all varieties and sizes. They had entered into an agreement called "General Code of Conduct" ("GCC") for members of the automotive tyre industry of India. The Commission did say that the GCC actually fixed the standards based on which the prices and profits were determined.. The agreement made elaborate provision for joint credit policies and trade prices for all the respondents. The agreement was held to be restrictive of competition, and therefore, void.

In the case of *Hindustan Times Ltd*,[26] the respondents were the publishers of leading newspapers namely Hindustan Times, Statesman, Times of India, National Herald, Indian Express and Patriot, and were members of an association of newspaper publishers (Indian and Eastern Newspaper Society). All the six undertakings increased the prices of their newspapers three or four times between 1971-1974, on or about the same time. The prices of the newspaper were simultaneously reduced. It was alleged that these increases were done in concert either by informal consultation *inter se* by the six undertakings or through their association; and these increases adversely affected competition among the publishers and the sellers of the newspaper and tended to bring about manipulation of prices of newspapers so as to impose unjustified costs on the consumer. All the respondents except the publishers of 'Patriot' submitted to the orders of the MRTP commission. The Commission accordingly passed 'cease and desist' order against them. However, there were no evidence of collusion between 'Patriot' and the other respondents and thus the concert was accordingly proved against Patriot.

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[25] *RRTP* v *Incchecktyres ltd*. (1976) 46 Comp Cas 146 (MRTPC).
[26] *In Re. Hindustan Times Ltd*, 1979 Comp Cas 495 (MRTPC).

In the case of *RRTA v. Bombay Customs House Agents Association*[27], the custom house agent had formed a trade association by its Code of Conduct and fixed the minimum rates to be charged by its members for various services rendered to their clients. The MRTP commission held it to be restrictive trade practice of fixing prices in concert.

In the case of *Durgapur Trucks owner's Association*[28], the Commission was assured that the association would "cease and desist" from fixing hiring charges for the members, prohibiting the use of trucks other than those belonging to the association members, etc.

The study of the aforesaid cases reveals that the MRTP commission had taken a serious view of collective agreements fixing prices. It condemned all such consorted actions. The price fixing in concert is generally due to the instrumentality of the combination of the manufactures or the suppliers or by their association and is *prima facie*, anti-competitive in effect, adversely affecting consumers, and therefore, the Competition Act 2002 has rightly declared such agreements void *per se*.

The BCCI has been fined Rs 52.24 crore (US$10m approx.) by the Competition Commission of India for misusing its dominant position and indulging in anti-competitive practices.[29] The Indian board had 90 days to pay the fine.[30]

In its order, the CCI, directed the BCCI to "cease and desist" from any practice that denies market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities. It suggested that the Indian board now must "set up an effective internal control system to its own satisfaction, in good faith and after due diligence."

V. CONCLUSION

In conclusion it can be said that the provisions against anti-competitive agreements like price-fixing are there in place in India. But CCI examines every case on the test of appreciable adverse effect on competition. Now the language of the provisions in section 3 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, is not very clear in the context of burden of proof in the test of appreciable adverse effect on competition. In jurisdictions like USA, there are concepts like per se illegality and rule of reason. From the mere wording the burden of proof of appreciable adverse effect on competition in India appears to be higher than rule of reason. In India there is hardly any concept of per se illegality. While it gives a lot of scope for the alleged parties to defend themselves in price-fixing cases, India could not show that price fixing is more harmful than

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[27] *RRTA* v. *Bombay Customs House Agents Association*, RTPE 14 of 1979, decision on 13-10-1960 (MRTPC).

[28] *RRTA* v. *Durgapur Trucks Owners Association*, RTPE 8 of 1980, decision on 8-8-1980 (MRTPC)

[29] *BCCI fined $10m for anti-competitive practices*, (February 9, 2013), *available at*: http://www.espncricinfo.com/india/content/story/604236.html.

[30] *Id.*

other forms of anti-competitive activities. If stringent actions are not taken in price-fixing cases, the companies cannot be stopped from engaging in those practices.